

CIVIL UNION EQUALITY

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INTRODUCTION

2011 was a good year for marriage equality in the United States. President Obama publicly renounced the constitutionality of the Defense of Marriage Act (DOMA) and determined that the Department of Justice would refuse to defend it in court.<sup>1</sup> This determination was made despite the DOJ’s “longstanding practice of defending the constitutionality of duly-

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<sup>1</sup> Letter from Att’y Gen. Eric H. Holder, Jr. to The Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (reporting that the President had determined that Section 3 of DOMA, “as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment,” and that the Attorney General would no longer instruct Department of Justice attorneys to defend it in pending cases).

enacted statutes if reasonable arguments can be made in their defense.”<sup>2</sup> The DOJ concluded that there were no such reasonable arguments, making “[t]his . . . the rare case where the proper course is to forgo the defense of this statute.”<sup>3</sup> The President’s “manifest . . . conclu[sion] that the statute [wa]s unconstitutional” made even easier the DOJ’s determination to forgo DOMA’s defense.<sup>4</sup>

The legalization of same-sex marriage in New York presented a huge victory in 2011 for marriage equality not only federally but also at the state level.<sup>5</sup> The recognition of same-sex marriage in New York—which now means that same-sex marriage is legal in nine states and in the District of Columbia<sup>6</sup>—was a particularly notable victory in the fight for marriage

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (quoting Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1083 (2001)).

<sup>5</sup> See Michael Barbaro, *After Long Wait, Same-Sex Couples Marry in New York*, N.Y. TIMES, July 24, 2011, <http://www.nytimes.com/2011/07/25/nyregion/after-long-wait-same-sex-couples-marry-in-new-york.html> (describing people’s activities on the first day on which same-sex couples could legally marry in New York, following the June 2011 passage of same-sex marriage legislation). For the text of New York’s Marriage Equality Act, see <http://www.governor.ny.gov/assets/marriageequalitybill.pdf>.

<sup>6</sup> Same-sex marriage is legally recognized in California, Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, as well as in Washington, D.C. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991, 1003 (N.D. Cal. 2010) (invalidating California’s Proposition 8 and asserting that “the right to marry protects an individual’s choice of marital partner regardless of gender”). This case was subsequently renamed *Perry v. Brown*, and was recently decided by the Ninth Circuit. *Perry v. Schwarzenegger Becomes Perry v. Brown*, PROP 8 ON TRIAL (Sept. 5, 2011, 9:55 PM), <http://prop8.berkeleylawblogs.org/2011/09/05/perry-v-schwarzenegger-becomes-perry-v-brown/> (noting the case’s new name on appeal). See also Robert Barnes, *California Proposition 8 Same-Sex Marriage Ban Ruled Unconstitutional*, WASH. POST, Feb. 7, 2012, [http://www.washingtonpost.com/politics/calif-same-sex-marriage-ban-ruled-unconstitutional/2012/02/07/gIQAMNwkwQ\\_story.html?hpid=z1](http://www.washingtonpost.com/politics/calif-same-sex-marriage-ban-ruled-unconstitutional/2012/02/07/gIQAMNwkwQ_story.html?hpid=z1) (reporting that the Ninth Circuit held that Proposition 8 was unconstitutional); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 411–12 (Conn. 2008) (holding that state statutory prohibition against same-sex marriage impermissibly discriminated against gay people on account of their sexual orientation, in violation of Connecticut’s constitution); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (holding a provision of the Iowa Code prohibiting same-sex marriage unconstitutional because it violated the equal protection clause of Iowa’s constitution); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (invalidating Massachusetts law prohibiting same-sex couples from “the protections, benefits, and obligations of civil marriage”); Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, Jun. 3, 2009, <http://www.nytimes.com/2009/06/04/us/04marriage.html> (“The New Hampshire legislature [and Governor] approved revisions to a same-sex marriage bill . . . making the state the sixth to let gay couples wed.”); Nikita Stewart & Tim Craig, *D.C. Council Votes to Recognize Gay Nuptials Elsewhere*, WASH. POST, Apr. 8, 2009, at A1 (“[Y]esterday . . . Vermont became the fourth state to recognize same-sex marriages . . .”); Ian Urbina, *Gay Marriage Is Legal in U.S. Capital*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/04/us/04marriage.html> (reporting on D.C.’s legalization of same-sex marriage, and the law’s having “survived Congressional attempts to block it”). Though this Essay focuses on marriage developments from 2011, in 2012 the states of Washington and Maryland legalized same-sex marriage. See Ryan Watkins, *Washington Becomes Seventh State to Recognize Same-Sex Marriages*, THE GA VOICE (Feb. 13, 2012, 13:27), <http://www.thegavoice.com/news/national-news/4179-washington-becomes-seventh-state-to-recognize-same-sex-marriages>; Ian Duncan, *Maryland Governor Signs Same-Sex Marriage Law*, L.A. TIMES, Mar. 1, 2012, <http://articles.latimes.com/2012/mar/01/news/la-pn-maryland-gay-marriage-law-signed-20120301>.

equality because New York's same-sex marriage statute was the first same-sex marriage statute that passed with a Republican-led legislative chamber.<sup>7</sup> Moreover, New York's recognition of same-sex marriage reportedly caused the number of Americans living in a state recognizing same-sex marriage to more than double.<sup>8</sup>

But 2011 was not only a good year for marriage equality. It was also a good year for "civil union equality" in the U.S. In 2011, two states—Illinois and Hawaii—enacted laws legalizing civil unions between different-sex as well as same-sex couples.<sup>9</sup> Civil unions, the first of which were recognized in the U.S. in 2000 by the Vermont legislature<sup>10</sup> in response to the Vermont Supreme Court's ruling in *Baker v. State*,<sup>11</sup> present same-sex couples with a system for recognizing their relationships "with legal status and benefits substantially equivalent to marriage."<sup>12</sup> Though there exist other alternatives to marriage, such as domestic partnerships, this Essay focuses only on civil unions because these alternatives are not only marriage alternatives but marriage equivalents—civil unions offer to couples all of the same benefits that would attend marriage in the same state even though they have a different name.

Many have argued that civil unions are in fact not substantially equivalent to marriages.<sup>13</sup> Many have argued, too, that the provision of a differently named alternative to marriage for same-sex couples is objectionable because of its different name.<sup>14</sup> These arguments are

<sup>7</sup> Evan Wolfson, *Freedom to Marry's Top 10 Moments for Marriage in 2011*, FREEDOM TO MARRY (Dec. 16, 2011, 9:10 AM) <http://www.freedomtomarry.org/blog/entry/freedom-to-marrys-top-ten-moments-for-marriage-in-2011>.

<sup>8</sup> See *id.* (indicating that more than 35 million people lived in a state recognizing same-sex marriages when New York enacted its marriage equality act).

<sup>9</sup> See Katherine Franke, *Civil Unions in Hawaii and Illinois: How'd They Get it Right?*, HUFFPOST POLITICS (Feb. 23, 2011, 12:18 PM), [http://www.huffingtonpost.com/katherine-franke/civil-unions-in-hawaii-an\\_b\\_827132.html](http://www.huffingtonpost.com/katherine-franke/civil-unions-in-hawaii-an_b_827132.html).

<sup>10</sup> See 1999 VT. H.B. 847 § 3 (1999); see also Associated Press, *Dean Signs Nation's First Civil-Union Law*, TIMES UNION (Albany) at A4 (May 27, 2000) ("Gov. Howard Dean signed a first-in-the-nation law Wednesday granting gay couples nearly all of the benefits of marriage.").

<sup>11</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999) (reversing a lower court's ruling that the denial of marriage licenses to three same-sex couples by town clerks in Vermont did not violate the Common Benefits Clause of the Vermont Constitution but leaving up to the legislature the task of enacting into law a statute that would not violate the state constitution); see also Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 937 (2000) ("While refusing to specify what statutes the legislature had to enact or modify in order to satisfy the requirements of the Vermont Constitution, the *Baker* court made clear that the legislative package 'must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.'" (quoting *Baker*, 744 A.2d at 867)).

<sup>12</sup> Cheryl Hanna, *State Constitutional Decision-Making and Principles of Equality: Revisiting Baker v. State and the Question of Gender in the Marriage Equality Debate*, 74 ALB. L. REV. 1683, 1683 (2011). See also VT. STAT. ANN. tit. 15 § 1204(a) (2009) ("Parties to a civil union shall have all the same benefits, protections, and responsibilities under the law . . . as are granted to spouses in a civil marriage.").

<sup>13</sup> See discussion *infra* Part I.B (describing some differences between benefits offered through marriages and civil unions).

<sup>14</sup> See, e.g., Marc Poirier, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1425 (2009) ("[T]o deploy 'civil

accompanied—sometimes implicitly and often explicitly—by an analogy between the provision of civil unions for same-sex couples and the provision of separate accommodations for Blacks.<sup>15</sup>

Of course, the provision of “separate but equal” accommodations for those of different races is unconstitutional.<sup>16</sup> Moreover, “the notion that separate can never be equal is now a universally accepted principle of our jurisprudence”<sup>17</sup> has further fueled arguments against the provision of civil unions. But civil union equality—under which states recognize civil unions between same-sex and different-sex couples—may undermine this analogy. And the 148 different-sex couples who entered into civil unions in Illinois as of December 29, 2011 suggest that a civil union may be more than a second-best alternative to marriage that would be unconstitutionally “separate but equal.”<sup>18</sup> Put another way, civil unions may not be “separate but equal” because Whites in the Jim Crow South did not elect to use facilities designated for Blacks.<sup>19</sup>

Like other literature that seeks to “imagine a space beyond marriage,”<sup>20</sup> this Essay’s goal is to preserve those aspects of the LGBT rights movement that have been obscured by recent victories in the fight for marriage

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union’ and ‘marriage’ properly requires everyone involved in interactions where these names are to be used to identify the couple as same- or different-sex. The mere fact of imposing a nomenclature distinction is problematic.”)

<sup>15</sup> See William N. Eskridge, Jr., *Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 853 (2001) (“Some of the criticism [of *Baker v. State*], however, came from liberals who assailed these moves as falling short of full equality for lesbian, gay, and bisexual people—in essence creating a ‘separate but equal’ regime for gays.”).

<sup>16</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896) (upholding the constitutionality of a Louisiana statute requiring “all railway companies carrying passengers in their coaches in that State, [to] provide equal but separate, accommodations for the white[] and colored races”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy*’s “separate but equal” doctrine in the field of public education).

<sup>17</sup> Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381, 1384 (2009).

<sup>18</sup> See John Culhane, *No to Nuptials: Will Opposite-Sex Civil Unions Spell the End of Traditional Marriage*, SLATE (Jan. 3, 2012, 1:41 PM), [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\\_.htm](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_.htm).

<sup>19</sup> See discussion *infra* Part I.C. Though further elaboration on this point appears later in this Essay, it bears immediate notation that in rare instances whites did use facilities designated for Blacks. See, e.g., Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, in TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211 (Harvey Molotch and Laura Noren, eds., 2010) (describing the experience of John Howard Griffin, a white journalist who darkened his skin so as to report his experiences living as a Black man in the South in the late 1950s, who sought “sanctuary in a colored restroom” (quoting JOHN HOWARD GRIFFIN, *BLACK LIKE ME* 130 (1996)).

<sup>20</sup> Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 237 (2011); see also NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009); Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation*, *OUT/LOOK*, Fall 1989, at 9, 14-17, reprinted in WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 683 (3d ed. 2008); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537 (2007).

equality.<sup>21</sup> By first describing civil unions in Part I, this Essay draws on insights from the same-sex marriage debate elaborated in Part II in order to argue ultimately in Part III that the civil union—though conceived as a temporary solution to the problem of unequal marriage rights—should remain as a permanent alternative to marriage that is available to all couples regardless of their members’ sexes.

## I. THE EVOLUTION OF CIVIL UNIONS

Civil unions have been defined by their similarity to, or difference from, same-sex marriage.<sup>22</sup> As this Part demonstrates, since their introduction civil unions have met ambivalent reactions from gay rights advocates. Civil unions have been perceived as a compromise, regardless of the equivalency between the benefits they provide and those provided by marriage.<sup>23</sup> Because civil unions have been characterized as “separate but equal” alternatives to marriage, civil unions have largely been celebrated only insofar as they have been deemed to be a necessary step toward the legalization of same-sex marriage. The aim of this Essay is not to argue that civil unions have not been a necessary step in the fight for marriage equality. But the possibility exists—particularly in light of the recent movement toward civil union equality—to redefine civil unions without reference to same-sex marriage. This part lays the foundation for such a redefinition.

### A. *Baker v. State and the Birth of the Civil Union*

After being denied marriage licenses by their respective town clerks in Vermont, three couples filed a lawsuit against the state of Vermont in 1997.<sup>24</sup> After losing at the trial court level, the couples fared much better on appeal. Though they did not win the right to marry, they convinced the Vermont Supreme Court that “the State [wa]s constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”<sup>25</sup>

The *Baker* court based its holding on the Common Benefits Clause in Article 7 of the Vermont Constitution, which is Vermont’s counterpart to the Equal Protection Clause of the Fourteenth Amendment.<sup>26</sup> On the basis

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<sup>21</sup> See *supra* notes 1-6 and accompanying text.

<sup>22</sup> See, e.g., Developments in the Law, *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2005 (2003) (mentioning the enactment of Vermont’s civil union as a piece of evidence of a “growing national . . . acceptance of same-sex marriages and families”).

<sup>23</sup> See Andrew Koppelman, *The Decline and Fall of the Case against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 14 (2004) (arguing that, with respect to the “‘civil unions’ compromise,” “[m]ore is at issue . . . than legal benefits”).

<sup>24</sup> *Baker*, 744 A.2d at 889.

<sup>25</sup> *Id.* at 867.

<sup>26</sup> See *id.* at 870. The Common Benefits Clause provides, in pertinent part: “That

of the *Baker* court's statement that its constitution's Article 7 required a "more stringent" reasonableness inquiry than was generally associated with rational basis review under the federal constitution,"<sup>27</sup> requiring Vermont courts to engage in "case-specific analysis to ensure that any exclusion from the general benefit and protection of the law would bear a just and reasonable relation to the legislative goals,"<sup>28</sup> it concluded that refusing to provide same-sex couples with the benefits of marriage violated Vermont's constitutional guarantees even though it did not violate the federal constitution.<sup>29</sup>

The "legislative goal" that the *Baker* court found to have motivated the state's licensing civil marriage "was . . . to legitimize children and provide for their security."<sup>30</sup> The *Baker* court reasoned that because same-sex couples were "no different from opposite-sex couples with respect to these objectives," and moreover, because "the exclusion of same-sex couples from the legal protections incident to marriage expose[d] their children to the precise risks that the State argue[d] the marriage laws [we]re designed to secure against," the exclusion of same-sex couples from Vermont's marriage laws was not rationally related to the legislative goal behind these laws.

But the *Baker* court left up to the Vermont legislature the determination of whether such common benefits and protections would be provided to same-sex couples in Vermont through "inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."<sup>31</sup> In response to the court's holding in *Baker*, the Vermont legislature enacted the first civil union statute in the U.S. in 2000.<sup>32</sup> This statute was limited in scope to same-sex couples<sup>33</sup> and permitted same-sex couples to "have all the same benefits, protections and responsibilities under law, whether they derive[d] from statute, administrative or court rule, policy, common law or any other source of civil law, as [we]re granted to spouses in a marriage."<sup>34</sup>

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government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . ." VT. CONST. ch. 1, art. 7 (quoted in *Baker*, 744 A.2d at 867).

<sup>27</sup> *Baker*, 744 A.2d at 871.

<sup>28</sup> *Id.* at 872 (citing *State v. Ludlow Supermarkets, Inc.*, 448 A.2d 791, 795 (Vt. 1982)).

<sup>29</sup> *See id.* at 870 n.3 (comparing levels of scrutiny courts employ when determining laws' constitutionality under Vermont's Common Benefits Clause and the federal constitution's Equal Protection Clause).

<sup>30</sup> *Id.* at 882.

<sup>31</sup> *Id.*

<sup>32</sup> *See* Associated Press, *Dean Signs Nation's First Civil-Union Law*, TIMES UNION (Albany) at A4 (May 27, 2000) ("Gov. Howard Dean signed a first-in-the-nation law Wednesday granting gay couples nearly all of the benefits of marriage.").

<sup>33</sup> *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 211 (2002) (discussing Vermont civil unions); Erin Cleary, Note, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 523 (2008) (same); Strasser, *supra* note 11, at 937 (same).

<sup>34</sup> 1999 VT. H.B. 847 § 3 (1999).

*B. The “Separate but Equal” Alternative to Marriage*

Vermont’s civil union law divided Vermonters who favored relationship recognition rights for gays and lesbians from Vermonters who did not.<sup>35</sup> Moreover, the law’s impact was felt not only in Vermont but across the nation.<sup>36</sup> But even those who applauded Vermont’s legislation as “the boldest step in an expanding movement to extend legal benefits to gay and lesbian couples” characterized the legislation as just that—a step.<sup>37</sup> And though gay rights advocates on the whole celebrated Vermont’s step,<sup>38</sup> they also referred to civil unions as “separate but equal” alternatives to marriage.<sup>39</sup>

This reserved optimism can be explained by the incrementalist theory, advanced by scholars such as Kees Waaldijk,<sup>40</sup> Bill Eskridge,<sup>41</sup> and Yuval Merin.<sup>42</sup> Incrementalists have argued that equal marriage rights for same-sex couples follow a series of smaller changes, each of which will cause the eventual “acceptance of same-sex marriage [to] be perceived as a *small* step once all the preceding steps have been achieved.”<sup>43</sup> Though the theory has been challenged,<sup>44</sup> the incrementalist theory remains the “most accepted and widely cited theory of the path to the legalization of same-sex

<sup>35</sup> See Debra Rosenberg, *State of the “Union”: A Law Allowing Gays to All but Marry Has Divided the Pastoral State of Vermont. “It’s Like North and South,” Says One Woman*, NEWSWEEK 56 (Oct. 23, 2000).

<sup>36</sup> See MICHAEL MELLO, LEGALIZING GAY MARRIAGE 16-18 (2004) (describing the “widespread national attention” that Vermont received for enacting its civil union statute).

<sup>37</sup> Elizabeth Mehren, *Vermont Senate Approves Civil Unions Bill, Sends it to House*, L.A. TIMES, VALLEY NEWS (Apr. 20, 2000).

<sup>38</sup> See Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI-KENT L. REV. 379, 396 (2009) (“The creation of civil unions . . . was greeted with great joy by LGBT citizens around the country.”) (citing WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 43-82 (2002); Greg Johnson, *Civil Union: A Reappraisal*, 30 VT. L. REV. 891, 892 (2006)).

<sup>39</sup> See *id.* (describing the “‘separate but equal’ [claim] lodged by gay-rights advocates against marriage substitutes).

<sup>40</sup> See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 437 (Robert Wintemute & Mads Andenaes, eds., 2001).

<sup>41</sup> See ESKRIDGE, *supra* note 38; see also William N. Eskridge, Jr., *Essay, Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 647 (2000).

<sup>42</sup> See MERIN, *supra* note 33.

<sup>43</sup> Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105, 108 (2010) (arguing that the incrementalist theory inaccurately describes the path toward legalizing same-sex marriage).

<sup>44</sup> See *id.*; see also M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE J.L. & FEMINISM 71 (2005) (arguing that the theory of incrementalism must be supplemented with an approach that factors in “conditions for change” that might differ from one continent to another and would therefore undermine the predictive ability of the incrementalist theory).

marriage.”<sup>45</sup> As a result, the incrementalist theory might explain the ambivalent response to civil unions among LGBT rights advocates.<sup>46</sup>

However it may be explained, this ambivalence may be warranted. In a way, civil unions have been separate but equal. Though many commentators have resisted the analogy between civil union laws and segregated schools and public services in the Jim Crow South, it is important to remember that “in a real sense, civil union statutes, like racial segregation laws, are discriminatory in that they are enacted for the purpose of excluding a disfavored group from a legally privileged status available to others.”<sup>47</sup> One legislature even provided in its civil union bill that the purpose of creating civil union status was to “preserv[e] the traditional, historic nature and meaning of the institution of civil marriage.”<sup>48</sup>

And though the Vermont Supreme Court’s decision in *Baker* has been characterized as “monumental,” “truly historic,”<sup>49</sup> and “a milestone in the movement to secure equal rights for lesbians, gays, and bisexuals,”<sup>50</sup> the effect of its holding—namely the establishment of the Vermont civil union—is no longer valid in Vermont. When Vermont legalized same-sex marriage in 2009, it stopped allowing couples to establish civil unions.<sup>51</sup> In fact, Connecticut and New Hampshire, the other two states that had enacted civil union statutes and subsequently legalized same-sex marriages, have also eliminated the option of entering into civil unions.<sup>52</sup>

The elimination of the option to enter into a civil union in these states likely did not cause controversy because it occurred simultaneously with these states’ legalization of same-sex marriage.<sup>53</sup> Moreover, same-sex

<sup>45</sup> Aloni, *supra* note 43, at 107.

<sup>46</sup> See *supra* notes 23 and 39 and accompanying text; see also Aloni, *supra* note 43, at 108 (arguing that the incrementalist theory provides “a theoretical justification . . . for incremental progress”).

<sup>47</sup> See, e.g., Scott, *supra* note 20, at 543 (describing the debate about whether to embrace or resist the analogy).

<sup>48</sup> Mass. Senate Bill No. 1275 (2003). This proposed statute was rejected as unconstitutional by the Massachusetts Supreme Court. See Scott, *supra* note 20, at 543 n.32 (citing Opinion of the Justices to the Senate, 802 N.E. 565 (Mass. 2004)).

<sup>49</sup> Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 248 (2001) (commentary by co-counsel to plaintiffs in *Baker v. State*).

<sup>50</sup> Strasser, *supra* note 11, at 935.

<sup>51</sup> See State of Vermont, Legislative Counsel, *Frequently Asked Questions About S.115, An Act Relating to Civil Marriage, As Passed by the House and Senate* 1 <http://www.leg.state.vt.us/misc/s115faq.pdf> (answering in the negative the question of whether couples would be permitted to establish civil unions).

<sup>52</sup> See David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 130-31 (2010) (concluding, in light of experiences in Vermont, Connecticut, and New Hampshire that civil unions seem to be “merely placeholders for [marriage] in a time of social transition”); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 60 (“In many cases, the introduction of marriage equality has prompted the demise of alternative statuses and the possibility of a ‘menu’ of diverse options for relationship recognition.”).

<sup>53</sup> See *id.*: see also Jonathan Rauch, *For Better or Worse?*, in SAME-SEX MARRIAGE: PRO AND CON 172 (Andrew Sullivan ed., 1997) (explaining that “marriage is society’s fundamental institution”).

couples are equally disadvantaged as compared to different-sex couples whether they choose to enter into a marriage or a civil union. Until DOMA's repeal, same-sex couples that choose either relationship recognition regime are not considered married for purposes of federal law.<sup>54</sup> This lack of federal recognition has been linked to more than a thousand federal laws that apply differently on the basis of marital status.<sup>55</sup> Some of these laws have received particular attention because they quantifiably disadvantage same-sex couples, such as those relating to income tax,<sup>56</sup> social security spousal or survivor benefits, and the payment of taxes on a spouse's health insurance benefits.<sup>57</sup> But the absence of federal recognition for same-sex couples is applied equally against all same-sex couples, whether married, in civil unions or neither.

Though the federal failure to recognize same-sex relationships may not advantage marriages over civil unions, the interstate recognition of same-sex relationships might.<sup>58</sup> Joanna Grossman highlighted a body of case law testing the validity of Vermont civil unions that returned mixed results.<sup>59</sup> For example, in *Rosengarten v. Downes* a Connecticut trial court dismissed for lack of subject matter jurisdiction plaintiff's petition to dissolve a civil union entered into in Vermont, which the plaintiff brought in Connecticut because of Vermont's prerequisite six-month period of residency for filing for a petition for divorce in Vermont.<sup>60</sup> The appellate court upheld the

<sup>54</sup> See Mark Strasser, *What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT'L L.J. 249 (2010) (explaining that DOMA has a clear impact on the recognition of couples for federal purposes, even though its impact on the recognition of couples from state to state is less clear).

<sup>55</sup> See Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, 17 VA. J. SOC. POL'Y & L. 83, 106 n.70 (2009) (indicating that 1,138 federal laws had been identified in which marital status had an impact on the receipt of benefits, rights, or privileges) (citing Letter from Dayna K. Shah, Associate General Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>).

<sup>56</sup> See, e.g., ANTHONY C. INFANTI AND BRIDGET J. CRAWFORD, EDS., *Sexual Orientation and Taxation*, in *CRITICAL TAX THEORY: AN INTRODUCTION* (2009); Samuel Brunson, *Taxing Polygamy: Married Filing Jointly (and Severally?)*, (draft) (explaining that the lack of federal recognition for same-sex couples can generate "real costs"), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1941860](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941860); Patricia A. Cain, *Taxing Families Fairly*, 48 Santa Clara L. Rev. 805, 805-06 (2008) (explaining that as a result of the lack of federal recognition for same-sex couples that are legally recognized in some states, these couples file joint returns at the state level but can only file as single taxpayers at the federal level).

<sup>57</sup> See Tara Siegel Bernard, *How Gay Marriage Will Change Couples' Financial Lives*, N.Y. TIMES (Jun. 27, 2011), <http://bucks.blogs.nytimes.com/2011/06/24/how-gay-marriage-will-change-couples-financial-lives/> (explaining that such same-sex couples are not eligible for social security spousal or survivor benefits and that they do owe income taxes on their spouse's health insurance benefits whereas different-sex couples do not).

<sup>58</sup> But see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2147-48 (2005) (doubting whether applying a label other than marriage to a same-sex relationship diminishes its right to extraterritorial recognition).

<sup>59</sup> See Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 484-86 (2005).

<sup>60</sup> *Rosengarten v. Downes*, 802 A.2d 170, 177 (Conn. App. Ct. 2002).

dismissal because “the governing statute provide[d] for jurisdiction over matters involving ‘dissolution of marriage’ and a ‘civil union,’ even under Vermont law, [wa]s not a ‘marriage.’”<sup>61</sup> But *Rosengarten* can be contrasted with other more favorable cases in which Vermont civil unions have been recognized for the purpose of dissolving them.<sup>62</sup> In addition, a Georgia appellate court had ruled that a woman living with another woman with whom she had entered into a civil union in Vermont had not complied with an order specifying that visitation with her children was not permitted while the woman was cohabiting with an adult to whom she was not legally married, effectively refusing to recognize the validity of the civil union.<sup>63</sup> Grossman noted that the Georgia court relied not only on the fact that a Vermont civil union was not a “marriage” but also on the Georgia “mini-DOMA” statute which explicitly refused to recognize an out-of-state same-sex marriage.<sup>64</sup>

These mixed results do not offer a clear winner as between marriage and its “separate but equal” counterpart. The difference between the two alternatives has been characterized as “more than semantic” because the distinction “relegate[s] same-sex couples to ‘second-class status’” by denying them the right to marry.<sup>65</sup> But the fact that the right to marry should not be denied to same-sex couples does not itself indicate that same-sex couples would or should choose marriage over an alternative regime, assuming they could. After all, the history of marriage—and even the recent history of marriage—is “one of subordinating wives both practically and symbolically.”<sup>66</sup> For this reason it is imaginable that an individual might choose to enter into a civil union over a marriage, if given the choice. Either option, it seems, “has an unattractive history.”<sup>67</sup>

### C. Civil Union Equality

Of course, it was not until very recently that the choice between civil unions and marriages existed in the U.S. for two reasons. First, as states in the U.S. have legalized same-sex marriages, these states have stopped allowing same-sex couples to enter into civil unions if the states had previously recognized same-sex civil unions (or domestic partnerships, for

<sup>61</sup>Grossman, *supra* note 59, at 484 (citing *Rosengarten*, 802 A.2d at 177).

<sup>62</sup>See *id.* at 485 (discussing cases from Massachusetts, Iowa, and Texas).

<sup>63</sup>See *id.* (citing *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002)).

<sup>64</sup>See *id.* at 485-86 (citing Ga. Code Ann. 19-3-3.1 (2004)).

<sup>65</sup>Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEX. 11, 21 (quoting Goodridge, 798 N.E.2d at 570).

<sup>66</sup>Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1223 (2010). Case argued that an “asymmetry of roles, duties, and privileges [between men and women]. . . remained very much a part of the legal landscape [of marriage]” through the 1970s. See *id.* at 1210-11. Though this asymmetry improved since the nineteenth century, it improved from something to which Case analogized slavery to something to which she analogized the law requiring animals to wear identifying collars and tags. See *id.*

<sup>67</sup>Koppelman, *supra* note 23, at 15 (when commenting on the characterization of civil unions as separate but equal, arguing that “[s]eparate but equal has an unattractive history”).

that matter).<sup>68</sup> Second, though different-sex civil unions have existed as available alternatives to marriage in other countries such as France, the Netherlands,<sup>69</sup> New Zealand,<sup>70</sup> the United Kingdom,<sup>71</sup> and South Africa,<sup>72</sup> no state in the U.S. until 2011 had recognized civil unions between different-sex couples,<sup>73</sup> with the exception of New Jersey's civil union statute's availability to heterosexual couples in which at least one partner is over the age of sixty-two.<sup>74</sup>

The Illinois Religious Freedom Protection and Civil Union Act, which Governor Pat Quinn signed into law on January 31, 2011, permits same-sex and different-sex couples to enter into civil unions, which afford those couples “the obligations, responsibilities, protections, and benefits afforded or recognized by the state of Illinois to spouses.”<sup>75</sup> Similarly, Hawaii's civil union law, known as Act 1, was signed into law by Governor Neil Abercrombie on February 23, 2011 and began recognizing same-sex and different-sex couples who enter into civil unions on January 1, 2012.<sup>76</sup>

It is at this point too early to tell whether the provision of civil unions to different-sex couples will “spell the end of traditional marriage.”<sup>77</sup> But it is similarly unclear whether the 148 different-sex couples out of the total 1,993 couples that as of December 29, 2011 had obtained civil union licenses from the state of Illinois may “portend something big” about people's likely responses to having a choice between entering into a marriage or a civil union.<sup>78</sup> Most of them cited “personal or religious

<sup>68</sup> See *supra* note 52 and accompanying text.

<sup>69</sup> See Franke, *supra* note 9 (explaining that “France, the Dutch, and many other non-U.S. jurisdictions have” offered different-sex couples the option of entering into civil unions).

<sup>70</sup> See Kenneth McK. Norrie, *National Report: New Zealand*, 19 AM. U. J. GENDER SOC. POL'Y & L. 265, 268 (2011).

<sup>71</sup> See Kenneth McK. Norrie, *National Report: United Kingdom*, 19 AM. U. J. GENDER SOC. POL'Y & L. 329, 335 (2011).

<sup>72</sup> See Macarena Saez, *Why “Same” is So Different*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1, 7-8 (2011).

<sup>73</sup> See *supra* note 9 and accompanying text.

<sup>74</sup> See Case, *supra* note 66, at 1224-25 (explaining that senior citizens who choose to enter into civil unions or domestic partnerships—which in California were also available to such couples—instead of marriages “tend to do so to preserve the benefits they have already accrued from a prior traditional marriage”). For this reason, senior citizens were counseled to advocate for the passage of a gender-neutral civil union statute in Illinois before such a statute eventually passed. See John R. Schleppenbach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act*, 17 ELDER L.J. 31 (2009).

<sup>75</sup> Illinois Religious Freedom Protection and Civil Union Act, Pub. Act 096-1513 (2011), <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=096-1513&GA=96&SessionId=76&DocTypeId=SB&DocNum=1716&GAID=10&Session=>; see also National Conferences of State Legislatures, Civil Unions & Domestic Partnership Statutes, Jul. 2011, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx#IL>.

<sup>76</sup> S.B. 232, 2011 (Hawaii 2011), [http://www.capitol.hawaii.gov/session2011/bills/SB232\\_HD1\\_.pdf](http://www.capitol.hawaii.gov/session2011/bills/SB232_HD1_.pdf); see also National Conferences of State Legislatures, Civil Unions & Domestic Partnership Statutes, Jul. 2011, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx#IL>.

<sup>77</sup> See Culhane, *supra* note 18.

<sup>78</sup> See *id.*

convictions against marriage” as the reason for choosing to enter into civil unions as opposed to marriages.<sup>79</sup> Some of them cited the desire to avoid the labels of “husband,” “wife,” or “marriage.”<sup>80</sup> And apparently only between two and four of the couples chose to enter into civil unions as a way to avoid the loss of benefits that would apply only to senior citizens.<sup>81</sup>

Of course, it is possible to speculate that attitudes about marriage in the U.S. will one day become like those that have for some time prevailed in France.<sup>82</sup> Or that a lawsuit like the one filed on February 2, 2011 by the United Kingdom’s Equal Love Campaign—a popular campaign<sup>83</sup> which challenges bans against same-sex marriage as well as different-sex civil partnerships<sup>84</sup>—would ever be filed in the U.S.<sup>85</sup> Sixteen plaintiffs are parties to the suit, comprising eight couples: four same-sex couples and four different-sex couples.<sup>86</sup> The four same-sex couples were refused marriage licenses at register offices in Greenwich, Northampton, and Petersfield.<sup>87</sup> The four different-sex couples were refused civil partnerships at register offices in Islington, Camden, Bristol, and Aldershot.<sup>88</sup> The letters of refusal that all eight couples received from their respective register offices served as “the evidential basis to challenge in the European Court of Human Rights the UK’s exclusion of gay couples from civil marriage and its prohibition of straight civil partnerships.”<sup>89</sup> Because access to each of these institutions is not open to all couples, the lawsuit alleges that both institutions discriminate.<sup>90</sup>

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<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*; *see also supra* note 74 and accompanying text.

<sup>82</sup> *See* Molly Moore, *More Longtime Couples in France Prefer L’Amour Without Marriage*, WASH. POST (Nov. 21, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/20/AR2006112001272.html> (reporting on the growing distaste for marriage in France).

<sup>83</sup> *See* FOR A SECULAR EUROPE, Dec. 19, 2011, <http://secular-europe-campaign.org/2011/12/eu-labour-meps-praised-for-supporting-equal-love/> (reporting that all thirteen labour members of the European parliament have expressed their support for the Equal Love Campaign). The campaign’s petition currently has 2,634 signatories, supposedly all living in the U.K., and its Facebook page is “liked” by 2,825 Facebook users (at least one of whom lives outside of the U.K.). *See* EQUAL LOVE, <http://equallove.org.uk/petition/> (last visited February 20, 2012); FACEBOOK, EQUAL LOVE, <http://www.facebook.com/pages/Equal-Love/163531170333628?sk=wall> (last visited February 20, 2012).

<sup>84</sup> EQUAL LOVE, <http://equallove.org.uk/about/> (last visited February 20, 2012).

<sup>85</sup> *See* David Walters, *Equal Love Case Filed to European Court*, POLAR! MAGAZINE (Feb. 7, 2011), <http://www.polarimagazine.com/news/equal-love-case-filed-european-court> (“The UK Equal Love Campaign, coordinated by human rights activist Peter Tatchell, has progressed significantly in the last few days with the historic filing of a legal application to the European Court of Human Rights.”).

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *Id.* (quoting Peter Tatchell).

<sup>90</sup> *See id.* (“There is strength in the fact that the Equal Love case highlights the two separate but equal institutions of civil marriage and civil partnership as discriminatory, divisive and exclusionary in that access to each institution is dependent upon the sexuality of the couple.”).

## II. THE OTHER SAME-SEX MARRIAGE DEBATES

The debate about legally recognizing same-sex marriage is not alone. Though the other same-sex marriage debate predates the current debate about same-sex marriage, the other *other* same-sex marriage debate is arguably a debate that has more recently emerged. This Part elaborates both of these other same-sex marriage debates, the first of which is a debate about the appropriate normative priority of marriage and the second of which is a debate about the exclusivity of same-sex couples. Taken together, these other same-sex marriage debates suggest that the same-sex marriage debate is arguably about neither marriage nor same-sex couples. Ultimately insights from both of these other debates are relevant to the LGBT rights movement, a movement that undoubtedly urges civil union equality.

A. *The Other Same-Sex Marriage Debate*

The debate about whether to legally recognize same-sex marriage in the U.S. is said to have begun in earnest in 1993.<sup>91</sup> It was then that the Hawaii Supreme Court held in *Baehr v. Lewin* that denying marriage licenses to same-sex couples was unconstitutional unless the state could show a compelling reason to do so.<sup>92</sup> Though same-sex marriage did not last for long in Hawaii, the *Baehr* decision has been credited with sparking the modern debate about legalizing same-sex marriage.<sup>93</sup> Since *Baehr* and its attendant aftermath,<sup>94</sup> “the quest for the right to marry . . . bec[a]me the LGBT movement’s signature issue.”<sup>95</sup>

But agreement was not always universal about the movement’s shared goal to legalize same-sex marriage. Before the LGBT rights movement directed its “obsessive focus” on the issue of same-sex marriage, there was another, fundamentally different debate about same-sex marriage.<sup>96</sup> That debate is exemplified by the 1989 debate between recently deceased Paula Ettelbrick,<sup>97</sup> then legal director of Lambda Legal Defense Fund, and Tom

<sup>91</sup> See Schacter, *supra* note 38, at 380 (“[T]he campaign for marriage began in earnest in 1993 . . .”).

<sup>92</sup> See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 53 (1997) (discussing *Baehr*).

<sup>93</sup> See Schacter, *supra* note 38, at 380-81 (linking the same-sex marriage movement to the Hawaii Supreme Court’s decision in *Baehr*).

<sup>94</sup> See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1069-80 (2d ed., 2004) (discussing the aftermath of *Baehr*).

<sup>95</sup> Schacter, *supra* note 38, at 380-81.

<sup>96</sup> See Shannon Gilreath, Rebuttal, *Arguing Against Arguing For Marriage*, 159 U. PA. L. REV. PENNUMBRA 28, 29 (2010), <http://pennumbra.com/debates/debate.php?did=37> (criticizing “the Gay rights movement’s current obsessive focus on marriage”).

<sup>97</sup> See David W. Dunlap, *Paula Ettelbrick, Legal Expert in Gay Rights Movement, Dies at 56*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/nyregion/paula-l-ettelbrick-legal-expert-in-gay-rights-movement-dies-at-56.html> (“Ms. Ettelbrick was a prominent voice in asserting that the many kinds of families created by homosexuals deserved acceptance and protection. But her views, paradoxically, put her at odds with other lesbian and gay leaders over

Stoddard, then Lambda's executive director, in *Out/Look* Magazine about whether to pursue access to marriage.<sup>98</sup> This debate emerged from the early stages of the gay rights movement in the 1960s and 1970s.<sup>99</sup>

The other same-sex marriage debate involved an "internal resistance to marriage advocacy" which "came from those strongly committed to gay equality."<sup>100</sup> It "took place within the LGBT community" between advocates for marriage and advocates who argued that advocacy for marriage equality should be accompanied by advocacy for a menu of alternative forms of relationship recognition, including but not limited to civil unions.<sup>101</sup> This debate was about "whether same-sex marriage was a worthy normative priority for the LGBT movement."<sup>102</sup> This debate—the "Primacy of Marriage" debate—had "largely receded" when Schacter called attention to it in 2009, after five states had legalized same-sex marriage in a span of six years.<sup>103</sup>

Since then the Primacy of Marriage debate seems to have experienced a comeback. The internal resistance to marriage equality is arguably no longer as quiet as it once was.<sup>104</sup> For example, Shannon Gilreath argued in 2010 that marriage is "a furtherance of an alarming movement toward assimilationist erasure of Gay identity and community."<sup>105</sup> The assimilationist erasure to which Gilreath referred derives from the "homo kinship" model or "like straight" logic that scholars such as Katherine Franke, Nancy Levit, and Marc Spindelman have observed, where gay rights advocates highlight the similarities between homosexuals and heterosexuals as a strategic way to argue for gay rights.<sup>106</sup> As I have

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same-sex marriage and how much political capital should be spent in its pursuit.").

<sup>98</sup> See Schacter, *supra* note 38, at 387 (citing *Gay Marriage: A Must or a Bust?*, *OUT/LOOK*, Fall 1989, at 9, 9-17, reprinted in RUBENSTEIN ET AL., *supra* note 20, at 678-88).

<sup>99</sup> See Gilreath, *supra* note 96, at 30 (grounding his critique of marriage in "Gay liberationism—much influenced by the liberationist understandings that emerged in the 1960s and 1970s, which were linked to women's liberation and to the early Gay movement's acknowledgement of the importance of destroying gender conventions and disestablishing the family").

<sup>100</sup> Schacter, *supra* note 38, at 383.

<sup>101</sup> *Id.* at 392 ("[A]dvocacy for marriage equality should be paired with a more inclusive policy that acknowledges and addresses the needs of a range of differently-configured family forms") (citing POLIKOFF, *supra* note 20, at 132-33).

<sup>102</sup> *Id.* at 382.

<sup>103</sup> See *id.* at 382, 380, nn.7-11 (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, *N.Y. TIMES*, Apr. 8, 2009, at A1) (describing the legalization of same-sex marriage in Massachusetts, Connecticut, California, Iowa, and Vermont).

<sup>104</sup> See *id.* at 382-83 ("The fact that the public debate about same-sex marriage has been framed as the true test of LGBT equality undoubtedly has been a prime force in quieting any internal resistance to same-sex marriage.").

<sup>105</sup> Gilreath, *supra* note 96, at 30.

<sup>106</sup> Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 *COLUM. J. GENDER & L.* 21, 23 (2010) (relying on, inter alia, Nat'l Gay & Lesbian Task Force et al., *Make Change, Not Lawsuits*, [http://www.thetaskforceactionfund.org/take\\_action/guides/change\\_not\\_lawsuits.pdf](http://www.thetaskforceactionfund.org/take_action/guides/change_not_lawsuits.pdf) (last visited Nov. 27, 2011), which urged strategic lawsuits); see also Katherine M. Franke, Essay, *The*

argued elsewhere, while such a strategy may have practical merit, its use risks leaving behind those within the LGBT rights movement who do not look like straight people.<sup>107</sup> Similarly, Gilreath argued that an exclusive focus on marriage disenfranchises from the LGBT rights movement the “non-normative Gays—those who do not acquiesce in patriarchal notions of monogamous coupling and childrearing.”<sup>108</sup>

The Primacy of Marriage debate continued its resurgence in 2011, as well. Franke, who wrote earlier of the homo kinship model, expressed “some worry” in response to the New York Legislature’s decision to legalize same-sex marriage.<sup>109</sup> She explained that “[w]hile many in our community have worked hard to secure the right of same-sex couples to marry, others of us have been working equally hard to develop alternatives to marriage.”<sup>110</sup> And for these “others”—participants in the Primacy of Marriage debate—domestic partnerships and civil unions “aren’t a consolation prize made available to lesbian and gay couples because we are barred from legally marrying” but rather vehicles through which to “order our lives in ways that have given [gays and lesbians] greater freedom than can be found in the one-size-fits-all rules of marriage.”<sup>111</sup> Franke argued that by taking away these alternative vehicles and by taking away rights for those who have elected to recognize their relationships through these alternative vehicles, people are forced into marriage. That force was the cause of Franke’s worry.

The conventional debate about same-sex marriage has generated other worries, too. Gilreath worried about a potential increase in physical violence.<sup>112</sup> Judith Stacey worried that same-sex marriage would further widen the gap between classes and races because “[s]ame-sex marriage, like its heterosexual model, is disproportionately accessible to members of the white middle class.”<sup>113</sup> These worries, like Franke’s, are worries about

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*Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (expressing concern that “the rights-bearing subject of the lesbigay rights movement has now become ‘the couple’”); Marc Spindelman, *Homosexuality’s Horizon*, 54 EMORY L.J. 1361, 1368–75 (2005) (explaining the success of “like straight” arguments in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)).

<sup>107</sup> See Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. ### (2012), at ### (arguing that such a strategy has resulted in the exclusion from the LGBT rights movement of the interests of bisexuals and the inclusion within the movement of only those who are “straight, but for the fact that they’re gay”); Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66, 76–78 (2011), <http://www.columbialawreview.org/articles/sodomy-and-polygamy> (arguing that though such a strategy has been reasonably employed by the LGBT rights movement, it must be understood in light of the movement’s purposes).

<sup>108</sup> Gilreath, *supra* note 96, at 31.

<sup>109</sup> See *supra* note 5 and accompanying text; Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, Jun. 23, 2011, <http://www.nytimes.com/2011/06/24/opinion/24franke.html>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Gilreath, *supra* note 96, at 32–35 (“There is strong evidence that Gay relationships mirror the violence of their heterosexual counterparts. . . . The dominant structure of sexual inequality inherent in heterosexual relationships bleeds over into the Gay model, so that Gay relationships reaffirm those social conditions to the detriment of the people involved.”).

<sup>113</sup> Judith Stacey, Room for Debate, *Unequal Opportunity*, N.Y. TIMES, Jul. 3, 2011, <http://www.nytimes.com/roomfordebate/2011/07/03/marriage-the-next-chapter/marriage-in-the->

whether marriage is the thing around which debate should orbit.

*B. The Other Other Same-Sex Marriage Debate*

There is another set of worries left by the conventional same-sex marriage debate. And like the set of worries just described, this second set intensifies as same-sex marriage wins proliferate.<sup>114</sup> Whereas the Primacy of Marriage debate questions whether to fight for marriage, a second alternative same-sex marriage debate questions whether to fight exclusively for the rights of same-sex couples.<sup>115</sup>

Two points of clarification are in order about this additional debate, hereinafter the Exclusivity of Civil Unions debate. First, this second alternative debate is predicated upon the first; the Exclusivity of Civil Unions debate questions whether to fight for rights other than marriage for couples other than same-sex couples. Second, though the Exclusivity of Civil Unions debate has not been so characterized until now, it is a debate that has been brewing for quite some time. In 2002, Mary Anne Case argued that:

[a]lthough Vermont is to be commended for extending as many rights as it ha[d] to same-sex couples, by withholding from them the opportunity to marry, it devalues their unions both practically and symbolically. And, by restricting marriage to male-female couples and male-female couples to marriage, it forces women who wish to unite with men under state law to do so in an institution whose all too recent legal history is of subordinating wives both practically and symbolically, an institution Vermont . . . reserv[ed] for them alone because of and not in spite of its “traditional” (that is, patriarchal) significance.<sup>116</sup>

Since she wrote, Vermont has stopped reserving marriage for heterosexual couples comprised of wives who could be subordinated by their husbands.<sup>117</sup> But while Vermont may have stopped “restricting marriage to male-female couples,” it has not stopped “restricting male-female couples to marriage.”<sup>118</sup> To be sure, Case’s argument was one about the equality

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us-unequal-opportunity.

<sup>114</sup> See *supra* note 6 and accompanying text.

<sup>115</sup> At this point, even the other other same-sex marriage debate has not ventured beyond the monogamy norm. On the connections between same-sex marriage and polygamy, see Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010). On their disconnections, see Glazer, *Sodomy and Polygamy*, *supra* note 107.

<sup>116</sup> Mary Anne Case, *Reflections on Constitutionalizing Women’s Equality*, 90 CALIF. L. REV. 765, 788 (2002).

<sup>117</sup> See Stewart & Craig, *supra* note 6.

<sup>118</sup> See text accompanying *supra* note 116.

of women, and her position was that such equality was compromised if marriage was restricted to male-female couples or if civil unions were restricted to same-sex couples. Because marriage's history was that of husbands subordinating wives, limiting it to male-female couples and limiting civil unions to same-sex couples was a way to ensure that this history remained a part of the institution of marriage and therefore was the reason that Case objected to both limitations. As of 2010, when Case revisited the issue in another article, no state had opened up civil unions to all couples, giving further force to her argument.<sup>119</sup>

It was not until 2011 when Illinois and Hawaii made gestures toward civil union equality and when activists in Europe began to demand it.<sup>120</sup> Franke praised these states for doing so. In particular, she expressed hope that the civil union regimes in these two states accomplish three goals:

- (i) offer new legal security for same-sex couples who want it, (ii) become an attractive way for different-sex couples to formalize their partnerships as an affirmatively chosen alternative to marriage, and (iii) provide a means by which we might start to undermine the social hierarchy that legitimizes married people and delegitimizes those who organize their lives on marriage's outside.<sup>121</sup>

For Franke, opening up civil unions to all couples regardless of their members' sexes was important because doing so might legitimize those who do not wish to recognize their relationship as a "marriage" because of the negative historical meaning of marriage or for whatever other reason.

### III. A PERMANENT POSITION FOR A TEMPORARY SOLUTION

Both the Primacy of Marriage debate and the Exclusivity of Civil Unions debate highlight important aspects of the fight for rights for LGBT people. Thus, the fight for civil union equality is just as important as the fight for marriage equality. Moreover, because civil unions are unencumbered by the tradition that attends and arguably burdens the institution of marriage, civil unions may offer couples the ability to "order [their] lives in ways that . . . give[ them] greater freedom than can be found in the one-size-fits-all rules of marriage."<sup>122</sup> For this reason civil unions should be available to couples regardless of the sexes of their members, and civil unions should continue to be available to all couples even after states have legalized marriage for all couples.

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<sup>119</sup> See Case, *supra* note 66, at 1223.

<sup>120</sup> See *supra* notes 9, 73-90 and accompanying text.

<sup>121</sup> Franke, *supra* note 9.

<sup>122</sup> Franke, *supra* note 109.

*A. The Importance of the Other Debates*

Taken together, the Primacy of Marriage debate and the Exclusivity of Civil Unions debate question whether the same-sex marriage debate is about either of its component parts, namely marriage or same-sex couples.<sup>123</sup> The desire for an anti-assimilationist LGBT rights movement has motivated the Primacy of Marriage debate, namely the debate about whether to fight for marriage.<sup>124</sup> The desire for equality has motivated the Exclusivity of Civil Unions debate, namely the debate about whether to limit the fight for relationship recognition rights to same-sex couples.<sup>125</sup> At first blush these might seem like contradictory goals. They are not.

The desire to be equal may seem as though it contradicts the desire not to assimilate. After all, being “just like everybody else” is arguably another way of being equal to everybody else. The two alternative same-sex marriage debates highlight that it is not only the liberty interest of not being forced to assimilate that is essential for the LGBT rights movement but also the equality interest of not being treated differently from couples whose members are of different sexes.

Moreover, liberty and equality arguments are often intertwined.<sup>126</sup> Though each of the other same-sex marriage debates can be characterized as a debate motivated by a liberty or equality concern, neither debate is exclusively about equality or exclusively about liberty. The preservation of alternatives to marriage, articulated in the Primacy of Marriage debate, seeks to ensure that individuals can exercise their liberty by choosing among options for relationship recognition. But this debate assumes that such a choice is only valuable if same-sex couples can make it. Thus, equal marriage rights must precede the choice that the Primacy of Marriage debate seeks to provide.

Similarly, the Exclusivity of Civil Unions debate, while largely about equality, is also about liberty. If civil unions are unavailable to different-sex couples, then only same-sex couples have the right to exercise the liberty of choosing among alternative relationship recognition vehicles. And if only same-sex couples are offered such a choice, the law treats similarly situated individuals differently and therefore unequally.<sup>127</sup>

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<sup>123</sup> At this point, one might imagine, for fun but also for explicative value, Mike Myers’s *Saturday Night Live* character Linda Richman beginning one of her “episodes” of “Coffee Talk with Linda Richman” by prompting the audience to “discuss” the fact that the same-sex marriage debate is about neither same-sex nor marriage. See <http://snltranscripts.jt.org/91/91ncoffeetalk.phtml>

<sup>124</sup> See *supra* notes 105-106 and accompanying text.

<sup>125</sup> See *supra* notes 116-117 and accompanying text.

<sup>126</sup> See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 n.14 (2011) (citing sources that argue that constitutional equality and liberty claims are often intertwined in connection with the author’s ultimate argument that courts have accepted more liberty-based claims in the wake of the nation’s “pluralism anxiety,” namely the anxiety that attends an increasing number of groups seeking protection for their denial of civil rights).

<sup>127</sup> Whether such unequal treatment is based upon sex or sexual orientation is unimportant for the purpose of this Essay but it should be noted that the determination of this issue is the

*B. The Difference in Civil Unions' Difference*

Civil unions have a power within the debate about legalizing same-sex marriage that is arguably greater than marriage itself. Conservatives such as David Blankenhorn have supported the recognition of civil unions for same-sex couples in order to preserve the sanctity of traditional marriage.<sup>128</sup> But this does not mean that civil unions are only second-best, or “separate but equal” alternatives to marriage.

Civil unions have essentially no history. Their roots can be traced only about a decade.<sup>129</sup> Moreover, civil unions that have been made available to U.S. couples regardless of the sexes of their members are only about a year old and are exceedingly rare.<sup>130</sup> Thus, in sharp contrast to marriage civil unions remain unencumbered by a history of exclusion and inequality.

Moreover, civil unions—though they offer couples all of the benefits of marriage in states that provide marriage—could potentially begin to differ from marriage in meaningful ways. Scholars such as Franke have argued that individuals should have the right to “order [their] lives in ways that . . . give[ them] greater freedom than can be found in the one-size-fits-all rules of marriage,”<sup>131</sup> but thus far it is unclear exactly what such greater freedom would look like.

It remains unclear how individuals who elect to recognize their relationships by a civil union might order their lives differently from those who elect to recognize their relationships by a marriage. Though there are certainly aspects of courts' treatment of civil unions that could use clarification, courts do treat civil unions like marriages in many cases.<sup>132</sup> But civil unions are not marriages. For this reason civil unions are immune from the argument often raised by opponents to same-sex marriage, namely that the tradition of marriage is inconsistent with its extension to same-sex couples.<sup>133</sup> And though the freedom that civil unions bring with them remains to be determined, perhaps civil unions may serve as the vehicle for a wide range of alternative relationship structures whose legal recognition

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subject of another debate. See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001). I recently engaged with this very debate. See Elizabeth M. Glazer, *Optimizing Orientation*, 100 Geo. L.J. ## (2012); Andrew Koppelman, *Sexual Disorientation*, 100 Geo. L.J. ## (2012).

<sup>128</sup> See Sharon Jayson, *Blankenhorn: A Family Guy with a Cause*, Mar. 14, 2007, <http://www.americanvalues.org/html/FUMA.htm>

<sup>129</sup> See discussion *supra* Part I.A.

<sup>130</sup> See *supra* notes 73-76 and accompanying text.

<sup>131</sup> Franke, *supra* note 109.

<sup>132</sup> See *supra* notes 59-64 and accompanying text.

<sup>133</sup> See, e.g., Kate Ericsson, Book Review, *From Disgust to Humanity: Sexual Orientation and Constitutional Law*, 26 BERKELEY J. GENDER L. & JUST. 179, 185 (2011) (“Often, those in opposition to same-sex marriage assert that their position defends traditional marriage . . .”).

seems unlikely: for example, “exploding marriages,”<sup>134</sup> “three strikes marriages,”<sup>135</sup> “line marriages,”<sup>136</sup> “renewable marriages,”<sup>137</sup> solitary marriages,<sup>138</sup> or a menu of “registered contractual relationships.”<sup>139</sup>

The legal recognition of these alternative relationship structures is now purely fictional. That may never change. However unlikely their legal recognition may be, alternative relationship structures seem to be the norm rather than the exception.<sup>140</sup> The divorce rate for first marriages in the U.S. is 45-50 percent.<sup>141</sup> The Current Population Survey of 2011 found that 7.6 million different-sex couples live in nonmarital arrangements.<sup>142</sup> Thus, the failure to recognize relationships other than marriages disadvantages most people in the U.S. Because of the tradition and history associated with marriage, marriages are not appropriate vehicles through which to legally recognize nontraditional relationships. Civil unions just might be.

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<sup>134</sup> See Emens, *supra* note 20, at 242 (describing a version of marriage that appeared in Goethe’s *Elective Affinities* in which marriages would only last for a period of five years, about which a character from the novel remarked would cause one or both parties to the marriage to “become increasingly attentive” as the five year “explosion” date approached) (quoting Johann Wolfgang von Goethe, *Elective Affinities*, in 11 GOETHE: THE COLLECTED WORKS 139 (David E. Wellbery ed., Judith Ryan trans., Princeton University Press 1995) (1809)).

<sup>135</sup> See *id.* at 243 (describing a second version of marriage from *Elective Affinities*, in which only marriages involving at least one party who had been married twice before would be legally permanent because such a history would demonstrate “that marriage was something this person could not do without”) (quoting Goethe, *supra* note 136, at 140).

<sup>136</sup> See *id.* at 245-46 (describing a version of marriage somewhat similar to polygamy except that it more particularly requires multiple spouses of both sexes, which derives from Robert Heinlein’s novels) (citing ROBERT A. HEINLEIN, *THE MOON IS A HARSH MISTRESS* (Orb ed. 1997) (1966) and ROBERT A. HEINLEIN, *STRANGER IN A STRANGE LAND* (Ace Books 1987) (1961)).

<sup>137</sup> See *id.* at 248-52 (describing a version of marriage inspired by Shakespeare’s *The Winter’s Tale* in which marriages could be terminated and then resumed, a model possibly useful to spouses who wish to spend years apart as a result of mistreatment by one of them but after such time apart experience remorse for the mistreatment and wish to reunite) (citing WILLIAM SHAKESPEARE, *THE WINTER’S TALE* (J.H.P. Pafford ed., Arden 2006)).

<sup>138</sup> See *id.* at 252-53 (describing the importance of solitude in marriage which in its strongest form might exist as marriage to oneself, a version of marriage referenced in the television series *Sex and the City* in response to the economic benefits and resulting transfer of wealth from single people to married people) (citing *Sex and the City: A Woman’s Right to Shoes* (HBO August 17, 2003)).

<sup>139</sup> See Erez Aloni, *Registering Relationships* (draft at 30) (proposing a model of “registered contractual relationships” that would legally recognize relationships falling “in the large space between marriage and informal cohabitation” which includes “diverse groups of couples with different levels of commitment and varied legal needs”).

<sup>140</sup> See *id.* at 6-7 (reporting that the U.S. has experienced an “extraordinary rise in the number of unmarried couples, which has been accompanied by a decline in the number of marriages).

<sup>141</sup> Linda A. Jacobsen & Mark Mather, *U.S. Economic and Social Trends Since 2000*, 65 POP. BULL., 10 (Feb. 2010).

<sup>142</sup> U.S. Census Bureau, *More Young Adults are Living in Their Parents’ Home*, *Census Bureau Reports*, Nov. 3, 2011, [http://www.census.gov/newsroom/releases/archives/families\\_households/cb11-183.html](http://www.census.gov/newsroom/releases/archives/families_households/cb11-183.html)

## CONCLUSION

For nearly twenty years the movement for LGBT rights has been largely defined by the fight for same-sex marriage. As same-sex marriage wins thankfully proliferate, it is important to remember that the fight for same-sex marriage is not the only fight for relationship recognition that matters to the LGBT rights movement. This Essay has described two alternative same-sex marriage debates, the Primacy of Marriage debate and the Exclusivity of Civil Unions debate, which together question whether the LGBT rights movement should limit its focus to marriage or to same-sex couples. Because of the movement's dedication to liberty as well as equality interests, this Essay has argued for civil union equality. First, civil unions should remain as alternatives to marriage in the U.S. even after states legally recognize same-sex marriages. Second, civil unions should be made available not only to same-sex couples but also to different-sex couples.

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