

## ARTICLES

### A RIGHT NOT TO MARRY

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*In Obergefell v. Hodges, the United States Supreme Court recognized a constitutional right for same-sex couples to marry. Although the decision is an important milestone in the struggle for equality, it also threatens to destabilize the relationships of those who previously entered into civil unions or domestic partnerships and may, for a variety of reasons, prefer not to trade their existing status for marriage. That is because states have routinely responded to the legalization of same-sex marriage by eliminating their nonmarital statuses. Some states have terminated such statuses and have required couples to opt into marriage to continue receiving the rights to which they had become accustomed. Other states have converted the nonmarital statuses to marriages and have required couples wishing to avoid marriage to dissolve their legal relationships. These actions have made it difficult—and in some cases practically impossible—for couples to choose not to marry.*

*These state actions reveal the existence and scope of a right that has largely hidden in plain sight: a right not to marry. Although widely assumed to exist, courts have not yet found the occasion to invoke it. But a flurry of cases culminating in the Obergefell decision compel the conclusion that the values supporting the right to marry also support a corollary right not to marry. The terminations and conversions of nonmarital relationships bring this right not to marry into sharper focus*

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*through the directness of their interventions and their impact on the choice to marry.*

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#### INTRODUCTION

Dozens of states and scores of municipalities have created nonmarital statuses like civil unions and domestic partnerships for those who (until recently) could not, or chose not to, marry. Tens of thousands of couples currently access a combination of rights and responsibilities through those statuses, ranging from employment benefits to hospital access to all of the other rights and responsibilities of marriage.<sup>1</sup> Where same-sex couples have won the right to marry, however, jurisdictions have repeatedly treated that legalization as a green light to eliminate existing nonmarital statuses.

Couples receiving state or local benefits through civil unions or domestic partnerships have sometimes been required to marry to continue receiving those benefits. In Arizona, for example, a federal district court struck down the state's opposite-sex marriage requirement in October 2014.<sup>2</sup> Within a month, the state sent an email to its employees in same-sex domestic partnerships notifying them that “[b]ecause same-sex couples may now marry in Arizona, . . . same-sex domestic partners will no longer be eligible

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1. *See infra* Part I.A.

2. *Majors v. Horne*, 14 F. Supp. 3d 1313 (D. Ariz. 2014).

for [health insurance] coverage . . . effective January 1, 2015.”<sup>3</sup> That bureaucratic message was followed on December 11, 2014, by a more sharply worded email from an LGBT rights organization stating, in no uncertain terms, “*If you have not married your same-sex domestic partner, and you wish to retain family benefits for your partner and/or partner’s children, you have until December 31, 2014 to marry.*”<sup>4</sup>

Other states have responded to the legalization of same-sex marriage by flat out converting nonmarital statuses like domestic partnerships and civil unions into marriages. For example, the 2012 Washington marriage equality legislation provided registered same-sex domestic partners with three options. Couples could marry on their own. They could also dissolve their partnerships. Or, if they did nothing, any partnerships in which a member was not over the age of sixty-two would automatically convert to marriages in the summer of 2014.<sup>5</sup> Members of civil unions in the states of Connecticut,<sup>6</sup> Delaware,<sup>7</sup> and New Hampshire<sup>8</sup> similarly saw their unions automatically converted when marriage became legal in their respective states.

Both types of responses coerce the choice to marry.<sup>9</sup> In the first situation, the state promises to strip the partners of valuable benefits unless they marry. In the second, the partners are married by the state; they can only avoid marriage by choosing to surrender their existing legal rights in a divorce-like proceeding.<sup>10</sup> It would be hard to characterize the choice to marry under these circumstances as freely made. These situations have brought into sharp relief a set of questions overlooked in the rush to legalize

3. Email from ASU Benefits Communications to ASU Employees (Nov. 6, 2014, 11:25 PDT) (on file with author).

4. Posting of Stephen Pratt, Stephen.Pratt@asu.edu, to Staff and Faculty Group Supporting Gay, Lesbian & Bisexual Issues at ASU, UBIQUITY@asu.edu (Dec. 11, 2014, 16:24 PDT) (on file with author).

5. See generally WASH. REV. CODE § 26.60.010 (2014). See also 2012 Wash. Sess. Laws 203 (“[A]ny state registered domestic partnership in which the parties are the same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is *automatically merged into a marriage and is deemed a marriage* as of June 30, 2014.” (emphasis added)).

6. CONN. GEN. STAT. § 46b-38rr (2009) (converting existing civil unions to marriages after October 1, 2010); see also Act Implementing the Guarantee of Equal Protection, 2009 Conn. Acts No. 9-13 § 12(a).

7. DEL. CODE ANN. tit. 13, § 218 (2013); see also Civil Marriage Equality and Religious Freedom Act of 2013, 79 Del. Laws ch. 19, § 6 (2013).

8. N.H. REV. STAT. ANN. § 457:46 (2010).

9. I use the term “state” here to refer to state actors in the constitutional sense. In addition to states, both federal agencies and municipalities, for example, have announced plans to terminate existing domestic partner benefits. See *infra* note 13.

10. In Washington, for example, domestic partners would have to go through the same divorce proceedings as married couples unless the partnership met a restrictive set of requirements. If neither partner had minor children, any ownership interest in real property, and unpaid obligations in excess of \$4000, and if the net fair market value of the community assets fell below \$25,000, the partners could bypass formal dissolution procedures *as long as* the partners could agree upon a division of assets and they also waived rights to maintenance. See Act Expanding Rights and Responsibilities for Domestic Partnerships, 2008 Wash. Sess. Laws 122–123.

same-sex marriage: Do people have a right *not* to marry? If so, how might this right constrain the state?

The resolution of these questions is a matter of great urgency given the Supreme Court's decision in *Obergefell v. Hodges*,<sup>11</sup> invalidating state-imposed same-sex marriage bans nationwide.<sup>12</sup> If the approaches above are any indication of what is to come, thousands of partners will likely be told that they must marry to retain valuable employment benefits. Thousands more could have their domestic partnerships or civil unions transformed into marriages with no affirmative choice on their part. Indeed, some state actors are already calling for the elimination of their states' nonmarital statuses.<sup>13</sup>

Although no court has yet defined the contours of a right *not* to marry or even confirmed its existence,<sup>14</sup> the terminations and conversions of nonmarital statuses provide the occasion to recognize such a right.

State actions that compel marriage can be seen as falling on a spectrum from minimal interventions, like creating legal incentives for people to marry (for example, by providing favorable inheritance, tax, evidence, and tort rules to married couples), to maximal ones (like requiring marriage between unwilling participants). These actions differ both in terms of the degree of coercion and the nature of state intervention.

Depending on which state actions the right not to marry would prevent, that right can also be understood as falling along a spectrum. For example, the recent framing of the right to marry in terms of "personal choice" and "individual autonomy"<sup>15</sup> leaves little doubt that the Fourteenth Amendment would recognize, at the very least, *some* right not to marry—it is unlikely that the state could pair off unmarried strangers and deem them legally married over their objection. One might further argue that *any* favorable treatment of married couples could impermissibly influence the choice to marry and therefore violate the right not to marry. This would be an expansive right. But history and precedent teach that states need not safeguard the choice to marry from *any* state encouragement.

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11. 135 S. Ct. 2584 (2015).

12. *Id.* at 2607.

13. See Molly Beck, *Wisconsin Lawmaker Calls for Repeal of State's Domestic Partner Registry*, WISC. ST. J. (June 27, 2015), [http://host.madison.com/wsj/news/local/govt-and-politics/wisconsin-lawmaker-calls-for-repeal-of-state-s-domestic-partner/article\\_5bbf1b48-f40a-5a4e-99d2-1f95e26cd7d0.html](http://host.madison.com/wsj/news/local/govt-and-politics/wisconsin-lawmaker-calls-for-repeal-of-state-s-domestic-partner/article_5bbf1b48-f40a-5a4e-99d2-1f95e26cd7d0.html) [<https://perma.cc/S4YJ-EWU4>]; Stephen Hudak, *Orange County Repeals Same-Sex Benefits*, ORLANDO SENTINEL (Oct. 20, 2015), <http://www.orlandosentinel.com/news/breaking-news/os-orange-repeals-same-sex-benefits-20151020-story.html> (noting the termination of domestic partner benefits provided by Orange County, Florida) [<https://perma.cc/3VFN-M54Z>]; Rebecca Kruth, *Senator Wants Domestic Partners to "Put a Ring on It" or Lose State Benefits*, MICH. RADIO (Oct. 5, 2015) <http://michiganradio.org/post/senator-wants-domestic-partners-put-ring-it-or-lose-state-benefits> (discussing proposed legislation that would terminate domestic partner benefits for state employees); Michael K. Lavers, *State Department to Phase Out DP Benefits*, WASH. BLADE (Oct. 19, 2015), <https://www.washingtonblade.com/2015/10/19/exclusive-state-department-to-phase-out-dp-benefits/> (reporting that the U.S. State Department would phase out domestic partner benefits starting in December 2015) [<https://perma.cc/Y5X5-M3FX>].

14. See *infra* note 96 and accompanying text.

15. *Obergefell*, 135 S. Ct. at 2597, 2599.

The elimination of nonmarital statuses shines a spotlight on a right that has been hiding in plain sight. When jurisdictions like Arizona terminate existing benefits, they go from providing incentives to stripping rights around which couples structure their lives.<sup>16</sup> The greater the package of existing rights, the more coercive the termination will be. Automatic conversions raise even greater concerns.<sup>17</sup> States like Washington marry the couple without any choice on their part and require the couple essentially to engage in self-harm in order to avoid marriage. These features render the terminations and conversions constitutionally suspect. In short, when we ask “what state actions might the right not to marry prohibit?,” we now have some realistic candidates.

I pause here to make a point about terminology. When I refer to a “right not to marry,” I refer to the right to be free from state-imposed marriage as a matter of current U.S. constitutional doctrine. The right, framed in this way, is a negative right.<sup>18</sup> For example, the right could prevent states from converting existing domestic partnerships and civil unions to marriages, but would not require states to create or license new domestic partnerships or civil unions. In contrast, some have suggested that the Constitution should affirmatively foster intimate relationships outside of marriage.<sup>19</sup> To the extent that such a right would compel state recognition of nonmarital family forms or intimate relationships—in addition to preventing their termination—that right would seem to have both positive and negative dimensions. Such a right—more of a “right to nonmarriage”<sup>20</sup>—is consistent with, and would encompass, the right not to marry, but lies beyond the scope of this Article.

The analysis proceeds as follows. Part I explains that people have different reasons for registering their relationships as domestic partnerships or civil unions, and not all who have done so desire marriage. Nonetheless, many states have terminated those statuses or converted them to marriages. Part II examines whether the Fourteenth Amendment protects a right not to

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16. See *infra* Part III.B.2.

17. See *infra* Part III.B.1.

18. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–66 (1986) (distinguishing between positive rights, which impose affirmative duties upon the government to protect those rights, and negative rights, which restrict states from depriving people of certain protections).

19. See Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIR. 107, 111–12 (2015) (raising the question whether unmarried people will be able to argue for constitutional protections after *Obergefell*); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661 (2015); Catherine Powell, *Up From Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 78 (2015) (arguing that the state should recognize “obligations toward nonmarital relationships as well as single individuals”). These arguments differ from those that call for the state to recognize other forms of relationships but do not argue that the recognition is constitutionally compelled. See *infra* note 92.

20. See Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015) (noting the distinction between the right to marry, a negative right, and the right to marriage, a positive right); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2089–94 (2005) (concluding that the right to marry protects equal access to whatever rights a state elects to associate with marriage, rather than a positive right to marriage).

marry. It first analyzes when and how a recognized “right to”—here, the right to marry—supports the existence of a heretofore unrecognized “right not to.” It then reasons from the established right to marry to identify the constitutional values that the right not to marry should protect. With this analysis in mind, Part III introduces a range of state actions that the right not to marry could possibly constrain and then identifies the right as a defensible, bounded part on that spectrum. Having identified the scope of the right, Part III then argues that a right not to marry would protect against the conversion of nonmarital statuses to marriages and might also prevent states from terminating statuses when the circumstances would give rise to significant reliance on existing rights and obligations.

### I. THE UNCERTAIN FUTURE OF NONMARITAL STATUSES

The last several decades have witnessed a rapid expansion in state and local recognition of nonmarital statuses. These relationships vary in terms of their composition (gender, age, conjugality),<sup>21</sup> rights and responsibilities (from employment benefits to all the rights of marriage under state law),<sup>22</sup> and formality. All told, tens of thousands (likely hundreds of thousands) of people, including same- and opposite-sex couples, are in official nonmarital statuses.<sup>23</sup> Unsurprisingly, given the patchwork way in which these nonmarital statuses were created, individuals have had different motives for entering these relationships—some seeking nothing more than the benefits offered by the government and others seeking recognition and validation of their marriage-like relationships.

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21. Compare CAL. FAM. CODE § 297 (2012) (creating domestic partnerships for same-sex couples and opposite-sex couples in which both persons are over the age of eighteen), with Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/10 (2011) (opening the status to either same- or opposite-sex couples).

22. Compare BROWARD CTY., FLA. CODE art. VIII, § 16.5 (2002) (creating domestic partnerships offering couples rights to municipal employment benefits), with CAL. FAM. CODE § 297.5 (2007) (offering state domestic partnerships with nearly all of the rights and responsibilities of marriage provided by state law).

23. The actual number is likely in the hundreds of thousands. In California, for example, 76,221 couples registered as domestic partners between 2000 and 2014; only 10,138 were dissolved during the same time period. Email from Special Filings Unit, Cal. Sec’y of State, to author (Jan. 13, 2015, 15:26 PDT) (on file with author). In Illinois, nearly 5000 couples entered into civil unions between 2011 and 2012. See Kathy Catrambone, *Nearly 5000 Same-Sex Civil Unions in First Year*, DOWNERS GROVE PATCH (June 4, 2012), <http://patch.com/illinois/downersgrove/hed-758ecc1d> [https://perma.cc/GJ5R-9N7G]. Oregon reports 5667 same-sex domestic partnerships between 2008 and 2013. See *Oregon Domestic Partnership Data*, OR. HEALTH AUTH., <https://public.health.oregon.gov/BirthDeathCertificates/VitalStatistics/dompart/Pages/index.aspx> (last updated Oct. 8, 2015) [https://perma.cc/FNM3-4QSC]. Additionally, the Human Rights Campaign lists over eighty municipalities that offer domestic partner benefits of some kind. See *City and County Domestic Partner Registries*, HUM. RTS. CAMPAIGN, <http://hrc.org/resources/entry/city-and-county-domestic-partner-registries> (last updated June 18, 2015) [https://perma.cc/MN27-6D37].

### A. *Choosing Not to Marry*

Marriage is still a goal for most people, even those in nonmarital statuses.<sup>24</sup> Yet, for various reasons, some people may enter nonmarital statuses.<sup>25</sup> Although the reasons may vary, they generally break into two categories: legal consequences and personal beliefs.

Couples may have financial or legal incentives for not marrying. Married couples are treated differently from unmarried couples—even though their nonmarital statuses approximate marriage—for federal income tax purposes.<sup>26</sup> Married couples earning similar amounts are often subject to higher taxation than they would be if filing as single individuals.<sup>27</sup> Couples with nonmarital statuses, who remain partially invisible to the Internal Revenue Service, can avoid these negative consequences while at the same time benefiting from favorable property characterizations under state law. California domestic partners, for example, divide their income equally but file taxes separately, meaning that a high earning partner could file based on a lower income and thereby pay lower federal taxes.<sup>28</sup> Married couples may also face a potential reduction in federal financial aid benefits like income-based loan repayment.<sup>29</sup> Remarriage could trigger a variety of consequences, including eligibility for pension and Social Security benefits.<sup>30</sup> Additionally, marriage might negatively affect spouses based on unique property ownership or debt issues.<sup>31</sup>

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24. See D’Vera Cohn, *Love and Marriage*, PEW RES. CTR. (Feb. 13, 2013), <http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/> (“Most who never have been married say they would like to be at some point in their lives.”) [<https://perma.cc/8UP9-2K9E>]; *Opposite-Sex Civil Unions: Motives for Not Marrying*, COOK CTY. CLERK, <http://www.cookcountyclerk.com/newsroom/newsfromclerk/Documents/Opposite%20Sex%20Civil%20Union%20Report%20Final%2012.19.11.pdf> (last visited Feb. 26, 2016) [hereinafter *Motives for Not Marrying*] (noting that many Illinois civil union registrants still plan to marry) [<https://perma.cc/DM6D-VHCH>].

25. Some scholars have performed a careful analysis of the differences between nonmarriage and marriage. See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014). Here, though, I focus on the differences between nonmarital statuses (like municipal or state domestic partnerships) and formal marriage.

26. See Patricia A. Cain, *Taxation of Same-Sex Couples After United States v. Windsor: Did the IRS Get It Right in Revenue Ruling 2013-17?*, 6 ELON L. REV. 269, 294 (2014).

27. Laura Saunders, *Same-Sex Couples and the Marriage Penalty*, WALL STREET J. (Feb. 19, 2011), <http://www.wsj.com/articles/SB10001424052748703561604576150332819819692> (explaining various manifestations of the “marriage penalty”) [<https://perma.cc/63X6-KKSW>].

28. See *id.* (using the example of partners earning \$225,000 and \$20,000 to realize annual tax savings of \$3144 as compared to a married couple).

29. Income-based loan repayment caps the required monthly payments on major types of federal student loans based on debt-to-income ratio. See Megan Slack, *Income Based Repayment: Everything You Need to Know* (June 7, 2012), <https://www.whitehouse.gov/blog/2012/06/07/income-based-repayment-everything-you-need-know> [<https://perma.cc/TBG5-VNYN>]. When an individual marries, both spouses’ incomes are used to calculate eligibility. *Id.*; see also Inga Nelson, Note, *Recognition of Civil Unions and Domestic Partnerships As Marriages in Same-Sex Marriage States*, 98 MINN. L. REV. 1171, 1198 (2014).

30. See, e.g., WASH. REV. CODE § 26.60.010 (2014) (noting that “some social security and pension laws . . . make it impractical for [couples in which one member is over the age of sixty-two] to marry”). Although some federal and state consequences kick in because of

Just as important, some people simply do not want to marry for ideological or religious reasons. As Professor Elizabeth Scott has observed,

Even today, marriage has not fully emerged as a secular legal status. Vestiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders, and cause concern for those who are committed to secular legal institutions. Second, traditional marriage was a deeply hierarchical institution, in which wives were legally and socially subordinated to their husbands . . . . Thus, it is not surprising that many feminists have little enthusiasm for marriage.<sup>32</sup>

Scholars within the LGBT community have also resisted marriage for similar reasons. Over two decades ago, Professor Nancy Polikoff opposed the same-sex marriage agenda because it would “detract from, even contradict, efforts to unhook economic benefits from marriage” and would also “require a rhetorical strategy that emphasizes similarities between [same-sex] relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people.”<sup>33</sup>

Opposition to marriage is not confined to legal academics. When Illinois created civil unions and opened them to both same- and opposite-sex couples, the Cook County Clerk’s office surveyed opposite-sex couples to ask why they had chosen civil unions over marriages.<sup>34</sup> Of the forty-six people who responded, twelve identified “political/ideological” and four identified “religious issues” as their primary reason.<sup>35</sup> In follow-up interviews with some of the survey participants, Professor John Culhane noticed a pattern of strong views against marriage, with participants reporting sentiments like a desire not to “fall[] into any preconditioned behavior” about gender roles, or a commitment to demonstrating that other family structures deserve respect.<sup>36</sup> A *New York Times* article published two days after the Supreme Court’s *Obergefell* decision featured interviews of several couples personally opposed to marriage but who feared the

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age, remarriage could affect the performance of private agreements for people regardless of age.

31. See Steve Branton, *After Gay Marriage Ruling, What Financial Steps Should Couples Take?*, CHRISTIAN SCI. MONITOR (July 3, 2015), <http://www.csmonitor.com/Business/Saving-Money/2015/0703/After-gay-marriage-ruling-what-financial-steps-should-couples-take> [<https://perma.cc/MWH4-DLGA>].

32. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 538 (2007) (citation omitted).

33. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535, 1549 (1993).

34. See *Motives for Not Marrying*, *supra* note 24.

35. See *id.*

36. John Culhane, *No to Nuptials*, SLATE (Jan. 3, 2012), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/01/are\\_states\\_that\\_experiment\\_with\\_opposite\\_sex\\_civil\\_unions\\_offering\\_a\\_way\\_to\\_opt\\_out\\_of\\_oppressive\\_ideas\\_about\\_marriage\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/01/are_states_that_experiment_with_opposite_sex_civil_unions_offering_a_way_to_opt_out_of_oppressive_ideas_about_marriage_.html) [<https://perma.cc/672Y-QGFJ>].

impact of the decision on their future ability to retain benefits.<sup>37</sup> We do not know how many of the 6.8 million unmarried-couple households in the United States<sup>38</sup> share this opposition to marriage, but even a small percentage would amount to a significant number of people who remain unmarried by choice.<sup>39</sup>

From time to time, people may also seek to enter a nonmarital relationship but choose not to marry for religious reasons. A gay Catholic, for example, might believe that marriage should be reserved for heterosexuals.<sup>40</sup> Recognizing that people holding such beliefs might want certain legal protections for their relationships without marrying, the Bishops' Conference of England and Wales opposed a proposal to automatically convert same-sex civil partnerships into marriages.<sup>41</sup> Some Jewish people believe that, regardless of civil divorce, a woman cannot remarry without obtaining a *get* from her husband.<sup>42</sup> It stands to reason that a woman without a *get* might register a nonmarital relationship for the purpose of obtaining certain legal benefits without wanting to face the religious consequences of remarrying.<sup>43</sup>

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37. Tara Siegel Bernard, *Fate of Domestic Partner Benefits in Question After Marriage Ruling*, N.Y. TIMES (June 28, 2015), [http://www.nytimes.com/2015/06/29/your-money/fate-of-domestic-partner-benefits-in-question-after-marriage-ruling.html?\\_r=0](http://www.nytimes.com/2015/06/29/your-money/fate-of-domestic-partner-benefits-in-question-after-marriage-ruling.html?_r=0) [<http://perma.cc/8KR3-GZE4>]; see also Cara Buckley, *Gay Couples, Choosing to Say 'I Don't'*, N.Y. TIMES (Oct. 25, 2013), <http://www.nytimes.com/2013/10/27/style/gay-couples-choosing-to-say-i-dont.html> (reporting that “[p]lenty of gay couples do not want to marry” for a variety of reasons including moral opposition, financial burdens, and the prospect of divorce) [<https://perma.cc/FAL8-BEEZ>].

38. See *Unmarried and Single Americans Week Sept. 16–22, 2012*, U.S. CENSUS BUREAU, [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff18.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff18.html) (last visited Feb. 26, 2016) [<https://perma.cc/S8SY-WC8B>].

39. In France, for example, there are two civil unions (*pacte civil de solidarite*, or PACS) for every three marriages, most of them straight couples. See Scott Sayare & Maia de la Baume, *In France, Civil Unions Gain Favor over Marriage*, N.Y. TIMES (Dec. 15, 2010), <http://www.nytimes.com/2010/12/16/world/europe/16france.html> [<http://perma.cc/3VRB-BLPL>]. Civil unions may never gain the popularity they have attained in France, but the French experience points to at least *some* degree of unmet need in this country.

40. See, e.g., Mark Oppenheimer, *A Gay Catholic Voice Against Same-Sex Marriage*, N.Y. TIMES (June 4, 2010), <http://www.nytimes.com/2010/06/05/us/05beliefs.html> [<http://perma.cc/6W35-JD93>].

41. *Don't Convert Same-Sex Civil Partnerships Automatically into Marriages, Urge Bishops*, CATHOLIC HERALD (May 22, 2014), <http://www.catholicherald.co.uk/news/2014/05/22/dont-automatically-convert-same-sex-civil-partnerships-into-marriages-urge-bishops/> [<https://perma.cc/ML6P-NLBZ>].

42. See Irving Breitowitz, *The Plight of the Agunah: A Study in Halacha, Contract, and the First Amendment*, 51 MD. L. REV. 312, 313 & n.2 (1992) (“The *get* is a written bill of divorce that a husband or his agent must physically hand over to his wife or her agent in the presence of witnesses.”).

43. Barbara J. Redman, Note, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389, 390 (1985) (noting that the consequence of a wife's failure to obtain a religious, as opposed to secular, divorce under Jewish law is that any subsequent remarriage would render her an adulteress).

B. *State Responses to the Legalization of Same-Sex Marriage*

Despite their differences, nonmarital relationships—from municipal registries, to state employment benefits, to state alternatives to marriage—all exist in what Professor Douglas NeJaime has called a “dialogical relationship” with marriage<sup>44</sup>: these statuses arose in the shadow of, in imitation of, and sometimes in opposition to, the institution of marriage.<sup>45</sup> The arrival of nationwide marriage equality therefore calls into question their reasons for being and leaves their future existence in jeopardy.

Many jurisdictions have already phased out existing nonmarital statuses like domestic partnerships and civil unions or are moving in that direction.<sup>46</sup> These jurisdictions have not only closed the statuses to future registrants, but have eliminated them altogether.<sup>47</sup> Others have, for now, decided to retain existing statuses. For example, the California legislature has made no move to terminate existing domestic partnerships or to close its registry to future domestic partners even though same-sex marriage has been legal for over two years.<sup>48</sup>

Nevertheless, there is lingering uncertainty even in those states that had previously preserved their statuses now that marriage equality is available nationwide. California did not eliminate its same-sex-only domestic partnerships after the legalization of same-sex marriage in the summer of 2013. Although the domestic partnership regime is vulnerable to the claim that it discriminates on the basis of sexual orientation, it was retained because uncertainty about the recognition of the state’s same-sex marriages across the country justified an additional safeguard for same-sex couples. With that uncertainty removed by the *Obergefell* decision,<sup>49</sup> it remains to be seen whether legislators will choose to remedy this sexual orientation discrimination by opening domestic partnerships to all or eliminating them.<sup>50</sup> The apparent leveling of the marriage playing field<sup>51</sup> might tempt legislators to “clean up” or streamline their family law regimes.<sup>52</sup>

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44. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 111 (2014).

45. *See id.* at 121–54; *see also id.* at 163–64 (noting that nonmarital statuses also influenced the development of marital norms); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 294–96 (2013).

46. *See supra* notes 5–8 and accompanying text.

47. *See id.*

48. *See Frequently Asked Questions*, CAL. SEC’Y OF ST., <http://www.sos.ca.gov/registries/domestic-partners-registry/frequently-asked-questions> (last visited Feb. 26, 2016) (“The Court’s ruling in *Obergefell v. Hodges* did not invalidate or change any of the California Family Code sections related to registered domestic partners.”) [<https://perma.cc/8GMH-HWFK>].

49. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“[T]here is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State.”).

50. *See* Jonathan D. Evans, *Domestic Partnerships in Doubt?*, DAILY J., July 7, 2015, at 6–7. In *Holguin v. Flores*, the court noted that “a legislative enactment or constitutional decision authorizing same-sex couples to marry (while also continuing to permit them the alternative of registering as domestic partners)” could give opposite-sex couples “a stronger claim of discriminatory treatment under the existing wrongful death provisions.” 18 Cal. Rptr. 3d 749, 759 n.60 (Ct. App. 2004) (rejecting an age and sexual orientation

The nature of the governmental body that created the nonmarital status, and that body's motivations for creating it, will likely influence lawmakers' decisions on whether and how to eliminate it. Municipalities and states that created domestic partnerships as a way to create some parity for same-sex couples might no longer see the need to provide those benefits to the unmarried. Those states like Colorado, Hawaii, and Illinois that legislated nonmarital statuses as an alternative to marriage, even for couples that could choose to marry, might be less inclined to eliminate those statuses.<sup>53</sup> At the end of the day, however, this Article does not seek to predict the next jurisdictions likely to eliminate their nonmarital statuses, but to study the effect of the elimination on the registrants.<sup>54</sup>

These eliminations have taken two basic forms. Some jurisdictions have simply terminated existing statuses, encouraging couples to opt into marriage if they want to retain their existing legal rights. Other jurisdictions have chosen to convert alternate statuses to marriages and have required couples to opt out if they do not want to be married. The following sections illustrate these approaches.

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discrimination challenge to the state's wrongful death statute on the grounds that domestic partners lacked the right to marry). Those developments have come to pass. Cf. Michael Dresser & Carrie Wells, *With Same-Sex Marriage Now Available, State to End Benefits for Domestic Partners*, BALT. SUN (May 3, 2013), [http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502\\_1\\_domestic-partners-health-benefits-state-employees](http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502_1_domestic-partners-health-benefits-state-employees) (quoting the executive director of Equality Maryland as saying, "We would like to see domestic partnership benefits on the books for same-sex couples *until there's a level playing field with regard to marriage*" on a nationwide level (emphasis added)) [<https://perma.cc/2DSV-PXXM>].

51. Strong arguments remain that the lack of antidiscrimination protections for individuals on the basis of sexual orientation makes the leveling of the playing field more apparent than real. A person may not be able to freely exercise the choice to marry a same-sex partner if that decision will make him vulnerable to discrimination in the workplace or in public accommodations. See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015), [http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?\\_r=0](http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html?_r=0) [<http://perma.cc/L9W7-M7AP>]; Mark Joseph Stern, *Gay Couples May Soon Have to Choose Between Getting Married and Not Getting Fired*, SLATE (July 3, 2014), [http://www.slate.com/blogs/outward/2014/07/03/gay\\_couples\\_may\\_soon\\_have\\_marriage\\_rights\\_but\\_still\\_face\\_discrimination.html](http://www.slate.com/blogs/outward/2014/07/03/gay_couples_may_soon_have_marriage_rights_but_still_face_discrimination.html) [<https://perma.cc/6Y2G-GPZH>].

52. See *supra* note 13 (noting decisions by counties, states, and federal agencies to terminate nonmarital statuses).

53. See, e.g., COLO. REV. STAT. § 15-22-101 (2015); HAW. REV. STAT. § 572B-1 (2012); Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. 75/1 (2011).

54. In the years leading up to the *Obergefell* decision, several scholars speculated as to whether the legalization of same-sex marriage would lead to the elimination of alternate statuses. See, e.g., WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002) (predicting that the creation of nonmarital statuses in the shadow of marriage would have a "sedimentary" effect); William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1966-67 (2012) (noting the circumstances under which jurisdictions have either maintained or terminated nonmarital statuses); Nancy D. Polikoff, *What Marriage Equality Arguments Portend for Domestic Partner Employee Benefits*, 37 N.Y.U. REV. L. & SOC. CHANGE 49 (2013); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 794-95 n.12 (2010) (arguing that marriage has usually been accompanied by "erasure" of alternate statuses).

### 1. Terminations

Some states have begun to phase out their recognition of nonmarital statuses by terminating those statuses and requiring couples to marry—or opt in—in order to keep the benefits they have enjoyed.

An example comes from the state of Arizona. In 2008, the state initially provided subsidized health benefits to an employee's domestic partner, defined as someone "of the same or opposite gender" who, among other things, had cohabited with the employee for at least a year and who could demonstrate financial interdependence.<sup>55</sup> To obtain coverage for a partner, a state employee would submit a "Qualified Domestic Partner Affidavit" to prove that the enrollment requirements were met.<sup>56</sup> Once approved by the Arizona Department of Administration, the partner would remain eligible barring a "qualified life event" such as dissolution, death, or remarriage.<sup>57</sup> Distinct from marriage-like regimes offering a collection of legal rights and responsibilities, domestic partnerships only offered the single, albeit valuable, benefit of state employment benefits.<sup>58</sup>

However, in 2009, the state legislature eliminated coverage for domestic partners.<sup>59</sup> Both same-sex and opposite-sex partners were affected by this legislation. Following this development, Lambda Legal ("Lambda"), the prominent LGBT legal rights organization, filed suit on behalf of the same-sex couples, but not opposite-sex couples, whose benefits were threatened.<sup>60</sup> By representing only same-sex couples, Lambda was able to

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55. *Collins v. Brewer*, 727 F. Supp. 2d 797, 800 (D. Ariz. 2010); *see also* *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011). To demonstrate financial interdependence, the employee would have to provide proof of three of the following:

- i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease;
- ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names;
- iii. Assuming joint liabilities;
- iv. Having joint ownership of significant property, such as real estate, a vehicle, or a boat;
- v. Naming the partner as beneficiary on the employee's life insurance, under the employee's will, or employee's retirement annuities and being named by the partner as beneficiary of the partner's life insurance, under the partner's will, or the partner's retirement annuities; and
- vi. Each agreeing in writing to assume financial responsibility for the welfare of the other, such as durable power of attorney; or
- vii. Other proof of financial interdependence as approved by the Director.

*Collins*, 727 F. Supp. 2d at 800.

56. *See, e.g.*, Qualified Domestic Partner Affidavit, Arizona State University (on file with author).

57. *See id.*; *see also, e.g.*, 2014 Benefits Enrollment/Change Form, Arizona State University (on file with author).

58. *See Collins*, 727 F. Supp. 2d at 800 (noting that the benefits "are commonly valued 'at between one-fifth and one-third of total compensation'").

59. *See Diaz*, 656 F.3d at 1010.

60. *See generally* Amended Complaint at 2, *Collins*, 727 F. Supp. 2d 797 (No. 09-2402) (identifying plaintiffs as lesbian and gay employees with "committed same-sex life partner[s]"). Professor Nancy Polikoff has speculated that this decision was motivated by Lambda's efforts to win marriage equality nationwide and the need to maintain conceptual and rhetorical consistency regarding the superiority of marriage over other statuses. *See* Nancy D. Polikoff, "Two Parts of the Landscape of Family in America": *Maintaining Both*

advance the ultimately successful argument that its clients, unlike heterosexual couples, were precluded from choosing to marry and thus unfairly targeted by the Arizona legislation.<sup>61</sup> The Ninth Circuit embraced this distinction in its equal protection analysis, noting that “different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so. The Arizona Constitution, however, prohibits same-sex couples from doing so.”<sup>62</sup>

One might predict, as a consequence of this analysis, that Arizona would demand that same-sex couples marry if marriage ever became available to them. That event came to pass when Arizona’s same-sex marriage ban was struck down several years later, in October 2014.<sup>63</sup> Within a month, same-sex employees who had been receiving domestic partner benefits received an email notifying them that “[b]ecause same-sex couples may now marry in Arizona, . . . same-sex domestic partners will no longer be eligible for coverage . . . effective January 1, 2015.”<sup>64</sup> That cryptically worded email providing under two months for domestic partners to marry was followed on December 11, 2014, by an email from Lambda attorneys stating, in no uncertain terms, “*If you have not married your same-sex domestic partner, and you wish to retain family benefits for your partner and/or partner’s children, you have until December 31, 2014 to marry.*”<sup>65</sup>

Arizona’s response to the legalization of same-sex marriage reveals some of the tradeoffs involved in the adoption of an opt-in approach. As the program was initially designed, same-sex couples would continue to receive benefits until the occurrence of a narrow range of qualified life events. Same-sex partners therefore had an expectation in the continuity of their benefits that the elimination of domestic partnerships would disturb.

However, especially in light of the Ninth Circuit’s embrace of Lambda’s legal argument, the choice to marry would seem like an adequate (or even superior) alternative for those couples seeking to continue their benefits. And lawmakers appear to assume that an opt-in rule could remedy the harms that might follow from the elimination of domestic partnerships.

## 2. Conversions

The opt-in option is not the only possible response for states eliminating nonmarital statuses. Some states have chosen instead to make marriage the default rule and have required unwilling couples to opt *out* of the status. States choosing this path have converted marriage-like statuses, like civil unions and registered domestic partnerships, into marriages.

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*Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 *FORDHAM L. REV.* 735, 746–47 (2012).

61. *See id.* at 741–42.

62. *Diaz*, 656 F.3d at 1014.

63. *See Majors v. Horne*, 14 F. Supp. 3d 1313 (D. Ariz. 2014).

64. Email from ASU Benefits Communications, *supra* note 3.

65. Posting of Stephen Pratt, *supra* note 4.

The state of Washington has adopted this approach.<sup>66</sup> Washington initially passed domestic partner legislation in 2007.<sup>67</sup> The state created a domestic partner registry granting registrants the right to visit a partner in the hospital and make medical decisions on his behalf, inherit a partner's property without a will, and sue for the partner's wrongful death.<sup>68</sup> Advocates hoped, and opponents feared, that the legislation would be a step on the pathway to marriage equality.<sup>69</sup> The primary sponsors of the legislation, state legislators Ed Murray and Jamie Pedersen, never hid this agenda from their colleagues.<sup>70</sup> At the same time, however, media coverage highlighted the fact that domestic partnerships offered only a limited handful of rights granted to married couples,<sup>71</sup> and the legislation itself stated that "[t]his act does not affect marriage."<sup>72</sup>

The legislature soon amended the domestic partnership law to add additional rights and obligations. Approximately a year after domestic partners were first allowed to register, the legislature added community property rights retroactive to the date of registration and made domestic partnerships subject to the same dissolution process as marriages (with limited exceptions).<sup>73</sup>

For state law purposes,<sup>74</sup> domestic partnerships essentially became marriage by a different name. In 2012, however, the legislature made the final push to legalize same-sex marriage.<sup>75</sup> The legislation eliminated gender-specific terms and defined marriage as "a civil contract between two persons."<sup>76</sup> It simultaneously redefined the entrance requirements for

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66. I chose Washington for several reasons. First, it is the most recent example to date of a legislative decision to convert domestic partnerships to marriages. Second, and more importantly, none of the states that converted alternative statuses to marriage have useful, easily accessible legislative history materials explaining why they insisted on conversion. But I was able to speak to one of the two primary drafters of the Washington same-sex marriage legislation and therefore have more insights into the process as it unfolded in that state. Finally, Washington's approach to legalizing same-sex marriage was incremental and sheds light on other states that made incremental advances, like California.

67. 2007 Wash. Sess. Laws 616.

68. *See id.*; *see also* S.B. REP., S.B. 5336, at 3 (2007) (summarizing provisions).

69. *See, e.g.*, John Iwasaki, *Domestic Partners Line Up for Rights*, SEATTLE POST-INTELLIGENCER (July 20, 2007), <http://www.seattlepi.com/local/article/Domestic-partners-line-up-for-rights-1244293.php> [<http://perma.cc/EC99-G7XJ>].

70. Telephone Interview with State Senator Jamie Pedersen (Apr. 29, 2015). Senator Pedersen felt that their incremental strategy depended on maintaining credibility with their colleagues, hence their forthrightness.

71. *See* Andrew Garber, *A Festive Scene in Olympia Today As Domestic Partners Register*, SEATTLE TIMES (July 23, 2007), <http://www.seattletimes.com/seattle-news/a-festive-scene-in-olympia-today-as-domestic-partners-register/> (discussing the limited "handful of rights" provided by the legislation) [<https://perma.cc/X9TX-ZJQK>]; Iwasaki, *supra* note 69 ("[D]omestic partnership 'comes with far fewer benefits than marriage.'").

72. WASH. REV. CODE § 26.60.010 (2014).

73. *See* 2008 Wash. Sess. Laws 53–76; WASH. B. ANALYSIS, H.B. 3104 (2008) (summarizing provisions).

74. Before and after *Windsor*, the federal government refused to treat domestic partnerships as marriages for purposes of federal law. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

75. 2012 Wash. Sess. Laws 199–205.

76. WASH. REV. CODE § 26.04.010.

domestic partnerships, limiting that status to relationships in which “one of the persons is at least sixty-two years of age.”<sup>77</sup> Finally, it created three options for same-sex couples no longer satisfying the requirements for a domestic partnership: they could either “apply and receive a marriage license and have such marriage solemnized,” which would replace the existing partnership with a marriage; they could dissolve their partnerships and become legal strangers; or they could do nothing until June 30, 2014, at which point their partnership would be “automatically merged into a marriage and [would be] deemed a marriage.”<sup>78</sup> The legislation also required the state to mail two notices to registered partners notifying them about the impending conversion of their partnerships to marriages.<sup>79</sup>

Based on this chain of events, the single affirmative choice by a couple in 2007 to enter into a domestic partnership with a limited set of rights could lead to today’s legal conclusion that the couple was *legally married* as of that date, with no additional action on their part. We know that a subset of these couples would not have chosen to marry, either because of their views about marriage or their desire to avoid some of its legal implications.<sup>80</sup> Nonetheless, some of these couples did not dissolve their partnerships and were therefore married against their wishes. How did the legislators justify this outcome?

The answer is that they relied heavily on the concept of notice to remedy the lack of formal choice. The state twice notified partners that they could step off the train—in 2008 when the state added community property and formal dissolution<sup>81</sup> and in 2012 when the state provided for the conversion of partnerships to marriages.<sup>82</sup> The first notice provided partners with the choice to dissolve their partnerships or accept significantly greater rights and responsibilities.<sup>83</sup> The second notice presented registered partners with the three choices discussed above: “[g]et married,” “[d]issolve your

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77. *Id.* § 26.60.010.

78. *Id.* § 26.60.100 (2012). In either case, the date of marriage for purposes of determining legal rights and responsibilities would be backdated to the date the partners registered their partnerships. *Id.* § 26.60.100(4).

79. 2012 Wash. Sess. Laws 205.

80. See, e.g., Paige Browning, *Washington to Convert Domestic Partners to ‘Married’ in June*, OPB (Apr. 1, 2014), <http://www.opb.org/news/article/washington-to-convert-domestic-partners-to-married-in-june/> (interviewing a woman who never intended to marry her partner but acquiesced to marriage) [<https://perma.cc/X9LJ-2LMA>]; Chris Henry, *Same-Sex Domestic Partnerships Will Convert to Marriage in 2014*, KITSAP SUN (Nov. 25, 2012), <http://www.kitsapsun.com/news/local/same-sex-domestic-partnerships-will-convert-to-marriage-in-2014-ep-416874597-356402161.html> (“The committee [drafting the bill] actually heard from some younger couples who want nothing to do with marriage, an institution they see as tainted throughout history.”) [<http://perma.cc/T4F7-K528>]; Lornet Turnbull, *State to Same-Sex Domestic Partners: You’re About to Be Married*, SEATTLE TIMES (Feb. 15, 2014), <http://www.seattletimes.com/seattle-news/state-to-same-sex-domestic-partners-yoursquare-about-to-be-married/> (interviewing the president of the LGBT bar association, who said that many couples across the state were unaware of the conversion to marriages and some had “signed up for the minimum”) [<https://perma.cc/3MFS-RVAV>].

81. See 2008 Wash. Sess. Laws 53–76, 122–155.

82. See WASH. REV. CODE § 26.60.100 (2012).

83. See 2008 Wash. Sess. Laws 25.

domestic partnership,” or “[d]o nothing, which would mean that . . . your domestic partnership [would] automatically convert.”<sup>84</sup>

But questions remain about actual notice.<sup>85</sup> Not all registered couples updated the addresses they provided when they registered their partnerships. As a result, hundreds of previous notices had been returned undelivered.<sup>86</sup> An official working in the Secretary of State’s office admitted that the failure to inform all registered partners of the conversion was inevitable: “They’re living quiet lives someplace and don’t know all of this is happening.”<sup>87</sup>

The legislators also assumed that the availability of dissolution procedures—akin to judicially supervised divorce—would provide an adequate remedy for those not wishing to marry.<sup>88</sup> We might expect, however, that the higher emotional and practical costs of choosing to marry or dissolve the partnership would channel people to the path of least resistance: doing nothing at all.<sup>89</sup> And in fact, in the days leading up to the

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84. Eli Sanders, *What Happens If I’m Already Domestic Partnered in Washington State? What Happens If I Live Here But Was Gay Married in Another State? Answers! Answers! Answers!*, STRANGER (Nov. 8, 2012), <http://slog.thestranger.com/slog/archives/2012/11/08/what-happens-if-im-already-domestic-partnered-in-washington-state-what-happens-if-i-live-here-but-was-gay-married-in-another-state-answers> (quoting Sen. Pedersen) [<https://perma.cc/B6HX-J49X>].

85. Washington’s conversion raises many unanswered questions about notice. Typically, the legislature is not obligated to provide affirmative notice of changes in the law, and people are presumed to have knowledge of current legal obligations. *See, e.g.*, *Torres v. INS*, 144 F.3d 472, 474 (7th Cir. 1998) (“Ignorance of a statute is generally no defense even to a criminal prosecution, and it is never a defense in a civil case, no matter how recent, obscure, or opaque the statute.”). On the other hand, the concept of notice is not irrelevant when assessing whether legislation is fundamentally fair. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1066 (1997). As Professor Fisch explains, “When Congress affirmatively invites parties to structure their transactions in reliance on existing legal rules, changing these rules without notice and an opportunity to mitigate the effects of the change violates important due process principles.” *Id.* at 1107. In the context of litigation, “[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

86. *See* Turnbull, *supra* note 80.

87. *Most Washington Domestic Partnerships to Convert to Marriages Under State’s Same-Sex Marriage Law*, ASSOCIATED PRESS, (June 29, 2014), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/06/washingtons\\_domestic\\_partnersh.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/06/washingtons_domestic_partnersh.html) [<https://perma.cc/GL7B-S2QA>]. Unwitting convertees face significant legal consequences: a future marriage may subject the convertee to charges of bigamy, *see* WASH. REV. CODE § 9A.64.010 (2011) (“A person is guilty of bigamy if he or she intentionally marries or purports to marry another person when either person has a living spouse.”), and those escaping prosecution may still have relied to their detriment on the existence of an illegal subsequent marriage, *see* *Elia-Warnken v. Elia*, 972 N.E.2d 17, 22 (Mass. 2012) (holding that a same-sex partner’s undissolved civil union rendered a subsequent marriage *void ab initio*).

88. *See* 2008 Wash. Sess. Laws 122–55.

89. The negative consequences of the decision to opt out make this rule what Professor William Eskridge would call a “hard default”: a default rule (in this case marriage) that is difficult to override, making the rule little different from a mandatory rule. *See* Eskridge, *supra* note 54, at 1902.

mandatory conversion, approximately 60 percent of registered domestic partners had not affirmatively opted into marriage.<sup>90</sup>

An opt-out approach like Washington's might be preferable as a majoritarian default, but it also involves tradeoffs. Under an opt-out rule, parties need not formally choose to marry. Rather, their earlier choice to register for an alternative status becomes the basis for the state designating a couple as married. This rule raises several questions: Can we treat as married two people who have not formally made that choice? Can the law substitute its own judgment about marital choice for people who are indifferent to marriage? And for those who would *not* otherwise choose to be married, does an opt-out option that imposes burdensome consequences like judicially supervised dissolution penalize partners who pursue that option?

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Terminations and conversions both push people toward marriage, but they do so in different ways. Terminations do not transform a nonmarital relationship into a marriage; they instead treat marriage as a substitute for the legal rights that are being taken away. The varied sources and substance of those rights could affect the impact of the termination on the decision to marry. A municipality, for example, lacks the power to offer state-provided legal rights like inheritance rights or tort remedies. A state might recognize nonmarital relationships for the limited purpose of providing employment benefits to state employees or might create a status more akin to marriage. These differences will influence how the partners view the significance of their choices to enter the relationship and the extent of their reliance on the package of legal rights provided by their nonmarital statuses.

Conversions, on the other hand, move people from the category of nonmarriage to marriage. As is the case with terminations, partners must marry in order to retain their existing legal rights. Here, though, they do not need to choose marriage, but can instead *acquiesce* to it. The adoption of an opt-out approach therefore results in a number of married couples who did not choose to marry in the traditional sense.<sup>91</sup> Moreover, conversions require those who do not wish to marry to dissolve their partnerships in order to avoid marriage. The requirement that a couple end its legal relationship would seem a strong inducement to accept marriage.

A jurisdiction's decision to eliminate a nonmarital status through either an opt-in or opt-out approach raises concerns about a person's choice to

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90. *The Impact* (TVW television broadcast June 26, 2014), <http://sdc.wastateleg.org/pedersen/news> (interview of Sen. Pedersen at 11:45) [<https://perma.cc/UK8Z-7WD7>]. The Washington Secretary of State currently (as of 2015) reports 3316 "married Domestic Partner registrations," 3311 "converted to marriage Domestic Partnership registrations," and 1367 "terminated Domestic Partnership registrations." *Domestic Partnerships*, SEC'Y OF ST., CORP., <https://www.sos.wa.gov/corps/domesticpartnerships/> (last visited Feb. 26, 2016) [<https://perma.cc/433F-DWC4>].

91. This situation begs the question what exactly the law of a particular jurisdiction requires with respect to the choice to marry. I will explore that question more fully in future work.

marry or not to marry to varying degrees. The next part of this Article explores what, if anything, the Constitution says about this.

## II. IS THERE A RIGHT NOT TO MARRY?

Legal scholars have long argued for the legal recognition of different forms of family relationships, intimate or otherwise.<sup>92</sup> They have also highlighted court decisions disaggregating rights, like the right to establish a parent-child relationship or to engage in private, consensual sexual conduct, once subsumed by the marital relationship—what Professor Melissa Murray has called a “jurisprudence of non-marriage.”<sup>93</sup> But few have gone so far as to argue that the right not to marry is a right protected by the U.S. Constitution. When the right has been invoked at all (and it has been invoked rarely), scholars and advocates have painted in broad brushstrokes, arguing, for example, that pegging various legal benefits to marital status violates the right of single people and cohabitants not to marry,<sup>94</sup> or assuming that the two-way nature of constitutional rights would compel the existence of both the right to, and *not* to, marry.<sup>95</sup> And thus far, no court has embraced the right not to marry or defined its precise contours.<sup>96</sup>

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92. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 226–36 (1995) (calling for the abolition of marriage and the recognition of “nurturing units”); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 123–35 (2008) (advocating for recognition of nonmarital partnerships, designated family relationships, and other relationships based on caregiving); Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 260 (2013) (advocating for pluralistic relationship recognition in addition to marriage equality); Murray, *supra* note 45, at 303–04 (noting the need for “different model[s] of rights and regulation” outside of marriage). These discussions have focused primarily on policy arguments for the recognition of alternate statuses and not on the question of whether the Constitution would *prevent* states from taking those statuses away. As Professor Douglas NeJaime has observed, that question has not been answered. Douglas NeJaime, *Windsor’s Right Not to Marry*, 123 YALE L.J. ONLINE 219, 248 (2013) (predicting that a Supreme Court opinion reinscribing the superior status of marriage (as the *Obergefell* opinion did) would prompt us to ask “whether there is a meaningful right *not* to marry”).

93. Melissa Murray, *Obergefell v. Hodges and the New Marriage Inequality*, CAL. L. REV. (forthcoming 2016) (manuscript at 4, 10–18) (on file with author); see also Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277 (2015) (discussing the development of constitutional protections for nonmarital children).

94. See, e.g., *infra* note 244.

95. See *infra* notes 97–103 and accompanying text.

96. See, e.g., *West v. Brown*, 558 F.2d 757, 760 (5th Cir. 1977) (rejecting the argument that a regulation prohibiting single parents from serving in the Army “affirmatively curtail[ed] marriage”); *Zavala v. City & Cty. of Denver*, 759 P.2d 664, 673 (Colo. 1988) (en banc) (rejecting the argument that the right “to create a marriage relationship” supports the existence of “the right not to marry”); *Willard v. Dep’t of Soc. & Health Servs.*, 592 P.2d 1103, 1106 & n.1 (Wash. 1979) (en banc) (rejecting the suggestion that laws discriminating on the basis of marital status would violate a fundamental right not to marry). *But see Doe v. Dep’t of Soc. Servs.*, 487 N.W.2d 166, 185 (Mich. 1992) (Levin, J., concurring) (assuming the existence of “right to choose not to marry” in dictum). In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court stated in broad terms that “the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State,” but

A. *Rights to and Not to*

It is a common assumption in American constitutional law that the existence of rights *to* include the right *not to*, and vice versa.<sup>97</sup> We might derive a right not to speak from the right to speak;<sup>98</sup> a right to procreate from the right not to procreate;<sup>99</sup> or the right not to associate with someone from the right to associate.<sup>100</sup> This view has gained traction from language in judicial opinions that seems to suggest that rights are “bilateral” or “two-way streets.”<sup>101</sup> In *Loving v. Virginia*,<sup>102</sup> for example, the Court stated that the “freedom of choice to marry” protected by the Fourteenth Amendment includes “the freedom to marry, *or not marry*, a person of another race.”<sup>103</sup>

Some scholars, however, have cautioned that symmetry alone does not justify the existence of rights.<sup>104</sup> Indeed, many constitutional rights, like the Sixth Amendment rights to a speedy and public trial or the Thirteenth Amendment’s right against involuntary servitude, do not imply equal and opposite rights—for example, rights to a slow and private trial or the right to be a slave.<sup>105</sup> In other words, we cannot simply assume into existence a right not to marry from the right to marry.

In one of the most detailed analyses of the relationship between rights to and not to in U.S. rights discourse to date,<sup>106</sup> Professor Joseph Blocher has argued that a right protects both a right *to* and *not to*—a “choice right” in his terminology—in two circumstances. The first is when the right is “purely personal,” that is to say that “the purpose of the right is to protect the autonomy of the individual rightsholders.”<sup>107</sup> Examples include the rights to speak, associate, and practice religion, all of which imply rights not to.<sup>108</sup> The second is when the proposed right furthers its own constitutional value(s).<sup>109</sup> That value might be the same for both the right to and not to—for example, both allowing speech and avoiding compelled

the state statute at issue *restricted* rather than *compelled* marriage, providing no basis to test the existence or content of the right not to marry. *Id.* at 12.

97. See JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 6 (1996).

98. See, e.g., *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 797 (1988) (noting that the term “freedom of speech” comprises “the decision of both what to say and what *not* to say”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634, 642 (1943) (upholding the right of public students not to salute the flag as part of the protection against compelled speech).

99. See, e.g., John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 416 (1983) (arguing that the “well-established” right not to procreate “implies the freedom not to exercise it and, hence, the freedom to procreate”).

100. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (“Freedom of association therefore plainly presupposes a freedom not to associate.”).

101. See GARVEY, *supra* note 97, at 5.

102. 388 U.S. 1 (1967).

103. *Id.* at 12 (emphasis added).

104. Joseph Blocher, *Rights to and Not to*, 100 CAL. L. REV. 761, 764 (2012).

105. See *id.* at 784–86.

106. Blocher emphasizes that his account is more descriptive than philosophical: the goal of his taxonomy of rights is to explain existing legal doctrine and apply the taxonomy to concrete legal disputes. See *id.* at 769–70.

107. *Id.* at 767.

108. *Id.* at 770.

109. *Id.* at 811.

speech serve the same constitutional value of promoting high-value speech.<sup>110</sup> But the values might differ. While the right to engage in sexual intercourse might primarily vindicate the value of autonomy, the right not to engage in sexual intercourse could additionally be justified by the separate interest of protecting a person's bodily integrity.<sup>111</sup>

Despite its deep importance to individuals, the right to marry is not "purely personal"; it is also "grounded in some broader social interest."<sup>112</sup> Moreover, even if it were possible to conclude, based on Blocher's framework, that the right to marry is a choice right, giving rise to a right not to marry, that conclusion would not answer the thornier question of how far that right extends. Courts might readily accept that the right not to marry should prevent the state from rounding up all single people and pairing them off in a way that maximizes social utility, but what actions short of that extreme would implicate the right? In the context of the right not to marry, to frame the inquiry in terms of whether the right *to* implies the right *not to* misses the critical inquiry. The appropriate question is not whether the recognition of a right implies an equal and opposite right in the Newtonian sense. Rather, it is whether that right encompasses the claims at issue.

That question prompts a functional analysis of the proposed right.<sup>113</sup> Under this view, we might ask what values the established right—in our case the right to marry—promotes.<sup>114</sup> Those values form a logical starting point to determine whether the law should recognize the proposed right, although we might identify additional instrumental values favoring the existence of such a right.<sup>115</sup>

### B. Valuing the Right to Marry

The right to marry has confounded courts and critics because it has always promoted both private and public values.<sup>116</sup> Though the right to

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110. *See id.*

111. *Id.* at 769.

112. *Id.* at 802.

113. Professor Kenneth Karst, for example, applied a functional analysis in arguing that the freedom of intimate association should protect both the choice to associate and the choice not to associate because "[a] chosen intimate association can serve, for example, as a statement of self-identification in a way that cannot be matched by an association imposed by force of law, and intimacy implies the choice *not* to associate oneself in intimate ways with the world at large." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980). Professor John Garvey made the point even more directly when he argued that "freedoms are not necessarily bilateral. Whether they are or not depends on the principles they revolve around." GARVEY, *supra* note 97, at 18.

114. There are many examples of this form of reasoning in the United States Reports. For example, the Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), recognized a right of public school students not to salute the flag based on "the individual's right to speak his own mind." *Id.* at 634. The same "sphere of intellect and spirit" promoted by voluntary speech would be threatened by compulsion. *Id.* at 642. The values underlying the affirmative right therefore protected the negative right.

115. *See* Blocher, *supra* note 104, at 768.

116. Through much of the Nation's history, marriage was the exclusive site for sex and procreation, policed by criminal laws prohibiting extramarital sex and property laws

marry has a long pedigree—“one of the vital personal rights essential to the orderly pursuit of happiness by free men”<sup>117</sup>—its substance remains uncertain. For example, some scholars have convincingly argued that states are not constitutionally obligated to recognize marriages, only to offer equal access to the institution they have created.<sup>118</sup> They contend that positive rights—unlike “negative rights that protect citizens from excessive intrusion by the state”—are not constitutionally compelled.<sup>119</sup> That being so, states retain the power to alter the package of marital rights and obligations.<sup>120</sup> Under this line of thinking, states could even abolish marriage entirely without running afoul of the Constitution.<sup>121</sup>

Three dissenting Justices in *Obergefell* came close to endorsing this view that the Constitution does not require states to create a system of legal rights associated with marriage.<sup>122</sup> Justice Thomas argued in his dissent that “liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.”<sup>123</sup> In a similar vein, Chief Justice Roberts questioned what a right to marriage would protect, given that same-sex marriage bans already allowed same-sex couples “to live together, to engage in intimate conduct, and to raise their families as they see fit.”<sup>124</sup> Justice Thomas added that same-sex couples could “make vows to their partners in public ceremonies” and even “hold themselves out as married” without running afoul of state restrictions.<sup>125</sup>

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governing inheritance and making distinctions between legitimate and illegitimate children. Marriage granted legal entitlements and immunities but also involved state control. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 27–77, 238–39 (2011); Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1353 (2010); Melissa Murray, *Marriage As Punishment*, 112 COLUM. L. REV. 1, 19–23 (2012).

117. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

118. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667 (2010); Scott, *supra* note 32, at 545 (“[L]awmakers probably could abolish marriage altogether.”); Sunstein, *supra* note 20, at 2084; Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1378 (2010).

119. See Scott, *supra* note 32, at 545.

120. See, e.g., Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REFORM 217, 253 (1990).

121. See *supra* note 118. But see Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184 (2004); Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1263 (2015) (arguing that such proposals are politically infeasible and practically impossible).

122. It goes without saying that these justices did not endorse the equality rationale advanced by the scholars discussed *supra* note 118.

123. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting).

124. *Id.* at 2620 (Roberts, C.J., dissenting). The first two parts of the assertion—that same-sex couples could live together and engage in intimate conduct—are most likely correct after *Lawrence v. Texas*, 539 U.S. 558 (2003). The third part—that couples could “raise their families as they see fit,” *Obergefell*, 135 S. Ct. at 2620, is patently incorrect. The challenged laws had the effect of interfering with the plaintiffs’ ability to jointly adopt children. See *id.* at 2595 (noting that Michigan only allowed opposite-sex *married couples* or single persons to adopt).

125. *Id.* at 2635 (Thomas, J., dissenting).

He contrasted the mere absence of legal protections for same-sex couples with the antimiscegenation law in *Loving* that prohibited, on pain of criminal prosecution, private actions associated with marriage.<sup>126</sup> By implication, a law merely withholding legal benefits from interracial couples would not violate the right to marry, because the couples could live together, engage in sexual contact, and hold themselves out as married without fear of prosecution.

The majority opinion did not explain its rejection of these arguments, but did offer two possible responses. First, and at the very least, the fact that a majority of justices expanded the right to marry to protect the choice of individuals to marry people of the same sex endorses an equality principle: once created, the rights and responsibilities of marriage cannot be denied on an unequal basis.<sup>127</sup> Although equality is the primary value protected by this approach, other values do not disappear. Marriage still remains a fundamental interest that the state cannot arbitrarily deny because of the values it promotes. But the rejection of the views expressed in Chief Justice Roberts's and Justice Thomas's dissenting opinions could also suggest that the majority viewed marriage as an inchoate good in and of itself—"a two-person union unlike any other in its importance to the committed individuals"<sup>128</sup> and a "keystone" institution "at the center of many facets of the legal and social order."<sup>129</sup>

Although the substance of the right to marry is far from certain, it is safe to say, at least for now, that the right to marry exists to promote certain values beyond equal access.<sup>130</sup> Those values inhere in both the individual and the state. The flurry of judicial opinions issued on the way to the *Obergefell* decision, and the *Obergefell* case itself, cast these values in a fresh light.

### 1. Autonomy and Identity

Marriage has long been characterized as a voluntary association.<sup>131</sup> And virtually every account of the right to marry in the past several decades has commented on the general turn toward the concepts of privacy, liberty, and

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126. *Id.* at 2637 (noting that the Lovings were sentenced to a year of imprisonment for holding themselves out as married).

127. See Sunstein, *supra* note 20, at 2096; Tebbe & Widiss, *supra* note 118, at 1380 ("[O]ur equal access approach holds that, once conferred, the right to marry in a legally recognized ceremony is fundamental: if a government decides to recognize and support civil marriage, it cannot exclude same-sex couples without providing an adequate justification.").

128. *Obergefell*, 135 S. Ct. at 2589.

129. *Id.* at 2590.

130. See Leib, *supra* note 20, at 41–42 (noting the existence of an "open" question over "whether Justice Kennedy actually created not just a right to marry, but also a right to marriage itself").

131. See NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–17 (2000); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 17 (2010).

autonomy.<sup>132</sup> Those concepts have led to the recent emergence of an identity-centric understanding of autonomy.

In striking down Virginia's antimiscegenation law in *Loving*, the Court characterized the "freedom to marry" as a "vital personal right" and noted that the choice of one's spouse—regardless of race—"resides with the individual."<sup>133</sup> The personal nature of the right to marry gained further clarification from the connection between marriage and procreative freedom. Cases protecting decisions related to contraception<sup>134</sup> and abortion<sup>135</sup> emphasized the significant impact on one's identity of having children. The Court in *Roe v. Wade*,<sup>136</sup> for example, observed that unwanted "[m]aternity, or additional offspring, may force upon the woman a distressful life and future," potentially causing "[p]sychological harm" and "stigma."<sup>137</sup> These statements reveal a sensitivity to how a person views herself—focusing on psychological harm and distress—and how the person is viewed by others—as a person with a disfavored identity.<sup>138</sup>

This reasoning entered marriage cases like *Turner v. Safley*,<sup>139</sup> in which the Court struck down a requirement that prisoners obtain permission from the superintendent to marry.<sup>140</sup> Because of their incarceration, prisoners lacked the ability to cohabit with their spouses or consummate their relationship. Nonetheless, the Court held that they retained their right to marry because many of the "important attributes" of marriage remained, even despite those limitations: "Inmate marriages, like others, are expressions of emotional support and public commitment," as well as an "expression of personal dedication."<sup>141</sup>

Unsurprisingly, marriage equality advocates tapped into these understandings. During the widely publicized trial regarding the validity of Proposition 8, California's same-sex marriage ban, plaintiff Paul Katami was asked what would change if he were allowed to marry his partner, Jeff Zarrillo.<sup>142</sup> Katami responded,

Being able to call him my husband is so definitive, it changes our relationship. . . . It is absolute, and also comes with a modicum of respect

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132. See, e.g., Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1428–29 (2012).

133. *Loving v. Virginia*, 388 U.S. 1 (1967).

134. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

135. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

136. 410 U.S. 113 (1973).

137. *Id.* at 153.

138. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989) (contending that the right to self-definition—what Rubenfeld calls the "personhood thesis"—has come to dominate the Fourteenth Amendment's right of privacy).

139. 482 U.S. 78 (1987).

140. See *id.* at 99–100.

141. *Id.* at 95–96. Cass Sunstein has called "the expressive legitimacy that comes from the public institution of marriage" one of two characteristics of marriage that the right to marry protects. Sunstein, *supra* note 20, at 2083.

142. Transcript of Trial at 88, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-2292-VRW).

and understanding that your relationship is not temporal . . . . It's something you've dedicated yourself to and you're committed to.<sup>143</sup>

When asked how it felt not to be able to choose to marry, he described “the struggle that we have validating ourselves to other people” and continued, “Unless you have to go through a constant validation of self, there's no way to really describe how it feels.”<sup>144</sup>

Katami's testimony articulates a particular theory about the relationship between the choice to marry and development of one's sense of self. The decision to marry is a means of self-identification. As Katami notes, it changes one's own “understanding” of one's relationship and impacts the way one “feels.”<sup>145</sup> But it also makes a public statement and asks for public respect and validation, which likewise affects one's sense of self.<sup>146</sup>

These arguments reached their zenith in the Court's latest discussion of the right to marry in *Obergefell*. Justice Kennedy's majority opinion starts from the lofty premise that the “liberty” protected by the Fourteenth Amendment extends to “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>147</sup>

Several principles explain why the right to marry falls within this concept of liberty.<sup>148</sup> First, the choices “whether and whom to marry” are “among life's momentous acts of self-definition.”<sup>149</sup> Thus, because these decisions are “inherent in the concept of individual autonomy”—and, indeed, they “shape an individual's destiny”—they are constitutionally protected.<sup>150</sup> The principle comes into sharper focus when read in light of Chief Justice Roberts's dissent. The Chief Justice argued that same-sex marriage bans left same-sex couples “free to live together, to engage in intimate conduct, and to raise their families as they see fit.”<sup>151</sup> If same-sex couples could choose to live together or to engage in intimate conduct without fear of government interference, how was their autonomy being interfered with? In other words, what measure of autonomy would they gain by accessing marriage?<sup>152</sup>

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143. *Id.* at 89.

144. *Id.* at 90–91.

145. *Cf.* Karst, *supra* note 113, at 635 (arguing that all intimate associations play a role “with the formation and shaping of an individual's sense of his own identity”).

146. The other plaintiffs in *Perry* offered similar testimony: “Stier explained that marrying [her same-sex partner, Perry,] would make them feel included ‘in the social fabric.’ Marriage would be a way to tell ‘our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment.’” *Perry*, 704 F. Supp. at 933 (citations omitted).

147. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

148. *Id.* at 2598 (distilling the “essential attributes of [the right to marry] based in history, tradition, and other constitutional liberties”).

149. *Id.* at 2599 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003)).

150. *Id.*

151. *Id.* at 2620 (Roberts, C.J., dissenting).

152. This is also the thrust of Justice Thomas's dissent, in which he argues that “liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement.” *Id.* at 2631 (Thomas, J., dissenting). According to

A second principle answers those questions. The majority opinion states—somewhat tautologically—that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>153</sup> In other words, marriage is fundamental because people *believe it is* more fundamental than other two-person relationships. The consequence of this belief is that other forms of relationships, even if legally equivalent to marriage, cannot confer the full measure of dignity and liberty that marriage can provide: “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”<sup>154</sup> Because of these qualitative differences, the choice to marry affects the person making the choice differently from the choice to enter other types of intimate relationships.

Together, these two principles elaborate on the autonomy rationales that emerged in earlier marriage cases and in Katami’s testimony. The choice to marry is an important act of self-definition in that it expresses individual preferences and taps into an institution with greater social meaning. By recognizing the contribution of social validation to the right of marriage, the majority opinion endorses the view that identity is not formed in a vacuum but depends also on external conditions.<sup>155</sup> The majority opinion also amplifies the suggestion from *Turner v. Safley* that the right to marry extends beyond the scope of the individual.<sup>156</sup> Through marriage, “two persons *together* can find other freedoms, such as expression, intimacy, and spirituality.”<sup>157</sup> If the union of marriage is itself “profound,” and through it “two people become something greater than they once were,”<sup>158</sup> then the value of autonomy protects individual choice as well as broader social connections. In its latest incarnation, the right to marry embraces the self-

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Justice Thomas, same-sex couples could “make vows to their partners in public ceremonies” and even “hold themselves out as married” without running afoul of state restrictions. *Id.* at 2635.

153. *Id.* at 2589.

154. *Id.* at 2600. This argument had not escaped the attention of legal scholars. *See, e.g.*, Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 *IND. L.J.* 893, 902 (2010); NeJaime, *supra* note 92, at 230; Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 *CONN. L. REV.* 1425, 1429 (2009). Other scholars, however, have argued that the relationship between autonomy and dignity is a complicated one, especially given the slippery meanings of both concepts and that the concepts can sometimes be at odds. *See, e.g.*, Robert C. Post, *Three Concepts of Privacy*, 89 *GEO. L.J.* 2087, 2092 (2001) (“Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons.”); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 *NOTRE DAME L. REV.* 183, 187–88 (2011) (noting that dignity can refer to freedom for the individual to exercise his autonomy, or to the belief in particular conceptions of human flourishing that may express community, rather than individual, values).

155. This principle, I believe, is an implicit rebuttal of Justice Thomas’s argument, in dissent, that “[s]laves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. . . . The government cannot bestow dignity, and it cannot take it away.” *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

156. *See supra* note 141 and accompanying text.

157. *See Obergefell*, 135 S. Ct. at 2599 (emphasis added).

158. *Id.* at 2594, 2608.

defining choice to marry in its individual, interpersonal, and societal dimensions.<sup>159</sup>

## 2. Stability, Identity, and Identification

When the substance of the right to marry is thought of at all, it is usually thought of in terms of entry or access.<sup>160</sup> Most cases, after all, have challenged laws preventing people from marrying in the first instance, whether because of race,<sup>161</sup> sexual orientation,<sup>162</sup> finances,<sup>163</sup> or imprisonment.<sup>164</sup> But the right to marry surely must encompass more than the choice to enter the relationship. After all, distinctions based on marital status are relevant during the life of the marriage and continue on through divorce.<sup>165</sup> Until recently, we knew very little about these other dimensions of the right to marry, but they have begun to come into sharper focus.

Although it is primarily a case about access to marriage, the *Obergefell* case gestures to an additional aspect to the right to marry: “permanency and stability.”<sup>166</sup> Several times in the majority opinion, Justice Kennedy called attention to the innate (in his view, at least)<sup>167</sup> need for intimate companionship: “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live

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159. It is worth noting that four dissenting justices did not endorse the majority’s conclusions regarding the relationship between marriage and autonomy. But it is not clear to what extent those justices would sever autonomy from the right to marry. Although Chief Justice Roberts suggested that only laws that “interfere with the ‘right to be let alone’” implicate a right to autonomy, *see id.* at 2620 (Roberts, C.J., dissenting), he did not disavow the reasoning of the Court’s earlier marriage precedents. *See id.* Only Justices Thomas and Scalia appear to believe that autonomy and marriage are conceptual strangers. To those justices, marriage is fundamentally about government entitlements—not “any understanding of ‘liberty’ that the Framers would have recognized.” *See id.* at 2636 (Thomas, J., dissenting) (“To the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to government recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in.”).

160. *See* Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 64 (2012) (“When courts refer to a ‘right to marry,’ they refer not to particular benefits currently included in marriage but instead to the right of access to whatever privileged status the state is currently offering.”). *But see* Sanders, *supra* note 132, at 1424 (arguing that same-sex couples who marry in a state in which it is legal and move to one in which it is not—no longer a problem after *Obergefell*—have “a significant liberty interest . . . in the ongoing existence of [their] marriage”).

161. *Loving v. Virginia*, 388 U.S. 1 (1967).

162. *Obergefell*, 135 S. Ct. at 2584.

163. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

164. *Turner v. Safley*, 482 U.S. 78 (1987).

165. *Cf.* Strauss, *supra* note 121, at 1266–73 (noting the ways in which the law regulates these phases of the marital relationship).

166. *Obergefell*, 135 S. Ct. at 2600.

167. *But cf.* Noah Feldman, *Marriage Is a Right, Not an Obligation*, BLOOMBERG VIEW (June 28, 2015), <http://www.bloombergvie.com/articles/2015-06-28/marriage-is-a-right-not-an-obligation> (arguing that Justice Kennedy’s discussion of loneliness “went too far” and “has the effect of devaluing the fullness of lives conducted outside the bounds of marriage”) [<https://perma.cc/53DL-XP67>].

there will be someone to care for the other . . . .”<sup>168</sup> “[M]arriage embodies a love that may endure even past death.”<sup>169</sup> But, as Chief Justice Roberts observed, “No one is ‘condemned to live in loneliness’ by the laws challenged in these cases—no one.”<sup>170</sup> On this point, the Chief Justice appears to have the upper hand: the named plaintiffs, after all, were living together, albeit in a state of nonrecognition, and not even marriage could bring back James Obergefell’s deceased spouse.<sup>171</sup> Moreover, in a world where a substantial percentage of marriages end in divorce,<sup>172</sup> marriage is not a particularly effective panacea for loneliness.

This seemingly tangential dispute reveals that marriage is something more than contemporaneous companionship. It involves the expectation (or “hope”) of permanency.<sup>173</sup> That expectation in turn promotes stability.<sup>174</sup> These values are part of the right to marry, as the following examples will illustrate.

*United States v. Windsor*<sup>175</sup> generated intense debate about what the decision portended for the constitutional right to marriage equality at the state level.<sup>176</sup> But the case was fundamentally about whether the federal government could refuse to recognize same-sex marriages that were valid under state law, thereby giving different legal effect to opposite- and same-sex marriages that a state deemed identical.<sup>177</sup> In answering that question, the Court looked closely at the effect of nonrecognition on otherwise valid same-sex marriages. “By creating two contradictory marriage regimes within the same State,” the Court reasoned, the federal Defense Against Marriage Act (DOMA) “forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, *thus diminishing the stability and predictability of basic personal relations* the State has found it proper to acknowledge and protect.”<sup>178</sup> There was nothing particularly unpredictable about the discrimination at issue, which allowed the couples all of the benefits of marriage at the state level but none at the federal level. Instead, the instability came from the “position of being in a second-tier marriage.”<sup>179</sup> The differential treatment would undermine the stability of the relationship by expressing to “those couples, and all the

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168. *Obergefell*, 135 S. Ct. at 2600.

169. *Id.* at 2608.

170. *Id.* at 2620 (Roberts, C.J., dissenting).

171. *See id.* at 2594–95 (majority opinion).

172. *See* Claire Cain Miller, *The Divorce Surge Is Over, but the Myth Lives on*, N.Y. TIMES (Dec. 2, 2014), <http://www.nytimes.com/2014/12/02/upshot/the-divorce-surge-is-over-but-the-myth-lives-on.html> (noting that over 45 percent of marriages from the 1970s and 1980s ended in divorce, but that approximately 35 percent of marriages from the 1990s ended in divorce) [<http://perma.cc/KXA5-3EEV>].

173. *Obergefell*, 135 S. Ct. at 2600.

174. Justice Kennedy did not cite any empirical support for this reasoning, but the literature suggests that marriages, while by no means permanent, are more stable than cohabiting relationships. *See* Scott, *supra* note 32, at 547–48.

175. 133 S. Ct. 2675 (2013).

176. *See, e.g.,* NeJaime, *supra* note 92.

177. *See Windsor*, 133 S. Ct. at 2692.

178. *Id.* at 2694 (emphasis added).

179. *Id.*

world,” that their relationships are in some way less valuable than other marriages.<sup>180</sup>

Relatedly, courts have also considered whether states must recognize marriages entered into during periods of legal transition. These cases illustrate both a right to *maintain* one’s marriage and a recognition of both individual and state interests in protecting an ongoing right to marry.

On Friday, March 21, 2014, the United States District Court for the Eastern District of Michigan struck down Michigan’s Marriage Amendment prohibiting same-sex marriage, and enjoined the State of Michigan from enforcing it.<sup>181</sup> Notwithstanding the state’s pending stay request, on that Saturday morning, four local county clerks opened their offices, waived the three-day waiting period, and immediately began to issue marriage licenses.<sup>182</sup> That afternoon, however, the Sixth Circuit issued a temporary stay, which was later converted to a full stay pending appeal.<sup>183</sup> With that, the window for obtaining marriage licenses abruptly closed, but not before clerks had issued marriage licenses to approximately 300 same-sex couples in a few hours.<sup>184</sup> Following the issuance of the full stay on March 26, Michigan Governor Richard Snyder announced that the state would not recognize the Saturday marriages.<sup>185</sup>

In *Caspar v. Snyder*,<sup>186</sup> same-sex couples who had married that Saturday, March 22, sued the state demanding recognition of their marriages as valid under state law.<sup>187</sup> The district court noted that the lawsuit presented a unique legal issue—whether couples lawfully married (during a legal window lasting mere hours in this case) could be deprived of their marital status due to a subsequent change in the law (bringing the law back to its original state).<sup>188</sup>

In ordering the state to recognize the plaintiffs’ marriages, the court reasoned that the decision not to recognize the Saturday marriages as valid “could catastrophically undermine the stability that marriage seeks to create.”<sup>189</sup> It would disturb their estate plans, pensions, and other financial arrangements.<sup>190</sup> “In terms of the personal ordering and orderliness of

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180. *See id.*

181. *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev’d sub nom.* 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015).

182. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 621 (E.D. Mich. 2015).

183. *See id.*

184. *Id.*

185. *Id.* at 621–22 (quoting the Governor’s statements at a March 26 press conference).

186. 77 F. Supp. 3d 616 (E.D. Mich. 2015).

187. *Id.* at 620. Plaintiffs alleged that the refusal to recognize their marriages as valid caused intangible harms such as “loss of dignity,” “feelings of ‘uncertainty and anxiety,’” “loss of peace of mind,” and “‘hurt’ and ‘disheartenment,’” as well as tangible harms like the denial of health insurance benefits and the inability to adopt their partner’s child. *Id.* at 622.

188. *See id.* at 623 (stating the issue as “whether same-sex couples who were married pursuant to Michigan marriage licenses issued under Michigan law—as it stood at the time their marriages were solemnized—may, consistent with the Constitution, be stripped by the state of their marital status”); *see also id.* at 629.

189. *Id.*

190. *See id.*

one's most fundamental affairs, nothing would be more destructive of 'ordered liberty.'"<sup>191</sup>

Other courts considering whether to recognize marriages in analogous circumstances have come to similar conclusions. In *Evans v. Utah*,<sup>192</sup> same-sex couples who had married in the period between a district court decision striking down Utah's same-sex marriage ban and a stay imposed by the U.S. Supreme Court sought a preliminary injunction compelling the state to recognize their marriages.<sup>193</sup> Similarly holding that the couples' marriages were legal, and that the subsequent nonrecognition of those marriages would unlawfully deprive the couples of the constitutionally protected rights and responsibilities of marriage,<sup>194</sup> the court emphasized that

[t]he State has placed Plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage. These legal uncertainties and lost rights cause harm each day that the marriage is not recognized.<sup>195</sup>

What would be so unfair, though, about not recognizing marriages entered into under such uncertain circumstances? Put another way, why should the couples not share some responsibility for the legal uncertainty they faced? The district court opinions authorizing these marriages were on the books for only hours or days before they were stayed. It would seem impossible for this short duration to give rise to the settled expectations to which they referred.<sup>196</sup>

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191. *Id.* Much of the court's analysis depends on the government's concession that the marriages that occurred were legal. *See id.* at 623.

192. 21 F. Supp. 3d 1192 (D. Utah 2014).

193. *Id.*

194. *See id.* at 1209–10.

195. *Id.* at 1210.

196. *Cf. Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 265 (1994); *United States v. Carlton*, 512 U.S. 26, 37–38 (1994) (O'Connor, J., concurring) (emphasizing the value of "settled expectations" and "finality and repose" (citation omitted)). Courts have identified several factors relevant in assessing whether one's expectations are settled, including "the extent of reliance upon the former law, the legitimacy of that reliance, [and] the extent of actions taken on the basis of that reliance." *Strauss v. Horton*, 207 P.3d 48, 121 (Cal. 2009) (discussing whether to invalidate 18,000 same-sex marriages occurring between the state supreme court's decision legalizing same-sex marriage and a voter-initiated constitutional amendment defining marriage as between a man and a woman). These factors appear to point away from settled expectations rather than toward it. Practically speaking, how many changes to estate plans, pensions, and benefits could the couples have possibly made before the district court decisions were stayed? In other legal contexts, scholars have argued that the law should promote responsible decision making by encouraging parties to anticipate the possibility of legal change or forcing them to internalize the costs of poor decisions. *See, e.g.,* Michael J. Graetz, *Retroactivity Revisited*, 98 HARV. L. REV. 1820, 1823–24 (1985); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 524–28 (1986). Reliance interests are weaker when the law is in a state of flux. *See* Fisch, *supra* note 85, at 1109. One cannot imagine that courts would encourage businesses or taxpayers to make impactful long-term decisions in a similar legal landscape. *See* *United States v. Carlton*, 512 U.S. 26, 33 (1994) (suggesting that a plaintiff's reliance on a previous version

The impossibility of significant economic and legal reliance in these circumstances reveals that these decisions clearly protect more than economic decision making. To wit, the *Caspar* court noted that “[s]ame-sex couples, like their opposite-sex-couple counterparts, have the same innately human impulse to *maintain* bonds of committed intimacy in a socially and legally recognized marriage.”<sup>197</sup> Refusing to recognize otherwise lawful marriages strikes at the heart of self-identification by rejecting the couple’s description of their relationship.<sup>198</sup> In that sense, *remaining* married—like choosing to marry—promotes individual autonomy.

But it is worth noting that certainty serves not only the interests of individuals, but also of the state. In other words, certainty is of special importance with respect to marriage because of marriage’s role in identifying individuals as legal subjects. In *Strauss v. Horton*,<sup>199</sup> the California Supreme Court considered whether Proposition 8, a constitutional amendment effectively overruling a state court decision legalizing same-sex marriage, invalidated thousands of marriages that had taken place before the amendment passed.<sup>200</sup> Answering in the negative, the court reasoned that invalidating five months worth of marriages would “disrupt thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others . . . potentially undermining the ability of citizens to plan their lives.”<sup>201</sup>

The choice to marry is not an isolated decision affecting just the parties, but rather fundamentally changes the way a person interacts with society as both a social and legal subject.<sup>202</sup> Because so many legal rights and obligations are bundled into the status of marriage,<sup>203</sup> the disruptive effect of uncertainty is magnified and can burden those around the marital couple: creditors, employers, children, and even the state. And this consideration for the interests of third parties reveals that marital choice goes beyond

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of the tax code would have to be legitimate); *see also id.* at 35–36 (O’Connor, J., concurring) (analyzing the legitimacy of reliance in more depth).

197. *Caspar*, 77 F. Supp. 3d at 642 (emphasis added).

198. The *Caspar* court analogized the situation to another involving self-authorship: cases in which surviving same-sex-spouses had requested (and district courts commanded) that the state issue death certificates identifying decedents as “married” to them over the states’ refusal. *Id.* at 640 (citing *Majors v. Jeanes*, 48 F. Supp. 3d 1310, 1317 (D. Ariz. 2014); *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014)).

199. 207 P.3d 48 (Cal. 2009).

200. *Id.*

201. *Id.* at 122.

202. *See Evans v. Utah*, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014) (identifying the “state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage” as the irreparable harm justifying injunctive relief).

203. *See Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”).

protecting identity; it also performs *identification*.<sup>204</sup> That is to say that a function of the right to marry is not only to protect settled expectations, but actually to *settle* the expectations of the couple and others on an ongoing basis.

### 3. Dignity

That marriage is a tool to identify and categorize legal subjects serves as a reminder that marriage exists to vindicate not only individual autonomy interests, but the state's interests as well. Indeed, the *Obergefell* majority ruled in favor of same-sex couples because their relationships could embody the preexisting and “essential attributes” of marriage<sup>205</sup>—“a two-person union” involving “intima[cy],” “harmony,” “loyalty,” “commitment,” and lifelong “companionship.”<sup>206</sup>

This Court-endorsed normative view of marriage serves the state in several respects. It renders the family unit the primary source of financial support and caregiving for dependents and children.<sup>207</sup> Marriage is also a site of discipline and regulation, articulating sexual and moral norms<sup>208</sup> and reinforcing appropriate spousal behavior.<sup>209</sup> Couples seeking the law's assistance in altering spousal duties have discovered that their authority in that regard is significantly constrained.<sup>210</sup>

*Obergefell* reminds us that marriage is a public good.<sup>211</sup> Professor Nan Hunter has observed that “the dignity rights at issue [in *Obergefell*] flow

204. *Cf. id.* at 969 (describing marriage as a “vital organizing principle of our society”).

205. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 2599 (2015). Professor Clare Huntington has characterized the competing images of marriage as “social fronts,” and she argues that the choice between social fronts unnecessarily “reifies marriage as a key element in the social front of family.” Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 23 (2015).

206. *Obergefell*, 135 S. Ct. at 2599–600 (citations omitted).

207. *See, e.g.*, FINEMAN, *supra* note 92, at 226 (“In our individualistic society, the state relies on the family—allocating to it the care and protection of society's weaker members.”); Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 *VAND. L. REV.* 1835, 1866 (2014). Some scholars have gone so far as to argue that this is the family's *primary* function. *See id.* (arguing that “the ultimate value underlying legal recognition of family” is “private family support”).

208. *See Murray*, *supra* note 116, at 40. Another way that the law of marriage articulates norms is through fault-based grounds for divorce, which include adultery, desertion, mental or physical cruelty, drunkenness, and nonsupport. GROSSMAN & FRIEDMAN, *supra* note 116, at 161–68. In the states that recognize these fault-based grounds, spouses who behave in these disapproved of ways can face negative consequences. *See id.*

209. For example, Chief Justice Roberts's dissent, joined by Justices Scalia and Thomas, noted that “by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without.” *Obergefell*, 135 S. Ct. at 2613 (Roberts, C.J., dissenting) (emphasis added); *see also 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.”); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 *YALE J.L. & FEMINISM* 159, 162–63 (2013).

210. *See Matsumura*, *supra* note 209, at 178–95.

211. *See, e.g.*, Leib, *supra* note 20, at 41; Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 *CAL. L. REV. CIR.* 126, 126 (2015).

less from the bedrock of human rights than from the respectability of both the particular institution and the particular plaintiffs whose moral worth render them eligible to participate in it.”<sup>212</sup> The choice to engage in intimate sexual conduct, for example, promises a certain measure of freedom, but “does not achieve the *full* promise of liberty” that marriage can provide: people who cannot marry are still society’s “outcast[s].”<sup>213</sup> Although autonomy remains important under this account, the Court appears equally concerned about the denial of access to a “transcendent” institution that “embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”<sup>214</sup> The dignity referred to in *Obergefell* depends on shared social norms regarding both what types of relationships are valued and what types of conduct society owes to those who aspire to those values.<sup>215</sup>

That the right to marry acts in service of the common good, however, does not negate the individual interests also served by the right. As Professor Robert Post has observed, “[R]eal persons in the real world possess selves that are both independent and socially dependent.”<sup>216</sup> Citing the work of sociologist George Herbert Mead, Post has noted that the self is both socialized and self-expressive: “Taken together, they constitute a personality as it appears in social experience.”<sup>217</sup> The concepts of autonomy and dignity, like the individual and the collective, can point in opposite directions. The recognition of one, however, does not imply the exclusion of the other.

In fact, the social meaning of marriage itself—the good to which *Obergefell* refers—integrates the concept of voluntariness and individual choice. The social meaning of marriage is inseparable from individual interests. The Court tells us that “by the time of the Nation’s founding [marriage] was understood to be a *voluntary* contract.”<sup>218</sup> Marriage is a liberty protected by the Fourteenth Amendment precisely because it involves an “intimate choice[] that define[s] personal identity and beliefs.”<sup>219</sup>

Even privatized dependency is not an unalloyed benefit to the state. In *Windsor*, the Court noted that the Defense of Marriage Act not only deprived same-sex couples of key federal benefits, but also some key

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212. See Hunter, *supra* note 19, at 109; see also *Obergefell*, 135 S. Ct. at 2600 (noting that “[t]he right to marry . . . dignifies couples who ‘wish to define themselves’” by choosing to marry).

213. *Obergefell*, 135 S. Ct. at 2600 (emphasis added).

214. *Id.* at 2602, 2608.

215. Cf. Post, *supra* note 154, at 2092 (“Autonomy refers to the ability of persons to create their own identity and in this way to define themselves . . . . Unlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons.”).

216. *Id.* at 2095.

217. *Id.* (citing GEORGE HERBERT MEAD, ON SOCIAL PSYCHOLOGY 239 (Anselm Strauss ed., 1964)).

218. *Obergefell*, 135 S. Ct. at 2595 (emphasis added).

219. *Id.* at 2597.

responsibilities.<sup>220</sup> For instance, because federal law would ignore a same-sex spouse's income for the purposes of calculating federal financial aid eligibility, a married same-sex spouse might be eligible for more financial aid than a heterosexual spouse.<sup>221</sup> Instead of seeing this as a windfall, however, the Court saw it as a harm in that it would deprive the same-sex spouses of a responsibility that is "an essential part of married life . . . support[ing] each other as they pursue educational opportunities."<sup>222</sup> To the Court, "Responsibilities, as well as rights, enhance the dignity and integrity of the person."<sup>223</sup>

The Court's emphasis on the importance of responsibilities suggests that a relationship without legally enforceable rights and obligations might be qualitatively different than one that is completely voluntary and therefore less consequential. Of course, this view advances the interests of the state in encouraging private individuals to support each other. But the act of taking responsibility for another also reinforces and supports a person's self-concept to the extent that those actions are integral to the person's understanding of his or her relationship and the significance of the relationship to that person's identity more broadly.<sup>224</sup>

### C. Valuing the Right Not to Marry

Many of the values promoted by the right to marry also support the recognition of a right not to marry. The Court has stated that the decision "whether and whom to marry" is an important, self-defining choice.<sup>225</sup> It follows from *Loving* and *Obergefell* that the choice of a particular partner, regardless of race or gender, is central to one's identity.<sup>226</sup> But if, as Justices Roberts and Thomas have pointed out, people could already engage in intimate behavior or cohabit with their chosen partners without fear of legal consequences before *Obergefell*,<sup>227</sup> then the decision to identify the relationship with the institution of marriage makes a particularly significant statement. It is precisely because of marriage's "transcendent," "highest meaning"<sup>228</sup> that the decision whether to marry at all says so much about the self.

One might therefore argue that given the state's veneration of marriage, the right to marry would not necessarily compel the same level of respect for, or recognition of, choices to enter other (arguably inferior) relationships or not to marry at all. For example, it is not self-evident that the choice to enter a domestic partnership would involve the same autonomy interests as

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220. See generally *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

221. *Id.* at 2695.

222. *Id.*

223. *Id.* at 2694.

224. See Peter J. Burke & Donald C. Reitzes, *The Link Between Identity and Role Performance*, 44 SOC. PSYCHOL. Q. 83, 84 (1981) ("[T]he self operates in choosing behaviors and . . . the behaviors reinforce and support the self.").

225. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

226. See *id.* at 2607; *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

227. See *supra* notes 122–26 and accompanying text.

228. *Obergefell*, 135 S. Ct. at 2602.

the choice to marry, because of the different social meanings associated with those statuses.<sup>229</sup> If one were to argue that the right not to marry imposed obligations on the state to create domestic partnerships, the right *to* marry might fail to offer support.

If the right not to marry is thought of as freedom from state-imposed marriage, however, the autonomy interests become symmetrical with the interests protected by the right to marry. Choosing to marry only takes on meaning because of the freedom to choose not to marry. Although the state may prefer one choice over the other, the choice in either direction has the same valence from the perspective of self-definition and autonomy.<sup>230</sup>

A right not to marry is justified by an additional, related value. In its purest form, the right would entail freedom from state interference in “matters of family life” that are protected by the Due Process Clause.<sup>231</sup> In safeguarding a range of related “intimate and personal” choices, the Court has noted that “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” This concept of noninterference characterizes the privacy rights recognized under the Due Process Clause.<sup>232</sup> While the *Obergefell* majority’s theory of autonomy and identity envisions the right to marry moving in the direction of a positive right,<sup>233</sup> a negative right not to marry would still rest on more solid conceptual ground.

A right not to marry also promotes “the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect,”<sup>234</sup> at least to some degree. The *Windsor*, *Caspar*, and *Evans* cases discussed in Part II.B.2 above demonstrate that the right to marry or not to marry contributes to one’s identity on an ongoing basis: a person’s identity depends not only on *choosing* to marry, but *continuing* in that status.<sup>235</sup> That identity might be “married,” or “not married,” as the case may be. To the extent that the right to marry promotes stability in one’s identity as married, and that ongoing identity is meaningful to the married person, a right not to marry would serve the same ends.

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229. This is not to say that there would not be good reasons to recognize other forms of intimate relationships. *See, e.g.*, ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 156–88 (2012) (providing philosophical justifications for the legal recognition of a variety of relationships).

230. Note that my argument does not depend on the normative value of the choice but merely on the impact that the choice will have on a person’s identity. The argument that the law may value the choice to marry differently than the choice not to marry does not change the impact of the choice on a person’s identity and therefore the importance of that choice from a constitutional perspective according to *Obergefell*.

231. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *see also id.* (noting the importance of “the decision to enter the relationship that is the foundation of the family in our society”).

232. *See* Sunstein, *supra* note 20, at 2094 (“For the ordinary privacy rights with which marriage is associated, the Constitution requires governmental noninterference; it does not require the government to provide money, institutional arrangements, or anything else.”).

233. *See supra* notes 127–30 and accompanying text.

234. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added).

235. *See supra* Part II.B.2.

Those cases, however, also referred to stability in another sense: that the status of marriage confers security in one's relationship that enables people to plan for the future and make investments in their families and their children.<sup>236</sup> Whether or not this distinction rests on a solid empirical foundation,<sup>237</sup> it is the social meaning of marriage that the courts have adopted: marriage provides greater security over other family forms.<sup>238</sup> For instance, in discussing the right to marry, courts have not bothered to acknowledge the possibility of divorce.<sup>239</sup> Moreover, even if marriage does not create actual stability, it may create at least the expectation of it. While a right not to marry serves to secure the stability of one's identity as married or unmarried, it cannot lay claim to the separate interest in promoting the stability of a socially desirable relationship.

This is not to say that couples in alternate statuses like domestic partnerships and civil unions lack a protectable interest in the continuation of their statuses. Those statuses also bring order to "one's most fundamental affairs,"<sup>240</sup> including "adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, [and] inheritance."<sup>241</sup> Couples in domestic partnerships and civil unions may have relied on the particular set of rights and obligations offered by those statuses. Cohabitants might have defined their relationship around the absence of legal rights and obligations.<sup>242</sup> These arguments, however, rest in legal doctrine that protects individuals from unfair changes in the law. The Court has observed that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."<sup>243</sup> Following this principle, legislation that imposes legal consequences on past conduct must "meet a burden not faced by legislation that has only future effects."<sup>244</sup> This burden is not a particularly

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236. See *supra* notes 189–90 and accompanying text.

237. There are studies that suggest that marriages are more stable than cohabiting relationships. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 311–12 (2015) (citing survey data and scientific studies). One must keep in mind, though, that this difference does not rest on any inherent inferiority of nonmarital relationships. Cohabiting relationships could be statistically less stable both because of the characteristics of people who choose to cohabit rather than marry and because the law fails to support those relationships. See *id.* at 361–62.

238. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) (finding, as a factual matter, that "[t]he state regulates marriage because marriage creates stable households").

239. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (noting that marriage offers the hope that "while both still live there will be someone to care for the other").

240. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 629 (E.D. Mich. 2015).

241. *Evans v. Utah*, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014).

242. See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 846 (2005) (noting that cohabiting and married couples view their relationships differently, with cohabitants usually functioning "as a substitute for being single, not for being married").

243. *Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 265 (1994).

244. *United States v. Carlton*, 512 U.S. 26, 31 (1994) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984)).

high one, but retroactive legislation must still be reasonable rather than “harsh and oppressive.”<sup>245</sup>

Although these due process values are distinct from a right not to marry, they can also intersect. A law terminating existing domestic partnerships or imposing different legal rights and obligations would not directly implicate a right not to marry—it would not impose legal marriage on anyone. Instead, it would raise due process concerns.<sup>246</sup> But the state frequently allays these due process concerns by offering the palliative of marriage. It is that coupling—termination with marriage—that brings the right not to marry into the picture.

### III. SITUATING THE RIGHT NOT TO MARRY

The right not to marry rests on a solid foundation of constitutionally protected values. Those values, however, merely point in the direction of the right without revealing what state actions a right not to marry should tolerate or prohibit.

#### A. *The Right on a Spectrum*

The few legal and scholarly attempts to define the right not to marry have primarily arisen in the context of marital status discrimination. These attempts present what I call a maximal view of the right not to marry. The argument goes something like this<sup>247</sup>: the Supreme Court has told us that the right to marry is fundamental.<sup>248</sup> In doing so, it has emphasized the importance of choice.<sup>249</sup> If the choice to marry is fundamental, it must be protected whether that choice is affirmative or negative.<sup>250</sup> After all, the choice to marry can only say something meaningful about the self if the person had an equally powerful choice not to marry. Any law that expresses a preference for marriage—whether in benefits, property law, or parenting<sup>251</sup>—would tend to influence the choice in favor of marriage and

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245. *Id.* at 30.

246. I have previously called for a more searching analysis of the retroactive impacts of domestic partner legislation. See Kaiponanea T. Matsumura, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185 (2006) (arguing that California's expressly retroactive domestic partner legislation violated the state due process clause).

247. This particular account comes from Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (1988). Jaff's article, unlike this one, focuses primarily on the political argument in favor of legal recognition of nonmarital unions. *Id.* at 235. Perhaps for that reason, she did not address the state's deep historical involvement in shaping and regulating the institution of marriage. See *id.* at 225–34. There are a handful of other articles that make broad assertions about the right not to marry without much analysis about whether such a right should exist. See, e.g., Cara C. Orr, *Married to a Myth: How Welfare Reform Violates the Constitutional Rights of Poor Single Mothers*, 34 CAP. U. L. REV. 211, 218 (2005).

248. Jaff, *supra* note 247, at 223.

249. *Id.*

250. *Id.* (citing not only decisions related to marriage like *Loving v. Virginia*, but also those that discuss the importance of choice in deciding whether or not to have children, like *Eisenstadt v. Baird*).

251. See *id.* at 210–20.

would therefore burden the right not to marry.<sup>252</sup> This is a maximal view of the right because it would subject all laws that make distinctions based on marital status to constitutional scrutiny. As we have learned from the marriage equality cases, those distinctions are legion.<sup>253</sup>

On the other end of the spectrum, we might imagine a right not to marry that prevents the state from only the most significant and direct infringements. Imagine a law that takes all unmarried adults over the age of thirty and pairs them off on the basis of income to maximize the resultant household income of all married couples. Such a law would not only deprive people of the autonomous choice to marry a particular person, but also the choice whether to marry at all. We can imagine a slightly less extreme (and more plausible) example in which a state would deem all presently cohabiting couples to be legally married.<sup>254</sup> A right not to marry prohibiting only state interventions of this magnitude would express a much more minimal version of the right.

This spectrum reveals some common ground: both the maximal and minimal views would agree that at some point, a right not to marry is necessary to limit state action to protect the values of individual autonomy, freedom from excessive state interference, and stability.<sup>255</sup> Simply put, the right to marry could not promote self-definition if the state could choose people's spouses or deem them legally married against their will. The more challenging question is at what point an infringement on the values protected by the rights to marry and not to marry becomes problematic. To answer, we must examine how the state actions at issue intersect with those values.

The problem with the maximal view is that it finds little support in the existing right to marry. The implication of the maximal view is that the state cannot distinguish between marriage and other relationships. However, the state has historically taken an active role in promoting marriage and determining its legal incidents.<sup>256</sup> Moreover, existing case law has supported these state interventions. Courts have repeatedly held that the government can distribute benefits to married couples without running afoul of a right not to marry.<sup>257</sup> In *Califano v. Jobst*,<sup>258</sup> the Court

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252. *See id.* at 208. Jaff does not elaborate on her theory of how exactly the right not to marry would be infringed.

253. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (noting the existence of over 1000 federal statutes and regulations that make classifications based on marital status).

254. The state of Washington comes somewhat close to this hypothetical situation by imposing marriage-like property obligations on unmarried partners who have cohabited for over two years and have not affirmatively opted out of owing each other legal duties. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 53–59 (2010).

255. *See supra* Part II.C.

256. *See supra* Part II.B.3.

257. *See, e.g.*, *Zavala v. City & Cty. of Denver*, 759 P.2d 664, 673 (Colo. 1988) (en banc) (rejecting the argument that a zoning ordinance disallowing occupancy by unmarried cohabitants infringed fundamental right not to marry); *Willard v. Dep't of Soc. & Health Servs.*, 592 P.2d 1103, 1106 n.1 (Wash. 1979) (en banc) (rejecting a challenge based on the unequal distribution of welfare benefits to married couples).

distinguished between rules that might “deter[]” a decision to marry because of the unequal provision of valuable benefits<sup>259</sup> and attempts “to interfere with the individual’s freedom to make a decision as important as marriage”<sup>260</sup> by “banning, or criminally prosecuting, nonconforming marriages.”<sup>261</sup> Based on this distinction, the Court upheld a rule stripping a Social Security beneficiary of benefits based on the eligibility status of his spouse.<sup>262</sup> The Court did not consider the tradeoff between marriage and the loss of benefits to interfere with the right to marry. Rather, the relevant benefits and burdens were a part of the choice that the individual was free to make.<sup>263</sup> To the *Califano* Court, at least, the version of autonomy that the Constitution protects when it protects the choice to marry does not require neutrality on the part of the government, just the absence of more tangible forms of coercion.<sup>264</sup>

In contrast, outright mandates or prohibitions impermissibly constrain the right to marry even though mere incentives might not. The bans and criminal prosecutions referred to in *Califano* amount to near-categorical restrictions, but one need not go quite that far. *Zablocki v. Redhail*,<sup>265</sup> argued on the same day as *Califano*, involved a Wisconsin law that required men with noncustodial minor children to obtain a court order granting them permission to marry.<sup>266</sup> Although the men could obtain the necessary court order by showing that they had fulfilled their support obligations and that their children were not likely to become public charges,<sup>267</sup> the Court noted that some, like the named plaintiff, could not practically satisfy those requirements.<sup>268</sup> But the *Zablocki* Court went further. It also expressed concern that some men who *could* satisfy the statutory requirements would “be sufficiently burdened by having to do so that they [would] in effect be coerced into forgoing their right to marry.”<sup>269</sup> To require the men to obtain a court order to marry—even if that order was based in large part on the fulfillment of a preexisting legal duty that they could meet—would

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258. 434 U.S. 47 (1977).

259. *Id.* at 54.

260. *Id.* (emphasis added).

261. *Id.* at 54 n.11.

262. *See id.* at 48–50. Plaintiff received Social Security benefits as the dependent of his deceased father. Had the plaintiff married someone who was currently eligible for benefits instead of one who was not, his benefits would have continued. Because his spouse was ineligible, his benefits terminated upon marriage. *See id.*

263. Arguments that the burdens associated with marriage infringe the right to marry would also fall on deaf ears.

264. *See supra* notes 258–62 and accompanying text. This is a descriptive claim, not a normative one.

265. 434 U.S. 374 (1978).

266. *See id.* at 375.

267. *See id.*

268. *See id.* at 378, 387 (observing that Roger Redhail was in arrears on his child support payments and that his daughter would still be on public assistance even if he paid his existing obligations).

269. *Id.* at 387.

nonetheless amount to a “serious intrusion” into the men’s “freedom of choice.”<sup>270</sup>

Together, *Califano* and *Zablocki* stand for the proposition that some state actions are problematic both because of their impacts on individual autonomy and because they represent a departure from the types of state intervention that have become an accepted part of the right to marry.<sup>271</sup> Admittedly, there is a wide and uncharted chasm between laws that merely encourage the choice to marry by favoring marriage and laws that would restrict the choice of spouse to a certain class of people or require judicial preclearance to marry.<sup>272</sup> But it is possible to compare these laws on two dimensions: the nature of state action at issue (with providing incentives being less problematic than imposing categorical restrictions) and the degree of coercion (with promotion being much less coercive than compulsion).

### B. Exploring the Middle Ground

The termination and conversion approaches adopted by states seeking to eliminate their nonmarital statuses allow us to develop the middle ground of the right not to marry.

These approaches do not stop at promotion. The termination of benefits to which people in the nonmarital statuses were previously entitled is a different type of state action and creates a different type of incentive than merely rewarding a particular choice. The conversion approach couples termination with automatic conversion, eliminating the previous status and categorically moving people into marriage without any additional choice on their part.

#### 1. Automatically Converting Partnerships to Marriages

The conversion approach adopted in Washington and several other states marries people who have never chosen to marry and, in some instances, would not have affirmatively made that choice.<sup>273</sup> These conversions threaten the values of autonomy and stability and therefore present a strong case for the application of a right not to marry.

American jurisdictions have moved away from recognizing informal means of establishing valid marriages to requiring the formal choice to

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270. *Id.*

271. The *Zablocki* Court distinguished the incentives to marry in *Califano* by focusing on “the directness and substantiality of the interference with the freedom to marry.” *See id.* at 387 n.12.

272. Justice Powell raised this critique in his concurring opinion in *Zablocki* when he argued that the Court failed to provide “any principled means for distinguishing” between “reasonable regulations” and those that “directly and substantially interfere” with the choice to marry. *Id.* at 396 (Powell, J., concurring).

273. *See supra* note 80.

marry.<sup>274</sup> For example, in Washington, couples must apply for a marriage license from the county auditor at least three days in advance of the intended wedding ceremony; they pay a sixty-six dollar fee and must either show up in person with acceptable identification or complete an official application requiring notarization; and the wedding ceremony must be performed by an approved officiant, among other requirements.<sup>275</sup> These steps reinforce the significance of the choice to marry, give the couple opportunities to change their mind, and formally identify the couple to the state, which certifies the relationship.

The individuals in the 3311 domestic partnerships automatically converted to marriages by the state of Washington did not engage in these formalities, but were married by operation of law.<sup>276</sup> Because it was automatic, this conversion resembles a categorical restriction on the choice to marry. To put it another way, the legislature, and not individuals, acted to change the status of the couples from unmarried to married. There was no necessary exercise of autonomous choice by the partners in the direction of marriage. By substituting the judgment of legislators for the decision of the partners, the infringement on the partners' autonomy resembles the outright prohibitions that characterize the more defensible terrain of the right not to marry.

One might be tempted to argue that given the similarity of domestic partnerships to marriage, the formal designation of "marriage" makes little difference. In other words, the choice to register a domestic partnership, which involves its own set of formalities,<sup>277</sup> can constitute the choice to marry. But if the battle for marriage equality has taught us anything, it is that there is a legally significant difference between marriage and nonmarriage, even if the two are comprised of substantially similar rights. The *Obergefell* Court held that "the right to marry is fundamental because it supports a two-person union *unlike any other* in its importance to the committed individuals."<sup>278</sup> And the district court in *Perry v. Schwarzenegger*<sup>279</sup> held that California's separate-but-equal domestic partnership regime violated the fundamental right to marry because it "[did] not provide the same social meaning as marriage."<sup>280</sup> As a constitutional matter, then, the choice to enter a registered domestic partnership cannot be

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274. Cf. GROSSMAN & FRIEDMAN, *supra* note 116, at 81, 84–86 (noting that only ten jurisdictions allow common law marriage, and providing reasons for the demise of common law marriage including the rise of formal government regulation and benefits).

275. See *Applying for a Marriage License*, KING CTY., WASH., <http://www.kingcounty.gov/depts/records-licensing/Recorders-Office/marriage-licensing/applying-marriage-license.aspx> (last updated Oct. 21, 2015) [<https://perma.cc/STB8-RNGG>].

276. See *supra* notes 80, 90.

277. See WASH. REV. CODE § 26.60.040 (2009) (requiring a notarized Domestic Partnership Declaration but not requiring a waiting period or formal ceremony).

278. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (emphasis added).

279. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

280. *Id.* at 994; see also *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) ("The official, cherished status of 'marriage' is distinct from the incidents of marriage, such as those listed in the California Family Code."), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

treated the same as a choice to marry. Any suggestion to the contrary should find few supporters: both advocates and opponents of same-sex marriage agree on the importance of that designation.

One might also argue that the failure to exercise a choice not to opt out essentially amounts to a choice to marry (albeit without the same bells and whistles). There are several problems with this argument. First, a voluminous literature analyzing opt-out rules reveals that the selection of defaults influences outcomes to a significant degree. Multiple studies have found that the status quo position of a particular option will bias people toward that option above and beyond what their preferences would otherwise reveal.<sup>281</sup> There are several different explanations for this phenomenon, all of which challenge the value of autonomy that the right to marry protects:

[1] Mere inattention could lead some decision makers to retain a [certain] default if action is required only when opting out of the default. [2] Loss-averse decision makers may not want to give up the default because it feels like a loss that is more painful than gaining a different option is pleasurable . . . . [3] The fact that someone has set an option as a default can create an “information leakage” . . . from which people might infer normative reasons for choosing the default. [4] Finally, people may choose defaults when there are sufficient transition costs of money or time in choosing an alternative.<sup>282</sup>

Of these four explanations, only the third does not offend the values that the rights to marry and not to marry promote, as it is consistent with the state’s ability to promote marriage and to proclaim its normative superiority.<sup>283</sup> By contrast, the first and fourth explanations are both highly plausible in the context of automatic conversions, and they are highly problematic.

Recall the concern on the part of Washington officials that some registered partners did not receive notices of the impending conversion of their partnerships to marriage.<sup>284</sup> People who did not receive notice, or who ignored or did not understand the notice, would be legally married based solely on the decisions of legislators. Their marriages would not be a product of their autonomous choice, and they would therefore lose the right to self-determination regarding a socially and legally significant decision.

Transaction costs pose another significant concern. Assuming that the parties received notice of the impending conversion, it seems somewhat unlikely that the matter would be one about which they would lack strong preferences: people in our society are not totally indifferent to marriage. Typically, stronger preferences mitigate (but do not completely erase) the effects of status quo bias.<sup>285</sup> On these facts, one might therefore assume

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281. See, e.g., RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

282. Nikhil Dhingra et al., *The Default Pull: An Experimental Demonstration of Subtle Default Effects on Preferences*, 7 JUDGMENT & DECISION MAKING 69, 69 (2012).

283. See *supra* Part II.B.3.

284. See *supra* note 87.

285. See Samuelson & Zeckhauser, *supra* note 281, at 8.

that concerns about bias fall away. However, the transaction costs of the decision could be significant enough to preserve the status quo.

It is here that the potential for coercion is most visible. The decision to marry comes at the end of a complicated negotiation process.<sup>286</sup> The joint decision by an amicable couple to divorce would likely involve complications as well. Partners might hesitate to indicate skepticism about marriage for fear of telegraphing a lack of commitment and hurting the feelings of the other; they might worry about the impact of those discussions on their children; they might even want to avoid the effect of the unpleasantness of the topic on their own sense of well-being.<sup>287</sup> Add to these costs the fact that a couple agreeing not to marry would have to reimagine their relationship outside of the legal rights and obligations they previously enjoyed. These transaction costs could make it tremendously difficult for individuals to depart from the default of marriage.

Even setting aside the biases that might internally influence the choice to marry, the option to opt out presents additional external obstacles. In states like Washington, one cannot simply opt out of a domestic partnership; one has to go through a substantially similar procedure to what we call divorce.<sup>288</sup> This process is costly and harmful to the relationship<sup>289</sup>: the average divorce costs between \$15,000 and \$30,000.<sup>290</sup> Even completely uncontested divorces will usually cost in the hundreds to low thousands of dollars in attorneys fees, excluding filing fees and property transfer fees.<sup>291</sup> Equally significant is the imposition of an unwanted identity on the partners who opt out. In addition to the impact of their views about divorce, which may be negative, the former partners would have to explain their breakups

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286. See *infra* notes 305–09 and accompanying text.

287. See Shelly L. Gable & Emily A. Impett, *Approach and Avoidance Motives and Close Relationships*, 6 SOC. & PERSONALITY PSYCHOL. COMPASS 95, 100 (2012) (noting that “[p]eople who are anxiously attached to a romantic partner often engage in behaviors, both to obtain the closeness and intimacy that they highly desire, but also to avoid the conflict and rejection that they so highly fear”); cf. John M. Gottman, *The Roles of Conflict Engagement, Escalation, and Avoidance in Marital Interaction: A Longitudinal View of Five Types of Couples*, 61 J. CONSULTING & CLINICAL PSYCHOL. 6, 13–14 (1993) (describing different engagement styles among married couples including conflict avoiders or “separates”); Tara Parker-Pope, *The Decisive Marriage*, N.Y. TIMES (Aug. 25, 2014), <http://well.blogs.nytimes.com/2014/08/25/the-decisive-marriage/> (“If you define things, you risk breaking up. Maybe you don’t really want to know how committed [your partner] [is], and it feels safer not to have the talk.”) [<https://perma.cc/2AC4-UVN4>].

288. See *supra* note 73 and accompanying text.

289. Cf. Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 756 (“[I]t is rationally undeniable that divorce is a very painful experience.”).

290. See Leah Hoffman, *To Have and to Hold on to*, FORBES (Nov. 7, 2006), [http://www.forbes.com/2006/11/07/divorce-costs-legal-biz-cx\\_lh\\_1107legaldivorce.html](http://www.forbes.com/2006/11/07/divorce-costs-legal-biz-cx_lh_1107legaldivorce.html) [<http://perma.cc/Q56Q-AQS>].

291. See Beverly Bird, *The Average Cost of an Uncontested Divorce*, LEGAL INFO, <http://info.legalzoom.com/average-cost-uncontested-divorce-20665.html> (last visited Feb. 26, 2016) [<http://perma.cc/H6EX-8B75>].

to their family, coworkers, and friends.<sup>292</sup> Previously partnered and never married are different things.

These practical consequences essentially require partners to engage in self-harm to avoid marrying. Combined with the fact that opt-out rules can shape individual preferences in the first instance, the option of exit from a converted marriage is illusory at best. Automatic conversions therefore pose a great threat to the autonomy promoted by the right not to marry, as well as the stability central to the right to remain married or unmarried.

## 2. Terminating Statuses

Terminating an existing status implicates the right not to marry differently than converting that status into marriage because it leaves the couple with the choice to opt into marriage. That is, the termination will leave the couple *unmarried*. How, then, can the act of terminating a status threaten the right not to marry?

Focusing first on the quality of the state action, the act of taking away a right is different than the act of offering it. When the state terminates a benefit it has provided and a couple has availed itself of, it acts directly to transport the couple from one legal category to another. In contrast, when a state provides benefits as an incentive to marry, it merely makes available to a couple the option of choosing to take advantage of that benefit. If the couple does in fact marry, the couple, not the state, moves itself to a different legal status. The state's role is more passive. This difference tracks the distinction between acts and omissions that has great salience throughout the law.<sup>293</sup> Social scientists have repeatedly demonstrated that people "often judge acts to be worse than omissions with the same consequences."<sup>294</sup> Scholars have debated the salience of the act/omission distinction at length, with some arguing persuasively that the distinction matters least when the government is the relevant actor because of the pervasive regulatory tools at the government's disposal.<sup>295</sup> Nonetheless, the distinction provides a useful shorthand here to illustrate the different, and far more assertive, character of the action taken by states in terminating statuses.

Moreover, a whole range of legal doctrines express the basic premise that state actions depriving people of legal benefits on which they have relied

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292. Glenn Cohen has argued that the process of explaining and correcting misperceptions about family status (in his case, parenthood vis-à-vis assisted reproductive technologies) can constitute an "attributional harm" that the law should recognize. I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1134–45 (2008).

293. See, e.g., Jack M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 228 (1990) (noting that the whole system of tort law distinguishes between acts and omissions where there is no duty to act).

294. Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORG. BEHAV. & HUM. DECISION PROCESSES 475, 475 (1994).

295. See Cass R. Sunstein & Adrian Vermuele, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 721 (2005). Here, for example, one cannot ignore that states have acted to create incentives to marry just as they have acted to terminate nonmarital statuses.

are suspect. Property law doctrines—from servitudes to cotenancies, trusts, and leases—provide security for expectations and protect reliance interests.<sup>296</sup> The Takings and Due Process Clauses likewise prevent legislatures from passing laws that disrupt expectations by taking property in which owners had a vested interest,<sup>297</sup> imposing unforeseen liabilities,<sup>298</sup> or changing the character of laws on which the parties relied.<sup>299</sup> These doctrines have been justified on the ground that certainty promotes the productive use of resources and that instability, by contrast, deters investment.<sup>300</sup>

It is also worth keeping in mind that whether the nonmarital status at issue merely provides access to valuable employment benefits or approximates marriage in the range of rights and responsibilities it accords, those benefits would likely be protected from arbitrary deprivation by state officials. In *Board of Regents of State Colleges v. Roth*,<sup>301</sup> the Court noted that the property interests safeguarded by the Fourteenth Amendment could take many forms, provided that the individual had “a legitimate claim of entitlement” as opposed to an “abstract need” or “unilateral expectation of it.”<sup>302</sup> Both welfare benefits and public employment are quintessential examples of protected interests if they are obtained pursuant to statutory and administrative standards that secure them.<sup>303</sup> We have here the termination of legal rights and obligations not based on the conduct or choice of the parties but merely because the government has decided to discontinue them. If the termination of rights by the executive branch of government would be sufficiently disruptive to a person’s expectations that the Due Process Clause would require “notice and an opportunity for [a] hearing appropriate to the nature of the case,”<sup>304</sup> we might be sensitive to the wholesale elimination of those statuses, even if that action is accomplished by the legislature and not the executive.

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296. See Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 452–53 (2011).

297. U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”).

298. See *E. Enters. v. Apfel*, 524 U.S. 498, 528–29 (1998) (holding that the Takings Clause was violated by legislation “impos[ing] severe retroactive liability on a limited class of parties that could not have anticipated the liability”).

299. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Prot.*, 560 U.S. 702, 713 (2010) (noting that a change in law recharacterizing private property as public would violate the Takings Clause); see also *id.* at 738 (Kennedy, J., concurring) (arguing that the Due Process Clause allows courts to make “incremental modification[s]” to state common law but not to “abandon settled principles”).

300. See Davidson, *supra* note 296, at 445–47; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1212 (1967) (discussing the utilitarianism of Jeremy Bentham).

301. 408 U.S. 564 (1972).

302. *Id.* at 576–77.

303. See *id.* at 577. In contrast, courts have rejected claims where a statute “does not contain a particularized standard, because the nature and extent of the entitlement that it allegedly creates are too indeterminate, [or] because it allows [state and] local governments extensive functional discretion regarding whether” to provide the benefit. *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010).

304. *Roth*, 408 U.S. at 570 n.7 (citations omitted).

The coercive potential of terminations is also problematic in several respects. These terminations impose time limits (weeks in the case of Arizona and over a year in the case of Washington) in which couples must exercise the choice to marry or lose their legal rights. The idea that a couple can come to a quick consensus about the decision to marry, especially in the face of a looming legal deadline, however, ignores the complicated dynamics of how couples reach the decision to marry.<sup>305</sup> Although marriage is sometimes conceptualized as an individual right,<sup>306</sup> the decision-making process is complicated by the fact that two different individuals must come to the same decision at the same time. Couples that make the decision to cohabit, for example, do not always marry; one of the reasons is that couples often disagree about the future of their relationship.<sup>307</sup> Studies have also revealed that partners often have little success in persuading reluctant parties to marry.<sup>308</sup> The decision to enter a formal nonmarital status might suggest that the couple would be more inclined to choose to marry, but individual views about the meaning of marriage—in all their idiosyncrasies—suggest that we cannot assume that one decision stands for the other.<sup>309</sup> The imposition of deadlines creates a unique set of pressures that can distort the already complicated process of deciding to marry.

Partners already receiving benefits might be more sensitive to the termination of their rights than they would be to incentives to marry. A deep body of literature on the endowment effect generally supports this assumption: “[T]he loss of utility associated with giving up a valued good is greater than the utility gain associated with receiving it.”<sup>310</sup> That is to say, people value the loss of a particular benefit more greatly than they do the gain of that same benefit.<sup>311</sup> If the theory holds true, then terminating existing benefits will influence choice more than the typical situation in which benefits are merely offered as an inducement.

Coercion is only heightened when the rights and responsibilities are the type on which people would reasonably rely. As discussed in Part II.C

305. I thank Professor Gayla Margolin for raising this point.

306. See *supra* notes 133–38 and accompanying text (emphasizing the values of autonomy and casting marriage as a personal decision).

307. See Garrison, *supra* note 242, at 851 (“Researchers have found that, 20 to 40 percent of the time, cohabitants express different views on whether they plan to marry each other.”); Sharon Sassler & James McNally, *Cohabiting Couples’ Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553, 553 (2003).

308. See Sassler & McNally, *supra* note 307, at 553.

309. See, e.g., Buckley, *supra* note 37 (interviewing committed couples that nonetheless eschewed marriage); Turnbull, *supra* note 80 (noting that some Washington couples thought that they “signed up for the minimum” when they registered as domestic partners).

310. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1041 (1991).

311. See, e.g., Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CAL. L. REV. 51, 87 (2013) (“[W]hen negotiating a contract, parties demand higher compensation in return for changing an existing desirable term to a less desirable one than they are willing to pay to change an existing term to a more desirable one.”).

above, it is unclear whether the right not to marry, as opposed to due process considerations, would protect a person's reliance on a nonmarital status.<sup>312</sup> That said, the termination of benefits on which a person has relied might coerce that person to seek those rights through marriage, impacting the decision to marry.

The Arizona domestic partner regime, for example, provided "health, dental, life disability, and vision benefits," but little else.<sup>313</sup> Even those limited benefits, however, could have a value of between one-fifth and one-third of the employee's total compensation.<sup>314</sup> Domestic partnership regimes like the one in Washington went much further, providing all of the state rights and responsibilities of marriage, covering a whole range of subjects including community property, evidentiary privileges, standing to sue for wrongful death, rights to parental status and custody over children, and much more.<sup>315</sup> The domestic partner status in Washington therefore invited couples to make even deeper legally binding commitments on multiple dimensions of their lives.

When the state of Michigan refused to recognize same-sex marriages that were validly performed during a one-day window between a district court decision and court of appeals stay, the *Caspar* court worried that

children would suddenly face the stigma that their family was no longer legally recognized. Estate plans would leave unaddressed taxable events or incidents with costly tax consequences. Carefully crafted pension arrangements would become inoperative, plunging survivors into potentially ruinous financial hardship. . . . And such disarray would come about not because of action voluntarily taken by the couple after they married, but rather due solely to a change in the solemnizing state's law.<sup>316</sup>

These consequences would unfold with greater force following the termination of many domestic partnerships, especially those lasting for years instead of days.<sup>317</sup> Domestic partners would have to transition from community property to separate property and would lose presumptions of parentage, intestate succession rights, and pension and other employment benefits. A partner who left his job to care for an adopted child could therefore lose the attribution of half his partner's income, health insurance and related benefits, the right to inherit a significant portion of the couple's accumulated property without a will, and he could even face uncertainty about his parental rights. Where the only avenue to maintain these rights is

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312. See *supra* notes 240–45 and accompanying text.

313. *Collins v. Brewer*, 727 F. Supp. 2d 797, 800 (D. Ariz. 2010) (citation omitted).

314. *Id.*

315. See *supra* note 73; WASH. REV. CODE § 26.60.010 (2014).

316. *Caspar v. Snyder*, 77 F. Supp. 3d 616, 628 (E.D. Mich. 2015).

317. As discussed *supra* Part I.B.2, Washington phased out its domestic partnerships for individuals under sixty-two years old in two steps: notifying existing partners that the status will be eliminated and automatically converting all partnerships that had not been formally dissolved by a specific date. The legal analysis here focuses on the somewhat counterfactual question whether Washington could have terminated domestic partnerships without converting the remaining partnerships (just the first step).

to marry, it is difficult to imagine how the termination of these rights would not burden that choice.

The *Califano* and *Zablocki* cases discussed above distinguished between the act of offering legal benefits to married couples, which would not impermissibly influence the choice to marry, and imposing requirements that might be onerous or impossible to satisfy, which would significantly burden the choice.<sup>318</sup> Terminations clearly fall in the gray area between those two poles. All terminations involve a greater degree of coercive state action than incentives because they change the status quo. They also exert greater pressure on individual choice, threatening the value of self-definition and autonomy: at a certain point, the rights and responsibilities couples enjoyed become so pervasive that the decision to go without those rights would extract too high a cost.<sup>319</sup>

### 3. The Spectrum Revisited

The right not to marry advances individual autonomy but it also accommodates some promotion of marriage. Conversions constitute recognizable infringements of the right not to marry because they cross the line from promoting to imposing marriage. This is true both in terms of the nature of the state's actions and the impact of those actions on freedom of choice. Conversions approach categorical restrictions on the right not to marry—marrying people by operation of law.

Terminations, while less categorical, are nonetheless more coercive than mere incentives. The degree to which people in nonmarital statuses might have organized their lives around those rights and responsibilities only heightens the coerciveness of the state actions. The level of coerciveness, in turn, threatens the value of autonomy. It also imperils the value of stability that the Court has found to promote the development and maintenance of one's sense of self.<sup>320</sup> Where the rights associated with a nonmarital status approach the rights granted to married couples, and the circumstances surrounding the termination of the status exacerbate rather than mitigate the impact of the transition, the act of terminating a status can also raise constitutional concerns.

This view of the right not to marry does not threaten the state's interest in promoting marriage. If anything, cases establishing the right to marry have increasingly recognized that an objective of state intervention is to enable

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318. See *supra* note 259 and accompanying text.

319. The Court has recognized that even incentives can become so great that they transform into coercion. In *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), for example, the Court struck down the portion of the Affordable Care Act that would withhold states' Medicaid grants entirely if those states did not accept the Act's new expanded funding requirements. *Id.* at 2601. In doing so, the Court reasoned that "Congress may use its spending power to create incentives for States to act in accordance with federal policies[.]" but that "pressure [could] turn[] into compulsion" if those incentives were too great. *Id.* at 2602 (citation omitted). I thank Professor William Baude for bringing this parallel to my attention.

320. See *supra* Part II.B.2.

greater individual freedom.<sup>321</sup> In analyzing the limits of federal coercion of state governments through the federal spending power, the Court observed that our federalism “rests on what might at first seem a counter-intuitive insight, that freedom is enhanced by the creation of two governments, not one.”<sup>322</sup> In this context, that concept suggests that the state has an interest not only in serving its own ends, but also in preserving a realm of privacy for its citizens.<sup>323</sup> The legitimacy of the system of privatized dependency hinges in part on the voluntary aspect of marriage. Privatized support would not be accepted if the social meaning of marriage were based solely on government compulsion rather than love and altruism.<sup>324</sup> Likewise, the moral basis for marriage would be eroded if it were less of an altruistic, individual commitment.<sup>325</sup> This too should counsel against an expansive understanding of the state’s interest in encouraging marriage. When encouragement becomes compulsion, the state strikes the balance too far in favor of promotion and begins to undermine its own goals.

CONCLUSION:  
BEYOND CONVERSIONS AND TERMINATIONS

This Article concludes that the Fourteenth Amendment recognizes a right not to marry and that conversions and terminations of nonmarital statuses can infringe that right. In doing so, it lays a foundation for analyzing other state actions that arguably infringe a right not to marry. As this Article has argued, the most proximate concern, following on the heels of marriage equality, is the termination or conversion of nonmarital statuses. But it is not difficult to foresee other future applications.

*Marriage As an Alternative to Prosecution or Punishment*

In August 2015, a Texas judge ordered Josten Bundy, who faced charges for assaulting his girlfriend’s ex-boyfriend, to marry his girlfriend within thirty days as a condition of probation.<sup>326</sup> The judge offered Bundy an

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321. See *supra* notes 220–23 and accompanying text.

322. *Sebelius*, 132 S. Ct. at 2602 (citations omitted).

323. Cf. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1238 (2010) (contending that the family can promote freedom as an alternate source of authority).

324. Cf. TOM W. SMITH, NAT’L OPINION RESEARCH CTR., ALTRUISM AND EMPATHY IN AMERICA: TRENDS AND CORRELATES 12 (2006), <http://www-news.uchicago.edu/releases/06/060209.altruism.pdf> (finding that altruistic love is correlated with marital happiness) [<https://perma.cc/3SNM-M99G>].

325. I do not mean to imply that altruism is the exclusive, or highest, value that relationships should promote. The rhetoric of altruism has justified a “separate spheres” model of the family and market that has typically devalued wives’ contributions to the family. See Matsumura, *supra* note 209, at 179–80; Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2181–206 (1994). But there is a difference between the rhetoric of altruism, used to perpetuate hierarchies, and the lived experience of altruism, some amount of which is necessary for relationships to function.

326. Samantha Allen, *Texas Judge Orders Man to Get Married and Read the Bible*, DAILY BEAST (Aug. 13, 2015), <http://www.thedailybeast.com/articles/2015/08/13/texas-judge-orders-man-to-get-married-and-read-the-bible.html> [<https://perma.cc/883B-H3CZ>].

alternative fifteen-day sentence which Bundy declined for fear of losing his job, even though he would otherwise have preferred jail time to marriage.<sup>327</sup> This contemporary example brings to mind the historical practice of presenting marriage as a bar to prosecution for crimes like seduction<sup>328</sup> or rape.<sup>329</sup> Just as in those historical contexts, Bundy faced the choice of incarceration or marriage. The existence of a right not to marry would suggest that such a condition is likely unconstitutional.<sup>330</sup>

*Common Law Marriage Conscriptio*

Thomas Green, an avowed polygamist, participated in marriage-like relationships with nine different women, ultimately settling with five of the women and their twenty-five children in Juab County, Utah, where they set up a mobile home community.<sup>331</sup> Although some of his marriages were licensed, he always divorced one wife before marrying another, even though he continued to live with his previous spouses.<sup>332</sup> State prosecutors charged Green with bigamy, which criminalizes cohabitation with someone other than the defendant's spouse.<sup>333</sup> At the time, however, Green was not formally married to any of his wives. The prosecutors therefore filed a motion prior to the preliminary hearing on the charges seeking a court order deeming Green married to Linda Kunz under a state statute codifying common law marriage principles.<sup>334</sup> The court issued an order finding that Green and Kunz were married, and Green was ultimately convicted on several counts of bigamy.<sup>335</sup>

The *Green* case is just one dramatic example of the conscriptive effect of common law marriage.<sup>336</sup> Although Green considered himself married to Kunz under his personal definition of marriage, neither he nor Kunz considered themselves legally married.<sup>337</sup> Common law marriage raises

327. *See id.*

328. *See Murray, supra* note 116, at 21–23.

329. *See, e.g., Jourdan v. Jourdan*, 179 So. 268 (Miss. 1938) (noting that the husband claimed that he was married in order to avoid being charged with the statutory rape of his common law wife).

330. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

331. *State v. Green*, 99 P.3d 820, 822 (Utah 2004).

332. *Id.*

333. *See* UTAH CODE § 76-7-101 (1997).

334. *See Green*, 99 P.3d at 823. The statute, Utah Code section 30-1-4.5, authorizes courts to issue an order deeming a man and woman married if they

(a) are of legal age and capable of giving consent; (b) are legally capable of entering a solemnized marriage under the provisions of this chapter; (c) have cohabited; (d) mutually assume marital rights, duties, and obligations; and (e) . . . hold themselves out as . . . husband and wife.

UTAH CODE § 30-1-4.5 (2011).

335. *Green*, 99 P.3d at 823.

336. For recent examples of cases in which the trial court concluded that a couple was married over the opposition of the common law husband, see *Callen v. Callen*, 620 S.E.2d 59 (S.C. 2005), and *Clark v. Clark*, 27 P.3d 538 (Utah 2001).

337. *See* Ryan D. Tenney, Note, *Tom Green, Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 BYU J. PUB. L. 141, 145 (2002).

complicated questions about what it means to choose to marry that are beyond the scope of this Article, but the imposition of marriage over the objections of both potential spouses raises serious concerns about the limits of a state's power to label people as married over their express statements to the contrary.

*The Right to Divorce*

Divorce did not exist at common law and has been characterized as a legislative entitlement rather than a protected right.<sup>338</sup> Nonetheless, in *Boddie v. Connecticut*,<sup>339</sup> the Supreme Court held, as a matter of procedural due process, that a state could not deny divorces to those who could not afford to pay for them.<sup>340</sup> The Court reasoned that because marriage imposes significant legal obligations on the spouses, including criminal restrictions on bigamy (which could practically result if a person wanted to remarry but could not get a divorce), lack of access to the judicial process based on the inability to pay would deprive parties of the “only available” “dispute-settlement technique” without due process of law.<sup>341</sup> The Court did not need to go so far as to hold that divorce itself is a fundamental right; it was already available in the state for a cost. Moreover, the Court suggested that its solicitude for divorce was grounded in concerns about the right to remarry, not the ability of people to end their relationships at will.<sup>342</sup> Not all divorces result in remarriage, however. Grounding divorce in the self-definitional aspects of the right not to marry would better explain the importance of divorce in contemporary family life.

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The existence and scope of a right not to marry is central to the ongoing discussion of the extent to which both states and society at large should promote marriage over other forms of intimate relationships. A sharper understanding of the relevant constitutional values can play a valuable role in informing those debates.

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338. *Boddie v. Connecticut*, 401 U.S. 371, 389 (1971) (Black, J., dissenting); *see also* *McGee v. McGee*, 998 N.E.2d 270, 271 (Ind. Ct. App. 2013) (“The right to dissolve a marriage is not a common law right; rather, it is a purely statutory right.”).

339. 401 U.S. 371 (1971).

340. *Id.* at 374.

341. *Id.* at 376–77.

342. *See id.* at 376; *see also* Nussbaum, *supra* note 118, at 687 (concluding that the Court has moved in the direction of recognizing that “the denial of divorce, or excessively burdensome restrictions on divorce, could also come under constitutional scrutiny”); Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RES. L. REV. 447, 472–75 (2011) (arguing that “[t]he right to marry includes the right to remarry, and that right depends on the ability to divorce,” and suggesting that divorce falls within the “domain of liberty” protected by the Due Process Clause).