

COMMENTS

“WHAT’S IN A NAME?”¹: CIVIL UNIONS AND THE CONSTITUTIONAL SIGNIFICANCE OF “MARRIAGE”

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“The fight over gay marriage has become a fight over ownership of a word. But what a potent little word it is.”²

INTRODUCTION

Few issues today are as salient or contentious as same-sex marriage.³ Increasingly, same-sex couples have come out of the closet, living openly in monogamous relationships while raising children.⁴ As gays and lesbians have earned greater societal acceptance,⁵ and as their relationships have come to appear more like mainstream heterosexual unions, many same-sex couples have demanded all of the same privileges, rights, and obligations afforded by law to their straight counterparts.⁶ With limited success in the country’s legisla-

1 WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

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2 Margaret Wente, *From the Closet to the Altar*, *GLOBE & MAIL* (Toronto), July 20, 2002, at A15, quoted in James M. Donovan, *Same-Sex Union Announcements: Whether Newspapers Must Publish Them and Why We Should Care*, 68 *BROOK. L. REV.* 721, 747 (2003).

3 See Dana Nelkin, *Tradition and the Law: A Response to Wax*, 42 *SAN DIEGO L. REV.* 1111, 1113 (2005) (“[R]ecent elections have shown that the majority—at least in many states—is disinclined toward social change in th[e] area [of marriage].”).

4 See D’Vera Cohn, *Census Shows Big Increase in Gay Households*, *WASH. POST*, June 20, 2001, at A1 (documenting the dramatic increase of openly gay and lesbian families).

5 See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) (“Indeed, it appears that homosexuality has gained greater societal acceptance.”).

6 “As of 2005, the Government Accounting Office had identified more than 1,000 [federal] legal rights and responsibilities attendant to marriage. . . . States and localities have their own marriage provisions.” Dalton Conley, Op-Ed., *Spread the Wealth of Spousal Rights*, *N.Y. TIMES*, May 20, 2007, at A13. Relationship equality has been described as “the last frontier” of the gay rights movement. WILLIAM N. ESKRIDGE, JR., & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1069 (2d ed. 2004).

tures,⁷ the gay marriage movement has appealed to the courts, arguing that equal protection and corollary state-constitutional principles⁸ entitle same-sex couples to the rights, and the title, of marriage.

Support for civil unions—granting gay couples the legal incidences of marriage without its title⁹—has emerged as a middle-ground position in the raging marriage debate. The appeal of this compromise position is its ability to accommodate the public's apparently conflicting intuitions: beliefs that, on the one hand, gay people are generally entitled to equal rights, and on the other hand, the so-called traditional institution of marriage¹⁰ ought to be confined to

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- 7 Not counting those legislatures that have acted pursuant to a court order, only two legislatures in the country, in Connecticut and New Hampshire, have approved civil unions, and only one legislature, in California, has approved gay marriage. See William Yardley, *Day Arrives for Recognition of Gay Unions in Connecticut*, N.Y. TIMES, Oct. 1, 2005, at B1 (discussing state action on gay marriage). Governor Schwarzenegger vetoed the California marriage statute and the state continues to have a domestic partnerships law that affords many, but not all, of the rights of marriage. *Id.* A handful of other legislatures appear poised to adopt civil union laws soon.
 - 8 Many state constitutions guarantee equal protection through language different from that in the U.S. Constitution's Fourteenth Amendment. See, e.g., OR. CONST. art. I, § 20 (promulgating the equal privileges and immunities clause); VT. CONST. ch. I, art. 7 (promulgating the common benefits clause). See generally David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988). State courts have adopted a variety of tests, some very different from the U.S. Supreme Court's tiered scrutiny analysis, to implement their constitutions' equality guarantee. See, e.g., *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 445 (Or. Ct. App. 1998) (protecting gays under the State's equal privileges and immunities clause because they are a "true class").
 - 9 Not all states have called this legal construct a "civil union." See, e.g., H.B. 2007, 74th Reg. Sess. § 9 (Or. 2007) (offering the full legal protections and entitlements of marriage through "domestic partnerships"). Some states, including California, New York, Maine, Hawaii, and Washington, as well as Washington, D.C., have created civil union-like institutions called "domestic partnerships" that enumerate many, but not all, of the rights of marriage to be extended to same-sex couples. Oregon has called its civil unions "domestic partnerships" to make them more palatable to the public. See Byron Beck & Henry Stern, *Basic Rights Oregon and Rep. Tina Kotek*, WILLAMETTE WK. (Or.), Apr. 18, 2007, available at <http://week.com/editorial/3323/8833/> (last visited Feb. 3, 2008) (explaining the legislative name change).
 - 10 I say "so-called traditional institution of marriage" because marriage has gone through a dramatic evolution and no longer bears much resemblance to the many traditional/historical manifestations of that institution. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966–67 (Mass. 2003) (discussing some of the enormous transformations the institution of marriage has survived); see also Stephanie Coontz, *'Traditional' Marriage Has Changed a Lot*, SEATTLE POST-INTELLIGENCER, Feb. 23, 2006, at B7 (documenting the dramatic changes in the history of marriage). It may not be unreasonable, therefore, to conclude that institutional change is itself the "traditional" form. See Nelkin, *supra* note 3, at 1114.

opposite-sex relationships.¹¹ First adopted the Vermont General Assembly at the direction of its State Supreme Court,¹² the civil unions alternative has earned support in the public,¹³ in the political arena,¹⁴ and most notably in some courts.¹⁵ But same-sex marriage proponents have objected to the civil unions alternative, arguing that full equality under the law cannot be provided with a "separate but equal" substitute for marriage.¹⁶

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- 11 See PollingReport.com, Law and Civil Rights, <http://www.pollingreport.com/civil.htm> (last visited Feb. 3, 2008) (identifying 89% support for equal employment rights for gays (Gallup Poll, May 10–13, 2007) and 54% support for the proposition that homosexuality should be considered an acceptable alternative lifestyle (Gallup Poll, May 8–11, 2006), while only 46% support exists for legal recognition of same-sex marriages (Gallup Poll, May 10–13, 2007)).
 - 12 See *Baker v. State*, 744 A.2d 864, 886–88 (Vt. 1999) (requiring the Legislature to provide equal benefits for gay and lesbian couples); see also VT. STAT. ANN. tit. 15, § 1201 (2007) (providing for civil unions in the State of Vermont).
 - 13 See PollingReport.com, *supra* note 11 (identifying 54% public support for non-marriage gay unions (Pew Research Center for the People and the Press Poll, July 6–19, 2006)).
 - 14 Even President Bush, who has made opposition to gay marriage a centerpiece of his administration's policy agenda, has expressed support for civil unions. Elisabeth Bumiller, *Bush Says His Party Is Wrong To Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 26, 2004, at A21.
 - 15 See *Lewis v. Harris*, 908 A.2d 196, 221–22 (N.J. 2006) (discussing civil unions as a possible legislative remedy to the denial of equal protection to gays by the State's marriage statutes); *Li v. State*, No. 0403-03057, 2004 WL 1258167, at *8 (Or. Cir. Ct. Apr. 20, 2004) ("It is incumbent upon the legislature to evaluate the substantive rights afforded to married couples and to provide similar access to same-sex domestic partners."), *rev'd*, 110 P.3d 91 (Or. 2005); *Baker*, 744 A.2d at 886–88 (requiring the legislature to adopt civil unions or something similar at a minimum); *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004) ("The question of creating different kinds of domestic unions or partnerships is one for the Legislature."), *rev'd sub nom.* *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc). *But see In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004) (rejecting a legislative remedy establishing civil unions rather than marriage for same-sex couples); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 608–09 (Sup. Ct. 2005) (rejecting the civil unions remedy), *rev'd*, 855 N.E.2d 1 (N.Y. 2006).
 - 16 See David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73, 73–82 (2005) (applying the repudiated "separate but equal" doctrine to the civil unions debate); see also *In re Opinions of the Justices to the Senate*, 802 N.E.2d at 569 ("The history of our nation has demonstrated that separate is seldom, if ever, equal."). Not all gays and lesbians endorse this view. Some argue that it does not matter what the institution is called as long as the state provides equal rights, privileges, and responsibilities. See Kareem Fahim, *In New Jersey, Gay Couples Ponder Nuances of Measure To Allow Civil Unions*, N.Y. TIMES, Dec. 16, 2006, at B1 ("It doesn't matter what you want to call it. If it will keep the heterosexual people happy, let's just call it a union. Isn't that what a marriage is anyhow?" (internal quotation marks omitted)). Some celebrate the different institution for its "queer" character. See Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315, 339 (2002) ("Since civil unions are open only to same-sex couples, the lesbian and gay community has a chance to 'own' it, to turn it into a viable and vibrant institution, and to be proud of it."). And some recognize the incremental value of civil unions, arguing that civil unions

The debate between proponents of civil unions and advocates of full marriage recognition begins with the baseline that completely denying relationship rights to same-sex couples violates the principle of equal protection.¹⁷ Civil union proponents have articulated two constitutional defenses for depriving gay couples of state-sanctioned marriage. First, although there is no compelling reason to deprive gay couples of the tangible benefits of marriage, they argue, there might indeed be an overriding reason—be it tradition, institutional stability, or something else—to deny gay couples the label “marriage.”¹⁸ Second, marriage stripped of its legal incidences is just a name, civil union advocates argue, deprivation of which, without denial of any measurable benefits, is not necessarily a problem of constitutional magnitude.¹⁹ In other words, the equal protection analysis never even gets going according to this view, because the classification at issue is in name only. This Comment challenges the latter defense, arguing that the title “marriage” is indeed a benefit of constitutional magnitude, denial of which amounts to a facial deprivation of equal protection.

The doctrine of equal protection requires that the state afford similar treatment to similarly situated people.²⁰ Since all laws make

provide equal rights for gays while keeping pace with the public’s opposition to same-sex marriage. See Editorial, *Civil Unions: Jersey’s Prudent Pace*, PHILA. INQUIRER, Dec. 11, 2006, at A14 (“‘Civil union’ extends important legal rights to same-sex couples until society is ready to accept more.”).

- 17 This, by itself, is a controversial proposition. See, e.g., *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (refusing to recognize a constitutional right to marry for same-sex couples); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005) (upholding a bar on same-sex marriages); *Hernandez*, 855 N.E.2d at 12 (holding that a rational basis exists for limiting marriage to heterosexual couples); *Andersen*, 138 P.3d at 983–84 (upholding Washington’s opposite-sex marriage law). Nonetheless, this Comment presumes it as a baseline.
- 18 See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 979–80 (Mass. 2003) (Sosman, J., dissenting) (arguing that the sociological novelty of same-sex marriage and the inconclusive scientific evidence as to its effectiveness in childrearing provide a rational basis for a ban on same-sex marriages); *Lewis*, 908 A.2d at 222 (referring to “reason[s] to justify retaining the definition of marriage solely for opposite sex couples” that might make the classification constitutionally permissible). Perhaps the most creative reason for denying marriage to same-sex couples was presented by New York’s highest court, which asserted that heterosexual couples need the “stability and permanence” of marriage more than their gay and lesbian counterparts because straight relationships, which are more likely to produce unintended children, “are all too often casual or temporary.” *Hernandez*, 855 N.E.2d at 7.
- 19 See *Lewis*, 908 A.2d at 221–22 (“We will not presume that a difference in name alone is of constitutional magnitude.”).
- 20 *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (discussing the requirements of equal protection).

classifications,²¹ the great weight of equal protection jurisprudence identifies permissible classifications by determining whether the dissimilarly treated classes are similarly situated.²² Only in the rarest of cases do a classification's defenders argue that the classification does not amount to dissimilar treatment.²³ But that is precisely the argument suggested by civil union proponents: the classification is in name only, some say, since it does not "work to the actual disadvantage of one class in some material way."²⁴ One court illustrated the argument with this analogy: "the fact that two similar groups—men and women, say—are referred to by two different names does not provide the basis for an equal protection or due process challenge."²⁵

This Comment picks up the same-sex marriage discussion where the scholarly literature and case law have left off. Much has been written about the argument that statutory schemes denying marriage rights to same-sex couples are unconstitutional.²⁶ The Supreme

21 See *State v. Clark*, 630 P.2d 810, 816 (Or. 1981) ("[E]very law itself can be said to 'classify' what it covers from what it excludes.").

22 See *Kerrigan v. State*, 909 A.2d 89, 99 (Conn. Super. Ct. 2006) ("The cases in this area all involve an analysis of whether the government can justify treating one class of persons differently from another."). The Court does this through a tiered scrutiny analysis, which provides the least deference to legislative classifications based on criteria least likely to be relevant to legitimate policy and to those classifications that regulate the most constitutionally important institutions. See *Cleburne*, 473 U.S. at 460 (Marshall, J., concurring in part and dissenting in part) (explaining the court's equal protection cases).

23 See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8–10 (1967) (refuting the argument that anti-miscegenation statutes are permissible because they apply equally to people of different races); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (refuting the "separate but equal" argument); *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (upholding a law authorizing separate accommodations by race).

24 *Kerrigan*, 909 A.2d at 99. This Comment does not develop a comprehensive account of what amounts to a "material" classification—a classification of constitutional significance under the Equal Protection Clause. It presumes that a material classification is one that exhibits the following three indicia of materiality: objective importance, reasonable reliance, and detriment. First, the basic test of materiality is whether a classification's "existence or nonexistence is a matter to which a reasonable man would attach importance." RESTATEMENT (FIRST) OF TORTS § 538(2)(a) (1938); see also *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that materiality exists when "there is a substantial likelihood that a reasonable [person] would consider it important"). The other two indicia of materiality are, first, when a reasonable person is justified in relying on the classification, see *id.* (discussing reasonable reliance as an element of materiality), and second, when the classification "work[s] to the actual disadvantage of one class," *Kerrigan*, 909 A.2d at 99.

25 *Kerrigan*, 909 A.2d at 99.

26 See generally JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004) (making a conservative argument for gay marriage); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1207–31 (2004) (arguing that *Lawrence* helps to pave the way for same-sex marriage); John G. Culhane, *Uprooting the Ar-*

Courts of Massachusetts and New Jersey have begun an important dialogue about the next step: When same-sex couples successfully challenge a state's marriage laws, are civil unions an appropriate remedy?²⁷ But the arguments in answer to this question are inadequately developed. This Comment aims to advance the dialogue by proposing four distinct arguments for the constitutional significance of the title "marriage."

It first develops, in Part I, the most commonly recited account for marital recognition: although civil unions provide most of marriage's "tangible benefits"—easily recognized, state-conferred rights and privileges—they fail to provide marriage's intangible benefits, such as esteem, self-definition, and the stabilizing influence of social expectations. Although these benefits may be less concrete than, say, tax exemptions, they are no less constitutionally significant. Furthermore, reviving the tangible-intangible distinction violates the equal protection principle announced in *Brown v. Board of Education*²⁸ that "separate but equal" institutions, especially those that brand a particular class with a badge of inferiority, are inherently unequal.

Part II argues that state recognition is itself a tangible benefit analogous to other government-conferred statuses, such as citizenship or paternity/parentage. Because state recognition is a valuable privilege that facilitates social understanding, denial of that benefit is a deprivation of constitutional magnitude.

guments Against Same-Sex Marriage, 20 CARDOZO L. REV. 1119, 1180–209 (1999) (arguing in favor of same-sex marriage); William N. Eskridge, Jr., Essay, *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 642 (2000) (predicting that conservative criticisms of same-sex marriage will not be borne out in the long term, based on a comparative legal analysis); Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL'Y 61, 84–104 (1999) (mounting a thorough equal protection argument for recognition of same-sex marriages).

27 See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004) (arguing that civil unions deny equal protection to same-sex couples); *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., concurring and dissenting) (addressing the societal and emotional differences between civil unions and marriage). I excluded the Supreme Court of Vermont's decision in *Baker v. State*, 744 A.2d 864 (Vt. 1999), because its discussion of the civil unions remedy is brief and conclusory. See also David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 928–70 (2001) ("[I]n relegating same-sex couples to 'civil unions' while allowing mixed-sex couples 'marriage,' the state denies same-sex couples the expressive potential of civil marriage . . . in violation of First Amendment guarantees of freedom of speech . . ."); William N. Eskridge, Jr., Lecture, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 855–63 (2001) (analyzing civil unions as an alternative to marriage).

28 347 U.S. 483 (1954).

Part III argues that the title "marriage" is a constitutionally significant benefit because it enables the denial of private-sector privileges to civil-unioned couples. The doctrine of equal protection holds that the government may not facilitate private acts of discrimination, which is precisely what occurs when the state creates an inferior status—the civil union—that is used in turn by non-state actors to deny private-sector privileges to gay and lesbian couples. Much like a state identification card, marriage is a government-issued key that unlocks numerous private-sector benefits. Denial of access to this key is therefore a constitutionally significant deprivation.

Finally, Part IV explores the constitutional significance of marriage beyond the scope of equal protection. For many, marriage is a religious rite performed by a member of the clergy; therefore, the state's refusal to accord legitimacy to same-sex marriages lacks a secular purpose and amounts to an impermissible endorsement of religion under the First Amendment's Establishment Clause.²⁹

1. THE INTANGIBLE BENEFITS OF MARRIAGE

The most frequently articulated argument opposing civil unions in the scholarly literature and case law is that restricting the title "marriage" to opposite-sex couples denies gay families the "intangible benefits of marriage."³⁰ In addition to the many legal incidences of marriage—rights of inheritance, hospital visitation, child custody, evidentiary privilege, and so on—marriage confers a constitutionally significant status, producing a set of invisible privileges. The Massachusetts Supreme Court observed, "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidel-

²⁹ U.S. CONST. amend. 1.

³⁰ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (listing some "intangible" benefits of marriage, including "the enhanced approval that still attends the status of being a marital child"); *Lewis*, 908 A.2d at 226 (Poritz, C.J., concurring and dissenting) ("By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples."); Graeme W. Austin, *Essay: Family Law and Civil Union Partnerships—Status, Contract and Access to Symbols*, 37 VICTORIA U. WELLINGTON L. REV. 183, 196 (2006) ("By denying same sex couples the ability to marry, the state withholds the full symbolic significance of the term that can be invoked by and for heterosexual couples."); Tyler S. Whitty, Comment, *Eliminating the Exception? Lawrence v. Texas' and the Arguments for Extending the Right to Marry to Same-Sex Couples*, 93 KY. L.J. 813, 816 (2005) ("Though it is not often mentioned alongside the list of tangible benefits denied to same-sex couples, the ability for two individuals to commit themselves to one another, especially in the eyes of the public, is a very real benefit.").

ity, and family.”³¹ The court continued, “Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”³²

Policy analyst Jonathan Rauch casts the intangible benefits of marriage in another light. A set of informal yet powerful rules and expectations accompany the legal institution of marriage, a “hidden law” as he calls it, composed of “norms, conventions, implicit bargains, and folk wisdoms that organize social expectations, regulate everyday behavior, and manage interpersonal conflicts.”³³ Because “[t]he institution of marriage offers structural and cultural support to heterosexual partners[,] the denial of marriage to gay couples deprives them of this support.”³⁴ Thus, barring same-sex couples from the opportunity to enter a marriage, with all of its associated social rules and expectations, robs gay families³⁵ of the resulting stability that their heterosexual counterparts enjoy.³⁶

³¹ *Goodridge*, 798 N.E.2d at 954.

³² *Id.* at 955.

³³ Jonathan Rauch, *Conventional Wisdom: Rediscovering the Social Norms that Stand Between Law and Libertarianism*, REASON, Feb. 2000, at 37; see also Cruz, *supra* note 27, at 933 (“Marital commitment is expressed not simply by ceremonies, rings, and gifts. It is also expressed by the act of undertaking and continuing to live under the responsibilities of civil marriage, and by letting it be known that one is living as a part of a civil marriage.”). Even same-sex marriage opponents recognize the power of these social expectations in creating marital and familial stability. See, e.g., *Goodridge*, 798 N.E.2d at 995 (Cordy, J., dissenting) (“The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result . . .”); *Hernandez v. Robles*, 855 N.E.2d I, 7 (N.Y. 2006) (arguing that one rational basis for limiting marriage to opposite-sex couples is their greater need for its stabilizing influences).

³⁴ M. D. A. Freeman, *Not Such a Queer Idea: Is There a Case for Same Sex Marriages?*, 16 J. APPLIED PHIL. I, 12–13 (1999).

³⁵ I say “gay families” because the children of same-sex couples also benefit from state recognition and the stability and expectations that result from it. See *Goodridge*, 798 N.E.2d at 956–57 (“[C]hildren are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. . . . [T]he fact remains that marital children reap a measure of family stability . . . based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.”); Keith M. Phaneuf, *Same-Sex Marriage Debate Heats Up*, J. INQUIRER (North Manchester, Conn.), Feb. 1, 2007, available at http://www.journalinquirer.com/site/printerFriendly.cfm?brd=985&dept_id=161556&newsid=17793916 (“But unlike many Connecticut families, we don’t have the dignity and respect for our relationship and our children that society bestows on married heterosexual couples.”).

³⁶ In his book, Rauch criticizes gay marriage opponents for citing statistics purporting to demonstrate the instability of same-sex relationships. He argues that if marriage—with its associated social rules and expectations—facilitates stability, then a population excluded

While the intangible benefits of marriage may be significant, civil union proponents have doubted whether they rise to constitutional importance.³⁷ Two arguments indicate that they do. First, it is these intangible qualities, and not marriage's instrumental purposes, that the Supreme Court has emphasized as most relevant to marriage's constitutional status as a fundamental right. And second, regarding these intangible benefits as *de minimis* gives judicial sanction to a "separate but equal" regime, impermissible under the Supreme Court's equal protection cases.

A. *Intangible Benefits as Central to the Fundamental Right of Marriage*

The Supreme Court has repeatedly held marriage to be a fundamental constitutional right.³⁸ To justify, analyze, and apply this right, the Court has focused on its intangible benefits over its instrumental purposes. In *Griswold v. Connecticut*, the Court defended the inviolability of the marital relationship from intrusion by the State, describing marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."³⁹ In *Zablocki v. Redhail*,⁴⁰ by identifying marriage as a fundamental right, the Court held that the Constitution protected "something less tangible [than living together and having children] and more important: the values of self-identification and commitment."⁴¹

The Court later endorsed an inmate's right to get married in *Turner v. Safley*, describing marriage as an "expression[] of emotional

from marriage may understandably have more unstable relationships than those permitted to reap its benefits. See RAUCH, *supra* note 26, at 147–48.

37 See *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006) ("We will not presume that a difference in name alone is of constitutional magnitude.").

38 See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) ("[T]he right to marry is of fundamental importance . . ."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942))).

39 381 U.S. 479, 486 (1965).

40 434 U.S. 374 (1978).

41 Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 670 (1980). Application of *Zablocki* to same-sex marriage is not far-fetched; in fact, Justice Powell foresaw the application in his opinion concurring in judgment. See *Zablocki*, 434 U.S. at 399 (Powell, J., concurring in judgment) ("State regulation has included bans on incest, bigamy, and homosexuality, as well as various preconditions to marriage, such as blood tests. . . . A 'compelling state purpose' inquiry would cast doubt on the network of restrictions that the States have fashioned to govern marriage and divorce.").

support and public commitment. These elements are an important and significant aspect of the marital relationship . . . as an expression of personal dedication.”⁴² *Turner* presents a useful parallel insofar as the State sought to deny inmates the right to wed, similar in structure to the State’s denial of marriage rights to same-sex couples. In each of the above-mentioned cases, the Court notably identified the intangible benefits flowing from the title “marriage,” not the associated state-conferred benefits, as constitutionally significant.

Not only in Supreme Court dicta does our law hold the instrumental aspects of marriage to be of secondary importance to its intangible value. Someone who marries simply for instrumental reasons, such as helping a friend immigrate legally into the United States, is engaging in “marriage fraud” under federal law.⁴³ “By prosecuting such marriages, government insists on a tighter connection between civil marriage and the affect and commitment thought to justify marriage.”⁴⁴ The essence of marriage, American law holds, is its non-instrumental, intangible qualities.

Far from being a *de minimis* equal protection consideration, marriage’s non-instrumental purposes are central to its constitutional significance. Inequitably denying the right to marry—and its associated intangible benefits—might properly subject the classification to strict scrutiny;⁴⁵ at a minimum, however, the intangible benefits of marriage are constitutionally significant.

42 482 U.S. 78, 95–96 (1987).

43 See, e.g., *United States v. Chowdhury*, 169 F.3d 402, 405–07 (6th Cir. 1999) (upholding conviction for marriage fraud for the purpose of violating immigration laws).

44 Cruz, *supra* note 27, at 940.

45 See *Zablocki*, 434 U.S. at 383–87 (citing procreation, family relationships, childrearing and education, and marital privacy as essential aspects of the marital relationship, giving rise to strict scrutiny); see also *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (requiring strict scrutiny for interference in “the basic civil rights of man”—the right to marry and procreate). Predictably, post-*Lawrence* courts have been reluctant to review anti-gay classifications with heightened scrutiny. See, e.g., *Muth v. Frank*, 412 F.3d 808, 817–18 (7th Cir. 2005), cert. denied 126 S. Ct. 575 (2005); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 815–17 (11th Cir. 2004). But see *United States v. Marcum*, 60 M.J. 198, 205–07 (C.A.A.F. 2004) (recognizing that *Lawrence* requires some sort of heightened scrutiny); Evangelos Kostoulas, Comment, *Ask, Tell, and Be Merry: The Constitutionality of “Don’t Ask, Don’t Tell” Following Lawrence v. Texas and United States v. Marcum*, 9 U. PA. J. CONST. L. 565, 578–80, 585–87 (2007) (arguing that gays are entitled to heightened scrutiny after *Lawrence*). Although it is hard to imagine a court today applying anything more rigorous than rational basis scrutiny, there should be no doubt that, at a minimum, the intangible benefits of marriage warrant constitutional inquiry.

B. "Separate but Equal"

Rationalizing the deprivation of "intangible benefits" as being constitutionally insignificant is not a new theme in equal protection discourse. The Supreme Court sought to end this distinction in *Brown v. Board of Education*.⁴⁶ Regarding intangible benefits as *de minimis* gives judicial sanction to a "separate but equal" regime, impermissible under the Supreme Court's equal protection cases.⁴⁷ At issue in *Brown* was whether racially segregated schools could satisfy equal protection scrutiny, even when the parties stipulated that the tangible resources afforded to black and white schools were equal.⁴⁸ In fact, the resources afforded to racially segregated schools in the *Brown* era were not equal, but plaintiffs stipulated this point to force the Court to reconsider the "separate but equal" doctrine⁴⁹ it had pronounced in *Plessy v. Ferguson*.⁵⁰ Making explicit the problem that the *Brown* plaintiffs had set out to remedy, the District Court in *Brown* found that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children[,]"⁵¹ but nonetheless upheld the segregation scheme on the grounds that "the separate but equal rule [of *Plessy*] required equality only in the physical characteristics of buildings, equipment, the curricula, quality of instruction, and other tangible features of the school system."⁵² *Brown* represents a turning point precisely because the Supreme Court abandoned this specious tangible-intangible distinction in its equal protection jurisprudence.⁵³ After *Brown*, the Equal Protection Clause

46 347 U.S. 483, 493 (1954) ("Does segregation of children in public schools solely on the basis of race, *even though the physical facilities and other 'tangible' factors may be equal*, deprive the children of the minority group of equal educational opportunities? We believe that it does." (emphasis added)).

47 See Buckel, *supra* note 16, at 74–76.

48 See Paul E. Wilson, *The Genesis of Brown v. Board of Education*, 6 KAN. J.L. & PUB. POL'Y 7, 17 (1996) ("[The parties stipulated] that the same course of study and school textbooks were employed at both black and white schools, and that teacher qualifications, play supervision, health services, and other extra-classroom services supplied to white and colored schools were of the same quality and extent.").

49 See John Hart Ely, *If at First You Don't Succeed, Ignore the Question Next Time? Group Harm in Brown v. Board of Education and Loving v. Virginia*, 15 CONST. COMMENT. 215, 222 n.19 (1998) (discussing the historical background).

50 163 U.S. 537 (1896).

51 Wilson, *supra* note 48, at 20 (quoting Transcript of Record at 245, *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (Civ. No. T-316), *rev'd*, 347 U.S. 483 (1954)).

52 *Id.*

53 See *Brown*, 347 U.S. at 492 ("Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.").

reached not only textbooks and facilities, but intangible deprivations as well.

Brown's rejection of the tangible-intangible distinction was not just a doctrinal flash in the pan. Four years earlier, the Court laid the foundation for *Brown* in *Sweatt v. Painter*, when it held that Texas could not justify the all-white admission policy of its leading state law school on the ground that blacks could attend another inferior law school.⁵⁴ In addition to the all-black school's less accomplished faculty, fewer courses, and substandard resources, the Court cited "those qualities which are incapable of objective measurement but which make for [academic] greatness"⁵⁵—the school's "standing in the community, traditions and prestige"⁵⁶—as reasons for invalidating the State's practice of segregation in its law schools. In recent years, the Court has renewed its commitment to the constitutional significance of intangible benefits. In *United States v. Virginia*, citing *Sweatt*, the Court struck down the Virginia Military Academy's men-only admission policy, because, inter alia, the women-only alternative school denied its graduates "the benefits associated with [Virginia Military Academy]'s 157-year history, the school's prestige, and its influential alumni network."⁵⁷ The Court added, "[C]lassifications may not be used . . . to create or perpetuate . . . social . . . inferiority . . ."⁵⁸ The Court's rejection of the tangible-intangible distinction has been consistent in the generations since *Brown*, extending even to standing doctrine.⁵⁹

The doctrinal parallels between segregation and civil unions, if not the severity of the abuses at issue,⁶⁰ are striking. The civil union,

54 339 U.S. 629 (1950).

55 *Id.* at 634.

56 *Id.*

57 518 U.S. 515, 551 (1996). Interestingly, in his concurring opinion, Justice Rehnquist joined the Court's majority in affirming the constitutional significance of these intangible factors. See *id.* at 563 (Rehnquist, C.J., concurring in judgment) (citing Virginia Military Academy's "history and tradition").

58 *Id.* at 534 (majority opinion).

59 [T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739–40 (1984) (citation omitted).

60 Eskridge rightly points out that factual comparisons between the substantive inequalities for gays denied the right to marry and for African Americans living in the segregated

like the segregated black school, is a separate institution that purports to offer the same substantive provisions as its preferred, but inaccessible, counterpart.⁶¹ Those relegated to the less desirable institution⁶² are deprived not of tangible benefits, but of esteem; they are branded with "inferiority as to their status in the community."⁶³ In both cases, a class is relegated to the less desirable institution by virtue of its disfavored status.⁶⁴

South are inapt, since the plight of African Americans living under Jim Crow was so much more severe. See Eskridge, *supra* note 27, at 870; see also Johnson, *supra* note 16, at 332–33 (arguing that comparing civil unions to segregation is an unfair comparison); accord Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 75–88 (criticizing analogies between race discrimination and civil unions). In an equal protection context, however, the doctrinal comparisons are illuminating.

61 See, e.g., N.J. STAT. ANN. § 37:1-31 (West 2006) ("Civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.").

62 See generally David L. Chambers, *The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5, 12 (2000) (arguing that policymakers who adopted civil unions in Vermont "really do think that gay relationships are different from theirs and, though worthy, not quite equal"); Tina Kelley, *Couples Not Rushing to Civil Unions in New Jersey*, N.Y. TIMES, Mar. 21, 2007, at B1 (attributing the surprisingly low number of same-sex couples who applied for civil union licenses in their first month of availability to the sense that civil unions are inferior to marriage).

63 *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); see also *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) ("[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."); *Halpern v. Att'y Gen. of Canada*, [2003] 215 D.L.R.4th 223, ¶ 107 (Can.) ("Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships."), *aff'd* 225 D.L.R.4th 529 (Can.), available at <http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm>; Robert Schwaneberg, *Gay Couples Find Obstacles on Benefits*, STAR-LEDGER (Newark, N.J.), Apr. 15, 2007, at 21 ("In the employment sector in particular, folks don't understand civil unions, and then when they come to understand what they are they find ways to disrespect them . . . After all, the state has said that these relationships aren't worthy of marriage." (internal quotation marks omitted)). Legislators voting in favor of civil union legislation acknowledge that they are setting up an inferior institution. See, e.g., Audio file: House Debate on the Oregon Family Fairness Act, H.B. 2007, 74th Legis. Assem., Reg. Sess. (Or. 2007), at 55:00 (Apr. 17, 2007) (statement of Rep. Chip Shields), available at http://www.leg.state.or.us/cgi-bin/list_archives.cgi?archive.2007s&HOUSE&+House+Chamber+Sessions ("Let's be clear: this is not equality, not even close. . . . Couples who obtain a domestic partnership will not have what is truly equal, access to the full equality of marriage itself. . . . And I say to you colleagues, to me it is sad—sad that we are setting up a system of inequality in the name of furthering equality.").

64 See Eskridge, *supra* note 27, at 861 ("[E]ach regime acquiesces in tradition-based distinctions that connote second-class citizenship for the historically subordinated group.").

Importantly, *Brown* is not distinguishable, as some have argued, on the ground that civil unions impose a “rhetorical separation,”⁶⁵ while Jim Crow segregation imposed “physical separation.”⁶⁶ This observation identifies a distinction without a difference. The equal protection claim in *Brown* arose from the badge of inferiority imposed by segregated institutions.⁶⁷ Whether the badge of inferiority was the product of a physical or symbolic separation is incidental to the equal protection rationale. *Brown* is also not distinguishable on the ground that African Americans are a suspect class while gays are not, since the Court did not engage in a tiered scrutiny analysis in *Brown*.⁶⁸ Although gays do not enjoy the protection of heightened scrutiny,⁶⁹ the Supreme Court’s cases are concerned with state action branding them as inferior. *Romer v. Evans* held that the law may not “singl[e] out [homosexuals] for disfavored legal status,”⁷⁰ nor may it “classif[y] homosexuals . . . to make them unequal to everyone else.”⁷¹ *Lawrence v. Texas*⁷² spoke in even bolder terms. Citing the “stigma”⁷³ imposed on homosexuals by sodomy statutes, the Court insisted, “The State cannot demean their existence or control their destiny”⁷⁴ The Court described same-sex relationships as intimate, an enduring personal bond, and essential to the dignity of homosexuals as free persons.⁷⁵ “Taken together . . . [*Romer* and *Lawrence*] mean[] that government may not demean the lives of gay persons by . . . treat[ing]

65 *Kerrigan v. State*, 909 A.2d 89, 100 (Conn. Super. Ct. 2006) (emphasis omitted) (arguing that civil unions impose a rhetorical separation, rather than a physical separation, which is not sufficient to trigger due process analysis).

66 *Id.* at 99 (emphasis omitted). Physical separation remains an important policy concern, but is not necessarily a constitutional matter. Accord Benjamin P. O’Glasser, Comment, *Constitutional, Political, and Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, 9 U. PA. J. CONST. L. 595, 627 (2007) (discussing the economic segregation that has resulted from urban flight and the advantages of reintegration).

67 *See Brown*, 347 U.S. at 494 (discussing how segregated educational facilities brand African Americans with a badge of inferiority).

68 *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 n.3 (Mass. 2004).

69 *See* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 175 (2003) (describing the level of scrutiny applied to classifications based on sexual orientation as “rational review with bite”); *see also supra* note 45.

70 517 U.S. 620, 633 (1996).

71 *Id.* at 635.

72 539 U.S. 558 (2003).

73 *Id.* at 575.

74 *Id.* at 578.

75 *Id.* at 567.

them as a separate, secondary class."⁷⁶ This concern for the dignity and equal status of gays and lesbians is consistent with the Court's historical condemnation of state action that brands minorities with a badge of inferiority.⁷⁷

The intangible benefits of marriage are indeed considerations of constitutional magnitude, just as the intangible benefits of racially integrated education were constitutionally relevant a half century ago. Excluding gay couples from marriage, even while creating a parallel structure giving them all the instrumental benefits of marriage, offends the principle of equal protection by communicating that gays are disfavored and that their relationships are less valuable than those of their straight counterparts.

II. RECOGNITION AS A TANGIBLE BENEFIT

Relying on the function of the civil union as an institution degrading to gay and lesbian couples may not be necessary in mounting a facial equal protection claim, however. The "separate but equal" argument, discussed above, seeks to discredit the tangible-intangible distinction in equal protection jurisprudence. But if state recognition is itself a "tangible benefit," then depriving same-sex couples of that recognition gives rise to an equal protection claim.

When a couple weds in the eyes of the law, the two individuals are entitled to a litany of rights and privileges, one of which is official recognition by the state that they are a married unit.⁷⁸ But "civil union[] law[s] forthrightly concede[] that [they] 'do[] not bestow the status of civil marriage' on same-sex couples,"⁷⁹ thereby denying to gays and their children the constitutionally significant privilege of state recognition. Some courts have belittled the benefit of state recognition as merely a "symbolic benefit, [providing gay couples noth-

76 Brief of Plaintiffs-Appellants at 15, *Cook v. Rumsfeld*, No. 06-2313 (1st Cir. Nov. 13, 2006), available at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3310.pdf.

77 *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (striking down a statute barring African Americans from juries on the ground that the law was "an assertion of their inferiority").

78 *See Cruz, supra* note 27, at 939 (discussing the importance of the "the formal legal status of being civilly married" to the construction of identity); *see also* HCJ 721/94 El-Al Isr. Airlines, Ltd. v. Danielowitz [1994] 1srSC 48(5) 749 (Kedmi, J., dissenting), available at http://elyon1.court.gov.il/files_eng/94/210/007/z01/94007210.z01.htm ("[M]arriage' is what grants legal—and social—recognition to the joint life of the 'spouses' as a family unit . . .").

79 Eskridge, *supra* note 27, at 859 (citing An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess., § 1(10) (Vt. 1999)).

ing more than the] moral satisfaction[] of seeing their relationships recognized by the State.”⁸⁰ A state-conferred status is not of negligible importance, however, because individuals experience a government-issued status in much the same way they experience any other material benefit.⁸¹

When the government grants citizenship or declares paternity, the status it bestows can be as important as the associated legal benefits. Imagine if in response to growing Hispanic immigration into the United States and an accompanying surge in American nativism, the government barred Hispanics from gaining American citizenship, but granted to those who would otherwise qualify for citizenship an alternative status—say, “domestic inhabitant”—offering all of the substantive rights and privileges of citizenship without the title.⁸² This strikes one as intuitively inequitable because the right to call one’s self a citizen and to be recognized as such by the government is significant.⁸³ Depriving a class of people recognition as citizens, even if its members possess all other incidences of citizenship, would be experienced as deprivation equal in magnitude to the withholding of material benefits.⁸⁴

80 *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

81 *See infra* notes 83, 85, 86.

82 William Eskridge offered a similar hypothetical, analogizing the civil unions of today to a marriage-like institution that could have been created for interracial couples in the civil rights era. *See* Eskridge, *supra* note 27, at 870–71.

83 *See* Ediberto Roman, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 572 (2006) (“[T]he ‘membership facet’ of citizenship [is] the sense of belonging and participation in the national community . . . demonstrat[ing] a psychological component of citizenship. . . . [T]he anointment of citizenship is an important title that goes to the heart of the individual’s feeling of inclusion as well as the collective citizenry’s sense of the value and virtue of the democracy.” (citation omitted)). Naturalization accounts confirm the importance of government recognition as equally or more important than the practical benefits of citizenship. Reflecting the importance of citizenship-as-identity, one newly naturalized citizen cheered, “I’ve been born again as an American citizen,” Celia W. Dugger, *In Surge to Be Americans, Thousands Take Oath*, N.Y. TIMES, July 5, 1997, at 1 (internal quotation marks omitted). When one newly naturalized citizen was “[a]sked what benefits he believed came with citizenship, [he] replied, ‘Not a lot.’ ‘You can apply for federal jobs,’ he said. ‘That’s about it.’” Edward Wong, *Swift Road for U.S. Citizen Soldiers Already Fighting in Iraq*, N.Y. TIMES, Aug. 9, 2005, at A11. In fact, many naturalized citizens choose not to vote, suggesting that people become citizens for the status it confers rather than the associated legal benefits. *See* June Kronholz, *Uphill Climb: Registering Hispanics to Vote*, WALL ST. J., Oct. 10, 2006, at A4 (discussing the low numbers of naturalized Hispanics who actually vote).

84 One might rebut this analogy by arguing that Hispanics are a suspect class, thus making the deprivation of citizenship status unconstitutional for failing to survive strict scrutiny. At issue in the present analysis, however, is whether recognition is a benefit of constitutional magnitude giving rise to a facial equal protection claim. *See* *Lewis v. Harris*, 908

Declarations of paternity and parentage are similarly important state-conferred statuses. When an unmarried father sues a hostile mother for paternity, he seeks both the rights of a parent—usually, custodial rights—and recognition from the state that he is the father.⁸⁵ When adoptive parents establish parentage, they too seek a combination of rights and recognition. If the state were to grant a disfavored class of people (the disabled, for example) the rights of paternity/parentage without the associated declaration of status others receive, members of this class would experience a constitutionally significant inequality.⁸⁶

The importance of government recognition in the area of marriage is not easily overstated. State recognition is an essential part of the traditional marriage ceremony script—"By the power vested in me by the State of . . ."—representing the state's legitimization of the union.⁸⁷ Recognition is so important that at common law a cou-

A.2d 196, 221–22 (N.J. 2006). One only reaches the issue of tiered scrutiny once the facial case has been made.

85 See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 148 (1989) (Brennan, J., dissenting) ("What [the putative father] wants is a chance to show that he is [the child's] father."); *id.* at 161 (White, J., dissenting) (discussing the putative father's "interest in establishing that he is the father of the child"); *Gay Man Wins Right to Call Girl His Daughter*, ROCKY MNT. NEWS (Denver, Colo.), Nov. 20, 1994, at 94A (describing a court's declaration of paternity as winning the right "[to] call [one]self the father of the girl").

86 A third illustration is provided by states that permit postoperative transsexuals to change the sex on their birth certificates. See, e.g., *M. T. v. J. T.*, 355 A.2d 204, 210–11 (N.J. Super. Ct. App. Div. 1976) (favoring full legal recognition of the transsexual as his or her postoperative sex). Although a tangible legal benefit resulting from this change is the transsexual's right to marry someone of his or her birth sex, the primary motivation for securing a birth certificate change is the value of state recognition to the transsexual's identity. See Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213, 245 (2005) ("[L]egal sex matters . . . [because] it provides the basic framework of existence for individuals."). Indeed, for transsexuals who wish to partner with someone who shares their postoperative gender, there is no prospect of legal marriage in most states. Still, many pursue the birth certificate change for its importance to their identity. As with citizenship and paternity/parentage, if the state denied a subclass of postoperative transsexuals—say, those who are left-handed—the right to change their birth certificates, this would presumably give rise to a facial equal protection claim.

87 "[W]e both were profoundly moved when the marriage commissioner said, 'By the power vested in me by the province of British Columbia, I now pronounce you wife and wife.' It was another transformative moment that solidified our foundation. . . . [O]ur marriage is strengthened by legal recognition in Canada . . ." Barbara J. Rhoads-Weaver & Heather E. Rhoads-Weaver, *In the Pursuit of Happiness: One Lesbian Couple's Thoughts on Marriage*, 2 SEATTLE J. FOR SOC. JUST. 539, 544 (2004); see also Johnson, *supra* note 16 ("[W]hen you go into a ceremony and hear a justice (of the peace) say, 'By the power vested in me,' it truly was the most joyous experience I'd ever had." (quoting David Mace, *A Year with Civil Unions*, TIMES ARGUS (Montpelier, Vt.), July 1, 2001)).

ple whose marriage was solemnized by the state was considered a legal unit, no longer individuals,⁸⁸ a tradition whose imprint lingers today through such legal entitlements as the marital privilege.⁸⁹ One article, written jointly by a lesbian couple, bemoaned that “[t]he law . . . forces us to operate in a system that will only recognize each of us as individuals, rather than acknowledging and protecting our desired status as unified individuals.”⁹⁰

Recognition is also valuable inasmuch as it facilitates an understanding of the relationship by others, providing the language and context in which to situate same-sex couples.⁹¹ To family members, acquaintances, colleagues, and passing associates, a same-sex relationship not solemnized as a marriage may seem more like cohabitating friends or elderly sisters who provide care for one another than a marriage.⁹² One couple reported “shar[ing] many years together, and already celebrat[ing] a purely religious union ceremony, but only after they participated in a ceremony of potential legal significance did their family begin to take them seriously as a couple.”⁹³ Some couples have even resorted to changing last names to provide some ritual-legal context for others to comprehend their transformation from single to “married.”⁹⁴

Perhaps the greatest beneficiaries of state recognition are the children of same-sex couples.⁹⁵ Children must interact with adults—

88 See *Trammel v. United States*, 445 U.S. 40, 44 (1980) (explaining that at common law “husband and wife were one”).

89 See *id.* at 44–45 (exploring the origins of the current legal privilege of marriage in common law).

90 Rhoads-Weaver & Rhoads-Weaver, *supra* note 87, at 542.

91 See *id.* (“[T]he absence of legal recognition makes it more difficult for those in our family and community to understand . . . our marriage.”)

92 Some domestic partnership legislative proposals provide marriage-like rights to any two people who register with the state, including elderly sisters and cohabitating friends, conflating these different types of relationships in the eyes of the state. See, e.g., Michelle Cole, *Benefits Bill Follows Measure 36*, OREGONIAN (Portland, Or.), May 29, 2005, at B01 (describing a reciprocal benefits scheme); see also Beccah Golubock Watson, *Beyond Marriage: Love and the Law*, NATION, Jan. 29, 2007, available at <http://www.thenation.com/doc/20070212/watson> (discussing the extension of marriage benefits by contrasting marriage with non-traditional partnerships, like same-sex couples and families or friends with integrated finances, and asserting that “[p]artnerships like these, rather than marriage, hold many American families together” (emphasis added)).

93 Donovan, *supra* note 2, at 749.

94 See Rhoads-Weaver & Rhoads-Weaver, *supra* note 87, at 543 (“The impact that legally changing her name had on Heather underscores the impact that the legal recognition of a marriage has on a couple. By changing her name, Heather’s colleagues understood that she had married.”).

95 See *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235, at *8 (Haw. Cir. Ct. Dec. 3, 1996) (“[C]hildren of same-sex couples would be helped if their families received the social

in particular, teachers and peers' parents—who do not understand their same-sex parents' relationship. If it is difficult for adults to comprehend the civil union relationship, it must be all the more difficult for the peers of same-sex couples' children to understand a family structure that lacks the government-conferred status of marriage.⁹⁶

Civil unions, it is true, do provide some type of state recognition.⁹⁷ But the state is decidedly not recognizing the couple as "married,"⁹⁸ denying both the self-identification value and the cultural context of marriage. The government recognition provided by a civil union is inferior to that provided by a marriage,⁹⁹ and therein lies the equal protection claim. It is a basic canon of constitutional law "that there should be a remedy for every wrong."¹⁰⁰ When the state withholds recognition from a disfavored class—be it citizenship, paternity/parentage, sex,¹⁰¹ or marital status—the denial of recognition is experienced as a wrong by members of that class. Because recognition of status is experienced as a material benefit, denial of this benefit is therefore a deprivation of constitutional magnitude sufficient to mount a facial equal protection claim.

status derived from marriage."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) ("[C]hildren are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. . . . Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child.").

96 One civil-unioned parent complained that he "does not want [his son] to have to explain to anyone who asks that what his parents have is something like a marriage . . . [or] almost a marriage." Brief of Plaintiffs-Appellants at 3, *Kerrigan v. Comm'r of Pub. Health*, S.C. 17716 (Conn. Nov. 22, 2006) (internal quotation marks omitted), available at http://www.glad.org/marriage/Kerrigan-Mock/Kerrigan_%20Supreme_Court_Final.pdf.

97 See Johnson, *supra* note 16, at 339 (arguing that civil unions afford gays a unique type of recognition, separate from marriage).

98 See Eskridge, *supra* note 27, at 860 (observing that civil union laws pointedly withhold marriage from same-sex couples).

99 See *Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 479 (App. Div. 2005) ("[T]he Vermont Legislature went to great pains to expressly decline to place civil unions and marriage on an identical basis. . . . The import of that action is of no small moment."); Ray Henry, *Gay Marriage About Strategy*, PRESS ATLANTIC CITY (N.J.), Mar. 18, 2007, at G7 ("Even though civil unions and individual laws can grant gay couples some protection, lawmakers who support them are deliberately setting up a lesser system. . . .").

100 *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 54 (1994) (Stevens, J., concurring) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

101 See *supra* note 86.

III. THE PRIVATE-SECTOR PRIVILEGES RESERVED FOR MARRIAGE

In addition to conferring a status important to the self-definition of same-sex couples and facilitating public understanding of their relationships, government recognition enables important private-sector benefits. Many privileges in the private sector are available only to married spouses, at the exclusion of same-sex civil-unioned partners. These private-sector privileges are an equal protection concern for two reasons. First, the principle of equal protection dictates that the law may not facilitate systematic private acts of discrimination.¹⁰² Second, one public benefit of marriage is the key it provides to unlock private privileges. Although private acts of discrimination are themselves beyond the reach of the Equal Protection Clause,¹⁰³ the public decree enabling citizens to employ these private privileges is not.

Countless benefits, privileges, and opportunities are available to married couples in the private sector that are not available to their civil-unioned counterparts.¹⁰⁴ Gay couples often struggle to share pri-

102 See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622–24 (1991) (striking down racially motivated peremptory challenges in civil cases because the discrimination is facilitated by the court); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

103 See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–73 (1972) (holding that a private club’s discriminatory admission policy was outside the Equal Protection Clause’s reach, yet barring any state enforcement).

104 Some of these distinctions are remedied with state antidiscrimination laws protecting gays, or by laws specifically requiring equal provisions, like employment benefits, for partnered employees. See, e.g., *Law Against Discrimination*, N.J. STAT. ANN. § 10:5-4 (West 2007) (requiring equal treatment of gays and lesbians in the private sector). But many states do not have antidiscrimination laws protecting gays. See *Gay, Lesbian, Bisexual and Transgender Americans and State Legislation*, EQUALITY FROM ST. TO ST. (Human Rights Campaign Found., Wash., D.C.), Dec. 2006, at 15, available at <http://www.hrc.org/documents/StateToState2007.pdf> (reporting that only 17 states have antidiscrimination laws protecting gays). Even those state laws that do protect gays from private discrimination do not address all of the private-sector inequalities between married and civil union couples. See Bill Graves, *Decades in Making, Gay-Rights Law Passes*, OREGONIAN (Portland, Or.), Apr. 20, 2007, at A01 (discussing a broad exemption to the state’s anti-discrimination law that allows sexual orientation discrimination by religiously affiliated churches, hospitals, schools, camps, day-care centers, thrift stores, bookstores, radio stations, shelters, and other institutions). Even in cases covered by these laws, many private actors persist in refusing to recognize civil-unioned couples as married and therefore decline to extend equal benefits as a result. See *Kelley*, *supra* note 62, at B1 (“Hospitals, employers and other institutions will say, ‘We don’t care what the law says, you are not married.’ . . . The word is starting to spread that the civil union law is in fact not working to provide couples with the protection that only the word marriage can.” (quoting Steven Goldstein, Chairman of Garden State Equality)).

vate employment benefits.¹⁰⁵ Some academic institutions fail to provide spousal healthcare to civil-unioned students, while married students acquire spousal coverage as a matter of course.¹⁰⁶ Some landlords rent only to married couples.¹⁰⁷ Some hospitals allow visitation privileges only to married couples. Some private adoption agencies preference married over non-married couples in placing children.¹⁰⁸ Some insurance companies fail to provide equal benefits to civil-unioned couples, for example, declining to continue coverage for a gay partner when his insured spouse dies.¹⁰⁹ The list of private-sector privileges includes countless relatively trivial items as well, such as newspapers that print wedding announcements only for couples entering a state-recognized marriage.¹¹⁰ A recent report by the New Jersey Civil Union Commission, issued on the one year anniversary of the State's civil union law, confirms that private actors such as employers and officials at hospitals and banks treat civil-unioned couples unequally "not because of an objection to the government recogni-

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- 105 Numerous complaints have been filed with gay rights organizations for the failure of employers to provide spousal benefits to civil-unioned couples. *See* Schwaneberg, *supra* note 63, at 21 (documenting couples who have failed to receive benefits). One expert observed, "In the employment sector in particular, folks don't understand civil unions, and then when they come to understand what they are they find ways to disrespect them After all, the state has said that these relationships aren't worthy of marriage." *Id.* (internal quotation marks omitted). One resistant employer explained, "We're subject to federal law Our understanding is we would not have to change our eligibility at this time to cover civil unions" *Id.* (internal quotation marks omitted); *see also* Rhoads-Weaver & Rhoads-Weaver, *supra* note 87, at 544 (discussing the difficulty in securing employment benefits); *accord* Bailey v. City of Austin, 972 S.W.2d 180, 194 (Tex. Ct. App. 1998) (upholding a city initiative barring registered domestic partners from receiving public-sector employment benefits like healthcare).
- 106 *See* Rhoads-Weaver & Rhoads-Weaver, *supra* note 87, at 545 (noting that this affected the couple when one attended law school).
- 107 *See generally* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, Nos. 04-56916, 04-57173, 2008 WL 879293 (9th Cir. Apr. 3, 2008) (discussing sexual orientation discrimination in housing).
- 108 In fact, some states have pushed formally to grant legal permission for these discriminatory adoption-placement practices. *See, e.g.*, H.B. 5908 & 5909, 93rd Leg., Reg. Sess. (Mich. 2006) (permitting discrimination based on a placement agency's expressed "religious or moral convictions").
- 109 *See* Geoff Mulvihill, *Civil Unions Won't Have Full Benefits of Marriage—Federal Law, Insurance Provisions Are Among Obstacles for Gay Couples*, REC. (Hackensack, N.J.), Dec. 17, 2006, at A03 (discussing insurance inequality).
- 110 *See* Marylynn Pitz, *Glaad Tidings—Alliance Campaigns for Newspapers to Announce Gay Engagements*, *Civil Unions*, PITTSBURGH POST-GAZETTE, Jan. 23, 2007, at C1 (explaining that many newspapers do not publish same-sex engagement and civil union announcements); Donovan, *supra* note 2, at 733–40 (discussing same-sex wedding announcements).

tion of same-sex couples, but because of the term used by the statutes”¹¹¹

A. *Giving Effect to Private Biases*

A traditional equal protection inquiry would end with the observation that these inequitable classifications are undertaken by private actors, not the state. But while “[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect.”¹¹² The private discriminations described above are facilitated and supported by the designations “marriage” and “civil union” constructed and maintained by state law.¹¹³ Private actors could not express a preference for married over civil-unioned couples if the distinction did not exist. The state therefore cultivates and perpetuates the impression that “traditional marriages” are preferable to civil unions by relegating gay couples to the less-favored status;¹¹⁴ it then facilitates the discrimination by imposing a distinction of law that is, in turn, used by private actors to discriminate.¹¹⁵

In addition to the long list of private-sector benefits denied to civil-unioned couples, the state-imposed marriage/civil union distinction forces gays and lesbians who seek private-sector benefits for themselves and their partners to “out” themselves in the private arena, most often to their employers or coworkers.¹¹⁶ This makes gays

111 N.J. CIVIL UNION REVIEW COMM’N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION 9 (2008), <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf>. The report confirms that Vermont, which has had civil unions since 2000, continues to experience these problems, while Massachusetts, which legalized same-sex marriage in 2004, does not. *See id.* at 5, 7–9.

112 *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

113 *See Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980, 999 (D. Neb. 2005) (“Civil marriage is a creature of statute.”), *rev’d on other grounds* 455 F.3d 859 (8th Cir. 2006).

114 *See Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (“[P]reserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.”).

115 One relatively trivial yet clear example of a private actor using the government classification to discriminate is the decision of eHarmony.com, an online dating website, to deny service to gays and lesbians. The company’s founder Neil Clark Warren justifies its policy on the basis that, *inter alia*, “[S]ame-sex marriage is illegal in most states[, and] ‘[w]e don’t really want to participate in something that’s illegal.’” Janet Kornblum, *eHarmony: Heart and Soul*, USA TODAY, May 19, 2005, at 1D.

116 In order to seek healthcare benefits, for example, gay job applicants and employees must inquire as to whether the employer provides equal benefits to married and civil union couples. *See, e.g., Schwaneberg, supra* note 63 (“I called to ask if they were going to be honoring th[e] civil unions] law and providing me with the same coverage that they would any married couple, and I was told no” (quoting Jennifer Bonfilio)).

and lesbians vulnerable to further discrimination, because those "who identify themselves as homosexuals may be stigmatized as 'willing to defy or violate' [traditional values, mores, and] norms"¹¹⁷ in the eyes of others. Thus, if private actors wish to discriminate against or socially ostracize their gay coworkers, the state-created and maintained distinction between the marital status of gay and straight couples allows and enables that private unequal treatment.

The Constitution is concerned with state action promoting private discrimination against gays and lesbians. *Lawrence v. Texas* condemned state sodomy laws because the criminalization of homosexual conduct "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."¹¹⁸ Similarly, *Romer v. Evans* invalidated a state constitutional amendment for placing "[h]omosexuals, by state decree . . . in a solitary class with respect to transactions and relations in both the private and governmental spheres."¹¹⁹ Private discriminations that would not take place but for state facilitation, in particular those targeting gays and lesbians, are therefore subject to equal protection scrutiny.¹²⁰

B. Unlocking Private-Sector Benefits

Unequal private benefits are an equal protection concern for a second reason: the title "marriage" is itself a state-conferred benefit insofar as it is a key that unlocks private-sector privileges. One must be married, for example, to be eligible for some insurance and spousal employment benefits, as discussed above.¹²¹

State-issued identification cards offer an illuminating analogy. Unlike a driver's license, a state identification card does not confer any obvious public benefit (setting aside, *arguendo*, recently enacted

117 *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 88 (Cal. Ct. App. 1991).

118 539 U.S. 558, 575 (2003) (emphasis added); see also *id.* at 576 ("[T]he Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example."). Although the *Lawrence* decision purported to make a substantive due process argument, equality themes were pervasive and the majority opinion bears importantly on the principle of equal protection. See ESKRIDGE & HUNTER, *supra* note 6, at 280–81 (commenting on the important equal protection themes in the majority opinion and their complementarity with the Court's liberty argument).

119 517 U.S. 620, 627 (1996) (emphasis added).

120 See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622–24 (1991) (striking down racially motivated peremptory challenges in civil cases because the discrimination is facilitated by the court).

121 See *Rhoads-Weaver & Rhoads-Weaver*, *supra* note 87, at 544 (discussing one couple's difficulty in obtaining health insurance coverage); *supra* note 108.

laws requiring government-issued identification to vote).¹²² The identification card is useful inasmuch as it permits access to various private-sector benefits: consuming alcohol in a bar, flying on a commercial airline, and opening a bank account, to name just a few. Like marriage, the identification card is itself a state-issued benefit that enables activity within the private sector.

Denial of state identification cards to a disfavored class would certainly raise a question of constitutional magnitude. In fact, Congress recently enacted a law setting minimum uniform standards for state-issued identification cards, including a rule barring undocumented immigrants from obtaining identification cards and setting limits on those obtained by resident aliens.¹²³ While the constitutionality of this new law is in dispute, there is little doubt that the limits on access to state identification cards raise a facial equal protection question.¹²⁴ The card, although conferring no subsidiary state privileges, is itself a benefit of constitutional magnitude because it acts as a key issued by the state to unlock private-sector benefits. Similarly, marriage—or, to make the analogy more precise, the marriage license—unlocks countless private-sector benefits. Denial of marriage licenses to same-sex couples therefore raises a question of constitutional magnitude in an equal protection analysis.

But reducing marriage to a set of instrumental privileges—be they conferred by the private sector or the state—mischaracterizes the institution's core value. Although access to tangible privileges is important and may indeed be a necessary element of a successful equal protection claim, same-sex couples desire marital recognition in large part because of the centrality of marriage to identity. An important aspect of the marital relationship for many same-sex couples, not yet mentioned in the present analysis, is its religious significance. This, too, raises a question of constitutional magnitude.

122 See, e.g., *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (enjoining enforcement of a Georgia law requiring a government-issued identification card to vote).

123 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (REAL ID Act), Pub. L. No. 109-13, 119 Stat. 231 (2005) (creating "REAL ID Act").

124 See *Requirements for Driver's License/I.D.: Hearing on S.B. 189 Before the H. Comm. on State Affairs*, 23d Leg., (Ak. 2006) (statement of Margaret Stock, Associate Professor of Law, United States Military Academy at West Point), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=24&beg_line=00170&end_line=01196&time=0809&date=20060427&comm=STA&house=H (arguing that the REAL ID Act violates the Alaska and U.S. constitutions).

IV. EXPANDING THE DISCUSSION BEYOND EQUAL PROTECTION: CIVIL UNIONS AND THE ESTABLISHMENT CLAUSE

The question of whether civil unions present a deprivation of constitutional magnitude is not limited to the realm of equal protection. Denial of the label "marriage" presents a question of constitutional law because it amounts to a facial deprivation of equal protection *and* because it runs afoul of the First Amendment's Establishment Clause.¹²⁵

It may seem unusual to discuss the Establishment Clause in the context of an equal protection analysis, but the Religion Clauses are themselves "an early kind of equal protection provision . . . assur[ing] that government will neither discriminate for nor discriminate against a religion or religions."¹²⁶ In recognizing opposite-sex religious unions as valid marriages, but declining to extend the same recognition to same-sex religious unions, the state discriminates against those religions that perform same-sex marriages.

The debate over whether same-sex unions constitute marriages is the leading religious controversy of the day. Major worldwide religious denominations including the Methodist, Presbyterian, Lutheran, and Anglican branches of Christianity¹²⁷ and the Conservative branch of Judaism¹²⁸ have faced the serious prospect of permanent division over this issue. This Part argues that the state violates the Establishment Clause, both in doctrine and in aspiration, when it takes sides on such a salient and contentious religious controversy.

Civil unions set the Establishment Clause issue in bold relief. As Andrew Koppelman observes, two separate matters are at stake in the conventional debate over same-sex marriage: an administrative question and a normative question.¹²⁹ The administrative question addresses whether same-sex couples should have access to the same rights and privileges as their opposite-sex counterparts; the normative question addresses whether the law should take a moral stance against same-sex unions. By guaranteeing equal rights and privileges to same-sex couples, civil union states have resolved the administrative question. In those states, opponents of same-sex marriage must

125 U.S. CONST. amend. I.

126 *Newdow v. U.S. Congress*, 328 F.3d 466, 491 (9th Cir. 2002) (Fernandez, J., concurring and dissenting), *rev'd on other grounds* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

127 See Koppelman, *infra* note 144, at 10 n.21.

128 See *infra* note 161.

129 See *infra* note 144.

therefore ground their argument in the belief that the law ought to take sides on the normative question of whether gay unions constitute marriages.

This background sets the stage for the Establishment Clause argument. Instituting civil unions as the alternative to marriage for gay couples runs afoul of the Establishment Clause on two grounds: it lacks a secular legislative purpose and it constitutes an impermissible endorsement of one religious view over others.¹³⁰

A. *Religious Purpose*

Creating a separate legal institution for gay and lesbian couples lacks a secular purpose. To avoid privileging one religion over others and religion over irreligion, the Establishment Clause compels legislatures to enact laws for secular goals.¹³¹ Although laws may be motivated by a variety of purposes, courts look to the legislative history in identifying the predominating purpose.¹³²

The predominating purpose motivating the exclusion of gays and lesbians from state-recognized marriages is religious. Speaking of policies that exclude gays and lesbians, Episcopal Bishop V. Gene Robinson observed,

There is perhaps no other prejudice ensconced in the laws of this land so based on sacred scripture, so entwined with our theological understanding of the nature of humankind and the sexuality which proves to be its blessing and its curse. No other attitude in the body politic is so tied to an attitude stemming from a particular Judeo-Christian teaching. Change in no other social attitude in the secular culture is so tied to change in religious belief.¹³³

130 I understand that the argument set forth in this Part will likely be unpersuasive to most United States courts today. Nonetheless, the argument is doctrinally sound and contributes to the scholarly discourse on same-sex marriage and civil unions.

131 See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 585–86 (1987) (removing a creationism law for lacking a secular legislative purpose, as required by the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 60–61 (1985) (striking down a school prayer statute for lacking a secular purpose); *Stone v. Graham*, 449 U.S. 39, 41 (1980) (invalidating a state requirement to post the Ten Commandments in schools for lack of a secular purpose).

132 See, e.g., *Edwards*, 482 U.S. at 588–89 (scrutinizing the legislative history); *Wallace*, 472 U.S. at 59 (drawing evidence from the legislative history).

133 Audio file: V. Gene Robinson, Bishop of N.H., Lecture at Nova Southeastern University Shepard Broad Law Center 2007 Goodwin Symposium: 30 Years After Anita Bryant's Crusade: The Continuing Role of Morality in the Development of Legal Rights for Sexual Minorities, at 57:50 (Nov. 27, 2007), available at <http://www.nsulaw.nova.edu/goodwin/videos/2007/robinson.wmv>. An article based on this talk is forthcoming. 32 NOVA L. REV. (forthcoming 2008).

This may explain why the movement to exclude gay couples from the institution of marriage has been a fundamentally religious movement.¹³⁴ Legislators and activists alike have publicly professed their opposition to gay marriage for religious reasons. Presidential candidates—even those who support civil unions—have relied on religious beliefs to explain their opposition to same-sex marriage.¹³⁵ One New York assemblyman echoed this common view, explaining his opposition to same-sex marriage as religious, and adding that he would not support a bill extending marriage to gays “unless God sends a message to me during the next two hours of the debate.”¹³⁶ Doug Stiegler, Executive Director of the Family Protection Lobby in Maryland, lobbied legislators with this message: “Marriage is, by God’s definition, one man and one woman Marriage and family is the bedrock of any society. It’s been here since the beginning of time. Gays and lesbians have not been here since the beginning of time.”¹³⁷

Oregon’s gay marriage ban, enacted by citizen-initiative, owes its success to aggressive political organizing by evangelical churches.¹³⁸ Churches that organized petition drives to qualify the gay marriage ban for the 2004 general election ballot declined to circulate peti-

134 Indeed, the entire public policy discourse about the status of gays and lesbians in American society is inseparable from religious themes. At a congressional hearing, General Peter Pace, Chairman of the Joint Chiefs of Staff, explained that he supports the military’s “don’t ask, don’t tell” policy because gay sex is “counter to God’s law,” adding, “My upbringing tells me that sexual activity outside the bonds of marriage between a man and a woman is immoral.” Josh White, *Pace’s Remarks on Gays Upset Hearing on Hill*, WASH. POST, Sept. 27, 2007, at A16.

135 See, e.g., David Domke, *How Are the Main Contenders Handling the Faith Issue?*, USA TODAY, Dec. 3, 2007, at 13A (quoting John Edwards’ religious explanation for his opposition to same-sex marriage); accord, e.g., David D. Kirkpatrick & Michael Powell, *Between Pulpit and Podium, Huckabee Straddles Fine Line*, N.Y. TIMES, Jan. 19, 2008, at A1 (urging passage of a constitutional amendment banning gay marriage to bring the Constitution in line with “God’s standards”).

136 Michael M. Grynbaum, *Gay Marriage, a Touchy Issue, Touches Legislators’ Emotions*, N.Y. TIMES, June 21, 2007, at B5 (internal quotation marks omitted).

137 Kelly Brewington, *Gay Marriage Case in Md. Court; State’s Highest Court Weighs Right to Wed; Judges Ask Few Questions as Scene Outside Is Quiet*, BALT. SUN, Dec. 5, 2006, at 1A (internal quotation marks omitted).

138 See Bill Graves, *Gay Marriage Fight Takes Shape*, OREGONIAN (Portland, Or.), July 31, 2004, at A01 (“The Defense of Marriage Coalition successfully placed the measure on the fall ballot this week by drawing heavily on churches to collect more than 240,000 signatures.”); Bill Graves & Jeff Mapes, *Faith Politics Could Tip Vote*, OREGONIAN (Portland, Or.), Oct. 30, 2004, at D01 (“Some congregations have become active in the [marriage amendment] campaign by canvassing neighborhoods, registering voters, displaying campaign signs, distributing campaign literature, and calling voters. Several also have shown a DVD, during church services, in support of [the gay marriage ban] produced by the measure’s sponsor, the Defense of Marriage Coalition.”).

tions to oppose the state's new domestic partnership law,¹³⁹ however, and the referendum consequently failed to garner enough signatures to qualify for the ballot.¹⁴⁰ These actions have brought into focus the view of many religious activists and legislators that reserving civil marriage for heterosexual couples is a religious concern, while any other legal status gays might obtain is not.¹⁴¹

The most commonly asserted secular purpose for same-sex marriage bans is that the state should sanction heterosexual marriage as the optimal condition for childrearing.¹⁴² This asserted purpose amounts to little more than a non sequitur, however. The state does not seriously purport to encourage gays and lesbians to marry people of the opposite sex and to raise children in the context of those marriages. Nor is there any evidence that same-sex couples not permitted to marry will decline to have children. (By any account, children raised by same-sex couples are worse off when their parents lack the status of civil marriage.)¹⁴³ Since same-sex marriage bans do not result in any practical benefit to children, one is left to conclude that the childrearing account is nothing more than a secular reframing of the belief that the law should codify moral precepts.¹⁴⁴

One might project a variety of other secular purposes attained by banning same-sex marriage, among them: using state resources to incentivize childrearing in the context of historically reliable opposite-sex relationships,¹⁴⁵ or conversely, using state resources to support

139 See Bill Graves, *Clock Ticking for Gay-Rights Law Foes*, OREGONIAN (Portland, Or.), Aug. 14, 2007, at A01 (describing the petition drive opposing Oregon's domestic partnership law).

140 See Michelle Cole, *Opponents of Domestic Partnerships Fall Short*, OREGONIAN (Portland, Or.), Oct. 9, 2007, at C01 (reporting that volunteer signature-gatherers fell 116 signatures short in a failed attempt to repeal the state's domestic partnership law).

141 This Comment has offered just a few pieces of evidence supporting its claim that legislation opposing gay marriage lacks a primarily secular purpose. To successfully litigate this point, one would need to offer significantly more evidence.

142 See, e.g., Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 49 (2004) ("By making marriage a permanent sexual union based on the fidelity of both spouses, the state seeks to increase the likelihood that children will be raised in 'intact' families, cared for by their mother and father.").

143 See *supra* note 35, 95.

144 See generally Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 7-15 (2004) (discussing the problem of conflating utilitarian and normative arguments in the same-sex marriage debate).

145 See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (arguing that one purpose for resisting same-sex marriage is the inconclusiveness of scientific evidence as to the impact of same-sex parents on childrearing).

"all too often casual or temporary" heterosexual relationships likely to produce unplanned pregnancies.¹⁴⁶

These hypothetical purposes fall short. First, advocates of reserving marriage for opposite-sex couples would be hard pressed to argue that these theoretical purposes have *actually* motivated legislators.¹⁴⁷ Even if some legislators had these purposes in mind, evidence that religious purposes have predominated is overwhelming. Second, when a state offers all of the material benefits of marriage to same-sex couples in the form of civil unions, these secular purposes no longer make sense.¹⁴⁸ Civil union states no longer provide greater financial resources to opposite-sex married couples than to same-sex civil-united couples. Since the state's allocation of resources is equal among gay and straight couples, the only legislative purpose remaining must be symbolic.

Those who defend the distinction between marriage and civil unions may account for this symbolic distinction as the legislature's wholly secular deference to public opinion or tradition. But these purportedly secular purposes are merely proxies for the impermissible religious purpose, since religious notions about marriage have shaped the traditional norm and public opinion.¹⁴⁹ If these apparently secular stand-ins for religious purposes could save a statute, then school prayer, Ten Commandments monuments, and creationism curricula would be defensible on the same ground.¹⁵⁰ The sym-

146 See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (arguing that marriage can be viewed as a sort of heterosexual welfare program).

147 The Establishment Clause test is of a law's subjective purpose. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) ("In applying the purpose test, it is appropriate to ask whether *government's actual purpose* is to endorse or disapprove of religion." (emphasis added) (internal quotation marks omitted)).

148 The Arizona Court of Appeals explained that state's limitation of marriage to opposite-sex couples this way: "[B]y legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship, the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern." *Standhardt v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003). If Arizona adopted a civil union law, this explanation would be nonsensical. Civil unions, like civil marriage, "impos[e] both obligations and benefits on the couple and insert[] the State in the relationship." *Id.* If gay and straight relationships alike are "uniquely important as a public concern," *id.*, then something else must explain why only heterosexual couples are entitled to the special status afforded by civil marriage.

149 See Robinson, *supra* note 133.

150 Seventy-nine percent of Americans support the teaching of creationism in public schools, James Glanz, *Survey Finds Support Is Strong for Teaching 2 Origin Theories*, N.Y. TIMES, Mar. 11, 2000, at A1, and creationism represents the "traditional" western view of the origins of life. Still, laws mandating the teaching of creationism are unconstitutional because they

bolic purpose underlying the marriage/civil unions distinction is, at its core, religious.¹⁵¹

B. Endorsement of One Religious Tenet over Competing Views

For most Americans, a marriage is a religious rite performed by a member of the clergy.¹⁵² The officiant serves a dual role as religious leader and agent of the state.¹⁵³ But when the state declines to recognize some religious weddings as marriages, it expresses a preference for those religious rites to which it affords complete sanction. Since state endorsements of religions or religious beliefs are impermissible under the Establishment Clause,¹⁵⁴ this declared preference is unconstitutional.

Marriage has been recognized as a religious rite by the Supreme Court. In *Turner v. Safley*,¹⁵⁵ a case protecting the right of inmates to marry, the Court acknowledged, “[M]any religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith”¹⁵⁶ By recognizing a religious wedding as a civil ceremony, the state sanctions the religious rite. This is in contrast

are motivated by religious purposes. See *Edwards v. Aguillard*, 482 U.S. 578, 585–86 (1987) (striking down a creationism education law). One might distinguish creationism and Ten Commandments monuments on the ground that they are inherently religious in nature, while opposition to same-sex marriage is not. So-called “intelligent design” curricula and moments of silence (rather than vocalized prayer) are not inherently religious, however, and deference to tradition and public opinion do not save them either.

- 151 In an interview with the *New York Times*, Justice John Paul Stevens floated a similar argument in support of abortion rights. See Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50 (“[R]estrictions on a woman’s right to choose may be unconstitutional because they reflect religiously motivated views about human life—thus violating the government’s responsibility under the First Amendment to be neutral between religious and secular viewpoints.”).
- 152 See *Kerrigan v. State*, 909 A.2d 89, 96 (Conn. Super. Ct. 2006) (“[Marriage] is perhaps best known as an ecclesiastical institution.”).
- 153 This dual role is evident when examining the memorable wedding script: “By the power vested in me, by” See Rhoads-Weaver & Rhoads-Weaver, *supra* note 87, at 544 (discussing state endorsement in the traditional wedding script).
- 154 See *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 575 (1989) (“[T]he Constitution mandates that the government remain secular, rather than affiliat[ing] itself with religious beliefs or institutions, precisely in order to avoid discriminating”); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).
- 155 482 U.S. 78 (1987) (recognizing a constitutional right to marry by overturning Missouri’s ban of marriages for the incarcerated). For more information, see *supra* text accompanying note 42.
- 156 *Id.* at 96.

with some European countries that recognize only civil marriages performed by justices of the peace or other state authorities; religious weddings in these countries are entirely separate and have no civil significance.¹⁵⁷

Many (if not most) same-sex unions are religious marriages.¹⁵⁸ Same-sex marriages are performed and recognized by Jewish denominations including Reform,¹⁵⁹ Reconstructionist,¹⁶⁰ and Conservative;¹⁶¹ some Episcopalians¹⁶² and other mainline Christian denominations, such as the United Church of Christ,¹⁶³ as well as other religious groups, including Unitarians and some Buddhists.¹⁶⁴ These religious marriages are performed in the same types of ceremonies and by the same clergy who, when acting with the sanction of the state, perform opposite-sex unions. But states that recognize only civil unions for same-sex couples express a preference for opposite-sex religious weddings over same-sex unions.

It is true that religious clergy can officiate at and solemnize a same-sex civil union just as they can an opposite-sex marriage.¹⁶⁵ But civil unions are not religious rites, while marriages are. By recogniz-

157 See, e.g., Embassy of France in the United States, Getting Married in France, <http://www.ambafrance-us.org/visitingfrance/marriage.asp> (last visited Feb. 4, 2008) (describing the civil and religious marriage processes in France).

158 See, e.g., Donovan, *supra* note 2, at 749 (discussing one gay couple's religious wedding).

159 See Linda Kulman, *Helping "Two People Who Love Each Other,"* U.S. NEWS & WORLD REP., Apr. 10, 2000, at 50 (stating that the Central Conference of American Rabbis overwhelmingly passed a resolution allowing Reform Jewish rabbis to officiate at same-sex ceremonies).

160 See Josh Lipowsky, *Civil Union Clause Draws Mixed Reaction*, JEWISH STANDARD (N.J.), Jan. 4, 2007, available at <http://www.jstandard.com/articles/2076/1/Civil-union-clause-draws-mixed-reactions> ("[T]he Reconstructionist movement sanctions gay marriage . . .").

161 See Laurie Goodstein, *Conservative Jews Allow Gay Rabbis and Unions*, N.Y. TIMES, Dec. 7, 2006, at A26 ("The highest legal body in Conservative Judaism . . . voted yesterday to allow the ordination of gay rabbis and the celebration of same-sex commitment ceremonies.").

162 See Sharon LaFraniere & Laurie Goodstein, *Anglicans Rebuke U.S. Branch on Blessing Same-Sex Unions*, N.Y. TIMES, Feb. 20, 2007, at A1 (discussing the American Episcopal Church's performance of same-sex unions).

163 See Shaila Dewan, *United Church of Christ Backs Same-Sex Marriage*, N.Y. TIMES, July 5, 2005, at A10 (reporting on the denomination's acceptance of gay marriage rites); see also Koppelman, *supra* note 144, at 10 n.21 (documenting the division among Christian denominations concerning same-sex marriage).

164 See generally Harry Knox & Sharon Groves, *World Religions and the Struggle for Equality*, HUMAN RIGHTS CAMPAIGN, Mar. 1, 2006, <http://www.hrc.org/issues/religion/1252.htm> (describing the various religious positions on same-sex marriage).

165 See Oregon Family Fairness Act, H.B. 2007, § 2(8), 74th Legis. Assem., Reg. Sess. (Or. 2007) (explaining that civil unions can be solemnized by clergy, but no religious solemnization is necessary).

ing only one type of religious union as a valid marriage, the state expresses its preference for that religious rite over its counterparts.

One might counter this argument by observing that the state regularly takes sides among competing religious tenets, for example, when it deems that divorce is permissible and polygamy is not. First, divorce is distinguishable on the ground that, unlike marriage, it is an entirely secular, civil process. Legal divorces do not occur at religious ceremonies. They are not performed or overseen by clergy and they lack the religious context of (even civil) marriages.¹⁶⁶ Second, divorce and polygamy are distinguishable on the ground that the state has a secular utilitarian interest in permitting divorce and proscribing polygamous marriages;¹⁶⁷ by contrast, civil union states lack any secular interest in withholding the title of marriage from same-sex couples.¹⁶⁸ Third, unlike divorce and polygamy, the validity of same-sex marriages is the leading religious controversy of our day. Major Christian and Jewish denominations have faced the serious specter of permanent division over this issue.¹⁶⁹ The religious conflict's salience implicates Establishment Clause doctrine in two ways: first, when the state weighs in on the leading religious controversy of the day, the "reasonable observer" is likely to interpret the state's decision as a religious endorsement;¹⁷⁰ and second, the aspiration of the Establishment Clause is that the state not pick sides in such a fundamental religious clash.¹⁷¹

166 Furthermore, permitting divorce is the religiously neutral state position, since it allows adherents to abstain from divorce because their religion forbids it.

167 The state's interest in permitting divorce is, *inter alia*, to maximize individual autonomy. The state's interest in proscribing polygamous marriages is, *inter alia*, to prevent the subjugation of women. The prudence of these policies is not at issue. This Comment only asserts that secular utilitarian interests distinguish the cases of divorce and polygamous marriage from the case of the civil union state that bars same-sex marriage.

168 See *supra* Part IV.A.

169 See Koppelman, *supra* note 144, at 10 n.21.

170 One relatively trivial yet clear example of this phenomenon is the decision of eHarmony.com, a dating website founded by evangelical Christian leader Neil Clark Warren that promotes religious marriage, to deny service to gays and lesbians. Rather than justifying the company's decision on disputed religious grounds, Warren argues that because same-sex marriage is illegal in most states, "We don't really want to participate in something that's illegal." See Korbblum *supra* note 115. By endorsing Warren's religious views, the state provides him a sort of "political cover," even in the context of a religiously themed website. Rather than justifying the website's policy on religious grounds, Warren appeals to state authority as if to say, "Our decision is justified because the government endorses our religious view."

171 See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (holding that the Establishment Clause requires "neutrality," which is absent "when the government's ostensible object is to take sides"; and arguing that this "understanding [was] reached . . . after dec-

This type of religious preference is impermissible under the Establishment Clause, which "at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"¹⁷² The state takes a strong position on a religious question by recognizing the validity of opposite-sex religious unions but not same-sex religious unions.¹⁷³ Essentially, the state communicates that Southern Baptists are right and Episcopalians are wrong; Orthodox Jews are right and Reform Jews are wrong; Seventh Day Adventists are right and Unitarian Universalists are wrong. Moreover, the state makes this important religious distinction "relevant to a person's standing in the political community"¹⁷⁴ by depriving gay couples of married status, perhaps the status *most* relevant to one's standing in the American political community.¹⁷⁵ The state's refusal to accord civil legitimacy to religious same-sex marriages is therefore an impermissible endorsement of religion under the First Amendment's Establishment Clause.

ades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . ." (second and third alteration in original) (internal quotation marks omitted)). See generally Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-98 (1992) (arguing that "the Establishment Clause extinguished" the use of "[r]eligious grounds for resolving public moral disputes"). Sullivan provides extensive doctrinal support for her view that the Establishment Clause's aspiration is one of secular neutrality in government decision-making. Her view is also grounded in the history of America's church-state separation. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987) ("The social and historical conditions of modern democratic regimes have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration . . .").

172 *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 594 (1989).

173 Indeed, this is precisely why conservative churches have been so active in barring state recognition of same-sex marriages: they want their religious beliefs codified in law. See, e.g., Kirkpatrick & Powell, *supra* note 135 (describing the view of Mike Huckabee, a presidential candidate and evangelical pastor, who supports a constitutional amendment banning gay marriage in order to bring the Constitution in line with "God's standards"); Editorial, *Mr. Spitzer and Gay Marriage*, N.Y. TIMES, Apr. 24, 2007, at A24 ("Religious groups, particularly the Catholic Church, are likely to be the bill's most outspoken opponents. It should be clear that these religious institutions have the right to refuse to marry anyone within their own religious houses. But they should not be allowed to dictate who can and cannot be married by the state.").

174 *McCreary County*, 545 U.S. at 883 (internal quotation marks omitted).

175 American political discourse and public policy is heavily focused on promoting marriage and providing for families headed by a married couple. Indeed, "[t]he family is the most important organizing unit of our society." Katz, *supra* note 26, at 61-62.

CONCLUSION

Acting at the direction of its State Supreme Court, the New Jersey legislature has now enacted a civil union statute, extending to same-sex couples all of the legal incidences of marriage but also codifying their disfavored status in law. Echoing a Massachusetts Supreme Court justice's Shakespearian play on words,¹⁷⁶ New Jersey's Justice Albin, writing for the court's majority, suggested that the different status might not be an unequal status, rhetorically asking, "what's in a name?"¹⁷⁷ The answer to his question: quite a lot.

Unaddressed in the present analysis is perhaps the greatest inequity of the civil union scheme: lack of recognition in other jurisdictions. Although a same-sex couple in Vermont, New Jersey, Connecticut, or California may receive most of the state-conferred tangible benefits afforded to their straight counterparts, nearly all of those benefits and protections evaporate as soon as that couple crosses state lines.¹⁷⁸ And even while that same-sex couple remains within its home state, it receives no privileged recognition or tangible benefits from the federal government.¹⁷⁹ Because no government entity is responsible for the inequalities perpetrated by other government entities, this consideration fails to establish a facial equal protection claim.¹⁸⁰

Although this Comment argues that the title "marriage" is a benefit of constitutional magnitude, it does not address whether an overriding factor—be it deference to tradition,¹⁸¹ concern for institutional

176 *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 n.1 (Mass. 2004) (Sossman, J., opinion) (quoting Shakespeare's *Romeo and Juliet*).

177 *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

178 *See, e.g., Langan v. St. Vincent's Hosp.*, 802 N.Y.S.2d 476, 479–80 (App. Div. 2005) (holding that a surviving civil-unioned partner has no claim in tort for the wrongful death of his spouse in New York).

179 *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)) (declining to afford any federal recognition to same-sex marriages recognized by state governments).

180 *See Kerrigan v. State*, 909 A.2d 89, 101 (Conn. Super. Ct. 2006) (calling this "real injury . . . a situation over which neither the legislature nor this court has any power").

181 One wonders whether tradition alone is sufficient to make a normative equal protection argument. As Justice Holmes famously said, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from imitation of the past." O. W. Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897). *But see* Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1097–103 (2005) (arguing that "[h]abit, custom, tradi-

stability, or something else—might justify the marriage/civil union inequality. Nor does it address what level of equal protection scrutiny courts should apply to this classification.

Even if the classification were held constitutionally invalid, this Comment does not presume that elevating same-sex relationships to marriage status is the only available remedy.¹⁸² One solution proposed by some gay rights advocates would eliminate state recognition of "marriage" altogether. The state would grant civil unions to opposite- and same-sex couples equally, leaving the definitionally loaded status of marriage to the private and religious spheres. Alternatively, the state could afford no privileged status to committed, romantic, monogamous relationships, guaranteeing equal benefits to all family-like relationships, whether between cohabitating sisters, friends, or spouses.¹⁸³ Or states could "unbundle" marriage rights, allowing individuals to parcel out the legal entitlements of marriage to the friends or family-members of their choosing.¹⁸⁴

No matter what the particular remedy, however, the increasingly popular civil union solution faces significant constitutional hurdles. Civil union proponents argue that depriving same-sex couples of the title of marriage does not raise a constitutionally cognizable inequality. But one has little doubt that if a legislature stripped another disfavored class of that venerated title—say Native Americans or the disabled—judges would rightly acknowledge the obvious inequality and proceed to apply the standard equal protection scrutiny. Insisting

tion, and settled understandings" provides a persuasive reason to resist same-sex marriage, which must be overcome by same-sex marriage advocates). Holding on to tradition for its own sake is a trend being confronted in many arenas. See, e.g., David S. Connors, *A Ghost in the Catalog: The Gradual Obsolescence of the Main Entry*, 55 SERIALS LIBRARIAN (forthcoming 2008) (arguing that persisting in using outdated concepts prevents needed adaptation to novel conditions).

182 See, e.g., *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result) ("Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.").

183 See Watson, *supra* note 92 (discussing "[b]eyond [m]arriage" movement, which advocates this policy solution). Watson discusses a move in this direction by the City Council in Salt Lake City, Utah, where an "ordinance [was adopted] that allows employees to choose their own 'adult designee' to receive spousal benefits. This designee could be a roommate, relative or a domestic partner who lives indefinitely with the employee and is financially connected to the employee . . ." *Id.*

184 See Conley, *supra* note 6 ("We could go down the list of rights and responsibilities embedded in the marriage contract. . . . [And] everyone [could] have the freedom to decide how to configure his domestic, business, legal and intimate relationships in the eyes of the law.").

that marriage and civil unions are equal belies the very reason for the distinction. Policymakers and members of the public do not hold them to be equal, which is precisely why it is so important to so many people that marriage be withheld from same-sex couples. Gays and lesbians are not blind to the important difference between a marriage and a civil union, and neither is our Constitution.