

## THE REACTIONARY ROAD TO FREE LOVE: HOW DOMA, STATE MARRIAGE AMENDMENTS, AND SOCIAL CONSERVATIVES UNDERMINE TRADITIONAL MARRIAGE

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Much has been written about the possible effects on different-sex marriage of legally recognizing same-sex marriage. This Article looks at the defense of marriage from a different angle: It shows how *rejecting* same-sex marriage results in political compromise and the proliferation of “marriage light” alternatives (e.g., civil unions, domestic partnerships or reciprocal beneficiaries) that undermine the unique status of marriage for everyone. After describing the flexibility of marriage as it has evolved over time, the Article focuses on recent state constitutional amendments attempting to stop further development. It categorizes and analyzes the amendments, showing that most allow marriage light experimentation. It also explains why ambiguous marriage amendments should be read narrowly. It contrasts these amendments with foreign constitutional provisions aimed at different-sex marriages, revealing that the American amendments reflect anti-gay animus. But they also reflect fear of change. This Article gives reasons to fear the *failure* to change.

Comparing American and European marriage alternatives reveals that they all have distinct advantages over traditional marriage. The federal Defense of Marriage Act adds even more. Unlike same-sex marriage, these alternatives are attractive to different-sex couples. This may explain why marriage light

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regimes increasingly extend to all couples, and why these gender-neutral marriage alternatives—once established—tend to be permanent. In the end, *all* couples could be left with cafeteria options for legal relationship recognition. This may be a good solution, but it is certainly not a conservative one.

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*I don't support gay marriage despite being a Conservative. I support gay marriage because I'm a Conservative.*

—David Cameron<sup>1</sup>

## I. INTRODUCTION

Opponents of same-sex marriage are destroying traditional marriage, not defending it as they claim.<sup>2</sup> This may sound odd in terms of the current marriage debate. Yet, it becomes obvious if one takes a step back to view the struggle in context.

Because there are at least as many proponents as opponents of same-sex marriage, the standoff tends to result in a compromise recognizing some form of marriage light.<sup>3</sup> This trend toward legal alternatives to marriage is amplified by traditionalist support of covenant marriage options and—at least for now—by the federal Defense of Marriage Act (“DOMA”).<sup>4</sup> It is virtually ensured by the strategy of amending state constitutions, which forestalls the marriage option for future generations and invites experimentation with marriage light alternatives. And once gender-neutral marriage light is established, it is resilient. In the end, *all* couples could be left with cafeteria options for legal relationship recognition.

As British Prime Minister David Cameron has recognized, marriage is conservative, and its nature does not change when it is extended to same-sex couples.<sup>5</sup> Some progressive activists agree. Since at least the 1950s, some supporters of gay and lesbian equality have rejected advocacy of same-sex marriage because it could shore up the conservative institution of marriage

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<sup>1</sup> Tim Ross, *Archbishop Attacks Cameron's "Gay Marriage" Plan*, DAILY TELEGRAPH (U.K.) (Oct. 5, 2011), <http://www.telegraph.co.uk/news/uknews/8809548/Archbishop-attacks-Camerons-gay-marriage-plan.html>.

<sup>2</sup> While there are good reasons to doubt this claimed motivation in many cases, *see infra* Part VI, this Article is concerned with those who sincerely care about defending marriage more than disapproving of lesbians and gay men. Hopefully, it will convince some that their opposition to same-sex marriage is shortsighted and counterproductive. In the process, it provides a new take on several broader legal questions in the marriage debate.

<sup>3</sup> *See infra* Part V.A (describing this political calculation); *see also infra* pp. 209–209 (defining “marriage light”).

<sup>4</sup> Defense of Marriage Act, Pub. L. No. 104-100, §3(a), 110 Stat. 2419 (2006) (codified at 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)). While the federal definition of marriage in DOMA may soon be struck down by the U.S. Supreme Court, *see Massachusetts v. U.S. Dept. of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012) (holding that DOMA violated equal protection principles, and thus was unconstitutional), *petition for cert. filed*, 81 U.S.L.W. 3006 (July 20, 2012) (No. 12-97), DOMA remains in effect as of the publication of this article.

<sup>5</sup> Ross, *supra* note 1.

rather than liberate individuals to define their own families of choice.<sup>6</sup> Conservatives like David Brooks and Jonathan Rauch support same-sex marriage for that very reason.<sup>7</sup> But the point seems lost on conservative opponents of marriage equality.<sup>8</sup> They focus instead on their fears about the possible effects of same-sex marriage on different-sex spouses. Meanwhile, they fail to recognize the much more radical consequences of their own short term victories: the likelihood that their strategies in opposing marriage for lesbians and gay men will eventually undermine the status of civil marriage for everyone.<sup>9</sup>

While marriage has evolved dramatically over time, it continues to play two parallel roles.<sup>10</sup> Largely because of its historical, religious, and social connotations, marriage communicates a set of general expectations and messages about a married couple and their family.<sup>11</sup> Governments also regulate civil marriage; and governments, businesses and others rely on this legal status in determining thousands of specific benefits, rights, limitations, and responsibilities for couples and their children.<sup>12</sup>

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<sup>6</sup> See, e.g., Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK: NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON 118, 123–24 (1997); Nancy Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 90–91 (2009).

<sup>7</sup> Jonathan Rauch, *For Better or Worse?*, THE NEW REPUBLIC, May 6, 1996, reprinted in SULLIVAN, *supra* note 6, at 169, 169–181; see also ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 182–83 (1995); David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15; Theodore Olson, *The Conservative Case for Gay Marriage*, NEWSWEEK, Jan. 18, 2010, at 48.

<sup>8</sup> See *infra* Part II.C.2.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part II.A (describing some of the substantial ways in which marriage has changed over time).

<sup>11</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (recognizing that marriage “demonstrate[s] to one another and to society [a couples’] mutual commitment”); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 417 n.14 (Conn. 2008) (“Any married couple [reasonably] would feel that they had lost something precious and irreplaceable if the government were to tell them that they no longer were “married” and instead were in a “civil union.” The sense of being “married”—what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies—would be taken from them.”)(quoting Brief for Lambda Legal Defense and Education Fund, Inc. as Amici Curiae, (No. 17716), 2007 WL 4725454, at \*5)).

<sup>12</sup> See *Varnum*, 763 N.W.2d at 873. Paula Ettelbrick observed that marriage “has become a facile mechanism for employers to dole out benefits, for businesses to provide special deals and incentives, and for the law to make distinctions in distributing meager public funds.” Ettelbrick, *supra* note 6, at 123–24.

More and more people now view as unjust the refusal to grant these benefits, rights, and responsibilities to same-sex couples and their children.<sup>13</sup> In attempting to compromise and provide equal legal rights without altering the tradition- and religion-laden communicative component of marriage, presidents, legislatures, and some judges have separated those legal attributes from the word “marriage.”<sup>14</sup> One popular solution has been to maintain different-sex civil marriage alongside new, separate-but-equal same-sex “quasi-marriages” with the legal attributes of marriage, but a different label such as “civil union” or “domestic partnership.”<sup>15</sup>

Given the nature of political compromise, some legislatures do not go as far as others. Instead, they have devised lesser, “semi-marriage” institutions, which alter the legal attributes as well as the name of the recognized relationship.<sup>16</sup> Different rules and less benefits and responsibilities stem from these experimental new “domestic partnership” and “reciprocal beneficiary” regimes.<sup>17</sup>

Because of the multifaceted distinctions in nomenclature and attributes of new quasi- and semi-marriage institutions, this article uses the collective term “marriage light” when discussing forms of state-created recognition of pairs if the forms do not constitute full marriage equality under applicable state or foreign law, including the communicative label “marriage.”<sup>18</sup>

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<sup>13</sup> See *Marriage*, GALLUP, <http://www.gallup.com/poll/117328/marriage.aspx> (last visited Sept. 8, 2012) (showing consistently increasing number of people who “think marriages between same-sex couples should . . . be recognized by the law as valid, with the same rights as traditional marriages” from twenty-nine percent to fifty percent since 1996).

<sup>14</sup> See, e.g., *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (recognizing the right of same-sex couples to “the same benefits and protections afforded by Vermont law to married opposite-sex couples” while suggesting that a quasi-marriage alternative would meet that standard); *infra* note 264 (George W. Bush’s view that states should be able to grant benefits and duties of marriage without the label); *infra* notes 340–342 and accompanying text (listing state statutes sanctioning various marriage light regimes).

<sup>15</sup> This Article employs the useful “quasi-marriage” and “semi-marriage” terminology coined by Kees Waaldijk. See Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 570 (2004). Since the federal DOMA refuses recognition of over 1,100 federal benefits, rights and responsibilities of marriage to all same-sex couples and likely to most different-sex couples in quasi-marriages, see *infra* notes 428–433, all American same-sex marriages and most same- or different-sex quasi-marriages could be classified as semi-marriages. See *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 379 (D. Mass. 2010) (citing General Accounting Office reports concluding that DOMA implicated 1,138 laws in 2004). However, for purposes of this Article it is useful to differentiate between marriage, quasi-marriage, and semi-marriage as determined solely by state or foreign law.

<sup>16</sup> See *infra* note 342 and accompanying text.

<sup>17</sup> See *infra* Part V.B, note 342.

<sup>18</sup> In addition to registered relationships, this Article considers marriage light to include legally recognized cohabitation without registration in jurisdictions where significant legal

Various forms of marriage light represent an increasingly popular compromise between those who favor and those who oppose marriage equality for same-sex couples. Faced with strong opposition to marriage equality, supporters of same-sex marriage have often settled for marriage light compromises. Some conservatives opposing same-sex marriage also find these compromises acceptable.<sup>19</sup> Even conservatives opposing compromise seem less troubled by new marriage light alternatives than by the specter of full marriage equality.<sup>20</sup> Ignoring any independent danger to unitary marriage posed by

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consequences stem from that recognition. *See infra* Part IV.C. It appears that the term “marriage lite” was first used in the context of covenant marriage debates in the 1990s, describing the status to which “marriage plus” covenant marriages would relegate “regular marriage.” *See* Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law*, 47 EMORY L.J. 929, 956 (1998) (citing opponents of Louisiana’s covenant marriage law during the 1997 debate for the proposition that covenant marriage would “undermine and degrade the status of ‘regular’ marriages” as “‘marriage lite, L-I-T-E,’” in comparison) (citing *Nightline: Covenant Marriages: New Louisiana Law Makes It Harder to Divorce* (ABC television broadcast Aug. 20, 1997); *see also* Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 450 (1999) (citing Amitai Etzioni, *Marriage With No Easy Outs*, N.Y. TIMES, Aug. 13, 1997, A23, as an example of the way “many writers” refer to the two-tier system of “Marriage Lite” and “Marriage Plus” as a matter of concern to both liberals and conservatives). Since 2000, “marriage lite” and “marriage light” have been widely used to describe civil unions, domestic partnerships and other non-marital forms of recognition for same-sex relationships. The term here is not meant to diminish the significance of this recognition, which provide important legal benefits and societal recognition to many relationships. Rather, it is used as shorthand to distinguish those relationships from legally recognized marriages. In an attempt to minimize the denigrating sense of the term, this article employs the term “marriage light,” rather than “marriage lite.”

<sup>19</sup> *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 311–14 (1992) (suggesting the possible desirability of a Swedish-style contractual “simulacrum of marriage” since the incidents of marriage, designed with heterosexual couples in mind, may not be a precise fit for same-sex couples); William J. Bennett, *GOP Must Wed Values to Politics*, L.A. TIMES, Jan. 18, 2004, (Opinion) at 2, available at 2004 WLNR 19795619 (expressing openness to states granting “individuals in a relationship of mutual responsibility certain benefits, privileges, rights and immunities ‘based on need,’” so long as they are allocated “without discrimination and without privileging homosexual relations”); David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK 11 (in which the president of the Institute for American Values joined Jonathan Rauch in recognizing that opponents of marriage equality “may come to see civil unions as a compassionate compromise” and calling for Congress to create federal civil unions with “robust religious-conscience exceptions”); Ross, *supra* note 1 (reporting that British Bishop Kieran Conry objected to marriage equality while stressing “the Catholic Church supported civil partnerships [in the U.K.], which confer the same rights to gay couples as marriage”).

<sup>20</sup> Even Maggie Gallagher, co-founder of the National Organization for Marriage, once implied that it might be acceptable to experiment with marriage light for same-sex couples as a prerequisite to seriously considering the issue of marriage equality for lesbians and gay men. *See* Maggie Gallagher, *Is There a Fourth Option? Granting Legal Benefits to Gay Couples Won’t Mute the Marriage Debate*, NAT’L REV. ONLINE (June 6, 2005, 8:04 AM), <http://www.nationalreview.com/articles/214617/there-fourth-option/maggie-gallagher> (stating

experimentation, they focus on minimizing, if not eliminating, recognition of same-sex couples.<sup>21</sup> Ironically, some “conservatives” have also supported voluntary different-sex covenant marriage options, pioneering the realm of legal alternatives to unitary marriage and blazing a trail for the more popular marriage light options to follow.<sup>22</sup>

The uncompromising conservatives, who oppose marriage light for same-sex couples, argue that it poses a danger to the unique status of marriage in our society. They are right, but for the wrong reason. They believe it is because same-sex civil unions and domestic partnerships are too similar to marriage.<sup>23</sup> Actually, the danger is that they will be *too different* from marriage, and therefore more attractive to different-sex couples.<sup>24</sup>

The experience of French *pactes civil de solidarité* (“PACS”), Dutch registered partnerships, and similar institutions in several U.S. jurisdictions reveals that some heterosexual couples find marriage light an attractive alternative to traditional marriage.<sup>25</sup> That attraction is greatest when the alternative offers consequential differences that are advantageous for some.<sup>26</sup> For example, PACS are attractive because they are more flexible and easier to end quickly than civil marriages in France.<sup>27</sup>

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that she has “no strong objection” to civil unions or domestic partnerships available to non-sexual unions and same-sex couples, provided that they are not available to couples, who are eligible to marry).

<sup>21</sup> See *infra* pp. 236–237, 255–257.

<sup>22</sup> See *infra* notes 83–84 and accompanying text; see also, e.g., Jamie Alan Aycock, *Contracting Out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J. L. & PUB. POL’Y 231 (2006); *Governor, Wife Enter Marriage Covenant*, CHI. TRIBUNE, Feb. 15, 2005, at 13, available at 2005 WLNR 23424145 (reporting Arkansas Gov. Mike Huckabee’s renewal of his marriage in covenant form to raise support for covenant marriage legislation nationwide).

<sup>23</sup> Perhaps the language of their arguments (i.e., marriage light constitutes “counterfeit marriage”) demonstrates this best. See, e.g., Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 416–23 (2007) (cataloguing various instances of the counterfeit analogy as used to describe marriage light); Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1269 n.45 (2006) (“The traditional values movement routinely uses the term ‘counterfeit marriage’ to refer to Civil Unions, registered domestic partnerships and even the grant of employee benefits to same-sex partners.”).

<sup>24</sup> See *infra* Part IV.A (popular appeal of marriage light alternatives like PACS grows with their consequential differences from legal marriage).

<sup>25</sup> See *infra* notes 322, 334, 371 and accompanying text.

<sup>26</sup> See *infra* note 337 and accompanying text.

<sup>27</sup> See *infra* notes 326–329 and accompanying text. Dutch registered partnerships and Illinois civil unions may be somewhat less attractive because of their greater similarity to marriage. See *infra* notes 334–337, 365 and accompanying text.

Congress has greatly increased the likelihood that marriage light will grow in popularity in the United States. By enacting the Defense of Marriage Act (“DOMA”), it dramatically increased the variety of possible packages of rights and responsibilities available to couples in many states. DOMA defines “marriage” for federal purposes as “only a legal union between one man and one woman as husband and wife,”<sup>28</sup> ensuring that same-sex marriages and same- and most *different*-sex marriage light relationships do not entail the extensive federal consequences of marriage.<sup>29</sup> In many states, DOMA doubles or triples the number of significantly different relationship categories available. In California, for example, there are now different-sex spouses with all state and federal rights of marriage, same-sex spouses with the state label and rights of marriage but few if any federal rights, and same- and different-sex domestic partners with similar state rights but neither the symbolic label nor federal consequences of marriage.<sup>30</sup>

As with PACS in France, the substantially less consequential American forms of marriage light can be attractive. Same-sex couples are right to bemoan the second-class status of even the most comprehensive forms of quasi-marriage. But the distinctions of marriage light that are disadvantages to some couples are advantageous to others.<sup>31</sup> Many couples are better off with single tax treatment, the absence of community property, or easy relationship dissolution.<sup>32</sup> State legislatures in California, Washington, and New Jersey recognized the advantages of marriage light under Social Security regulations when they opened up domestic partnerships to certain different-sex couples over the age of sixty-two in addition to all same-sex couples.<sup>33</sup>

Even alternative institutions very similar to marriage have advantages for different-sex couples who reject the heavy residue of gender stereotyping and historical and religious meanings that still adhere to the word “marriage.”<sup>34</sup> Conservative efforts to exclude lesbians, gay men and their children from the protection of marriage add a new layer of meaning that may be unattractive to

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<sup>28</sup> Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006); and 28 U.S.C. § 1738C (2006)).

<sup>29</sup> See *infra* Part V.C.

<sup>30</sup> See *infra* note 194; but see *infra* note 431 (one IRS official recently opined that different-sex couples in Illinois civil unions that were expressly equated with marriage under state law qualified as “husband and wife” under federal tax law in spite of DOMA).

<sup>31</sup> See *infra* Part V.B–C.

<sup>32</sup> See *infra* Part V.C.

<sup>33</sup> CAL. FAM. CODE § 297(a)(4)(B) (2012); N.J. STAT. ANN. § 268A-4(b)(5) (2012); WASH. REV. CODE § 26.60.030(6) (2012). The Washington statute has recently been amended (pending approval by referendum in November 2012) to recognize marriage equality for same-sex couples and to phase out domestic partnerships except for couples where at least one partner is at least sixty-two years old. See WASH. REV. CODE § 26.60.030(2) (2012); see also *infra* p. 299.

<sup>34</sup> See *infra* notes 405–408 and accompanying text.



some young heterosexuals as well. A few American celebrities have famously hesitated to marry until same-sex couples can.<sup>35</sup> Other Americans have chosen civil unions over marriage.<sup>36</sup> British and Austrian different-sex couples feel so strongly about the symbolic clean slate of quasi-marriage registered partnerships that they have filed suit challenging their ineligibility to register as partners.<sup>37</sup>

U.S. state legislatures enacting marriage light regimes have recently tended to extend coverage to different- and same-sex couples equally.<sup>38</sup> Where marriage light regimes have recognized advantages over marriage, it is hard imagining democratically elected representatives doing anything else. As with marriage discrimination against same-sex couples, marriage light discrimination against different-sex couples also raises serious state and federal constitutional concerns.<sup>39</sup>

Unless the U.S. Supreme Court recognizes a constitutional right to marriage equality for same-sex couples, there is bound to be more and more experimentation with marriage light alternatives in the United States.<sup>40</sup>

Opponents of same-sex marriage have succeeded widely with a reactionary strategy of anchoring fleeting opposition to marriage equality with anti-gay state constitutional amendments.<sup>41</sup> By freezing in constitutions the strong anti-gay sentiment of 2000–2008, the George W. Bush Generation left future judges and legislators little or no option for recognizing same-sex relationships except the invention of new, experimental alternatives to marriage.<sup>42</sup> The more legislatures innovate and alter traditional aspects of

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<sup>35</sup> Nicole Eggenberger, *How Angelina Jolie and Brad Pitt Changed Their Mind About Marriage*, US WEEKLY (Apr. 13, 2012, 7:39 PM), <http://www.usmagazine.com/celebrity-news/news/how-angelina-jolie-and-brad-pitt-changed-their-mind-about-marriage-2012134>; Jason Mraz *Waiting for Gay Marriage*, HUFFINGTON POST (Jan. 22, 2011, 7:25 PM), [http://www.huffingtonpost.com/2011/01/22/jason-mraz-waiting-for-gay-marriage\\_n\\_812593.html](http://www.huffingtonpost.com/2011/01/22/jason-mraz-waiting-for-gay-marriage_n_812593.html); Brad Pitt, *My List: Fifteen Things I Think Everyone Should Know*, ESQUIRE (Oct. 1, 2006, 2:00 AM), [http://www.esquire.com/features/ESQ1006ESQ1006\\_164R\\_2](http://www.esquire.com/features/ESQ1006ESQ1006_164R_2).

<sup>36</sup> See *infra* notes 359–362 and accompanying text.

<sup>37</sup> See *infra* notes 448–449 and accompanying text.

<sup>38</sup> See *infra* notes 344–345 and accompanying text.

<sup>39</sup> See *infra* Part V.E

<sup>40</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (striking down California's state marriage amendment as unconstitutional under the Fourteenth Amendment of the US Constitution), *aff'd* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (affirming on more limited grounds).

<sup>41</sup> See *infra* pp. 255–258.

<sup>42</sup> Twenty-seven states enacted constitutional amendments banning marriage equality between 2000 and 2008. Alaska and Nebraska had enacted trail-blazing amendments in 1998 and 1999, respectively. See, e.g., ALASKA CONST. art. I, § 25 (1999); NEB. CONST., art. I, § 29 (2000). Hawaii's earlier amendment does not limit future options because it merely authorized the legislature to define marriage. HAW. CONST. Art. I, § 23 (1998). Since 2008, only North Carolina

marriage, the more likely their creations will pass muster under state constitutions that expressly prohibit same-sex marriage and, in some cases, “substantially similar” alternatives.<sup>43</sup> And the more likely the new institutions will attract different-sex couples. Anti-gay constitutional amendments also increase the likelihood that state constitutions will require gender-neutral marriage light while prohibiting same-sex marriage.<sup>44</sup>

Opponents of marriage equality are either badly miscalculating their negative effect on the exclusive status of marriage or rationalizing a deeper desire to withhold recognition of lesbian and gay couples, even if they undermine traditional marriage in the process. This Article starts with the assumption that their primary goal sincerely is to protect marriage. After exploring the actual repercussions of this fundamentalist opposition, however, it is difficult not to question whether that goal has actually been subordinated to strategies catering to populist animus against lesbians, gay men, and their relationships. Even opponents of marriage equality sincerely motivated by a desire to preserve marriage traditions rather than animus have been lured to distraction by short-sighted battles against same-sex couples, which were easy because of public homophobia. One prominent long-time foe of same-sex marriage seemed to recognize this point recently when he changed his position to favor equality, explaining that he has recognized “with deep regret” that “much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus.”<sup>45</sup>

Part II of this Article explores the evolution of civil marriage over time and describes the political battles surrounding both different-sex covenant marriage and recognition of same-sex couples over the last generation. It also sets out and evaluates conventional arguments on both sides of the marriage debate before concluding that same-sex marriage is clearly a conservative move when considered in context. Part III describes constitutional marriage provisions in Europe and the U.S., contrasting the general protection and substantial support of marriage and families by the former with the specific exclusion of same-sex couples in the latter. It classifies anti-gay American marriage amendments into four groups and describes the possibility of marriage

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has adopted a new anti-gay constitutional amendment. *See* N.C. CONST. art. XIV, § 6 (2011). However, Minnesota voters will face such an amendment in November 2012. David Bailey, *Minnesota Voters to Decide on Gay Marriage Ban*, REUTERS (May 22, 2011, 2:41 AM), <http://www.reuters.com/article/2011/05/22/us-minnesota-marriage-idUSTRE74L0GZ20110522>. Hopefully, Minnesota voters will consider all of the consequences of a vote in favor of the anti-gay marriage amendments.

<sup>43</sup> *See infra* notes 273–276 and accompanying text.

<sup>44</sup> *See infra* Part V.E.

<sup>45</sup> David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES, June 23, 2012, available at 2012 WLNR 13113935 (announcing new support of marriage equality while confirming he still cares deeply about traditional marriage).

light in each case. It criticizes the undemocratic social conservative strategy of enshrining one generation's particular current version of marriage in constitutions in order to limit the options of future generations who may disagree. Then, it suggests three reasons why state marriage amendments should be read narrowly, limiting ambiguous attempts at "dead hand" control over the particular social policies pursued by future generations.<sup>46</sup>

Part IV compares various marriage and marriage light regimes recognized in the U.S. and some other countries, noting their availability and attractiveness to different-sex couples. It also briefly discusses unregistered partners, and how their legal recognition alters the picture. Part V develops the thesis that changing politics, evolving social understandings, and unchanging constitutional definitions of marriage will result in increasing recognition of permanent gender-neutral marriage light options in the United States. It explains how marriage light alternatives have clear advantages over marriage for some couples, particularly in light of DOMA. It also identifies the tendency of nations and states, which later recognize marriage equality, to maintain established gender-neutral marriage light options. Thus, even if same-sex marriage recognition were not a conservative move in itself, it is conservative in comparison to the likely alternative.

This Article concludes that efforts to halt the continuing evolution of marriage before it is extended to same-sex couples will not actually "defend" marriage. Instead, they are likely to lead to the demise of the marriage monopoly in favor of competition from a cafeteria of distinctive alternative forms of relationship recognition for *all* couples. This Article does not take a position as to whether that flexibility will be good or bad. But it points out the obvious: This outcome is not consistent with the conservative goal of maintaining the traditional stabilizing, if evolving, monopoly of civil marriage.

## II. *KULTURKAMPF* USA: THE BATTLE OVER SAME-SEX CIVIL MARRIAGE

Justice Scalia has branded the U.S. culture war over lesbian and gay rights a "*Kulturkampf*,"<sup>47</sup> apparently referencing German Chancellor Otto von Bismarck's efforts opposing the influence of the Roman Catholic Church in German politics.<sup>48</sup> Among other ends, Bismarck's efforts resulted in the

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<sup>46</sup> The term "dead hand" in the context of constitutional interpretation was borrowed from criticism of estate planning in perpetuity. *See infra* note 295 and accompanying text. Part III.B.2 suggests that courts borrow the property law technique of narrow construction (reading wills narrowly where a devisor was attempting to control generations far into the future) in certain specific instances when interpreting constitutional provisions aimed to prevent future majorities from altering an earlier generation's specific policy decisions.

<sup>47</sup> *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("The Court has mistaken a *Kulturkampf* for a fit of spite.").

<sup>48</sup> 12 THE CAMBRIDGE MODERN HISTORY 141–55 (1910); Lech Trzeciakowski, *The Prussian State and the Catholic Church in Prussian Poland 1871–1914*, 26 SLAVIC REV. 618 (1967).

Prussian Civil Marriage Law of 1874, which withdrew the clergy's authority to maintain state registers of civil marriage.<sup>49</sup> To this day, Germans must be legally married in a civil ceremony, and any religious wedding ceremony is both optional and unrecognized by the state.<sup>50</sup>

In spite of the popular idea of separation of church and state stemming from the First Amendment, Americans conflate religious and civil marriage to a far greater extent than citizens of countries like Germany.<sup>51</sup> Clergy in the U.S. are authorized to perform a single ceremony, which is recognized for both civil and religious purposes.<sup>52</sup> This union of religious and civil marriage communicates the social and historical meaning evoked by the label "marriage" in a way that the German civil register does not. It also intensifies political passions and creates confusion among U.S. lawyers and politicians, who regularly refer to religious sources when defending the "sanctity of marriage" against lesbians and gay men.<sup>53</sup> Meanwhile, U.S. state and federal governments have defined and recognized civil marriage as a short cut in determining relationship status for purposes of hundreds of legal rights, benefits, duties, and responsibilities.<sup>54</sup>

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<sup>49</sup> MARGARET BARBER CROSBY, *THE MAKING OF A GERMAN CONSTITUTION: A SLOW REVOLUTION 156–57* (2008).

<sup>50</sup> Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1793–94 (2005).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1794.

<sup>53</sup> See, e.g., Scott Titshaw, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act, and the Children of Same-Sex Couples*, 25 GEO. IMMIGR. L.J. 407, 446–73 (2011) (citing numerous references to the religious basis of marriage in the legislative history of DOMA); David VonDrehle, *Gay Marriage is a Right, Massachusetts Court Rules*, WASH. POST, Nov. 19, 2003, at A1 (quoting President George W. Bush's vow to "defend the sanctity of marriage" because "[m]arriage is a sacred institution between a man and a woman."). Case explains both the paradox of American conflation of religious and civil marriage and the more pronounced Protestant opposition to same-sex civil marriage based on the way Protestant denominations in the United States "have essentially abdicated the definition, creation and above all the dissolution of marriage to the state," using this formally secular institution for sectarian ends just as they have state-sponsored public schools. Case, *supra* note 50, at 1795–96. Case suggests that disaggregating the religious and secular licensing of marriage may be a precondition to settling the issue of marriage equality. *Id.* at 1797.

<sup>54</sup> See *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 379–383 (D. Mass. 2010) (listing examples of federal programs whose benefits were proscribed by DOMA, including the Federal employees Health Benefits Program, the Federal Employees Dental and Vision Insurance Program, the Flexible Spending Arrangement Program, Social Security Retirement Benefits, Social Security Survivor Benefits (Lump-Sum Death Benefit and Widower's Insurance Benefit), and joint spousal filing status on federal income tax under the Internal Revenue Code); U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R: DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (identifying 1138 statutory provisions turning on marital status).

Bearing its socially significant communicative function in mind, this Part focuses on state recognition of civil marriage under the law and the arguments for and against extending such recognition to same-sex couples. Section A provides a brief overview of the history of state recognized marriage, describing dramatic changes over time in who could marry and the rules and consequences marriage entailed. Section B recounts the story of covenant marriage, arguing that its limited popularity contrasts with popular enthusiasm for “defending” marriage from same-sex couples to demonstrate the anti-gay nature of the latter. It also shows that covenant marriage set a legal precedent for experimentation with state-recognized alternatives to marriage, blazing the trail for the more popular marriage light options to follow. Section C describes the parallel debates regarding same-sex marriage on the left and the right; it concludes that extending the conservative institution of marriage to same-sex couples is a conservative move. Finally, Section D provides a brief introduction to the history of U.S. state political movement on the issue of same-sex marriage, marriage light compromise, and constitutional marriage amendments, using Hawaii as the trailblazing example. These themes will be explored in more detail in Parts III and IV.

A. *A Brief History of the Evolving Institution of Marriage*

Opponents of same-sex couples often assert that marriage is an ancient institution that has survived millennia and that should not be subject to modern experimentation.<sup>55</sup> Of course, it is true that the concept of marriage has ancient origins. However, there are few legal concepts whose content has changed more over time.<sup>56</sup>

Marriage in continental Europe was largely a matter of private agreement and custom until the Catholic Church asserted control in the thirteenth century, eventually requiring that priests officiate marriages in 1563.<sup>57</sup> English marriages, too, originally fell largely within the purview of

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<sup>55</sup> See, e.g., Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL’Y 561, 569 n.37 (2007) (quoting numerous statements of federal senators and members of Congress to this effect in the 2006 legislative record).

<sup>56</sup> The meaning and purposes of marriage vary greatly over space as well as time. See generally STEPHANIE COONTZ, *MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE* 24–33 (2005) (describing some of the many variations in societal expectations of marriage, including polygamy, consanguinity, and whether couples should live together or separately, eat together or separately, share resources or not, or share responsibility for children or not). The brief history recounted here focuses on European and American marriage over the last 2000 years.

<sup>57</sup> F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference Re Same-Sex Marriage*, 42 ALTA. L. REV. 1099, 1112 (2005); Judith E. Koons, “Just” Married?: *Same-Sex Marriage and a History of Family Plurality*, 12 MICH. J. GENDER & L. 1, 38–39 (2005). Prior to the referenced decree *Tametsi* at the Council of Trent, the Church had apparently recognized a forerunner of modern common law marriages. For instance, in the Twelfth Century,

private custom and religious cannon law.<sup>58</sup> But the state finally asserted monopoly control in the 1753 Act for the Better Preventing of Clandestine Marriages, declaring marriages null and void if not preceded either by issuance of an official ecclesiastical license or the publishing of banns in the Anglican Church.<sup>59</sup>

The legal attributes of marriage in the eighteenth and nineteenth centuries were still dramatically different from those we take for granted today. It combined with criminal law to discipline human sexuality to such an extent that it sometimes could be compared to criminal punishment for both spouses.<sup>60</sup> Professor Mary Anne Case describes the eighteenth century English state's view of a marriage license as "loosely analogous to a modern dog license . . . something like a certificate of ownership of the wife."<sup>61</sup> One early-nineteenth century American judge used a peculiarly American analogy instead, observing that "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated . . ."<sup>62</sup>

Long after the American Revolution, lawyers and judges in the U.S. still conceptualized marriage under the English common law doctrine of coverture.<sup>63</sup> Echoing the Biblical idea that a married couple shall become "one

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Pope Alexander III clarified the canon law view of marriage as a private contract, declaring that "a contract by words or present consent" sufficed to form a valid marriage. Case, *supra* note 50, at 1766.

<sup>58</sup> DeCoste, *supra* note 57, at 1113.

<sup>59</sup> Case, *supra* note 50, at 1767. The publishing of banns involved a public announcement, repeated on three consecutive Sundays to confirm that there is no impediment to the couples' marriage. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 728 (1988).

<sup>60</sup> Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012).

<sup>61</sup> Case, *supra* note 50, at 1768. Later, it was also a license to have legal sex because criminal laws prohibited fornication, adultery, oral and anal sex, bestiality, and even access to masturbatory aids and pornography. *Id.* at 1769.

<sup>62</sup> *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808). Ironically, this comparison did not apply to marriages between slaves themselves. While slaves could not be legally separated from their *masters*, slave husbands and wives were routinely separated against their will under a regime where neither church nor state recognized their marriages. See *infra* notes 73–74 and accompanying text.

<sup>63</sup> See Ellen Dannin, *Marriage and Law Reform: Lessons from the Nineteenth-Century Michigan Married Women's Property Acts*, 20 TEX. J. WOMEN & L. 1, 5–6 (2010) (listing state acts enacted in the mid-nineteenth century that made it possible for married women to own their own property); Suzanne D. Lebsack, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. S. HIST. 195, 209 (1977) (relating how "Georgia wives were not granted legal control over their own earnings until 1943").

flesh,” coverture meant that the identity of a wife and husband merged into one when they married.<sup>64</sup>

Romantic as this union may sound, it could actually resemble climbing into a horse costume where the husband was always the head. Blackstone described the legal result of marriage under English law as “one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and *cover*, she performs every thing.”<sup>65</sup>

While the wife initially had to consent to the marriage contract in order for it to be valid, that one-time agreement bound her to all of the non-negotiable rules of marriage, greatly limiting her choices thereafter.<sup>66</sup> She could not sue or be sued for a personal injury in her own name.<sup>67</sup> She could not contract on her own with a third party.<sup>68</sup> If she “misbehaved,” her husband could restrain her physically “by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children.”<sup>69</sup> A married man controlled any property his wife brought into the marriage.<sup>70</sup> Courts even recognized a marital exception to rape laws, reasoning that “by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>71</sup> The theory of a

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<sup>64</sup> See *Ephesians* 5:22 (King James) (“Wives submit yourselves unto your husbands, as unto the Lord. For the husband is the head of the wife, even as Christ is head of the church . . .”).

<sup>65</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (2d ed. 1765) (emphasis in original).

<sup>66</sup> *Id.* at 427–28 (a “good civil marriage” required that both parties be willing and able “to contract” the marriage).

<sup>67</sup> *Id.* at 431.

<sup>68</sup> *Id.* at 432 (“[A]ll deeds executed and acts done, by her, during her coverture, are void, or at least voidable . . .”).

<sup>69</sup> *Id.*

<sup>70</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433 (2d ed. 1766). A husband gained absolute title and dispositional authority with regard to his wife’s personal property “with the same degree of property and with the same powers, as the wife, when sole, had over them.” *Id.* However, he only gained title to the rents and profits of her real estate during the coverture. *Id.*

<sup>71</sup> 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 628 (Robert H. Small 1847) (1736); see also *Commonwealth v. Fogerty*, 74 Mass. 489, 491 (1857) (recognizing that evidence of marriage constituted a defense against charges of raping one’s wife in the process of holding that a rape indictment need not affirm the victim and rapist are not married because a husband could be convicted as a principal in the second degree for assisting another man to rape his wife); *People v. Meli*, 193 N.Y.S. 365, 366 (1922) (holding that a man cannot be guilty of raping his wife, but may be found guilty of rape if he encouraged another man to rape her because the determining factor is who performed the rape act itself); *State v. Twyford*, 186 N.W.2d 545, 547 (S.D. 1971) (“[T]he rule in South Dakota should be that nonmarriage of the prosecutrix to the perpetrator of the sexual act is an essential ingredient of the crime . . .”); Jill

husband's control over his wife was so strong that a woman could not be convicted of a crime like theft or burglary if her husband had commanded her to do it.<sup>72</sup>

In addition to the subordination of married women, there were some women and men who could not marry at all. American slaves were not allowed to be married by state or church.<sup>73</sup> Even after the abolition of slavery, interracial marriages were widely prohibited, forming the basis for criminal prosecution and, in some cases, the loss of U.S. citizenship.<sup>74</sup>

Fortunately, the meaning of "marriage" has changed radically over the last 200 years.<sup>75</sup> Today, married women retain their legal personalities. They can own private property and sign binding legal contracts. Unlike their forefathers, married men no longer have a categorical right to beat<sup>76</sup> or rape their own wives.<sup>77</sup> By 1967, a unanimous U.S. Supreme Court found laws proscribing interracial marriage to be unconstitutional.<sup>78</sup> Now men and women can marry regardless of race without fear of prosecution or loss of U.S.

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Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1396–97 (2000).

<sup>72</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 28–29 (1770).

<sup>73</sup> Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 299, 310–11 (2006). Because slaves were viewed as chattels, slave codes prohibited the issuance of marriage license to slaves, prohibited clergy from performing marriage ceremonies for them, and allowed slave owners to separate families by selling off either spouse or their offspring with impunity. *Id.* at 306–08.

<sup>74</sup> See, e.g., *Toshiko Inaba v. Nagle*, 36 F.2d 481, 481–82 (9th Cir. 1929) (where a wife lost her U.S. citizenship because of her marriage to a Japanese man); *State v. Jackson*, 80 Mo. 175, 179 (1883) (upholding criminal prosecution of interracial marriage under the Fourteenth Amendment, finding sufficient grounds for interfering with the interracial "taste" of potential spouses based on the slippery slope to consanguinity and the "well authenticated fact that if the issue of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have progeny"); *Naim v. Naim*, 87 S.E.2d 749, 755–56 (Va. 1955) (pointing out that "[i]t is the considered opinion of the people of more than half the States . . . that the prohibition against miscegenetic marriages is a proper governmental objective" of preserving "racial integrity" and avoiding "a mongrel breed of citizens"). See also Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 574 (2010).

<sup>75</sup> See Jessica Feinberg, *Exposing the Traditional Marriage Agenda*, 7 NW. J. L. & SOC. POL'Y 301, 306–34 (2012) (describing the eventual rejection of traditional marriage requirements: permanence, gender roles, procreation, and monogamy).

<sup>76</sup> See *supra* note 69 and accompanying text.

<sup>77</sup> Hasday, *supra* note 71, at 1381, 1388. However, Hasday has persuasively argued that reform of the marital rape exemption has only been fragmentary, cataloguing the way that marital rape is still treated as a special category of rape. *Id.* at 1380, 1484–85. She concludes that "[v]irtually every state legislature has revisited the marital rape exemption over the last" quarter of the twentieth century, "but most have chosen to preserve the exemption in some substantial manifestation." *Id.* at 1375.

<sup>78</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).



citizenship. Every state has enacted divorce laws and eventually liberalized them to recognize some form of no-fault divorce.<sup>79</sup> States now also recognize the possibility of unilateral divorce without the consent of both spouses.<sup>80</sup>

Clearly, marriage has evolved dramatically since churches and states first became involved. The continuing liberalization over time of rules for determining who could marry whom and the legal consequences of marriage has been so pronounced that one of the most constant aspects of marriage has been its flexibility to adapt to social change.<sup>81</sup>

### B. *The Movement for Covenant Marriage*

As marriage and divorce laws were liberalized, divorce and single parenting became increasingly common. Blaming the resulting harm to children on no-fault divorce, some traditionalists advocated its repeal along with other changes to “strengthen” marriage.<sup>82</sup> But more strict divorce requirements are not popular.

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<sup>79</sup> Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L. Q. 427, 438 (2004); Joel A. Nichols, *supra* note 18, at 938–39 (tracing the history of no-fault divorce from its inception when then-Governor Ronald Reagan signed California’s ground-breaking law in 1969 until its adoption by South Dakota in 1985).

<sup>80</sup> Joel A. Nichols, *supra* note 18, at 938 (describing California’s pioneering law, which recognized unilateral no-fault divorce on demand).

<sup>81</sup> Opponents of same-sex marriage might point out that Americans have refused to allow marriage to evolve to include polygamy. However, this does not necessarily undermine the argument that marriage evolves to meet changing societal conditions and that unforeseen consequences threaten to undermine it when it does not. Although its Mormon incarnation was a significant issue in nineteenth century America, polygamy was actually an often reviled ancient institution that ran counter to a strong modern current in American society, the growing equality of women. Alternatively, conservatives who believe men require domestication might argue that polygamy would give some restless husbands (and single women) an outlet to stem some of the adultery and divorce they bemoan. *See infra* Part II.C.2.

<sup>82</sup> *See* Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 45 (2003) (describing unsuccessful attempts of Louisiana legislators to use an unwilling Louisiana Law Institute to justify their desire to generally reinstate fault as a prerequisite to divorce); Barbara Dafoe Whitehead, *Dan Quayle was Right*, THE ATLANTIC, Apr. 1, 1993, at 71 (suggesting several options to improve marriage including a reemphasis on fault principles in divorce, a two-tiered divorce law that treats spouses with minor children differently, a “children first” focus in divorce law, bonuses for women who marry, and publically supported children’s educational television, among other ideas). *But see* Deborah L. Rhode, *To Fault or Not to Fault*, NAT’L L.J., at A19 (May 13, 1996) (arguing that “changes in the divorce law were the response, not the cause of changes in peoples’ attitudes and behaviors”); Anya Sostek, *Census Sees Marriages Surviving, Divorces Declining*, PITT. POST-GAZETTE, May 23, 2011, at A1, available at 2011 WLNR 10241143 (citing scholars who point to various other contributing factors for the early 1980s peak in divorce rates, including pent-up demand at the time when divorce became easier, changes in the power dynamic and expectations of men and women within existing marriages, and increased health and life expectancies that make people less likely

Faced with a lack of support for reinstating mandatory fault requirements for divorce, some traditionalists suggested an *optional* heavy form of marriage for couples who freely choose to be bound extra-tight.<sup>83</sup> In 1997, Louisiana became the first state to enact a law creating these “covenant marriages,” which essentially allow couples to opt for the 1938 version of divorce law (requiring serious fault or long separation) plus new modern requirements of pre-marital and pre-divorce counseling.<sup>84</sup> Politicians in many other states introduced similar legislation, but covenant marriage was only adopted by Arizona (1998) and Arkansas (2001).<sup>85</sup>

With the exception of politicians and a few “family values” activists, the covenant marriage movement has not caught on.<sup>86</sup> Only one to two percent

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to just stick out an unhappy marriage until someone dies). *See also* Joel A. Nichols, *supra* note 18, at 940–43 (discussing various arguments on whether no-fault divorce is problematic)

<sup>83</sup> *See* Spaht, *supra* note 82, at 49. Spaht, an early advocate of Louisiana’s covenant marriage law, attributed the political success of some covenant marriage bills to their optional character, only binding those couples who chose to be bound. *Id.*; *see also* Kevin Allman, *Covenant Marriage Laws in Louisiana*, GAMBIT WKLY. (Mar. 2, 2009), <http://www.bestofneworleans.com/gambit/covenant-marriage-laws-in-louisiana/Content?oid=1252802> (quoting Spaht’s comment that the final Louisiana covenant marriage law “‘is more liberal than the one we introduced, but you have to compromise in the political process’”).

<sup>84</sup> LA. REV. STAT. ANN. §§ 9:272–274, § 9:307 (2011); Cynthia Samuel, *Letter from Louisiana: An Obituary for Forced Heirship and a Birth Announcement for Covenant Marriage*, 12 TUL. EUR. & CIV. L.F. 183, 191 (1997) (“Except for the counseling requirements and changes adding physical abuse and abandonment as grounds for divorce, the rules for dissolving a covenant marriage are almost identical to those for dissolving a marriage in Louisiana that were in effect from 1938 to 1979.”); Ed Anderson, *La. Couples Say, ‘I Don’t’ to Covenant Marriages: 99 Percent Opting for Standard Marriage*, TIMES-PICAYUNE, Aug. 11, 2009, at 2, available at 2009 WLNR 15496593 (only adultery, abuse, abandonment or a two-year separation are recognized bases for terminating a Louisiana covenant marriage). Long before Spaht and others called for covenant marriage in Louisiana and other U.S. states, France seriously considered the idea of an optional form of indissoluble marriage in the late 1940s. Samuel, *supra*, at 191–92. While many people agree that pre-marital counseling is a good idea, there is evidence that counseling during marriage actually triples the number of couples that proceeded to divorce afterwards. STEVEN L. NOCK, LAURA ANN SANCHEZ & JAMES D. WRIGHT, COVENANT MARRIAGE: THE MOVEMENT TO RECLAIM TRADITION IN AMERICA 122 (2008).

<sup>85</sup> Alan J. Hawkins & Tamara A. Fackrell, *Covenant Marriage: The Movement to Reclaim Tradition in America*, 71 J. MARRIAGE & FAM. 804 (2009), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1741-3737.2009.00635.x/pdf> (reviewing NOCK, *supra* note 84); *see* ARIZ. REV. STAT. ANN. §§ 25-901–25-906 (2012); ARK. CODE ANN. §§ 9-11-801–9-11-810 (2012).

<sup>86</sup> ‘06 Marriage Quickly Failed, ARIZ. REPUBLIC, March 8, 2011, at A6, available at 2011 WLNR 4513444 (describing the brief covenant marriage of Arizona Senate Majority Leader Scott Bundgaard, which ended during his honeymoon when his wife called the police to ask for protection from her new husband); Pam Bordelon, *Covenant Marriage a La. Option Most Ignore*, BATON ROUGE ADVOC., Feb. 14, 2009, at E1, available at 2009 WL 2983406 (describing the covenant marriages of Louisiana Governor Bobby Jindal, State Rep. Tony Perkins—sponsor of the Louisiana bill and later President of the Family Research Council—and several other

of Louisiana couples opt for covenant marriages.<sup>87</sup> They are even less popular in Arizona and Arkansas.<sup>88</sup> Apparently, the passionate popular “defense” of marriage from lesbians and gay men does not extend to efforts directly affecting different-sex couples.<sup>89</sup> As one covenant marriage enthusiast explained seven years ago, their movement “did stall a bit. The debate over same-sex marriage has taken a lot of attention.”<sup>90</sup>

The lack of enthusiasm for covenant marriage indicates that many political opponents of same-sex marriage are more opposed to same-sex couples than interested in “defending” different-sex marriage.<sup>91</sup> As Kathleen

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advocates of covenant marriage); Rick Lyman, *Trying to Strengthen an “I Do” with a More Binding Legal Tie*, N.Y. TIMES, Feb. 15, 2005, at A1 (describing the covenant marriage “upgrade” of Arkansas Governor Mike Huckabee and his wife of thirty-one years before a crowd of 5,000 constituents); *Marriage Issues—Family Law*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/marriage-issues-family-law.aspx> (last visited Oct. 19, 2012) (see “Covenant Marriage” subcategory).

<sup>87</sup> Anderson, *supra* note 84, at 2 (between 1997 and 2007, only 1.05% of new Louisiana marriages were covenant marriages). Some covenant marriage advocates point out that “upgrades” are not included in Louisiana and Arkansas estimates and opine that another two to three percent of married couples may be later converting their already successful marriages to the form of a covenant marriage. *See id.*; Bordelon, *supra* note 86, at E1 (quoting the three to four percent estimate of Gene Mills, executive director of Family Forum). However, one could also argue that the number might be smaller if it were not for the religious leaders who refuse to perform standard marriages for their parishioners and residents of the other forty-seven states who may enter a covenant marriage in the three states where it is possible. Hawkins & Fackrell, *supra* note 85, at 806 (stating that “[a] few religious ministers in Louisiana have said they will only marry couples if they agree to get a covenant marriage”); Cheryl Wetzstein, *Covenant Marriage Keeps More Couples Together*, WASH. TIMES, Sept. 7, 2008, at M20, available at 2008 WLNR 16978470 (pointing out that “anyone” can choose a covenant marriage “by marrying in Louisiana, Arizona or Arkansas”); *see also* Lyman, *supra* note 86, at A1.

<sup>88</sup> Aaron Sharockman, *Alan Grayson Says Opponent Wants to Make Divorce Illegal in Stingy New Ad*, ST. PETERSBURG TIMES, Sept. 28, 2010, available at 2010 WLNR 19347328 (from 2002–2007, only 0.6% of all new marriages in Arkansas were covenant marriages); Wetzstein, *supra* note 87, at M20 (apparently including “upgrades” in her estimate that around two percent of Louisiana couples “have” covenant marriages “and even fewer have them in Arizona and Arkansas”); Sheri Stritof & Bob Stritof, *Covenant Marriage—Pros and Cons*, ABOUT.COM, <http://www.marriage.about.com/cs/covenantmarriage/a/covenant.htm> (last visited Sept. 8, 2012) (only one-fourth of one percent of Arizona marriages are covenant marriages according to Scott D. Drewianka of the University of Wisconsin-Milwaukee).

<sup>89</sup> *See* Spaht, *supra* note 82, at 52 (bemoaning the lackluster support for covenant marriage from Louisiana’s Catholic and Baptist leaders).

<sup>90</sup> Lyman, *supra* note 86, at A1 (quoting Len Munsil, President of the conservative Christian Center for Arizona Policy). At the same time that it was pushing to prevent same-sex marriage with a federal constitutional amendment, the George W. Bush Administration refused to take a public position on covenant marriage because it was a state issue. *Id.*

<sup>91</sup> This point is illustrated by contrasting lackluster conservative efforts to directly support different-sex marriage with their passionate drive to fight any legal recognition of same-sex couples. They and their political allies were willing to amend state constitutions and even the federal constitution to block marriage equality for lesbians and gay men, but their efforts to wield

Shaw Spaht, the “mother” of covenant marriage in Louisiana has lamented: “There are a lot of hypocrites in this world. . . . A lot of these people screaming about same-sex marriage? Boy, howdy, they sure know how to turn on a dime” when it comes to covenant marriage for different-sex couples.<sup>92</sup>

Although largely rejected by the heterosexual majority, the covenant marriage movement is highly instructive. It has demonstrated that creative invention and compromise are as likely among regressive activists as among progressive ones.<sup>93</sup> More significantly, covenant marriage established a “dual system,” which featured a status parallel to standard marriage, challenging the idea of unitary marriage and pioneering state experimentation with a cafeteria of relationship choices for couples.<sup>94</sup>

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government power to directly affect different-sex marriage has been largely limited to education and voluntary counseling, even with \$150,000,000 per year of federal funding appropriated as part of the George W. Bush Administration’s Healthy Marriage Initiative. *See* Spaht, *supra* note 82, at 66–69 (listing “successful state efforts” to promote and strengthen marriage using TANF funds); *Healthy Marriage Matters*, U.S. DEPT. OF HEALTH AND HUMAN SERVS. [http://archive.acf.hhs.gov/healthymarriage/about/factsheets\\_hm\\_matters.html](http://archive.acf.hhs.gov/healthymarriage/about/factsheets_hm_matters.html) (last visited Sept. 26, 2012) (describing the Healthy Marriage Initiative and showing the text of the legislation establishing it). Most of the efforts only included education, counseling, and research. *Id.* However, Oklahoma apparently initiated a marriage-mentoring program, and West Virginia actually paid married couples an extra bonus welfare check. *See* Spaht, *supra* note 82, at 66–69; *see also* Allman, *supra* note 83, at 13 (listing prominent cultural conservatives including Sarah Palin, Rick Warren, Rush Limbaugh, Bill O’Reilly, and Sean Hannity, who did not take a public position on covenant marriage although many of them have led a very public charge against marriage equality for lesbians and gay men).

<sup>92</sup> Allman, *supra* note 83, at 13.

<sup>93</sup> The word “regressive” is not intended to be pejorative here, but to indicate a desire to return to a preferred past state of marriage, rather than a “conservative” desire measured by the current status quo.

<sup>94</sup> This legacy would clearly horrify the early proponents of covenant marriage, like Spaht, the mastermind behind Louisiana’s covenant marriage law, who has passionately attacked same-sex civil unions and domestic partnerships as a “devastating legal assault on marriage.” Spaht, *supra* note 82, at 24–25 (quoting John Leo, *Unrelenting Assault Against Marriage*, WASH. TIMES, Dec. 16–22, 2002 (Nat’l Weekly), at 32). But the link has been noted by various commentators. *See, e.g.*, Emitai Etzioni & Robert P. George, *Virtue and the State: A Dialogue Between a Communitarian and a Social Conservative*, THE RESPONSIVE COMMUNITY, Spring 1999, at 54, 61, *available at* <http://www2.gwu.edu/~ccps/etzioni/M34.pdf> (pointing out that the very idea of elective “supervows” stemmed from his side of the debate specifically because it tended in the desirable direction of greater choice). The Louisiana law was enacted during July 1997, the same month when Hawaii’s groundbreaking Reciprocal Beneficiary law became the first U.S. state experiment with marriage light. *See Civil Unions & Domestic Partnerships*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16444> (last visited Oct. 20, 2012) (the Hawaiian law was enacted July 8, 1997). Given its lack of popularity, the option of covenant marriage has probably not undermined interest in marriage in Louisiana, but it does not appear to have increased the popularity of marriage either. In fact, Louisiana, with its covenant marriage option, has the second-lowest level of marriage in the entire country. David Sarasohn, *The Census’ Wedding Cake: Marriage: Like Politics, Runs Short of Candidates*, PORTLAND OREGONIAN, June 5, 2011, *available at* 2011 WLNR 11308979.

The covenant marriage movement was born of sincere concern about increased divorce rates and evidence that divorce and out-of-wedlock births were harmful to children. The percentage of marriages ending in divorce doubled between the late 1960s and 1980, reaching a level where one in every two marriages was expected to end in divorce.<sup>95</sup> Fortunately, more recent news indicates that traditional family life may be less fragile than it appeared in the 1990s. Although Americans are marrying less and waiting longer before marrying, the most recent statistics show an upside to these trends.<sup>96</sup> U.S. divorce rates peaked from 1979 to 1981, and they have been steadily declining ever since.<sup>97</sup> The 2010 census shows that more couples are now celebrating ten-year, twenty-five-year, and fifty-year anniversaries.<sup>98</sup> The number of women who marry in their teens has decreased from forty-two percent in 1970 to seven percent in 2009.<sup>99</sup> “[D]omestic violence rates have fallen by half[,] and men have doubled the amount of time they spend doing housework and tripled their childcare efforts.”<sup>100</sup> Some of these American trends are reflected in other economically developed nations as well.<sup>101</sup>

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<sup>95</sup> ARTHUR J. NORTON & LOUISA F. MILLER, U.S. DEPT. COM., MARRIAGE, DIVORCE, AND REMARRIAGE IN THE 1990’S, 2–5 (1992), available at <http://www.census.gov/hhes/socdemo/marriage/data/cps/p23-180/p23-180.pdf>.

<sup>96</sup> See *More Married Couples Make 10th Anniversary*, CHI. SUN-TIMES, May 24, 2011, at 20, available at 2011 WL 10318841 (describing the increase in median age of first marriage from twenty-three for men and twenty for women in 1950 to twenty-eight for men and twenty-six for women today); Sostek, *supra* note 82, at A1 (noting that only a quarter of women between twenty-five and twenty-nine years old had not yet married in 1986, compared to nearly half of women the same age in 2009); Carol Morello, *Number of Long-Lasting Marriages in U.S. Has Risen*, *Census Bureau Reports*, WASH. POST (May 18, 2011), [http://www.washingtonpost.com/local/number-of-long-lasting-marriages-in-us-has-risen-census-bureau-reports/2011/05/18/AFO8dW6G\\_story.html](http://www.washingtonpost.com/local/number-of-long-lasting-marriages-in-us-has-risen-census-bureau-reports/2011/05/18/AFO8dW6G_story.html) (“Nearly a third of adults never marry at all. That number has marched upward in every age group over the past decade and a half.”). More disturbing, marriage seems to correlate increasingly with wealth, class and education. See Jason DeParle, *Two Classes, Divided by “I Do,”* N.Y. TIMES, July 15, 2012, at A1.

<sup>97</sup> Sostek, *supra* note 82, at A1. The age demographics of the census apparently reinforce the trend of decreasing divorce rates since the rate among forty to forty-four years old was almost five percent less than those fifty-five to fifty-nine years old. *Id.*

<sup>98</sup> *Long-Lasting Marriages on the Rise*, BOSTON GLOBE, May 19, 2011, at 2, available at 2011 WL 9941853 (describing the increase between 1996 and 2009 of one to two percent in silver and golden anniversaries); Morello, *supra* note 96 (there are now three percent more ten-year anniversaries than in the early 1980s).

<sup>99</sup> DIANA B. ELLIOTT & TAVIA SIMONS, U.S. DEPT. COM., MARITAL EVENTS OF AMERICANS: 2009, at 13 (2011), available at <http://www.census.gov/prod/2011pubs/acs-13.pdf>.

<sup>100</sup> Sostek, *supra* note 82, at A1.

<sup>101</sup> See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? 173–97 (noting that out-of-wedlock births and divorce rates among Scandinavian different-sex couples stabilized or began to decline in the late 1980s and early 1990s); OECD, SF3.1: MARRIAGE AND DIVORCE RATES 1, 4 (2011), available at <http://www.oecd.org/els/familiesandchildren/40321815.pdf> (noting a significant crude marriage

Today, interest in covenant marriage appears to have waned. Tony Perkins, the original sponsor of Louisiana's covenant marriage law, acknowledges that, "[i]n public policy, fashions come and go. I think the season for covenant marriage . . . the novelty has kind of worn off."<sup>102</sup> However, the novelty of movements for same-sex marriage and marriage light does not appear to have worn off—at least not in a negative way.

### C. *The Debate Over Same-Sex Marriage Equality*

Marriage equality for same-sex couples has gone from an absurdist mid-century fantasy to a realistic, popular position, accepted by several states and half the U.S. population.<sup>103</sup> A clear majority supports same-sex civil unions,<sup>104</sup> and some jurisdictions now recognize a choice of options for both same- and different-sex couples.<sup>105</sup>

The ideas of same-sex marriage and even cafeteria options for marriage are not as novel as some may think. A number of Asian,<sup>106</sup> American,<sup>107</sup> and

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rate decrease since 1970 in almost all OECD and E.U. countries, while also pointing out that the decrease has been leveling off in countries like Denmark and Sweden where the rates were already relatively low and noting increasing divorce rates in OECD countries, but a slight increase in the duration of marriage to divorce in a number of developed countries); *Marriage and the State: A Ménage À Trois*, *ECONOMIST*, Jan. 23, 2010, at 28 (“[T]he present divorce rate, at its lowest in England and Wales since 1981, may be attributed to the fact that only the hard-core are still getting married in the first place.”) [hereinafter *Marriage and the State*]; *Marriages, Divorces Germany*, D STATIS, <https://www.destatis.de/EN/FactsFigures/Indicators/LongTermSeries/Population/lrbev06.html> (last visited Oct. 13, 2012) (official figures of the German federal statistical office showing that marriage rates decreased significantly from 1950 until they seemed to level off over the last decade, while divorce rates seem to have generally leveled off in the early 1980s).

<sup>102</sup> Allman, *supra* note 83, at 13.

<sup>103</sup> See *infra* notes 190–194 and accompanying text. See also Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans-favor-legal-gay-marriage.aspx>.

<sup>104</sup> See, e.g., *Washington Post/ABC News Poll: Question 32*, WASH. POST, - [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_021010.html](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html) (last visited Oct. 20, 2012) (reporting that sixty-six percent of adults surveyed favored legally recognized civil unions); *Law and Civil Rights*, POLLINGREPORT.COM, <http://pollingreport.com/civil.htm> (last visited Oct. 13, 2012) (reporting on CBS News/New York Times polls indicating sixty-two percent approval of either marriage equality or same-sex civil unions in April and May 2012).

<sup>105</sup> See *infra* notes 199, 475–482 and accompanying text.

<sup>106</sup> See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* xxvi (1994); BRET HINSCH, *PASSIONS OF THE CUT SLEEVE* (1990), *reprinted in* SULLIVAN, *supra* note 6, at 23.

<sup>107</sup> See BOSWELL, *supra* note 106, at xxvi; WILL ROSCOE, *THE ZUNI MAN-WOMAN* 26–27 (1991); WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH* (1986), *reprinted in* SULLIVAN, *supra* note 6, at 35; Maurice Kenny, *Tinselled Bucks: A Historical Study in Indian Homosexuality*, in *LIVING THE SPIRIT: A GAY AMERICAN INDIAN ANTHOLOGY* (W. Roscoe ed., 1988).

African<sup>108</sup> cultures have recognized and institutionalized same-sex unions at various times. There is evidence that the ancient Greeks recognized four types of same-sex unions as well as two types of different-sex marriage and various other categories of different-sex union.<sup>109</sup> The late Yale historian John Boswell cited extensive support for his thesis that same-sex civil unions were even recognized in the church-dominated rules of medieval Europe.<sup>110</sup>

Later, at a time when Christian states developed rules defining marriage largely in terms of the different legal and social roles played by men and women, the notion of same-sex marriage might have seemed nonsensical to most people. How could two equal individuals possibly enter a relationship that was so dependent on unequal gender roles and the coverture of women by men? Same-sex marriage seems much less radical today when women's and men's roles in marriage are not necessarily predetermined.

Even in the age of coverture when sodomy was viewed as an unspeakable crime of "deeper malignity" than rape,<sup>111</sup> some gay people desired to marry one another. In 1862, a German intellectual named Karl Heinrich Ulrichs insisted that there are natural gay marriages, despite their lack of legal recognition.<sup>112</sup> In 1906, the pioneering sexologist Auguste Forel recorded, as a "peculiar and characteristic phenomenon," that many homosexuals exhibited an "ardent desire . . . to become secretly engaged or married to the abnormal

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<sup>108</sup> See BOSWELL, *supra* note 106, at xxvi; Melville J. Herskovits, *A Note on "Woman Marriage" in Dahomey*, 10 AFRICA 335 (1937), reprinted in SULLIVAN, *supra* note 6, at 32.

<sup>109</sup> BOSWELL, *supra* note 106, at 28–107.

<sup>110</sup> *Id.* at 218–61. Boswell describes the veneration of "coupled saints" such as Serge and Bacchus, as well as various medieval same-sex rites. *Id.* He compares these unions to their ancient predecessors and to different-sex unions of the same period. *Id.* In addition to the language of Catholic and Orthodox liturgies, he focuses on contemporaneous accounts of same-sex unions in many areas of Europe. *Id.*

<sup>111</sup> *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) ("Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'") (citation omitted).

<sup>112</sup> Letter from Karl Heinrich Ulrichs to his Sister (Sept. 22, 1862), in 1 JAHRBUCH FÜR SEXUELLE ZWISCHENSTUFEN UNTER BESONDERER BERÜCKSICHTIGUNG DER HOMOSEXUALITÄT [YEARBOOK FOR SEXUAL INTERMEDIARIES WITH PARTICULAR CONSIDERATION OF HOMOSEXUALITY] 39–46 (1899). The *Jahrbuch* in question was the first volume of a series of scholarly journals published annually from 1899 until 1923 by the Scientific-Humanitarian Committee of Berlin and Leipzig, Germany. Pioneering sexologist Magnus Hirschfeld founded the Committee in 1897, and it is widely regarded as the world's first modern "gay rights" organization. Originally sent to his sister and other family members at the time of the U.S. Civil War, Ulrichs's German-language coming out letters exhibit a very modern sense of pride and resolute self-confidence about his sexuality. Except for the common nineteenth century ideas of homosexuals as a "third sex," these letters could have been written by a gay man to his troubled family at the turn of the twenty-first century. See ARMISTEAD MAUPIN, *MORE TALES OF THE CITY* 221–23 (Harper Perennial ed. 1998).

homosexual object of their love.”<sup>113</sup> While he dismissed the possibility of legal same-sex marriage, Forel expressed sympathy for the idea of its private celebration, arguing that “the real crime” is the “social monstrosity” of gay men marrying heterosexual women as directed by “ignorant,” old-fashioned (in 1906!) professionals attempting to “cure” homosexuality.<sup>114</sup>

This Section will illustrate the different American debates about same-sex marriage, all beginning with the common assumption that marriage is an innately conservative institution. Subsection One describes the debate among feminists and gay rights activists on the left, pitting egalitarian proponents of marriage equality against those who find this conservative institution so flawed that it should be de-emphasized or abolished entirely. Subsection Two describes the parallel debate between conservatives who oppose same-sex marriage and those who favor it because they argue it will have a stabilizing effect on both marriage and gay people. Subsection Three counters some conservative arguments against marriage equality before pointing out the fatal failure of anti-marriage conservatives to consider context and recognize that same-sex marriage is clearly more conservative than its realistic alternatives.

### 1. The Gay and Feminist Debate About Same-Sex Marriage

Recent arguments favoring marriage equality on the left are familiar.<sup>115</sup> However, the idea of same-sex marriage has a long pedigree, and gay libertarians have attacked it as a conservative move since at least the 1950s. *One* magazine, the best known early “homophile” publication in the U.S., raised the issue of same-sex marriage in the cover essay of its August 1953 edition.<sup>116</sup> Questioning early activists’ search for societal acceptance and

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<sup>113</sup> AUGUST FOREL, *THE SEXUAL QUESTION: A SCIENTIFIC, PSYCHOLOGICAL, HYGIENIC AND SOCIOLOGICAL STUDY* 378 (C. F. Marshall trans., Physicians & Surgeons Book Co. 1931) (1906).

<sup>114</sup> *Id.* at 404, 439.

<sup>115</sup> See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* (2004); Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113 (2000); Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139 (2005); E.J. Graff, *Retying the Knot*, THE NATION, June 24, 1996, at 12, reprinted in *SAME-SEX MARRIAGE: PRO AND CON*, *supra* note 6, at 134.

<sup>116</sup> E.B. Saunders, *Reformer’s Choice: Marriage License or Just License?*, ONE, Aug. 1953, at 10, available at <http://www.queermusicheritage.us/jun2008one.html>. In the 1950s, *One* played an important role in the U.S. gay rights movement when it posed a legal challenge to the accepted post office practice of censoring publications exhibiting non-critical views of homosexuality. Thanks to a new standard adopted in *Roth v. U.S.*, 354 U.S. 476, 489 (1957), the U.S. Supreme Court reversed the Ninth Circuit holding that at least one edition of the magazine was “nonmailable.” *One, Inc. v. Otto Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev’d per curiam*, 355 U.S. 371 (1958). See also JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 27–50 (2002) (describing the story surrounding *One, Inc.*). The



equality, the author foresaw that “equal rights means equal responsibilities . . . [and] limitations” including same-sex marriage and monogamy.<sup>117</sup>

In mid-twentieth century America, with its criminal sodomy laws and anti-gay witch hunts, many readers found the issue of same-sex marriage absurdly unrealistic.<sup>118</sup> Those who took the idea seriously did not like it at all. Objecting to the specter of marital limitations on sexual freedom, one reader asserted that “humanity would be better off if more people were rebellious enough to demand more freed[o]m. How good are our beliefs and codes and morals and ethics if we must forever cry for laws to force us to keep faith with them.”<sup>119</sup> Even the cover essay’s author appeared to find the constraining equality of acceptance and marriage equality undesirable in the end because it would “cause as great a change in homosexual thinking as in heterosexual—perhaps greater,” including “necessary homosexual monogamy.”<sup>120</sup>

Feminists and gay rights activists on the left have echoed this sentiment over the last generation, questioning advocacy of same-sex marriage because it would shore up one of our society’s most conservative institutions.<sup>121</sup> As Paula Ettelbrick famously argued in 1989, “marriage will not liberate us as lesbians and gay men . . . [i]t will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of” affirming lesbian and gay identity and culture and validating many different forms of relationships.<sup>122</sup> While the movement for marriage equality has gained greater acceptance on the left since 1989, many left-leaning intellectuals would still prefer to either abolish legal recognition of marriage or to end its monopoly and establish a menu of alternatives to it.<sup>123</sup>

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August 1953 edition containing the marriage opinion piece had also been held up for three weeks until postal employees determined that it was mailable. *Id.* at 29.

<sup>117</sup> Saunders, *supra* note 116, at 12.

<sup>118</sup> R.H. Karcher, Letter to the Editor, ONE, Oct. 1953, available at <http://www.queermusicheritage.us/jun2008one.html>.

<sup>119</sup> *Id.*

<sup>120</sup> Saunders, *supra* note 116, at 12.

<sup>121</sup> See, e.g., Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011); Murray, *supra* note 60, at 7 n.20; Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567 (2009); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 582–87 (1995); Chris Geidner, *Domestic Disturbance: Before DOMA, There Was Another Debate Over Marriage—Within the Gay and Lesbian Community*, METRO WEEKLY (May 4, 2011), <http://www.metroweekly.com/feature/?ak=6213>.

<sup>122</sup> Ettelbrick, *supra* note 6, at 14.

<sup>123</sup> See *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), [http://www.beyondmarriage.org/full\\_statement.html](http://www.beyondmarriage.org/full_statement.html) (a statement favoring the vision of broader state recognition of relationships beyond civil marriage, listing over a thousand signatories including: Judith Butler, John

## 2. The Conservative Debate About Same-Sex Marriage

Marriage critics on the left and conservative voices in the marriage debate share a basic assumption. They all recognize the conservative nature of marriage in general. Despite the many substantial changes to the institution of marriage, commentators and courts agree that it still performs a conservative, stabilizing, and organizing role in society.<sup>124</sup>

Whether this is a good thing or a bad thing, is a different question. Ettelbrick and others on the left have focused on the history of marriage in establishing and maintaining a capitalist patriarchy that has systematically perpetuated existing patterns of property ownership, the dominance of men over women, and the priority of spouses and their children over single people and their children.<sup>125</sup> Conservatives tend to approve of the way marriage promotes stability, security, caretaking, male “domestication,” and the promotion of child welfare.<sup>126</sup> However, they disagree vigorously about whether the extension of marriage to same-sex couples is a good or bad thing.

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D’Emilio, Chai Feldblum, Martha Fineman, Nan Hunter, Arthur Leonard, Nancy Polikoff, Gloria Steinem, Cornel West, and Kenji Yoshino); *see also, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (arguing to replace a gay-rights strategy seeking the “special rights” of marriage to a “valuing-all families strategy” that deemphasizes the import of marriage); Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239 (2001) (urging abolition of marriage as a legal category in favor of new forms of protection for various forms of caretaker and dependent relationships); Nancy Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201 (2003) (arguing that diverse relationship recognition options, while still insufficiently flexible, would be more effective than unitary marriage at allocating rights and responsibilities); Nancy Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 558 (2009) (arguing that the optimal approach would be to reform each law individually so that it applies to those within its purpose without ever using marriage as “the dividing line between who is in and who is out”) [hereinafter Polikoff, *Equality and Justice*]; Katherine M. Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25 (pointing out the downside of New York state recognition of same-sex marriage as movement away from a more desirable menu of relationship recognition options). In a fascinating twist, at least one opponent of same-sex marriage has called for the abolition of civil “marriage” altogether, finding that marriage should be solely a religious institution. Douglas W. Kmiec & Shelley Ross Sager, *Equality in Substance and in Name*, S.F. CHRON. (Mar. 2, 2009, 4:00 AM), <http://www.sfgate.com/opinion/article/Equality-in-substance-and-in-name-3249218.php>.

<sup>124</sup> *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (“The state regulates marriage because marriage creates stable households, which in turn form the basis of a stable, governable populace.”).

<sup>125</sup> Ettelbrick, *supra* note 6, at 118–24; *see also supra* note 123 and accompanying text. *See generally* FRANK BROWNING, *THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY* 134–59 (1993) (providing detailed illustrations of the developing phenomenon of chosen family); Frank Browning, *Why Marry?*, N.Y. TIMES, Apr. 17, 1996, at A23, *in* SULLIVAN, *supra* note 6, at 132 (arguing for a more inclusive concept of family).

<sup>126</sup> *See* Rauch, *supra* note 7, at 177–78 (naming three important purposes of marriage as producing and raising children, domesticating men, and providing caregivers); *see also* Dale

Some conservatives, particularly those motivated by traditional religious belief systems, still view homosexuality as a choice—a choice that should be actively discouraged.<sup>127</sup> Although they do not all call for reinstatement of criminal sodomy laws,<sup>128</sup> they do argue that homosexuality should still be morally condemned and certainly not legally accepted in the form of same-sex marriage.<sup>129</sup> The logic behind this thinking is that same-sex marriage will lead more people to make the morally wrong “choice” to be gay or, at least, to act on gay desires.<sup>130</sup> Some even seem to believe that recognition

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Carpenter, *Gay Marriage in the Conservative Movement: Transcript: A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 97–102 (2008) (pointing to the purposes of parental stability, private care-giving that reduces demand for state resources, as well as promotion of monogamy, conformity and social responsibility); Andrew Sullivan, *Here Comes the Groom*, THE NEW REPUBLIC, Aug. 28, 1989, at 20 (asserting that marriage promotes the goals of social cohesion, economic security, and nurturing children).

<sup>127</sup> E.g., *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 358 F.3d 804 (11th Cir. Fla. 2004) (finding a categorical bar on adoption by “practicing homosexuals” to be rational, based on the assumption that lesbian and gay men who have sex are less qualified to parent children); H.R. REP. NO. 104-3396, at 15 n.53 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919 n.53 (“Maintaining a preferred societal status of heterosexual marriage thus will also serve to encourage heterosexuality . . .”); 142 CONG. REC. S. 9999, S10000 (daily ed. Sept. 6, 1996) (statement of Sen. John Ashcroft) (asserting that homosexuality was a lifestyle choice, and he was “worried about youngsters in our society” who might choose it rather than “ordinary sexual orientation”). Some professional counselors and politicians still support “reparative therapy,” which Forel would have labeled “old fashioned” back in 1906. William J. Bennett, *Gay Marriage: Not a Very Good Idea*, WASH. POST, May 21, 1996, at A19 (arguing that “[s]ocietal indifference about heterosexuality and homosexuality would cause a lot of confusion” for teenagers who think it is “cool” . . . to proclaim they are gay or bisexual”); see Sheryl Gay Stolberg, *Christian Counseling by Hopeful’s Spouse Promotes Questions*, N.Y. TIMES, July 17, 2011, at A14 (describing the “reparative therapy” counseling performed by Michele Bachmann’s husband and approved by the 50,000 member American Association of Christian Counselors); 142 CONG. REC. S. 9999, S10000 (daily ed. Sept. 6, 1996) (statement of Sen. John Ashcroft) (“[T]hat there are thousands of former homosexuals, individuals who once were engaged in a homosexual lifestyle, who have changed that lifestyle and have repudiated it and find themselves to be engaged in heterosexual lifestyles. So it is clear to me that, while there may be a genetic base for the activity in some respects, it is clear that it is an activity of choice in other respects and that it is a choice which can be made and unmade.”).

<sup>128</sup> The focus on a choice to “commit” homosexual acts was the same justification long used to justify criminal sodomy laws prior to the Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986). Some of its adherents would apparently like to see such criminal prohibitions reinstated. See 142 CONG. REC. H7480, H7500 (daily ed. July 12, 1996) (statement of Rep. Henry J. Hyde) (expressing nostalgia to return to the days when homosexual conduct was a crime in all states).

<sup>129</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 636–53 (1996) (Scalia, J., dissenting) (describing the state majority’s right to demonstrate “their moral disapproval of homosexual conduct” by prohibiting any local laws protecting lesbians and gay men against discrimination on the basis of sexual orientation).

<sup>130</sup> Jason Horowitz, *Michele Bachmann’s Husband Shares Her Strong Conservative Values*, WASH. POST, July 5, 2011, <http://www.washingtonpost.com/lifestyle/style/>

of marriage equality would cause so many bad choices that it would reduce procreation and the perpetuation of the citizenry.<sup>131</sup>

Recognizing that most Americans actually believe lesbians and gay men exist and should not be “cured,” scholars and public intellectuals opposing marriage equality tend to avoid this line of argument. They focus instead on secular public policy goals arguably underlying state recognition of civil marriage such as the protection of vulnerable women,<sup>132</sup> the domestication of irresponsible men,<sup>133</sup> raising children well,<sup>134</sup> and private security against individual economic, psychological and health problems.<sup>135</sup> Some point out how all of these advantages are accentuated further by the extended network of kin created through joining two existing family structures.<sup>136</sup>

Many conservative writers have concluded that same-sex marriage serves these purposes as well as different-sex marriage.<sup>137</sup> The early empirical

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michele-bachmanns-husband-shares-her-strong-conservative-values/2011/06/21/gIQAYNmzH\_story.html (describing Rep. Bachman’s argument that public tolerance of homosexuality and marriage equality would result in children being “lured into trying homosexuality out,” high divorce rates, and, according to her husband, homosexuality would increase in schools).

<sup>131</sup> See Maria L. La Ganga, *Lawyers in Prop. 8 Trial Clash at End: Judge Has Pointed Questions in Closing Arguments over Same-Sex Marriage*, L.A. TIMES, June 17, 2010 (LATEXtra) 1, available at 2010 WLNR 12274897 (quoting the assertion during closing arguments by the Proposition 8 proponents’ attorney that the “marital relationship is fundamental to the existence and survival of the race” and “[w]ithout the marital relationship, society would come to an end”); Carolyn Lochhead, *Repeal of Marriage Law Debated Defense of Marriage Act Equated to Racial Segregation, But Supporters Argue Abolishing It Would Damage the Institution*, HOUS. CHRON., July 21, 2011, at A5, available at 2011 WLNR 14499917 (quoting Rep. Steve King, a U.S. Congressman from Iowa, who, in turn, cited “a 1947 Supreme Court case” for the proposition that “[m]arriage and procreation are fundamental to the very existence and survival of the race”). Arguably, just the opposite is true: “In fact, the society that allows same-sex marriage is apt to procreate more.” Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23, COLUM. J. GENDER & L. 132, 154 (2012).

<sup>132</sup> Bennett, *supra* note 19, at 2 (“Marriage is about many things, but it primarily ties together three purposes: protecting women, domesticating men and raising children.”).

<sup>133</sup> *Id.*; Rauch, *supra* note 7, at 177 (“For taming men, marriage is unmatched.”).

<sup>134</sup> Bennett, *supra* note 19, at 2; Rauch, *supra* note 7, at 176–77 (“When men and women get together, children are a likely outcome; and, as we are learning in ever more unpleasant ways, when children grow up without two parents, trouble ensues.”).

<sup>135</sup> Rauch, *supra* note 7, at 178 (“If marriage has any meaning at all, it is that, when you collapse from a stroke, there will be at least one other person whose ‘job’ is to drop everything and come to your aid; or that when you come home after being fired by the postal service there will be someone to persuade you not to kill the supervisor.”).

<sup>136</sup> Carpenter, *supra* note 126, at 100; Rauch, *supra* note 7, at 179 (“Legally speaking, marriage creates kin. Surely society’s interest in kin-creation is strongest of all for people who are unlikely to be supported by children in old age and who may well be rejected by their own parents in youth.”).

<sup>137</sup> SULLIVAN, *supra* note 7, at 182–85; Rauch, *supra* note 7, at 177–80.

evidence supports their view that marriage equality significantly benefits same-sex couples and their children by providing benefits, a sense of stability and reliability, increased security regarding familial commitment, and less stress around legal and social issues.<sup>138</sup>

While the power of marriage to coerce monogamy has been viewed negatively by some on the left,<sup>139</sup> many scholars and other commentators support same-sex marriage recognition specifically because of this conservative implication. Thinkers ranging from Yale Law Professor William Eskridge to conservative columnists like Andrew Sullivan and David Brooks have praised the ability of marriage to “civilize” or “domesticate” gay men and encourage monogamy.<sup>140</sup> Even famous anti-gay conservative William Bennett conceded that marriage might benefit some lesbian and gay families by promoting monogamy.<sup>141</sup>

Conservatives favoring marriage equality focus on same-sex couples rather than different-sex marriages. They point out that same-sex marriage cannot directly affect most different-sex marriages because it offers no real alternative for heterosexual men and women, who would not be tempted to enter a marriage with someone of the same sex.<sup>142</sup> Additionally, they argue that

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<sup>138</sup> CHRISTOPHER RAMOS, NAOMI G. GOLDBERG & M. LEE BADGETT, WILLIAMS INST., THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCES AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES 5–9 (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf> (analyzing and summarizing data from the Massachusetts Department of Public Health’s Health and Marriage Equality in Massachusetts survey upon the fifth anniversary of marriage equality in that state). In addition to the benefits enjoyed by Massachusetts spouses, “[o]f these households, nearly all respondents (93%) agreed or somewhat agreed that their children are happier and better off as a result of their marriage.” *Id.* at 8.

<sup>139</sup> Saunders, *supra* note 116, at 12. The author of the 1953 article in *One* feared that “[e]qual rights mean equal responsibilities: equal freedoms mean equal limitations,” including “necessary homosexual monogamy” that would dramatically change the attitudes and behavior of gay people. *Id.*

<sup>140</sup> WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996); SULLIVAN, *supra* note 7, at 183; Brooks, *supra* note 7, at A15 (arguing that the moral commitment of marriage can “domesticate” all people, not just men); Rauch, *supra* note 7, at 177–78; see also Carpenter, *supra* note 126, at 99 (inverting the language of Martin Luther King, Jr. to celebrate how married same-sex couples will be “bound at last”). As described below, thinkers on all sides of the marriage debate seem to agree that lesbian couples tend towards monogamy at at least the same rate as their heterosexual counterparts. See *infra* note 152 and accompanying text. Perhaps this is why they are virtually ignored in many of the arguments on this topic.

<sup>141</sup> Bennett, *supra* note 127, at A19 (conceding this possibility in the process of arguing that “overall, allowing same-sex marriages would do significant, long-term social damage”).

<sup>142</sup> Sullivan, *supra* note 126, at 22 (“Gay marriage could only delegitimize straight marriage if it were a real alternative to it, and this is clearly not true. To put it bluntly, there’s precious little evidence that straights would be persuaded by any law to have sex with—let alone marry—someone of their own sex.”).

same-sex marriage is unlikely to even indirectly alter the institution of marriage since it involves such a small percentage of the population.<sup>143</sup>

Conservatives who oppose marriage equality generally do not deny that it could help—or a least not harm—same-sex couples and their children.<sup>144</sup> But this does not appear to concern them. They largely ignore the effect of marriage equality on same-sex couples, focusing instead on the ways same-sex marriage recognition might affect different-sex couples and their children.

Anti-gay marriage activists tend to focus on only one purpose for marriage: producing and raising children.<sup>145</sup> They also tend to define the benefits of marriage for children very specifically, often limiting them to children's relationships with their *biological* parents.<sup>146</sup> William Bennett and Maggie Gallagher envision an implicit or express “natural law” that marriage has already been defined by God or society and the only role the state plays is to recognize and reinforce this socio-religious fact of life.<sup>147</sup> State recognition

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<sup>143</sup> See, e.g., Carpenter, *supra* note 126, at 98–99 (dismissing as overblown the fear that the marriage of a “tiny minority” of gay people would “infect marriage and somehow change it”); Rauch, *supra* note 7, at 172 (“[I]t seems doubtful that extending marriage to, say, another 3 or 5 percent of the population would have anything like the effects that no-fault divorce has had, to say nothing of contraception.”).

<sup>144</sup> Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “the Tragedy of the Commons,”* 22 BYU J. PUB. L. 441, 453 (2008); Bennett, *supra* note 127, at A19 (conceding, despite what he perceived as overwhelmingly negative social effects, that even same-sex marriage “might benefit some people” by promoting gay monogamy).

<sup>145</sup> See *infra* note 156 and accompanying text. However, some opponents of marriage equality have looked at other reasons, albeit in a very gendered way. Bennett, *supra* note 19, at 2 (recognizing arguments of “protecting women, domesticating men and raising children”).

<sup>146</sup> Gallagher, for example, argues that biological parental relationships are superior and so central to the purpose of marriage that it is inadvisable to recognize same-sex marriages. See, e.g., Maggie Gallagher, *The Case for the Future of Marriage*, 17 REGENT U. L. REV. 185, 188–89 (2004–2005). But she does not spell out other ends of this singular focus. It is interesting to contemplate the possible consequences of her premise when a married man is not the biological father of his wife's child. Should the couple divorce for the good of their child so that the woman can marry the child's biological father? What if a woman has children with different fathers? Is polygamy the answer? What if a couple used a sperm donor to get pregnant because the husband was sterile? Oddly, Gallagher seems to view assisted reproductive technology (“ART”) primarily in relation to the lesbians and gay men about whom she claims the marriage debate has “nothing to do” although ART is most commonly employed by married heterosexuals. *Id.* at 186 (“I’m a person who has spent, not the last year or the last five years, but the last fifteen years engaging in a marriage debate in this country. It had nothing to do with gays and lesbians.”).

<sup>147</sup> See Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 ST. THOMAS L. REV. 33, 39–40 (2004) (arguing that the “bundle of legal incidents” accompanying marriage is merely the state taking “marriage seriously as a one-flesh union” “and treat[ing] the couple as married, because that is what they are”); William J. Bennett, *What Nature Joins Let No Gays Put Asunder. Marriage is Meant to be Between One Man and One Woman. Period.*, L.A. TIMES (Oct. 17, 2003), <http://articles.latimes.com/2003/oct/17/opinion/oe-bennett17> (opining that the biological sexes

and consequences of marriage are useful mainly as rewards or propaganda to instill heterosexual monogamy as the norm for all children in society so that those accidentally conceived will be born and raised by their biological parents.<sup>148</sup> A version of this argument has been accepted by some state high courts as a valid justification for reserving marriage to different-sex couples because of their propensity for irresponsible procreation.<sup>149</sup>

Some conservatives opposing marriage equality attribute negative characteristics to gay people or, at least, to their relationships.<sup>150</sup> Those who are more neutral assert instead that same-sex couples do not fulfill all the purposes of traditional marriage and, therefore, the couples and the institution are a poor fit, which will undermine societal understanding of the meaning of marriage.<sup>151</sup> Of course, the latter view supports the establishment of marriage light alternatives that promise a closer fit for same-sex couples.<sup>152</sup>

Because the bad characteristics attributed to gay people and their relationships often center on promiscuity, anti-gay arguments largely ignore the existence of lesbians. This is understandable—if misleading—since studies tend to find lesbian couples are at least as monogamous as different-sex couples.<sup>153</sup> But it hangs the banner of conservative anti-equality logic atop a very flimsy pole: gay men—or men in general—are less likely to remain monogamous and their failed marriages will undermine the meaning of

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are “complementary on the basis of nature,” defining “proper sexual behavior” and the “appropriate relationship for sexual behavior: marriage”).

<sup>148</sup> See e.g., Gallagher, *supra* note 147, at 42 (“The legal incidents of marriage arise from and exist to serve the ‘sanctification’ narrative embedded in the law.”). The most important legal purpose of defining marriage is to communicate to the young the essential, broad characteristics of the normative (or ideal) sexual union.” *Id.*

<sup>149</sup> Morrison v. Sadler, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005) (“[O]pposite-sex marriage is recognized and supported by law in large part to encourage ‘responsible procreation’ by opposite-sex couples, who are the only ones who can, in fact, procreate ‘by accident’ . . . .”); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (finding it rational to offer incentives for different-sex marriages because heterosexuals are capable of becoming parents “as a result of accident or impulse”); Andersen v. King Cnty., 138 P.3d 963, 982 (Wash. 2006) (finding it rational to legally favor different-sex couples since “no other relationship has the potential to create, without third party involvement, a child biologically related to both parents”); see *infra* note 179; see also Wardle, *supra* note 144.

<sup>150</sup> See *infra* notes 159, 163–165 and accompanying text.

<sup>151</sup> See, e.g., RICHARD A. POSNER, SEX AND REASON 311–14 (1992) (arguing that the incidents of marriage, designed with heterosexual couples in mind, may not be an exact fit for same-sex couples).

<sup>152</sup> *Id.* at 313–14 (suggesting a Swedish contractual model as a possible option).

<sup>153</sup> See, e.g., Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 566, 569 (2005) (reporting statistics showing that lesbians in Vermont, whether in a civil union or not, were less likely to have had sex outside of their relationships than married heterosexual men or women).

marriage for everyone else.<sup>154</sup> This argument, in turn, depends on three doubtful assumptions: (1) marriage will not make same-sex couples substantially more monogamous; (2) the small number of gay spouses and their children in the population will have a significant effect on the way different-sex couples view marriage; and (3) that difference will be greater if gay couples can legally marry than if they cannot.<sup>155</sup>

Some foes of same-sex marriage give the impression that they would really rather not address this unseemly issue at all. Maggie Gallagher, one of the most vociferous opponents of marriage equality, has explained that the same-sex marriage debate really “ha[s] nothing to do with gays and lesbians”; it is a debate about divorce, unmarried child bearing, and fatherless homes.<sup>156</sup> She appears to view same-sex marriage as merely a negative factor contributing to heterosexual irresponsibility. Still, Gallagher focuses a tremendous amount of energy and passion on her fight against recognizing gay relationships, and she seems to have cast her lot with populists, who oppose same-sex relationships without *directly* addressing any of the problems regarding different-sex couples and their children.<sup>157</sup>

Other anti-gay conservatives focus obsessively on the details of same-sex sexuality and perceived evil attributes of gay people. In his passionate arguments against legal recognition of same-sex couples and their children, Brigham Young Law Professor Lynn Wardle attacks pro-equality conservative arguments as inaccurate and inconsistent with true conservative principles.<sup>158</sup> In *A Response to the “Conservative” Case for Same-Sex Marriage*, Professor

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<sup>154</sup> In addition to the critique below, this same argument could justify the superiority of lesbian marriages over any marriage involving a man. ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995), reprinted in SULLIVAN, *supra* note 6, at 146, 151–52 (pointing out the “deliciously ironic” conclusion that this conservative anti-gay rationale finds “its full fruition in a lesbian collective”).

<sup>155</sup> See *infra* notes 160, 166–167 and accompanying text.

<sup>156</sup> Gallagher, *supra* note 146, at 186.

<sup>157</sup> E.g., Maggie Gallagher, *The GOP Will Pay a Grave Price*, NAT’L REV. ONLINE (June 24, 2011 11:49 P.M.), <http://www.nationalreview.com/corner/270489/gop-will-pay-grave-price-maggie-gallagher> (threatening New York Republicans with a two-million dollar campaign from “The National Organization for Marriage” based on their failure to prevent a vote favoring marriage equality); see *supra* notes 84–91 and accompanying text (describing the unwillingness of most opponents of same-sex marriage to support efforts related to divorce, covenant marriage and other issues directly touching on different-sex couples); *infra* notes 487–501 and accompanying text (describing the anti-gay focus of the constitutional amendments drafted and backed by Ms. Gallagher’s organization). Gallagher and other anti-gay activists still tend to advocate other requirements of traditional marriage as well, but they have been unsuccessful in contrast to their anti-gay activities. See Feinberg, *supra* note 75, at 306–34.

<sup>158</sup> Wardle, *supra* note 144, at 448–50. Wardle describes true conservative concepts as the preservation of valuable institutions, cautious and very slow progress, tradition-based experience, distrust of state power, “responsible” individual liberty, and non-material morality, which seems to veer into territory traditionally labeled natural law.



Wardle describes a “gay lifestyle” that results in relationships innately “less responsible, less stable, less monogamous, less faithful and less committed to responsible child-rearing” as well as a related propensity to contract venereal disease and die early.<sup>159</sup> Of course, this argument is a non-starter for anyone who does not begin with Professor Wardle’s assumptions about the disloyal, promiscuous, diseased nature of lesbian and gay male couples. Even if one accepts Wardle’s assumptions about gay men in general and his willingness to ignore lesbians (or to shoehorn them into ill-fitting stereotypes of gay men), his factual assertion that “marital or marriage-like status” has “virtually no impact on the high infidelity rates of gay men” is not supported by his own source, a study comparing same-sex couples in Vermont civil unions with other same-sex couples.<sup>160</sup> In fact, that study was based on information compiled within the first year after civil unions became legal, and its authors expressly warned that the early data was “about who chooses to have a civil union and who does not. It is not about how being in a civil union [let alone a marriage] changes a relationship.”<sup>161</sup> Relevant studies actually point in the opposite direction.<sup>162</sup>

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<sup>159</sup> *Id.* at 460 (Wardle treats the characteristics of this “gay lifestyle” as largely inalterable, although he seems to believe that sexuality itself is chosen); *see also* Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 998–1014 (2007).

<sup>160</sup> Wardle, *supra* note 144, at 456.

<sup>161</sup> Solomon et al., *supra* note 153, at 574. In addition to ignoring the obvious social distinction between marriage and civil union, Wardle expected dramatic and documented immediate changes in these civil-unionized male couples within one year while asserting that it would take “a full generation” to discern and clearly document the degeneration of different-sex couples wrought by the “serious risk of lowering the[ir] standards” caused by extending marriage to lesbians and gay men. Wardle, *supra* note 144, at 460–68. An even larger problem with his cherry-picked conclusions from the first year civil union study was his misleading use of the data reported. It is true that the study found that a much larger number of gay men than married heterosexual men questioned had had sex outside of their relationships and that those gay men were only 2.8% less likely to have had sex outside of their present relationship than the other gay couples. *Id.* at 569. However, the introduction to the report of the study explains that it looked at couples in and out of civil unions that were “similar on such factors as age and length of relationship.” Solomon, *supra* note 153, at 562. Therefore, the couples would have all been in the same group of unrecognized relationships prior to the recent date of the civil unions. Since the researchers were interested in who enters a civil union, not what happens afterwards, they asked their subjects “if they had ever had sex with anyone other than their current partner *since they and their partner became a couple.*” *Id.* at 564 (emphasis added). Of course, the answer to that question proves nothing about the couples’ sexual behavior *after* they entered civil unions. In addition to this misuse of data, Wardle failed to point out the differences that the study did conclude with regard to the gay male couples who entered civil unions. They “had more mutual friends as a couple, were less likely to have seriously considered ending their relationship, and were less likely to have seriously discussed ending their relationship, than were gay men not in civil unions.” *Id.* at 562. He also omitted any mention of the much larger number of lesbian couples studied, who were somewhat less likely to have had sex outside their relationship than were heterosexual married women. *See id.* at 566.

<sup>162</sup> *See, e.g.,* RAMOS, GOLDBERG & BADGETT, *supra* note 138, at 1, 5–6.

In his *Response*, Professor Wardle leaps from his belief that “promiscuity and polyamory are the standard in gay and lesbian relationships”<sup>163</sup> to the conclusion that inferior gay standards of loyalty and infidelity pose a “serious risk of lowering the standards” of others and leading to the disintegration of marriage as we know it.<sup>164</sup> This leads him down the outrageous path of equating recognition of same-sex marriage with slavery and “sexual apartheid,” then arguing that marriage equality will result in “sexual chaos,” setting the stage for an authoritarian state similar to Napoleon’s France or Hitler’s Germany.<sup>165</sup>

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<sup>163</sup> Wardle, *supra* note 144, at 467 (citing a 1978 study of gay men and a 1997 study of still sexually-active gay men of the same generation (i.e., 50 and older in 1997) recruited through sex shops, saunas, health centers, pornography outlets and other gay businesses—for this generalization about gay and *lesbian relationships*). As the authors of the 1997 study pointed out, that “generation of older homosexually active men ha[d] lived through remarkable changes in perceptions and attitudes toward homosexuality,” including the advent of public openness, activism, AIDS and the development of gay community. Paul Van de Ven, et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. SEX RES. 349, 350 (1997).

<sup>164</sup> Solomon, et al., *supra* note 153, at 569; Wardle, *supra* note 144, at 467. Wardle did not mention the standard of honesty within a relationship, perhaps because one of the studies he relied on showed that heterosexual married men were eight times more likely than men in civil unions to feel it is okay for them to have sex outside their relationship without discussing it with their partners.

<sup>165</sup> Wardle, *supra* note 144, at 463–64 (comparing the basic moral value that made it impossible for Lincoln to accept popular tolerance for slavery with the imperative to reject any popular tolerance for same-sex marriage or civil unions today; of course, this argument for civil war was odd in light of Wardle’s characterization of his argument as Burkean conservative in inspiration); *see also id.* at 473–74 (“Sexual segregation will increase and the historically gender-integrated public institution of marriage will be redefined to include sexual apartheid couples”); *id.* at 467–69 (predicting that “[t]he abandonment of social responsibility and the pursuit of private self-interest” exemplified by marriage equality will lead to “sexual chaos and family disintegration,” although “it will probably take a generation or two to fully unfold”). The fact that Wardle supposes the downward spiral “probably will be more gradual than the eighteenth-century French (or twentieth-century German) Revolution” hardly ameliorates his comparison of same-sex marriage to the origins of Hitler and the Nazi party “in the gay bars of Munich.” *Id.* at 469. This flip remark is as misleading as it is offensive since the Nazis eventually incarcerated and killed thousands of gay men, including Ernst Roehm and the handful of other allegedly gay leaders of the early Strum Abteilung (“SA”). *See* RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* 54–69 (1986) (describing the importance of Roehm and a few other gay men to the foundation of the SA and “the night of the long knives” in 1934 when Himmler’s Schutzstaffel, Heydrich, and Göring finally won their internecine battle against the SA brown shirts, leading to the murder of those Hitler and Göring labeled “homosexual pigs”); *id.* at 149 (estimating the number of men convicted of homosexuality in Germany between 1933 and 1944 at 50,000 to 63,000); *id.* at 154 (estimating that “somewhere between 5000 and 15,000 homosexuals perished behind barbed-wire fences” under the Nazi regime); *see generally* HEINZ HEGER, *THE MEN WITH THE PINK TRIANGLE: THE TRUE, LIFE-AND-DEATH STORY OF HOMOSEXUALS IN THE NAZI DEATH CAMPS* (David Fernbach trans., 2nd ed. 1994) (the compelling biographical account of one gay concentration camp survivor). Perhaps, Wardle should have paid

It might be wrong to dismiss Professor Wardle's argument entirely because of his inability to resist the urge to delve into bizarre analogy and fanciful flights of prognostication. But his underlying leaps of logic also exemplify problems typical of less hysterical arguments against marriage equality. For example, he foresees few gay couples actually marrying, but then finds it likely that this small number of same-sex couples would change the institution of marriage profoundly, rather than be changed by it.<sup>166</sup> Because same-sex couples comprise under two percent of all cohabiting U.S. couples (and gay male couples are an even smaller percentage), it is difficult to see how this small group would change marriage substantially, rather than the other way around.<sup>167</sup> The more likely assumption is that marriage will discipline and regulate same-sex couples and their families as it has biracial couples and women who can now own property and occasionally refuse sex to their husbands.<sup>168</sup> After all, conservatives like Professor Wardle apparently feel so strongly regarding marriage precisely because of their assumptions about its transformative power on married couples.

### 3. Same-Sex Marriage Recognition Is a Conservative Move

Proponents of same-sex marriage can point to empirical evidence supporting their arguments that marriage equality is a conservative move,

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attention when Gallagher warned Andrew Koppelman that “[p]redicting the future is an inherently chancy, and perhaps even an essentially unscholarly enterprise.” Gallagher, *supra* note 147, at 34, 69–70 (Gallagher predicting the future of sentiment in favor of marriage equality descending after it “peaked in 2003” while also predicting that—if recognized—marriage equality would undermine the institution of marriage).

<sup>166</sup> Wardle, *supra* note 144, at 467. Wardle similarly attributes all things bad to gay people when he blames them for the decadence that caused the decline and fall of the Weimar Republic, while asserting that the reactionary Nazi force responding to this decadence also originated among gay men in bars. *Id.* at 469.

<sup>167</sup> According to the 2008 Current Population Survey of the U.S. Census Bureau, there were 66.9 million different-sex couples cohabiting in the U.S. in 2008 (60.1 million married couples and 6.8 unmarried couples). Press Release, U.S. Census Bureau, *As Baby Boomers Age, Fewer Families Have Children Under 18 at Home* (Feb. 25, 2009), available at [http://www.census.gov/newsroom/releases/archives/families\\_households/cb09-29.html](http://www.census.gov/newsroom/releases/archives/families_households/cb09-29.html). The same survey estimated the number of same-sex cohabiting couples at 565,000 in 2008. See GARY J. GATES, WILLIAMS INST., SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at 3 (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-ACS2008FullReport-Sept-2009.pdf>. The estimated number of same-sex couples increased to 646,464 in 2010, of which fifty-one percent were female couples. GARY J. GATES & ABIGAIL M. COOKE, UNITED STATES CENSUS SNAPSHOT: 2010, at 1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf>.

<sup>168</sup> As described above, this unexceptional assumption has been accepted by conservative marriage proponents as well as inspiring a sixty year debate on the left. See *supra* notes 118–122 and accompanying text; *infra* notes 137–141 and accompanying text.

which is—at worst—unlikely to harm different-sex marriage.<sup>169</sup> There is no significant evidence that marriage equality is damaging traditional marriage in the United States.<sup>170</sup> States that recognize same-sex marriage actually have some of the lowest average divorce rates.<sup>171</sup> In fact, the national trend toward lower divorce rates “has been largely confined to states which have *not* passed a state constitutional ban on gay marriage.”<sup>172</sup> States that have enacted constitutional amendments saw their divorce rates increase slightly.<sup>173</sup> These statistical distinctions were likely *caused* by factors such as education, wealth, and age at wedlock, rather than state recognition of same-sex marriage.<sup>174</sup> Yet they do seriously undermine the unsupported, but popular, conservative assertion that marriage equality somehow hurts different-sex marriages.

Conservative arguments against marriage equality invoke tradition, slippery slopes, and the goals of normalizing heterosexuality, heterosexual

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<sup>169</sup> Of course, other advocates of marriage equality have argued that same-sex marriage recognition will have progressive effects on marriage, liberalizing its meaning and related gender roles for all spouses. See Graff, *supra* note 115, at 135–37 (arguing that “[s]ame-sex marriage is a breathtakingly subversive idea,” resulting in “gender-blind” marriage law and the negation of the idea that marriage is justified mainly by procreation); see also Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155, 163–66 (1997). However, they do not argue that it will *undermine* different-sex marriage, just the sexism and “compulsory heterosexuality” traditionally associated with it. See Graff, *supra* note 115; Cox, *supra*.

<sup>170</sup> See *supra* notes 160–161 and accompanying text (debunking some of the statistics that have been misused for that purpose). While Scandinavian statistics have been wielded to argue that the legal recognition of same-sex relationships destroys traditional marriage and its link to birth and childrearing, see Stanley Kurtz, *Scandinavian Shadow*, NEWSDAY (Apr. 15, 2004, 8:00 PM), [www.newsday.com/opinion/scandinavian-shadow-1.620766](http://www.newsday.com/opinion/scandinavian-shadow-1.620766), those arguments have been comprehensively refuted. See also ESKRIDGE & SPEDALE, *supra* note 101, at 173–97.

<sup>171</sup> Danielle Kurtzleben, *Divorce Rates Lower in States with Same-Sex Marriage: Why do Divorce Rates and Gay Marriage Laws Seem to be Correlated?, Education and Marriage Age May Play a Part*, U.S. NEWS & WORLD REPORT, July 6, 2011, available at 2011 WLNR 13450101 (“[Five] of [ten] states, plus the District of Columbia, with the lowest divorce rates per thousand people (of the [forty-four] states, plus D.C., that had available data) are also among the nine jurisdictions (a group that includes eight states and the District of Columbia) that currently perform or recognize gay marriages.”). “In states that recognize or perform gay marriages, the number of divorces in 2009 was 41.2 percent of the number of marriages. In the [thirty-six] other states for which 2009 data are available, it was 50.3 percent. Remove the outlier Nevada . . . and the figure jumps to 53.2 percent.” *Id.*

<sup>172</sup> Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FIVETHIRTYEIGHT: POLITICS DONE RIGHT (Jan. 12, 2010, 4:12 AM), [http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.fivethirtyeight.com/2010/01/divorce-rates-appear-higher-in-states.html?utm_source=twitterfeed&utm_medium=twitter) (finding that the divorce rates in states without anti-gay constitutional amendments decreased by eight percent between 2003 and 2008).

<sup>173</sup> *Id.* (citing a one percent rise in divorce rates over the period from 2003 to 2008 for states that enacted anti-gay amendments by January 1, 2008).

<sup>174</sup> *Id.*; Kurtzleben, *supra* note 171.

monogamy, and a link between procreation, childrearing, and marriage.<sup>175</sup> However, none of the arguments hold up well in themselves, and they all break down when examined in context.

The tradition-based rationale for current discrimination against same-sex couples is difficult to take seriously in light of the dramatic changes in marriage over time.<sup>176</sup> Abolishing coverture, punishing marital rape, recognizing biracial marriage, and allowing divorce—eventually including unilateral no fault divorce—all represent major breaks with prior tradition. In fact, as described above, one of the most constant aspects of marriage has been its flexibility to evolve over time.<sup>177</sup>

Conservatives also argue against marriage equality by insisting that it is a matter of shoring up the terrace on a slippery slope. The evolution of marriage must stop somewhere or it will cease to have meaning, and marriage defenders draw a line at same-sex couples in order to prevent marriage from becoming meaningless and leading toward “sexual chaos” or “man-on-dog marriage.”<sup>178</sup>

Slippery slope arguments often arise to draw lines just when and where the drawers wish. The claim of protecting marriage by preventing its availability to same-sex couples appears disingenuous in light of the general failure of marriage traditionalists to significantly change any marriage or divorce rules for different-sex couples. Arguably, the whole “defense of marriage” argument against same-sex couples is merely a less hateful sounding rationalization for punishing lesbians and gay men and their families. As Justice Scalia observed in his *Lawrence v. Texas* dissent, “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s *moral disapproval* of same-sex couples.”<sup>179</sup>

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<sup>175</sup> See, e.g., Gallagher, *supra* note 147, at 36–52 (raising normative and slippery slope issues); Lynn Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 778–79 (arguing that legal recognition of same-sex marriage will undermine the time-honored societal purpose of heterosexual marriage).

<sup>176</sup> See *supra* Part II.A.

<sup>177</sup> See *supra* text accompanying note 81.

<sup>178</sup> Wardle, *supra* note 144, at 469 (imagining that sexual chaos and family disintegration will result from the recognition of same-sex marriage, leading to the “disintegration of basic social institutions” and eventually to Nazis); *Excerpts from Santorum’s Remarks on Gays*, BALTIMORE SUN, Apr. 23, 2003, at 10A, available at 2003 WLNR 2006187 (quoting then-Senator Rick Santorum’s argument that “the definition of marriage has not ever, to my knowledge, included homosexuality. That’s not to pick on homosexuality. It’s not, you know, man on child, man on dog or whatever the case may be. It is one thing.”).

<sup>179</sup> *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (emphasis in original). Efforts to scrub the taint of disdain from the “defense” of traditional marriage have led some courts to diminish the central purpose of marriage to a pitiful “reckless procreation” rationale: Straight couples may be less responsible than their gay counterparts, so that they require the benefits of marriage to assist them when they accidentally conceive children. See Barbara J. Cox,

For those who look beyond the conception and rearing of children by their two biological parents (the sole aspect of marriage where same-sex couples are categorically different), it is clear that same-sex couples fit all of the other non-sexist state interests served by civil marriage.<sup>180</sup> Those interests are sufficient to justify same-sex marriage for many people. Even those who are not convinced that marriage is the right fit for same-sex couples must recognize that states should legally recognize lesbian and gay relationships in some way. There's the rub. The logical solution for anyone who opposes marriage equality but actually cares about the welfare of same-sex couples and their children is the creation of some alternative form of recognition.<sup>181</sup> And the alternatives will be better for some different-sex couples too. After all, lesbians and gay men do not comprise the majority of couples who fail to have procreative sex. Couples who are elderly, sterile, or effective users of birth control, are similarly situated to same-sex couples in this regard.<sup>182</sup>

Many of those who focus solely on marital, biological procreation as *the* essential element of marriage would refuse to recognize same-sex relationships altogether. However, that too would lead to results anathema to a true defense of traditional marriage.

Even if same-sex marriage, in isolation, were not a conservative move, it is clearly conservative in context. To rationally understand whether a policy position will realistically lead to desirable results, one must compare the likely outcome of its success or failure. The opponents of same-sex marriage have dwelt in great detail on their fears of what might happen if they fail and lesbians and gay men can marry. However, they do not appear to have critically considered the likely results if they succeed.

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*"A Painful Process of Waiting": The New York, Washington, New Jersey, and Maryland Dissenting Justices Understand that "Same-Sex Marriage" is Not What Same-Sex Couples are Seeking*, 45 CAL. W. L. REV. 139, 143 (2008) (explaining that "one almost feels sorrow about the circumscribed purpose left for marriage after these courts and state governments do their best to retain it as an exclusively heterosexual institution"); Kenji Yoshino, *Too Good for Marriage*, N.Y. TIMES, July 14, 2006, at A19. A Northern European style paternity registration system would be a more effective way of achieving this goal, while avoiding discrimination.

<sup>180</sup> See *supra* notes 132–138, 140–141 and accompanying text.

<sup>181</sup> See, e.g., RICHARD A. POSNER, SEX AND REASON 312–14 (1992) (suggesting an "intermediate solution" of registered partnership or some other "simulacrum of marriage" for same-sex couples after expressing ambivalence towards the recognition of full marriage equality due to its "information cost" and because same-sex marriage is "unlikely to fit" perfectly with the incidents of different-sex marriage); Gallagher, *supra* note 147, at 58 (arguing in 2004 that any discussion of marriage equality for the very small group of lesbians and gay men would be premature because "alternative mechanisms for meeting the social needs (ones perhaps even better designed for them than marriage) have hardly been seriously tried, much less exhausted").

<sup>182</sup> Of course, there are also symbolic and communicative ramifications of marriage recognition. But conservative concerns on those issues, too, are best served by recognition of marriage equality. See *infra* notes 186–187 and accompanying text.

Even accepting the doubtful assumption that same-sex marriage would harm the institution of marriage,<sup>183</sup> the anti-equality argument would only make sense if the growing number of “out” same-sex couples is more harmful when they can legally marry than when they cannot. As this paper demonstrates, an additional question is whether society and marriage would be better off if the strategies for maintaining gay-free marriage lead to a cafeteria of legal relationship options for both same and different-sex couples. While liberals may disagree, the conservative answer to these questions is clear.

Rather than examine these alternative paths, Wardle, Gallagher and other opponents of marriage equality seem to assume that their victory would make lesbians, gay men and their families disappear—or at least stop affecting societal views of family. But, there are now millions of out lesbians, gay men, and bisexuals, including over 110,000 same-sex couples raising children throughout the United States.<sup>184</sup> These couples are unlikely to retreat voluntarily into the closet. It is also currently difficult to imagine the American public supporting a return to the days when lesbians and gay men were persecuted, prosecuted, and shamed into invisibility even if hetero-supremacists had the will, and the stomach, to renew the persecution of homosexuality common in Christendom from the time of Augustine to the era of *Bowers v. Hardwick*.<sup>185</sup>

Conservatives lament the negative effect of unmarried couples cohabiting and even raising children without marriage. After all, these counter-

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<sup>183</sup> See ESKRIDGE & SPEDALE, *supra* note 101, at 173–97; see also Silver, *supra* note 172 (citing a one percent rise in divorce rates over the period from 2003 and 2008 for states that enacted anti-gay amendments by January 1, 2008).

<sup>184</sup> GARY J. GATES, WILLIAMS INST., FAMILY FORMATION AND RAISING CHILDREN AMONG SAME-SEX COUPLES 1 (Jan. 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf> (estimating that over 110,000 same-sex couples are raising children in the United States); GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1, 6–7 (Apr. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> [hereinafter GATES, LGBT] (estimating that nine million Americans identify as LGBT and that more than twice that number have engaged in same-sex sexual behavior); GARY J. GATES, WILLIAMS INST., SEXUAL MINORITIES IN THE 2008 GENERAL SOCIAL SURVEY: COMING OUT AND DEMOGRAPHIC CHARACTERISTICS, 4 (Oct. 2010), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Sexual-Minorities-2008-GSS-Oct-2010.pdf> (“[o]nly [four percent] of gay men and lesbians have never told [come out to] anyone compared to more than [twenty-five percent] of bisexuals”).

<sup>185</sup> See generally *Bowers v. Hardwick*, 487 U.S. 186, 196 (Burger concurring) (describing long history of persecution of homosexuality). Of course, some American hetero-supremacists have been actively promoting a persecution agenda abroad. See Jeffrey Gettleman, *Americans’ Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES, Jan. 3, 2010, [www.nytimes.com/2010/01/04/world/africa/04uganda.html?partner=rss&emc=rss](http://www.nytimes.com/2010/01/04/world/africa/04uganda.html?partner=rss&emc=rss) (tracing an uproar leading to legislation that would impose the death penalty for homosexual behavior in Uganda to anti-gay American religious visitors).

examples to marriage become normative as they become more frequent.<sup>186</sup> Certainly, adding a group of families to this list does not help. And, in the special case of same-sex couples, the effect could be magnified. Society, the media and politicians have focused intently on these families. What if the final result of that debate is a message that marriage is unsuited to same-sex couples and their children? If these families do well—if they are active in the PTA, playgroups and their local communities, and eventually taking out loans to send their teenagers to college—that could truly undermine the norm of marriage. If these innately unmarriageable couples can do as well at raising their children as other families, then why should others feel compelled to legally marry?<sup>187</sup>

As University of Chicago Professor Mary Anne Case has pointed out, modern civil marriage is legally a “thinly” defined institution with very few fixed requirements.<sup>188</sup> Couples can choose to “have an open marriage, to live in different cities or in different apartments in the same city, to structure their finances as they please,” and remain just as married as their more traditional counterparts.<sup>189</sup> Since “marriage” means a lot of different things to different people, the categorical distinction on the basis of sex has ceased to make sense. Why should lesbians and gay men be categorically banned from a civil institution, which otherwise allows all sorts of behavior unrelated to responsible biological procreation? No one is suggesting that we can change the social meaning of marriage to the uniform, patriarchal institution that it was a century ago. Therefore, the only answer might be uncoupling social and religious marriage from the legal institution of civil marriage. This answer has

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<sup>186</sup> Richard Posner, *The End of Marriage?*, THE BECKNER-POSNER BLOG (Apr. 4, 2010, 5:31 PM), <http://www.becker-posner-blog.com/2010/04/the-end-of-marriage-posner.html> (arguing that “widespread practices tend to become normative,” so that “[t]he more unmarried people there are, the more the unmarried state seems normal”).

<sup>187</sup> See Carpenter, *supra* note 126, at 100 (arguing that the traditionalist notion of marriage as the normative status for couples willing to show social responsibility including childrearing would be reinforced by marriage equality and undermined by responsible non-marital lesbian and gay family relationships). Of course, many of these couples are married as far as they, their families, their friends and even their churches are concerned. That may maintain the religious or societal norms of marriage, while merely undermining the importance of civil marriage as a legal institution. This may please some, but—because it would also undermine the special legal status of civil marriage—it would tend to reduce the material advantages of marriage with substantial consequences.

<sup>188</sup> Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203–06 (describing a “thin view” of civil marriage as “a legal shell that couples can fill with their own normative meaning and internal structure”).

<sup>189</sup> See *id.* at 1203 (quoting Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigation for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643, 1665–66 (1993)); see also, Case, *supra* note 50, at 1773. But see Murray, *supra* note 60, at 29–40 (describing the disciplining effect of marriage); Titshaw, *supra* note 74, at 580–82 (describing an exception, the federal government’s examination of the internal *bona fides* of otherwise legal different-sex marriages for purposes of immigration recognition).



actually been suggested by many intellectuals on the left and the right.<sup>190</sup> But it seems to have little resonance with the public, and it is probably the most radical solution of all. On the other hand, there has been a great deal of movement over the last twenty years toward normalizing and legally recognizing same-sex relationships.

*D. The Movement for Same-Sex Marriage in the United States*

A reader of the August 1953 *One* magazine essay on marriage commented that discussing same-sex marriage was like “supposing that tomorrow, all humans will suddenly become giants” and debating whether to “tear down all our houses and build new ones,” or “simply raise the roof[s].”<sup>191</sup> This skepticism echoed true for forty years.<sup>192</sup> But that has now changed. Hawaii’s Supreme Court first took the issue of marriage equality seriously in the 1990s, leading other courts and legislatures to do the same. Now, the original essay in *One* predicting same-sex marriage by 2053 appears very conservative.

Nearly half of U.S. states and the District of Columbia have begun to legally recognize same-sex unions over the last fifteen years.<sup>193</sup> Eight jurisdictions have recognized full same-sex marriages: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, the District of Columbia, New York, and California.<sup>194</sup> Three more have marriage laws awaiting popular

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<sup>190</sup> See generally Fineman, *supra* note 123 (urging abolition of marriage as a legal category in favor of new forms of relationship recognition); Kmiec & Saxer, *supra* note 123 (calling for the abolition of civil marriage, solely the religious institution of marriage).

<sup>191</sup> Karcher, *supra* note 118, at 13–14.

<sup>192</sup> See, e.g., Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding the constitutionality of Minnesota’s state provision limiting marriage to male-female couples); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. 1974) (upholding the constitutionality of Washington’s exclusion of same-sex couples from its definition of marriage); see also, e.g., Adams v. Howerton, 486 F. Supp. 1119, 1121–25 (C.D. Cal. 1980), *aff’d*, 673 F.2d 1036 (9th Cir. 1982) (affirming an I.N.S. decision denying an immigrant visa petition filed on behalf of his Australian husband because the petitioner “failed to establish that a bona fide marital relationship can exist between two faggots”).

<sup>193</sup> See *infra* notes 194–199 and accompanying text.

<sup>194</sup> See Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 481–82 (Conn. 2008), Varnum v. Brien, 763 N.W.2d 862, 905–07 (Iowa 2009); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 967–70 (Mass. 2003); Michael Barbaro, *With Wait Over, Gay Couples Wed Across New York*, N.Y. TIMES, July 25, 2011, at A1; Mike DeBonis & Tim Craig, *High Court Declines to Hear Challenge to D.C.’s Gay Marriage Law*, WASH. POST, Jan. 19, 2011, at B04; Abby Goodnough, *New Hampshire Approves Same-Sex Marriage*, N.Y. TIMES, June 4, 2009 at A19; Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1 (Vermont’s legislature overrode Governor Jim Douglas’s veto of that state’s same-sex marriage bill). Since the passage of a statewide referendum rejecting same-sex marriage in November 2008, new licenses are no longer issued in California; however, that state does still

referenda in November.<sup>195</sup> Maryland, New Mexico, and Rhode Island do not license same-sex marriages yet, but they recognize same-sex marriages celebrated in other states, at least for some purposes.<sup>196</sup> Nine states and the District of Columbia have reached a political compromise electing to establish quasi-marriage civil unions or domestic partnerships featuring all of the state benefits and responsibilities of marriage without the label,<sup>197</sup> and eleven states have adopted more limited semi-marriage domestic partnerships, reciprocal beneficiaries, or other arrangements.<sup>198</sup> If you do the math, this adds up to thirty-two different possibilities for same-sex relationship recognition. But it does not involve thirty-two different states. Rather, there are at least thirty-two different parallel and overlapping marriage and marriage light regimes in twenty-three jurisdictions. That is, some states offer more than one.<sup>199</sup>

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recognize the marriages of the around 18,000 couples who were married during the seven months when marriage licenses were issued. Maura Dolan, *Battles Brew as Gay Marriage Ban is Upheld, The 6-1 Ruling Concerns Some Who Fear Erosion of Rights in the Future. But Wedded Couples Retain Their Status*, L.A. TIMES, May 27, 2009, at 1, available at 2009 WLNR 10005913. This may change again soon in California if the U.S. Supreme Court denies *cert.* and allows the Ninth Circuit decision in *Perry v. Brown* to stand. At least, two American Indian tribes also recognize marriage equality. *Tribe Adopts Gay Marriage Law*, L.A. TIMES, Aug. 4, 2011, at 10, available at 2011 WLNR 15392249; *Where Gay Marriage is Welcome*, SEATTLE TIMES, Aug. 5, 2011, at B1, available at 2011 WLNR 15714199.

<sup>195</sup> See L.D. 1860, 125th Leg., 2d Reg. Sess. (Me. 2012), available at <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=IB0003&item=1&snum=125> (indefinitely postponing consideration of citizens same-sex marriage initiative, thereby sending it directly to Maine voters); H.B. 438, 2012 Reg. Sess. (Md. 2012), available at <http://mlis.state.md.us/2012rs/bills/hb/hb0438t.pdf> (enacting marriage equality after a delay to allow for a referendum); H.B. 2516, 62d Leg., 2012 Reg. Sess. (Wash. 2012), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/2516.pdf> (enacting marriage equality, which is on hold pending a November 2012 referendum).

<sup>196</sup> See *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships> (last visited Sept. 9, 2012); see also, e.g., *Marriage—Whether Out-of-State Same-Sex Marriage that is Valid in the State of Celebration May be Recognized in Maryland*, 95 OP. ATT'Y GEN. 3, 5–6 (2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf> (opining that out-of-state same-sex marriages are recognizable under Maryland law). California, where Proposition 8 barred recognition of same-sex marriage, also recognizes out of state marriages entered into before November 5, 2008. CAL. FAM. CODE § 308(b) (West 2008).

<sup>197</sup> California, Delaware, the District of Columbia, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington note that there is some overlap of states recognizing marriage light and those recognizing marriage. See M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES 8 (Nov. 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-Dissolution-FINAL.pdf>.

<sup>198</sup> Arizona, Colorado, Hawaii, Maine, Maryland, Montana, New Jersey, New Mexico, New York, Vermont, and Wisconsin. See generally *infra* note 342 and accompanying text.

<sup>199</sup> See, e.g., New Jersey (offering different-sex marriage, same-sex civil unions, and gender neutral but age-restricted domestic partnerships), Vermont (offering both marriage and reciprocal

As the first state to take the question of marriage equality seriously, Hawaii's marriage debate is an example worth recounting. Some aspects of the Hawaiian marriage story were unique. Many more were typical.

The public marriage discussion in Hawaii began with a constitutional challenge filed in state courts.<sup>200</sup> A handful of plaintiffs had already unsuccessfully challenged marriage discrimination in other states, but the Hawaiian case was different. When the Hawaii Supreme Court held that marriage discrimination constitutes sex discrimination, triggering heightened scrutiny under the state's Equal Rights Amendment, Hawaii appeared to be on the verge of marriage equality.<sup>201</sup> This set off a national uproar as other states and the federal government leapt to enact so-called Defense of Marriage Acts, clarifying that they would not recognize any Hawaiian same-sex marriage.<sup>202</sup>

In the end, negative popular reaction in Hawaii led to a constitutional amendment before Hawaii could celebrate its first legal same-sex marriage.<sup>203</sup> This popular move to circumvent "judicial activism" through a state constitutional amendment would be repeated in other states.<sup>204</sup> However, the form of the Hawaiian amendment was uniquely modest, merely taking the question out of the hands of judges and authorizing the state's legislature to define marriage as it and as its constituents see fit.<sup>205</sup>

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beneficiaries after phasing out the third institution of same-sex civil unions). *See infra* notes 480–483 and accompanying text.

<sup>200</sup> *See* Baehr v. Lewin, 852 P.2d 44, 48–50 (Haw. 1993) (describing the history of that lawsuit, where plaintiff couple sued DOH for denying them a marriage license because they were of the same-sex, claiming this violated Hawaii's Constitution).

<sup>201</sup> *Id.* at 68–74 (concluding that Hawaii's refusal to license same-sex marriage could only be upheld as constitutional if the state overcame the burden of "strict scrutiny" by demonstrating that its discriminatory law "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights").

<sup>202</sup> Titshaw, *supra* note 53, at 468.

<sup>203</sup> Elaine Herscher, *Same-Sex Marriage Suffers Setback Alaska, Hawaii Voters Say "No,"* S.F. CHRON., Nov. 5, 1998, at A2, available at 1998 WLNR 3984799.

<sup>204</sup> In 1998, the same year that South Carolina finally repealed its constitutional prohibition of interracial marriage, Alaska became the first state to enact a constitutional amendment prohibiting same-sex marriages. *See id.*; Cheryl Wetzstein, *Gays Can't 'Marry,' 2 States Say*, WASH. TIMES, Nov. 5, 1998, at A16, available at 1998 WLNR 361336. Between 2000 and 2008, twenty-nine additional states amended their constitutions to ban same-sex marriage. Robert Barnes, *Calif. Ban on Gay Marriage Reversed*, WASH. POST, Feb. 8, 2012, at A1, available at 2012 WLNR 2704104; *State by State: The Legal Battle Over Gay Marriage*, NPR.ORG (last visited Sept. 24, 2012), <http://www.npr.org/2009/12/15/112448663/state-by-state-the-legal-battle-over-gay-marriage> [hereinafter *State by State*]. In 2012, North Carolina followed suit. Campbell Robertson, *Ban on Gay Marriage Passes in North Carolina*, N.Y. TIMES, May 9, 2012, at A15.

<sup>205</sup> HAW. CONST. art. 1, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

Like the elected representatives of many other states, the Hawaiian legislature reached a compromise solution regarding same-sex couples' recognition.<sup>206</sup> It defined marriage as the union of one man and one woman, but it also invented the status of reciprocal beneficiary, extending some of the rights and duties of marriage to other co-habitants who could not legally marry based on their sex or close family relationship.<sup>207</sup> For instance, an aunt and nephew sharing a household could register as reciprocal beneficiaries, as could same-sex couples.

Over the past decade, Hawaii has occasionally reconsidered the marriage question. Finally, in 2011, it enacted a quasi-marriage civil union law offering the benefits and responsibilities, but not the label, of marriage.<sup>208</sup> These civil unions are available to both different- and same-sex couples.<sup>209</sup> Hawaii also continues to allow non-coupled pairs, who do not qualify for either different-sex marriage or a gender neutral civil union, to register as reciprocal beneficiaries.<sup>210</sup>

Thanks to the flexibility allowed by the Hawaiian constitution, the legislature in Hawaii can change its policy in whatever way it deems wise as popular opinion changes on this subject. Unfortunately, that is no longer an option in other states, which rejected the Hawaiian model and were unable to resist the temptation to embed their particular temporary public policy ideas in state constitutions. Thirty states have passed constitutional amendments restricting marriage to different-sex couples.<sup>211</sup> On the other hand, lawmakers have sought compromise even in many of these states, and seven of the states with anti-gay constitutional amendments now also recognize some form of civil union or domestic partnership for same-sex couples.<sup>212</sup>

Thus, legal recognition of family relationships continues to progress, even as states put the brakes on the evolution of marriage. As described above, marriage is largely a conservative institution, which promotes stability, security, adult caretaking, and child welfare. Yet it has remained highly relevant and popular because it evolved over time to suit a changing society. Now social conservatives have tried to stop this evolution before it allows same-sex couples to marry, leaving society to seek out alternative outlets for

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<sup>206</sup> As Judge Scalia remarked in *Lawrence v. Texas*, “[o]ne of the benefits of leaving regulation of this [sodomy regulation] matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion [of marriage equality].” *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting).

<sup>207</sup> HAW. REV. STAT. § 572C-1 (West 2012).

<sup>208</sup> *Id.* § 572B-9.

<sup>209</sup> *Id.* § 572B-2.

<sup>210</sup> *Id.* § 572C-4.

<sup>211</sup> *See infra* Part III.B.1.

<sup>212</sup> *See infra* note 271 and accompanying text.

change. Some of their most potent—and myopic—weapons have been the anti-gay state constitutional marriage amendments addressed below.

### III. FOREVER FROZEN IN 2004: THE CONSTITUTIONAL AMENDMENT STRATEGY

More than three years before a Massachusetts Supreme Judicial Court decision led to the first legal same-sex marriages in the United States, conservative interest groups and politicians successfully pushed to permanently ban same-sex marriage in the Alaska and Nebraska state constitutions.<sup>213</sup> Over the next eight years twenty-seven additional states would join them.<sup>214</sup>

Decades earlier, some European nations adopted constitutional marriage provisions.<sup>215</sup> The provisions were broadly drafted to defend marriage and family against economic distress and the specter of totalitarian state interference. American constitutional amendments, in contrast, focus on the one very specific thing they are “defending” marriage against—same-sex couples.<sup>216</sup> The European examples could have served as models for protecting families and the privileged status of marriage generally. Americans’ choice of very specific anti-gay amendments instead indicates that their motivating impulse was likely disapproval of gay couples rather than felicity towards marriage. Like state anti-miscegenation amendments before them, they were aimed at excluding disfavored spouses, yet justified as protecting marriage and children.<sup>217</sup>

Section A of this part describes German and Hungarian constitutional provisions, which focus on marriage generally, ensuring private autonomy and protecting and caring for women and children. It also briefly describes distinctions drawn by European high courts as they upheld same-sex marriage

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<sup>213</sup> See *supra* note 42 (regarding Alaska and Nebraska).

<sup>214</sup> Missouri, Nevada (2002), Arkansas, Georgia, Louisiana, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, Utah (2004), Kansas, Texas (2005), Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin (2006), Arizona, California, Florida (2008). See *State by State*, *supra* note 204. Later, North Carolina enacted an amendment in 2011. See *infra* note 259.

<sup>215</sup> See *infra* notes 221–233.

<sup>216</sup> Arguably, some—but not all—of the amendments also prohibit polygamy. Compare N.C. CONST. art. XIV, § 6 (establishing “marriage between one man and one woman” as the “only domestic legal union” valid in North Carolina), with GA. CONST. art. I, § 4, para. 1 (apparently ignoring polygamy while specifying that “[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage”).

<sup>217</sup> See Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 51 (1964) (listing six states with anti-miscegenation constitutional provisions and nineteen states with anti-miscegenation statutes just three years before the Supreme Court held in *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967), that state’s anti-miscegenation statute reflected the doctrine of “white supremacy” and violated the Fourteenth Amendment).

light statutes against challenges under these constitutional provisions. Section B describes the anti-gay marriage amendments enacted in U.S. states, classifying them into four groups, analyzing the possibility of enacting marriage light regimes under the various amendments, and suggesting that courts read narrowly these specific constitutional policy restrictions on the options of future democratic majorities.

A. *Constitutional Amendments Protecting Marriage in Germany and Hungary*

In 1972, more than two thirds of the United States Congress passed an Equal Rights Amendment, which would have guaranteed women and men equal rights under the U.S. Constitution.<sup>218</sup> However, ratification by state governments fell three states short because, in part, of the argument that gender equality would require marriage equality for same-sex couples.<sup>219</sup>

Twenty-three years earlier, the new post-war constitutions of both East and West Germany included provisions promoting gender-based equality under the law.<sup>220</sup> The West German version (the “Basic Law”) also included an article guaranteeing state protection of marriage, family, mothers, and children.<sup>221</sup>

The 1949 German Basic Law was adopted long before any popular debate about same-sex marriage. However, its proponents in the conservative

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<sup>218</sup> Eileen Shanahan, *Equal Rights Amendment Is Approved by Congress*, N.Y. Times, Mar. 23, 1972, at A1. Equal rights amendments (“ERAs”) had been introduced in the U.S. Congress since 1923.

<sup>219</sup> See Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 476–77. Although supporters of the amendment argued that it would not result in same-sex marriage, opponents of the federal ERA disagreed. ERA opponents appear to have had a point. When Hawaii became the first state to recognize that discrimination against same-sex couples was facially unconstitutional, it did so on the basis of its state ERA. See *Baehr v. Lewin*, 852 P.2d 44, 66–67 (Haw. 1993).

<sup>220</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 3.2 (Ger.), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (“Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”); VERFASSUNG DER DEUTSCHE DEMOKRATISCHE REPUBLIK [CONSTITUTION], Oct. 7, 1979, art. 7 (Ger. Dem. Rep.), available at <http://translate.google.com/translate?hl=en&sl=de&u=http://www.verfassungen.de/de/ddr/ddr49-i.htm&prev=/search%3Fq%3Dverfassung%2Bder%2Bdeutsche%2Bdemokratische%2Brepublik%2Bart%2B7> (“[M]en and women have equal rights. All laws and regulations that hinder the equal rights of women, are waived.”).

<sup>221</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6 (Ger.), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (“Marriage and the family shall enjoy the special protection of the state. . . . The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. . . . Every mother shall be entitled to the protection and care of the community.”).

Christian Democratic Union (“CDU”) asserted many arguments echoed later by advocates of anti-gay marriage amendments in the United States. They argued that marriage was based on God-ordained, natural law, which pre-existed state legislation.<sup>222</sup> The centrality of the family-unit was a starting point for an ordered society, and the family must contain a sphere of free *Lebensraum* (living space), largely beyond the reach of the state.<sup>223</sup> They also believed that wives and mothers should be free of the pressures of the labor market so that they could stay at home to care for children.<sup>224</sup>

In the end, the CDU had to compromise with other political parties, resulting in the broad and flexible language of Article Six of the Basic Law, which guarantees that “[m]arriage and the family shall enjoy the special protection of the state.”<sup>225</sup> Article Six also added specific provisions guaranteeing parental rights to care for their children, a community duty to care for mothers, and legal protection for illegitimate children.<sup>226</sup>

The provisions in the Basic Law guaranteeing gender equality and protecting marriage and family were both reactions to the views of individuals and families as tools of the state in the totalitarian regimes of Germany’s recent Nazi past and then-contemporary communist East Germany. For instance, the Nazi government had blocked women from certain professions and relegated them to the roles of mothers and homemakers for the future of a racially-defined German nation.<sup>227</sup> Women and their bodies were “subordinated to the

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<sup>222</sup> Compare ROBERT G. MOELLER, PROTECTING MOTHERHOOD: WOMEN AND THE FAMILY IN THE POLITICS OF POSTWAR WEST GERMANY 64 (1993), available at <http://publishing.cdlib.org/ucpressebooks/view?docId=ft3c6004gk&brand=ucpress> (citing the views of leading CDU delegates to the Parliamentary Council, which drafted the Basic Law), with Gallagher, *supra* note 147, at 39–40, 42–51 (describing the natural law inspired arguments for modern opponents of same-sex marriage); Bennett, *supra* note 147 (same).

<sup>223</sup> MOELLER, *supra* note 222, at 65.

<sup>224</sup> *Id.* at 66.

<sup>225</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6.1 (ger.), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>. MOELLER, *supra* note 222, at 69 (attributing this compromise to Free Democratic Party leader and West Germany’s first president, Theodor Heuss).

<sup>226</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6.2–6.5, available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>. Some CDU delegates argued that illegitimate children should not be treated the same as those who were legitimate, but they failed in the end. MOELLER, *supra* note 222, at 66–67. In the end, it took twenty years until the declared equality of illegitimate children was finally enforced by the German Constitutional Court (*Bundesverfassungsgericht*). Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1320 (2008).

<sup>227</sup> MOELLER, *supra* note 222, at 39, 46, 50–51.

expansionist needs of the *Volk*.<sup>228</sup> Children had also been taken from fit parents and given to others preferred by the state.<sup>229</sup>

Article Six's protection of "marriage and family" was also a reaction to the gender equality provision of the Basic Law. Responding to fears that gender equality might be interpreted to *require* women to do work to which they were "unsuited," to conscript them into the military, or to deny spousal support after divorce, Article Six was meant to clarify the importance of the family and the value of women who chose to work in the home.<sup>230</sup>

One thing the Basic Law did not do was define marriage or family. Nor did it expressly address issues with regard to same-sex couples. This became clear many years later when the German Constitutional Court upheld broad federal legislation recognizing registered same-sex life partnerships as consistent with the protection of marriage in Article Six.<sup>231</sup>

The West German Basic Law was highly influential, serving as a model for constitutions in Greece, Portugal, Spain, South Africa, and many new democratic constitutions throughout Eastern Europe, including Hungary.<sup>232</sup> Hungary's constitution thus guaranteed that the "Republic of Hungary shall protect the institutions of marriage and family."<sup>233</sup>

By 2007, the Hungarian liberal party began to seek marriage equality for same-sex couples.<sup>234</sup> Although it failed to pass marriage legislation, it was able to convince its socialist coalition partner to join in enacting a compromise

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<sup>228</sup> *Id.* at 50.

<sup>229</sup> Nigel Jones, *Kidnapped; Hitler Stopped at Nothing in His Sinister Bid to Create a Master Race. As a New Radio Documentary Reveals, His Evil Henchmen Even Snatched Children from the Streets to Fill His Secret Orphanages. Its Presenter, Nigel Jones, Meets Some of the Survivors*, DAILY MAIL (UK), June 11, 2005, at 10, available at 2005 WLNR 9328854; Ron Laytner, *Hitler's Children*, S. FLA. SUN-SENTINEL, Sept. 15, 1985, at 13, available at 1985 WLNR 1049006.

<sup>230</sup> MOELLER, *supra* note 222, at 41, 49, 52, 56–57.

<sup>231</sup> See generally *Entscheidungen des Bundesverfassungsgerichts [BVerfGe] [Federal Constitutional Court]* July 17, 2002, 1 BvF 1/01 (Ger.), available at [http://www.bundesverfassungsgericht.de/entscheidungen/fs20020717\\_1bvf000101en.html](http://www.bundesverfassungsgericht.de/entscheidungen/fs20020717_1bvf000101en.html) (reasoning, among other considerations, that the limitation of German registered life partnerships to same-sex couples clearly distinguished them from the unaffected institution of different-sex marriage).

<sup>232</sup> Markovits, *supra* note 226, at 1338–39.

<sup>233</sup> 154/2008 (XII.17.) AB, Korm. (Governmental Decision No. 154/2008 (XII.17. AB)) (Hung.) (quoting from Hungary's 1989 Constitution and describing constitutional changes of that era, which maintained this provision), available at [http://www.mkab.hu/letoltesek/en\\_0154\\_2008.pdf](http://www.mkab.hu/letoltesek/en_0154_2008.pdf) [hereinafter Hungarian Decision].

<sup>234</sup> Tams Dombos, *Constitutional Court Affirms Registered Partnership*, EUROPEAN COMMISSION ON SEXUAL ORIENTATION LAW (Mar. 23, 2010), <http://www.sexualorientationlaw.eu/news/2010-03-23%20Hungarian%20Constitutional%20Court.html>.



registered partnership act.<sup>235</sup> Unlike German life-partnerships, these Hungarian partnerships would be open to both different and same-sex couples.<sup>236</sup> However, that was not to be.

Before the new registered partnership act came into effect, the Hungarian Constitutional Court struck it down based on Hungary's constitutional promise to "protect the institutions of marriage and family."<sup>237</sup> However, the Court based its decision on particular problems with the inclusion of *different-sex* couples in the registered partnership scheme.<sup>238</sup> It reasoned that a marriage light regime that was clearly different from marriage would be acceptable, but it found that different-sex registered partnerships and marriage had the same function and could "be regarded as 'interchangeable' legal institutions," violating the constitutional obligation to protect marriage.<sup>239</sup>

Finding the relevant provisions of the statute were not severable, the Hungarian Constitutional Court struck down the act in its entirety.<sup>240</sup> However, its opinion made clear that the Court would view the statute differently if it applied only to *same-sex* couples.<sup>241</sup> Citing German, French and Belgian constitutional court opinions, the Hungarian Court noted the importance of details in distinguishing particular marriage light regimes from marriage.<sup>242</sup> It agreed with the German constitutional court's reasoning that a couples' same-sex nature and inability to marry under the law constituted a substantial distinction.<sup>243</sup> The Hungarian court reasoned that legislation promoting other constitutional values, such as individual dignity, "should grant" same-sex couples "legal status—similar to that of the spouses—guaranteeing their treatment as person[s] of equal dignity."<sup>244</sup> It noted the status of marriage for

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<sup>235</sup> *Hungarian Parliament Adopts New Registered Partnership Act*, ILGA EUROPE (Apr. 20, 2009), [http://www.ilga-europe.org/home/guide/country\\_by\\_country/hungary/Hungarian-Parliament-adopts-new-registered-partnership-act](http://www.ilga-europe.org/home/guide/country_by_country/hungary/Hungarian-Parliament-adopts-new-registered-partnership-act).

<sup>236</sup> *Id.*

<sup>237</sup> *See* Hungarian Decision, *supra* note 233, at 3–7.

<sup>238</sup> *Id.* at 13–14.

<sup>239</sup> *Id.* at 15.

<sup>240</sup> *Id.* at 17.

<sup>241</sup> *Id.* at 1, 16; *see also* PETER PACZOLAY, JUDICIAL REVIEW AS A SUBSTITUTE FOR NOT YET CONSTITUTED INSTANCES OF POPULAR SOVEREIGNTY 6 (2010), *available at* [http://www.venice.coe.int/docs/2010/CDL-UD\(2010\)013-e.pdf](http://www.venice.coe.int/docs/2010/CDL-UD(2010)013-e.pdf) (report by the President of the Constitutional Court of Hungary to the Venice Commission, the European Commission for Democracy through Law, stating that "under the same decision a partnership scheme only for homosexual couples would be constitutional").

<sup>242</sup> *See* Hungarian Decision, *supra* note 233, at 10.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 16.

different-sex couples “is not affected, injured or threatened” by such legal recognition of same-sex couples.<sup>245</sup>

Just months after the gender-neutral act was struck down, the Hungarian legislature enacted a registered partnership law granting most of the rights and responsibilities of marriage exclusively to same-sex couples.<sup>246</sup> The Hungarian Constitutional Court upheld this new version of the law.<sup>247</sup>

More recently, Hungarian politics has taken a serious turn to the right, and the conservative new legislative majority has enacted a controversial new constitution beginning with the phrase “God bless the Hungarians,” which includes a provision that “protect[s] the institution of marriage as the union of a man and a woman . . . and the family as the basis of the nation’s survival.”<sup>248</sup> However, both the Hungarian government and the European Commission for Democracy through Law have read this more American-style anti-gay marriage definition to be consistent with Hungary’s extensive same-sex registered partnership law.<sup>249</sup> Similar logic could apply to uphold exclusive same-sex marriage light regimes in United States jurisdictions with constitutional marriage amendments.

The older European constitutional provisions illustrated above have existed to protect and promote different-sex marriages since the years following World War II. However, when they became interested in “defending marriage” in the 1990s, American activists ignored these ready examples. Their reactionary amendments focused solely on defending marriage against the same-sex couples, whom European high courts viewed as no threat to different-sex marriage.

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<sup>245</sup> *Id.*

<sup>246</sup> The exceptions are the right to take a common surname and rights related to adoption and assisted reproductive technology. *Hungary Approves Partnership Legislation*, ILGA EUROPE (Dec. 18, 2007), [http://www.ilga-europe.org/home/guide/country\\_by\\_country/hungary/hungary\\_approves\\_partnership\\_legislation](http://www.ilga-europe.org/home/guide/country_by_country/hungary/hungary_approves_partnership_legislation).

<sup>247</sup> *Constitutional Court Affirms Registered Partnership*, EUR. COMM’N ON SEXUAL ORIENTATION L. (Mar. 23, 2010), <http://www.sexualorientationlaw.eu/news/2010-03-23%20Hungarian%20Constitutional%20Court.html>.

<sup>248</sup> A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] Apr. 25, 2011, Foundation, art. L (Hung.), available at [http://www.kormany.hu/download/2/ab/30000/Alap\\_angol.pdf](http://www.kormany.hu/download/2/ab/30000/Alap_angol.pdf). This religiously grounded constitution also protects “embryonic and foetal life . . . from the moment of conception.” *Id.* at art. II (Freedom and Responsibility).

<sup>249</sup> *Parliament Has Adopted Hungary’s New Constitution*, WEBSITE OF THE HUNGARIAN GOV’T, (Apr. 20, 2011, 1:35 PM), <http://www.kormany.hu/en/ministry-of-public-administration-and-justice/news/parliament-has-adopted-hungary-s-new-constitution>; Opinion on the New Constitution of Hungary, *Venice Commission*, 87th Plenary Sess., June 17–18, 2011, Op. No. 621/2011, CDL-AD(2011)016 (June 20, 2011).

*B. Anti-Gay American Constitutional Amendments*

In upholding New York's former restriction of marriage to different-sex couples, a majority of that state's high court reasoned "[w]e do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected representatives."<sup>250</sup> In fact, the New York legislature would decide in favor of marriage equality just five years later.<sup>251</sup> Conservative legislatures in many other states took the present generation's prerogatives a step further, taking advantage of strong temporary majorities to lock in their particular current idea of marriage, refusing to allow future generations a choice through the normal legislative process.

Three years after Nebraska joined Alaska as the first U.S. states constitutionally defining marriage to exclude same-sex couples, Massachusetts became the first U.S. state to recognize same-sex marriage.<sup>252</sup> That year, constitutional amendments prohibiting same-sex marriage recognition appeared on the ballots of eleven states. All of them passed, and they were popularly viewed as a key to President Bush's reelection in 2004.<sup>253</sup> Karl Rove, whom the President described as "the architect" of his victory, described the marriage issue as one of the most powerful forces in politics at that time, taking notice of exit polls that showed "moral values" ranking unusually high among 2004 voter motivations.<sup>254</sup> Politicos on the right and left reasoned that Rove had brilliantly managed state marriage referenda to turn out four million conservative Christian voters, who had not voted in 2000, and to tilt undecided voters to support Bush as the champion of traditional marriage.<sup>255</sup> Christian conservatives agreed, taking credit for the election result.<sup>256</sup>

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<sup>250</sup> Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006).

<sup>251</sup> See Barbaro, *supra* note 194, at A1.

<sup>252</sup> See Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); sources cited *supra* note 42 (describing these first anti-gay marriage amendments);

<sup>253</sup> Thad Kousser & Mathew D. McCubbins, *Social Choice, Crypto-Initiatives, and Policymaking by Direct Democracy*, 78 S. CAL. L. REV. 949, 969–72 (2005) (describing some marriage amendments as "crypto-initiatives" designed to accomplish goals other than policymaking); Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 18, 18 (2006); Alan Cooperman & Thomas B. Edsall, *Evangelicals Say They Led Charge for the GOP*, WASH. POST, Nov. 8, 2004, at A1 (calling ballot referendums against same-sex marriage "[o]ne of the most successful tactics of social conservatives" and an "election-year bonanza").

<sup>254</sup> Elisabeth Bumiller, *Turnout Effort and Kerry, Too, Were G.O.P.'s Keys to Victory*, N.Y. TIMES, Nov. 4, 2004, at A1; Adam Nagourney, *"Moral Values" Carried Bush, Rove Says*, N.Y. TIMES, Nov. 10, 2004, at A20; Transcript of President Bush's Victory Speech, N.Y. TIMES, Nov. 4, 2004, at P2.

<sup>255</sup> See David D. Kirkpatrick, *In Fight Over Gay Marriage, Evangelicals Are Conflicted*, N.Y. TIMES, Feb. 28, 2004, at A10 (describing Rove's increasing focus on Christian conservative turnout); *but see* Pam Belluck, *Maybe Same-Sex Marriage Didn't Make the Difference*, N.Y.

Whether this narrative is accurate or not, it was influential. Marriage amendments appeared on ballots again in 2006 and 2008, the next national election years.<sup>257</sup> The amendments continued to pass, but the general election results were less favorable for their conservative proponents.<sup>258</sup> Most recently, North Carolina voters passed a constitutional amendment in May, 2012.<sup>259</sup> Minnesota voters will decide on an amendment in November.<sup>260</sup> Maryland, Washington and Maine voters will also be deciding about same-sex marriage in November, but those referenda merely present a choice of whether to accept marriage equality immediately, rather than whether to amend state constitutions to prohibit it forever.<sup>261</sup>

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TIMES, Nov. 7, 2004, (Week in Review) § 4, at 5 (arguing that the marriage amendments may not have been decisive after all). There is some dispute as to whether Rove manipulated the advent of these state amendments or just enjoyed undeserved credit for political serendipity and the hard work of others. Cooperman & Edsall, *supra* note 253, at A1 (citing anti-gay Christian activists who denied Democratic suspicions that Karl Rove engineered the ballot initiatives, taking credit for them and finding they overcame initial White House resistance).

<sup>256</sup> See, e.g., Bumiller, *supra* note 254, at A1 (citing the Vice President of the anti-gay group Focus on the Family's statements regarding the increased Christian conservative turnout for Bush in 2004); Cooperman & Edsall, *supra* note 253, at A1 (quoting the president of the Family Research Council as referring to same-sex marriage as "the hood ornament on the family values wagon that carried the president to second term"); David D. Kirkpatrick & Sheryl Gay Stolberg, *Backers of Gay Marriage Ban Use Social Security as Cudgel*, N.Y. TIMES, Jan. 25, 2005, at A17 (citing a letter from the leaders of Focus on the Family, the Family Research Council, and the Southern Baptist Convention, among others, for "an unprecedented number of African-Americans, Latinos and Catholics who broke with tradition and supported the president[']s election] *solely because of this issue*" of same-sex marriage) (emphasis added).

<sup>257</sup> Adam Nagourney, *Looking to Win in November, With a 2-Year-Old Playbook*, N.Y. TIMES, Apr. 16, 2006, (Week in Review) § 4, at 1 (pointing to an election year Senate vote on the proposed Federal Marriage Amendment and at least seven state constitutional amendments on 2006 ballots as a renewed get-out-the-vote effort aimed at religious conservatives).

<sup>258</sup> Michael Cooper, *Among Republicans, a Debate Over the Party's Roadmap Back to Power*, N.Y. TIMES, Nov. 17, 2008, at A17 (describing disagreement among Republicans regarding whether to deemphasize social issues like opposition to same-sex marriage or to double down on them following two major Republican electoral defeats). Arizona voters actually rejected a marriage amendment that also prohibited domestic partnerships in 2006, but it enacted an amendment limited to defining marriage in 2008. Mary Jo Pitzl, *Gay-Marriage Vote Polarizes Ariz.*, ARIZ. REPUBLIC, Nov. 11, 2008, at B1, *available at* 2008 WLNR 26463795.

<sup>259</sup> See sources cited *supra* note 204. The decision of the North Carolina legislature to break with the pattern of holding marriage amendment referenda in conjunction with major general elections may be a concession to the more ambiguous changing political dynamics of the marriage question as well as the desire of North Carolina Democrats to avoid a repeat of the Republican successes of 2004. These changing dynamics are also illustrated by referenda this year to *recognize* marriage equality in Maine. See sources cited *supra* note 195.

<sup>260</sup> Nicholas Confessore, *Beyond New York, Gay Marriage Faces Hurdles*, N.Y. TIMES, June 27, 2011, at A1 (referring to the Minnesota referendum to ban marriage equality that will be decided in 2012).

<sup>261</sup> See sources cited *supra* note 195.

In addition to supporting anti-gay state marriage amendments in 2004, President Bush also endorsed a federal constitutional amendment that would take the marriage issue away from states and expressly foreclose marriage to same-sex couples under the United States Constitution.<sup>262</sup> While the language of proposed federal marriage amendments has varied,<sup>263</sup> the version President Bush favored would have left open the option for states to enact their own marriage light regimes, apparently including quasi-marriage civil unions.<sup>264</sup> Conservative advocates of traditional marriage should join gay rights activists in rejoicing that this proposed federal amendment failed. It would have forced the seven U.S. jurisdictions that now allow marriage to switch to marriage light alternatives. It would have also channeled the entire marriage debate in the direction of non-marital alternatives. As described below, this could seriously undermine the privileged position of marriage in American laws and society.<sup>265</sup>

The following discussion illustrates how state marriage amendments limit the options of democratic change remaining for future generations and the likely outcome of those limitations. Subsection One categorizes anti-gay state marriage amendments into four groups and analyzes their likely effect on the marriage light options available to future legislatures. Subsection Two looks at the peculiarly undemocratic nature of amendments, which withdraw specific policy decisions from future legislative majorities without the justification of protecting individual liberties or vulnerable minorities. It compares this anti-democratic “dead hand” control to medieval efforts to control property rights

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<sup>262</sup> Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage; President Says States Could Rule on Civil Unions*, WASH. POST, Feb. 25, 2004, at A1.

<sup>263</sup> See S.J. Res. 26, 108th Cong. (2003); H.J. Res. 56, 108th Cong. (2003). Both contain identical language that “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, *nor state or federal law*, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups,” arguably prohibiting any state recognized benefits and duties of marriage to same-sex relationships. *Id.* (emphasis added). *But see* H.J. Res. 106, 108th Cong. (2004); S.J. Res. 43, 110th Cong. (2008). Where the language above was changed to read as follows: “Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman[,]” silencing any argument that would limit state authority to establish marriage light institutions for same-sex couples by statute. *Id.*

<sup>264</sup> See Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 (“‘The amendment should fully protect marriage while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage,’ said Mr. Bush . . . .”); Elisabeth Bumiller, *Bush Says His Party Is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 26, 2004, at A21 (“Mr. Bush said, ‘I don’t think we should deny people rights to a civil union, a legal arrangement, if that’s what a state chooses to do . . . .’ He added: ‘I view the definition of marriage different from legal arrangements that enable people to have rights . . . states ought to be able to have the right to pass laws that enable people to be able to have rights like others.’”).

<sup>265</sup> See *infra* Part V.

far into the future and gives three reasons to interpret ambiguous marriage amendments narrowly when they conflict with later legislative or popular majorities.

1. Four Categories of Anti-Gay Marriage Amendments and the Likely Effects of Each

One of the most common arguments for state marriage amendments and revisions over the last decade was the need to keep the definition of marriage out of the hands of “activist” judges and leave the decision up to the democratic process.<sup>266</sup> Of the thirty-one states adopting constitutional marriage provisions, however, only Hawaii left room for the possibility that the democratic majority might change. Hawaii’s amendment merely clarified the state legislature’s authority to define marriage without judicial interference.<sup>267</sup> Unfortunately, every other state amendment set an anti-gay definition of marriage in constitutional stone, withdrawing the question from future legislatures as well as judges.

The thirty states with anti-gay constitutional marriage provisions can be categorized into four groups. The first group is comprised of ten states with constitutional amendments merely defining “marriage” to exclude same-sex couples.<sup>268</sup> None of these states can recognize full-fledged same-sex marriage without amending their constitutions. Yet, like the Hungarian provision discussed above, these amendments do not appear to bar non-marital forms of

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<sup>266</sup> See James Dao, *State Action is Pursued On Same-Sex Marriage*, N.Y. Times, Feb. 27, 2004, at A24 (quoting Mike Crotts, a Republican state senator who sponsored Georgia’s amendment explaining that his bill “focused on activist judges who don’t rule from the bench based on the law, but based on their personal views or opinions”); Sarah Kershaw, *The 2004 Elections: Issues—Gay Marriage; Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P9 (quoting Gary Bauer, chairman of a political action committee that supported the state marriage amendments, assessing them as “a warning shot across the bow to activist judges”); Nagourney, *supra* note 254, at A20 (quoting Karl Rove, President Bush’s chief political advisor, attributing the success of eleven state marriage amendments in 2004 to impatience with “a few activist judges”).

<sup>267</sup> HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”). The legislature then moved to limit marriage to different-sex couples and to recognize reciprocal beneficiary status for pairs who could not marry. See sources cited *supra* notes 207–208 and accompanying text.

<sup>268</sup> ALASKA CONST. art. 1, § 25; ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; OR. CONST. art. XV, § 5A; TENN. CONST. art. XI, § 18. While Tennessee’s amendment literally includes more than a definition of “marriage,” it still limits all of its prohibitions to “marital contract[s]” and “marriage.” TENN. CONST. art. XI, § 18. *But see* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (holding CAL. CONST. art. I, § 7.5 unconstitutional), *petition for cert. filed*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144).

recognition for same-sex couples, including quasi-marriage civil unions.<sup>269</sup> This distinction is certainly consistent with the record in Arizona, where voters rejected a broad proposition that would have limited marriage light options before approving a narrower amendment focused only on defining marriage.<sup>270</sup> In fact, seven of the ten states in this group have already recognized some level of rights for same-sex couples in spite of the amendments.<sup>271</sup> Elected representatives in the remaining states—Mississippi, Missouri and Tennessee—can constitutionally enact such legislation too if the politics dictate.

Twenty states have adopted broader constitutional amendments purporting to do more than merely restrict the definition of marriage.<sup>272</sup> The amendment language varies from state to state, but most of them (the second and third groups below) leave room for semi-marriage options.

The second group consists of seven states, which merely prohibit recognition of non-marital unions identical or substantially similar to marriage,<sup>273</sup> indicating—by implication—that unions which are similar, but not

<sup>269</sup> See *supra* Part III.A.

<sup>270</sup> Compare Ariz. Dep't of State, Office of the Sec'y of State, *2006 Ballot Propositions: Proposition 107* (unsuccessful), AZ.GOV, <http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop107.htm> (last visited Oct. 13, 2012) (prohibiting any “legal status for unmarried persons” in addition to defining marriage to exclude same-sex couples), with Ariz. Dep't of State, Office of the Sec'y of State, *2008 Ballot Propositions: Proposition 102* (successful), AZ.GOV, <http://www.azsos.gov/election/2008/info/pubpamphlet/english/prop102.htm> (last visited Oct. 13, 2012) (merely defining “marriage”).

<sup>271</sup> See, e.g., Oregon Family Fairness Act, 2007 Or. Laws Ch. 99 (H.B. 2007), OR. REV. STAT. ANN. § 106.300 (West 2008) (providing most of the state rights and responsibilities of marriage).

<sup>272</sup> Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin. See sources cited *infra* notes 273–276, 283–290 and accompanying text.

<sup>273</sup> ALA. CONST. art. I, § 36.03 (prohibiting both “common law marriage of parties of the same sex” and unions “replicating marriage of or between persons of the same sex in the State of Alabama”); ARK. CONST. amend. 83, §§ 1–3 (prohibiting status “identical or substantially similar to marital status” in Arkansas); FLA. CONST. art. I, § 27 (prohibiting any non-marital “legal union that is treated as marriage or the substantial equivalent thereof” in Florida); KY. CONST. § 233A (proscribing “legal status identical or substantially similar to that of marriage for unmarried individuals” in Kentucky); N.D. CONST. art. XI, § 28 (proclaiming that “[n]o other domestic union, however denominated may be recognized as a marriage or given the same or substantially equivalent legal effect”); UTAH CONST. art. I, § 29 (“No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”); WIS. CONST. art. XIII, § 13 (proscribing “legal status identical or substantially similar to that of marriage for unmarried individuals”). The Texas amendment could also be grouped into this category, but they omitted the word “substantially,” prohibiting recognition of “any legal status identical or similar to marriage.” TEX. CONST. art. I, § 32. While it is otherwise similar to the seven provisions described above, the alteration seems to leave it with more in common with Georgia and other states that have ambiguous language regarding exactly what is “similar” enough to marriage to be prohibited, and I have grouped it accordingly. See sources cited *infra* notes 277–280 and accompanying text.

“substantially” so, would be acceptable. Wisconsin, whose constitution prohibits “[a] legal status identical or substantially similar to that of marriage for unmarried individuals, “has already enacted a semi-marriage domestic partnership law.<sup>274</sup> Anti-gay activists challenged the law under Wisconsin’s marriage amendment, but the domestic partnership status has been upheld as not “identical or substantially similar to” marriage in the only opinion announced thus far.<sup>275</sup> The Wisconsin public would likely agree. Just six months before the vote in favor of the constitutional amendment, a poll showed that Wisconsin residents favored both civil unions and the anti-gay marriage amendment.<sup>276</sup>

The possibility of marriage light is less clear in the third group of states. These nine states all adopted amendments that are facially ambiguous regarding whether they prohibit recognition of unions covering *any* of the benefits of marriage or *all* of those benefits.<sup>277</sup> The Georgia marriage

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<sup>274</sup> Compare WIS. CONST. art. XIII, § 13 (proscribing “legal status identical or substantially similar” to marriage), with WIS. STAT. ANN. § 770.001 (West 2012) (establishing limited domestic partnership system for the state of Wisconsin).

<sup>275</sup> Decision and Order, *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011), available at [http://www.aclu.org/files/assets/10cv4434\\_1.pdf](http://www.aclu.org/files/assets/10cv4434_1.pdf) (granting summary judgment against challenge to Wisconsin domestic partnership law on the basis of Wisconsin’s marriage amendment). An appeal to the Wisconsin Supreme Court was certified by the Wisconsin Court of Appeals. *Appling v. Doyle*, No. 2011AP1572, 2012 WL 2579687 (Wis. Ct. App. July 5, 2012).

<sup>276</sup> *Survey Hints at Less Support for Anti-Gay Marriage Amendment*, WSAW.COM (Apr. 14, 2006, 12:46 PM), <http://www.wsaw.com/home/headlines/2633976.html> (sixty-one percent of residents polled favored the marriage amendment, but fifty-nine percent favored civil unions for different-sex couples and forty-eight percent favored them for same-sex couples, while only forty-seven percent opposed those).

<sup>277</sup> GA. CONST. art. I, § 4, ¶ I (“No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.”); KAN. CONST. art. XV, § 16 (prohibiting recognition of any “relationship, other than marriage . . . entitling the parties to rights or incidents of marriage”); LA. CONST. art. XII, § 15 (in addition to a prohibition on “legal status identical or substantially similar to that of marriage,” Louisiana prohibits any official from legally requiring “that marriage or the legal incidents thereof be conferred upon any member of a [non-marital] union”); NEB. CONST. art. I, § 29 (“uniting of two persons of the same sex in a civil union, domestic partnership, or *other similar same-sex relationship* shall not be valid” (emphasis added)); OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35 (prohibiting laws requiring “that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”); S.D. CONST. art. XXI, § 9 (“The uniting of two or more persons in a civil union, domestic partnership, or *other quasi-marital* relationship shall not be valid or recognized in South Dakota.”) (emphasis added); TEX. CONST. art. I, § 32 (“This state or a political subdivision . . . may not create or recognize any legal status *identical or similar to marriage*.”) (emphasis added); VA. CONST. art. I, § 15-A (prohibiting recognition of any “legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage”). One local Ohio court found that the legal status of unmarried couples under Ohio’s Domestic Violence Act was inconsistent with the quoted part of Ohio’s marriage amendment, but it went on to find this part of the state amendment unconstitutional under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. *Phelps v. Johnson*, No. DV05305642, 2005 WL 4651081 (Ohio Ct. Com.



amendment, for example, states that “[n]o union between persons of the same-sex shall be recognized . . . as entitled to the benefits of marriage.”<sup>278</sup> Obviously, the constitutionality of a semi-marriage in Georgia could hinge on whether *all* or *any* of “the benefits of marriage” were covered by this constitutional prohibition. This ambiguity was a primary focus of a superior court decision and arguments on both sides of a constitutional challenge to the amendment’s enactment as a prohibited multiple-objective amendment.<sup>279</sup> However, the Georgia Supreme Court unanimously punted on this question, refusing—for now—to clarify the ambiguous language of the statute by “adopt[ing] as the amendment’s objective, reserving *marriage and its attendant benefits* to unions of man and woman.”<sup>280</sup>

One of the most oddly formulated marriage amendments is Ohio’s provision that “[t]his state and its political subdivisions shall not create or recognize a *legal status* for relationships of unmarried individuals that *intends* to approximate the design, qualities, significance or effect of marriage.”<sup>281</sup> Although grammatically the intending subject here appears to be the “legal status,” a court would likely look to the *legislature’s* intent. Still, a great deal of judicial creativity will be required to nail down when it “intends to approximate” the named aspects of marriage.<sup>282</sup>

The fourth group consists of Idaho, North and South Carolina, and—probably—Michigan, which purport to prohibit all marriage light recognition. Michigan’s amendment uses the malleable term “marriage or similar union” to

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Pl. Nov. 28, 2005); *but see* State v. Abdellahi, No. 2005CRB6993, 2005 WL 4651078 (Ohio Ct. Com. Pl. June 7, 2005) (reading the Ohio marriage amendment narrowly to find it consistent with the Domestic Violence Act). One federal district court also found Nebraska’s amendment unconstitutional, but that decision was reversed on appeal. Citizens for Equal Prot., Inc. v. Bruning, 368 F. Supp. 2d 980, 985 (D. Neb. 2005), *rev’d sub nom.* Citizens for Equal Prot. v. Bruning, 455 F.3d 859 (8th Cir. 2006).

<sup>278</sup> GA. CONST. art. I, § 4, ¶ I.

<sup>279</sup> See O’Kelley v. Perdue, No. 2004CV93494, 2006 WL 1350171, at \*8 (Ga. Super. Ct., May 16, 2006), *rev’d*, Purdue v. O’Kelley, 632 S.E.2d 110, 113 (Ga. 2006) (holding that the objective of the amendment language quoted is “to ensure that unions between persons of the same sex—without restriction—are not afforded any of the advantages, rights or privileges afforded to married same sex couples under state law”).

<sup>280</sup> Perdue v. O’Kelley, 632 S.E.2d 110, 113 (Ga. 2006) (emphasis added). The decision that this single objective encompassed both a heterosexual definition of marriage and the prohibition of certain same-sex unions implies that the prohibition was limited to *all* of the “attendant benefits” of marriage, but the court did not say so expressly. When it is called on to decide this question in the future, hopefully it will consider the assumptions underlying *Perdue*. This interpretation would be supported by the rule of construction described below, *see infra* Part III.B.2, and by the ballot language, which merely asked Georgia voters whether “this state shall recognize as marriage only the union of man and woman.” *Perdue*, 632 S.E.2d at 111.

<sup>281</sup> OHIO CONST. art. XV, § 11 (emphasis added).

<sup>282</sup> Thus far, two Ohio trial courts have attempted to interpret the language of this amendment with different results. *See supra* note 277.

describe its prohibition, but—unlike states in group three—it may have answered the “any” or “all” question, expressly adding “for any purpose” so that it reads: “[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union *for any purpose*.”<sup>283</sup> This addition was a primary focus of the Michigan Supreme Court’s opinion reading the amendment broadly to prohibit health-insurance benefits for same-sex domestic partners of government employees.<sup>284</sup> In light of this decision, Michigan may fit best in the fourth group with Idaho and the Carolinas.<sup>285</sup> Idaho’s constitution provides that “[a] marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”<sup>286</sup> North Carolina’s amendment is almost identical.<sup>287</sup> South Carolina prohibits recognition other than marriage of “any . . . domestic union, however denominated.”<sup>288</sup> Apparently anticipating this broad language could affect prenuptial agreements, the North and South Carolina amendments clarify that they do not prohibit domestic private contracts.<sup>289</sup> Idaho made no such clarification.

In conclusion, ten states with constitutional amendments seem to leave open the option of recognizing quasi-marriage with all of the legal benefits and responsibilities of marriage, so long as they avoid the word “marriage.” Seven additional states have adopted amendments, clearly implying the possibility of some forms of semi-marriage. The language of nine anti-gay marriage amendments is ambiguous, but leaves room for semi-marriage possibilities if read to prohibit unions recognizing *all* rather than *any* of the benefits and

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<sup>283</sup> MICH. CONST. art. I, § 25 (emphasis added).

<sup>284</sup> Nat’l Pride at Work, Inc. v. Governor of Mich., 748 N.W.2d 524 (Mich. 2008). The opinion focused on the “for any purpose” language to the extent that the dissenting justices argued that the majority had read “similar union” out of the amendment all together. *Id.* at 551 (Kelly, J., dissenting). The majority opinion admitted that the “for any purpose” language might have been essential to reach the conclusion that domestic partner health insurance benefits were precluded. *Id.* at 538.

<sup>285</sup> *National Pride at Work, Inc.* may have left the door slightly ajar to less marriage-like unions, since it focused on marriage-like *prerequisites* of the unions like lack of close blood ties, but it is hard to imagine less marriage-specific *consequences* than the dependent healthcare benefits already provided to domestic partners of employees of most major American companies.

<sup>286</sup> IDAHO CONST. art. III, § 28.

<sup>287</sup> N.C. CONST. art. XIV, § 6 (“Marriage between *one* man and *one* woman is the only domestic legal union that shall be valid or recognized in this State.”) (emphasis added). Changing “a” to “one” may be an attempt to be arithmetically certain that polygamy will not be recognized in North Carolina.

<sup>288</sup> S.C. CONST. art. XVII, § 15.

<sup>289</sup> N.C. CONST. art. XIV, § 6 (“This section does not prohibit a private party from entering into contracts with another private party . . . .”); S.C. CONST. art. XVII, § 15 (“This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.”).

responsibilities of marriage. (As described in the following section, these ambiguous provisions should be read narrowly to allow flexibility for future lawmakers.) Finally, four states seem to have answered the “any” or “all” question and purposed to prohibit recognition of *any* benefits or duties for non-marital “domestic unions.”

The few decisions interpreting state marriage amendments thus far make it clear that the more those institutions vary from marriage, the more likely they are to pass muster under the state amendments.<sup>290</sup> This will naturally encourage experimentation by future legislatures that wish to constitutionally establish some form of legal recognition for same-sex relationships.

## 2. Three Reasons for Construing “Dead Hand” Marriage Amendments Narrowly

Unclear state anti-gay marriage amendments, like those in group three above, should be construed narrowly for three reasons: (1) in order to limit the specific policy decisions imposed by one generation on the next; (2) in order to limit the effect of constitutional amendments to what was intended by referenda voters; and (3) to read those amendments as consistently as possible with state and federal constitutional guarantees of equality and due process.

With the exception of the amendment in Hawaii, every state constitutional marriage amendment forecloses the options of future legislative majorities recognizing same-sex marriage. Of course, it has always been necessary to amend constitutions. For instance, updating basic rules to keep the democratic system functioning or protecting minority rights beyond the realm of normal legislative decision-making are familiar and uncontroversial.<sup>291</sup> Yet the anti-gay marriage amendments do something different. They embody a conservative strategy to enshrine temporarily-popular particular policy positions in state constitutions to guard against changing public opinion.<sup>292</sup>

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<sup>290</sup> See, e.g., *Nat'l Pride at Work, Inc.*, 748 N.W.2d at 534–37 (focusing on “obviously important, and apparently unique (at least in combination)” marriage-like requirements regarding gender and lack of close blood connections to conclude that domestic partnerships recognized by Michigan employers constituted “unions similar to marriage”).

<sup>291</sup> See Scott Titshaw, Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L. REV. 1085, 1112–13 (1989) (describing the function of the federal Bill of Rights and the Fourteenth Amendment as bulwarks protecting minorities against the majority will as reflected in the laws enacted by a properly functioning democratically-elected government).

<sup>292</sup> See, e.g., MICH. CONST. art. I, § 25 (expressly stating its purpose for barring same-sex relationship recognition in order “[t]o secure and preserve the benefits of marriage for our society and for future generations of children”). This policy for perpetuity is similar to Eighteenth Amendment of the U.S. Constitution (prohibition) and state anti-miscegenation amendments. See Applebaum, *supra* note 217, at 51.

Thomas Jefferson famously opined that constitutions should expire every nineteen years so that each new generation could fashion one suitable to its own time.<sup>293</sup> Some scholars have reached back beyond Jefferson's time for a term to describe one generation's use of constitutions to limit the democratic options of their descendants: the "dead hand."<sup>294</sup> Jefferson may well have agreed with this analogy between overreaching constitutional provisions and the maligned efforts of medieval land barons to control the lives of unborn progeny through clever will drafting. Constitutionally foreclosing the legislative policy options of future citizens limits democracy as well as individual liberty.

In the context of state marriage amendments and changing public opinion, the dead hand control now in place is likely to become increasingly problematic. In response, I propose neither Jefferson's constitutional expiration date nor a rule against political perpetuities. But judges battling the dead hands of testators also employed another, more modest strategy in defense of devisees, a tactic that may be appropriate in the context of constitutional policymaking as well: namely, interpreting ambiguous provisions narrowly so as to allow greater liberty to the living generation.<sup>295</sup> In the context of constitutional marriage amendments, judges should follow this example by reading ambiguous constitutional language narrowly to conflict as little as possible with later legislation.

The anti-democratic aspect of the marriage amendments is particularly problematic where the language was intentionally drafted to be vague in a direct democracy "bait-and-switch," allowing referendum proponents to claim a limited intent prior to a popular vote, then a broad mandate afterwards.<sup>296</sup> At least one state went a step further, employing ballot language that only referred to a definition of marriage, while the actual corresponding amendment also

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<sup>293</sup> The Papers of Thomas Jefferson, Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THE FOUNDERS' CONSTITUTION, <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> (last visited Oct. 14, 2012) (arguing that "no society can make a perpetual constitution, or even a perpetual law [because t]he earth belongs always to the living generation").

<sup>294</sup> See, e.g., Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609, 613–25 (2008) (describing the long history of criticism of "dead hand" constitutional authority and its possible relationship to interpretive theories in a broader context).

<sup>295</sup> JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 616, 622 (Vicki Been et al. eds., 5th ed. 2010) (in interpreting ambiguous conveyances in the absence of clear intent, judges prefer constructions that avoid forfeiture by one in current possession).

<sup>296</sup> Staszewski, *supra* note 253, at 19–20. While finding the Michigan state amendment to be "unambiguous," even the *National Pride at Work, Inc.* majority recognized that proponents of that state's marriage amendment claimed prior to passage that the amendment would not preclude the domestic partner healthcare benefits it did preclude. *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 540 (Mich. 2008).

covered civil unions, marriage-like benefits, and even the jurisdiction of courts.<sup>297</sup>

Judges and other state officers should interpret ambiguous constitutional marriage amendments narrowly in order to limit their effect to the clear intent of the voters. The experience of Arizona in 2006 and 2008 provided a valuable experiment to demonstrate why. In 2006, Arizona voters rejected an amendment that prevented domestic partnership recognition and affected different-sex couples; two years later, they adopted an amendment that was clearly limited to the issue of same-sex marriage.<sup>298</sup> While these issues might not resonate the same in other states, the Arizona experiment certainly demonstrates that not all voters who oppose same-sex marriage would approve an amendment that clearly prohibits other forms of relationship recognition.

Finally, vague marriage amendments should be read narrowly in order to minimize conflict with other constitutional provisions. If possible, different provisions of the same constitution should be read consistently with one another.<sup>299</sup> Therefore, state marriage amendments should be read consistently with state constitutional equal protection and due process requirements whenever possible. If a state constitution requires marriage discrimination against same-sex couples, a state constitutional equality guarantee could be served by a second-class institution providing the legal incidents of marriage only to same-sex couples who may not marry. This logic would parallel German and Hungarian constitutional court decisions identifying a requirement to ameliorate constitutionally sanctioned discrimination with guarantees of substantial legal equality.<sup>300</sup> Additionally, American states would be subject to federal constitutional review, and their constitutions should also be interpreted so as to avoid likely conflict with the Equal Protection Clause of the Fourteenth

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<sup>297</sup> See sources cited *infra* notes 494–495 and accompanying text (describing the various topics expressly covered by Georgia’s constitutional amendment while ballot language described only a vote that “[t]his state shall recognize as marriage only the union of man and woman”).

<sup>298</sup> Jen Christensen, *Straight Talk Wins in Arizona*, THE ADVOC., Dec. 19, 2006, at 34 (attributing the first Arizona vote to a strategy emphasizing the way that amendment would affect different-sex couples, particularly older couples who chose not to marry in order to maintain full social security benefits); Pitzl, *supra* note 258, at B1.

<sup>299</sup> See *Gilbert v. Richardson*, 452 S.E.2d 476, 479 (Ga. 1994) (“It is a basic rule of construction that a statute or constitutional provision should be construed ‘to make all its parts harmonize and to give a sensible and intelligent effect to each part[, as i]t is not presumed that the legislature intended that any part would be without meaning.’”) (alteration in original) (quoting *Houston v. Lowes of Savannah, Inc.* 219 S.E.2d 115, 116 (Ga. 1975)); John Devlin, *Louisiana Constitutional Law*, 54 LA. L. REV. 683, 725 (1994) (“[C]onstitutional provisions should be construed as a whole, harmonizing all elements so as to give effect to each.”) (citing *Succession of Lauga*, 624 So. 2d 1156, 1158 (La. 1993)).

<sup>300</sup> See sources cited *supra* notes 231–249 and accompanying text.

Amendment if the relevant jurisdiction follows the federal standard of constitutional avoidance.<sup>301</sup>

If a conflict with the Fourteenth Amendment is unavoidable, the anti-democratic aspect of these specific policy-based state amendments may also undermine traditional federal judicial deference to state legislative acts and referenda. That deference is normally justified by the democratic authority underlying state laws. However, any objection to “activist judges” overriding the popular will as expressed through their elected representatives is at its weakest when a court is allied with current popular and legislative majorities in sweeping away a prior generation’s particular policy restrictions on the current one.

Given the ambiguity in many of the state marriage amendments (particularly groups two and three above), a narrow construction of the amendments would have meaningful consequences, allowing robust forms of marriage light in almost all states. Yet thirty American constitutional marriage amendments still expressly prohibit full marriage equality rather than promote and protect marriage and families in the tradition of their European counterparts. This leaves these U.S. states with less flexibility to contemplate full marriage equality, likely channeling their efforts to recognize same-sex couples into experimentation with marriage light.

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<sup>301</sup> See LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 235–37 (Russell L. Weaver ed., 2008) (“[I]f serious constitutional doubt is raised, [courts] will first ascertain whether another construction of the statute is *fairly possible* so that the constitutional question can be avoided.”) (emphasis in original); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

## IV. COMPARING MARRIAGE LIGHT ALTERNATIVES FOR BOTH SAME- AND DIFFERENT-SEX COUPLES

Public debate about legal recognition of same-sex relationships is a global phenomenon. Countries in Europe, Latin America and Africa already recognize same-sex marriages, and Asian countries have been debating the issue as well.<sup>302</sup>

In 1989, Denmark became the first country in the world to introduce a registered partnership system for same-sex couples.<sup>303</sup> By 2001, the Netherlands became the first to recognize same-sex marriage.<sup>304</sup> Since then, Belgium (2003), Spain (2005), Norway (2008), Sweden (2009), Iceland (2010),

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<sup>302</sup> New Zealand has a broad, gender-neutral civil union law, and there are active marriage debates going on there and in neighboring Australia. Michelle Cooke, *Union and Marriage, It's Not Quite Even*, STUFF.CO.NZ (May 19, 2012, 2:37 PM), <http://www.stuff.co.nz/national/politics/6952190/Union-and-marriage-its-not-quite-even> (stating that 2745 couples have entered civil unions since 2005—twenty percent were heterosexual, a marriage bill is being drafted, and the leadership of both the labour and conservative parties have indicated they would not oppose marriage equality); Samantha Maiden, *Big Vote for Gay Marriage*, SUNDAY TEL. (New S. Wales), May 20, 2012, at 25, available at 2012 WLNR 10617718 (a recent poll shows that a majority of Australians favor marriage equality and support a conscience vote in parliament, while New Zealand's conservative Prime Minister John Key "has backed Mr. Obama's support for gay marriage"). There has been serious discussion about civil unions and marriage equality in Taiwan for a decade, with leaders of both major parties supporting some form of recognition, but hesitating to move forward politically before there is clear societal consensus. See, e.g., Martin Aldrovandi, *Same Sex Marriage in Taiwanese Elections*, BALLOTS & BULLETS (Jan. 5, 2012), <http://nottspolitics.org/2012/01/05/same-sex-marriage-in-taiwanese-elections/> (describing Democratic Progressive Party's (DPP) eight-year-old marriage equality bill and the current pledge of Tsai Ing-wen to support civil unions if elected president); Chris Hogg, *Taiwan Move to Allow Gay Unions*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/3219721.stm> (last updated Oct. 28, 2003) (describing the government's efforts towards marriage equality and adoption by same-sex couples); Philip Hwang, *Taiwan Presidential Election Candidates Discuss Same-Sex Marriage in Televised Debate*, FRIDAE (March 17, 2008), <http://fridae.asia/newsfeatures/2008/03/17/2025.taiwan-presidential-election-candidates-discuss-same-sex-marriage-in-televised-debate> (quoting both presidential candidates general support for marriage or an alternative once "societal consensus" can be established); *Lesbian Couple to Take Vows in Nation's First Public Buddhist Same-Sex Union*, TAIPEI TIMES (July 8, 2012), <http://www.taipetimes.com/News/taiwan/archives/2012/07/08/2003537249>. Some movement toward legal recognition of same-sex relationships has also occurred in Hong Kong and Japan. See Nichi Hodgson, *Fake Gay Weddings in Tokyo Disneyland Are Not a Fairytale Come True*, THE GUARDIAN (May 18, 2012), <http://www.guardian.co.uk/commentisfree/2012/may/18/fake-gay-marriage-japan-not-fairytale> (referring to an "embryonic" campaign for civil partnership by an openly gay Japanese politician); see also Chris Ip, *Gay Partners Given "Relationship Visa" Prolonged Visitor Visa Effectively Sanctions Same Sex Partners with Aim of Retaining Business Talent*, S. CHINA MORNING POST, July 10, 2011, at 1, available at 2011 WLNR 13616795.

<sup>303</sup> Ian Curry-Sumner, *Same-Sex Relationships in Europe: Trends Towards Tolerance?*, 3 AMSTERDAM L.F. 43, 47 (2011).

<sup>304</sup> *Id.* at 43 (although with some restrictions on adoption).

Portugal (2010) and Denmark (2012) have followed suit in Europe, as have Canada (2005), South Africa (2006), Argentina (2010), Mexico City (2010), seven U.S. states and the District of Columbia.<sup>305</sup> However, these jurisdictions do not all treat same-sex marriage exactly the same. To paraphrase George Orwell, marriage equality is more equal for some than for others.<sup>306</sup> Predictably, legislative debates on hotly contested issues like same-sex marriage often end in some form of compromise, even when the result is labeled “marriage.” Some jurisdictions have made religious exemptions to general discrimination laws with regard to the marriages of same-sex couples.<sup>307</sup> When some nations recognized same-sex “marriage,” they limited adoption rights, presumptions of paternity, and even authorization to use assisted reproductive technology for same-sex spouses.<sup>308</sup> These distinctions have been eliminated in some jurisdictions as marriage equality gains broader acceptance.<sup>309</sup> In others, “marriage” still consists of two tiers with less and more equal forms.<sup>310</sup>

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<sup>305</sup> Dudley Althaus, *Gay Marriage Is Legalized in Mexico City Married Gay Couples Are Also Allowed to Adopt*, HOUS. CHRON., Dec. 22, 2009, at A10, available at 2009 WLNR 25752444; *Copenhagen Orders Church to Marry Homosexuals*, VANCOUVER SUN, June 8, 2012, at B6, available at 2012 WLNR 12001492; Dan Fastenberg, *A Brief History of International Gay Marriage*, TIME WORLD (July 22, 2010), <http://www.time.com/time/world/article/0,8599,2005678,00.html>. Washington and Maryland have also enacted marriage equality in 2012, but those acts are subject to possible veto by referendum in November. See sources cited *supra* note 195. If things go as planned for France’s new President, François Hollande, that country will begin recognizing same-sex marriage in 2013. See *Gay Marriage, Adoption Allowed in France from 2013: PM*, AGENCE FR.-PRESSE, July 3, 2012, available at Westlaw 7/3/12 Agence Fr.-Presse 15:46:44.

<sup>306</sup> The pigs’ commandment in Orwell’s *Animal Farm* winds up as “[a]ll animals are equal, but some animals are more equal than others.” GEORGE ORWELL, *ANIMAL FARM* 123 (Signet Classic ed. 1946).

<sup>307</sup> See, e.g., Macarena Sáez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” Is So Different*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1, 6–9 (2011) (describing exceptions in favor of religious conscientious objectors in Canada, Norway, and South Africa); see also N.Y. DOM. REL. LAW § 10-b (McKinney 2011). Although this New York “religious exception” regarding discrimination prohibitions is facially neutral, it was included in the bill extending marriage to same-sex couples as a compromise particularly related to them. See Danny Hakim & Thomas Kaplan, *After Talks with G.O.P., Cuomo Expects Passage of Gay Marriage Bill*, N.Y. TIMES, June 17, 2011, at A17.

<sup>308</sup> Sáez, *supra* note 307, at 2–14 (describing initial adoption limitations recognized by Belgium, the Netherlands, and Portugal, as well as parental presumption limitations in Belgium, the Netherlands, and Spain).

<sup>309</sup> *Id.* at 3–5 (describing the eventual elimination of some limits on adoption and parental presumption for Dutch same-sex marriages, as well as the elimination of adoption limits, but not paternity presumptions for Belgian same-sex marriages).

<sup>310</sup> *Id.* Some of these second-class “marriages” could accurately be described as a third form of “marriage light” (with semi-marriage attributes and the label “marriage”), but it would be unnecessarily confusing to focus on this distinction for purposes of this paper.



The compromise result of the marriage debate is even clearer in the many states and nations that have devised non-marital forms of relationship recognition. This includes at least twenty European countries as well as Brazil, Columbia, Costa Rica, Ecuador, Uruguay, and Venezuela.<sup>311</sup> It also includes twenty-two U.S. states and the District of Columbia.<sup>312</sup>

Some, but not all, marriage light regimes are available to different-sex couples as well as same-sex partners. Since they have not been around for very long, it is not entirely clear how these new institutions will affect same and different-sex relationships, including the decisions of couples who are allowed to choose between these alternatives and traditional marriage. But it is likely to have some effect.

Subsection A of this Part examines some of the data already available, focusing on French and Dutch marriage light models with relatively long, officially documented histories. These examples show the popularity of marriage light regimes, particularly those different enough from marriage and unregistered cohabitation to offer distinct advantages to some couples with a choice. As Part V will demonstrate, this popularity is likely to lead to permanent multi-tier systems of relationship recognition for both different and same-sex couples. Subsection B discusses various American examples of marriage light, which have attracted some different-sex couples, but less than their European counterparts. Subsection C briefly discusses the third, and lightest, option—legal recognition of unregistered cohabitants. This option is an important variable in assessing the attractiveness of marriage and marriage light alternatives since it tends to eliminate distinctions regarding legal benefits and duties, leaving only symbolic differences among marriage, registered partnerships, and unregistered cohabitation.

#### A. *Marriage Light in Europe*

At least twenty countries in Europe have adopted some form of marriage light. Quasi-marital same-sex registered partnerships with rights and benefits very similar to marriage have been developed in Denmark, Norway, Sweden, Greenland, Iceland, the Netherlands, Germany, Finland, Switzerland,

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<sup>311</sup> Nick Allen, *British Lesbian Couple Fight Ecuadorean Law to Become Joint Parents*, DAILY TELEGRAPH (U.K.), June 1, 2012, at 25, available at 2012 WLNR 11517862 (describing 2008 Ecuadorean constitution establishing civil unions with same rights as marriage except joint adoption); Taylor Barnes, *Brazil Becomes Largest Nation Yet to Legalize Civil Unions Brazil on Thursday Became the Sixth Country in Latin America, in addition to Mexico City, to Extend Rights to Gay and Lesbian Couples But Stopped Short of Legalizing Gay marriage*, CHRISTIAN SCI. MONITOR, May 2, 2011, available at 2011 WLNR 8943896 (Brazil, Columbia, and Uruguay recognize quasi-marriage regimes, while Costa Rica and Venezuela recognize less comprehensive forms of semi-marriage). See also *infra* notes 313–314 and accompanying text (listing and describing various forms of marriage light recognized in Europe).

<sup>312</sup> See sources cited *infra* notes 340–342 and accompanying text.

the United Kingdom, Hungary, Ireland, and Austria.<sup>313</sup> Registered partnerships with more limited rights and responsibilities for same-sex couples have been enacted in France, Belgium, Luxembourg, Andorra, the Czech Republic, Slovenia, and Liechtenstein.<sup>314</sup>

During the debates in many European nations, it became clear that some different-sex couples also were interested in marriage light. There are numerous reasons for this, ranging from attractive substantive distinctions—like easier termination of the relationship—to the undesired religious and paternalistic baggage of marriage. Responding to this interest, some countries agreed to open marriage light to different-sex couples. The Netherlands invented a form of gender-neutral registered partnership very similar to marriage in 1997.<sup>315</sup> Later, France, Belgium, Luxembourg, and Andorra enacted new forms of civil partnership, open to couples regardless of gender, but with rights and responsibilities that were more distinctive from marriage.<sup>316</sup> Certainly the most famous of these has been the French *pacte civil de solidarité* (civil solidarity pact) or “PACS.”<sup>317</sup>

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<sup>313</sup> Curry-Sumner, *supra* note 303, at 48, 51. Waaldijk, Chair in comparative sexual orientation law at the University of Leiden, the Netherlands, coined the phrase “quasi-marriage” to describe these forms of registered partnership which have successfully replicated most legal aspects of civil marriage. See KEES WAALDIJK, MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP FOR DIFFERENT-SEX AND SAME-SEX PARTNERS 42 (Kees Waaldijk ed., 2004), available at <https://openaccess.leidenuniv.nl/bitstream/handle/1887/12585/More-or-less-together00-Complete%20report.pdf?sequence=2>. Waaldijk has done extensive work in compiling and systematically analyzing the comparative characteristics of marriage light options in Europe and beyond.

<sup>314</sup> WAALDIJK, *supra* note 313, at 38–39; Curry-Sumner, *supra* note 303, at 49–52; Wojtek Radwanski, *Liechtenstein “Yes” Vote for Civil Partnerships*, YAHOO! NEWS (June 20, 2011), <http://ph.news.yahoo.com/liechtenstein-yes-vote-civil-partnerships-220243116.html> (describing the sixty-eight percent referendum vote in favor of Liechtenstein’s new civil partnership law); see also Dr. Aurelia Frick, *Fragen und Antworten Betreffend das Partnerschaftsgesetz zur Volksabstimmung am 17./19. Juni 2011* [Questions and Answers Regarding the Partnership Act to Referendum on 17th/19th June 2011], REGIERUNG DES FÜRSTENTUMS LIECHTENSTEIN, <http://regierung.li/index.php?id=377> (last visited Oct. 14, 2012) (Liechtenstein government answers to questions about the new law, including clarification that it cannot be used by different-sex couples). In addition to these countries, Croatia provides rights to *unregistered* same-sex couples. See Curry-Sumner, *supra* note 303, at 52.

<sup>315</sup> Curry-Sumner, *supra* note 303 at 46–49. The primary distinction was a restriction on adoption. *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, at A8.

<sup>316</sup> Curry-Sumner, *supra* note 303, at 49–51.

<sup>317</sup> PACS provide some, but not all of the benefits and duties of marriage. The benefits include inheritance and gift tax exemptions, income tax benefits, social security benefits, eased residency permits for foreign partners, certain employment benefits, and residential lease protection upon the death of a partner. Significantly, PACS are much easier to terminate than French marriages.

English language scholarly and popular publications have rightfully taken notice of the fascinating trends regarding marriage and PACS in France.<sup>318</sup> To the surprise of many, PACS are *au courant*. Established in 1999, PACS were instantly popular with different-sex couples. In 2000, seventy-five percent of PACS were registered by different-sex couples, and their popularity has grown tremendously, so that ninety-five percent of PACS involved a man and a woman by 2009.<sup>319</sup> This does not mean that same-sex couples ignored the PACS option. Their PACSing increased by fifty percent between 2001 and 2007.<sup>320</sup> But the number of different-sex PACS per year increased ten times faster.<sup>321</sup> By 2009, there were 175,000 couples registering PACS in France, approximately two PACS for every three new marriages.<sup>322</sup> During the same period, the number of marriages in France decreased by around eleven percent.<sup>323</sup> Combining PACS and marriage, however, there has been an increase in total legal recognition of French relationships by more than forty percent.<sup>324</sup> These statistics suggest that PACS serve two purposes for different-

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<sup>318</sup> See, e.g., Christina Davis, *Domestic Partnerships: What the United States Should Learn From France's Experience*, 24 PENN ST. INT'L L. REV. 683, 684 (2006) (arguing that different-sex marriage light should not be allowed because it "degrade[s] the institution of marriage and hurt[s] society at large"); *Marriage and the State*, *supra* note 101 (finding a "pink ray of hope" in the popularity of U.K. same-sex civil partnerships and suggesting that opening them up to different-sex couples might rejuvenate marriage by secularizing it as the French did with PACS); Edward Cody, *Straight Couples in France Are Choosing Civil Unions Meant for Gays*, WASH. POST, Feb. 14, 2009, at A13 (describing the reasons underlying the popularity of French PACS among different-sex couples); Scott Sayare & Maïa de la Baume, *Bliss for Many French Couples Is Now Less Marital Than Civil*, N.Y. TIMES, Dec. 16, 2010, at A1 (describing the popularity of French PACS among different-sex couples); *Straights Wed the Gay Way*, BRISBANE NEWS (Austl.), May 18, 2010, at 9, available at 2010 WLNR 10219963.

<sup>319</sup> Sayare & Baume, *supra* note 318, at A1.

<sup>320</sup> *La population de la France en 2007 [The Population of France in 2007]*, LA FRANCE EN CHINE, [http://www.ambafrance-cn.org/imprimer.html?id\\_article=4739&lang=fr&cs](http://www.ambafrance-cn.org/imprimer.html?id_article=4739&lang=fr&cs) (last updated June 5, 2008) [hereinafter *France en 2007*].

<sup>321</sup> *Id.* (the number of different-sex couples entering PACS increased from 15,426 to 97,000 between 2001 and 2007).

<sup>322</sup> Anne Pia & Catherine Beaumel, *Bilan Démographique 2009: Deux Pacs pour Trois Mariages [Two to Three Marriages PACS]*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES [NAT'L INST. OF STATISTICS & ECON. STUDIES] (Fr.), [http://www.insee.fr/fr/themes/document.asp?ref\\_id=ip1276](http://www.insee.fr/fr/themes/document.asp?ref_id=ip1276) (last visited Oct. 14, 2012).

<sup>323</sup> Compare *Id.* (in 2009, there were 256,000 marriages in France), with *France en 2007*, *supra* note 320 (in 2001, there were 288,000 marriages in France).

<sup>324</sup> Compare *France en 2007*, *supra* note 320 (in 2001, there were 288,000 marriages and 19,632 PACS for a total of 307,632), with Pia & Beaumel, *supra* note 322 (in 2009, there were 256,000 marriages and 175,000 PACS for a total of 431,000).

sex couples: In some cases, they are a substitute for marriage; in others, they provide recognition for couples who would not have married.<sup>325</sup>

A number of reasons have been cited for the tremendous growth in popularity of PACS in comparison to marriage. Couples are anxious to receive some of the benefits of marriage such as inheritance and gift tax exemptions, income tax benefits, social security benefits, eased residency permits for foreign partners, certain employment benefits, and residential lease protection upon the death of a partner.<sup>326</sup> However, they do not all want to be strapped with the possible disadvantages of marriages, particularly difficult and expensive divorce procedures.<sup>327</sup>

Some couples want to avoid the message communicated by marriage, which they view as a “‘heavy and invasive’ institution” with “a side that’s very institutional and very square and religious.”<sup>328</sup> They see the PACS as an end in itself, the ideal form of state recognition for their relationship. Other couples view a PACS as a lower-risk trial run before marriage. As one French woman explained soon after registering a PACS with her male partner, “To me, it doesn’t replace marriage. I’d still like to get married one day.”<sup>329</sup>

With their popularity now rivaling marriage, French PACS have caught on more than marriage light regimes in other countries. However, marriage light is gaining popularity in other places as well. For example, the number of registered partnerships in the Netherlands rose almost five-fold between 2001 and 2010.<sup>330</sup> Different-sex couples registered almost ninety-four percent of the

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<sup>325</sup> At least one prominent English publication found a “pink ray of hope” in the popularity of U.K. same-sex civil partnerships, suggesting that, if they were made available to different-sex couples, they might rejuvenate marriage by secularizing it as the French did with PACS. *Marriage and the State*, *supra* note 101, at 28. Murray has described the desire of some people to avoid the thickly regulated and socially coercive force of marriage. Murray, *supra* note 60, at 63–64. Perhaps, PACS and other marriage light regimes fill some of this demand.

<sup>326</sup> Davis, *supra* note 318, at 691; Phil Cain, *Austrians Seek Right to Partnership Created for Gays*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/8687064.stm> (last visited Oct. 23, 2012) (quoting Delphine Rorive’s explanation that she and her male partner “just wanted to pay less taxes”); Sayare & Baume, *supra* note 318, at A1.

<sup>327</sup> Cody, *supra* note 318, at A13.

<sup>328</sup> Sayare & de la Baume, *supra* note 318, at A1 (quoting Wilfried Rault, a sociologist with the French National Institute for Demographic Studies, and Sophie Lazzaro, a French woman who registered a PACS with her different-sex partner, respectively).

<sup>329</sup> Cain, *supra* note 326. This particular French couple did everything half-way, with a fancy party for friends, but no family, and the top halves of formal wedding outfits, but casual attire from the waist down. *Id.*

<sup>330</sup> *Number of Registered Partnerships Grew Further in 2010*, STATISTICS NETH. WEB MAG. (March 15, 2011), <http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2011/2011-3331-wm.htm> [hereinafter . STATISTICS NETH. 2010].

registered partnerships there in 2009.<sup>331</sup> As in France, this is roughly in line with the heterosexual ratio in the population.<sup>332</sup> On the other hand, same-sex couples may now marry in the Netherlands, and they do so two to three times as frequently as they enter registered partnerships.<sup>333</sup> The total number of registered partnerships in comparison to marriages is much smaller in the Netherlands than in France, but it is still significant with more than one partnership registered for every eight new marriages in 2009.<sup>334</sup>

There are several possible reasons why PACS are more popular in France than registered partnerships in the Netherlands. First, PACS offer a much greater contrast to marriage than registered partnerships in the Netherlands, where the main contrast is symbolic since the benefits and duties are the same as those of marriage. Second, the Netherlands has evolved to allow marriage for same-sex couples, nullifying any motivation for different-sex couples to choose the nondiscriminatory partnership option out of solidarity with lesbian and gay friends and family. Third, unregistered and unmarried cohabitating couples in the Netherlands are recognized by the state for more purposes than their counterparts in France, providing an even more distinctive alternative to marriage than registered partnerships.<sup>335</sup> Finally, there may be a particularly bad fit between the social expectations of different-sex couples in France and the traditional institution of marriage.<sup>336</sup>

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<sup>331</sup> Kees Waaldijk, *Sexual Orientation Law*, UNIV. LEIDEN, <http://www.law.leiden.edu/organisation/meijers/research-projects/samesexlaw.html> (last updated Oct. 3, 2011). While the numbers for 2001 through 2009 may have been distorted by different-sex couples converting their marriages into registered partnerships in order to dissolve them more cheaply and easily, that option ended in 2009 without causing a substantial dip in the 2010 figure. STATISTICS NETH. 2010, *supra* note 330.

<sup>332</sup> GATES, LGBT, *supra* note 184, at 1 (estimating that approximately 3.5% of the U.S. adult population was lesbian, gay or bisexual); Theo G.M. Sandfort, Floor Bakker, François G. Schellevis & Ine Vanwesenbeeck, *Sexual Orientation and Mental and Physical Health Status: Findings From a Dutch Population Survey*, 96 AM. J. PUB. HEALTH 1119, 1121 tbl. 1 (June 2006) (describing the self-reported sexual orientation of respondents to a Dutch National Survey as ninety-seven to ninety-eight percent heterosexual).

<sup>333</sup> *Marriages and Partnership Registrations; Key Figure*, CENTRAL BUREAU OF STATISTICS (Neth.) [http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLEN&PA=37772eng&D1=0-28,35-39&D2=\(1-11\)-1&HD=110207-0636&LA=EN](http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLEN&PA=37772eng&D1=0-28,35-39&D2=(1-11)-1&HD=110207-0636&LA=EN) (last updated Aug. 13, 2012) (table showing that 1358 same-sex couples married in 2009 while 495 registered their partnerships instead) [hereinafter Neth. CBS]. Same-sex domestic partnerships dropped by two-thirds in 2001 when marriage became equally available. *See* Waaldijk, *supra* note 15.

<sup>334</sup> *Compare* Neth. CBS, *supra* note 333 (table showing 73,477 marriages and 9497 registered partnerships in the Netherlands in 2009), *with France en 2007*, *supra* note 320 (indicating that there were 256,000 marriages and 175,000 PACS in France in 2009).

<sup>335</sup> *See infra* Part IV.C.

<sup>336</sup> At least among the French elite and media, there is a strong enough sense of sexual-familial *laissez faire* that President François Mitterrand was able to maintain a secondary family—a longtime mistress and her daughter—without great exposure or outcry. Cody, *supra*

The French and Dutch examples show that some different-sex couples are attracted to marriage light and that the attraction may be stronger the more the new institution differs from traditional marriage and unregistered cohabitation, offering a real choice with significant advantages for some.<sup>337</sup> As described below, different-sex marriage light has not caught on in the United States to the same extent, but there are good reasons to believe it may.

*B. U.S. State Experiments with Marriage Light*

Since Berkeley and West Hollywood, California, became the first two U.S. cities to recognize domestic partnerships in the mid-1980s, dozens of states, counties and municipalities have followed their lead.<sup>338</sup> Today, there are substantial statewide laws recognizing same-sex marriage and/or marriage light in almost half of the United States.<sup>339</sup>

The District of Columbia and at least seventeen states, including seven with constitutional marriage amendments, currently recognize marriage light on

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note 318, at A13. Current President François Hollande and his partner, Valerie Treirweiler, are the first unmarried couple to share the Elysee Palace. *See* Maia de la Baume, *First Lady Without a Portfolio (Or a Ring) Seeks Her Own Path*, N.Y. TIMES, May 16, 2012, at A6. Then again, German President, Joachim Gauck and his long-time partner moved into Schloss Bellevue several weeks earlier. *Id.*

<sup>337</sup> Scott Sayare & Maia de la Baume, *In France, Civil Unions Gain Favor Over Marriage*, N.Y. TIMES, Dec. 16, 2010, at A1.

<sup>338</sup> *City Extends Benefits to Unwed Partners*, BOSTON GLOBE, Dec. 6, 1984, at 12 (describing the 8-0 vote of Berkeley's city council to create the nation's first domestic partnership ordinance, which covered both same and different-sex partners); *W. Hollywood to Recognize Non-Married Partnerships*, L.A. TIMES, Feb. 23, 1985, at 1 (describing the 1985 passage of West Hollywood's ordinance allowing both same and different-sex couples to register their domestic partnerships in that city). San Francisco's city council passed what would have been the first domestic partnership ordinance in 1982 by a vote of 8-3, but then-mayor Dianne Feinstein vetoed it. *See* Wallace Turner, *Couple Law Asked for San Francisco*, N.Y. TIMES, Nov. 28, 1982, at 131; Wallace Turner, *Partnership Law Vetoed on Coast*, N.Y. TIMES, Dec. 10, 1982, at A17. Domestic partner benefits quickly spread far beyond the costs. *See, e.g.*, Barbara J. Cox, "The Little Project": *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77, 78 (2000) (describing Madison, Wisconsin's trailblazing domestic partnership ordinance, as well as related history in other localities). Today there are municipal and county domestic partnership ordinances in locations ranging from Salt Lake City, Utah and El Paso, Texas, to Duluth, Minnesota and Athens-Clarke County, Georgia. *See Cities and Counties in the United States Offering a Domestic Partnership Registry*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Cities\\_and\\_counties\\_in\\_the\\_United\\_States\\_offering\\_a\\_domestic\\_partnership\\_registry](http://en.wikipedia.org/wiki/Cities_and_counties_in_the_United_States_offering_a_domestic_partnership_registry) (last updated Aug. 30, 2012).

<sup>339</sup> *Status of Same-Sex Relationships Nationwide*, LAMBDA LEGAL, <http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships> (last updated June 8, 2012).

a statewide basis.<sup>340</sup> Nine states and D.C. recognize quasi-marriage civil unions or domestic partnerships, offering all or almost all of the state benefits and duties of marriage.<sup>341</sup> At least eleven states recognize some lesser form of semi-marriage for domestic partners, designated beneficiaries, or reciprocal beneficiaries.<sup>342</sup>

These American marriage light regimes developed as a compromise in the same-sex marriage debate. Thus, many states created marriage light regimes open only to same-sex couples as a consolation prize for refusing to recognize marriage equality.<sup>343</sup> However, like in Europe, the recent American trend is to open marriage light to different-sex couples as well, even within quasi-marriage regimes that include all the state rights and responsibilities of marriage.<sup>344</sup> Since 2009, Colorado, Nevada, Illinois, Hawaii, and Wisconsin

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<sup>340</sup> This includes the states that currently recognize quasi- and semi-marriage institutions, as listed below. Note that New Jersey and Hawaii each recognize both civil unions and some less-comprehensive semi-marriage regime.

<sup>341</sup> California, Delaware, the District of Columbia, Hawaii, Illinois, Nevada, New Jersey, Oregon, Rhode Island, and Washington. BADGETT & HERMAN, *supra* note 197, at 3. (Connecticut, New Hampshire, and Vermont also recognized quasi-marriage institutions, prior to phasing them out upon adoption of statewide marriage equality). *See, e.g.*, 2003 Cal. Legis. Serv. 13, available at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf) (“This act shall be construed liberally in order to secure to eligible couples who register as domestic partners the full range of legal rights, protection and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.”).

<sup>342</sup> Colorado, Hawaii, Maine, Maryland, New Jersey, Vermont and Wisconsin, offer varying degrees of general state recognition for non-married couples. *See* Badgett & Herman, *supra* note 197, at 3. Arizona, Montana, New Mexico and New York also recognize unregistered domestic partnerships for specific limited purposes under state law. *See, e.g.*, Diaz v. Brewer, 656 F.3d 1008 (9th Cir. 2011) (upholding preliminary injunction against Arizona and requiring it to continue providing benefits to the same-sex domestic partners of employees in that state); Steve Terrell, *Capital Shake-Up Domestic-Partner Benefits at Risk?*, SANTA FE NEW MEXICAN, Jan. 5, 2011, at A10 (describing New Mexico’s executive order providing benefits to the domestic partners of state employees); Arthur S. Leonard, *New York State’s First Domestic Partnership Law*, LEONARD LINK (Feb. 8, 2006), [http://newyorklawschool.typepad.com/leonardlink/2006/02/new\\_york\\_states.html](http://newyorklawschool.typepad.com/leonardlink/2006/02/new_york_states.html) (describing 2006 law according domestic partners equal status with married couples regarding disposition of remains when one partner dies); *Medical Benefits*, MONT.’S OFFICIAL STATE WEBSITE, <http://benefits.mt.gov/medical.mcp> (last visited Sept. 9, 2012) (offered to domestic partners of state employees).

<sup>343</sup> *See, e.g.*, S.B. 30, 146th Gen. Assem., 1st Reg. Sess. (Del. 2011).

<sup>344</sup> *See, e.g.*, California, Colorado, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Nevada, New Jersey, New Mexico, New York, Vermont, and Washington. *See Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated Feb. 2012) (overview of some states with gender-neutral civil unions and domestic partnerships registries).

have all enacted gender neutral marriage light regimes.<sup>345</sup> Only Delaware and Rhode Island have adopted new laws excluding different-sex couples during the same period.<sup>346</sup>

Today, different-sex couples in D.C., Hawaii, Illinois, and Nevada can choose between marriage and a quasi-marriage civil union or domestic partnership.<sup>347</sup> These alternatives may be attractive for symbolic reasons, but they may also offer substantive advantages such as federal law invisibility. Regardless of state law, the federal government is not likely to recognize even the most marriage-like civil unions for most purposes.<sup>348</sup> In fact, DOMA prohibits federal recognition of different-sex couples, who are not defined as a “husband” and “wife” under state law.<sup>349</sup> California, New Jersey, and Washington noted just this point when they made exceptions to their general same-sex requirement to register different-sex domestic partners, where partners were over sixty-two years old.<sup>350</sup> These states were looking to maximize federal benefits, such as social security, for their heterosexual

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<sup>345</sup> BADGETT & HERMAN, *supra* note 197, at 34 (listing California, Colorado, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Nevada, New Hampshire and Washington as states recognizing forms of different-sex marriage light); *id.* at 16 (explaining that the California, Washington and New Jersey versions are available only to different-sex couples with one or more partner over sixty-two); *see also* A.B. 75, 99th Leg., 10th Reg. Sess. (Wis. 2009), §§ 774–776, available at <http://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>, at 186 (establishing a gender-neutral limited form of domestic partnership in Wisconsin).

<sup>346</sup> *See* DEL. CODE ANN. Tit. 13, § 202(3) (West 2012) (limiting civil unions to same-sex couples); R.I. GEN. LAWS § 15-3.1-2 (West 2011).

<sup>347</sup> D.C. CODE § 37-702 (2010); NEV. REV. STAT. ANN. §122A.100(2) (West 2010); 4 *Hawaii Couples Reading for Civil Union Ceremony*, B97HAWAII.COM, <http://www.b97hawaii.com/4-Hawaii-couples-reading-for-civil-union-ceremony/11835879> (last visited Oct. 14, 2012); Kevin McDermott and Doug Moore, *Illinois Offers Civil Unions as of Wednesday: Most of the Same Rights as Marriage will Apply; Opposite Sex Couples also Can Get the License and its Benefits*, ST. LOUIS POST-DISPATCH, May 28, 2011, at A1.

<sup>348</sup> Thousands of federal laws hinge on the terms “spouse” and “marriage.” Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 379 (D. Mass. 2010) (DOMA implicated 1,138 laws by 2004). An exception to this general federal invisibility could be different-sex state unions expressly defined in terms like “spouse,” “husband,” and “wife.” *See* sources cited *infra* notes 429–431 and accompanying text. Of course, this distinction is largely irrelevant for same-sex couples as long as the Defense of Marriage Act (DOMA), prohibits the federal recognition of even same-sex marriages. Defense of Marriage Act, Pub. L. No. 104-199, §§ 1–3, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. §1101(a)(35) (2006)).

<sup>349</sup> *See* sources cited *infra* notes 427–433 and accompanying text.

<sup>350</sup> New Jersey and Washington legislatures maintained these forms of domestic partnerships when generally phasing out this category in favor of more comprehensive quasi-marriage civil unions and marriage, respectively, for same-sex couples. N.J. STAT. ANN. § 26:8A-4.1 (West 2007); S.B. 6239, 62d Leg., Reg. Sess. (Wash. 2012).



residents.<sup>351</sup> Federal invisibility allows couples to enjoy state benefits, such as tax free inheritance, while avoiding federal marriage related tax disadvantages or social security benefit reductions.<sup>352</sup>

Possibly the most open and innovative new form of marriage light is Colorado's contract-based "designated beneficiary" regime.<sup>353</sup> Not only is it gender neutral, but it also rejects the normal one-size-fits-all approach of marriage and most types of marriage light, allowing beneficiaries to customize their legal relationships by selecting from a menu of options regarding issues like joint property ownership, hospital visitation, medical decision-making, intestate inheritance, and standing in a wrongful death suit.<sup>354</sup> Unlike most forms of marriage light, this Colorado experiment does not require that the designated beneficiaries cohabit or that they be a sexual couple. Thus pairs such as aunts and nephews, brothers and sisters, or best friends can also elect coverage under this Colorado law.<sup>355</sup>

Two states have developed options specifically aimed at non-sexual pairs who live together and depend on one another. While experimenting with non-marital institutions for same-sex couples, Hawaiian and Vermont lawmakers invented new forms of "reciprocal beneficiary" status providing limited recognition for non-couples as well. In Hawaii, reciprocal beneficiary status was designed for both same-sex couples and these other pairs who could not marry.<sup>356</sup> Vermont devised quasi-marriage civil unions for same-sex couples and reciprocal beneficiary recognition for pairs who could neither marry nor form a civil union due to consanguinity.<sup>357</sup>

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<sup>351</sup> See, e.g., CAL. FAM. CODE § 297 (West 2005) (specifically defining different-sex couple eligibility for California domestic partnership status in terms of social security eligibility criteria). This was meant "expressly to benefit those eligible for benefits under the Social Security Act." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (D. Cal. 2010).

<sup>352</sup> See *infra* Part V. (listing other ways that federal invisibility makes marriage light attractive to different-sex couples).

<sup>353</sup> COLO. REV. STAT. ANN. §§ 15-22-104 to 112 (West 2009).

<sup>354</sup> *Id.*; see also David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 121–22 (2010) (describing the unique attributes of this arrangement before arguing that it was merely the "high-water mark" of a movement toward fragmentation that will soon fade away into a return to unitary marriage); Polikoff, *Equality and Justice*, *supra* note 123, at 556 (describing the ability to individually select among various legal consequences on Colorado's designated beneficiary form).

<sup>355</sup> Sara Gandy, *Beneficiaries Bill Would Give Rights to Unmarried*, 9NEWS.COM (Feb. 16, 2009, 11:02 AM), [www.9news.com/rss/story.aspx?storyid=110022](http://www.9news.com/rss/story.aspx?storyid=110022).

<sup>356</sup> See HAW. REV. STAT. § 572C-4 (West 1997).

<sup>357</sup> In fact, no pair has ever registered as reciprocal beneficiaries in Vermont. Telephone interview with Cindy Hooley, Vital Statistics Manager, Vt. Health Dep't [hereinafter Hooley Interview]. This may suggest a limit on the attraction of ultra-light alternatives, or—more likely—the lack of knowledge of the institution among Vermont's citizens.

So far, the new marriage light options have not been as popular with different-sex couples in the United States as in Europe.<sup>358</sup> For instance, different-sex couples comprised less than eight percent of civil union licenses issued by Cook County, Illinois, during the first six months of availability.<sup>359</sup> Different-sex couples likely constitute forty-five percent of Nevada's early domestic partner registrations.<sup>360</sup> Their share of D.C. domestic partnerships has grown in popularity from eight percent in 2002 to fifty-one percent in 2010, but the total numbers are still relatively small.<sup>361</sup> It is impossible to know how many different-sex couples have registered under marriage light regimes in other U.S. states that do not ask about gender when they process domestic partnership and reciprocal beneficiary applications.<sup>362</sup>

Although the numbers are smaller, American different-sex couples, who choose marriage light appear to do so for similar reasons as their PACSIng French contemporaries: as a political statement of solidarity with same-sex couples, as a way to obtain the optimal package of benefits and responsibilities for that particular couple, and as a religious statement.<sup>363</sup> Also, like the French, there seems to be a split among those different sex couples viewing a civil

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<sup>358</sup> See BADGETT & HERMAN, *supra* note 197, at 16–18 (describing the one to eight percent choice of domestic partnerships over marriage and contending that this lack of popularity of marriage light for different-sex couples indicated a clear preference for marriage, while recognizing that the relatively recent nature of marriage light recognition may also play a role).

<sup>359</sup> DAVID ORR, COOK CNTY CLERK, OPPOSITE-SEX CIVIL UNIONS: MOTIVES FOR NOT MARRYING, 1 n.2, available at <http://www.cookcountyclerk.com/newsroom/newsfromclerk/Documents/Opposite%20Sex%20Civil%20Union%20Report%20Final%2012.19.11.pdf> (stating that 138 of the 1,856 civil unions licensed from June to November, 2011, were for different-sex unions) (last visited Oct. 14, 2012).

<sup>360</sup> BADGETT & HERMAN, *supra* note 197, at 28.

<sup>361</sup> Excel Chart provided by Willis R. Bradwell, Jr., Registrar, Vital Records Division, Center for Policy, Planning and Evaluation, District of Columbia (on file with author). In 2002, different-sex couples comprised only eleven of the one-hundred-forty-six domestic partnerships in D.C. at the end of that year. During 2010, different-sex couples comprised 105 of the 207 new domestic partnerships registered in D.C. (not counting the eight relationships terminated that year, for which no gender is recorded). This was the same number of different-sex domestic partnerships as in 2008, but the number of total partnerships decreased by almost one-third in 2010, possibly because of the rapidly changing law for same-sex couples, including recognition in D.C. of out-of-state same-sex marriages in 2009 and anticipation of full marriage equality in D.C., which occurred in 2011.

<sup>362</sup> *E.g.*, Vermont (Hooley Interview, *supra* note 357), Maine, (telephone interview with Heidi Lincoln, Marriage Coordinator, with the Maine CDC Vital Records Office (Oct. 9, 2012)), and California (telephone interview with Jonnie, California Secretary of State, Special Filings, Domestic Partnership Section.).

<sup>363</sup> ORR, *supra* note 359, at 2–3 (describing the answers to an open-ended question about why each different-sex couple chose a civil union over marriage, including political/ideological factors and benefits most prominently); see *supra* notes 328–329 and accompanying text (describing similar European attitudes).

union as their final goal and those who see it as a step toward possible marriage.<sup>364</sup>

The relative lack of popularity of different-sex marriage light in the U.S. in comparison to Europe could stem from lack of information or motivation. Most of the gender-neutral forms for registering marriage light in the U.S. are quasi-marriage unions identical to marriage for state purposes.<sup>365</sup> They are also invisible for important federal purposes ranging from immigration to federal income tax. Americans are also more likely to be actively religious and, perhaps, less offended by the tradition-laden message of marriage.<sup>366</sup> The American ease of divorce and the prevalence of prenuptial agreements—trends bemoaned by marriage traditionalists—may also be reducing the desire for alternatives; in Austria, by contrast, divorces can take up to six years.<sup>367</sup> In essence, standard American marriage and relatively liberal divorce laws may be more akin to marriage light rules in some European countries. Finally, Americans tend to be more mobile and, thus, the interstate recognition of relationships afforded by marriage may be more important in the U.S.<sup>368</sup>

Although marriage light may remain less attractive to different-sex couples in the U.S. than in France, there is reason to doubt that American heterosexuals are entirely impervious to its attractions. One need only look as far as the more established practice of private, employment related domestic partner benefits. Over nine thousand U.S. employers, including eighty-three percent of Fortune 100 companies, offer benefits to the domestic partners of their employees.<sup>369</sup> The majority of these companies offer benefits to both

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<sup>364</sup> ORR, *supra* note 359, at 1 (showing a significant gender gap in the responses to this question, with sixty-five percent of women, but only thirty-eight percent of men, planning to marry someday).

<sup>365</sup> Compare *supra* text accompanying note 341, with *supra* text accompanying note 345 (of the ten gender-neutral marriage light jurisdictions, seven are quasi-marriage regimes).

<sup>366</sup> Pew Research Center, *The American-Western European Values Gap*, PEWGLOBAL.ORG (Nov. 17, 2011), <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap/?src=prc-headline8-11> (last updated Feb. 29, 2012) (describing polls indicating that half of Americans, but only thirteen to twenty-two percent of French, British, Germans, and Spanish deem religion *very* important in their lives).

<sup>367</sup> Cain, *supra* note 326.

<sup>368</sup> EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, LABOUR MOBILITY IN A TRANSATLANTIC PERSPECTIVE 2 (Oct. 30–31, 2007), available at <http://www.eurofound.europa.eu/pubdocs/2008/26/en/1/ef0826en.pdf> (comparing 2.8–3.4% annual interstate-migration of American working-age individuals to 0.1% among fifteen EU countries and only 1% *within* those countries).

<sup>369</sup> See EMPLOYEE BENEFIT RESEARCH INSTITUTE, DOMESTIC PARTNER BENEFITS: FACTS AND BACKGROUND 1 (Feb. 2009), available at <http://www.ebri.org/pdf/publications/facts/0209fact.pdf> (showing 9374 employers offered domestic partner benefits as of May 16, 2008); *Domestic Partner Benefits*, HUMAN RIGHTS CAMPAIGN, [http://preview.hrc.org/issues/health/domestic\\_partner\\_benefits.htm](http://preview.hrc.org/issues/health/domestic_partner_benefits.htm) (last visited Oct. 17, 2012) (eighty-three percent of the Fortune

different-sex and same-sex couples.<sup>370</sup> In this context, different-sex couples comprise the majority of employees using domestic partnership benefits.<sup>371</sup> And recognition is attractive to these couples at a very substantial cost: Unlike spousal benefits, domestic partnership benefits are taxed as additional income to the employee.<sup>372</sup>

C. *The Lightest Option—Cohabitation Without Registration*

In addition to registered forms of marriage light, states and foreign nations have begun recognizing unregistered, cohabiting couples for legal purposes. This variable clearly plays a role in the comparative market positions of marriage and marriage light, where available.

Since the 1970's, cohabitation by unmarried couples in the U.S. has increased more than tenfold.<sup>373</sup> Some legal developments during this time have eased the lives of cohabiting couples and their children and lead to their recognition for limited purposes. Criminal laws prohibiting unmarried cohabitation have been repealed.<sup>374</sup> Most states have also followed the precedent of the celebrated 1976 California "palimony" case *Marvin v. Marvin*, honoring express and implied contracts between unmarried cohabiting couples

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100, fifty-eight percent of the Fortune 500, and forty percent of the Fortune 1000 had domestic partnership policies in place in 2011); see also *Domestic Partnership Benefits and Obligations Legislation for Federal Employees Would End Disparities, Help Attract and Retain Top Talent*, STATES NEWS SERV., Nov. 18, 2011 (describing the increase in companies, states, and municipalities recognizing domestic partner benefits, including an increase from twenty-five percent to sixty percent of Fortune 500 companies between 2000 and 2011).

<sup>370</sup> *Domestic Partner Benefit Eligibility: Defining Domestic Partners and Dependents*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/domestic-partner-benefit-eligibility-defining-domestic-partners-and-dependents> (last visited Sept. 5, 2012) (citing a 2005 Hewitt study showing that fifty-eight percent of employers offering partner benefits include both same- and different-sex couples).

<sup>371</sup> See Zachary Bromer, *Domestic Partner Benefits, from Marginal to Mainstream*, SALARY.COM, <http://www.salary.com/domestic-partner-benefits> (last visited Sept. 5, 2012) (quoting a 1994 study by Hewitt Associates, which found that sixty-seven percent of domestic partners covered were in different-sex couples).

<sup>372</sup> Liz Pulliam Weston, *Your Benefits: Health Plans for Domestic Partner Can Add to Tax Bill*, L.A. TIMES, Sept. 24, 2000, at 1, available at 2000 WLNR 8426483.

<sup>373</sup> Jason M. Merrill, Note, *Two Steps Behind: The Law's Struggle to Keep Pace with the Changing Dynamics of the American Family*, 11 J.L. & FAM. STUD. 509, 510 (2009) (citing an increase in different-sex, unmarried cohabitation from 450,000 to over 4.6 million between the late 1970's and 2009).

<sup>374</sup> Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite-Sex Couples*, 7 J.L. & FAM. STUD. 135, 141–51 (2005) (tracing the repeals in most states to the ALI's 1962 Model Penal Code, and questioning the continued constitutionality of the remaining statutes after the Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

without recognizing any general status for these partnerships.<sup>375</sup> State and federal domestic violence laws tend to cover unmarried partners, at least when they are not gay.<sup>376</sup> A few states have recognized a cause of action for a partner's loss of consortium due to a third party's negligent conduct.<sup>377</sup> Others have recognized entry into a new, non-marital relationship as a basis for terminating a prior spouse's duty to pay alimony.<sup>378</sup> In probably the most sensitive area, some states have recognized the possibility of *de facto* or psychological parenthood, where a legal parent holds out her cohabiting partner as the co-parent of a child over time.<sup>379</sup> The compelling factual cases that first drew judicial recognition of these relationships were often those of lesbian and gay families, which had no choice to marry, but the resulting rules have benefitted different-sex couples as well. This demonstrates how the exclusion of same-sex couples from marriage can undermine the monopoly of marriage on certain legal consequences and the resulting normative effect even without any form of state-recognized marriage light status.

While there has been some piecemeal recognition of cohabiting couples in some states, there is still no broad categorical family status recognition for these couples in the U.S.<sup>380</sup> In 2001, the American Law Institute proposed recognition of unmarried cohabitation as a family status, but that proposed reform has not yet been adopted by any state.<sup>381</sup> However, some European nations do recognize a categorical status for cohabiting couples and attach significant legal consequences to that status. For instance, many Scandinavian countries and the Netherlands treat marriage and unregistered

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<sup>375</sup> *Id.* at 159; Elizabeth A. Pope, *Cohabitation: What to Do When Couples Cannot or Do Not Marry*, 20 DUPAGE CNTY BAR ASS'N BRIEF 22, 24–26 (2007); *see also* *Marvin v. Marvin*, 557 P.2d 106, 121–22 (Cal. 1976). Prior to *Marvin v. Marvin*, many states refused to even enforce private contractual agreements between cohabiting couples. Mahoney, *supra* note 374, at 159.

<sup>376</sup> Mahoney, *supra* note 374, at 162, 193–95.

<sup>377</sup> *See, e.g.*, *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994); *Lozoya v. Sanchez*, 66 P.3d 948 (N.M. 2003); *but see Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (denying standing to unmarried cohabitant for loss of consortium and emotional distress due to partner's wrongful death); *see also* Mahoney, *supra* note 374, at 162, 190–93.

<sup>378</sup> *See, e.g.*, PA. CONS. STAT. ANN. § 3706 (West 2012); *see also* Mahoney, *supra* note 374, at 162, 180.

<sup>379</sup> *See, e.g.*, *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005) (finding analogous situation of second mother to presumed paternity under the California version of the Uniform Parentage Act (UPA) even though the couple had not entered a marriage or registered as Domestic Partners in the state).

<sup>380</sup> *See* Mahoney, *supra* note 374, at 158–59 (discussing the definition of “legal status,” and its general inapplicability to unmarried cohabiting couples). Mahoney points out that the recognition that cohabiting couples have received in the U.S. was often driven by unique policy considerations in the particular field of law in which the recognition arises. *Id.* at 162–63.

<sup>381</sup> *Id.* at 160; *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2001).

cohabitation the same for tax and social security purposes.<sup>382</sup> Other countries, including Germany, Belgium, and France, recognize unmarried couples for some tax and social security purposes.<sup>383</sup> Many European countries also tend to attach the same parenting consequences to cohabiting couples as to married ones.<sup>384</sup> Some have general laws regarding the distribution of property among separating unmarried partners and the protection of the rental home of a surviving unmarried partner when the other dies.<sup>385</sup> Other countries authorize wrongful death compensation, immigration benefits, and public health insurance benefits on the basis of unregistered cohabitation.<sup>386</sup>

Scholars have remarked that the trend toward decoupling married or registered couple status from state rights, benefits and duties is complete, or nearly complete, in countries like Sweden, where married and unregistered cohabiting partners are virtually identical.<sup>387</sup> Marriage light registration would logically be less attractive in jurisdictions like Sweden, where the principle remaining advantage of the relatively recent status of registered partnership is the symbolic value of being called “legally registered,” rather than “married” or unregistered “partners,” which is a meager distinction indeed. Unregistered cohabitation thus constitutes a true marriage light alternative in its own right.

Together, unregistered partnerships and the other marriage light alternatives described in this Part comprise a veritable smörgåsbord of experimental regimes for recognizing unmarried couples. This variety can accelerate and diversify the sort of evolution that has occurred more slowly under the umbrella of unitary marriage because it merely presents options to compete with others, rather than altering one institution which all recognized couples must accept. As described below, the strategies employed by American social conservatives make U.S. states more likely laboratories for the proliferation of such marriage light experimentation.

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<sup>382</sup> WAALDIJK, *supra* note 313, at 42 (explaining that Denmark, Sweden and the Netherlands recognize complete equality for all couples, Iceland and Finland do for different-sex couples).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation be the (Legal) Default Option*, 64 LA. L. REV. 403, 419 (2004) (citing Dorian Manning, *The Changing Meaning of Cohabitation and Marriage*, 12 EUR. SOC. REV. 53 (1996) for the proposition that cohabitation and marriage have become socially indistinguishable in Sweden and Denmark). *But see* WAALDIJK, *supra* note 313, at 9 (finding significant distinctions in around twenty-five percent of the consequences of different-sex cohabitation and marriage in Sweden in 2005).

## V. THE LIKELY PROLIFERATION OF MARRIAGE LIGHT OPTIONS FOR ALL COUPLES

The door to considering marriage alternatives cracked open as soon as scholars and the public began rejecting the continuing evolution of marriage. When they balked at same-sex marriage recognition and suggested separating the communicative component of “marriage” from its legal consequences, the door opened further. Once states adopted covenant marriage and marriage light options for some couples the door was wide open. In the meantime, public opinion has continued to develop in favor of same-sex couple recognition and other changes to marriage. By amending state constitutions to prevent same-sex marriage, conservatives have blocked the only way back. Now it appears almost inevitable that we will eventually face a cafeteria of optional forms of relationship recognition, leaving “traditional marriage” just one of several alternatives. This Part sets forth this logic, step by step.

### A. *The Political Calculus in Favor of Marriage Light*

Public support for marriage equality has been increasing, and that increase has accelerated dramatically over the last three years.<sup>388</sup> In fact, recent polls have shown a majority of Americans supporting same-sex marriage for the first time.<sup>389</sup> The level of support for same-sex couples is greater among younger people, indicating that this trend may continue to accelerate.<sup>390</sup>

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<sup>388</sup> Memorandum from Joel Benenson, Benenson Strategy Grp., and Jan van Lohuizen, Voter Consumer Research, to Interested Parties 2 (July 27, 2011), *available at* [http://freemarry.3cdn.net/5ae85613318ade1b2e\\_8dm6bnq72.pdf](http://freemarry.3cdn.net/5ae85613318ade1b2e_8dm6bnq72.pdf) (regarding The Rapid Increase in Support for Marriage Changes Political Equation: Emerging Majority Support the Freedom to Marry and an analysis of accelerating trends in favor of marriage equality, citing a one percent annual increase in support for freedom to marry between 1996 and 2009 and a five percent annual increase between 2009 and mid-2011) [hereinafter Benenson and Van Lohuizen Memo]. The authors of this Freedom to Marry commissioned report were “the top pollsters for Presidents George W. Bush and Barack Obama.” Ben Smith, *Bush, Obama Pollsters See Dramatic Shift Toward Same-Sex Marriage*, POLITICO (July 27, 2011, 10:52 AM), [http://www.politico.com/blogs/bensmith/0711/Bush\\_Obama\\_pollsters\\_.html](http://www.politico.com/blogs/bensmith/0711/Bush_Obama_pollsters_.html).

<sup>389</sup> Benenson & Van Lohuizen Memo, *supra* note 388, at 1 (citing prominent Gallup, PRRI, CNN/ORC, and ABC/WaPo polls from 2011 showing from fifty-one percent to fifty-three percent of Americans favoring marriage equality); Nate Silver, *Gay Marriage Opponents Now in Minority*, FIVETHIRTYEIGHT BLOG (Apr. 20, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/> (referencing four recent credible polls showing an outright majority of Americans favoring marriage equality, including a CNN poll from April 2011 that showed fifty-one percent in favor to forty-seven percent opposed); *see also Law and Civil Rights*, POLLINGREPORT.COM, <http://pollingreport.com/civil.htm> (last visited Sept. 6, 2012) [hereinafter *Law and Civil Rights*] (showing this trend over eight years, including at least a dozen polls since 2011 indicating support exceeding fifty percent).

<sup>390</sup> *See* Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), <http://www.gallup.com/poll/147662/first-time-majority-americans->

However, for now, the pro-equality majority is still small and subject to change. In addition, although the increase in support for marriage equality has been widespread, the regional starting points were so divergent that same-sex marriage supporters are clearly still a minority in many states.<sup>391</sup>

On the other hand, polls have long shown that a large majority of Americans support some form of legal recognition of same-sex relationships, such as civil unions.<sup>392</sup> Even among Republicans, who still tend to strongly oppose marriage equality, some recent polls show a slight majority in favor of lesser forms of legal recognition for same-sex couples.<sup>393</sup>

The popularity of the marriage light compromise makes perfect sense. Unless they are extraordinarily confident and ideologically uncompromising, the proponents of same-sex marriage will also support marriage light and the proponents of quasi-marriage will support semi-marriage regimes, so long as the perceived choice is between the less comprehensive form of relationship recognition and no recognition at all.<sup>394</sup>

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favor-legal-gay-marriage.aspx (showing that seventy percent of those eighteen to thirty-four years of age, fifty-three percent of those between thirty-four and fifty-five years of age, and thirty-nine percent of those over fifty-five years of age favor recognition of same-sex marriage); see also Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, August 22, 2010, at 3 (describing a majority of those under age thirty favoring marriage equality, “not because of overwhelming majorities found in more liberal states[, but because] . . . a majority of young people in almost every state support it.”); Benenson & Van Lohuizen Memo, *supra* note 388, at 2 (citing several polls showing that younger adults are substantially more supportive of marriage equality, including an ABC News/Washington Post poll indicating support by sixty-eight percent of those eighteen to twenty-nine years of age, sixty-five percent of those thirty to thirty-nine years of age, fifty-two percent of those forty to forty-nine years of age, forty-five percent of those fifty to sixty-four years of age, and thirty-three percent of those over sixty-four years of age).

<sup>391</sup> Ron Tau, *Polls Show a Mixed Picture for Legalizing Gay Marriage*, POLITICO (May 9, 2012, 5:26 PM), <http://www.politico.com/politico44/2012/05/polls-show-a-mixed-picture-for-legalizing-gay-marriage-122984.html> (describing unfavorable attitudes toward same-sex marriage in Ohio, Pennsylvania, Florida, Iowa, and Virginia).

<sup>392</sup> *Law and Civil Rights*, *supra* note 389 (describing CBS and Fox News polls showing a growing majority of Americans supporting either marriage or civil unions for lesbians and gay men since 2004, reaching sixty-six percent to seventy percent by 2010, when a CBS News poll showed even a majority of Republicans favoring such recognition for the first time). The number of Americans supporting state recognition of *some* form of marriage light may be even greater than indicated in these polls, since they asked about “civil unions,” which have generally been understood as quasi-marriage, encompassing all of the state rights and responsibilities of marriage, just not the label.

<sup>393</sup> *Id.*

<sup>394</sup> While this appears to be the case in most political contexts thus far, there are hints that some LGBT rights groups may be beginning to actively oppose marriage light regimes that do not go far enough. See, e.g., Abby Goodnough, *Rhode Island Senate Approves Civil Unions After Marriage Measure Falts*, N.Y. TIMES, June 30, 2011, at A16 (describing the strong opposition of LGBT rights advocates to Rhode Island’s Civil Union bill).



In a parallel universe, it is possible to imagine an alliance between conservative defenders of traditional marriage and proponents of same-sex marriage combining to oppose any recognition of couples short of full marriage. But popular opposition to same-sex marriage in the U.S. is so intertwined with uncompromising religious fundamentalism and anti-gay animus that such an alliance is now almost unthinkable.<sup>395</sup>

Reflecting popular support for compromise, many politicians tend to favor marriage light as well. While adamantly opposed to marriage equality, Republicans like New Jersey Governor Chris Christie and President George W. Bush have shown a soft spot for same-sex civil unions.<sup>396</sup> Prominent Democrats, including President Clinton and presidential candidates Gore and Kerry, also stopped at the popular point just short of marriage equality, supporting quasi-marriage civil unions instead. Although President Obama famously “evolved” to support marriage equality, he still considers it a state issue and has not rejected marriage light as an interim step.<sup>397</sup>

Ironically, the covenant marriage movement in the United States reinforces the likelihood of marriage light compromise. Covenant marriage broke down the barriers against experimenting with alternatives to the marriage monopoly. One observer has already argued for extending the Christian religious idea reflected by covenant marriage to its logical non-sectarian conclusion—recognition of a cafeteria of different marriage options based on the convictions of various religious and secular communities, requiring the state to enforce those particular rules with regard to the community members who choose them.<sup>398</sup>

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<sup>395</sup> This appears to be true even in the rare jurisdictions where advocates of marriage equality are secure enough in their position to oppose a marriage light compromise as insufficient. *See id.* (explaining that LGBT rights advocates and the Roman Catholic Church finally agreed on their opposition to the Civil Union compromise, but certainly not indicating any institutional Catholic or other conservative support for same-sex civil marriage as a preferable alternative).

<sup>396</sup> Jarrett Renshaw and Jenna Portnoy, *Christie Won't Say Whether He'd Reject Gay Marriage Bill*, N.J. REC., Jan. 13, 2012, at A4, available at 2012 WLNR 855020; Rosemary Winters and Robert Gehrke, *Governor's Civil-Unions Stand Panned, Praised*, SALT LAKE TRIB., Feb. 11, 2009, available at 2009 WLNR 2689461; Scott Lindlaw, *Some Conservative Groups Uneasy with Bush's Stand on State-Sanctioned Civil Unions*, AP WORLDSTREAM (Oct. 26, 2004), <http://www.highbeam.com/doc/1P1-101773231.html>.

<sup>397</sup> *Mr. Obama's Welcome Evolution*, WASH. POST, May 10, 2012, at A18.

<sup>398</sup> *See Nichols, supra* note 18, at 929. Of course, this interesting proposal to honor each couples' selected marriage and divorce law as regulated by any of various “groups (like Catholicism, Islam and Judaism),” allowing them to “co-exist within society and to regulate marital issues with only minimal state involvement” (i.e., enforcement) might raise more issues than it resolves. *Id.* at 988. Would polygamy be recognized? What if one member of a couple converted to another religion after marriage? Does this violate the establishment clause? Israel has a regime somewhat similar to this proposal, recognizing marriage according to the tenets of four different religions, but with no secular marriage law. Brett G. Scharffs & Suzanne Disparte,

Covenant marriage proposals represent a compromise by social conservatives, who would have preferred to roll back liberal divorce rules for everyone rather than just those who opt-in to covenant marriage. Although there was little popular and political appetite for mandatory covenant marriage, there was sufficient support for the optional alternative in three states.<sup>399</sup> Supporters viewed this as a good first step.<sup>400</sup>

Like covenant marriage on the right, marriage light is a compromise for supporters of marriage equality.<sup>401</sup> They too tend to view semi-marriage or quasi-marriage options as intermediate steps in the right direction.<sup>402</sup> In the end, however, the “first steps” invented by proponents of both marriage equality and universal covenant marriage may wind up as permanent new alternative institutions, undermining the status and normative effects of unitary marriage.<sup>403</sup>

*B. Advantages of Marriage Alternatives for Couples with a Choice*

Given a choice, some couples are likely to support continued alternatives to marriage once they recognize the advantages. In a country where grocery shelves are filled with dozens of different types of water for sale, it is hard to imagine any other result. And there are more reasons to differentiate among forms of relationship recognition than among bottles and cans of H<sub>2</sub>O.

There are many different forms of legal alternative to marriage throughout the U.S. and foreign countries, and each presents distinct advantages over marriage. While some options extend only to pairs who could

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*Comparative Models from Religious to Civil Marriage Systems*, 12 J.L. & FAM. STUD. 409, 411 (2010).

<sup>399</sup> See *supra* notes 83–85 and accompanying text.

<sup>400</sup> See Krisy Gashler, *Wedded Bliss?*, DESERET MORNING NEWS, Aug. 1, 2002, at C01, available at 2002 WLNR 11218910 (citing the founder of Americans for Divorce Reform’s description of covenant marriage as a good first step towards reducing divorce); Katherine S. Spaht, *Covenant Marriage Bill May Stem Divorce Tide*, NEW ORLEANS TIMES-PICAYUNE, June 8, 1997, at B6 (explaining that the Louisiana covenant marriage bill is “the first step” in the direction of revising no-fault divorce laws to make marriage “the commitment it once was”).

<sup>401</sup> See, e.g., David Ariosto, *Rhode Island Legislature Passes Civil Union Bill*, CNN (June 29, 2011), [http://articles.cnn.com/2011-06-29/us/rhode.island.civil.unions\\_1\\_civil-unions-couples-legal-rights?\\_s=PM:US](http://articles.cnn.com/2011-06-29/us/rhode.island.civil.unions_1_civil-unions-couples-legal-rights?_s=PM:US) (explaining that the Rhode Island civil union bill “is widely seen as a compromise intended to provide same-sex . . . rights and benefits, while also preventing an expanded legal definition of marriage”).

<sup>402</sup> See generally Ariosto, *supra* note 401 (quoting marriage equality proponent Rhode Island Gov. Lincoln Chafee); Cain, *supra* note 326 (explaining that gay and lesbian groups in Austria see the country’s new registered partnership law as “significant progress” in the conservative, Catholic country).

<sup>403</sup> See *infra* Part V.F (arguing that marriage light, once established, is likely to survive the eventual acceptance of marriage equality).

not marry in a given jurisdiction (e.g., same-sex couples and close relatives), others provide choices with significant communicative and substantive advantages to couples who could.

The most attractive alternatives are those providing the largest number of distinctions from both marriage and unregistered cohabitation.<sup>404</sup> But even the most marriage-like alternative unions communicate messages that some couples prefer. For instance, some political and religious leaders have “converted” their longtime legal marriages into covenant marriages to communicate a message about the permanence and sanctity of their union and this institution.<sup>405</sup> Like their European counterparts, other American couples may wish to avoid the historic religious, patriarchal, and anti-gay symbolism of marriage.<sup>406</sup> They may also wish to temporarily or permanently escape the expectations and costs of elaborate wedding ceremonies.<sup>407</sup> Marriage light registration could provide legal marital protections without these social implications and expectations.<sup>408</sup>

In addition to social and communicative variations, there are numerous substantive legal distinctions among marriage, unregistered cohabitation, and diverse registered alternatives to marriage.<sup>409</sup> All of these differences result in advantages for some couples.

Many different-sex couples who choose French PACS are not ready to commit to marriage because they are afraid it may end in divorce with its expense, legal complications, and public message of failure.<sup>410</sup> Although divorce generally is less complicated for American couples, our divorces can lead to claims based on community property or other methods of defining and dividing “marital property.”<sup>411</sup> Divorcing spouses can claim temporary and

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<sup>404</sup> See *supra* Part IV.A.

<sup>405</sup> See *supra* note 86 and accompanying text.

<sup>406</sup> See *supra* pp. 270–272; see also ORR, *supra* note 359.

<sup>407</sup> Young Americans and Europeans frequently cite wedding costs as a reason to wait about marriage. Jack Doyle, *The Long Wait to Wed . . . How the Typical Bride Is Now Aged 30*, DAILY MAIL UK, Mar. 31, 2011, available at 2011 WLNR 6232736; Pamela J. Smock, Wendy D. Manning & Meredith Porter, “Everything’s There Except Money”: *How Money Shapes Decisions to Marry Among Cohabitators*, in 67 J. MARRIAGE & FAM., 680 (2005), available at 2005 WLNR 24916132.

<sup>408</sup> In fact, data from the most recent U.S. census appear to support the view that ceremonial marriage may be returning to its medieval role as a resort of the elite propertied classes. *United States: For Richer, for Smarter; the Decline in Marriage*, ECONOMIST, June 25, 2011, at 42 (reporting increasing correlation between higher education and marriage, particularly when children enter the picture).

<sup>409</sup> See *supra* Part IV.

<sup>410</sup> See generally Cody, *supra* note 318.

<sup>411</sup> See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

permanent alimony rights.<sup>412</sup> Even if a couple does not file for divorce, a spouse may claim support upon separation.<sup>413</sup> Avoiding these consequences upon termination of a relationship could justify the choice of domestic partnerships in Maine as well as PACS in France.<sup>414</sup>

On the other hand, one of the main attractions of covenant marriage regimes is the difficulty of termination.<sup>415</sup> Counseling, fault requirements, and shame serve as tools to assure permanence.<sup>416</sup> This too appears to appeal to some couples.

In addition to issues regarding termination, numerous other incidents of marriage have advantages or disadvantages for some couples. The attraction of various forms of marriage light may depend on the absence of these incidents. For example, different-sex Marylanders may have good substantive reasons to forego marriage in favor of that state's very limited gender-neutral form of domestic partnership.<sup>417</sup>

Spouses in Maryland may file state income taxes jointly. This is desirable for many couples. However, some married couples are also subject to an infamous "marriage penalty," paying higher state income tax rates than their single counterparts.<sup>418</sup>

Widows and widowers in Maryland may have a right to override a decedent's wishes and claim a statutorily mandated elective share of their spouses' estates.<sup>419</sup> A woman who married late in life to a man of means might leave a will, devising all of her property to children from a prior marriage. However, if she died first, her widower could legally override her wishes and claim at least one-third of her net estate.<sup>420</sup>

Some couples in Maryland may reasonably prefer to enter a domestic partnership rather than a marriage in order to avoid these undesired consequences. As domestic partners, the couples would still have rights to visit

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<sup>412</sup> *Id.*

<sup>413</sup> *Id.*

<sup>414</sup> ME. REV. STAT. ANN. tit. 22, § 2710(4) (2011).

<sup>415</sup> See *supra* Part II.B (describing how covenant marriage was a compromise proposal in furtherance of stricter divorce requirements).

<sup>416</sup> See *supra* notes 82–84.

<sup>417</sup> See S.B. 566, 425th Leg., 2008 Reg. Sess. (Md. 2008) (codified as 2008 Md. Laws 4597); S.B. 597, 425th Leg., 2008 Reg. Sess. (Md. 2008) (codified as 2008 Md. Laws 4649).

<sup>418</sup> Len Lazarick, *Progressive Delegates Objected to the Income Tax Hikes Too*, MARYLANDREPORTER.COM (May 18, 2012, 7:59 AM), <http://marylandreporter.com/2012/05/18/progressive-delegates-objected-to-the-income-tax-too/>.

<sup>419</sup> MD. CODE ANN., EST. & TRUSTS § 3-203 (LexisNexis 2012) (authorizing a surviving spouse to elect a one-third share, or a one-half share if there is no surviving issue).

<sup>420</sup> *Id.*

each other in the hospital, share a room in a nursing home, and make certain healthcare and funeral arrangements.<sup>421</sup>

Minor children can also factor into the equation. A spouse is generally the presumed parent of a wife's child born during the marriage, entailing substantial rules regarding custody, visitation, support, and out-of-state removal when married parents divorce.<sup>422</sup> Many parents may favor this commitment, and the desire to make these rules mandatory is a strong argument for maintaining traditional marriage rules.<sup>423</sup> However, one can certainly imagine a mother who would rather not have to ask a court for permission when she wants to move with her child to a different state if her marriage doesn't work out. She might choose a semi-marriage regime instead. On the other hand, a different couple contemplating pregnancy might want to ensure that both partners remain together with the children except in the most extreme circumstances. That couple might choose to enter a covenant marriage before conceiving a child.

A choice between marriage, marriage light, and covenant marriage provides some couples with options they desire, but Colorado's contract-based "designated beneficiary" regime takes flexibility to a whole new level.<sup>424</sup> Colorado couples who want more control can cheaply customize the legal consequences of their relationship by selecting from a menu of options regarding joint property ownership, hospital visitation, medical decision-making, intestate inheritance, and standing in a wrongful death suit.<sup>425</sup>

### C. *How DOMA Makes Marriage Light Options More Attractive*

All of the examples above can be advantages under state or foreign law. When the United States Congress created DOMA, numerous additional distinctions were created that can make marriage light more attractive to even the most traditional American couples.<sup>426</sup> By coupling federal invisibility with legal state recognition, couples enjoy substantive legal advantages similar to marriage under state law, while avoiding the disadvantages of marriage under federal laws.

DOMA requires the federal government to ignore state same-sex marriages and treat same-sex spouses differently from different-sex spouses.<sup>427</sup>

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<sup>421</sup> See MD. CODE ANN., HEALTH-GEN. § 6-101 (LexisNexis 2012); S.B. 566, 425th Leg., Reg. Sess., (Md. 2008); S.B. 597, 425th Leg., Reg. Sess., (Md. 2008).

<sup>422</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956 (Mass. 2003).

<sup>423</sup> See *supra* notes 144–149 and accompanying text.

<sup>424</sup> COLO. REV. STAT. ANN § 15-22-104 (West 2012).

<sup>425</sup> See *supra* note 354 and accompanying text.

<sup>426</sup> See Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

<sup>427</sup> *Id.*

DOMA also appears to constrain recognition of different-sex marriage light partners since it expressly limits the meaning of the word “spouse” for federal purposes to “a person of the opposite sex who is a *husband or wife*.”<sup>428</sup>

DOMA arguably does not limit federal recognition of different-sex quasi-marriage partners in states like New Jersey, whose civil union statute expressly defines the terms “spouse,” “husband,” and “wife” to include civil union partners.<sup>429</sup> Federal law has long incorporated state family law definitions, like those regarding marriages between cousins and biracial couples as well as unlicensed common-law marriages.<sup>430</sup> However, the text of DOMA appears to prevent federal recognition where state law does not define domestic partners as “husband” and “wife.”<sup>431</sup>

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<sup>428</sup> *Id.*

<sup>429</sup> N.J. STAT. ANN. § 37:1-28 (West 2012) (“[W]henver in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to ‘marriage,’ ‘husband,’ ‘wife,’ ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ ‘widow,’ ‘widower,’ ‘widowed’ or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union [pursuant to the provisions of this act.]”); *see also infra* note 481 and accompanying text.

<sup>430</sup> The U.S. Supreme Court has observed that “[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law,” particularly “where a statute deals with a familial relationship; there is no federal law of domestic relations[hips], which is primarily a matter of state concern.” *De Sylva v. Ballentine*, 351 U.S. 570, 580–82 (1956). *See also* Titshaw, *supra* note 74, at 562–73 (describing the federal reliance on state anti-miscegenation, consanguinity and common law marriage law to determine whether to recognize couples as “spouses” under federal immigration law). But, if DOMA were repealed or struck down as unconstitutional, there would be good arguments that legal state quasi-marriages should be recognized for some federal purposes. For instance, Cain, an expert on tax law and its implications for same-sex couples, says she “can’t see the wisdom in not treating spousal equivalents as spouses absent DOMA . . .” She points out that appropriate rules for the treatment of spouses at divorce, death and transfer of property have evolved over time since the beginning of the modern income tax in 1913, and there is no reason not to apply those time-tested tax rules to couples who are in the same position with respect to state law rights and responsibilities based on quasi-marriage recognition. E-mail from Patricia A. Cain, Inez Mabie Distinguished Professor of Law, Santa Clara Law School (Aug. 3, 2011, 19:21 EST) (on file with author).

<sup>431</sup> This could arguably extend to situations where state law expressly provides for equal treatment between civil unions and marriages. *See* Letter from Pamela Wilson Fuller, Senior Technician Reviewer, I.R.S., to Robert Shair, Senior Tax Advisor, H&R Block (August 30, 2011), *available at* <http://beyondhealthcarereform.com/2011/12/changes-in-illinois-civil-union-partner-tax-status/> (citing 750 ILL. COMP. STAT. ANN 75/20 (2012)) (reading the gender-neutral Illinois Religious Freedom and Civil Union Act to recognize different-sex partners in a civil union as “husband and wife” under the Internal Revenue Code based on the Illinois act’s provision that “[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses . . .”). However, it is hard to imagine DOMA’s extension to different-sex couples in other semi-marriage unions, let alone forms of quasi-marriage.

One could argue that such a reading of DOMA is too literal and remote from the intent of Congress, which focused mainly on prohibiting recognition of same-sex relationships.<sup>432</sup> But DOMA's proponents also purported to "defend traditional marriage," a motivation arguably furthered by the prohibition of marriage light alternatives for different-sex couples.<sup>433</sup>

The federal invisibility of marriage light relationships has numerous negative consequences for many couples. But for some, it also entails substantial advantages since visibility comes with significant disadvantages. Professor Pat Cain has enumerated a long list of significant federal tax advantages for couples who are not recognized by the Internal Revenue Service, such as twice the deduction for step-parent adoption expenses as well as avoidance of anti-tax-abuse rules for married taxpayers and the "marriage penalty."<sup>434</sup> For example, two-wage-earner, different-sex couples in states like Nevada may have an incentive to opt for domestic partnership registration over marriage to avoid the federal marriage tax penalty, while still enjoying similar state benefits.<sup>435</sup>

California, Washington, and New Jersey lawmakers noted the social security related advantage of domestic partnerships for older different-sex couples when they extended partnership eligibility to those over the age of sixty-two.<sup>436</sup> Benefits can be significantly less after they marry.<sup>437</sup> These couples can now presumably enjoy the state benefits of domestic partnerships, yet avoid the disadvantage of marriage for federal purposes.<sup>438</sup> While this approach may seem dishonest to some, it certainly has substantial advantages. And if it's gaming the system, these states show no qualms about playing along.

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<sup>432</sup> Titshaw, *supra* note 53, at 446–74 (describing DOMA's legislative history).

<sup>433</sup> *Id.*

<sup>434</sup> Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 500–03 (2009) (listing disadvantages of marriage recognition in the context of the federal invisibility of same-sex marriage on account of DOMA; so far the IRS has also failed to treat marriage light partners as spouses under the IRC). In addition to taxes and the other instances described here, there are likely many other examples of DOMA's refusal to recognize unmarried state partners. *See, e.g.*, Peter C. Alexander, *Better Than Traditional Marriage?: The Bankruptcy Benefits to a Divorcee Following a Same-Sex Marriage, Domestic Partnership or Civil Union*, 20 AM. BANKR. INST. L. REV. 271 (2012). *But see, In re Balas*, 449 B.R. 567 (C.D. Cal. 2011) (finding the federal definition of DOMA unconstitutional in a bankruptcy context).

<sup>435</sup> *See* Cain, *supra* note 434, at 484.

<sup>436</sup> *See supra* notes 350–352 and accompanying text.

<sup>437</sup> Pamela Yip, *Premarital Concerns Different for Seniors*, DALL. MORNING NEWS, June 6, 2012, at 12, available at 2012 WLNR 11860723.

<sup>438</sup> This loss of benefits is also a reason why some older different-sex couples have long chosen not to marry. John R. Schleppebach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act*, 17 ELDER L.J. 31, 36–37 (2009).

Even in an area like immigration, where the federal invisibility of same-sex marriages has forced thousands of U.S. citizens to choose between spouse and country, there are occasional advantages to DOMA.<sup>439</sup> For instance, *married* sons and daughters of U.S. citizens fall into a different immigrant visa quota category than their unmarried siblings.<sup>440</sup> This can mean waiting three years longer for permission to join their parents in the United States.<sup>441</sup> Thus, a son might get his “green card” three years earlier if he and his female partner register a PACS in France rather than marrying.<sup>442</sup>

*D. Different-Sex Couples Are Increasingly Likely to be Eligible for Marriage Light*

Over time, as American legislatures began to freely propose new marriage light alternatives without judicial coercion, they have become more likely to include different-sex as well as same-sex couples.<sup>443</sup> This trend seems inevitable. As homosexuality and same-sex couples are viewed more equally, marriage light regimes can be viewed with less stigma, and heterosexuals are more likely to appreciate the advantages they can provide.<sup>444</sup> Many European legislators have recognized this and allowed different-sex couples to register as partners since the Netherlands first chose to do so in 1997.<sup>445</sup>

Once recognized as something more useful than a consolation prize for gay people, the exclusion of the heterosexual majority from marriage light options cannot survive long politically. As Justice O'Connor reasoned in her concurrence in *Lawrence v. Texas*, a law repressing heterosexuals is not likely

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<sup>439</sup> Titshaw, *supra* note 74, at 539–40 (describing one of the 35,820 estimated cases of separated same-sex bi-national couples as of 2000).

<sup>440</sup> See 8 U.S.C. § 1153(a) (2006).

<sup>441</sup> U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, VISA BULLETIN, 2 (Aug. 2012).

<sup>442</sup> This might not be a good solution for his partner, since she would gain no U.S. immigration status as the result of her unrecognized PACS. However, it could be beneficial to a couple that is willing to accept a temporary transatlantic relationship. The citizens' son could gain U.S. citizenship in around five years and then marry his partner and apply for her green card in a category with no wait list.

<sup>443</sup> See *supra* note 345 and accompanying text.

<sup>444</sup> See, e.g., Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx> (describing a positive gradual cultural shift in American perceptions of lesbians and gay men).

<sup>445</sup> See Curry-Sumner, *supra* note 303, at 48–51 (including examples of the Netherlands, France and Belgium; but other countries, such as Denmark, Sweden and Norway recognized only same-sex registered partners before they moved on to marriage equality).



to last.<sup>446</sup> The political considerations that have stopped mandatory covenant marriage support this conclusion.

In addition to the current trend and the strong likelihood it will continue as the advantages of marriage light alternatives become better known to the heterosexual majority, there may be state or federal constitutional constraints limiting discrimination against different-sex as well as same-sex couples.

Recent litigation in Europe has gone beyond the familiar American challenge to marriage discrimination against same-sex couples.<sup>447</sup> Different-sex couples are now challenging discriminatory same-sex-only registered partnership regimes in the U.K. and Austria.<sup>448</sup> In the words of Helmut Graupner, the attorney for Austrian couples challenging discrimination in both marriage and registered partnerships, “You can’t be a little bit equal, in the same way as you can’t be a little bit dead or a little bit pregnant. You can only be equal or unequal.”<sup>449</sup> This simple argument has logical appeal. When marriage light suits different-sex couples better, why shouldn’t they be able to claim that legal status? The answer certainly can’t be the inferiority of their relationships. The law prefers different-sex couples if it prefers anyone.<sup>450</sup> It is one thing to discriminate in favor of those society prefers. It is another thing entirely to discriminate *against* them.

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<sup>446</sup> 539 U.S. 558, 584–85 (2003) (O’Connor, J., concurring) (“I am confident . . . that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society.”).

<sup>447</sup> See *Kerrigan v. Comm’r of Pub. Health*, 757 A.2d 407 (Conn. 2008) (challenging marriage discrimination against same-sex couples under state constitution); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (same); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (same).

<sup>448</sup> Adam Gabbatt & Julia Mueller, *Heterosexual Couples Make Second Attempt for Civil Partnership*, THE GUARDIAN (Nov. 8, 2010, 10:21 EST), <http://www.guardian.co.uk/lifeandstyle/2010/nov/08/heterosexuals-attempt-civil-partnership> (describing both the case of Tom Freeman and Katherine Doyle in the U.K. and the case brought by Austrian attorney and LGBT rights advocate Dr. Helmut Graupner). Even British Catholic Bishops seem impressed by the merits of this anti-heterosexual discrimination. See CATHOLIC BISHOPS’ CONFERENCE OF ENGLAND AND WALES, RESPONSE FROM THE CATHOLIC BISHOPS’ CONFERENCE OF ENGLAND AND WALES TO THE GOVERNMENT CONSULTATION ON “EQUAL CIVIL MARRIAGE” 6 (June 12, 2012), available at <http://www.catholic-ew.org.uk/Home/News-Releases/April-June/Catholic-Bishops-Conference-of-England-and-Wales-Responds-to-the-Equal-Civil-Marriage-Consultation>.

<sup>449</sup> Cain, *supra* note 326.

<sup>450</sup> As U.S. District Court Judge Walker found in *Perry v. Schwarzenegger*, all of these arguments for refusing to recognize same-sex marriage boil down to the idea that straight people are better than gay people, or at least that different-sex relationships are preferable to same-sex ones. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998, 1002 (N.D. Cal. 2010), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

So far, there has been no challenge to the exclusion of different-sex couples from comprehensive marriage light status in the United States, but that is likely to change.<sup>451</sup> When it does, some of these cases are likely to be successful on similar grounds as marriage equality, and applying the same standard of scrutiny.<sup>452</sup>

*E. How Constitutional Marriage Amendments Lead to the Proliferation of Marriage Light Alternatives for Everyone*

Institutional flexibility has preserved unitary marriage as it adapted to changing social forces over the centuries, but the new rigidity posed by marriage amendments stops change in its tracks. This sets in motion experimentation with new, gender-neutral marriage light alternatives, eliminating the monopoly of marriage as the sole form of legal recognition for committed couples and their families.

Like running water that is artificially dammed, ongoing social change is not easily stifled. Imagine that conservatives of past generations had widely amended state constitutions to freeze in time the political opinions of their age, prohibiting divorce or constitutionalizing coverture.<sup>453</sup> Public impatience with outdated views of divorce and women's subordinate role in marriage could have substantially undermined the institution of marriage over time. Lawmakers might have eventually devised legal alternatives to marriage, allowing divorce and recognizing the right of wives to sign contracts in their own names. And Americans might well have clamored to these alternatives as the French have to PACS.<sup>454</sup>

Although affecting fewer people directly, fossilized opposition to same-sex marriage is already causing marriage light work-arounds of constitutional obstacles established by the George W. Bush generation.<sup>455</sup> As public opinion shifts in favor of recognizing same-sex relationships, state legislatures, which are prevented from recognizing marriage equality, are forced in the direction of creative new alternatives.<sup>456</sup> Seven states with anti-

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<sup>451</sup> These challenges are increasingly likely as more states recognize marriage light for same-sex couples and more different-sex couples recognize the advantages of marriage light for them. *See supra* Parts V.A–B.

<sup>452</sup> *See infra* notes 459–461 and accompanying text.

<sup>453</sup> *See* Applebaum, *supra* note 217, at 51. At least six states did amend their state constitutions to outlaw bi-racial marriage, and in spite of the smaller numbers it took a broad U.S. Supreme Court decision in *Loving v. Virginia*, 388 U.S. 1 (1967) to overcome those obstacles.

<sup>454</sup> *See supra* Part IV.A.

<sup>455</sup> *See supra* note 271 and accompanying text.

<sup>456</sup> *See supra* Parts III.B.1, V.A.

gay marriage amendments already recognize some forms of marriage light.<sup>457</sup> Others will surely follow. In fairness to the heterosexual majority, these alternatives are more and more likely to extend to different-sex couples as well.<sup>458</sup>

In addition to leading equality-minded legislatures to create and perpetuate marriage light, state marriage amendments will constrain equality-minded state courts, increasing the likelihood those courts will recognize a constitutional right to marriage light for different-sex partners even where marriage discrimination, and its impetus for marriage light recognition, continues.<sup>459</sup>

Without state anti-gay marriage amendments, courts would be likely to follow similar paths in either upholding or striking down both marriage discrimination against same-sex couples and marriage light discrimination against different-sex couples.<sup>460</sup> If same-sex couples are comparable to

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<sup>457</sup> See *supra* Parts III.B.1.

<sup>458</sup> See *supra* Part V.D.

<sup>459</sup> Most American state constitutions have equality provisions overlapping, and often exceeding, the protections provided by the federal Equal Protection Clause. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1222 (1985) (arguing that “uncritical ‘reception’ of federal equal protection doctrine . . . has drained [much of the vitality out of these diverse state provisions]”).

<sup>460</sup> Whatever the level, the standard of scrutiny applied to discrimination against same-sex couples would likely apply to discrimination against different-sex couples as well. One can make a strong argument for applying more exacting scrutiny to laws discriminating against traditionally subordinated sexual minorities, rather than against heterosexuals. See Titshaw, *supra* note 291 (describing the primary purposes of the Fourteenth Amendment and the Bill of Rights as the protection of minorities from properly functioning democratic majority rule in proposing an extension of that concept against laws enacting majority religious beliefs without any valid secular purpose); see also *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 610 (7th Cir. 2001) (Justice Posner focusing on the question of whether “[h]eterosexuals cohabiting outside of marriage” constitute a suspect *class*, rather than whether marital status or sexual orientation is a suspect *classification*); *Haldeman v. Dep’t of Rev.*, No. TC-MD 070773C, 2008 WL 4371517 (Or. T.C. Sept. 24, 2008), *aff’d* 2010 WL 3655956 (Or. T.C. Sept. 21, 2010) (distinguishing between heightened scrutiny for same-sex couples and lower scrutiny for different-sex unmarried couples). However, the U.S. Supreme Court and some state courts have opted for a “blind” approach to equality guarantees, applying the same level of scrutiny when a distinction is made on the basis of a suspect classification even if the challenged discrimination appears to favor women or racial minorities. Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved and Ricci*, 34 HARV. J.L. & GENDER 1, 1–3 (2011) (“The Supreme Court has made it clear that race classifications, whether benign or invidious, will trigger rigid strict scrutiny analysis . . .”); see also, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (finding unconstitutional discrimination in New Haven Fire Department promotion process that failed strict scrutiny); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (applying strict scrutiny to school district plans using race-based enrollment targets); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (applying strict scrutiny in regard to school affirmative action program); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (employing strict scrutiny to all government classifications on the basis of race); *Miss. Univ. for*

different-sex couples warranting equal access to marriage under the equality guarantees of their state constitutions, it likely follows that different-sex couples cannot be excluded from marriage light status.<sup>461</sup>

On the other hand, courts upholding the constitutionality of marriage discrimination in favor of different-sex couples are likely to also uphold discrimination against them in the context of marriage light.<sup>462</sup> The rationales for upholding marriage discrimination against same-sex couples may or may not be sufficient to justify discrimination against different-sex couples.<sup>463</sup> But there would be strong new reasons to allow the exclusion of different-sex couples from marriage light: the goals of encouraging different-sex marriage and ameliorating the exclusion of same-sex couples from marriage through a second-best marriage light substitute. The United States Court of Appeals for the Seventh Circuit accepted these, among others, as valid reasons justifying the exclusion of a different-sex partner from the Chicago school system's

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Women v. Hogan, 458 U.S. 718, 723–24 (1982) (explaining that the fact that a law “discriminates against males rather than against females does not . . . reduce the [intermediate scrutiny] standard of review”); Lind v. City of Battle Creek, 681 N.W.2d 334 (Mich. 2004) (holding the same standard of scrutiny applies to “reverse discrimination” under the Michigan Civil Rights Act).

<sup>461</sup> See *In re Marriage Cases*, 183 P.3d 384, 440–41 (Cal. 2008) (holding that sexual orientation is a suspect classification triggering strict scrutiny under state constitutional equal protection clause); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431–32 (Conn. 2008) (holding that sexual orientation in a quasi-suspect classification triggering intermediate scrutiny); *Varnum v. Brien*, 763 N.W.2d 862, 885, 889 (Iowa 2009) (holding that sexual orientation is a quasi-suspect classification triggering heightened scrutiny). However, the U.S. Attorney General recently addressed the level of scrutiny issue in a way the courts have avoided by analyzing each of the factors the Supreme Court has laid out for identifying a suspect classification, finding that sexual orientation qualifies, leading to the Justice Department’s unusual decision not to defend DOMA against constitutional challenges. See Letter from Eric H. Holder Jr., Attorney Gen., to John A. Boehner, Speaker, House of Representatives, (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (on litigation involving DOMA).

<sup>462</sup> *Conaway v. Deane*, 932 A.2d 571, 605–16 (Md. 2007) (finding no suspect or quasi-suspect class); *Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006) (rejecting application of heightened scrutiny in the specific context of marriage discrimination); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 673–74 (Tex. App. 2010) (finding no suspect class); *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006) (rejecting heightened scrutiny, but leaving the door open to future plaintiffs who proved sexual minorities met the standard of a suspect class). Obviously, any argument that heightened scrutiny should be applied on the basis of marriage as a fundamental right would be inapplicable in the context of challenges to *marriage light* discrimination.

<sup>463</sup> For instance, arguments for excluding same-sex couples from marriage include tradition and binding biological fathers to their children and the mothers of their children. Even if a court were to find these goals sufficient to justify marriage discrimination, they seem inapplicable to discrimination *against* different-sex couples.

employee benefit plan in *Irizarry v. Board of Education of the City of Chicago*.<sup>464</sup> So have several high courts in Europe.<sup>465</sup>

However, an anti-gay state constitutional marriage amendment throws a wrench into the equation described above. Not only will these amendments force equality-minded legislatures to funnel political movement towards marriage light experimentation, but they also hem in equality-minded judges, increasing the likelihood that different-sex couples can claim a constitutional right to marriage light in the same jurisdictions where marriage light is the sole option for same-sex couples.

Imagine, for instance, that Iowa were to amend its state constitution to prohibit same-sex marriage and that the state legislature later enacts some form of semi-marriage in fairness to same-sex couples. Different-sex couples could rely on *Varnum v. Brien* (the Iowa marriage case) to claim marriage light discrimination against them. If the Iowa Supreme Court applied the *Varnum* “closer scrutiny” standard to discrimination against different-sex couples, it could reasonably strike down marriage light discrimination against different-sex couples who were denied the substantial advantages of marriage light status.<sup>466</sup> Thus, the state amendment could provide popular and legislative

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<sup>464</sup> *Irizarry*, 251 F.3d 604. Judge Posner’s opinion in *Irizarry* did not involve a statewide marriage light regime, and the circuit court did not acknowledge that the desired status gave couples any advantage over marriage. In fact, the opinion did not even view the issue as one of sexual orientation based discrimination. Still, his discussion of marriage “promotion” as a rational basis for discriminating against different-sex couples is highly relevant. *Id.* at 607. See also *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (upholding Nynex Corporation’s same-sex-only domestic partnership employee benefit policy because different-sex couples could obtain the same benefits by marrying in a Title VII gender discrimination challenge); *Haldeman*, 2008 WL 4371517, at \*4 (upholding distinction in excluding same-sex, but not different-sex, domestic partner benefits from taxable income). *But see* *Devlin v. City of Phila.*, 862 A.2d 1234, 1249, 1251 (Pa. 2004) (applying analysis “generally the same as that under the [E]qual [P]rotection [C]lause of the United States Constitution” to strike down a Philadelphia ordinance allowing tax free real property transfers by unmarried couples only if they are of the same-sex, rejecting *Irizarry*-based marriage encouragement argument as insufficient to justify the resulting discrimination, and finding it “irrational to presume that opposite-sex, cohabiting, financially interdependent couples, who are otherwise inclined to marry, would be dissuaded from doing so by an ordinance permitting them to transfer real property between them without having to pay a transfer tax”).

<sup>465</sup> See *supra* pp. 253–255.

<sup>466</sup> The marriage amendment might influence the court to alter its prior understanding of equality between same- and different-sex couples, particularly if it wished to avoid advantaging *only* different-sex couples on the basis that sexual orientation is a suspect classification due to the history of discrimination against lesbians and gay men. The availability of marriage to different-sex couples would also remain a valid objective if the court found it sufficiently connected to the exclusion of different-sex couples from alternative institutions. However, a court adhering to the now common “blind” approach to suspect classifications could reasonably strike down marriage-light discrimination against different-sex couples, while respecting the state constitutional definition of marriage. See *supra* notes 460–461 and accompanying text.

incentives to create marriage light, paired with a pre-existing egalitarian constitutional imperative requiring that such marriage light extend to include different-sex couples.

While this scenario would not occur in every state, in a country with thirty state constitutions now defining marriage, it is likely in some—just as state courts ruled differently on the validity of sodomy statutes before *Lawrence v. Texas* set a federal constitutional standard.<sup>467</sup> A federal marriage equality decision might be the only solution.

*F. Once Established, Gender-Neutral Marriage Light Is Likely to Last*

Given the accelerating current public opinion in favor of marriage equality, it is logical to wonder if marriage light is merely a passing phase, a transitional bridge to marriage equality that will be phased out when the original goal of equality is inevitably achieved. Tulane Law School Dean David Meyer has made this argument, pointing to a lack of public enthusiasm for cafeteria options and to the decisions of Connecticut, New Hampshire, and Vermont to phase out marriage light regimes for most or all residents upon the adoption of marriage equality.<sup>468</sup> This hypothesis appears to hold in the limited context where marriage light is available only to same-sex couples. But it ignores two key real-world variables: (1) constitutional obstacles to marriage equality and (2) the availability of marriage light to different-sex couples.<sup>469</sup>

Most states now have anti-gay constitutional marriage amendments.<sup>470</sup> Connecticut, New Hampshire, and Vermont are exceptions.<sup>471</sup> If public opinion in the thirty states with amendments changes to favor same-sex relationship recognition, legislative options will be restricted, funneling recognition toward marriage light experimentation until the time, if ever, when marriage equality becomes so popular that the constitutional amendments can be repealed.<sup>472</sup> That may provide sufficient time for some couples to see advantages in the new marriage light regimes and develop a vested interest in their perpetuation.

The general marriage-monopoly-inevitability argument also ignores another unusual aspect of the examples of Connecticut, New Hampshire, and

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<sup>467</sup> *Lawrence v. Texas*, 539 U.S. 558, 576 (2003) (citing five state court opinions striking down sodomy laws under state equal protection and due process provisions after the U.S. Supreme Court decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). See also *supra* Part III.B.1 (describing and classifying the thirty state constitutional amendments defining marriage).

<sup>468</sup> Meyer, *supra* note 354, at 130–32.

<sup>469</sup> See *supra* Parts III.B.1, V.D.

<sup>470</sup> See *supra* Part III.B.1.

<sup>471</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last visited Oct. 21, 2012).

<sup>472</sup> See *supra* Part III.B.1.

Vermont. The terminated institutions in those states all fell within the minority of marriage light regimes that did not extend to any different-sex couples.<sup>473</sup> They seemed to serve solely as a consolation prize for same-sex couples who could not marry. In that context, it made sense to phase out marriage light when the states adopted marriage equality. Legislators would likely refuse to favor same-sex couples with a choice between marriage and marriage light not available to the heterosexual majority. But that logic falls apart when different-sex couples already enjoy such a choice. In those instances, lawmakers have presumably pursued goals other than the mere consolation of same-sex couples. And such gender-neutral marriage alternatives have become increasingly popular.<sup>474</sup> They may even be constitutionally mandated.<sup>475</sup>

When same-sex couples obtain more comprehensive relationship recognition, lawmakers actually tend to repeal *same-sex-only* forms of marriage light but to maintain established marriage light options to the extent they are also available to *different-sex* couples. For example, the District of Columbia has continued its gender-neutral domestic partnership regime even after enacting full marriage equality.<sup>476</sup> So will Maryland and Maine if their November 2012 referenda favor marriage equality.<sup>477</sup>

Developments in Washington and New Jersey demonstrate this point precisely. When these states began recognizing domestic partnerships for same-sex couples, they also extended eligibility to different-sex couples involving partners over the age of sixty-two.<sup>478</sup> When Washington recently enacted a marriage equality act, that law eliminated the domestic partnership option for most same-sex couples since they could now marry.<sup>479</sup> Yet it maintained that option for all couples where one partner is over sixty-two years old—the exact same extent to which domestic partnerships already served as an alternative for

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<sup>473</sup> See William N. Eskridge, Jr., *Family Law Pluralism: The Guided Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1943 (2012).

<sup>474</sup> See BADGETT & HERMAN, *supra* note 197.

<sup>475</sup> See *supra* Part V.E.

<sup>476</sup> See *Marriage and Domestic Partnership Information*, DIST. COLUMBIA, <http://gibt.dc.gov/DC/GLBT/Resources+and+Publications/Marriage+and+Domestic+Partnership/Marriage+and+Domestic+Partnership+Information> (last visited Oct. 21, 2012).

<sup>477</sup> MD. CODE ANN., FAM. LAW §§ 2-201 to -202 (LexisNexis 2012); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (adopting marriage equality for same-sex couples without repealing Maryland's four-year-old gender-neutral domestic partnership legislation); Susan M. Cover, *2012 Election: Some Want Marriage Question Reworked*, PORTLAND HERALD PRESS, June 21, 2012, available at 2012 WLNR 12945129.

<sup>478</sup> See WASH. REV. CODE ANN. § 26.60.030(6) (West 2012) (limiting domestic partnerships to same-sex couples and couples where at least one of the persons was sixty-two years of age or older); N.J. STAT. ANN. § 26:8A-4(b)(5) (West 2004) (limiting domestic partnerships to same-sex couples and couples where both partners were sixty-two years of age or older).

<sup>479</sup> S.B. 6239, 62d Leg., Reg. Sess. (Wash. 2012). This law may not come into effect if voters reject it in a November 2012 referendum.

different-sex couples.<sup>480</sup> This made sense, because the bases for recognizing older different-sex couples was unchanged, and that rationale now extends to older same-sex couples as well. When New Jersey enacted a quasi-marriage same-sex civil union statute, it followed the same pattern. It generally phased out the existing option of semi-marriage domestic partnership, but it made an exception for all couples where one partner is over sixty-two years old—the extent to which different-sex couples already qualified.<sup>481</sup>

These examples illustrate the rule: The survival of marriage light variants appears to turn on whether, and to what extent, the existing regime extends beyond same-sex couples at the time when marriage equality or a more comprehensive form of marriage light is recognized. Democratic majorities (e.g., heterosexuals) do not lightly relinquish established rights available to all.<sup>482</sup> With this caveat, even Dean Meyer's Vermont example proves the point. Vermont and Hawaii maintained their reciprocal beneficiary regimes after they began recognizing same-sex marriage and quasi-marriage civil unions, respectively.<sup>483</sup> Thus, they too retain lighter institutions to the extent they represent something more than a second-class marital substitute for same-sex couples—here, recognition of non-conjugal relationships.

The correlation between institutional survival and gender-neutrality of marriage light institutions occurs abroad as well. Belgium and the Netherlands, for example, continued their gender-neutral registration of partnerships even after recognizing marriage equality for same-sex couples.<sup>484</sup> On the other hand, Denmark, Iceland, Norway, and Sweden discontinued their same-sex-only partnership registration when they recognized marriage equality.<sup>485</sup> Although

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<sup>480</sup> *Id.* §§ 8–9.

<sup>481</sup> 2006 N.J. Sess. Law Serv. § C26:8A-4.1 (West) (eliminating the domestic partnership option except for partners sixty-two and older).

<sup>482</sup> This is the genius of the few social programs that have become sacrosanct in American politics: social security, Medicare and home mortgage tax exemptions.

<sup>483</sup> *See* VT. STAT. ANN. tit. 15, § 1301 (2012); HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2012).

<sup>484</sup> *See Property Effects of Marriage and Registered Partnership*, EUR. COMMISSION, [http://ec.europa.eu/justice/civil/family-matters/marriage/index\\_en.htm](http://ec.europa.eu/justice/civil/family-matters/marriage/index_en.htm) (last updated Mar. 2, 2012) [hereinafter *Property Effects*]. South Africa simultaneously recognized marriage and civil unions for all couples in 2006. François du Toit, *National Report: The Republic of South Africa*, 19 AM. U. J. GENDER SOC. POL'Y & L. 277, 280–81 (2011).

<sup>485</sup> *Property Effects*, *supra* note 484 (listing Sweden among countries where only same-sex partnerships were registered); Ministry of Justice, Sweden, *Family Law: Information on the Rules*, at 25, available at <http://www.sweden.gov.se/content/1/c6/13/83/44/12624b3b.pdf>; DÓRA GUÓMUNDSDÓTTIR, DANISH INST. FOR HUMAN RIGHTS, STUDY ON HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY, LEGAL REPORT: IRELAND 15 (2010), available at [http://www.coe.int/t/Commissioner/Source/LGBT/IcelandLegal\\_E.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/IcelandLegal_E.pdf); Nor. Ministry of Foreign Aff., *Norway Introduces New Marriage Act*, NORWAY.ORG,



legislation has not yet been introduced, this theory predicts that France will also retain its popular gender-neutral PACS if it recognizes marriage equality next year as planned.<sup>486</sup>

## VI. CONCLUSIONS

For over a generation, queer theorists, feminists, social engineers, and other socially liberal scholars have promoted state recognition of more, and more flexible, forms of consensual private relationships.<sup>487</sup> While these calls have become louder and more numerous over time, they do not seem to have resonated outside the academy and other relatively small circles in the United States. No significant political constituency or prominent political leader openly supports this vision. However, these voices have powerful political allies who are turning the tide in favor of a radically liberal cafeteria of relationship options for everyone. Those unlikely, and apparently unwitting, allies are the conservative opponents of marriage equality.

Over the last two decades, social conservatives have used every tool at their disposal to fight against same-sex marriage recognition. This included a strategy to amend constitutions, locking in fleeting policy preferences until popular opinion someday shifts just as far in the opposite direction or courts use the federal constitution to strike them down.<sup>488</sup> Perhaps they believe that they can turn back not only the growing majority sentiment of Americans who now appear to favor same-sex marriage, but also the larger majority of Americans who have long favored some form of state-recognized same-sex unions. But such a reversal seems unlikely.

Of course, if opponents of marriage equality are actually reacting to an anti-gay agenda rather than “defending marriage,” their strategies make more sense. Some may be so loath to recognize the equality of gay people or same-sex couples under any circumstances that they are willing to allow collateral damage to the status of marriage in the process.

This is not to say that Maggie Gallagher and others are all insincere when they base arguments against marriage equality on concern for the maintenance and strengthening of traditional marriage norms.<sup>489</sup> But it is to say

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<http://www.norway.org/ARCHIVE/policy/gender/ekteskapslov> (last visited Sept. 7, 2012). However, many of the advantages of marriage are provided without any formal registration in these countries.

<sup>486</sup> *France to Introduce Same-Sex Marriage Bill*, UPI.COM (Aug. 26, 2012, 11:06 AM), [http://www.upi.com/Top\\_News/World-News/2012/08/26/France-to-introduce-same-sex-marriage-bill/UPI-90231345993582/?spt=hs&or=tn](http://www.upi.com/Top_News/World-News/2012/08/26/France-to-introduce-same-sex-marriage-bill/UPI-90231345993582/?spt=hs&or=tn) (reporting that French Prime Minister Jean-Marc Ayrault promised to send a bill to the National Assembly and Senate in October, 2012 to allow same-sex couples to marry and adopt children).

<sup>487</sup> See *supra* Part II.C.1.

<sup>488</sup> See *supra* Part III.B.

<sup>489</sup> See *supra* pp. 234–236.

that the popular and political forces so critical to their legislative and referendum successes have been animated by anti-gay animus.<sup>490</sup> It is also to say that the strategies of those sincerely supporting the institution of marriage have been severely misguided, actually leading in the opposite direction by undermining the preferred position of unitary marriage in our laws and society.

If anti-gay sentiment were not the prime reason for the success of “pro-marriage” forces enacting statutes and constitutional amendments in forty-five states, the success would not have been limited to the repression of same-sex couples.<sup>491</sup> But it has been. The three states that enacted an entirely voluntary covenant marriage option have seen them largely unused.<sup>492</sup> As the mastermind of America’s first such law complained: “There are a lot of hypocrites in this world . . . . A lot of these people screaming about same-sex marriage? Boy, howdy, they sure know how to turn on a dime” when it comes to even *voluntary* covenant marriage for different-sex couples.<sup>493</sup> Not to mention marriage reform that would actually *require* more of different-sex couples.

The form of conservative American marriage legislation and amendments also indicates that their common objectives are more anti-gay than pro-marriage, particularly when contrasted with more neutral and comprehensive European pro-marriage provisions. For instance, in spite of its location in Georgia’s “Bill of Rights,” that state’s anti-gay constitutional provision is clearly focused only on refusing rights to same-sex couples. Its only purported affect on *marriage* is to “prohibit” same-sex marriages in Georgia.<sup>494</sup> It then goes on to expressly refuse recognition of “the benefits of marriage” to “union[s] between persons of the same-sex,” to refuse full faith and credit to any foreign same-sex marriage, and—for good measure—to eliminate any judicial jurisdiction “to consider or rule on any of the parties’ respective rights arising” from “such relationship.”<sup>495</sup>

Germany’s 1949 Constitution, in contrast, not only guarantees “marriage and family” the “special protection of the state,” but it also specifies particular duties of the state to promote families.<sup>496</sup> For instance, children may only be removed from their parents on account of serious neglect, “every

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<sup>490</sup> See *supra* note 45 and accompanying text. The realization of this underlying animus contributed to the recent conversion of one prominent longtime opponent to the marriage equality position.

<sup>491</sup> Prior to 1993, seven states had statutes defining marriage as a different-sex union, but forty-five states had such statutes and/or amendments by 2008. Melissa B. Neely, Note, *Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed*, 41 IND. L. REV. 245, 248–49 (2008).

<sup>492</sup> See *supra* Part II.B.

<sup>493</sup> Allman, *supra* note 83.

<sup>494</sup> GA. CONST. art. I, § 4, ¶ I(a) (2004).

<sup>495</sup> *Id.* § 4, ¶ I(b).

<sup>496</sup> See *supra* pp. 250–252.

mother shall be entitled to the protection and care of the community,” and “children born outside of marriage shall be provided the same opportunities for physical and mental development” as children born in wedlock.<sup>497</sup> These provisions guarantee positive as well as negative rights to protect and promote German marriages and families.<sup>498</sup>

Clearly there are models for constitutional provisions that actually aim to assist couples who do marry as well as parents and children more generally. Focusing on the exclusion of same-sex couples from marriage will do nothing to help different-sex couples, and it will actively harm the children of gay couples, forcing them to grow up out of wedlock.<sup>499</sup> Amendments like Georgia’s do not even attempt to affect different-sex marriages. Nor do they purport to prevent *different-sex* marriage light alternatives to traditional, unitary marriage.<sup>500</sup> Even most of the amendments that do apply to different-sex marriage alternatives are unlikely to prevent all forms of marriage light.<sup>501</sup> Instead, the amendments merely encourage greater experimentation with more diverse, lighter institutions.

Conservatives, who are truly interested in preserving the central role of marriage as a guiding norm in our society, could expend their energy on directly relevant political battles to make biological fathers responsible, to support mothers and children, to promote new marriages and support existing

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Article 6 [Marriage—Family—Children] (1) Marriage and the family shall enjoy the special protection of the state. (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty. (3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect. (4) Every mother shall be entitled to the protection and care of the community. (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6 (Ger.), available at <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

<sup>498</sup> See *supra* pp. 250–252.

<sup>499</sup> See *supra* notes 142–144, 245 and accompanying text.

<sup>500</sup> See, e.g., ALA. CONST. art. I, § 36.03 (2011) (invalidating a “union replicating marriage of or between persons of the same sex”); GA. CONST. art. I, § 4, ¶ I(a) (2004) (limiting only laws relating to same-sex couples); NEB. CONST. art. I, § 29 (2000) (only prohibiting recognition of “same-sex relationship[s]”). Many other state amendments were worded in a way that could potentially affect heterosexuals. See, e.g., KY. CONST. § 233A (2004) (foreclosing recognition of “[a] legal status identical or substantially similar to that of marriage for unmarried individuals” without reference to their sex); S.D. CONST. art. XXI, § 9 (2006) (“The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”).

<sup>501</sup> See *supra* Part III.B.1–2.

ones, or even to fight against no fault divorce and other changes to the different-sex marriages they claim as their motivation. Instead, many have limited their struggle to the battles they could win by playing to popular prejudices against gay people. But such focused populist strategies only work to the extent the underlying popular opinions remain constant. That does not seem to be the case regarding same-sex marriage, nor has it been the case regarding marriage more generally.<sup>502</sup>

In the end, the intense focus on whether same-sex couples can marry has distracted greatly from any focus on what marriage means for those who can. More significantly, it has greatly increased the likelihood that the long-time marriage monopoly will be broken apart into various alternative forms of state relationship recognition. The resulting cafeteria of relationship options for everyone may be a good thing. Queer theorists, feminists, social engineers, and social liberals may welcome this change. But dismantling unitary marriage is not a conservative development. Those who truly care about traditional marriage must learn to welcome evolution as one of its most enduring attributes, accepting same-sex spouses just as earlier generations accepted no-fault divorce, bi-racial spouses, and wives as their husband's equals.

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<sup>502</sup> See *supra* Parts II.A, V.A.