

CIVIL UNION, A REAPPRAISAL¹

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What a difference five years makes. On July 1, 2000, Vermont made history by enacting the nation's first civil union law.² The law was passed in response to the Vermont Supreme Court's decision in *Baker v. State*, in which all five Justices held that denying same-sex couples the rights and benefits of marriage violates the Vermont Constitution.³ The civil union law grants same-sex couples all the rights, benefits, and responsibilities of marriage.⁴ It treats same-sex couples as if they were married in every respect, from inception to dissolution, withholding only the word "marriage" itself.⁵ After the law took effect, thousands of same-sex couples from across the country came to Vermont to join in civil union and to celebrate a level of equality never before seen in the United States. Passage of the law made international news.⁶ It also drove the state into a very uncivil political war. An ugly, nativist "Take Back Vermont" movement was born and flourished in many counties of the state. Several lawmakers who heroically supported the law in the face of intense opposition lost their seats in the November 2000 election.⁷ Although most statewide candidates who supported civil union (including then-Governor Howard Dean) were re-elected, Republicans seized control of the Vermont House of Representatives on the strength of the backlash to civil union.⁸

Five years later, life is pretty much back to normal in Vermont. In the November 2004 election, Vermont Democrats regained their majority in the House and added to their majority in the Senate.⁹ Lesbian/gay rights

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

3. *Baker v. State*, 744 A.2d 864, 886, 170 Vt. 194, 224 (1999); *id.* at 889, 170 Vt. at 229 (Dooley, J., concurring); *id.* at 898, 170 Vt. at 242 (Johnson, J., dissenting in part).

4. Tit. 15, § 1204(a).

5. *Id.*

6. E.g., David Osborne, *First Gay Couples 'Unite' in U.S. - but Boy Scouts Win Right to Discriminate*, INDEP. (U.K.), July 2, 2002, at 25, available at 2000 WLNR 5996369.

7. Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 256 (2001) ("In the Senate, only one candidate lost reelection largely because of his civil union vote, and it was a close election. . . . In the House, we definitely suffered some losses. We saw a decided swing in the balance of the House, with around a dozen incumbents losing their seats over their civil union vote.").

8. *Id.*

9. Ross Sneyd, *Triumphant Democrats Take Solid Control as Vermont Legislature Convenes*, ASSOCIATED PRESS, Jan. 5, 2005, available at <http://digbig.com/4mhjx>.

advocates like to point out “[t]he sky didn’t fall” after the civil union law was passed.¹⁰ The early rancor and outrage have subsided. Today, civil union has gained a “quiet acceptance” in Vermont.¹¹ “[C]ouples that have joined in Civil Unions are an accepted and dynamic part of Vermont’s community fabric.”¹² When the three remaining Vermont Supreme Court Justices who served on the court at the time of *Baker* (two have subsequently retired) were all retained by a vote of the Vermont House and Senate in March 2005, leaders in Montpelier considered it “the final act of the drama over the Legislature’s enactment of” the civil union law.¹³ In short, according to lobbyist Steve Kimbell, the “backlash has worn off and we’re back to the natural balance.”¹⁴

In the heat of the battle, same-sex marriage advocates in Vermont decided to support the civil union law, but they have never been happy with it. “Vermonters for Civil Unions,” a political action committee formed in 2000 to support candidates who voted in favor of the law, disbanded in February 2005.¹⁵ Susan Murray, the group’s Chair, said, “[f]or us to continue our organization would be misleading’ . . . ‘Civil unions were a step forward in 2000, but we remain committed to full equality for same-sex couples, and civil unions fall short of that goal.’”¹⁶ Now that the uproar over civil union has faded in Vermont, a renewed push for same-sex marriage has begun. The immediate prospect for such a development is a bit dim (key players like Republican Governor Jim Douglas do not support marriage equality),¹⁷ but advocates are working hard in Montpelier and across the state to convince Vermonters that it is time to take the next step.

Nationally, events in Massachusetts and elsewhere have overshadowed Vermont’s achievement. In November 2003, the Massachusetts Supreme Judicial Court ruled by a slim 4–3 majority in *Goodridge v. Department of Public Health* that prohibiting same-sex couples from marrying violates the Massachusetts Constitution.¹⁸ On May 17, 2004, Massachusetts began issuing marriage licenses to same-sex couples.¹⁹ Thousands of same-sex

10. *Id.* (citing Editorial, *A Step Forward*, RUTLAND HERALD (Vt.), Mar. 16, 2005, at 10).

11. Amy Roberts, *CUs Gain Quiet Acceptance Here*, VT. STANDARD, Mar. 17, 2005, at A1.

12. *Id.*

13. Ross Sneyd, *Dems View Vote on Justices as End of Civil Unions Drama*, RUTLAND HERALD (Vt.), Mar. 21, 2005, available at <http://digbig.com/4gpbr>.

14. Sneyd, *supra* note 9.

15. Press Release, Vt. Freedom to Marry Action Comm., Inc., (Mar. 1, 2005) (on file with author).

16. *Id.*

17. *Vermont Governor Suggests Gay Marriage Veto*, 365Gay.com, Feb. 6, 2006, <http://digbig.com/4qrdr>.

18. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

19. David Ho, *Wedding Day Arrives for Gay Couples in Massachusetts*, COX NEWS SERV.,

couples are now legally married in Massachusetts.²⁰ The rush of couples from out-of-state did not happen in Massachusetts as it did in Vermont since Massachusetts Governor Mitt Romney invoked a long-abandoned 1913 law to bar out-of-state, same-sex couples from getting married.²¹ On recent challenge, the Supreme Judicial Court of Massachusetts held the enforcement of the 1913 law to be constitutional, notwithstanding its disproportionate impact on same-sex couples.²²

While Massachusetts was readying for same-sex marriage, Mayor Gavin Newsom of San Francisco caught everyone off-guard by offering marriage licenses to same-sex couples on Valentine's Day, 2004.²³ Multnomah County (Portland) Oregon soon followed suit,²⁴ as did smaller communities such as New Paltz, New York.²⁵ Pictures of same-sex couples exchanging vows before city and county officials galvanized both sides of the same-sex marriage debate. Court decisions in California²⁶ and Oregon²⁷ eventually nullified the marriages in those states, but this did not lessen the social and cultural impact of the courageous acts of Mayor Newsom and others: America has seen the face of same-sex marriage.

The excitement over the reality of same-sex marriage has made civil union blasé. In March 2005, the Connecticut legislature rather unceremoniously passed its own civil union law, which closely mirrors the Vermont law.²⁸ This move is significant since it came about without court action and with nowhere near the controversy as in Vermont, yet it was met largely with indifference within the lesbian/gay community. The largest gay rights advocacy group in Connecticut initially lobbied against the measure but eventually came around to offering its half-hearted support.²⁹

May 17, 2004.

20. Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, IMAPP POL'Y BRIEF (Inst. for Marriage and Pub. Pol'y, Manassas, Va.), Apr. 26, 2006, at 5–6, available at <http://digbig.com/4mhjy>.

21. MASS. ANN. LAWS ANN. ch. 207, § 11 (LexisNexis 1998) (“No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”).

22. *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 643–44 (Mass. 2006).

23. *Lockyer v. City and County of S.F.*, 17 Cal. Rptr. 3d 225, 231–33 (Cal. 2004).

24. *Li v. State*, 110 P.3d 91, 102 (Or. 2005).

25. Larry Fisher-Hertz, *Obstacles Remain for Gay Couples*, *POUGHKEEPSIE J.* (N.Y.), Feb. 26, 2006, 1A.

26. *Lockyer*, 17 Cal. Rptr. 3d at 273 (“[T]his court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity . . .”).

27. *Li*, 110 P.3d at 102 (“[M]arriage licenses issued to same-sex couples in Multnomah County . . . were issued without authority and were void at the time that they were issued . . .”).

28. An Act Concerning Civil Unions, 2005 Conn. Legis. Serv. 11, 11–15 (West) (to be codified at CONN. GEN. STAT. §§ 46b-38aa to -38pp).

29. Sarah Schweitzer, *Conn. Approves Gay Civil Unions*, *BOSTON GLOBE*, Apr. 21, 2005, at

About the most gay rights advocates could muster, as one commentator put it, was “two cheers for civil unions.”³⁰

Has time and circumstance already passed civil union by? There is no question that the debate on same-sex marriage has evolved rapidly. ABC News summarized a view commonly held when it reported on the five-year anniversary of the civil union law in Vermont: “Perhaps the strongest measure of how far the issue has come is that civil unions, considered so radical in 2000, are now the ‘conservative’ compromise--providing benefits but still not ‘real’ marriage--offered by politicians grappling with similar proposals elsewhere.”³¹ Congressman Barney Frank, in his inimitable way, puts it this way: “[A] year ago civil unions were the most divisive issue in history. Now they are very boring to anyone who isn’t in one.”³² As with most political compromises, it seems no one likes civil union. Same-sex marriage advocates see it as “separate-but-equal,” akin to Jim Crow laws, and opponents see it as marriage by another name.³³ Now that same-sex marriage is a reality, should civil union be relegated to the trash heap of failed social experiments? Is there a place for civil union in the supercharged debate on same-sex marriage?

I will argue that the lesbian and gay community should embrace civil union as a viable alternative to marriage. This has been my position since the inception of the institution and, after much soul searching spawned by the “Massachusetts miracle,” I still believe it. For committed same-sex couples who need the many benefits and protections marriage offers, civil union can provide immediate relief while the battle for same-sex marriage continues. And for those in the lesbian/gay community who like being different, who recoil at the idea of losing their identity in a heterosexual tradition, civil union is the answer. Either way—as a stopgap measure or as a durable symbol of identity—civil union is a winner. I will argue that even if civil union is but a stepping-stone to true marriage equality, it should remain an option for couples who, for whatever reason, do not like the “fit” of marriage. We should strive to increase the range of choices available to couples seeking state recognition of their relationship—from domestic

A1, available at <http://digbig.com/4qrd5>.

30. Alan Hirsch, *Two Cheers for Civil Unions*, <http://digbig.com/4mhcm> (last visited Aug. 10, 2006).

31. Adrienne Mand Lewin, *Vermont Marks Five Years of Civil Unions*, ABC NEWS, Apr. 26, 2005, <http://digbig.com/4mhcn>.

32. Jennifer Levi, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 WIDENER L.J. 831, 853 (2004) (quoting Massachusetts Congressman Barney Frank).

33. See MICHAEL MELLO, LEGALIZING GAY MARRIAGE 162–63 (2004) (analyzing the similarities between civil unions and the separate-but-equal treatment addressed in *Brown v. Board of Education*).

partnership, to “marriage-lite” (like France’s “civil solidarity pact”³⁴), to civil union, to marriage. In the end, civil union should have a lasting and honorable place in the evolving history of marriage and commitment.

I. CIVIL UNION AND MARRIAGE ARE LEGALLY EQUAL

I begin my defense of civil union with this key point: legally, civil union is exactly the same and completely equal to marriage. For this, I let the civil union law speak for itself; it grants same-sex couples “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”³⁵ The law is comprehensive: it offers not some, many, or most, but “all the same” rights as are offered to opposite-sex couples.³⁶ Couples in a civil union are responsible to each other in the same way as couples in a marriage. Couples seeking to dissolve their civil union must go to family court, just like couples in a marriage, and there the same “law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply.”³⁷ In the legal realm, rights matter, and in this regard the civil union law scores a perfect ten. It provides same-sex couples with the entire package of rights and responsibilities associated with marriage, bar none.

This fact undermines the argument often made by advocates of same-sex marriage that civil union is not as “portable” as marriage—that is, it is less likely to be recognized for marital benefits in other states.³⁸ Courts can use the language quoted above as well as other provisions of the law to find that civil union is the legal equivalent of marriage and therefore subject to interstate recognition. Close to forty states now have Defense of Marriage statutes or constitutional amendments, and recognition of either civil union or same-sex marriage in these states is highly unlikely.³⁹ But in the few remaining states without a Defense of Marriage Act (DOMA), an out-of-

34. For a discussion of the history and contents of the civil solidarity pact, see R. Lalement, *The French Registered Partnership Law: The Civil Solidarity Pact*, FRANCE QRD, Oct. 14, 1999, <http://digbig.com/4mhkp>.

35. VT. STAT. ANN. tit. 15, § 1204(a) (2002).

36. *Id.*

37. *Id.* § 1204(d).

38. See, e.g., Levi, *supra* note 32, at 853–56 (highlighting, among other things, the transitory nature of today’s society and noting that married couples do not have to worry that their marriage will not be recognized as valid in other states; however, this is something couples in civil unions have to be concerned about).

39. Kavan Peterson, *Wash., New York Say No to Gay Marriage*, STATELINE, Mar. 29, 2005, <http://digbig.com/4mhhep>.

state civil union has as good (or as poor) a chance of being recognized as an out-of-state same-sex marriage. Only a few courts have addressed this issue in the five years since the civil union law was passed, and these decisions are split. Courts in Georgia and Connecticut refused to recognize civil union for marital benefits, but courts in Iowa, Massachusetts, and New York have recognized them.⁴⁰ The New York trial court decision deserves a closer look since it carefully lays out an analysis and methodology that courts in other states can use to recognize civil union for marital benefits.

New Yorkers Neal Spicehandler and John Langan met on November 1, 1986, and moved in with each other eight months later.⁴¹ By all accounts they were “as inseparable as any married couple could possibly be.”⁴² In the fall of 2000, Spicehandler and Langan traveled to Vermont for a civil union.⁴³ They returned to New York and soon thereafter Spicehandler was hit by a car.⁴⁴ He was taken to St. Vincent’s Hospital in Manhattan with a broken leg.⁴⁵ He underwent two surgeries and, tragically, died while in the hospital.⁴⁶ Langan sued the hospital for wrongful death and medical malpractice.⁴⁷ The hospital moved to dismiss, arguing that under New York’s wrongful death statute he could not sue because he was not Spicehandler’s “spouse.”⁴⁸ The question presented was whether, for the purposes of the wrongful death statute, Langan should be considered

40. Compare *Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. Ct. 2002) (“[T]he legislative history reveals that the legislature failed to enact its own version of the Defense of Marriage Act not because it intended to evince a willingness to recognize civil unions but because it thought such an enactment unnecessary.”), and *Burns v. Burns*, 560 S.E.2d 47, 49 (Ga. Ct. App. 2002) (“[E]ven if Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia, the place where the consent decree was ordered and agreed to by both parties . . . and more importantly the place where the present action is brought.”), with *Alons v. Iowa Dist. Court for Woodbury County*, 698 N.W.2d 858, 870–71 (Iowa 2005) (denying standing to married couples who sought to challenge the district court’s dissolution of a civil union), and *Salucco v. Alldredge*, 2004 WL 864459, at *4 (Mass. Super. Ct. 2004) (“A careful reading of *Goodridge* . . . provides that same-sex couples should be afforded the same rights and responsibilities as those of opposite-sex married couples. Opposite-sex couples who marry are afforded the opportunity to extinguish their legal relationship . . . Reasoning follows therefrom that same-sex couples who enter into legal relationships should also be allowed to dissolve their legal relationships.” (citation omitted)), and *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411, 418 (N.Y. Sup. Ct. 2003) (“New York will recognize a marriage sanctioned and contracted in a sister state and there appears to be no valid legal basis to distinguish one between a same-sex couple.”), *rev’d*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

41. *Langan*, 765 N.Y.S.2d at 412.

42. *Id.* at 413 (quoting affidavit of Laura Spicehandler, Neal’s sister-in-law).

43. *Id.* at 412.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 412, 418.

Spicehandler's spouse as a result of their civil union.⁴⁹

As noted, a necessary predicate to even begin such an analysis is that the state must not have a DOMA. New York is one of the few remaining states without a DOMA.⁵⁰ To the contrary, the state offers employment benefits to domestic partners and has laws protecting gays and lesbians from discrimination in employment, education, and housing.⁵¹ Based on this evidence, the court was able to find that recognizing a same-sex civil union would not violate any strong public policy of the state.⁵² Next, the court looked at Vermont's civil union law to determine whether it was a "state sanctioned union equivalent to marriage."⁵³ It noted all the ways that civil union and marriage are the same, including provisions of the civil union law that include "part[ies] to a civil union in the definition of the term 'spouse, family, immediate family, dependent, next of kin and other terms that denote the spousal relationship as those terms are used throughout the law,'" and which explicitly allow for suit under Vermont's wrongful death statute.⁵⁴ From this it was not hard for the court to conclude, "civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."⁵⁵ The court held that Langan was a spouse under the laws of Vermont and should be included within the definition of spouse in New York's wrongful death statute.⁵⁶ Langan's suit against the hospital was allowed to proceed. The hospital appealed this ruling, and while the trial court's analysis is thorough and convincing, the Appellate Division reversed the order on October 11, 2005.⁵⁷ Despite the outcome of the appeal, the *Langan* decision proves that courts are willing to recognize civil union across state lines.⁵⁸

49. *Id.* at 418.

50. *Id.* at 415.

51. N.Y. EXEC. LAW § 296(1)(a), (4)–(5)(a)(1) (McKinney Supp. 2006).

52. *Langan*, 765 N.Y.S.2d at 415–16.

53. *Id.* at 413.

54. *Id.* at 417 (quoting VT. STAT. ANN. tit. 15, § 1204(b), (c)(2) (2002)).

55. *Langan*, 765 N.Y.S.2d at 417–18.

56. *Id.* at 422.

57. *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 477 (N.Y. App. Div. 2005).

58. As this Law Review went to press, the *Langan* decision was reversed by a 3–2 vote of the Supreme Court, Appellate Division, Second Department. *Id.* at 477, 480. The majority stressed that when the Legislature drafted the wrongful death statute, "the thought that the surviving spouse would be of the same sex as the decedent was simply inconceivable." *Id.* at 477. The majority deferred to the Legislature to decide whether same-sex couples should be covered by the wrongful death statute. *Id.* at 479–80. The two dissenting judges concluded the wrongful death statute, classifies "similarly-situated persons on the basis of sexual orientation without a rational relationship to any conceivable governmental purpose." *Id.* at 480 (Fisher, J., dissenting). Lambda Legal Defense and Education Fund, which represents *Langan*, is considering an appeal.

It would be disingenuous to suggest that this will always be the case. Same-sex couples joined in civil union or marriage should appreciate that they face an uphill battle in having their unions recognized in many parts of the country hostile to gay/lesbian civil rights. A child custody dispute proceeding through Vermont and Virginia courts vividly highlights this harsh reality. Lisa and Janet Miller-Jenkins, a lesbian couple living in Virginia, joined in civil union in Vermont in December 2000.⁵⁹ They returned to Virginia and there decided to have a baby.⁶⁰ They both participated in selecting a sperm donor, and they both decided that Lisa should carry the baby to term.⁶¹ After the child was born, they moved to Vermont “due to the perceived inhospitality of the Commonwealth of Virginia to a same-sex couple with a child.”⁶² Lisa and Janet lived in Vermont with their child from August 2002 to September 2003 when they separated, at which time Lisa moved back to Virginia with the child.⁶³

The couple filed suit in Vermont in November 2003 to have their civil union dissolved.⁶⁴ In June 2004, a Vermont trial court issued a temporary order allocating parental responsibilities and awarding Janet visitation time as a noncustodial parent.⁶⁵ On July 1, 2004, Virginia enacted an amendment to its so-called “Marriage Affirmation Act,” stating that “[a]ny . . . civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia.”⁶⁶ On that same date, Lisa, who now considers herself a “former lesbian,”⁶⁷ filed a petition to establish parentage in a Virginia court.⁶⁸ That court, relying on the revised Marriage Affirmation Act, held that Janet “cannot claim a right to legal custody under the laws of this Commonwealth as her claims are based on rights under Vermont’s civil union laws that are null and void [in Virginia].”⁶⁹ The court prohibited Janet from any contact with the child.⁷⁰ In November 2004, the Vermont

59. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03, slip op. at 4–5 (Vt. Fam. Ct., Nov. 17, 2004).

60. *Id.* slip op. at 5.

61. *Id.*

62. *Id.*

63. *Id.* slip op. at 6.

64. *Id.* slip op. at 1.

65. *Id.* slip op. at 3.

66. VA. CODE ANN. § 20-45.3 (Supp. 2004).

67. S. Mitra Kalita, *Vt. Same-Sex Union Null in Va., Judge Says*, WASH. POST, Aug. 25, 2004, at B1.

68. Jonathan Finer, *Custody Case Puts Civil Union on Trial*, WASH. POST, Aug. 7, 2004, at A3.

69. *Miller-Jenkins v. Miller-Jenkins*, No. CH04-280, slip op. at 2 (Va. Cir. Ct., Sept. 9, 2004) (order and certification for interlocutory appeal).

70. *Id.* at 3.

court ruled that under the civil union law both Lisa and Janet are the child's parents.⁷¹ The court rejected the Virginia court's claim to jurisdiction over the case and said its original custody order "remains in full force."⁷²

With the Vermont and Virginia courts on a "collision course," experts suggest that this case may well be resolved by the Supreme Court.⁷³ In any event, the case highlights the looming national battle over recognition of civil union. Over seventy percent of the couples joined in civil union in Vermont are from out of state.⁷⁴ Courts across the country will undoubtedly see scores of cases like *Langan* and *Miller-Jenkins*, as same-sex couples seek to secure any number of the hundreds of rights and responsibilities associated with marriage in their home states. Lesbian/gay civil rights advocates should be coming up with creative arguments in support of interstate recognition of civil union rather than distancing themselves from the new institution. The thousands of committed, same-sex couples joined in civil union who might need to have their unions recognized—for the same myriad reasons opposite-sex couples rely on interstate recognition of their marriages—would expect nothing less.

I do not support civil union under the naive notion that, as a compromise, it will somehow placate opponents of same-sex marriage. We learned the hard way in Vermont that "settling" for civil union does not end the debate. Opposition to civil union from the religious right was fierce, unrelenting, and often mean-spirited.⁷⁵ Nor do I support civil union because, as is sometimes said, it might avoid the strictures of DOMA since it is not "marriage." First, most DOMAs implicitly cover civil union; the federal DOMA provides, for example, that states do not have to recognize "a relationship between persons of the same sex that is treated as a marriage under the laws" of another state.⁷⁶ As I have argued, and as courts like *Langan* have found, Vermont treats civil union like marriage under its laws, so the federal DOMA would cover it.⁷⁷ In any event, many of the latest wave of defense-of-marriage state constitutional amendments (now

71. *Miller-Jenkins*, No. 454-11-03, slip op. at 13.

72. *Id.*

73. Jonathan Finer, *Court Says Both in Gay Union are Parents*, WASH. POST, Nov. 22, 2004, at A3; Ann Rostow, *Custody Dispute Pits Virginia vs. Vermont*, PLANETOUT NEWS, Aug. 24, 2004, <http://digbig.com/4mheq>.

74. Carolyn Lochhead, *Gay Rights Law Starts Civil War in Vermont*, S.F. CHRON., Oct. 30, 2000, at A1.

75. For an excellent account of the opposition to civil union in Vermont, see MELLO, *supra* note 33.

76. 28 U.S.C. § 1738C (2000).

77. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411, 417 (N.Y. Sup. Ct. 2003), *rev'd*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005).

numbering eighteen and rising),⁷⁸ either name civil union explicitly, such as Nebraska (“The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”),⁷⁹ or use terms that unquestionably cover civil union, such as North Dakota (“Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”).⁸⁰ Civil union and same-sex marriage are both equally subject to these DOMAs.

Yet it might be the case that in a constitutional attack on these new, all-encompassing DOMAs, same-sex marriage and civil union would fair differently. We are already seeing the far-reaching consequences of what might be called the “global DOMAs” passed in November 2004. Michigan’s amendment, which states that the union of a man and a woman “shall be the only agreement recognized as a marriage . . . for any purpose,” has been interpreted by the Michigan Attorney General to mean that municipalities may not extend domestic partnership health care benefits to same-sex couples.⁸¹ The Ohio amendment, which rather obliquely prohibits the state from recognizing “a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage,”⁸² has been interpreted by at least one judge to mean the state’s domestic violence law cannot be applied to unmarried couples, straight or gay.⁸³ A constitutional amendment such as Oregon’s that simply provides, “only a marriage between one man and one woman shall be valid or legally recognized as a marriage,”⁸⁴ is, in my opinion, misguided and unnecessary, but whether it is unconstitutional is a close question. On the other hand, the global DOMAs, which deny recognition of all same-sex relationships, whatever the form, and which prohibit these relationships from obtaining any conceivable right or redress from the government, may well run aground of the Supreme Court’s recent equal protection

78. Social Policy, State Policies on Same-Sex Marriage, <http://digbig.com/4mhkr> (last visited Aug. 10, 2006).

79. NEB. CONST. art. I, § 29.

80. N.D. CONST. art. XI, § 28.

81. MICH. CONST. art. I, § 25; Constitutionality of City Providing Same-Sex Domestic Partnership Benefits, Op. Att’y Gen. No. 7171, 5 MICH. REG. 20, 22 (2005), available at <http://digbig.com/4mher>.

82. OHIO CONST. art. XV, § 1.

83. *State v. Burk*, No. CR 462510, 2005 WL 786212, at ¶ 26 (Ohio Ct. Common Pleas), *rev’d*, 164 Ohio App. 3d 740, 2005-Ohio-6727, 843 N.E.2d 1254, *appeal docketed* No. 2006-0336 (Ohio May 10, 2006); Connie Mabin, *Judge Rules Gay Marriage Ban Prohibits Some Domestic Violence Charges*, HUMAN RIGHTS CAMPAIGN, Mar. 24, 2005, <http://digbig.com/4mhes>.

84. OR. CONST. art. XV, § 5a.

jurisprudence. These amendments are not about protecting marriage; they are hostile attempts to harm an unpopular group for no reason other than animosity.

This is the conclusion a federal district court in Nebraska reached in a recent decision striking down that state's defense-of-marriage constitutional amendment (quoted above, and known as "Section 29").⁸⁵ The court found that the sweeping language of the amendment violates the First Amendment of the United States Constitution because it "imposes significant burdens on both the expressive and intimate associational rights of [same-sex couples] and creates a significant barrier to [their] right to petition or to participate in the political process."⁸⁶ The court also struck down the amendment under the Equal Protection Clause.⁸⁷ For this analysis, the court relied heavily on the 1996 Supreme Court decision in *Romer v. Evans*.⁸⁸ In *Romer*, the Supreme Court struck down a Colorado constitutional amendment passed by popular initiative that prevented the state or municipalities from recognizing any protected status or "claim of discrimination" based on sexual orientation.⁸⁹ The Court said the Colorado amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."⁹⁰ The Court held that this type of discrimination, born of "animus toward the class it affects," was a "denial of equal protection of the laws in the most literal sense."⁹¹

The district court concluded that Nebraska's constitutional amendment is "indistinguishable" from the Colorado amendment: "Like the amendment at issue in *Romer*, Section 29 attempts to impose a broad disability on a single group."⁹² The Nebraska amendment does much more, the court felt, than "preserve marriage," its "purported purpose."⁹³ "[I]t reaches not only same-sex 'marriages,' but many other legitimate associations, arrangements, contracts, benefits and policies. . . . Section 29 goes so far beyond defining marriage that the court can only conclude that the intent and purpose of the amendment is based on animus against [gays and lesbians]."⁹⁴ The real purpose of the Nebraska amendment and others like it, which comprehensively prohibit recognition of all same-sex

85. NEB. CONST. art. I, § 29; *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, No. 05-2604, 2006 WL 1933417 (8th Cir. July 14, 2006).

86. *Citizens for Equal Prot.*, 368 F. Supp. 2d at 995.

87. *Id.* at 1005.

88. *Romer v. Evans*, 517 U.S. 620 (1996).

89. *Id.* at 624, 635.

90. *Id.* at 635.

91. *Id.* at 632-33.

92. *Citizens for Equal Prot.*, 368 F. Supp. 2d at 1002.

93. *Id.* at 1000, 1002.

94. *Id.* at 1002.

relationships, is to make gays and lesbians unequal for no reason other than homophobia. This purpose violates the Equal Protection Clause, as the Court said about the Colorado amendment in *Romer*, in a “most literal sense.”⁹⁵ Under *Romer*, civil union and other forms of legal recognition of same-sex couples (such as the domestic partnership) might survive the burgeoning onslaught of state constitutional amendments banning same-sex marriage.

II. CIVIL UNION IS AN ACCEPTABLE SOCIAL SUBSTITUTE FOR MARRIAGE

To this point, I have sought to prove that civil union is legally equal to marriage, but is this enough? Even if civil union bestows every marital benefit on same-sex couples, including portability, should the lesbian/gay community accept it socially and culturally as a step forward? To many supporters of same-sex marriage, civil union reeks of discrimination. They consider it an unconstitutional “separate-but-equal” regime akin to the Jim Crow laws struck down by the Supreme Court in *Brown v. Board of Education* and other cases.⁹⁶ From the time of the law’s passage, I have defended civil union against this charge.⁹⁷ It is simply too facile to compare the civil union law to the Jim Crow laws of the Old South. Jim Crow laws established segregated facilities that infringed on the rights African-Americans gained through the Civil War Amendments. Conversely, the civil union law is expansive legislation, extending a host of rights to same-sex couples they never had before. Jim Crow laws were passed with malice by racist legislatures hell-bent on subjugating African Americans. The civil union law was passed by a legislature earnestly trying to do the right thing. Jim Crow laws pandered to the masses and to the white establishment. The civil union law represents a courageous attempt by a legislature to vote its conscience in the face of fierce protest and opposition. Indeed, as I have mentioned, some legislators lost their seats because of their support for civil union.⁹⁸ I doubt this was ever true for anyone who voted in favor of a Jim Crow law.

95. *Romer*, 517 U.S. at 633.

96. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); see *supra* note 33 and accompanying text.

97. Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315, 316–19 (2002); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 19 (2000).

98. See *supra* text accompanying note 7.

Noted scholar William Eskridge of Yale Law School has also concluded that the civil union law is not comparable to Jim Crow laws:

I am a classic liberal and a gay person who supports legal recognition of same-sex marriages. My last book criticized the twentieth-century legal regime that created an ‘apartheid of the closet’ for GLBT people. Yet I do not think the civil unions law creates an apartheid Nor do I believe the analogy to *Plessy* holds up. Formally, the law neither separates citizens nor equalizes their entitlements. Functionally, the law ameliorates rather than ratifies a sexuality caste system. The racial apartheid adopted by southern state legislatures and upheld in *Plessy* was very different from the new institution suggested in *Baker* and adopted by the Vermont legislature. Similarly, it is greatly unfair to tag the civil union measure as “separate but equal.”⁹⁹

Eskridge puts the Jim Crow laws in their larger historical context to show how they differ from the civil union law. The Thirteenth and Fourteenth Amendments required “free and equal treatment” of African-Americans.¹⁰⁰ But after Reconstruction, “southern states backslid, adopting laws and amending their constitutions to create the legal foundations for apartheid.”¹⁰¹ The Supreme Court’s decision in *Plessy* was “a betrayal of the goals of Reconstruction. . . . [It] ratified a regime that took away rights from people of color.”¹⁰² Eskridge contrasts this to *Baker* and civil union. He says the civil union law “gives partners joined in civil union a variety of state-supported rights and benefits that they did not have before the law was adopted.”¹⁰³ Eskridge concludes that “[s]ocially, politically, and constitutionally, *Baker* bears a closer kinship to *Brown v. Board of Education*” than it does to *Plessy*.¹⁰⁴

Other authors are now sounding a similar theme:

[T]he analogy between civil unions and racial segregation is somewhat dubious at face value. The injustices put forth by *Plessy v. Ferguson* and Jim Crow[] laws were, in spirit and letter, restrictive legislation. They outlined activities that African Americans could not do and places they could not be. Civil

99. WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 139–40 (2002) (footnote omitted).

100. U.S. CONST. amends. XIII, XIV.

101. ESKRIDGE, *supra* note 99, at 140.

102. *Id.* at 140, 142.

103. *Id.* at 142.

104. *Id.* at 141.

unions, on the other hand, are expansive, not restrictive. Same-sex couples are not being actively stripped of anything when civil union laws are enacted. On the contrary, they would be given rights they once did not have. Because of the expansive nature of civil union legislation, it is inappropriate to compare a step forward in rights with institutionalized racism.¹⁰⁵

All of this may still not be enough for critics of civil union who aspire to marriage and nothing less, and who simply are not comfortable with a separate system of rights and responsibilities. I suggest, though, that we give credit where credit is due. To casually lump the civil union law together with the truly deplorable segregation laws of the Old South misses the mark by a large measure. The Vermont legislature was well-intentioned, and it succeeded in granting same-sex couples literally hundreds of rights and responsibilities never before available in the United States. For this it deserves praise, not condemnation.

Vermont still fell short, most same-sex marriage advocates argue, and at least one high court would agree. In Massachusetts, after the *Goodridge* decision, the Massachusetts legislature drafted a civil union bill akin to the Vermont law, and asked the Massachusetts Supreme Judicial Court for an advisory opinion on whether the bill satisfied the mandate of *Goodridge*.¹⁰⁶ By the same 4–3 margin as the original decision, the court answered with a resounding “No.”¹⁰⁷ The court said the bill did not alleviate but in fact “exaggerated” the constitutional infirmity of the ban on same-sex marriage.¹⁰⁸ “Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or ‘preserve’ what we stated in *Goodridge* were the Commonwealth’s legitimate interests in procreation, child rearing, and the conservation of resources.”¹⁰⁹ The court saw a big difference in the choice of names.

The bill’s absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely

105. Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL’Y 229, 252–53 (2004) (footnote omitted) (citing ESKRIDGE, *supra* note 99, at 134–35).

106. Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

107. *Id.* at 572.

108. *Id.* at 569.

109. *Id.*

homosexual, couples to second-class status.¹¹⁰

The court concluded that establishing a civil union system “would deny to same-sex ‘spouses’ . . . a status that is specially recognized in society and has significant social and other advantages.”¹¹¹

Justice Sosman, in dissent, felt that the “pitched battle over who gets to use the ‘m’ word” was not “a dispute of any constitutional dimension whatsoever”¹¹² She said she would think otherwise if the name chosen was “insulting or derogatory,” but to Justice Sosman, “the term ‘civil union’ is a perfectly dignified title for this program—it connotes no disrespect.”¹¹³ I agree with Justice Sosman on this point, and on at least one other she makes. Justice Sosman lists various reasons why the legislature might rationally decide to give the marital system for same-sex couples a different name.¹¹⁴ Most of these are unconvincing (such as recognizing that same-sex couples will be treated differently than opposite-sex couples in other states and by the federal government), but she also argues that it might be rational to create a different name if the legislature chose to give same-sex couples *more* rights than opposite-sex couples have.¹¹⁵ For example, the legislature might give tax benefits to same-sex couples “to recognize that they have been deprived of certain deductions, credits, or other benefits on their Federal income taxes.”¹¹⁶ She also suggests establishing a program for same-sex couples and their children “to offset the hardship they will encounter as a result of being denied Social Security benefits.”¹¹⁷ Finally, she asks whether it would not be “desirable to formulate some mechanism—admittedly complex and difficult to fashion—by which same-sex couples who move out of State could still have resort to Massachusetts courts to enforce the obligations of their union.”¹¹⁸ Even if some future legislature were this benevolent, these salutary initiatives might not justify using a different name; nevertheless, they tend to highlight how same-sex couples need different treatment, regardless of what name is used.

The court is certainly correct that civil union does not have the same social meaning or cultural tradition as marriage. For those seeking acceptance into an age-old institution, then obviously only marriage will do.

110. *Id.* at 570.

111. *Id.*

112. *Id.* at 572 (Sosman, J., dissenting).

113. *Id.* at 578 n.5.

114. *Id.* at 575–76.

115. *Id.* at 576.

116. *Id.*

117. *Id.*

118. *Id.*

For me, though, the newness of civil union is one of its virtues. It is *tabula rasa*—the lesbian/gay community can imbue it with a meaning unique to our own culture and tradition, free from the ignoble baggage of marriage (sexism, patriarchy, etc.). It can become a symbol of pride, something to call our own, like the rainbow flag and the pink triangle. The pink triangle, it is worth recalling, was the identifying badge Nazis required suspected homosexuals to wear in the death camps. Today, the pink triangle is an international symbol of lesbian/gay pride and empowerment. If the community can convert something so heinous as the pink triangle into a universal symbol of strength and identity, then surely it can do the same for civil union.

A good start down this road is to use the singular “civil union,” as I have done in this Essay. Most references to civil union use the plural, as I did soon after the law was passed. I came to see that it is a contradiction to refer to “marriage” in the singular without doing the same for civil union. The singular “civil union” helps me conceptualize the new institution as one that can stand shoulder to shoulder with marriage. Give it a try. Civil union is like having our cake and eating it too. With civil union we have all the rights and responsibilities of marriage, but we are not subsumed into the dominant heterosexual paradigm. Civil union lets us celebrate our diversity.

Even those same-sex marriage advocates who do not like the “difference” civil union provides might still consider supporting the new institution since it may serve as a necessary stepping-stone to marriage. Some scholars and theorists posit that advances in lesbian/gay civil rights proceed sequentially, starting with the most basic right (no sodomy law) to the most advanced (marriage).¹¹⁹ One does not come before the other; rather, they proceed in order until full equality is achieved. Professor Eskridge calls this step-by-step approach the “progressivity principle” of lesbian/gay rights.¹²⁰ Vermont offers a good example of how this works. Vermont decriminalized sodomy in 1977.¹²¹ In 1992, after considerable debate and acrimony, Vermont banned discrimination based on sexual orientation in employment, housing, and public accommodations.¹²² In

119. See, e.g., ESKRIDGE, *supra* note 99, at 121–24 (identifying the “same-sex marriage movement [as only] part of a larger evolution in the way the state regulates human coupling”); Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 577 (2004) (asserting that same-sex marriage is the result of “small, sequential steps”).

120. *Id.* at 124.

121. 1977 Vt. Acts & Resolves 51; WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 336 (1999).

122. VT. STAT. ANN. tit. 9, §§ 4502, 4503 (1993); VT. STAT. ANN. tit. 21, § 495 (2003).

1996, the Vermont legislature codified an earlier Vermont Supreme Court holding that allowed for same-sex or “second-parent” adoption.¹²³ By 1999, when the Vermont Supreme Court issued its decision in *Baker*, gays and lesbians in Vermont had the same rights and protections as heterosexuals, except for marriage.¹²⁴ The decades of advocacy and achievement on lesbian/gay rights unrelated to marriage paved the way for the court and the legislature to take the next step in establishing civil union.

Europe’s experience with same-sex marriage and domestic partnership is also instructive in this regard. In 1989 Denmark became the first country in the world to enact a registered partnership law, bestowing almost all the rights and privileges of marriage on same-sex couples; Norway was next (1993), followed by Sweden (1994), Iceland (1996), and the Netherlands (1997).¹²⁵ Today most every country in Europe offers some form of legal recognition of same-sex couples.¹²⁶ In 2001, the Netherlands became the first country to open up marriage to same-sex couples.¹²⁷ Belgium became the second in 2003.¹²⁸ Canada and Spain now also offer marriage to same-sex couples.¹²⁹ Dr. Kees Waaldijk, of the law faculty at Leiden University in the Netherlands, has written extensively on same-sex marriage developments in Europe.¹³⁰ He agrees with the progressivity theory, asserting that “[t]he process by which the Netherlands became the first country in the world to open up marriage to same-sex couples involved several small, sequential steps.”¹³¹ He calls this process “the ‘law of small change’ and the ‘trend of standard sequences.’”¹³²

123. VT. STAT. ANN. tit. 15A, §§ 1–102 (2002).

124. *Baker v. State*, 744 A.2d 864, 170 Vt. 194 (Vt. 1999).

125. Lov om registreret partnerskab, Act No. 372 of June 1, 1989, Lovtidende A 1989, 1263 (Den.); Lov om ændring af ægteskabsloven, arveloven, straffeloven og lov om afgift af arv og gave, Act No. 373 of June 1, 1989, Lovtidende A 1989, 1264 (Den.); Lög um staðfesta samvist [Act on Registered Partnership] nr. 87/1996 (Ice.), available at <http://digbig.com/4qrea>; Act of July 5, 1997, Staatsblad van het Koninkrijk der Nederlanden [Stb.] 1997, nr. 324 (Neth.); Lov om registrert partnerskap, Act No. 40 of Apr. 30, 1993, Norsk Lovtidend 1993, 361 (Nor.); Lag om registrerat partnerskap (Svensk författningssamling [SFS] 1994:1117) (Swed.); Waaldijk, *supra* note 119, at 578, 586.

126. See Waaldijk, *supra* note 119, at 571 n.12 (listing the European countries with “marriage,” “quasi-marriage,” and “semi-marriage”).

127. Act of Dec. 21, 2000, Stb. 2001, nr. 9 (Neth.); Waaldijk, *supra* note 119, at 572.

128. Law No. 2003-820 of Feb. 13, 2003, Moniteur Belge, Feb. 28, 2003, 3d ed., p. 9980 (Belg.); Waaldijk, *supra* note 119, at 581.

129. The Civil Marriage Act, 2005 S.C., ch. 33 (Can.); Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (B.O.E. 2005, 11,364) (Spain). For a history of same-sex marriage in Canada, see R. Douglas Elliott, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591 (2004).

130. E.g., Waaldijk, *supra* note 119.

131. *Id.* at 577.

132. *Id.*

Each reform, in Professor Eskridge's words, "permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments."¹³³ Once the citizenry adjusts to antidiscrimination laws, then it gradually becomes ready for civil union. After another period of adjustment, marriage may follow. It may well be that the raucous debate and path-setting precedent of civil union in Vermont informed the debate in neighboring Massachusetts and enabled that state to open marriage to same-sex couples three years later.¹³⁴ In any event, even a "compromise" like civil union is not likely to come about in a state that does not have an antidiscrimination statute in place and that, more generally, has not already embarked years earlier in a public discussion of the lesbian/gay community's right to equal protection. If one accepts the progressivity theory, absent a court order (like in Massachusetts), a system of civil union might be necessary before a state is ready for same-sex marriage. Seen in this light, civil union does not stall or calcify the freedom to marry movement; it enables it to reach fruition.

III. CIVIL UNION SHOULD BE ONE OF MANY OPTIONS COUPLES CAN SELECT

If this supposition is correct, and civil union does lead to same-sex marriage in states like Vermont, what should become of civil union? Is civil union just a stopgap measure that should exist only until lesbians and gays attain true equality through marriage? If Vermont should eventually open up marriage to same-sex couples, my hope is that civil union will remain an option for those couples who do not want to marry, for the reasons I have suggested here, and for reasons all their own. More broadly, I believe family law should be moving away from an either/or approach—marriage or nothing—toward what progressives call a flexible "menu of options."¹³⁵ In today's diverse America, one size does not fit all. Some couples may want the handful of rights (such as health care benefits) and limited commitment that domestic partnership offers. Others, who seek full commitment but chafe at the stale trappings of marriage, may opt for civil union. Many couples would undoubtedly prefer traditional marriage, and some might even choose "covenant marriage." This option, available in Louisiana, Arkansas, and Arizona, does away with "no-fault divorce" and

133. William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 877 (2001).

134. See *supra* notes 1–14 and accompanying text (discussing the initial backlash and eventual acceptance of civil union in Vermont).

135. See, e.g., ESKRIDGE, *supra* note 99, at 121–26 (outlining one such "menu of options").

makes separating much more difficult.¹³⁶ As Kara Suffredini and Madeleine Findley argue in their recent and influential article critiquing the primacy of marriage, increasing the number of options will “create choices for forms of household and partnership recognition that might better respond to the diverse forms that real households take, depending on their specific and varying needs, while preserving marriage for those whose needs and desires favor the marital arrangement.”¹³⁷

This argument plays right into the hand of conservative critics of same-sex marriage, who see the proliferation of domestic partnership, civil union, and now same-sex marriage laws as weakening the institution of marriage. The leading academic critic of same-sex marriage, Professor Lynn Wardle of Brigham Young University School of Law, has likened recent reforms in U.S. family law to the radical attack on family life waged by the Russian Bolsheviks in the years after the Russian Revolution.¹³⁸ “Indeed,” he asserts:

[I]t can be argued that American lawmakers (legislative, executive, and judicial) seem to have gone further and had greater success in establishing and maintaining radical family law policies that ‘level’ marriage and deny and denigrate the importance of the marital family than the Bolshevik revolutionaries who galvanized world attention in Russia after the Revolution of 1917.¹³⁹

His complaints are many, and include the liberalization of divorce laws, the legalization of abortion, the abolition of “[t]he legal stigma associated with childbearing out of wedlock,” the repeal of sodomy laws, and, of course, same-sex marriage.¹⁴⁰ All of these developments, he says, have led to the “withering away” of marriage, a goal the Bolsheviks failed to achieve but which he thinks we are perilously close to seeing in America.¹⁴¹

136. Covenant Marriages, ch. 135, sec. 1, § 25-903, 1998 Ariz. Sess. Laws 812, 813 (codified at ARIZ. REV. STAT. ANN. § 25-901 (2000)); Covenant Marriage Act of 2001, sec. 5, § 9-11-808, 2001 Ark. Acts 5901, 5908-09 (codified at ARK. CODE ANN. § 9-11-808 (West 2002)); Act of July 15, 1997, No. 1380, sec. 3, § 307, 1997 La. Sess. Law Serv. 2848, 2852 (West) (codified as amended at LA. REV. STAT. ANN. § 9:307 (2000 & Supp. 2006)). Professor Eskridge describes the full menu of options, with gradations between those listed here, in his book, *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS*, *supra* note 99, at 121-26.

137. Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 617 (2004).

138. Lynn D. Wardle, *The “Withering Away” of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917-1926*, 2 GEO. J. L. & PUB. POL’Y 469, 499 (2004).

139. *Id.*

140. *Id.* at 491-505.

141. *Id.* at 497-518.

On the opposite end of the spectrum, Professor Nancy Polikoff would be happy to see marriage “wither away.” She has argued for “[e]nding [m]arriage [a]s [w]e [k]now [i]t.”¹⁴² Professor Polikoff “disagree[s] with those who would elevate marriage to a status above other relationships.”¹⁴³ Professor Polikoff applauds the recent recommendations of the American Law Institute which, in its *Principles of the Law of Family Dissolution*,¹⁴⁴ suggests couples—gay and straight—in a domestic partnership be treated the same as couples in a marriage for purposes of property division and support upon dissolution of the relationship.¹⁴⁵ Professor Wardle slams the American Law Institute’s recommendations, saying, “the *Principles* manifest that the mainstream of elite leaders of the bench and bar consider nonmarital relationships to be functionally equivalent to marriage in all significant respects relevant to any public policy in family law.”¹⁴⁶ To Professor Polikoff, the *Principles* are “an important step in the right direction of making marriage matter less.”¹⁴⁷

I agree with Professor Polikoff’s position, but my sense is a growing number of same-sex marriage advocates would favor Professor Wardle’s idealized view that marriage should be cherished and promoted to the exclusion of all other forms of commitment. Representative of this trend is Jonathan Rauch’s highly praised 2004 book, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*.¹⁴⁸ Rauch avows that he is “a true believer in the special importance and unique qualities of the institution of marriage.”¹⁴⁹ He calls marriage “the great civilizing institution. No other institution has the power to turn narcissism into partnership, lust into devotion, strangers into kin.”¹⁵⁰ For marriage to work, Rauch argues, “it must be understood to be better than other ways of living.”¹⁵¹ Compare all of this to Professor Wardle, who asserts that “[w]hile marriage and family relations are far from perfect, they are

142. Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 201 (2003).

143. Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 354.

144. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(1) (Am. Law Inst. 2002) (“[D]omestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”).

145. Polikoff, *supra* note 143, at 354–58.

146. Wardle, *supra* note 138, at 504.

147. Polikoff, *supra* note 143, at 354.

148. JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004).

149. *Id.* at 7.

150. *Id.*

151. *Id.* at 81.

incomparably superior to any other model of a companionate or nurturing relationship.”¹⁵²

Rauch rejects any other form of legal recognition, including domestic partnership and civil union.¹⁵³ He says these alternatives undermine marriage and should be eliminated: “The sooner the better, states should not only legalize gay marriage but simultaneously withdraw any public-sector alternatives, on the grounds that they are no longer necessary. Private-sector employers should do the same. . . . Domestic-partner programs should go down in history as a transition, not a destination.”¹⁵⁴ To those in the lesbian/gay community who oppose marriage, it is often said no one is saying you have to get married, but we should at least be able to get married. Rauch does not see it this way: “It is not enough, I think, for gay people to say we want the right to marry. If we do not use it, shame on us.”¹⁵⁵ He continues: “If gay marriage is recognized, single gay people over a certain age should not be surprised when they are subtly disapproved of or pitied. That is a vital part of what makes marriage work.”¹⁵⁶

Lines like this do not give me a warm and fuzzy feeling about the institution of marriage. Rauch’s vision of marriage seems to harken back to the constrained, Ozzie-and-Harriet model that the United States has, thankfully, been moving away from now for several generations. The original push for same-sex marriage came from left wing activists inspired by the foment of the 1960s and the fires of the Stonewall Rebellion. Jack Baker and Michael McConnell filed the first same-sex marriage case in 1970, one year after Stonewall.¹⁵⁷ Baker said their goal in filing suit was to “cause a cultural revolution.”¹⁵⁸ McConnell added, “[w]e want to cause a re-examination and re-evaluation of the institution of marriage. We feel we can be the catalyst for that.”¹⁵⁹ Other radicals, like John Singer in Washington State, also filed same-sex marriage cases in the early 1970s for political reasons.¹⁶⁰ Today, the defense of same-sex marriage, at least in the popular press, seems dominated by a conservative ideology, as evidenced by Rauch, Bruce Bawer, Dale Carpenter, and Andrew Sullivan, among others.

152. Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 214 (2003).

153. RAUCH, *supra* note 148, at 191.

154. *Id.*

155. Jonathan Rauch, *Who Needs Marriage?*, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 296, 313 (Bruce Bawer ed., 1996).

156. *Id.* at 312.

157. KAY TOBIN & RANDY WICKER, THE GAY CRUSADERS 145 (1972).

158. *Id.* at 144.

159. *Id.*

160. See *Singer v. Hara*, 522 P.2d 1187, 1196 n.12 (Wash. Ct. App. 1974) (discussing, in part, Singer’s argument that “homosexuals constitute ‘a politically voiceless and invisible minority’”).

Civil union can offer a breath of fresh air for those who find this narrow, conservative approach to marriage a bit stultifying. I will grant that most same-sex couples seeking legal recognition would rather be married than joined in civil union. Still, it is also undoubtedly true that some couples would rather join in civil union than marry. And just as assuredly there are couples who do not like either of these institutions, and would rather be recognized as domestic partners for limited rights and commitment. All of these options should be available so that couples may maximize their potential by selecting the system that fits them best. The obsessive focus among some lesbian/gay rights advocates on marriage as the only form of commitment worthy of legal recognition is outdated and misguided. By showing that there is a third way, civil union may well help save the freedom-to-marry movement from itself.

CONCLUSION

In Vermont, the freedom-to-marry movement may not have gotten all that it sought, but with civil union it came awfully close. Some will never accept the new institution, but thousands more have joined in civil union and many have found the experience profoundly gratifying. All three couples who were the plaintiffs in *Baker v. State* have joined in civil union.¹⁶¹ Stan Baker, the lead plaintiff, has called his civil union to Peter Harrigan “very spiritual and meaningful.”¹⁶² Reactions like this are not surprising. The name may not be the same, but the rights and responsibilities of civil union are identical to marriage. This is a great leap forward in the long struggle for lesbian/gay equality. I see lasting value in civil union, but even as a stepping-stone it is a major achievement. Five years after all the tumult, life in Vermont is back to normal, and same-sex marriage advocates are poised for another attempt at marriage equality. So, this is my advice to those in other states who join in the battle for same-sex marriage: shoot for the stars and demand your right to marry. But if you fall short, give civil union a chance. You just might find, like I have, that it grows on you.

161. *Baker v. State*, 744 A.2d 864, 170 Vt. 194 (Vt. 1999).

162. Ross Sneyd, *A Year After Baker*, RUTLAND HERALD, Dec. 18, 2000, available at <http://digbig.com/4fxyn>.