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*UNITED STATES v. WINDSOR* AND THE FUTURE OF CIVIL UNIONS  
AND OTHER MARRIAGE ALTERNATIVES

JOHN G. CULHANE\*

THE Supreme Court's decision in *United States v. Windsor*<sup>1</sup> was a victory for the LGBT rights movement and a vindication of basic principles of dignity and equality. The Court ruled that Section 3 of the Defense of Marriage Act (DOMA), which defined marriage as the union of a man and a woman for purposes of federal law,<sup>2</sup> betrayed the Constitution's promise of liberty, as expressed through the due process clause of the Fifth Amendment.<sup>3</sup>

For Justice Kennedy, who authored the majority opinion, congressional zeal for excluding legitimately married same-sex couples from the federal benefits and responsibilities attendant to marriage could only be explained by animus toward these couples.<sup>4</sup> For evidence of such animus, the Court looked no further than the many anti-gay statements that found their way into the Congressional Record and the House Report of DOMA.<sup>5</sup> That Congress cut so deeply into the definition of marriage otherwise left to the individual states, just to exclude same-sex couples, was further proof of the true purpose behind DOMA.

While *Windsor* is inarguably a watershed case, the Court's destruction of DOMA creates complexities that will need to be worked out over the next

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1. 133 S. Ct. 2675 (2013).

2. See 1 U.S.C. § 7 (2012).

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.

*Id.*

3. See *Windsor*, 133 S. Ct. at 2692–96.

4. See *id.* at 2694. "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency." *Id.*

5. See *id.* at 2693.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H.R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage."

*Id.* (citing H.R. REP. NO. 104-664, at 12–13 (1996)).

several years. The patchwork of state laws relating to the recognition of same-sex unions led to confusion and inconsistency even when the federal law was uniform,<sup>6</sup> but sorting out whether federal laws relating to marriage will apply to same-sex couples is bound to increase the messiness of the problem, if only in the short-term. Some laws, such as the immigration law that allows one member of a married couple to sponsor his or her spouse into the country, will be immediately advantageous to all legally wed same-sex couples.<sup>7</sup> Yet many others may not be. The situation is evolving, but it is still the case that if a same-sex couple living in, say, Pennsylvania, travels to New York or Delaware to marry, as of now there are at least some federal benefits for which they will not be eligible, such as spousal status under the Family and Medical Leave Act. That's because Pennsylvania has its very own law "defending" marriage against same-sex couples.<sup>8</sup> Perhaps same-sex couples and their allies in non-recognition states will gain momentum toward marriage equality by pointing out the absurdity of this situation.

Whatever the situation with the move toward full marriage equality, it seems likely that the civil union compromise is on the way out. Inasmuch as civil unions are not marriage (even though they confer all the state law benefits of that status), it is becoming clear that couples in civil unions will not accede to the federal benefits of marriage, even with DOMA gone. But is the demise of the civil union inevitable? And *should* civil unions go the way of other larval states—useful for a time, but ultimately discarded in favor of a more mature status?

In this essay, I explore the possible futures of civil unions and argue that the civil union has utility beyond its original goal of providing a kind of way-station for committed same-sex couples in the drive toward marriage equality, in part because events over the past couple years have transformed the civil union into something more exciting. Really.

#### I. A FEW WORDS ON THE ORIGIN AND EXPANSION OF THE CIVIL UNION

Civil unions are still young, first recognized by the state of Vermont in 2000. They were created in direct response to the decision by the Vermont

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6. One particularly thorny issue has been whether a validly married same-sex couple can obtain a divorce in a state that does not recognize their marriage. Often, the answer has been "no," leading to a complex and unresolved situation for many such couples. For a discussion of some of the state law proceedings, see John Culhane, *The Paradox of Gay Legal Unions*, WORDINEDGEWISE (Apr. 29, 2010), <http://wordinedgewise.org/?p=13784>.

7. See *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. CITIZENSHIP & IMMIGR. SERVICES (July 2, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD&vgnextoid=4579215c310af310VgnVCM100000082ca60aRCRD>.

8. See 23 PA. CONS. STAT. § 1102 (2013) (excluding same-sex couples from marriage); *id.* § 1704 (non-recognition of same-sex marriages from other states). These laws are currently under challenge. See *generally* Complaint, *Whitewood v. Corbett*, No. 1:13-CV-01861 (M.D. Pa. filed July 9, 2013), *available at* [http://www.aclupa.org/download\\_file/view\\_inline/1021/700/](http://www.aclupa.org/download_file/view_inline/1021/700/).

Supreme Court in *Baker v. State*,<sup>9</sup> in which the court found the exclusion of same-sex couples from marriage violated the state constitution's guarantee of equality for all "Vermonters." But the court cannily left the remedy to the legislature, directing the lawmakers only to afford same-sex couples substantial equality, while leaving the *name* of the couples' status to the democratic process.<sup>10</sup> The resulting civil union, which purported to provide all the state-based rights and responsibilities of marriage while pointedly withholding the label, was seen as either a shrewd compromise, or a capitulation.<sup>11</sup>

The creation of the civil union added a valuable dimension to the marriage equality debate, by emphasizing the institution's multiple purposes and meanings. If marriage was only about the legal benefits, then the civil union would have been less problematic (although even in that case, it is hard to explain the desire to create a new name for marriage just for same-sex couples other than as an effort to confer second-class status on them).<sup>12</sup> But marriage, of course, is much more than the sum total of its legal rights and obligations. It is a deeply rooted social institution, membership in which conveys social commitment and communicates substantial expressive values. In a way probably unanticipated at the time of its creation, the civil union served to highlight just how important marriage is to those seeking it. And it isn't marriage without the name.

Despite limitations that were recognized almost from the start, civil unions gained traction in a number of states for eminently practical reasons. In progressive states, civil unions (or the similar, but not always identical, domestic partnerships) were legislatively achievable even though marriage was not. For many same-sex couples, the enormous practical value of legal equality—again, at the state level only—was better than nothing. In particular, the disposition of property at divorce or death is much easier and clearer when the parties' relationship is legally recognized.

Further, many in the equality movement came to see civil unions as a cooling dish; a place to allow passions to dissipate while same-sex couples' fellow citizens reached a measure of comfort with the idea that gay and lesbian families were remarkably similar to their own. Full marriage equality, it came to be thought, would follow. And in several states it has, with the time between

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9. 744 A.2d 864 (Vt. 1999).

10. *See id.* at 886–88.

11. I was among those who saw it as a capitulation. *See* John G. Culhane, *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 WM. & MARY J. WOMEN & L. 447 (2001) (denouncing remedy). But some saw the compromise as wise. *See generally* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (applauding court and legislature's actions).

12. *See In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), *vacated and remanded by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

[B]ecause of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term "marriage" is withheld only from the family relationship of same-sex couples is all the more likely to cause the new parallel institution that has been established for same-sex couples to be considered a mark of second-class citizenship.

*Id.*

civil unions and marriage shrinking to the point where Delaware moved from one to the other in less than two years' time. Connecticut, New Hampshire, and Vermont have also moved from civil unions to full marriage equality. And the legal yo-yo in California—from an increasingly robust domestic partnership status, to full marriage equality, back to domestic partnership as a result of Proposition 8—has now come to rest, likely for good, on full marriage equality with the Supreme Court's recent decision in *Hollingsworth v. Perry*.<sup>13</sup>

Yet several states have gotten “stuck” at the civil union stage for different reasons. In New Jersey, the legislature voted for full marriage equality to replace the civil unions that have been in place since 2006, but the measure was vetoed by Governor Chris Christie.<sup>14</sup> A lower court judge recently ruled that civil unions are inadequate to confer the equality that New Jersey's Supreme Court required in deciding *Lewis v. Harris*<sup>15</sup> in 2006, but the Christie administration swiftly announced its intent to appeal, thereby keeping same-sex marriages on hold.<sup>16</sup> Not until the state supreme court denied a motion to stay the issuance of marriage licenses in October 2013 did the governor give up the appeal.

In Nevada, legal equality, or a “domestic partnership,” short of marriage is

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13. 133 S. Ct. 2562 (2013). With Proposition 8 (Prop. 8), though, it seems that Yogi Berra's maxim (“It ain't over 'til it's over”) applies with special force. Prop. 8's proponents have filed a petition with the California Supreme Court, seeking a writ compelling the California county clerks to continue to comply with Prop. 8, on the ground that the federal district court's decision bound only the parties to that litigation, and that state officials (the governor and the attorney general) lack authority to direct the clerks to issue marriage licenses to same-sex couples. See Petition for Writ of Mandate & Request for Immediate Stay or Injunctive Relief, *Hollingsworth v. O'Connell*, No. S211990 (Cal. denied Aug. 14, 2013), available at [http://gallery.mailchimp.com/cd3e28a2b5019008a4a05ecd9/files/2013.07.11\\_Petition\\_FINAL\\_WITH\\_SIGNATURES.pdf](http://gallery.mailchimp.com/cd3e28a2b5019008a4a05ecd9/files/2013.07.11_Petition_FINAL_WITH_SIGNATURES.pdf).

14. See Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES (Feb. 17, 2012), <http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html>.

15. 908 A.2d 196 (N.J. 2006).

16. See generally *Garden State Equal. v. Dow*, No. L-1729-11, slip op. (N.J. Super. Ct. Law Div. Sept. 27, 2013). According to a spokesman, Governor Christie, who had previously vetoed a marriage equality bill on the ground that the matter should be left to a statewide referendum, decided to let the state supreme court have the final word. See Salvador Rizzo, “Historic” Ruling: Gay Marriage Ruled Legal in N.J., But Christie Vows Appeal, NJ.COM (Sept. 28, 2013), [http://www.nj.com/politics/index.ssf/2013/09/gay\\_marriage\\_legal\\_in\\_nj\\_after\\_judges\\_historic\\_ruling\\_though\\_christie\\_vows\\_appeal.html](http://www.nj.com/politics/index.ssf/2013/09/gay_marriage_legal_in_nj_after_judges_historic_ruling_though_christie_vows_appeal.html). Just days before this article's publication, the New Jersey Supreme Court issued a unanimous ruling denying the state's request for a stay of the ruling, and demanded that marriage licenses be issued as of October 21, 2013. See generally *Garden State Equal. v. Dow*, 2013 WL 5687193 (N.J. Oct. 18, 2013). Given the opinion's strong denunciation of the civil union vis-à-vis marriage, it was clear that the court was going to find in favor of the plaintiffs on the merits. See John Culhane, *Marriage Equality at Hand in New Jersey*, HUFF. POST (Oct. 18, 2013), [http://www.huffingtonpost.com/john-culhane/marriage-equality-at-hand-in-new-jersey\\_b\\_4124786.html](http://www.huffingtonpost.com/john-culhane/marriage-equality-at-hand-in-new-jersey_b_4124786.html). The Christie Administration dropped its appeal on October 21. See *Chris Christie Administration Withdrawing Appeal of Gay Marriage Ruling in New Jersey*, HUFF. POST (Oct. 21, 2013), [http://www.huffingtonpost.com/2013/10/21/christie-gay-marriage-appeal\\_n\\_4135867.html](http://www.huffingtonpost.com/2013/10/21/christie-gay-marriage-appeal_n_4135867.html). Thus, marriage equality has just come to New Jersey.

as far as the legislature can go on its own, because the state constitution expressly prohibits same-sex unions.<sup>17</sup>

Similarly, the Illinois legislature recently tried, but failed, to move from civil unions to marriage.<sup>18</sup> But the civil union in Illinois is part of a “boomlet” of state laws allowing *opposite-sex couples* to enter into civil unions, too.<sup>19</sup> And a small but steady stream of such couples has done so, eschewing marriage for this newer option. Responding to a survey, opposite-sex couples in Illinois cited a variety of reasons for choosing these “virtual marriages”—a desire to express solidarity with same-sex couples for whom civil unions were the only option; the association of marriage with religion; and the historical connection between marriage and fixed gender roles.<sup>20</sup> As one woman stated: “Gay marriage doesn’t seem like the right discussion to me. Because it should be: ‘What is this institution of marriage and does it still need to be defined the way it has been?’”<sup>21</sup>

A few couples, though, chose civil unions as a way of gaining the state benefits of marriage while avoiding the consequences of remarrying and losing the federal benefits that they were currently enjoying.<sup>22</sup> Obviously, such a decision relied on an interpretation of federal law that regards “civil unions” as different from “marriages.” Although that reading appears sensible—no federal law refers to “civil unions”—at the time of this writing the status of civil unions for federal purposes has not been addressed in all contexts. But from what we have learned thus far, it seems they will not be treated as marriages by federal agencies charged with distributing benefits and allocating responsibilities to married couples.

## II. THE UNCERTAIN EFFECT OF DOMA’S DEMISE ON SAME-SEX COUPLES IN CIVIL UNIONS

A hint that civil unions might be seen as marriages came from a letter issued by the Internal Revenue Service (IRS) in 2011 in which a Senior Technician Reviewer responded to a question about joint filing status from an H&R Block Tax Advisor by stating:

In general, the status of individuals of the opposite sex living in a

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17. See NEV. CONST. art. 1, § 21; NEV. REV. STAT. § 122A.010 (2013) (establishing domestic partnerships).

18. Trudy Ring, *No Vote on Illinois Marriage*, ADVOCATE (May 31, 2013), <http://www.advocate.com/politics/marriage-equality/2013/05/31/breaking-no-vote-illinois-marriage-equality>.

19. Illinois, Hawaii, and Colorado allow opposite-sex couples to form civil unions. For a summary of these laws, with citations, see *Civil Unions and Domestic Partnership Statutes*, NAT’L CONF. OF STATE LEG., <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited Aug. 7, 2013).

20. See John Culhane, *No to Nuptials*, SLATE MAG. (Jan. 3, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/01/are\\_states\\_that\\_experiment\\_with\\_opposite\\_sex\\_civil\\_unions\\_offering\\_a\\_way\\_to\\_opt\\_out\\_of\\_oppressive\\_ideas\\_about\\_marriage\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/are_states_that_experiment_with_opposite_sex_civil_unions_offering_a_way_to_opt_out_of_oppressive_ideas_about_marriage_.html).

21. *Id.* (quoting Leah Whitesel).

22. See *id.* (citing data from Cook County Clerk’s Office report).

relationship that the state would treat as husband and wife is, for Federal income tax purposes, that of husband and wife. . . . Accordingly, if Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife, they are considered “husband and wife” for purposes of . . . the Internal Revenue Code, and are not precluded from filing jointly . . . .<sup>23</sup>

If followed consistently, the IRS letter quoted above might have resolved a problem that I discussed in 2009: Once DOMA disappears, civil unions stand “revealed as weak substitutes for marriage” because there is no such thing as a “federal civil union[.]”<sup>24</sup> In effect, DOMA papered over a potentially enormous inequality between marriages and civil unions. For example, a same-sex couple married and living in Massachusetts can claim all federal benefits conferred on legal spouses, but a couple civilly united in Illinois might not be entitled to any such benefits.<sup>25</sup> But if the federal government was willing to equate civil unions to marriages, as suggested by the IRS letter quoted above, that problem disappears.

Whatever encouragement civilly united couples might have drawn from that letter (even though it was only a letter from one official in one federal agency, relating to one issue) was squelched by IRS Revenue Ruling 13-17.<sup>26</sup> The IRS ruling is best known for stating that same-sex married couples, no matter where they reside, will be treated as legal spouses for tax purposes, and may therefore file joint federal tax returns.<sup>27</sup> Less noticed, though, was another statement in that ruling expressly denying marital status to those in civil unions.<sup>28</sup>

Thus, at least one federal agency has already resolved the inherent ambiguity of the civil union in a way not favorable to couples in these relationships. That’s not surprising, given that the status always carried ambiguity. Consider the case of Illinois. On the one hand, the legislators were specific and careful about conferring all the rights and benefits of marriage on couples in civil unions; on the other, Illinois law continues to define marriage as the union of one man and one woman.<sup>29</sup> Courts that have found “marriage equivalents” inadequate have pointed out, with justification, that the civil union was created both to confer benefits *and* to make blindingly clear that same-sex unions were not “the real deal.”<sup>30</sup>

For these reasons, the move from civil unions to full marriage equality has

23. I.R.S. Gen. Info. Ltr. coNEX-133350-11 (Aug. 30, 2011).

24. See John G. Culhane, *Letters; Seeking the Right to Marry, and the Rights of Marriage*, N.Y. TIMES (Feb. 26, 2009), <http://query.nytimes.com/gst/fullpage.html?res=9C07EEDF1F3DF935A15751C0A96F9C8B63>.

25. For a fuller discussion of the current situation in New Jersey, see *supra* notes 14–16 and accompanying text.

26. See Rev. Rul. 13-17, 2013-38 I.R.B. 201.

27. See *id.*

28. See *id.*

29. See 750 ILL. COMP. STAT. § 5/212(a)(5) (2013).

30. See generally *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

gained momentum from the demise of DOMA. For now it is no longer possible to promise same-sex couples that their civil unions will be treated just the same as marriages. Already, advocates in Illinois are pointing to the many federal benefits unavailable to gay and lesbian couples, and hoping that the now-obvious inequity will be the final ingredient needed to push marriage equality over the top.<sup>31</sup> And in New Jersey, the now-manifest inequality of that state's civil union was the central reason for the recent decision by a trial court judge that continuing to deny same-sex couples the right to marry is unconstitutional.<sup>32</sup> Per the court:

[T]he State's current system of classification assigns to same-sex couples a label distinct from marriage—a label that now directly affects the availability of federal marriage benefits to those couples. Following the *Windsor* decision [and its subsequent implementation] . . . [S]ame-sex civil union partners in New Jersey are ineligible for [those benefits]. The [civil union] therefore no longer provide[s] same-sex couples with equal . . . rights and benefits . . . , violating the mandate of *Lewis* and the [State] Constitution's equal protection guarantee.<sup>33</sup>

At a minimum, it now seems that few, if any states, will be motivated to *create* new civil union laws, except in the unlikely event that it becomes clear they will be treated as equivalent to marriages under federal law, perhaps by the enactment of a federal civil union law. But more than that, it is probably also a good bet that most of the civil union states will move in short order to marriage, and, in so doing, follow the lead of every state to have made that transition so far by doing away with civil unions, at least prospectively.<sup>34</sup> The way-station will recede in the rear-view mirror, eventually disappearing.

But this fate will not befall civil unions everywhere. And their continued vitality in a few places should point the way toward a new and quite different role for them than as marriage consolation prizes.

### III. THE TRANSFORMATIVE POTENTIAL OF THE STRAIGHT CIVIL UNION

As noted above, Illinois, Hawaii, and Colorado offer the civil union option to both same-sex and opposite-sex couples.<sup>35</sup> It is also noteworthy that, during the recent drive for marriage equality in Illinois, the proposed law did *not* seek

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31. See Alex Keefe, *Supreme Court Ruling "Bittersweet" for Illinois Civil-Union Couples*, WBEZ91.5 (June 26, 2013), <http://www.wbez.org/news/supreme-court-ruling-%E2%80%98bittersweet%E2%80%99-illinois-civil-union-couples-107867>.

32. See *Garden State Equal. v. Dow*, No. L-1729-11, slip op. (N.J. Super. Ct. Law Div. Sept. 27, 2013). Since then, full marriage equality has come to New Jersey. See *supra* note 16.

33. *Id.* at 50.

34. In some states, the law moving from civil unions to full marriage equality automatically converted all civil unions to marriages. In other states, couples already in civil unions may remain in them, but no new civil unions can be formed.

35. See *Civil Unions and Domestic Partnership Statutes*, *supra* note 19.



to do away with civil unions, even for couples not currently in them. Thus, once Illinois does allow same-sex couples to marry (which seems likely in the near future), all couples—gay, lesbian, and straight—will be able to choose between the two regimes. Hawaii and Colorado can be expected to do the same, once they move in the same direction. This is something new.

This approach is meant to satisfy the opposite-sex couples who *choose* civil unions over marriage; of course, it will now also serve same-sex couples who wish to make the same choice. Indeed, civil unions mean quite different things to same-sex couples and opposite-sex couples. For most same-sex couples, they are (or were) a second-best, good enough to fight for, absent a realistic prospect of full equality, but decidedly not the goal. But, as noted above, opposite-sex couples saw them quite differently: as a liberating alternative to an institution they wanted no part of. An opposite-sex couple in a civil union would rightly be upset were their union involuntarily “converted” into a marriage. After all, that isn’t what they wanted! Consider the statement of Jennifer Tweeton, another civil union pioneer: “I feel like we don’t value the families that choose to be families without being married. The civil union was a way to honor that . . . a way to demonstrate to others’ that these other family structures deserve respect, too.”<sup>36</sup>

Tweeton’s statement is a fascinating point of entry into a much broader discussion about how the law defines—and thereby celebrates, or ignores—human relations. It is a close cousin to Professor Nancy Polikoff’s sustained and effective argument that the law needs to respond to the actual needs of its citizens, who live in many different forms of relationships.<sup>37</sup> While Tweeton emphasizes the respect due these family structures, Polikoff’s focus is more practical. But the two insights are complementary, because the law respects what it recognizes, and signals its value.

Seen in this way, the civil union might be understood as a way-station of a different sort, or perhaps as a bridge to a broader range of legal (and therefore socially respected) options that would “value all families,” to use Polikoff’s felicitous phrase. Seen as part of this wider transformative project, the civil union is powerful rhetorically, but not as significant legally. As far as the *law* is concerned, it really is just marriage by a different name (assuming the federal benefits issues can be worked out).

But in a society in which both straight and gay couples could choose between civil unions and marriages, civil unions might finally fulfill the promise that people like Greg Johnson saw for them more than a decade ago:

Couples in a civil union are equal in all respects to couples in a marriage; yet at the same time the lesbian and gay community can retain and nurture a little of what is uniquely its own with the new institution. . . . The lesbian and gay community is free to write the

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36. See Culhane, *supra* note 20 (alteration in original). Tweeton also noted that many members of her traditional Lutheran family did not regard her civil union with Alex Rifman as “real,” and that they had not come out about it to her 100-year old grandmother. See *id.*

37. See generally NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (Michael Bronski ed., 2008).

story of civil unions on its own without having to borrow every term and tradition from heterosexuals. . . . The lesbian and gay community has the power, and perhaps even the responsibility, to turn civil unions into a vibrant, viable alternative to the institution of marriage.<sup>38</sup>

This call for creativity struck me as naïve then, because it began from a faulty premise: even given the good faith of many Vermont legislators, the irreducible fact was that same-sex couples were pointedly walled off from marriage. It is hard to see the creative potential in second-class citizenship. Now, though, Johnson's insight is worth a serious second look.

Consider this: in Delaware, the marriage equality law enacted earlier this year is converting all civil unions into marriages, involuntarily. But now that equality has been achieved, what if a particular couple does not *want* their union converted? Should they not have the option, just like the couples in Illinois, to retain their civil union status? An acquaintance of mine, who is a Delaware resident in a same-sex relationship, expressed something close to anger over the new law, which gives him two unpalatable options: become married by operation of law, or actively dissolve his partnership. What he *wants*, though, is to remain in the civil union. (There might be an interesting lawsuit there, but that is the subject for a different article.) Why should he and his partner—and all couples, straight or gay—not have that option? If anything, Johnson's insight might now turn out to have been too modest—perhaps not only same-sex couples can be part of a transformative project.

#### IV. POSSIBLE FUTURES—CIVIL UNIONS AND BEYOND

With the demise of DOMA having unmasked the inadequacy of the civil union, it now seems quite unlikely that any state will create civil unions of *any* kind, but I hope for a different result. Perhaps there is some chance that the “Illinois Experiment” will become a model for states to recognize this alternative to marriage for both same- and opposite-sex couples. In any case, that should be only the start of a broader examination of what couples actually need (in every sense of that rich word). The civil union is only a modest first step in the right direction.

After all, civil unions available to all as an alternative to marriage are mostly symbolic. Reasonable people can disagree about whether the importance of the messages they convey about autonomy, gender roles, and (perhaps) secularity outweigh the weakening of marriage (and its gently coercive function) that might occur from introducing a robust competitor. Especially to the extent that same-sex couples are allowed to join the marriage club, some of the straight couples that chose civil unions as an institution unmoored to marriage's historical and societal associations might now rethink that position, and take the view that *they* can define marriage as they wish—straight, gay, or queer; religious or secular; gender role defined, or defiant. Others, of course, will disagree.

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38. Johnson, *supra* note 11, at 19–20.

But whether the civil union is on balance worth saving, the time is overdue for government policies and incentives that recognize the rich diversity of lives and relationships in which people are actually living. As just two of many examples, the Family and Medical Leave Act might be expanded to grant time for people to care for their adult siblings, and financial and workplace support could be made legislatively available to caregivers who tend to their aged parents. Targeted solutions addressing the particular issues that affect specific populations may commend themselves; so might more limited forms of relationship recognition, such as local domestic partnership ordinances offering a limited plate of benefits that might be sufficient for some.

Broadly conceived as a push toward the full dignity and recognition of same-sex couples, the marriage equality movement has spun off some interesting legal relationships, including local and state-wide domestic partnership laws, federal laws, and judicial decisions that create a more expansive definition of “family,” and some intriguing foreign models, such as France’s *pacte civil*: a sort of “marriage lite” available to both same- and opposite-sex couples that has proven quite popular with young couples.<sup>39</sup>

Although some see a subversive drive to end, or at least diminish marriage, in any call for more creative responses to the lives families are actually living, I do not agree with this zero-sum-game mentality. There is no question that marriage is in crisis (with the flight from the institution having lately taken hold in the middle class),<sup>40</sup> but a mature discussion about how the law might be more responsive to people’s needs could lead, in unexpected ways, to a reinvigoration of marriage as the best way for many people to secure for themselves the rights, protections—and dignity—they seek as part of a fully authentic life.

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39. For a discussion of the effects of the *pacte civil*, see *Effets du pacte civil de solidarité* [Effects of the Civil Solidarity Pact], SERVICE-PUBLIC.FR [FRENCH CIVIL SERVICE] (July 1, 2013), <http://vosdroits.service-public.fr/particuliers/F1026.xhtml> (Fr.). For an English translation of the pertinent section of the French Civil Code, see CODE CIVIL [C. CIV.] arts. 515-1 to 515-7, available at [www.legifrance.gouv.fr/content/download/1950/13681/./Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/./Code_22.pdf).

40. See *The State of Our Unions: Marriage in America 2012*, NAT’L MARRIAGE PROJ. & CTR. FOR MARRIAGE & FAM. (2012), available at <http://stateofourunions.org/> (last visited Nov. 3, 2013).