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Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts

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CIVIL UNION STATUTES: A SHORTCUT TO LEGAL EQUALITY FOR SAME-SEX PARTNERS IN A LANDSCAPE LITTERED WITH DEFENSE OF MARRIAGE ACTS

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[Same-sex marriage] makes me uncomfortable, same as anybody else.[1] ~ Governor Howard Dean

I. INTRODUCTION

Howard Dean reminds homosexual men and women where they live.[2] They live in a country where even an outspoken liberal[3] identifies with Americans who are uncomfortable with gay marriage.[4] Because Governor Dean signed into law the country's only civil union legislation, such a statement speaks volumes. It can be gleaned from such a statement that the climate in the United States is not conducive to same-sex marriage. Thus, a decision is in order. As the legal question of marriage rises to prominence, proponents of same-sex marriage need to consider the possibility that the title "marriage" is too hotly protected. Perhaps winning the rights that married couples get without winning the title is the best that can be done.

Dr. Dean was responding to a question that more and more politicians must encounter. The legal question of same-sex marriage has come to the forefront since the Supreme Court overturned *Bowers v. Hardwick*[5] in *Lawrence v. Texas*.[6] The newsweeklies and cable news talk shows have

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1. Afi-Odelia E. Scruggs, *Same-Sex Marriage Not the Real Issue*, CLEV. PLAIN DEALER, Jan. 10, 2000, at 1B.

2. The reader should note that our argument, while explicitly mentioning gays and lesbians, is meant for all same-sex couples including bisexuals in same-sex relationships.

3. Matt Bai, *Dr. No and the Yes Men*, N.Y. TIMES MAG., June 1, 2003, at 46. Howard Dean, Governor of Vermont, was one of the more outspoken Democratic Presidential candidates for the 2004 election. *Id.*

4. For an extensive study on public opinion regarding same-sex marriage and homosexuality, see generally Clyde Wilcox & Robin Wolpert, *Gay Rights in the Public Sphere: Public Opinion on Gay and Lesbian Equality*, *in* THE POLITICS OF GAY RIGHTS 409-432 (Craig A. Rimmerman et al. eds., 2000).

5. Bowers v. Hardwick, 478 U.S. 186 (1986). The majority found that the constitutional right of privacy does not protect consensual homosexual sexual relations when committed within the privacy of a person's home. *Id.* at 190. Consequently, sodomy statues criminalized homosexual sex, which served to legitimize discrimination of homosexual persons. *See* JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 316 (2001). The authors argue that as a result of the *Hardwick* opinion, which considered homosexual intimacy anti-family, the anti-gay marriage argument became reinforced. *Id.* at 316-17. For a more in depth discussion, see Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813 (2001).

6. Lawrence v. Texas, 123 S. Ct. 2472 (2003). Prior to the Supreme Court's ruling, the illegality of sodomy in many states was often cited as reason for prohibiting same-sex marriages (or unions). *See generally id.* Thus, the Supreme Court ruling removes at least one legal obstacle

given attention to this legal topic which is sure to gain prominence in the coming months.[7] People are wondering what the cover of *Newsweek* put so succinctly: "Is Gay Marriage next?"[8]

The answer is almost certainly, "NO!" The Defense of Marriage Act[9] (DOMA) passed at the federal level[10] and subsequent "baby DOMAs" in

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to same-sex marriage or unions. *See generally id.* Justice Scalia, writing for the dissent, lamented that:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution." Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

Id. at 2498 (Scalia, J., dissenting) (citation omitted).

7. The prominence of the same-sex marriage issue significantly increased after President George W. Bush's July 30, 2003 news conference in which he firmly opposed same-sex marriages. *See infra* text accompanying note 25.

8. *See* Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38, *available at* 2003 WL 8639382.

9. The Defense of Marriage Act, signed in 1996 by President Bill Clinton, has two provisions. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7). The first provision defines marriage, for federal purposes, as only between heterosexuals:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

See 28 U.S.C. § 7 (2004). The second provision states that:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect of any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2004).

10. "Baby DOMAs" were passed in various states to preempt the possibility that all states might have to recognize the same-sex marriage of another state. Both Hawaiian and Alaskan

various states[11] almost certainly deny the possibility of same-sex marriage[12] within those states in the foreseeable future.[13] Alaska and Hawaii serve as especially illustrative examples[14] of the potential backlash against same-sex marriage.[15] Both states had judicial decisions granting

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judicial decisions allowing for same-sex marriage brought this possibility to the fore and because of the Full Faith and Credit Clause, a federal law was needed. *See* Diane M. Guillerman, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 442 (1997).

11. *See generally* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002). As of June 2001, thirty-four states have enacted the so-called "junior DOMAs" barring the recognition of out of state same-sex marriage, fearful that a sister state might eventually recognize same-sex marriage. *Id.* at 135. Additionally, two states, Alaska and Hawaii, now have constitutional amendments allowing for marriage to be defined as the union of one man and one woman. *See* ALASKA CONST. art. I, § 25.; HAW. CONST. art. I, § 23; *see also* MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS (2002). The thirty-five states that passed laws denying same-sex marriage are as follows: Alabama (1998), Alaska (1998), Arizona (1996), Arkansas (1997), California (2000), Colorado (2000), Delaware (1996), Florida (1997), Georgia (1996), Hawaii (1998), Idaho (1996), Illinois (1996), Indiana (1997), Kansas (1996), Louisiana (1999), Maine (1997), Michigan (1996), Minnesota (1997), Mississippi (1997), Montana (1997), Nebraska (2000), New Jersey (2001), New York (2001), North Carolina (1996), North Dakota (1997), Oklahoma (1996), Pennsylvania (1996), South Carolina (1996), South Dakota (1997), Tennessee (1996), Utah (1995), Virginia (1997), Washington (1998), and West Virginia (2000). *Id.* at 76, tbl.4.1.

12. *See* E. Todd Wilkowski, *The Defense of Marriage Act: Will It be the Final Word in the Debate Over Legal Recognition of Same-Sex Unions?*, 8 REGENT U. L. REV. 195 (1997).

13. *See Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2013-14 (2003) [hereinafter *Differing Paths*].

> The impact of federalism on the same-sex marriage movement in the United States is apparent in the absence of reform at the federal level and in the occasional far-reaching reforms that have occurred in various states and localities. Congress's 1996 enactment of the DOMA seriously set back efforts to legalize same-sex marriage nationally.

Id. at 2013.

14. It could be argued that the Hawaii, Alaska, and Vermont cases were part of a paradigm shift rather than a usurpation of legislative power by the judiciary, or "legislating from the bench." *See* Jeffrey J. Swart, *The Wedding Luau – Who is Invited?: Hawaii, Same-Sex Marriage, and Emerging Realities*, 43 EMORY L.J. 1577 (1994).

15. *See* DUPUIS, *supra* note 11, at 71-93.

same-sex couples the right to marry.[16] Both states failed to implement the decisions of their courts.[17] The overwhelming public outcry[18] to insert a

16. *See* Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993). The Hawaii Supreme Court held that the Hawaiian marriage law discriminated on the basis of sex, thus requiring strict scrutiny of the statute. *Id.* at 67. The *Baehr* court ordered a trial to determine whether the state had a compelling interest in the laws that would justify sex-based discrimination. *Id.* at 68. The lower court found the marriage law unconstitutional because the state failed to prove that the state had a compelling interest in sex-based discrimination in issuing marriage licenses. *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). The state appealed its case to the Hawaii Supreme Court, yet the point was moot before it could rule on the issue. While awaiting the Hawaii Supreme Court's opinion, the state legislature asked for the public's approval of an amendment to the state constitution that reserved for the legislature the right to define marriage as the union of a man and a woman. *See supra* text accompanying note 11; *see also* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562C1, 1998 WL 88743 (Alaska Super. Ct. Feb. 27 1998). The Alaska trial court became the first to hold that the right to choose one's marriage partner is a fundamental right, as afforded by the state constitution's guarantee to the right to privacy. *Id.* at 6. The trial court ruled that:

> The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's life partner is so rooted in our tradition. . . . It is the decision itself that is fundamental, whether the decision results in a traditional choice or the nontraditional choice. . . . The same constitution protects both.

Id. at 4,6. The trial court's order to issue a marriage license to the same-sex couple was postponed while the state sought an appellate review. Before the appellate court could issue a ruling, a constitutional amendment was easily passed in both houses of the legislature and by the voting public to define marriage as between one man and one woman, making any appellate decision moot. *See id.*

17. *See generally* Arthur S. Leonard, *Ten Propositions About Legal Recognition of Same-Sex Partners*, 30 CAP. U. L. REV. 343 (2002). In light of the author's claim that, "[i]t is unlikely legal marriage for same-sex couples in the United States will be achieved solely through litigation," the ineffectiveness of the judicial mechanisms to allow same-sex marriage is not surprising. *Id.* at 348.

18. The public outcry against same-sex marriage in both Hawaii and Alaska was demonstrated in local newspaper editorials and in the public support for state constitutional amendments against same-sex marriage. *See* Will Lester, *Poll Finds Majority Against Gay Unions, Candidates May Face Threat of Backlash*, HOUS. CHRON., Aug. 19, 2003, at 2, *available at* 2003 WL 57436548. Sixty-eight percent of Alaskans voted in favor of the Alaskan constitutional amendment, leaving only thirty-two percent of the voting public in opposition. *See id.* Strong public sentiment against the notion of same-sex marriage remains in the wake of *Lawrence*. Lawrence v. Texas, 123 S. Ct. 2472 (2003); Lester, *supra*. An Associated Press poll, conducted from August 8-12, 2003, found that fifty-two percent of those polled favor a law banning gay marriages, while forty-one percent oppose such a law. *See id.* The belief that marriage should remain between a man and a woman is so prevalent that fifty-five percent of those polled would support a constitutional amendment barring gay marriage and specifying that marriage can only exist between one man and one woman; only forty-two percent oppose such an amendment. *See id.* A February 5-8, 2004 Poll found that forty-nine percent opposed a federal constitutional amendment banning same-sex marriage, while forty-two percent favored it. Will Lester, *Poll: Gay Marriage Unpopular with*

definition of marriage as one man and one woman into the states' constitutions[19] eclipsed judicial efforts to legalize same-sex marriage in both states.[20] Today, vigorous calls for a constitutional amendment banning same-sex marriage at the federal level have begun anew,[21] following recent victories for the advancement of same-sex marriage.[22]

Vermont's expansion of rights to same-sex couples did not meet the same fate. Proponents of same-sex marriage must wonder what was different about the Vermont case.[23] One notable difference is that

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Most, S. FLA. SUN-SENTINEL, Feb. 10, 2004, at 7A, *available at* 2004 WL 67632255. The February 2004 poll also found that the majority of respondents, in a 2 to 1 margin, said that they oppose a law legalizing same-sex marriage. *Id. See also* Susan Page, *Americans Less Tolerant on Gay Issues*, USA TODAY, July 29, 2003, at 1A. The Page article, citing a July 2003 USA TODAY/CNN/Gallup Poll, reports that after several years of increased tolerance towards same-sex relations, public opinion is returning to the more traditional attitudes of the early and mid-1990s. *Id.* The author attributes the shift in attitudes to a public backlash resulting from the *Lawrence v. Texas* decision, legalized gay marriage in Canada, and recent expansions of anti-discrimination policies in the work place. *Id.*

19. The alteration of state constitutions denying same-sex couples the right to marry raised constitutional questions on the federal level. *See, e.g.*, Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999) (defending the constitutionality of Alaska's constitutional amendment banning same-sex marriages).

20. *See* Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES, Sept. 7, 2003, at 48. The author warns that "relying on courts for victories that you are unable to win in the legislatures is not a recipe for enduring success." *Id.*

21. *See* Alan Cooperman, *Opponents of Gay Marriage Divided: At Issue is Scope of an Amendment*, WASH. POST, Nov. 29, 2003, at A01.

> At least three versions of the amendment [banning same-sex marriage] are circulating in Washington. The leading text, and the only one introduced in Congress, is two sentences: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

Id.

22. Recent victories include the Supreme Court decision in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the decision of the Canadian government to allow same-sex marriage, *Halpern v. Canada* (Attorney General), [2003] 65 O.R. 3d 161, and the Massachusetts Supreme Court decision, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003). These decisions have perhaps served to solidify and strengthen national opposition to same-sex marriage and bolster support for proposed constitutional amendments prohibiting future legalization of same-sex marriage.

23. *See* Baker v. State, 744 A.2d 864 (Vt. 1999). A five-judge panel in Vermont heard statutory and constitutional arguments concerning Vermont's refusal to grant marriage licenses to three same-sex couples. *See id.* The *Baker* court's finding was unanimous; by refusing to grant marriage licenses to three same-sex couples the state was discriminating against the couples in violation of the Vermont Constitution. *Id.* at 886. The decision was suspended to allow the state

Vermont[24] bestowed all the rights of marriage on same-sex couples *without* infringing upon the apparently sacrosanct[25] word "marriage."[26] This difference is the primary reason we argue for the instatement of civil unions now, rather than just fighting uphill for the legalization of same-sex marriage without foreseeable results.[27]

Despite recent court decisions removing some of the barriers to marital equality for gay and lesbian couples, it remains unlikely that same-sex marriage will soon become a national reality. For instance, a recent victory for same-sex couples in Massachusetts does not suggest that same-sex marriage is a viable strategy for those interested in securing marital rights

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legislature time to remedy the discrimination. *Id.* at 889. The Vermont legislature's remedy came in the form of a new institution granting the same rights and responsibilities as marriage: civil unions. *See* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 141-42 (2002) (critiquing the Vermont Supreme Court's handling of the case). Because the possibility of same-sex marriage has brought about constitutional amendments in two states, it is possible that the Vermont Supreme Court tempered its ruling to avoid a backlash by referendum. *See id.* The question is did the judges abdicate their duty of fairness in favor of expediency? *See id.* Koppelman asserts the question is worth asking. *See id.*

24. *See* Mark Stasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 942-43 (2000). Following Vermont's lead to the letter could prove to be dangerous. *Id.* at 942. The logic in the *Baker v. State* decision, which called the denial of marital rights to same-sex couples discriminatory, rests on the Vermont Constitution's Common Benefits Clause. *Id.* Sister states attempting to follow Vermont's lead may erroneously think that an analogous clause in their state's constitution is necessary for the enacting of civil unions. *Id.* at 942-43. Strasser suggests that the remedy to this problem is a wider interpretation of the federal equal protection clause than was afforded by the *Baker* court. *Id.* at 943.

25. *See generally* Neil A. Lewis, *From the Rose Garden: Same-Sex Marriage; Bush Backs Bid to Block Gays from Marrying*, N.Y. TIMES, July 31, 2003, at A1. President George W. Bush told reporters at a press conference that he intended to insure that "marriage" remains between a man and a woman. *Id.* The White House spokesman, Scott McClellan, said, "We are looking at what may be needed legally to protect the sanctity of marriage." *Id.* The White House continued to use religious language in its stance on what is a secular governmental issue. *See id.* President Bush, in a questionable approach to seem tolerant said: "I am mindful that we're all sinners . . . . [A]nd I caution those who may try to take the speck out of their neighbor's eye when they got [sic] a log in their own." *Id.*

26. *See* Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J.L. & FAM. STUD. 105, 113-15 (2002). "Clearly the essence of marriage is what sets it apart from other 'marriage-like' arrangements, like cohabitation, domestic partnerships, or relationship contracts. This essence is embodied in the requirements for entry into marriage, and it is precisely this essence that is lacking in other options." *Id.* at 114. The author continues: "[h]ow will the recognition of domestic partnerships affect marriage? The domestic partnerships and relationships formed by cohabitation . . . will downgrade marriage, and they will dilute and weaken marriage." *Id.* at 115.

27. We certainly do not argue that the fight for same-sex marriage should be ceased, just that the rights associated with marriage are important enough to be wanted in a more timely manner than the uphill battle for marriage will allow.

in other, more conservative, states.[28] Civil unions still make sense after the Massachusetts decision because there is no reason that the fight for legal equality through civil unions should not be waged concurrently to a fight for symbolic equality through legal marriage.

Arguments made for the legalization of same-sex marriage often cite the need for equal treatment of same-sex and different-sex couples in terms of rights[29] afforded by marriage.[30] Married people have rights to hospital visitation, insurance benefits, and adoption that unmarried people simply do not have.[31] Same-sex couples are barred from using marriage as an avenue to gain these rights, and the demos has made its statement on the topic loud and clear with the enactment of DOMA.[32] Consequently, an important first step toward parity between same-sex and different-sex

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28. *See* M. NEIL BROWNE & STUART M. KEELEY, ASKING THE RIGHT QUESTIONS 103-04 (2000 6th ed.) (discussing fallacious reasoning of "searching for perfect solutions").

29. For additional discussion of the rights that arise after marriage, see Stacey Lynne Boyle, Note, *Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors*, 14 HASTINGS CONST. L.Q. 111, 115-16 (1986); JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS (2002).

30. *See* Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 LAW & SEXUALITY 55, 66-72 (1997). The state and federal governments grant certain rights to married couples that researchers Nancy K. Kubasek, Kara Jennings and Shannon T. Browne argue should also be afforded to same-sex couples. *See id.* Those rights include, but are not limited to:

> (1) parental rights, including foster care, adoption, joint parenting, and visitation rights; (2) local, state, and federal entitlement benefits, including social security, veterans, unemployment, and worker's compensation benefits; (3) employee benefits such as group insurance, family health care, and the assumption of pension rights if a partner dies; (4) the right to bring a tort action for wrongful death or loss of consortium; (5) housing rights; (6) local, state, and federal tax benefits, including the ability to file joint income tax returns; (7) the right to receive the partner's property through intestate succession; (8) qualification for immigration status; (9) legal rights to protection in cases of domestic violence; (10) the right to legal divorce or dissolution proceedings; and (11) the privilege of not having to testify against one's partner.

Id. at 66-67.

31. *Id.* at 67-72.

32. *See generally,* KOPPELMAN, *supra* note 23, at 140. Koppelman argues that DOMA is "unnecessary and mean-spirited" and only serves to furnish "ammunition to enemies [of the act]." DOMA reveals the general attitude of legislators toward same-sex couples and homosexuals in general. *See id.*

couples would be to guarantee marital rights to all couples.[33] Civil unions could provide such a guarantee. If marital rights are truly condign for same-sex couples,[34] why wait for people to become comfortable with the extension of the word "marriage"[35] to such unions?[36]

The argument proceeds as follows. Section II outlines evidence revealing that substantive resistance to same-sex marriage is semantic in nature. An exploration of relevant case law shows how courts continuously rely on definitional arguments for maintaining matrimonial prohibition. Section III addresses counterclaims to our assertions, including arguments from dignity and analogies to segregation. Section IV suggests that bit by bit, through statutes and judicial decisions, parity for same-sex couples is attainable. Also, Section IV includes warnings not to treat recent victories in the courts as immediate harbingers of equality. DOMA is still the law of the land, Massachusetts notwithstanding.

This Article seeks to find some middle ground in a discourse with few moderate words.[37] Legal writers on this topic tend to gravitate toward a few select conclusions. For example, they either suggest the immediate

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33. *See, e.g.*, Ryan Nishimoto, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage*, 23 B.C. THIRD WORLD L.J. 379, 394-96 (2003) (book review of ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW (2002)).

34. According to the General Accounting Office of the U.S. Congress, at least 1049 federal laws provide rights, benefits, and privileges on the basis of marital status. All of these rights are currently denied to same-sex couples. *See* General Accounting Office, GAO/OGC-97-16 (Jan. 31, 1997).

35. *See generally* Rosen, *supra* note 20. Indeed, even individuals who believe homosexuals deserve equal respect and treatment under the law find the notion of same-sex marriage to be bothersome. *Id.* Rosen writes, "many people who oppose gay marriage but support civil unions for gays and lesbians say they don't believe that gays and lesbians deserve less respect than heterosexuals but that there are differences between gay and straight unions that merit a semantic distinction." *Id.*

36. *See* David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001). Cruz discusses the public consternation associated with the word "marriage" to define a same-sex union. *See id.* at 955-65. The article finds heavy symbolic meaning with the word that should not so easily be replaced by less divisive language, such as civil unions or domestic partnerships. *See id.* at 996-1001.

37. MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 185 (1999).

> Rational argument on this issue will not resolve all controversy because it is very likely that the resistance to full equality for gays has deep psychological roots. Fear of the erosion of traditional distinctions and boundaries, fear of a type of female sexuality that is unavailable to men, fear of a type of male sexuality that is receptive rather than assertive — all these probably play a role in making the current debate as ugly and irrational as it is.

Id.

inclusion of same-sex couples into the institution of marriage,[38] or the danger of such inclusion.[39] Few authors address the possibility of same-sex civil unions as a way of advancing the rights of same-sex couples[40] without offending[41] marriage traditionalists.[42] When civil unions are addressed, they are usually accepted as a bittersweet token of the public's hesitation toward homosexuals.[43] For example, the Vermont law allowing civil unions is celebrated only briefly before it is decried as too little a step toward equality,[44] or worse, an affront to the dignity of homosexuals.

By arguing for the need to take a step toward parity now rather than wait for full parity,[45] we hope to bridge the gap between idealists and matrimonial conservatives.[46] Our argument will not be very convincing to those who are interested only in the symbolic victory that same-sex marriage would represent.[47] Civil unions make sense because rights are

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38. *See generally* Nishimoto, *supra* note 33; Cruz, *supra* note 36.

39. *See generally* William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119 (2003).

40. *See generally* Richard Goldstein, *The Radical Case for Gay Marriage* (Sept. 3-9, 2003), *available at* http://www.villagevoice.com/issues/0336/goldstein.php (last visited May 25, 2004). While Goldstein argues that same-sex couples should have the right to marry, he acknowledges that rights associated with marriage are of equal, if not greater, importance. *See id.* Kathleen Pollit, a writer for *The Nation*, is quoted to support the author's conclusion: "Even as we support legalizing same-sex unions . . . we might ask whether we want to distribute these rights and privileges according to marital status. Why should access to health care be a by-product of a legalized sexual connection, gay or straight?" *Id.* The rights currently associated with marriage should be available to all relationships, with or without the title of marriage. *See id.*

41. The only good reason for refraining from offending marriage traditionalists is that they often represent the constituency that will likely keep same-sex marriage illegal. To compromise with that constituency is to remove an important roadblock to attaining equal rights.

42. *But see* Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 353-59 (1999) (The author goes out of her way to seek compromise and actively seeks the middle ground, all the while slowly prodding towards the acceptance of same-sex marriage.).

43. *See generally* Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113 (2000).

44. *See id.* at 136.

45. *See* Jocelyn J. Osofsky, Baker v. State*: Is America Moving Towards Allowing Same-Sex Marriages?*, 3 J.L. & Fam. Stud. 79, 85 (2001) (tacitly accepting an incremental approach to the expansion of civil rights).

46. *See* Eckols, *supra* note 42.

47. *See generally* Cruz, *supra* note 36. If civil marriage is an expressive resource, the symbolic title "marriage" is an important right to be given to *all* couples as guaranteed by the First Amendment. The mixed-sex marriage requirement could be seen as unconstitutional because it limits the rights of expression for same-sex couples. To see civil marriage as expressive is to grant that it is in some way an important cultural symbol.

much easier to legislate than symbolic meanings.[48] Who knows how long the fight for symbolic equality for same-sex couples will take? In the mean time, civil unions could guarantee equal rights for all couples, regardless of sexual orientation.

II. THE DEFINITIONAL NATURE OF THE SAME-SEX MARRIAGE DEBATE

> *And that's really where the issue is headed here in Washington, and that is the definition of marriage. I believe marriage is between a man and a woman, and I believe we ought to codify that one way or the other and we have lawyers looking at the best way to do that.*
> ~ President George W. Bush[49]

The most popular arguments against same-sex marriage are not pieced together to form the whole of the opposition. Rather, they are woven. Each portion of the discourse is subtly connected to most of the other portions. Arguments from biological grounds reference arguments from natural law,[50] which in turn refer to religion.[51] The religious arguments[52] are

48. It is impossible to legislate attitudes; all symbolic victories come through the changing attitudes of the public. Attitudes are decidedly outside the realm of the judicial system.

49. *See* Lewis, *supra* note 25, at A1 (emphasis added). On July 30, 2003, President George W. Bush held a press conference in which he responded to a general question about homosexuality by discussing the issue of same-sex marriage. The President made it clear that he intended to ensure that the word "marriage" does not come to include same-sex unions. *Id.*

50. *See, e.g.*, James Q. Wilson, *Against Homosexual Marriage*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 141-42 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

51. It is not the intention of this Article to address arguments based upon biology, natural law, or religion, but rather to focus on the extent to which their opposition rests primarily upon semantic grounds. The reader should note the themes of biology, natural law, teleology, and religion that appear in the case law to follow. *See* discussion, *infra* Part II.A and accompanying notes.

52. *See, e.g.*, Cal Thomas, *Marriage from God, Not Courts*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 42 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

steeped in teleology,[53] which refer back to biology.[54] When a stance on any issue is comprised of such interlocking parts, it stands to reason that there is some part of the argument that is common to all elements. Further, it would make sense for those who wish to overcome such an argument to find the common part and diffuse it, thus unraveling the opposition.

As such, there is a common element to the standard and popular arguments opposing same-sex marriage. A review of the case law will show that a majority of the legal and philosophical antagonism to same-sex marriage lies in a semantic struggle over the word "marriage."[55] Consequently, same-sex civil unions could represent a viable way for proponents of gay marriage to secure the rights associated with the institution without encroaching on a fiercely guarded word.[56] It would follow that calling same-sex marriage something else removes a substantial obstacle to parity.[57]

Before considering the evidence in anti-gay-marriage arguments that the debate is largely semantic, a caveat is in order. There are numerous counters to the arguments we will consider. Reasons to be critical of gay-marriage prohibitionists abound in an already ample literature.[58] It is not

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53. *See, e.g.*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (2003). This Vatican decree against same-sex marriage is important in that so many people look to their church for moral and legal guidance on such issues, the Catholic Church often wields great influence. *Id.*

54. *See, e.g.*, *Marriage's True Ends*, COMMONWEAL, May 17, 1996, at 5, *available at* 1996 WL 11122616 ("Historically, marriage forged a powerful connection between sexual love, procreation, and the care of children.").

55. *See* DONALD N. LEVINE, THE FLIGHT FROM AMBIGUITY: ESSAYS IN SOCIAL AND CULTURAL THEORY 42 (1985). What is marriage? Until the recent possibility of same-sex marriage in the United States, the legal definition of marriage remained ambiguous, as if the concept were obvious. DOMA, and other similar laws, now strictly define the legal concept of marriage. *Id.* However, there are benefits to ambiguity. *Id.* The ambiguity of legal terms permits the infusion of new concepts, which allows the law to adapt to a continually changing legal environment. *Id.*

56. *See* Elizabeth Bumiller, *Cold Feet: Why America Has Gay Marriage Jitters*, N.Y. TIMES, Aug. 10, 2003, at 1. The article quotes Andrew J. Cherlin, professor of public policy at Johns Hopkins University, as arguing: "For the average American, civil unions sound like tolerance, but marriage sounds like approval." *Id.* Approval of marriage would be counter to the traditional notion of marriage held by most Americans, as Norval D. Gleen, a professor of sociology at the University of Texas, notes, "[Americans are] more traditional in how we define marriage in this country than is the case in most of the Western world." *Id.* Bumiller quotes William Schneider, a CNN commentator and longtime public opinion analyst, to sum up the point of her article, "Look, if you don't call it marriage, you'll get more support." *Id.*

57. *Contra* NUSSBAUM, *supra* note 37, at 186.

58. *See, e.g.*, MARRIAGE AND SAME-SEX UNIONS: A DEBATE (Lynn D. Wardle et al. eds., 2003).

our purpose here to join in that debate; rather, we wish to approach it from another angle. Whether the arguments impeding same-sex marriage are sound or not,[59] they are currently quite successful.[60] Put another way, to show where marriage prohibition arguments fail has not proven to reduce their power in legal reasoning.[61] If reason does not work as an antidote to same-sex marriage prohibition, perhaps sidestepping the entire semantic struggle will succeed in securing rights for same-sex couples.[62]

In the courts,[63] same-sex marriage has been denied on definitional grounds and on the grounds that marriage is fundamentally linked to procreation.[64] Interwoven in these reasons for prohibition are denials of an analogy to antimiscegenation statutes,[65] religious prohibitions, and appeals

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59. *See* NUSSBAUM, *supra* note 37, at 185; *see also* JOHN STUART MILL, THE SUBJECTION OF WOMEN 1-2 (Susan Moller Okin ed. 1988).

> So long as an opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it . . . [T]he worse it fares in argumentative contest, the more persuaded its adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh entrenchment's of argument to repair any breach made in the old.

Id.

60. The arguments are successful in that they appeal to widespread public opinion and traditional notions of marriage.

61. *See* NUSSBAUM, *supra* note 37, at 185.

62. Other approaches to sidestepping same-sex marriage prohibition have argued that marriage is not created by the state but passively recognized by it. The ramifications of such a view might include a hands-off approach by all arms of the government in terms of defining who can and cannot be married. *See, e.g.*, Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U.L. REV. 1245, 1247 (1998). Collett observes, "Marriage is a reality created by the commitment and actions of the couple. State involvement with marriage arises not because it is the source of the marital relationship, but because it encounters the reality of that relationship in the lives of its citizens." *Id.*

63. In *Jones v. Hallahan*, the *Jones* court relied upon definitions of the word marriage. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973). In *Baker v. Nelson*, the *Baker* court relied upon the common usage of the word to deny same-sex couples the right to marry. Baker v. Nelson, 191 N.W.2d 185, 185-86 (Minn. 1971). For further discussion, see *infra* Part II.A and accompanying notes.

64. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942). Even though this case is about criminal sterilization and not same-sex marriage, it is relevant because it is often cited as evidence that the court recognizes the importance of procreation to the institution of marriage.

65. In *Loving v. Virginia*, the U.S. Supreme Court established the right to marry as a fundamental right protected under the Constitution and invalidated Virginia's miscegenation statute. Loving v. Virginia, 388 U.S. 1, 2 (1967). Chief Justice Warren opined, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12 (citing *Skinner*, 316 U.S. at 541).

to "natural law."[66] What all of these argumentative approaches share is their crux: the definition of the word marriage. The following review of the cases substantiates our claim that same-sex marriage resistance is largely semantic.

A. *Evidence in the Case Law*

The popular and substantive objections to same-sex marriage are semantic.[67] In other words, much of the opposition to same-sex marriage rests with a fierce resistance to any change in the "traditional"[68] definition of marriage.[69] Marriage must remain a bond between one man and one woman,[70] lest the institution of marriage lose its meaning.[71] The driving force behind the continuing legal prohibition of same-sex marriage is the argument that to preserve the traditional meaning of marriage,[72] same-sex

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66. *See* Stephen Macedo, *Homosexuality and the Conservative Mind, in* MARRIAGE AND SAME-SEX UNIONS: A DEBATE 97 (Lynn D. Wardle et. al. eds., 2003).

67. *See* Bumiller, *supra* note 56, at 1.

68. RELIGION AND SOCIETY REPORT, *Same Sex Marriage is Not Marriage, in* GAY MARRIAGE 87 (Tamara L. Roleff ed., 1998). "Marriage is, and always has been, . . . a union between male and female." *Id.* at 88.

69. Robert H. Knight, *Same-Sex Marriage Should Not Be Legal, in* GAY MARRIAGE 58 (Tamara L. Roleff ed., 1998). "Marriage as traditionally defined – the union of one man and one woman – is the most important social institution around the world. Legalizing same-sex marriage would turn the state against those who believe in the traditional definition of marriage." *Id.*

70. *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution, House Comm. on the Judiciary*, 104th Cong. 2d Sess. (1996) (statement of Hadley Arkes, the Ney Professor of Jurisprudence at Amherst College and contributing editor of the National Review). Professor Arkes stated:

> [T]he notion of marriage may not be altered to fit marriage di solo [alone] without altering the defining logic of marriage. And in the same way, I would suggest that the notion of marriage could not be stretched to encompass people of the same sex without altering out of shape the definition that represents the coherence and meaning of marriage.

Id.

71. If marriage were to include same-sex couples, traditionalists argue, then the very essence of marriage would be changed in a harmful way. *See, e.g.*, The Ramsey Colloquium, *The Homosexual Movement: A Response by the Ramsey Colloquium*, FIRST THINGS: A MONTHLY J. OF RELIGION & PUB. LIFE, Mar. 1994, at 19. "[M]arriage and the family . . . are fragile institutions in need of careful and continuing support." *Id.*

72. *See Marriage's True Ends*, *supra* note 54. "Historically, marriage forged a powerful connection between sexual love, procreation, and the care of children. . . . Legalizing same-sex unions will not remedy a self-evident injustice by broadening access to the traditional goods of marriage." *Id.* The editorial continues to argue that, "same-sex marriage, like polygamy, would

couples must be denied the right to marry.[73] In the cases that we consider, denials of same-sex marriage flow from a court's adherence to the traditional definition of marriage.[74] The cases are addressed in chronological order.

1. *Baker v. Nelson*

A same-sex couple seeking a marriage license appealed their denial to the Supreme Court of Minnesota in 1971. The lower court not only ruled that the Clerk of Courts was not required to issue a marriage license to Richard John Baker and James Michael McConnell, but it further directed the clerk not to issue the license.[75]

The relevant portion of the decision was not on arguments claiming that the lower court offended the First,[76] Eighth, Ninth and Fourteenth Amendments to the Constitution.[77] Rather, the relevant portion of the decision concerned Minnesota's marriage statute itself. The plaintiff, Richard Baker argued that lacking an "express statutory prohibition against same-sex marriages" the marriage statute allows for such unions. The assertion was rejected on purely definitional grounds.

The decision went no further than Webster's Dictionary and Black's Law Dictionary to deny the statutory possibility of same-sex marriage. The Court held that common usage,[78] Webster's Dictionary,[79] and Black's Law

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change the very nature and social architecture of marriage in ways that may empty it of any distinctive meaning." *Id.*

73. *See* Kohm, *supra* note 26, at 115. Allowing alternative versions of marriage and marriage-like institutions downgrades the importance of marriage as it stands in our culture. *Id.*

74. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 61 (Haw. 1993). The Hawaiian Department of Health argued from a definitional standpoint that same-sex marriage was impermissible; "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." *Id.*

75. *See generally* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

76. *See* Cruz, *supra* note 36, at 965-70.

77. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965). The Supreme Court held that a statute prohibiting the use of contraceptives by married couples violated the Fourteenth Amendment's Due Process Clause. *Id.* at 485-86. The Court said that marriage was a "noble" and "sacred" relationship, into whose privacy the state could not intrude without compelling cause. *Id.* at 486.

78. *See* Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 219 (1995).

> Most commonly, dictionaries define marriage in terms of spouses, spouses in terms of husband and wife, and husband and wife in terms of marriage. In consequence, the various definitions do no work in explaining what marriage is and so simply end up assuming or stipulating that marriage must be between people of different sexes.

Dictionary,[80] agreed that marriage is by definition between one man and one woman. Consequently, the *Baker* court concluded that the marriage statute did not allow same-sex marriage.[81]

Once the semantic denial was in place, the *Baker* court denied all of the constitutional arguments, some without discussion. This theme will be repeated in other subsequent cases. There was no reason to consider constitutional arguments when the petitioners lack the definitional requirements of marriage.

2. *Jones v. Hallahan*

In a decision strikingly similar to *Baker v. Nelson*, the Court of Appeals of Kentucky, two years later, upheld the denial of a marriage license by the Jefferson County Clerk of Courts to Marjorie Jones and her partner.[82] While the *Baker* court heard constitutional arguments before dismissing them, Judge Vance refused in this case. The Kentucky decision addressed only the definitional inability of Jones and her partner to enter into a marriage. Because Kentucky's marriage laws lack a definition of the term, Webster's and Black's dictionaries were again referenced, as well as common usage.[83] Judge Vance wrote, "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."[84]

The *Jones* court's reasoning was as brief as it was simple: Jefferson County could legally deny two women a marriage license because "the resulting relationship would not constitute a marriage."[85] The *Jones* court did not consider whether the denial was an offense to the women's free exercise of religion or if the women were being punished unfairly; these

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Id.

79. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 713 (10th ed. 1993).

80. BLACK'S LAW DICTIONARY 1123-1124 (4th ed. 1951).

81. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

82. *See generally* Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973).

83. Intellectual backing for a reliance on common usage as a determiner of definition can be found in KEITH ALLAN, LINGUISTIC MEANING 78, vol. 1 (1986). "[T]he meaning of a word is governed by its use." However, if people begin to refer to civil unions or domestic partnerships in everyday language as "marriages" then the definition of marriage, in other words its common usage, will also have changed. Thus, the meaning of marriage, per se, is grounded in its daily use and acceptance.

84. *See Jones*, 501 S.W.2d at 589.

85. *Id.*

issues did not matter because the women sought a statutory impossibility. With a semantic denial to same-sex marriage in place, the *Jones* court found that there was no need to consider civil rights arguments.

3. *Singer v. Hara*

Many proponents of same-sex marriage rely on an analogy to antimiscegenation laws.[86] In light of these laws,[87] and their injustice,[88] the injustice in prohibiting men to marry men and women to marry women should be clear.[89] In *Singer v. Hara*,[90] the plaintiff cited *Loving v. Virginia*,[91] the landmark interracial marriage case and *Perez v. Lippold*,[92] a similar California case, to analogize prohibitions on same-sex marriage to antimiscegenation laws.[93]

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86. *See* Stephen Clark, *Same-Sex but Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L. J. 107, 160-85 (2002).

87. *See* James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U.L. REV. 93, 94 (1993). Another important similarity between same-sex marriage and interracial marriage is the impediment to progress caused by less-than-impartial judges. Much as discrimination was pandemic in the courts of the 1950s and 60s, today's courts could contain "judicial ignorance, prejudice, and hostility" toward gay men and women. *Id.*

88. *See* NUSSBAUM, *supra* note 37, at 201.

89. The analogy is strongest when applied as follows: supporters of interracial marriage fought antimiscegenation laws by stating that the law prohibits someone from getting married based solely on his or her race. *See* Singer v. Hara, 522 P.2d 1187, 1191 (Wash. App. 1974). The Fourteenth Amendment prohibits such discrimination. *Id.* When a man is denied the right to marry another man, the grounds for the denial are based on his gender; if he were a woman, the prohibition would not exist. *Id.* at 1191-92. Therefore, the hallmark interracial marriage case, *Loving v. Virginia*, should be considered precedent supporting same-sex marriage. *See generally* Loving v. Virginia, 388 U.S. 1 (1967); *contra* William C. Duncan, *The Mere Allusion to Gender: Answering the Charge that Marriage is Sex Discrimination*, 46 ST. LOUIS L.J. 963 (2002). The author asserts that the anti-miscegenation analogy is unfair:

> The argument is simple: marriage laws may treat men and women equally, but defenders of miscegenation statutes said that those laws treated both races equally. The distinction between sex and race is thus ignored by the court, though other courts have noted that *Loving* primarily regards race discrimination and so is not appropriate to the discussion of same-sex marriage.

Id. at 970.

90. *See generally Singer*, 522 P.2d at 1187.

91. *Id.*; *Loving*, 388 U.S. at 1.

92. Perez v. Sharp, 198 P.2d 17 (Cal. 1948).

93. For further discussion on the miscegenation analogy, see Jones v. Hallahan, 501 S.W. 2d 588 (Ky. App. 1973); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991).

Not surprisingly, the *Singer* court disagreed with John F. Singer's analogy on semantic grounds. While Richard Loving was denied legal marriage on the basis of a suspect race classification, "no analogous sexual classification"[94] was found in *Singer*. The decision states that legal history finds the definition of marriage so obvious that it barely needs mentioning.

The *Singer* court cited *Jones v. Hallahan*, relying on its definition of marriage, a union between a man and a woman, to exclude same-sex marriages from the term. The plaintiff's analogy to antimiscegenation laws failed because the *Singer* court found that there could be no unfair sex classification since the union of two same-sex people could never fall within the definition of marriage.[95]

4. *Adams v. Howerton*

Adams v. Howerton,[96] was brought after an Australian citizen, Anthony Sullivan, actually obtained a marriage license in Colorado with his partner, Richard Adams. Sullivan's visa expired and he sought immediate relative status with Adams so that he could stay in the United States. To deny immediate relative status to Sullivan in the days before DOMA, the California court relied on the traditional definition of marriage as a reason not to recognize the Colorado marriage license. Amid rhetoric about religious canons and procreation, the *Adams* decision clearly stated, "[T]hus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable,[97] and *by definition, impossible*."[98] Proponents of same-sex marriage may be able to tangle with the moral judgment, "unthinkable," but "impossible" is a much more damning label.

This case shows that even securing a license cannot stop the power that the definition of marriage has over the courts. Even before DOMA put the semantics into law, the meaning of marriage was invoked to deny same-sex matrimony.

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94. *See* Singer v. Hara, 522 P.2d 1187, 1192 (Wash. App. 1974).

95. *See contra* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 474 (2001) ("[T]his argument does not offer a strong legal strategy for obtaining lesbian and gay rights and that it should be used with caution.").

96. Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980).

97. Should logical interpretations of acceptable and unacceptable relationships be affirmed via semantic arguments? For a rather lofty method of visualizing the relationship between semantics and logic, see generally RONALD SCHLEIFER, A.J. GREIMAS AND THE NATURE OF MEANING: LINGUISTICS, SEMIOTICS AND DISCOURSE THEORY xxii (1987).

98. *See Adams*, 486 F. Supp. at 1123.

5. *De Santo v. Barnsley*

In 1981, John De Santo filed for divorce from William Barnsley.[99] This case exposes a novel facet to the argument over same-sex marriage. De Santo claimed that he and Barnsley had a common-law marriage of eleven years, and as such, he was entitled to the customary entitlements of divorce. In an ironic twist, Barnsley, a man who had participated in a uniting ceremony before friends, argued that he and De Santo were not married because they were incapable of the legal relationship. The *De Santo* court relied on the traditional definition of marriage to inform the common-law definition of marriage.[100] The *De Santo* court held that DeSanto and Barnsley could not by definition be married and therefore could not divorce.[101]

6. *Dean v. District of Columbia*

Most recently and most succinctly, *Dean v. District of Columbia*[102] in 1995 illustrates that the prohibition against same-sex marriage hinges on a definition. Craig Dean and his partner, Robert Gill, sued to obtain a marriage license in the District of Columbia. When the lower court denied their request, they appealed to the District of Columbia Court of Appeals. In a per curiam opinion, the judgment of the trial court was affirmed. Judge Terry's concurring opinion began by stating, "[t]he outcome of this case, in my view, turns on the definition of 'marriage.'"[103] This lengthy decision, which considered the widest array of issues at hand, declared in the first sentence that the definition was the determining factor. Additionally, Judge Terry asserted that marriage as a legal status "refers only to the mutual relationship between a man and a woman as husband

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99. De Santo v. Barnsley, 476 A.2d. 952 (Pa. Super. Ct 1984).

100. For an excellent discussion on the dangers of relying upon tradition as a source of rights, see generally Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002). Reliance on tradition is not helpful to minorities in general because, "in a nation in which subjugation has been more the norm than the exception, relying on tradition often legitimizes and perpetuates prior discrimination." *Id.* at 102.

101. One of the benefits or rights afforded to married couples is economic security. If a married couple decides to divorce, both parties have certain economic or financial rights. However, a same-sex couple does not have such rights in the event of a separation. *See* Elizabeth M. Dolan & Marlene S. Stum, *Economic Security and Financial Management Issues Facing Same-Sex Couples*, *in* THE GAY & LESBIAN MARRIAGE & FAMILY READER 1-24 (Jennifer M. Lehmann ed., 2001).

102. Dean v. District of Columbia, 653 A.2d 307 (1995).

103. *Id.* at 308 (Terry, J., concurring).

and wife, and therefore that same-sex 'marriages' are legally and factually — i.e., definitionally[104] — impossible."[105]

Dean, much more so than any of the cases discussed above, went beyond the semantic debate.[106] To be sure, the first and foremost argument in the decision hinged on statutory definition of marriage as a different-sex institution. However, the Court did address anti-sex discrimination law, human rights claims, and constitutional issues.[107] Thus the semantic nature of same-sex marriage prohibition is made very clear by this opinion.

B. *The Case for Civil Unions*

One may find it surprising how little of the prohibition against same-sex marriage rests on non-semantic reasoning. When the courts are made to defend the refusal of marriage licenses to same-sex couples, they go first to dictionaries.[108] That the legal definition of marriage on the federal and many state levels is between one man and one woman means that the current fight for same-sex marriage is an underdog at best.

The simplest reason that civil unions make sense is that they completely avoid using the word "marriage."[109] If gay and lesbian civil

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104. *See* ALEXANDER MATTHEWS, A DIAGRAM OF DEFINITION: THE DEFINING OF DEFINITION 5 (1998). Whether something is definitionally possible is often a reference to how a word or concept is conventionally understood. In the beginning of a definition's use, an arbitrary choice is made as to how a certain word will be described. Due to some common interest that particular alternative is perpetuated. That a particular definition has been perpetuated is no proof of its ultimate truth, only of its favor by "common interest." *Id.* If marriage as one man and one woman has been perpetuated because of some long-standing "common interest," it might make sense for same-sex couples to seek a less conventionally understood title for their unions. *Id.*

105. *See Dean*, 653 A.2d at 361 (Terry, J., concurring). In his concurring opinion, Judge Terry also wrote, "if it is impossible for two persons of the same sex to 'marry,' then surely no court can say that a refusal to allow same-sex couples to 'marry' could ever be a denial of equal protection." *Id.*

106. *See generally* Heather Hodges, *Dean v. The District of Columbia: Goin' to the Chapel and We're Gonna Get Married*, 5 AM. U.J. GENDER & L. 93, 144 (1996). "The ruling in *Dean* is a key decision in the movement to obtain same-sex marriage rights because it demonstrates that even after the decision in *Bowers*, a low blow to the gay and lesbian rights movement, same-sex couples may not obtain marriage rights even outside the privacy doctrine." *Id.*

107. For a typical example of the denial of constitutional claims for same-sex marriage, see generally Kevin Aloysius Zambrowicz, *"To Love and Honor all the Days of Your Life": A Constitutional Right to Same-Sex Marriage?*, 43 CATH. U. L. REV. 907 (1994).

108. *See* DUPUIS, *supra* note 11. The definitional approach has a sterilizing effect on the arguments. Writers of opinions are able to claim that their decisions come not from homophobia or anti-gay bias, but rather from a clean, crisp definition.

109. The popular tendency to cling to the word "marriage" in its traditional sense might be explained by Luanne C. Lea, *Words and Things – The Naming Game*, 49 ETC: A REVIEW OF GENERAL SEMANTICS 297, 298 (1992). "[N]o matter what we call any thing, that label is

rights leaders advocate civil unions, the opposition can never retort that "marriage is between a man and a woman." The fiercely guarded definition of marriage would become irrelevant to the question of granting rights to same-sex couples. Same-sex couples could seek marital rights without offending the definition of marriage that is so important to traditionalists.[110]

A recent example of the ferocity with which traditionalists guard the word marriage is the Massachusetts Supreme Court case *Goodridge v. Department of Public Health*.[111] In *Goodridge*, the court's decision ignored civil unions and focused on the constitutional question of same-sex marriage, holding that the common law definition of marriage did not include same-sex couples. Soon after the *Goodridge* court issued its ruling, a backlash appeared in the form of support for a state constitutional amendment.[112] Proposed amendments at state and federal levels again relied on definitional prohibitions of same-sex marriage.[113]

More interestingly, as the opposition to same-sex marriage becomes more complex, it becomes less relevant to civil unions.[114] There is no such thing as the historic institution of civil unions, steeped for centuries in

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responding to some bit of truth about the world. Whatever that truth is, its reality continues to exist before, after, and apart from our efforts to contain it with language." *Id.*

110. *See infra* Part III.A (explaining why the symbolic title is important, but not appropriate for this argument).

111. *See generally* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). In November of 2003, the Massachusetts Supreme Court ruled in a 4-3 decision that "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason." *Id.* at 968. The *Goodridge* court granted the state legislature 180 days to change the state law regarding marriages to allow for same-sex marriages. *Id.* at 970. This case is significantly different from the Vermont decision in that the result appears to be actual marriage, in name and rights, and not a civil union containing the rights of marriage without the title. *See generally* Baker v. State, 744 A.2d 864 (Vt. 1999).

112. *See A Massachusetts Court Starts a National Debate that Poses Problems for Both the Republicans and the Democrats*, THE ECONOMIST, Nov. 20, 2003, at 29-30. The article cites the strong backlash, which solidified the movement for a constitutional amendment to ban gay marriage, as a reason "why some gay leaders have argued that civil unions offer a more pragmatic solution." *Id.*

113. For an example of a proposed constitutional amendment, see Cooperman, *supra* note 21, at A01.

114. *See generally* Dale M. Schowengerdt, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage,"* 14 REGENT U.L. REV. 487 (2001/2002) (warning that same-sex marriage advocates are "chipping away" at the traditional institution of marriage). This article offers a legal strategy for opposing same-sex marriage. *Id.* at 488. The author also claims that "opponents" of same-sex marriage are not "opponents" at all, but rather "defenders" of traditional marriage. *Id.* at 489. The use of civil unions to guarantee rights to same-sex couples would, however, circumscribe such semantic opposition (or *defense*).

natural law, tradition and custom.[115] The nascent quality about civil unions guards it from arguments that claim the definition of matrimony is historical. Concerns over the potential degradation of child-rearing environments resulting from alterations to the traditional meaning of marriage can be laid to rest.[116] The complex forms of the semantic argument, outlined above, have little to say about civil unions. No one ever claimed that the meaning behind a civil union has anything to do with history, tradition, procreation, or sexual differentiation. With such insulation from the explicit arguments against same-sex marriage, civil unions stand a chance at granting same-sex couples legal equality.[117]

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115. *See* John C. Green, *Antigay: Varieties of Opposition to Gay Rights*, *in* THE POLITICS OF GAY RIGHTS 121, 122 (Craig A. Rimmerman et al. eds., 2000).

> Of course, "tradition" is a problematic notion in the United States, given the country's modern cast, intense individualism, great diversity, and dynamic nature. But precisely because of the unsettled character of American society, social stability and conventional arrangements are often prized and strenuously defended. If accepted for long enough and bolstered by the substantive values of enough people, such arrangements can take on the patina of "tradition," even though they may not be especially old.

Id.; *see generally* ROBERT H. WIEBE, THE SEGMENTED SOCIETY (1975).

116. However, it should be noted that three to four million gay and lesbian parents are estimated to be rearing between six and fourteen million children. Angela Bolte, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, *in* THE GAY & LESBIAN MARRIAGE & FAMILY READER 27 (Jennifer M. Lehmann ed., 2001).

> While traditional arguments claim that same-sex marriages should be banned because the children within those families will be subject to harm both through ridicule and confusion over sexual roles, it is rather the case that children are directly harmed through the banning of same-sex marriages. Currently, when a same-sex relationship ends, no institutions are in place to ensure the protection of the children, as there are when traditional marriages dissolve.

Id. Civil unions could offer similar protection to children raised by gay or lesbian parents.

117. *See generally* Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315 (2002).

III. ADDRESSING THE COUNTERARGUMENTS TO CIVIL UNIONS

It's important not to let the perfect be the enemy of the good.[118]
~ Hillary Clinton

Many of the loudest opponents of civil unions for same-sex couples are proponents of parity between same-sex and different-sex couples.[119] Unfortunately, there is a debate within the gay and lesbian community concerning the appropriateness of same-sex civil unions. This internal debate works against a unified movement towards establishing legal parity; it is not "us against them," but rather "us against us." Similar struggles are found within many minority communities. Because establishing parity is so important to so many people, disagreements within a disadvantaged group are unfortunate.[120]

Nonetheless, it is hoped that by defusing some of the arguments against civil unions, it can be shown that it is reasonable to advocate same-sex civil unions, at least in the short term. The strongest counterarguments to same-sex civil unions come in two main forms. One is that same-sex civil unions harm the movement toward parity by acquiescing to unequal treatment between same-sex and different-sex couples. Civil unions are not marriage, the argument goes, so they separate same-sex couples from what is considered acceptable, thereby causing same-sex couples to sacrifice their dignity. Similarly, the second objection is that same-sex civil unions harm the movement toward equality, but it is characterized in terms of harming progress. The objection states that incremental steps toward parity tend to drain strength from the movement. The two objections are similar because they agree that the movement toward parity should be protected. However, the two counterarguments are different enough to warrant separate attention.

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118. David Kirby, *Hillary: Up Close and Personal*, THE ADVOCATE, Oct. 2000, at 38, 44.

119. *See generally* Cox, *supra* note 43; James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 2-4 (2001); *see supra* NUSSBAUM, note 37.

120. Strong divisions within African American equality movements are especially pronounced in the United States. These historical divisions are analogous to the "us against us" division within the movement for same-sex marriage. *Compare generally* W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (Penguin Books 1989) (1903), *with* BOOKER T. WASHINGTON, UP FROM SLAVERY (Doubleday 1998) (1901).

A. *The First Counterargument to Advocacy of Civil Unions*

The first counterargument to advocating for civil unions appeals to dignity of same-sex couples and relies on the premise that separate rules for different people are rarely just.[121] Proponents of this counterargument state accepting civil unions is an unappropriate compromise.[122] For these critics, full equality is right and just,[123] and to accept anything less than marital parity from our government is tantamount to accepting separate but unequal treatment.[124] For them, accepting civil unions would "compromise" their integrity.

Proponents of this argument usually draw an analogy to *Brown v. Board of Education.*[125] They use this analogy as an appeal to dignity. They reason that by accepting anything less than parity is to lend legitimacy to injustice. By this argument, it is an insult to dignity to submit to injustice in the name of expediency, even when the compromise would afford far more rights to same-sex couples than they currently enjoy.[126]

This counterargument can be separated into two concerns: 1) civil unions are tantamount to separate but unequal treatment; and 2) accepting anything less than full parity is a sacrifice of human dignity. In response to the first concern, the analogy between civil unions and racial

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121. Indeed, a failure to find a compelling state interest for sex-based discrimination lead the Hawaiian court to allow same-sex marriage. *See generally*, Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

122. *See, e.g.*, Bolte, *supra* note 116, at 42. "If domestic partnerships [defined similarly to civil unions in this context] are expanded, these partnerships could be viewed as 'separate but equal' to marriages between opposite-sex couples. As the civil rights movement illustrates, such situations are very rarely equal." *Id.*

123. *See* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry, in* LESBIAN AND GAY MARRIAGE 16-18 (Suzanne Sherman ed., 1992).

124. *See generally* Cooperman, *supra* note 21; *see also* Clark, *supra* note 86, at 107.

125. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 242 (2000).

> Vermont's separate but equal system of marriage ought to be held unconstitutional for precisely the same reason that *Brown v. Board of Education* held separate but equal public schools unconstitutional and for the same reason the post-*Brown* cases held separate but equal buses, swimming pools, golf courses and libraries unconstitutional. Such legally-mandated segregation marks the segregated with an unmistakable badge of inferiority.

Id.

126. A more radical approach to dissolve the inequality between opposite and same-sex couples is the abolition of all marital rights. *See generally* Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 LAW & INEQ. 114 (2003).

segregation is somewhat dubious at face value.[127] The injustices put forth by *Plessy v. Ferguson*[128] and Jim Crowe laws were, in spirit and letter, restrictive legislation. They outlined activities that African Americans could not do and places they could not be. Civil 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.

Further, the rights extended to same-sex couples via civil unions would be identical to the rights of marriage. Civil unions would establish legal equality and so are not a relegation in every sense of the word. Of course, there is a separation when same-sex couples are forced to call their unions something other than marriage, but civil unions grant rights to same-sex couples that they otherwise would not have.[129] In short, when the circumstances are not ideal, a civil union is a rose by another name.[130]

Non-ideal circumstances should be kept in mind as we consider the second concern. This concern engages in an incomplete solution fallacy.[131]

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127. *See, e.g.*, ESKRIDGE, *supra* note 11, at 134-35.

> There is a disturbing parallel between the civil unions law and the segregation of railroad cars upheld by the U.S. Supreme Court in *Plessy v. Ferguson*. Just as Louisiana a century ago gave blacks and whites separate and (assertedly) equal railroad cars, so Vermont now gives gays and straights separate and (assertedly) equal legal forms for their committed relationships. . . . In each case the minority objected that separation, viewed in its social context, symbolically reflected and deepened a functional inequality — whose relevance the state denied.

Id.

128. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896). Often a parallel is made between the "separate but equal" legislation in *Plessy v. Ferguson* and the civil union laws granting "separate but equal" status to same-sex couples.

129. *See* Johnson, *supra* note 117, at 315.

130. *See* Craig A. Sloane, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189, 189-202 (1997).

131. *See* BROWNE & KEELEY, *supra* note 28, at 103-04.

> Just because part of a problem would remain after a solution is tried does not mean the solution is unwise. A partial solution may be vastly superior to no solution at all; it may make a contribution to solving the problem. It may move us a step closer to solving the problem completely. If we waited for perfect solutions to emerge, we would often find ourselves paralyzed, unable to act. A partial solution may be the best we can find.

Id. at 104.

That a solution is not ideal is not grounds to dismiss it entirely. If the social environment is not supportive of full equality, it is unreasonable to dismiss a solution because it falls short of perfection. Admittedly, civil unions are not full parity in the symbolic sense, but if full parity is perforce unlikely in the short term, the best chance for some equality should be sought a fortiori.[132] As Senator Hillary Clinton put it, opposing civil unions because they are not marriage would be allowing the perfect to be an enemy of the good.[133] If the semantic resistance to same-sex marriage proves insurmountable, it would behoove same-sex marriage advocates to resist vilifying same-sex civil unions just because they are not everything advocates of parity want.

Moreover, incomplete solutions are successful in other areas of everyday life. For instance, an ideal solution to environmental degradation would be a simultaneous move toward cleaner energy sources and an attitude of conservation among the public. In that such moves are unlikely, we gladly accept a gradual move toward clean energy and economic incentives for conservation. That our current solution to environmental problems is not perfect is no reason to discount it as unfit. Similarly, in a country where pundits from most of the ideological spectrum take a prohibitory stance to same-sex marriage, an incomplete solution is perfectly reasonable.[134]

Identifying an incomplete solution fallacy in the argument based on a lack of equality against civil unions does not escape the opposition focused on dignity, however. In response to the criticism that suggests a sacrifice of dignity for same-sex couples is inherent in civil union legislation, we can only point out that the law is limited. Public opinion cannot be legislated. The institution of marriage cannot easily be separated from historically strong religious sentiment. Legislation cannot make

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132. *See* Eckols, *supra* note 42, at 357.

> I am concerned that moving too quickly on legalization of same-gender marriage disregards the feelings of a large segment of the American population and puts same-gender couples at risk. The more prudent and, perhaps, wiser course of action is to acknowledge and accept the fears of opposite-gender couples, to encourage reflective discourse, to increase gradually the visibility of same-gender couples on a local, individual scale, and to foster support within the general public. Then, when same-gender marriage is legalized, the backlash out of fear and resentment will be minimized.

Id.

133. Kirby, *supra* note 118, at 38, 44.

134. *See* Bumiller, *supra* note 56, at 1.

homophobia disappear. What can be done is to legally guarantee equal rights to same-sex couples to encourage equality.[135]

Finally, if marriage as a legal institution exists as 1) a set of rights, and 2) a symbolic recognition by society, civil unions make even more sense in the short term. Currently, same-sex couples have neither of these attributes of legal marriage (outside of Vermont, anyway). Civil unions would at least grant one of marriage's attributes. If accepting only one of marriage's attributes is an affront to dignity, then the only bigger affront would be continuing with neither. Of course accepting "civil unions" feels wrong to people who think they should be allowed to "marry." But, allowing same-sex couples to be devoid of both the title AND rights of marriage is all the more harmful.

B. *The Second Counterargument to Advocacy of Civil Unions*

The second counterargument could be viewed as somewhat less lofty than the first. Rather than appeals to human dignity, this counterargument worries about the strength of the movement toward equality in a more practical sense.[136] Some argue that incremental steps and granting of partial status drain momentum from civil rights movements.[137] In short: small steps toward a goal ultimately slow progress,[138] ironically enough. More broadly, this counterargument is wary of incremental steps toward civil rights goals.

The authors hope to dispel this second counterargument by briefly defending incrementalism and asserting that, rightly or wrongly, small

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135. *See* Eckols, *supra* note 42, at 357. "I advocate for patience, understanding, and tolerance on the part of same-gender couples so society as a whole can move closer to a consensus of support and understanding rather than using our legal system as a weapon to force acceptance." *Id.*

136. *See, e.g.*, Bolte, *supra* note 116, at 42.

> Gays and lesbians must not be taken in by possible benefits, but must examine all the possibilities. There is a very real chance that domestic partnerships could be used to sidestep justice issues regarding the treatment of gays and lesbians. If domestic partnerships were granted, any request for the legalization of same-sex marriage could be seen as unnecessary and selfish.

Id.

137. *See generally* Cox, *supra* note 43. Civil unions are a step in the right direction, yet they remain separate and unequal from marriage. Furthermore, they create an atmosphere of complacency which consequentially lessens the passionate push for total equality.

138. *See Differing Paths*, *supra* note 13, at 2009. "One explanation for this failure to carry reform to completion may be that, having obtained many of the rights associated with marriage, same-sex couples are not as motivated to advocate for marriage rights as they were when the rights gap was greater." *Id.*

steps are the way things tend to get accomplished in the United States. To start, incrementalism is multifaceted. Certain kinds of incrementalism have very valid opposition. For instance, "list incrementalism"[139] like the kind used in the Employment Non-Discrimination Act (ENDA) is not too attractive from a civil rights standpoint. To be frank, a slowly expanding list of those to whom we afford equality has substantial faults. Specifically stating the groups that get equal treatment can add legitimacy to exclusion of those not on the ENDA list.[140]

This form of incrementalism is unfairly conflated with the acceptance of same-sex civil unions. There is no slowly expanding list of those who can marry. Marriage itself may not be a fundamental right in the same way that employment non-discrimination is, but if the rights we give to different-sex couples are condign[141] for same-sex couples as well, any step toward the latter's inclusion would be just.

Incremental steps are, after all, a reality of a federalist system. Unlike the European Union,[142] Scandinavia in particular,[143] civil rights progress in the United States has historically happened in fits and starts rather than bursts.[144] Additionally, the United States lacks the pressure from surrounding countries to be more accepting toward same-sex couples.[145] Scandinavian countries, however, seem to be in an arms race of sorts to outdo one another in human rights. The result of our federalist system and our lack of human rights encouragers from abroad is a harsh environment for speedy change.

But what of the argument concerned with the momentum of the civil rights movement? It seems that this argument has been dispelled by recent events. On the coattails of Vermont's civil union statute, the movement for

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139. *See generally* Donovan, *supra* note 119.

140. *Id.*

141. *Contra* Margaret F. Brinig & Lynn D. Wardle, *United States: Deconstructing the American Family – Developments in Family Law During 1993*, 33 U. OF LOUISVILLE J. OF FAM. L. 541, 553 (1995). This article argues that parity is a detriment to the family: "Homosexual relationships are the latest alternative lifestyle to mimic and claim parity with marital and parental relations." *Id.*

142. *See* Edward Brumby, *What Is in a Name: Why the European Same-sex Partnership Acts Create a Valid Marital Relationship*, 28 GA. J. INT'L & COMP. L. 145, 145-52 (1999).

143. *See* Sloane, *supra* note 130, at 189.

144. *See, e.g.*, DUPUIS, *supra* note 11.

145. Only recently has Canada, which in 2003 allowed same-sex marriages, made the United States look more closely at the possibility of same-sex marriage or civil unions. *See* Clifford Krauss, *Now Free to Marry, Canada's Gays Say, 'Do I?'*, N.Y. TIMES, Aug. 31, 2003, at 1. "How marriage affects gay and lesbian life in Canada, and wider society, is an issue being closely watched by gays in the United States, who see what is happening in Canada as a harbinger for American society." *Id.*

same-sex marriage has not slowed. On the contrary, cases in Massachusetts,[146] New Jersey,[147] and Indiana,[148] are challenging the foundations of DOMA and working for marital parity.

Further, Vermont has shown that civil unions are now within legislative possibility.[149] It is ironic that those who are worried about slowing down the movement by compromising fail to see the speed with which civil union legislation could be enacted relative to the snail's pace of the progress in the fight for same-sex marriage, especially in states more conservative than Massachusetts.

IV. CONCLUSION

Civil rights movements are doomed to proceed in stages, phases, fits, and starts.[150] When those on the vanguard of social movements see a goal

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146. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

147. Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Sup. Ct., Nov. 5, 2003). On November 5, 2003, a New Jersey State superior judge dismissed a lawsuit against the state brought by seven gay couples who sought the right to marry. *Id.* The judge ruled that nothing within the New Jersey Constitution guarantees same-sex marriage, and added that the state legislature is the proper forum for such change. *Id.* The case is being appealed to the state supreme court, and because it has a history of protecting civil rights, advocates of same-sex marriage are optimistic that the court with look favorably on their case. *Id. See also* Laura Mansnerus, *Massachusetts Ruling on Gay Marriage Bolsters Hopes in New Jersey*, N.Y. TIMES, Nov. 20, 2003, at B10. "Gay and lesbian couples who want to marry lost a round in New Jersey two weeks ago, but the Massachusetts Supreme Court's ruling that same-sex couples have the right to marry is expected to bolster the New Jersey case as it goes to a higher court." *Id.*

148. Morris v. Sadler (No. 49D13-0211-PL-001946). Three same-sex couples who have a civil union in Vermont filed a suit asking that the state of Indiana recognize their civil unions and afford them the all the rights the union carries in the state of Vermont. *Id.* This is the first such case since Vermont passed civil union legislation. *Id.* This case directly raises the question of the full faith and credit clause of the U.S. Constitution. However, Indiana's DOMA does not require the state to recognize the union or marriage of same-sex couples from other states. *Id.* It remains to be seen what will result from this groundbreaking case. *Id.*

149. *See generally* Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples*, 43 B.C. L. REV. 73 (2001). The *Baker* decision demonstrated the current legislative possibilities of civil unions when it used a historical and contextual analysis of Vermont's constitution, before remanding the issue to the legislature. This approach by the court represents a trend, in which state constitutions are being interpreted to grant more protection than the federal Constitution. Consequently, there is some speculation that Vermont is leading the way on the interpretation of state constitutions known as "New Judicial Federalism."

150. *See* Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progressive Report*, 21 FORDHAM URB. L.J. 927, 927 (1994). "The movement for gay and lesbian rights proceeds in stages." *Id.* If this is so, then those interested in parity should be interested in steps rather than pure

for society in terms of equality for a minority group it is understandable that they want immediate results. Unfortunately, civil rights movements have little success in the world of immediate results. Same-sex marriage is especially ill suited to win immediate success due to definitional barriers[151] that courts have championed.[152]

Civil unions should be seen as a viable option for proponents of same-sex marriage.[153] The new institution of union represents the best means currently available for getting the ball rolling toward equality.[154] Progress is progress; as long as same-sex couples insist on full marriage now, they will miss out on the most time efficient means of securing the rights heterosexual couples enjoy.

DOMA is the single biggest barrier to the recognition of same-sex marriage. But the statute needs to be challenged if it is to change.[155] The more states that adopt institutions like Vermont's civil unions, the better the environment for challenging DOMA will become.

Small steps have already begun to tear down the reasoning behind DOMA and its public support. Victories in the courts, such as *Lawrence v. Texas*, the overturning of *Bowers v. Hardwick* and more general relevant decisions such as *Romer v. Evans*,[156] and *Zablocki v. Redhail*,[157] are

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end states. The first phase, "[l]egalization" has already started. Civil unions could help with the next phases of gay and lesbian rights: "[n]ondiscrimination" and "[n]ormalization."

151. JOHN WILLIAM MILLER, THE DEFINITION OF THE THING WITH SOME NOTES ON LANGUAGE 38 (1980). Reductio ad absurdum, any attempt to change the definition of marriage is met with arguments that then say "all will be permitted" the method is not unlike Socrates' in the Republic regarding competing definitions of justice. By this reasoning, divorce is hardly permissible. *Id.*

152. *See generally* Chistopher Rizzo, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & POL'Y 1 (2002). Legislation that makes restrictions based on sexual orientation probably deserves more scrutiny than is afforded when the public is eager for such restrictions.

153. *See* ACLU, *Domestic Partnership, What's Possible?*, ACLU.ORG, July 8, 2003 (listing more information on the possibilities of civil unions or domestic partnerships), *available at* http://www.aclu.org/getequal/rela/domestic1.html (last visited May 25, 2004).

154. *See* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

155. *See* Osofsky, *supra* note 45, at 85. "Someday we may look back at [*Baker v. State*], as we now look upon *Loving v. Virginia* and wonder why same-sex marriages were a controversial issue in the first place." *Id.*

156. *See generally* Romer v. Evans, 517 U.S. 620 (1996); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263 (1997). The *Romer* decision could be seen to render DOMA unconstitutional. If DOMA is sufficiently similar to Colorado's Constitutional Amendment 2, which precluded all legislative, executive, or judicial action designed to protect people based on their homosexual orientation, DOMA seems much less defensible as federal law.

157. In *Zablocki v. Redhail*, 434 U.S. 374, 385-88 (1978). The Supreme Court invalidated any state law which forbad the remarriage of people who had outstanding child or spousal support

chipping away at the prohibition to same-sex marriage in a piecemeal fashion.[158] Additionally, new developments in domestic partnerships statutes in California,[159] are granting all the rights of marriage to same sex couples save joint tax filing. The title of marriage is missing, but the rights are being granted.

Most notably, the Massachusetts Supreme Court has ruled that forbidding same-sex marriage is contrary to the state constitution.[160] This ruling represents another step toward parity. A celebration by proponents of same-sex marriage would be premature. The ruling has already galvanized the resistance to same-sex marriage. Constitutional amendments to nullify the Massachusetts Supreme Court ruling have already picked up steam in Massachusetts as well as in Congress. Further, Massachusetts is hardly on the same ideological playing field as the more conservative Midwest and Plains states.[161]

Finally, polling data suggests caution; America is not as receptive to same-sex marriage as it is to civil unions.[162] Popular opinion suggests that intolerance is unacceptable, but the Massachusetts Court is perceived as having gone too far.[163] Civil unions remain the best and most logical compromise on the road to equality for same-sex couples.

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obligations. The Court's opinion stated, "freedom of personal choice in matters of marriage and family life" cannot be violated absent a finding of relevant social purpose. *Id.* at 385 (quoting Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639-40 (1974)).

158. *See generally* Andrew M. Jacobs, *Romer Wasn't Built in a Day: The Subtle Transformation in Judicial Arguments Over Gay Rights*, 1996 WIS. L. REV. 893 (1996). Jacobs contends that there are two rhetorical traditions in the realm of gay and lesbian issues in the Supreme Court: one that sees gays as participators in deviant sexual practices worthy of the majority's disdain and one that sees gays as victims and minorities. Surely, if the latter view of gays in the law becomes more prevalent, same-sex marriage could become a reality.

159. *In California, Equal Benefits for Partners are Mandated*, N.Y. TIMES, Oct. 14, 2003, at A23; *New Domestic Partner Rights*, N.Y. TIMES, Sept. 20, 2003, at A10.

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

161. *See* Pew Research Center for the People and the Press, *Religious Beliefs Underpin Opposition to Homosexuality*, PEOPLE-PRESS.ORG, Nov. 18, 2003, *at* http://people-press.org/reports/display.php3?ReportID=197 (last visited Apr. 26, 2004). The Pew Research Center released polling data in October 2003 indicating that more people in the Eastern part of the United States support "allowing gays and lesbians to marry legally" than in other parts of the country. Of those polled living in the East, forty-two percent support same-sex marriage, whereas only thirty-three percent of those polled living in the Midwest support same-sex marriage, and even fewer people in the South, twenty-three percent, give their support.

162. *See* Pew Research Center for the People and the Press, *Gay Marriage a Voting Issue, but Mostly for Opponents*, PEOPLE-PRESS.ORG Feb. 27, 2004, *at* http://people-press.org/reports/display.php3?ReportID=204 (last visited May 25, 2004).

163. *See, e.g.*, Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. TIMES, Nov. 20, 2003, at A29.