

## Civil Unions Reconsidered

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# CIVIL UNIONS RECONSIDERED

JOHN G. CULHANE\*

## INTRODUCTION

The prevailing view on civil unions is perhaps best captured by the brilliant parody news source, *The Onion*. In a story set in 2083, a high school history class is both amused and outraged that it took so long for same-sex couples to achieve full marriage equality. In that context, one student offers this breezy dismissal of the civil union: “Oh my God, and those civil union things were ridiculous, too. Just let gay people get married already!”<sup>1</sup>

That hindsight-assisted student might turn out to have been correct. “Those civil union things” are intended to bestow the full rights of marriage while pointedly reserving the marriage label (and attendant social meaning and prerogatives) for opposite-sex couples. Since those tasks are impossible, civil unions may be headed for one of history’s many oubliettes.

Yet civil unions, it turns out, are more interesting than you might think.

Seen by many – including me, once – mostly as an interesting, idiosyncratic artifact of compromise on the road to full marriage equality, the civil union and the circumstances of its birth have the potential to illuminate deep issues about the meaning of marriage and the deep basis of objection to marriage equality. Moreover, the process of creating the civil union has necessarily led lawmakers to think hard about the real, practical needs of their constituents. This process has occasionally spun off an

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<sup>1</sup> *Future History Students: ‘It’s Pretty Embarrassing How Long You Guys Took to Legalize Gay Marriage,’* THE ONION (Feb. 8, 2011), <http://www.theonion.com/articles/future-us-history-students-its-pretty-embarrassing,19099/>.

unrelated but welcome development: the creation of legal protections for those in *other* relationships – as in the “reciprocal beneficiary” status created for older Vermonters and Californians,<sup>2</sup> and the availability of the civil union to opposite-sex couples in Hawaii and Illinois.<sup>3</sup>

Thus, while it is unlikely in the extreme that this political compromise will long survive, it would be a mistake to dismiss this status as nothing more than a way station. In this brief essay, I want to explore the fuller meaning of the civil union.

Part I briefly reviews the civil union: its legal precedents, its effect, and its current status in the U.S. Part II begins with a discussion of the practical problems with civil unions, and then moves to the heart of my thesis: Despite protestations to the contrary, civil unions are not the equivalent of marriage because they were never really intended to be. The error is in reducing marriage to a set of legal benefits and entitlements and then constructing a parallel entity to mimic that fictional creation. Yet perhaps the civil union will have other positive effects, even if those effects are not what their champions originally envisioned for them.

## I. DESCRIBING THE CIVIL UNION: ANTECEDENTS, EFFECT, AND STATUS

As has been exhaustively chronicled, civil unions grew out of a twenty-plus year struggle for LGBT legal equality. That history will not be recounted here, but a few salient signposts need mentioning.

As the gay rights movement began to find traction in the 1970s, two separate streams of activism formed that would later find expression in what we today know as the battle for marriage equality. One of these was the effort by several same-sex couples to compel their home states to recognize their marriage. These efforts (in Minnesota, Kentucky, and Washington) were spectacularly unsuccessful in the short run.<sup>4</sup> Lacking the linguistic, legal and normative vocabulary needed to require the issuance of marriage licenses to couples that just, well, *could not* marry, the courts summarily dismissed each and every one of these actions. The couples had operated without the assistance of advocacy groups, and paid heavily for their losses – sometimes with the loss of employment for daring to “out”

<sup>2</sup> See VT. STAT. ANN. TIT. 15, § 1301-1306; CAL. FAM. CODE. § 297(B) (West 2012).

<sup>3</sup> HAW. REV. STAT. § 572B-1,2 (West 2012); 750 ILL. COMP. STAT. ANN. 75/§10 (West 2011).

<sup>4</sup> See John G. Culhane, *Marriage, Tort, & Private Ordering: Rhetoric & Reality in LGBT Rights*, 84 CHI.-KENT L. REV. 437, 440 (2009) (discussing the three aforementioned cases).

themselves so dramatically.<sup>5</sup>

Proceeding along a parallel but more cautious track, activists in California tried a more incremental and, as it turned out, more successful approach. Rather than agitating for state-wide recognition of full equality, they sought only narrow, local recognition in places where success was much likelier. Indeed, the first such effort was staged in Berkeley, California, and led, after a few years, to success both there and in neighboring San Francisco. These efforts began in the late 1970s but did not bear fruit until the mid-1980s.<sup>6</sup>

In the ensuing decades, the resulting entity, known as the “domestic partnership,” spread in several complementary ways. First, it migrated to other locations, and not only within California. Progressive cities and municipalities across the U.S. began to recognize same-sex relationships, at least for limited purposes (usually to provide health benefits to the same-sex partners of government employees, but sometimes in conjunction with anti-discrimination protection or to permit same-sex partners to assume some limited responsibility for each other, such as in hospital visitation).

Second, once same-sex couples had been accorded status by some local entities within a state, it was natural to expect the pressure to increase on state legislatures to recognize those same couples. In California, for example, in 1999 the legislature became the first to create a state-wide domestic partnership registry.<sup>7</sup> Although this prototype conferred only a modest set of benefits, the entitlements – along with certain responsibilities – were expanded by two subsequent acts, until today they are intended to do what civil unions also attempt: to confer the full benefits of marriage, withholding “only” the label.<sup>8</sup> This expansion of the benefits themselves was the third way that the domestic partnership grew.

Yet in 1999, no one would have equated this entity – nor the awkwardly named “reciprocal beneficiary” that arose in Hawaii in the wake of a failed

<sup>5</sup> A job that been offered to one of the plaintiffs in the Minnesota case was withdrawn after the case was filed. See Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 21 (2000).

<sup>6</sup> William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 B.Y.U.L. REV. 961, 965, 977 (2001).

<sup>7</sup> See Scott L. Cummings, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1259–60 (2010) (providing an insightful background as to how the bill was passed).

<sup>8</sup> The two most significant expansions to the law occurred in 2001 and 2003 (the latter law took effect on January 1, 2005). The 2001 law greatly expanded the rights available to registered domestic partners, and included survivorship benefits, medical visitation rights, the ability to recover for relational torts such as wrongful death, and joint adoption. A.B. 0025, 2001 Reg. Sess. (Cal. 2001). The Domestic Partner Rights and Responsibilities Act of 2003 expressly equates the rights of all registered domestic partners to those afforded married couples. Cal. Fam. Code § 297.5(a) (West 2013).

marriage equality case there – with marriage. It was a piecemeal aggregation of rights, recognition, and responsibility. It is against this background that the civil union must be understood.

When judicial victories on marriage equality in Hawaii and Alaska in the earlier 1990's had led to voter and legislative backlash,<sup>9</sup> gay activists in Vermont recognized the importance of ground-up coalition building. The Vermont Coalition for Lesbian and Gay Rights (established in 1986 as the Gay and Lesbian Coalition) formed the Vermont Freedom to Marry Task Force in 1995, thereby laying important groundwork for a suit brought by several same-sex couples in 1997 challenging their exclusion from the rights and protections of marriage.

In 1999, the Vermont Supreme Court issued a decision that might fairly be characterized as the last thing anyone was expecting. Asked to decide whether the exclusion of the plaintiff same-sex couples from the institution of marriage amounted to a denial of equal protection of the law, as the claimants had demanded,<sup>10</sup> the court instead effected a surgical separation of the benefits of marriage from the richer institution that houses those benefits. In other words, the court required that the benefits of marriage be afforded to same-sex couples, but left to the legislature the remedy: The right to marry or, in the court's words, some other "appropriate means of addressing th[e] constitutional mandate" of equality.

What means might those be? Although the court did not say that the law had to confer *exactly* the same rights as marriage, it strongly implied as much. After referring to "comprehensive" equality legislation – mostly from Scandinavian countries – the court cautioned that it did "not intend specifically to endorse any one or all of the referenced acts, particularly in view of the significant benefits omitted from several of the laws."<sup>11</sup>

After a hard-fought, but mostly civilly conducted debate, the legislature chose the middle course that the court had outlined: it created the virtually legal equivalent of marriage, and called it the "civil union."<sup>12</sup>

<sup>9</sup> Baehr v. Lewin, 852 P.2d 44 (Hi. 1993) *remanded to* Baehr v. Miike, 910 P.2d 112 (Hi. 1996); Alaska Civil Liberties Union v. State, 122 P.3d 781 (Ak. 2005) The rulings in these cases were effectively undone by state constitutional amendments. HAWAII CONST., art. I, § 23; ALASKA CONST., art. I, § 25.

<sup>10</sup> See Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (To be precise, the claim was that the denial of marriage licenses to otherwise-qualified same-sex couples violated the common benefits clause of the Vermont state constitution. That clause, though, is the state-law equivalent of the federal equal protection clause, and the court in *Baker* and in many other cases freely borrows from federal precedent in analyzing claims of inequality).

<sup>11</sup> *Id.* at 744.

<sup>12</sup> VT. STAT. ANN. TIT. 15, § 1201 (West 2012); David Moats, CIVIL WARS: A BATTLE FOR GAY

As has been well-chronicled by several scholars and journalists, the Vermont legislators declined other options open to them. On the one hand, the legislature avoided granting full marriage equality, including the label. Indeed, the law that was created pointedly states: “Marriage remains the union of one man and one woman.”<sup>13</sup>

But the lawmakers also rejected the option at the other pole: pushing through a constitutional amendment that would have defined marriage as the union of a man and a woman (and would perhaps have ruled out anything like the civil union, as well).

Instead, they gave birth to a new legal creature, intended to mimic marriage in every legal respect. Indeed, the law lists the many benefits intended to be conferred by the civil union and also states and the list is “nonexclusive” and that “parties to a civil union shall have all the same benefits, protections and responsibilities under law. . . as are granted to spouses in a marriage.”<sup>14</sup>

*Baker* was decided in late December of 1999, and the legislature acted with both deliberation and dispatch, making a priority of the issue and enacting the law in 2000. At the time, some (including me) strongly objected to the court’s creative decision that enabled what we saw as an unsatisfactory compromise. But the civil union nonetheless was a major step forward. In 2000, no other state was offering any similar rights to same-sex couples.<sup>15</sup> Only in California and Hawaii were same-sex couples afforded recognition at all, and neither state’s protections were anywhere near as comprehensive.

Vermont went from 0 to 60 overnight.

MARRIAGE (2004).

<sup>13</sup> 2000 VT LEGIS. SERV. 91 (West)

<sup>14</sup> *Id.*

<sup>15</sup> Although gay and lesbian couples are the most obvious beneficiaries of marriage equality, I want to pause here to mention how bisexual and transgendered couples might also benefit. Bisexuals provide a dramatic illustration of the weakness of exclusionary rules. If, say, a bisexual woman happens to be attracted to a man, she has the right to marry him; if, though, she finds herself seeking a commitment with another woman, she will be denied that same right. This will be true even if, for example, she is post-menopausal and therefore not a candidate for procreation no matter the sex of her partner.

For couples containing at least one transgendered (or gender non-conforming) person, the right to marry would immediately cure a host of complex and contradictory problems that the law currently creates. To oversimplify, in some states a transgendered person’s gender of choice, no matter how deliberately (or surgically) (re)constructed, is irrelevant: what matters is one’s genetic, biological sex. In other states, the trans person’s choice is valued. In at least one state, a trans person might be unable to marry anyone at all. In all such cases, though, a step is required that becomes needless if the requirement of opposite gender is removed from marriage. A similar observation applies to intersexed people – individuals whose genetic, biological, and hormonal make-up places them somewhere in a continuum between what we commonly term male or female.

Even in this liberal state, though, the battle was pitched. Probably a majority of citizens did not favor even this level of relationship recognition, and a substantial number would have voted for an anti-gay marriage amendment had it been put to them; it might have passed if enacted quickly enough.<sup>16</sup> They might also have gone further and ruled out any virtual legal equivalent, such as the civil union.

One might therefore agree with William Eskridge's conclusion that the court and legislature acted properly in recognizing the wrong while fashioning a less-than-complete remedy. These actions constitute what he terms "equality practice":

The case of Vermont illustrates a central tension between liberal theory and liberal practice, which lawyers . . . express as a tension between *right* and *remedy* or (more abstractly) between the *substance* of equality and the *procedure* used to get there. In a heterogeneous polity, immediate equality is usually not attainable, but sometimes *equality practice* is.<sup>17</sup>

The eminently practical approach Eskridge so eloquently defended had no hold on me at the time. In a 2001 law review essay,<sup>18</sup> I wrote disapprovingly of the court's unwillingness to take the step that the whole thrust of the opinion seemed to make inevitable: to require marriage, including the name. One member of the court agreed with me. In a partial dissent, Justice Denise Johnson accused the majority of shirking its responsibility in the constitutional framework and sidestepping the very question it had been asked.<sup>19</sup>

Put differently, once the arguments against inequality have been eliminated, then requiring—worse, *creating*—a separate name really does

<sup>16</sup> There is something oxymoronic about the term "quickly" as applied to the procedure for amendment the Vermont Constitution, however. It happens that the procedure for amendment is long and arduous in that state. See VT. CONST. ch. II, § 72 (1999) (setting forth the procedure for amendment). Beginning in 1975, amendments can be proposed only during biennial sessions of the General Assembly "convening every fourth year thereafter." *Id.* Proposals must be made by a two-thirds vote of the Senate and then approved by a majority of the House of Representatives. *Id.* Amendments approved through that process must then be referred to the next biennial session, and reapproved by a majority of both the Senate and House. *Id.* If all of those hurdles are cleared, the General Assembly must then submit the proposed amendment to the voters, who have the final say. *Id.* Only if they approve the amendment by a majority does it finally become part of the state constitution. *Id.*

<sup>17</sup> WILLIAM N. ESKRIDGE, EQUALITY PRACTICE, 128 (1st ed. 2001).

<sup>18</sup> See generally John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage & Products Liability*, 7 WM. & MARY J. WOMEN & L. 447 (2001).

<sup>19</sup> See *Baker v. State*, 744 A.2d 864, 897 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (criticizing the majority's "novel and truncated remedy").

stand as an exercise in separate but equal – which, of course, it never is.

I am a little surprised to discover that my views have changed, perhaps boosted a bit by the fact that Vermont, in 2009, moved to full marriage equality. But perhaps my change of heart is more than that: from a purist's perspective, it is the court that is responsible for interpreting constitutional guarantees. But it is not that simple. As the *Bush v. Gore* debacle reminds us,<sup>20</sup> courts should not and cannot conclusively resolve every dispute. It might turn out that, sometimes, legislatures and the electorate need some breathing space, some room to catch up. Here, the court strongly nudged the legislature and it responded with a comparatively very strong law. Living with that law, over time, made the lawmakers realize that their concerns really could not be defended by any neutral principles of secular law, and so, in 2009, a supermajority of them (enough to override the governor's veto) took the final step.

The court itself was startlingly explicit about the political dimension of its ruling. Its justifications, set out in opposition to Justice Johnson's dismay that the litigants were not being afforded the clear and direct constitutional remedy they had sought, are worth quoting at some length:

Our colleague greatly underestimates what we decide today and greatly overestimates the simplicity and effectiveness of her proposed mandate. First, our opinion provides greater recognition of— and protection for— same sex relationships than has been recognized by any court of final jurisdiction in this country with the *instructive* exception of the Hawaii Supreme Court in [*Baehr v. Lewin*.]False Second, the dissent's suggestion that her mandate would avoid the “political caldron”. . . of public debate is—even allowing for the welcome lack of political sophistication of the judiciary—significantly insulated from reality. See Hawaii Const., art. I, § 23; see also Alaska Const., art. I, § 25.”<sup>21</sup>

The court could hardly have been clearer than had it stated: “If we require marriage equality, the end result could be quite the opposite, as was the case in both Hawaii and Alaska. And since we believe that equality is required, it does not make sense for us to create incentives for the legislature and the voters to move in exactly the opposite direction.”

It is clear, but is it acceptable? The simplest response is that courts should not be concerned with the politics that follow their decisions. That is a principled position, but reflects neither judicial nor political reality. Even

<sup>20</sup> 531 U.S. 98 (2000).

<sup>21</sup> *Id.* at 888.

the much bolder decision by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*<sup>22</sup> might not have been reached had the *Baker* court not made such strong progress in the pro-equality direction. This is a necessarily speculative remark, but given that the *Goodridge* court split 4-3, it might have been decisive (to at least one jurist on the court) that another court had already moved to within one small step of complete legal equality.

Like current-swept swimmers searching for something to cling to, legislatures in other states have lately begun to embrace the civil union (or “full” domestic partnership) approach. This position enables politicians to claim – with some justification – that they are concerned about their gay and lesbian constituents while at the same time appeasing those who object, usually for religious reasons, to using the word “marriage” to describe the relationship between same-sex couples. For some of them, this cautious approach might even be a way of doing the equality “practice” that Eskridge favors.

Although New Jersey lawmakers did so by way of response to that state supreme court’s *Baker*-esque ruling in *Lewis v. Harris*,<sup>23</sup> legislatures in other states have done so without similar “prompting.” In 2011 alone, Hawaii, Delaware and Illinois enacted civil union laws. These laws followed the enactment of comprehensive domestic partnership laws in California, Nevada, Oregon, Washington, and the District of Columbia, which are civil unions by a different name.<sup>24</sup> As this article was going to press in late 2012, three more states opted for full marriage equality: Maine, Maryland, and Washington.<sup>25</sup> But civil unions remain a vital compromise in states not ready to take that final step.

Why is the formal equality the civil union confers not good enough?

<sup>22</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>23</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>24</sup> This flowering of names and statuses appeals to those, like Nancy Polikoff, who believe both that steps to reduce the privileged status of marriage are useful and that couples and families should have greater choices in the relationships that they establish. See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT & GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (Beacon Press 2009). Conservatives on both sides of the marriage equality debate disagree, based on their contrary belief that the state has a legitimate interest in continuing to privilege marriage. However one comes down on this issue, it is undeniable that the current situation creates confusing issues of interstate recognition that will only multiply when the Defense of Marriage Act is repealed.

<sup>25</sup> Zach Ford, *Sweeping 2012 Victories Show Promise Of LGBT Equality’s Future*, THINK PROGRESS (Nov. 19, 2012 5:00 PM), <http://thinkprogress.org/lgbt/2012/11/07/1155121/sweeping-2012-victories-show-promise-of-lgbt-equalitys-future/?mobile=nc>.

## I. THE INADEQUACY OF THE CIVIL UNION

The brilliance of the compromise that led to civil unions notwithstanding, this “marriage equivalent” fails of its essential purpose. Even on the level where it is strongest – legal equality – it does not deliver the goods promised, owing to a host of external factors that the civil union is powerless to address. But its deeper difficulties have little to do with law.

### A. *The Legal Effects of Civil Unions*

Before reaching the deeper difficulties with the civil union, it is important to outline the ways that it fails as a legal status. The impediments it faces are substantial, with two being particularly problematic: the civil union is surely less portable than marriage, and would not be recognized under federal law even if the Defense of Marriage Act were repealed. The following is a brief discussion of each of these issues.

A civil union is almost certainly not as portable as marriage. One state’s recognition of a same-sex marriage celebrated in another might run afoul of the “public policy” exception to the requirement that a state give full faith and credit to “public Acts, Records, and judicial Proceedings” of other states.”<sup>26</sup> This outcome is more likely in states that have enacted their own “mini-DOMAs”;<sup>27</sup> absent such a clear declaration of contrary public policy, state attorney generals have sometimes opined that same-sex marriages from other states will be recognized in the “home state.” The civil union, by contrast, is unlikely to find many “takers” in states that do not confer comprehensive relationship recognition on same-sex couples.

New York provides an instructive example of the challenges that civil unions face. In *Langan v. St. Vincent’s Hospital*,<sup>28</sup> the surviving member of a New York couple brought a wrongful death suit against the medical providers whose negligence had allegedly led to the death of his same-sex

<sup>26</sup> U.S. CONST., art. IV, § 1.

<sup>27</sup> See *Human Rights Campaign: State Laws & Legislation*, <http://www.hrc.org/laws-and-legislation/state> (A majority of states have statutes or amendments to their constitutions that expressly prohibit same-sex marriages; these are loosely referred to as mini-Defense of Marriage Acts aka “mini-DOMAs”). The situation is further complicated because some of these laws ban only same-sex marriages, while others sweep more broadly and purport to rule out any sort of relationship recognition of same-sex couples. A good example of the complexity is Nevada, where a state statute prohibits same-sex marriages, but where a 2009 law created domestic partnerships granting same-sex couples all of the rights, benefits and privileges of marriage that state law can confer. Nevada Domestic Partnership Act, 11 NEV. REV. STAT. ANN. § 122A (West 2011).

<sup>28</sup> *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411 (2003), *rev’d*, 802 N.Y.S.2d 476 (2d Dep’t 2005), *appeal dismissed*, 850 N.E.2d 672 (N.Y. 2006).

partner.

The couple had entered into a civil union in Vermont, which permits out-of-state same-sex couples to “civilly unite” (and opposite-sex couples to marry). But, as is the case with most wrongful death statutes, New York’s tightly restricts the class of eligible claimants – spouses are among these, but “partners to a civil union” are not. Through a creative process that I have detailed elsewhere,<sup>29</sup> the trial judge rejected a motion to dismiss the claim. Using a combination of full faith and credit and comity, he read the statute broadly so as to effectuate its dual purposes of compensating the person likeliest to be impacted (financially as well as emotionally) by the death and of deterring the defendant – and others – from negligent conduct in the future.

Over a strong dissent, the appellate court briskly reversed this ruling.<sup>30</sup> Avoiding detailed analysis of the full faith and credit arguments, the court stood mainly on the indisputable fact that the couple was not married under Vermont law, so that there was nothing to give full faith and credit *to*. Note the court’s pointed comparison between Massachusetts (which allows same-sex marriages) and Vermont (which, at the time, did not): “The fact that since the perfection of this appeal the State of Massachusetts has judicially created such right for its citizens is of no moment here since the plaintiff and the decedent were not married in that jurisdiction. They opted for the most intimate sanctification of their relationship then permitted, to wit, a civil union pursuant to the laws of the State of Vermont. In following the ruling of [*Baker*], the Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis.”<sup>31</sup>

While the appellate court’s holding in *Langan* left unclear whether out-of-state marriages by same-sex couples would be recognized under New York law, the state subsequently made clear that they would indeed be afforded equal status. In *Martinez v. County of Monroe*,<sup>32</sup> the plaintiff successfully argued to a unanimous appellate court that her Canadian marriage to another woman should be recognized in New York, thereby entitling her to the same spousal benefits that her employer, a community college, made available to other married employees. In finding that a

<sup>29</sup> John G. Culhane, *Even More Wrongful Death: Statutes Divorced from Reality*, 32 FORDHAM URB. L. J. 171, 182–84 (2005).

<sup>30</sup> See generally *Langan*, 802 N.Y.S.2d 476.

<sup>31</sup> *Langan*, 25 A.D.3d at 94.

<sup>32</sup> *Martinez v. County of Monroe*, 50 A.D.3d 189 (2008).

violation of state law prohibiting discrimination on the basis of sexual orientation, the court placed great weight on the fact that New York had never enacted a law “defending” marriage against same-sex couples. Therefore, the default presumption that marriages valid in the state of celebration would be recognized in New York applied, and the college was compelled to pay the benefits. Shortly thereafter, Governor David Paterson directed all state agencies to recognize the out-of-state marriages of same-sex couples.<sup>33</sup>

Note, then, the stark contrast between the civil union and marriage when it comes to interstate recognition of the couple. New York provides a clean example of the difference, because that state was one of the few that had neither any state-wide recognition of same-sex unions nor any law expressly prohibiting them. This distinction supports the claim that the civil union, for all of its effort at marriage mimicry, is incapable of doing even that.<sup>34</sup>

There is an even more serious problem with the civil union’s claim to be a marriage equivalent – a claim that, for now, is covered up by federal law.

Many federal laws attach substantial consequences to marriage. Consider, for example, the treatment of married couples under the Internal Revenue Code,<sup>35</sup> the ability to sponsor a spouse into the U.S. under immigration law,<sup>36</sup> and the payment of social security death benefits to surviving spouses.<sup>37</sup> In general, though, the federal government does not speak to the issue of who is actually *married*; that question is left to state law, and the federal consequences follow.

But what if the couple is in a civil union? Since the federal laws nowhere mention – much less grant benefits to – couples in a civil union, that status might be worthless at the federal level. Compare Massachusetts and, say, New Jersey: A same-sex couple can marry in Massachusetts, but can only be partners to a civil union in New Jersey. Under the usual understanding of how the federal laws regard marriage status, then, only the

<sup>33</sup> Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES (May 29, 2008), [http://www.nytimes.com/2008/05/29/nyregion/29marriage.html?\\_r=2&hp&oref=slogin](http://www.nytimes.com/2008/05/29/nyregion/29marriage.html?_r=2&hp&oref=slogin).

<sup>34</sup> In 2011, New York rendered this “full faith and credit” debate obsolete by enacting a full marriage equality law. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all> (last visited Nov. 13, 2012).

<sup>35</sup> I.R.C. § 6013 (2006) (stating that legally married couples are entitled to file a joint tax return).

<sup>36</sup> 8 U.S.C. § 1153(a)(2) (2006) (explaining that qualified immigrants who are the spouses of an alien lawfully admitted for permanent residence shall be allocated visas).

<sup>37</sup> 42 U.S.C. § 402(e)(1) (2006).

Massachusetts couple would be considered wed for federal purposes – however the two couples might be similarly treated within their home states.

This stark difference, though, has been erased for the time being by the federal Defense of Marriage Act (“DOMA”). One of DOMA’s two substantive provisions takes the unprecedented step of defining marriage for federal purposes. That definition expressly excludes same-sex couples.<sup>38</sup> Several lawsuits are challenging that part of DOMA, and the Obama Administration has decided no longer to defend it.<sup>39</sup> If this provision of the law is ultimately declared unconstitutional – or if Congress ever gets around to repealing it – the stark differences between civil unions and domestic partnerships, on one hand, and “real” marriages, on the other, will be laid bare.

It is possible, of course, that some kind of “federal civil union” might be recognized as a compromise (either by courts or legislatively), whatever DOMA’s fate. Were such a law to declare state marriages to be civil unions for federal purposes, one might expect that civil unions might truly begin to approximate marriages, from a purely legal perspective. In addition to federal benefits being equalized for states that had either civil unions or full marriage equality, we might expect that states already somewhat sympathetic to the rights of same-sex couples would begin to look at the two types of union similarly under principles of full faith and credit. For the current majority of states that have strong public policies against marriage equality – either in statute or by virtue of state constitutional provisions – neither would likely be recognized in any case.

<sup>38</sup> 1 U.S.C § 7 (2006).

<sup>39</sup> See *Massachusetts v. United States HHS*, 692 F.3d 1, 13–14 (1st Cir. 2012) (consolidated with *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 389 (2011); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012); Debra Cassens Weiss, *Supreme Court to Consider Gay-Marriage Cert Petitions Before Thanksgiving*, ABA JOURNAL (Nov. 20, 2012 10:30PM),

[http://www.abajournal.com/news/article/supreme\\_court\\_to\\_consider\\_gay-marriage\\_cert\\_petitions\\_before\\_thanksgiving/](http://www.abajournal.com/news/article/supreme_court_to_consider_gay-marriage_cert_petitions_before_thanksgiving/); Letter from Eric Holder, Att’y Gen., to John Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf> (declaring that the Department of Justice no longer believed that section 3 of DOMA could be constitutionally defended); Letter from Tony West, Assistant Att’y Gen., to Margaret Carter, Clerk of the U.S. Court of Appeals (Feb. 24, 2011), available at <http://www.glad.org/uploads/docs/cases/gill-v-office-of-personnel-management/doj-letter-re-ma-doma-cases-02-2011.pdf> (explaining that DOMA could not be defended because its true basis was anti-gay animus).

*B. Civil Unions and the Problem of Deep Meaning*

Even within a state that recognizes civil unions, people do not always know what they are. The final report of the NJ Civil Union Commission – which unanimously recommended conferring full marriage equality on same-sex couples – recounted many stories of couples whose unions were not recognized despite their purported legal equivalence to marriage.<sup>40</sup> The Vermont Civil Union Commission reached essentially the same conclusions.<sup>41</sup> In essence, those conclusions reduce to this observation: Civil unions are not marriage, and everyone knows it – those in the civil union, those confronted with whether to recognize it, and the broader society.

Both commissions were created by the very same statute that recognized the civil union for the first time;<sup>42</sup> in that sense, the lawmakers planted the seeds of the civil union’s own destruction.

There is scarcely need to recount all the stories the commissioners in both states heard. A few examples make the point.

Consider first partner health insurance benefits. Employers who self-insure for health benefits are covered by the *federal* Employer Retirement Income Security Act (“ERISA”), and therefore need not recognize same-sex spouses as legal. But couples in Vermont and New Jersey found that, compared to couples legally married in Massachusetts, they faced greater obstacles.<sup>43</sup> Even though the employers could have invoked DOMA to deny benefits to the same-sex couples married in Massachusetts, they typically did not do so. They did not want to be seen as discriminating between married couples on the basis of sexual orientation. On the other hand, employers in the civil union states could simply point to the different name and status, “civil union,” and then refuse to cover the same-sex “spouses” *qua* spouses.<sup>44</sup> Note the dark synergy of DOMA and the civil

<sup>40</sup> N.J. CIVIL UNION REVIEW COMM’N, FINAL REPORT (2008), <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf>.

<sup>41</sup> See REPORT OF THE VERMONT CIVIL UNION REVIEW COMM’N (2001), <http://www.leg.state.vt.us/baker/cureport.htm>; see also REPORT OF THE VERMONT COMM’N ON FAMILY RECOGNITION & PROTECTION (2008), [http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP\\_Report.pdf](http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/VCFRP_Report.pdf) (finding persistent problems with civil unions including a lack of portability, differences in benefits and responsibilities when compared to marriage, and issues relating to terminology, and social, cultural and historical significance).

<sup>42</sup> N.J. STAT. ANN. §37:1-28 (West 2011); VT. STAT. ANN. TIT. 15 § 1201 (2) (2011).

<sup>43</sup> FIRST INTERIM REPORT OF THE N.J. CIVIL UNION REVIEW COMM’N. (2008), <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

<sup>44</sup> *Id.*

union: DOMA provided legal justification for refusing benefits, and the different name and status of the civil union supplied the cover of language.

Now, as the commissioners recognized, some of these problems would doubtless dissipate with time, but there is a deeper point here.

The more complex reasons that civil unions just cannot be equivalent to marriage also reveal something about marriage itself and what it means, what it conveys. Simply put, no newly created legal entity – whatever its name – can duplicate marriage, which is such a rich (if flawed) institution.

### *C. What, exactly, is marriage?*

It turns out that it is far more than a set of legal entitlements. Indeed, if legal equality were all there was to it, I think this fight would be – if not over – well into the closing phase by now. Substantial majorities of those polled favor legal equality, whether the question is support for civil unions or support for the individual benefits that marriage confers. When the pollsters ask whether the respondents favor same-sex marriage, though, support drops substantially (although it continues to rise and is now at about the break-even point).<sup>45</sup>

So what do we mean when we say that a couple is married? On one level, we do mean that they have a legally sanctioned union that the state supports and that confers certain tangible benefits. But that is by no means all that is signified.

What else does marriage mean? Once we get away from a clear legal definition that everyone can agree on (at least in one sense of “agreement”), there is much less consensus. But I think we can identify at least a few of the other things marriage is meant to signify.

First, it conveys a *commitment*. This is obvious from tired clichés like “the ball and chain” and many other popular depictions.

It is also telling that people are forced to explain what a civil union even *is*.<sup>46</sup> Everyone understands marriage and little is required to document it in most situations. By contrast, a civil union sounds like a set of contracts drawn up to ensure certain rights. It does not convey the same sense of extra-legal commitment. That is not to say that people in civil unions—just like some unmarried, cohabitating couples (straight and gay alike) – are

<sup>45</sup> See Changing Attitudes on Gay Marriage, PEW RESEARCH (Nov. 20, 2012 10:30PM), <http://features.pewforum.org/same-sex-marriage-attitudes/index.php>; Polling Report, (Nov. 20, 2012 10:31PM), <http://www.pollingreport.com/civil.htm>.

<sup>46</sup> N.J. CIVIL UNION REVIEW COMM’N., FINAL REPORT, *supra* note 26, at 9.

not, in many cases, just as committed as those legally married. But civil unions and domestic partnerships do not have the same heft, the same resonance.

Consider the following example. Imagine two injured people. The first, Joseph, is married to a woman, Barbara. When Barbara shows up at the hospital and demands to see Joseph, experience shows that the request is granted even without documentation.

The second injured person, Paul, is in a civil union with another man, Zeke. When Zeke, the “partner to a civil union” shows up, he might be met with a blank stare. Even if he can prove the relationship through documents – and how many of us, in any kind of relationship, carry such papers with us? – he might be less than uncritically accepted as the spouse. The situation will doubtless be aggravated in a state, such as Florida, that has no kind of relationship recognition at all.

Of course, even if the same-sex couple were allowed to marry, I would not expect instant and universal changes to behavior. If the staff did not like same-sex marriage, or did not know the law (although this is harder to imagine), they might require the same-sex couple to prove it in a way that would never occur to them to do in the case of an opposite-sex couple.

But the law could be expected to effect swift and enforceable changes to behavior.

Second, marriage also carries religious significance, for many. I do not mean just that religions “bless” marriages, either. It is more than that. For many people, the *civil* marriage carries religious significance. Many churches want and expect couples to civilly marry, and many people attach religious meaning to their civil marriages.

In the United States, we further this conflation of the religious and civic spheres by vesting the state’s power to solemnize marriages in the clergy. Changing that practice by divesting clerics of this power would be a useful step – one that is at once quite small in fact (clergy would still perform solemnizations) and rather large in symbolism (couples would need official solemnization from government, thereby reminding them that all marriages are, in fact, *civil* unions). The French, with their clear separation of the two, are the model to emulate here. (Some have even speculated that the popularity of the “pacte civile de solidarité” (known as “PACS”) in France is related to this separation. This institution, created in 1999 principally to confer some of the benefits of marriage on same-sex couples, has proven quite popular with opposite-sex couples, who are also permitted to enter

into these less-binding arrangements.<sup>47</sup>

Third, marriage has an enormously important normative dimension, with most of society still regarding being married as a desirable state. I have written about this elsewhere, and this brief article is not the occasion to expand on the argument.<sup>48</sup> Whether this arguably coercive feature of marriage is a good or a bad thing depends on one's take on the institution. But certainly the decision to marry, and the institution of marriage, are not viewed neutrally. Thus, for couples that want to be married, the inability to participate in an activity that many regard as "required" or at least desirable is a negative. This point applies to both same- and opposite-sex couples, and the civil union is unlikely to be regarded as an acceptable substitute within this framework, at least not for the same-sex couples excluded from marriage. For opposite-sex couples who regard marriage negatively, though, the civil union may in fact be quite appealing. I have written elsewhere about the availability of the civil union for opposite-sex couples in Illinois, some of whom prefer this institution to marriage because it does not carry the same historical baggage that they reject.<sup>49</sup> (I will explore this issue further in a subsequent article.)

## CONCLUSION

Are civil unions necessarily inferior to marriages for same-sex couples?

Can one imagine a case in which civil unions would not be a slap in the face (in the guise, oddly, of equality)? I tried a few thought experiments. I tried to make the facts more and more sympathetic to the project before realizing that the very difficulty itself spoke volumes about the clout that the "M word" has – often imitated, never duplicated.

So here is the hypothetical I came up with: What if at the very dawn of this marriage equality debate, reasonable people said: "OK, same-sex couples are entitled to full equality. But there are some differences between same-sex and opposite-sex couples that are biological and the law should

<sup>47</sup> Scott Sayare & Maia DeLaBaume, *In France, Civil Unions Gain Favor Over Marriage*, N.Y. TIMES (Dec. 15, 2010), [http://www.nytimes.com/2010/12/16/world/europe/16france.html?\\_r=1&scp=1&sq=pacte%20civile&st=c](http://www.nytimes.com/2010/12/16/world/europe/16france.html?_r=1&scp=1&sq=pacte%20civile&st=c) (noting that 95% of all PACS were between opposite-sex couples).

<sup>48</sup> John G. Culhane, *Public Health & Marriage (Equality)*, in RECONSIDERING LAW & POLICY DEBATES: A PUBLIC HEALTH PERSPECTIVE 89, 89 (John G. Culhane ed., 2010).

<sup>49</sup> See John Culhane, *No to Nuptials*, SLATE, Jan. 3, 2012, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/01/are\\_states\\_that\\_experiment\\_with\\_opposite\\_sex\\_civil\\_unions\\_offering\\_a\\_way\\_to\\_opt\\_out\\_of\\_oppressive\\_ideas\\_about\\_marriage\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/are_states_that_experiment_with_opposite_sex_civil_unions_offering_a_way_to_opt_out_of_oppressive_ideas_about_marriage_.html) (last visited Nov. 21, 2012).

reflect that. The presumption of paternity is one that comes to mind. So we are going to create a parallel body of law that does everything M does but by another name. Is that acceptable?"

I am not sure I would believe the motivation. After all, there are many parts of the marriage law that do not apply to specific couples, or to whole groups of people – like the elderly, the infertile and so on. And no one has suggested creating a new body of law for them. So why do so in this case? I can see no good reason, other than political compromise (which, as I have argued, is acceptable for the present) or anti-gay animus (not good, and unconstitutional as discrimination).

Courts do not operate in a social vacuum, and, as the Vermont Supreme Court astutely noted, risk not only backlash in the short term but delegitimization in the long term if they fail to husband their power. *Baker v. State*, with the benefit of a decade's hindsight, is best understood as an exercise in giving the political process some breathing room, and allowing the democratic process to unfold in a way that is respectful to deeply held concerns on all sides. Yet the court handicapped the debate, insisting that substantial steps toward *legal* equality were required. As the civil union so pointedly shows, the rest is up to us.

