

# Washington University Journal of Law & Policy

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Volume 24 *Following Marriage*

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January 2007

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### Recommended Citation

Anita Bernstein, *Subverting the Marriage-Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J. L. & POL'Y 079 (2007), [http://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol24/iss1/6](http://openscholarship.wustl.edu/law_journal_law_policy/vol24/iss1/6)

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# Subverting the Marriage-Amendment Crusade with Law and Policy Reform

Anita Bernstein\*

## INTRODUCTION

Two judicial decisions of the mid-1990s that extended civil rights to gay people—the Supreme Court’s *Romer v. Evans*<sup>1</sup> in 1996, and *Baehr v. Lewin*<sup>2</sup> from the Hawaii Supreme Court three years earlier—appear in hindsight to have provoked a panic that took the shape of a “defense of marriage” campaign. In a 1996 statute Congress wrote a federal definition of marriage that insisted on the presence of one man and one woman in this legal category.<sup>3</sup> Further wandering into what had once been states’ business, this statute, the Defense of Marriage Act (“DOMA”)<sup>4</sup>, also declared that no state could be compelled to recognize marriages where both persons in the couple are of the same sex.<sup>5</sup> Over the next decade a large majority of states enacted their own “defense of marriage” laws.<sup>6</sup>

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1. 517 U.S. 620 (1996).

2. 852 P.2d 44 (Haw. 1993).

3. 1 U.S.C. § 7 (2000).

4. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in scattered sections of 1 and 28 U.S.C.). Before the Defense of Marriage Act (“DOMA”), states had, as they still have, varying criteria for entry into marriage. For example, at present the states divide about equally on the question of whether first cousins may marry. See Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 443 n.42 (2005). When a particular woman and man married in a state that permitted their union and then moved to a state that deemed them disabled from marrying each other, courts in the more restrictive state would frequently choose to tolerate the deviation and recognize the marriage. See *id.* at 434–47.

5. On *Baehr* as a provocation that led to DOMA, see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1,

Of this large majority, several states furthered the defense of marriage campaign effort by repeating their bans on same-sex marriage in their hardest-to-change law books, their constitutions.<sup>7</sup> States without such a ban in their constitutions are now in the minority. These state-level amendments are not only part of a national campaign by activists to add an anti-marriage amendment to the United States Constitution,<sup>8</sup> but also ends in themselves, forcing thousands of couples to live outside of family law as if they were legal strangers.

Working against this anti-marriage campaign, activists favoring access to marriage have struggled. Their resistance to defense-of-marriage legislative proposals and ballot initiatives lacks inherently the rhetorical flourishes that their adversaries enjoy (such as “family values” and appeals to religious faith) and so, typically unable to give the electorate a compelling enough reason for a “no” vote, they tend to lose at the polls. At the federal level, proponents of same-sex marriage fare better: they can depict their anti-amendment argument as one for states’ rights, federalist laboratories, and limited national government.<sup>9</sup> This strength evaporates when an individual state puts

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170 (1999). On *Romer* as provocation, see Nancy J. Knauer, *Lawrence v. Texas: When “Profound and Deep Convictions” Collide with Liberty Interests*, 10 *CARDOZO WOMEN’S L.J.* 325, 334 (2004) (“Although I do not mean to be an alarmist, it should escape no one’s attention that DOMA was enacted in the months following *Romer*, which, at the time, was a gay rights victory of unprecedented magnitude.”).

6. HUMAN RIGHTS CAMPAIGN, EQUALITY IN THE STATES: GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LAWS AND LEGISLATION IN 2004, at 39 (2004), available at [http://www.hrc.org/Content/ContentGroups/News\\_Releases/20042/leg\\_report\\_032004.pdf](http://www.hrc.org/Content/ContentGroups/News_Releases/20042/leg_report_032004.pdf) (offering interactive map of “Statewide Discriminatory Marriage Laws”).

7. *Id.*

8. Because “anti-same-sex-marriage” as a compound adjective is too cumbersome, this Article occasionally, and deliberately, says “anti-marriage.” Aware that opponents of same-sex marriage would prefer to be called something other than anti-marriage, I cannot think of a better terse label, and straining not to offend these people seems beside the point. See *infra* note 22 and accompanying text (acknowledging an agenda). Using “anti-marriage” as short for anti-same-sex-marriage seems to me no worse than using “defense of marriage” as short for denying gay men and lesbians the freedom to marry. The phrase “defense of marriage” perceives an attack on an institution that springs from homosexual interests—an attack that same-sex marriage activists consistently say no one is making—and takes a tendentious position on who exactly is the aggressor in this conflict.

9. For a gathering of these arguments, see Human Rights Campaign, Conservative and GOP Quotes on Constitutional Amendment, [http://www.hrc.org/Content/NavigationMenu/HRC/Get\\_Informed/Federal\\_Legislation/Index.htm](http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Federal_Legislation/Index.htm) (search “Conservative and GOP Quotes”; follow “Conservative and GOP Quotes on Constitutional Amendment” hyperlink) (last visited

an initiative on its ballot. Almost every statewide ballot measure purporting to limit marriage to a man and a woman has passed by a solid majority;<sup>10</sup> the 2006 defeat of an Arizona initiative is the lone exception.<sup>11</sup> Until marriage advocates come up with improved oppositional strategies, or somehow achieve better results with their old unavailing tactics, the defense-of-marriage campaign remains positioned to continue its winning record at the state level. Congress stands in the way of a federal amendment, but the state-level success of the campaign brings the United States closer to a change in its own Constitution.

Improved oppositional strategies will require more than recourse to the courts. In addition to serving unintentionally as firebrands, *Romer* and *Baehr* as now received also suggest that judges cannot rescue same-sex marriage from the amendment crusade that has mobilized against it.<sup>12</sup> The cases appear not to have delivered an equal protection lesson to other courts in the form of precedent. *Goodridge v. Department of Public Health*,<sup>13</sup> which found a right to same-sex marriage in the Massachusetts constitution, did not rely on *Romer* or *Baehr*, and indeed barely cited them.<sup>14</sup> In *Citizens for Equal Protection v. Bruning*<sup>15</sup> the Eighth Circuit, approving a

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Apr. 9, 2007). This limited-government posture worked well for Dick Cheney as vice president under a president who supported amending the United States Constitution to deny marriage to same-sex couples. *See id.*

10. National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, <http://www.ncsl.org/programs/cyf/samesex.htm> (reporting on the tendency of ballot initiatives to prevail by an “overwhelming majority”).

11. One journalist who analyzed the Arizona anomaly soon after early results came in argued that it is no harbinger of an end to homophobic voting around the nation; instead, the amendment went too far for this electorate by appearing to ban civil unions and domestic partnerships, a source of health insurance for many voters in the state. “The next proposition will be shorter and leave no room for interpretation. And it will pass easily.” Judd Slivka, *Am I Blue? Arizona’s Flirtation with Becoming a Blue State*, SLATE, Nov. 9, 2006, <http://www.slate.com/id/2153382>.

12. Chris Crain, *Why We’re Losing Gay Marriage Cases*, N.Y. BLADE, July 31, 2006, <http://www.newyorkblade.com/2006/7-31/viewpoint/editorials/crain.cfm> (arguing that the judiciary is a weak source of support for the same-sex marriage endeavor because judges fear the electorate and, in particular, the prospect of constitutional amendments).

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

14. A couple of citations are sprinkled through the majority opinion, the concurrence, and the dissent; none of them say much, and none of the judicial authors discuss either case in detail.

15. 455 F.3d 859 (8th Cir. 2006).

strongly worded Nebraska ban of same-sex marriage that also proscribed civil unions and domestic partnerships, distinguished *Romer* to hold that the Nebraska measure did not deprive lesbians and gay men of their right to participate in political deliberation because “there is no fundamental right to be free of [this] political barrier.”<sup>16</sup>

In one month, July of 2006, several instances of new decisional law displayed the courts as a weak source of newly recognized same-sex marriage rights. The highest court of New York—a state much more liberal and accepting of same-sex marriage than most, and a locus of hope for activists—rejected the *Goodridge* path on July 6, ruling that marriage could be withheld from same-sex applicants.<sup>17</sup> Also on July 6, the Georgia Supreme Court unanimously reversed a trial-court decision that had thrown out, on procedural grounds, a constitutional amendment approved by voters, removing the last obstacle to an anti-marriage amendment in Georgia.<sup>18</sup> On the tenth of the month, the Supreme Judicial Court of Massachusetts ruled that opponents of same-sex marriage could present to voters a measure rescinding *Goodridge* and banning same-sex marriage.<sup>19</sup> On July 14, the Tennessee Supreme Court rejected a challenge to yet another state ban.<sup>20</sup> The doctrines invoked in this July 2006 anti-marriage decisional law varied—federal constitutional law in Nebraska, state constitutional law in New York, standing in Tennessee, a state-based technicality sometimes called “the single subject rule” in Georgia—but the results appear uniform. Many gay-marriage activists, seeing themselves as civil rights pioneers, still continue to draw inspiration from the fight against de jure racial segregation; but to date their cause has not generated a counterpart to *Brown v. Board of Education*.<sup>21</sup> Meanwhile, the anti-marriage constitutional amendments accrete, undaunted by judicial intervention.

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16. *Id.* at 868.

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

18. *See Perdue v. O’Kelley*, 632 S.E.2d 110 (Ga. 2006).

19. *See Schulman v. Attorney Gen.*, 850 N.E.2d 505 (Mass. 2006). The effort went on to fail, however, when the Massachusetts legislature rejected the proposed ban. Pam Belluck, *Massachusetts Gay Marriage Referendum Is Rejected*, N.Y. TIMES, June 15, 2007, at A16.

20. *See ACLU v. Darnell*, 195 S.W.3d 612 (Tenn. 2006).

21. 347 U.S. 483 (1954).

Eschewing academic neutrality on the issue,<sup>22</sup> this Article endorses policy reform as a strategy to oppose the marriage-amendment crusade. Although partisans have been heartened by successes like the June 2006 vote in the Senate to reject the Federal Marriage Amendment<sup>23</sup> and the slow deflating of anti-marriage energies since their 2004 high point,<sup>24</sup> they have not manifested enough thought about a winning path. For the cohort who seek a marriage policy that does not take away civil rights from same-sex couples, the strategy of celebrating narrow votes like the Senate cloture count just mentioned,<sup>25</sup> hoping that one's fellow voters will find other issues to worry about, and putting faith in the difficulty of amending the federal Constitution adds up to inadequate coping and resistance.<sup>26</sup> Subverting the marriage-amendment crusade calls for ideas.

One vital source of policy-innovation ideas is a report by the Canadian Ministry of Justice titled *Beyond Conjuality*.<sup>27</sup> This report starts with a premise that conjuality (meaning the romance-paired dyad), like intimacy generally, should be seen as a private relation—none of your business, nor mine—unless it has public consequences. A heeding government might try harder to stay out of the consensual sexual lives of adult citizens while retaining concern with social welfare. As an approach to family law, “beyond conjuality” permits persons to declare themselves officially committed to each other, and

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22. Other academics who, like me, do not wish to marry a person of the same sex have also eschewed neutrality on sexual-orientation civil rights. See, e.g., Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149 (2000).

23. See Erin P. Billings, *Rapid Denouement Expected on Stem-Cell Bill*, ROLL CALL, July 18, 2006.

24. Kirk Johnson, *Gay Marriage Losing Punch as Ballot Issue*, N.Y. TIMES, Oct. 14, 2006, at A1.

25. The vote was forty-nine to forty-eight. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 179 (3d ed. 2006) (summarizing federal Marriage Amendment developments from 2004 to 2006).

26. Immediately after the 2006 result in the United States Senate, one opponent of same-sex marriage made this point. See M.D. Harmon, *Sooner or Later a Federal Anti-Marriage Amendment Will Pass*, PORTLAND PRESS HERALD, June 9, 2006, at A11.

27. CANADIAN MINISTRY OF JUSTICE, LAW COMM'N OF CAN., *BEYOND CONJUALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001) [hereinafter *BEYOND CONJUALITY*].

sometimes to have this commitment ascribed to them, without any suggestion that they share a physically intimate relationship.<sup>28</sup> *Beyond Conjugal*, published in 2001, recommended that the government instead regulate relations among persons with reference to human needs and functions, chief among them dependency and caregiving.<sup>29</sup>

The state of Hawaii implemented a beyond-conjugal policy in 1997 when it created “reciprocal beneficiaries,”<sup>30</sup> and since then other governments and private actors have been recognizing family-like affiliations between adults without insisting on a conjugal dyad. Meanwhile, American adults spend more years of their lives unmarried than they did in the past, and younger people report to surveyors a dwindling interest in pursuing marriage. Because individuals are growing less committed to conjugal as a source of entitlements and privileges in their lives—even while conjugal remains central to the legal category of “marriage”—the expansions of civil rights and liberties away from the sexual dyad are at least as crucial as high-stakes fights in the statehouses to subvert the marriage-amendment crusade. A beyond-conjugal approach to social welfare would continue this development.

In commending “beyond conjugal,” however, I do not thereby commend all of *Beyond Conjugal*, and also may not be ready to sign *Beyond Same-Sex Marriage*,<sup>31</sup> the manifesto issued also in the fateful month of July 2006 that urged “the idea that marriage should be one of many avenues through which households, families, partners, and kinship relationships can gain access to the support of a caring civil society.”<sup>32</sup> The principle behind these two documents is impeccable. The imperative that marriage, like religion in the liberal state, must “be ‘disestablished,’” which is to say that the state should not be permitted to use marriage “as an avenue for accomplishing

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28. *Id.* at 117

29. *Id.* at 120. For elaboration on the thesis, see Brenda Cossman & Bruce Ryder, *What Is Marriage-Like Like? The Irrelevance of Conjugal*, 18 CAN. J. FAM. L. 269, 272–75 (2001).

30. 1997 Haw. Sess. Laws 383 (codified at HAW. REV. STAT. ANN. § 572C).

31. See BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES AND RELATIONSHIPS (2006), available at <http://www.beyondmarriage.org/BeyondMarriage.pdf>.

32. *Id.* at 4.

otherwise legitimate political welfare goals,” suggests a boon to freedom from “beyond conjugality” that connects closely to foundational texts about political liberty.<sup>33</sup> My disagreement here is over tactics rather than ends. The Canadian national government shelved *Beyond Conjugality*,<sup>34</sup> and to the extent that *Beyond Same-Sex Marriage* announces a strategy for overt action, it too appears likely to fail.

Instead this Article endorses diffusion, the path of a peaceful guerrilla movement, in the struggle against the placement of marriage bans into state constitutions. The guerrilla movement commended here hurts no one while doing subversion work more effectively than does the unity-and-clarity approach that the non-guerrilla same-sex marriage movement seems to prefer. Among single-subject slogan messages sent to nonpartisans in the United States, “family values” or “traditional marriage” seems to beat what the progressive side thinks is its goal: “civil rights,” “marriage equality.” For activists, coming together to write enlightened marriage policy reform and announce an agenda on websites wins publicity and builds camaraderie, but also forms a target for focused conservative reaction, not to say homophobic rage. As an alternative—or at least a supplement—to this common cause, marriage activists should scatter into different corners of law and policy to make marital status of less law-based consequence for individuals.<sup>35</sup>

Part I of this Article states the task by reviewing the battleground: a nation with a large number of anti-marriage state constitutional amendments and ongoing efforts to enact more of them. Part II details an oppositional strategy. Afflicted with the sunny-side

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33. E-mail from Tamara Metz, Assistant Professor of Political Science and Humanities, Reed College, to Anita Bernstein, Wallace Stevens Professor of Law, New York Law School (Aug. 29, 2006, 15:16 EST) (on file with author).

34. Department of Justice Canada, Marriage and Legal Recognition of Same-Sex Unions, <http://www.justice.gc.ca/en/dept/pub/mar/2.html#> (last visited Apr. 9, 2007) (noting that “Beyond Conjugality” was “tabled in Parliament in 2002”).

35. One cultural critic has questioned the fight for same-sex marriage with reference to this priority: “rather than marriage as prerequisite to access government privileges,” she asks, “shouldn’t the fight be to uncouple resource distribution from marital status?” LAURA KIPNIS, *AGAINST LOVE: A POLEMIC* 169 (2003). It should indeed. But activists have to fight this fight with care, and work for particular reforms that would treat married people like their unmarried counterparts and unmarried people like the married. A comprehensive banner—“Uncouple Resource Distribution from Marital Status” writ large—is less likely to fly.



optimism that law reformers tend to harbor, this Part focuses on constructive changes that have already taken shape. The struggle against marriage-denying legislation and constitutional changes will look falsely bleak if all one contemplates is a map of the fifty states with only five rendered in a contrasting color for having staved off the blight of DOMA. According to Part II's cheerful map, even crimson Utah has taken some steps in a good direction. Developments outside the United States are especially heartening to this cause, but the Article remains inside the national border in order to better address American reformers—except for its attention to one Canadian contribution, *Beyond Conjugality*.

#### I. BATTLE LINES: CURRENT STATE LEGISLATION AND CONSTITUTIONAL AMENDMENTS

On the first Wednesday of June 2006, the United States Senate decisively rejected<sup>36</sup> the Federal Marriage Amendment,<sup>37</sup> introduced in the United States House of Representatives in May 2003 and revised slightly in 2004. The Federal Marriage Amendment laid down a gauntlet:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.<sup>38</sup>

Several observers enjoyed the result.<sup>39</sup> But roll back the calendar just a day, to the first Tuesday in June of the same year: the voters of one state, just about as resoundingly, approved their own similar

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36. Bennett Roth, *Gay Marriage Amendment Falls Short Again in Senate*, HOUSTON CHRON., June 8, 2006, at A3.

37. H.R.J. Res. 56, 108th Cong. (2003).

38. *Id.* § 1.

39. See, e.g., Macarena Hernández, *Give Gay Marriage Ban a Rest, GOP*, DALLAS MORNING NEWS, June 9, 2006, at A21 (describing the outcome as a “really pathetic” defeat for President Bush); Press Release, Nat’l Org. for Women, NOW Encouraged by Senate Defeat of Discriminatory Marriage Amendment (June 8, 2006), available at <http://www.now.org/press/06-06/06-08.html>.

constitutional amendment.<sup>40</sup> The results in the Senate and in Alabama are not nearly of equal magnitude, of course. Even if every state changed its constitution to deny this kind of marriage, the decision by Congress to reject the plan would keep an amendment from the United States Constitution, a document of greater importance than all the states' constitutions heaped together.

Yet dozens of anti-marriage constitutional amendment results like Alabama's are noteworthy nevertheless. When this Article was going to press, the laws of all but five of the nation's states—Massachusetts, New Jersey, New Mexico, New York, and Rhode Island—expressly limited marriage to a man and a woman.<sup>41</sup> With the exception of Massachusetts, marriage licenses are not available to same-sex couples in any U.S. jurisdiction.<sup>42</sup> Most of these same-sex restrictions on marriage were codified during the DOMA era, but a handful of states had expressly prohibited marriage between a man and a man and a woman and a woman before the passage of DOMA.<sup>43</sup> One newcomer to the defense-of-marriage list, Connecticut, joined the majority in 2005 while providing for same-sex civil unions<sup>44</sup>; the civil unions bill also included a DOMA amendment, ending Connecticut's long resistance to the marriage-restricting trend.<sup>45</sup>

Provisions against same-sex marriage vary. Some states use standard post-1996 defensive-of-marriage language, declaring this legal category to be a unique relationship between a man and a woman, asserting a state interest in gender dimorphism, and refusing to recognize same-sex marriages solemnized or licensed in another jurisdiction.<sup>46</sup> Indiana uses terser language: "Only a female may marry a male. Only a male may marry a female. . . . A marriage between persons of the same gender is void in Indiana even if the

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40. Jill Zuckman, *Same-Sex Marriage Ban Fails in Senate*, CHI. TRIB., June 8, 2006, at 1 (reporting Alabama outcome).

41. See National Conference of State Legislatures, *supra* note 10.

42. Belluck, *supra* note 19.

43. See MD. CODE ANN., Family Law § 2-201 (West 2004); N.H. REV. STAT. ANN. § 457:1 (2004); WYO. STAT. ANN. § 20-1-101 (2005).

44. See CONN. GEN. STAT. ANN. §§ 46b-38aa, 38bb (West 2004).

45. William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005, at B1.

46. See, e.g., GA. CODE ANN. § 19-3-3.1 (2004); MO. REV. STAT. § 451.022 (2000).

marriage is lawful in the place where it is solemnized.”<sup>47</sup> Some states include the condition of being the same sex as one’s prospective spouse, listed next to being the ancestor or the sibling of the prospective spouse, as among the disabilities that prevent marriage.<sup>48</sup>

As has been noted, the majority of American state constitutions declare marriage available only to a man and a woman: voters in Alabama, Alaska, Arkansas, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, and Washington have added provisions in their constitutions that follow much of the language of the Federal Marriage Amendment.<sup>49</sup> Of this majority, approximately sixteen state constitutions contain an additional proscription: they now prohibit state and local governments from establishing civil unions or partnership benefits that resemble marriage for any relationship other than between a man and a woman.<sup>50</sup>

Almost every time an American state electorate has faced a ballot initiative or referendum proposing a yes or no vote on whether a state should limit marriage to a man and a woman, it has turned in a resounding majority: Voters say “Yes.”<sup>51</sup> Poll data diverge from this solidity, indicating that Americans are not opposed to same-sex

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47. IND. CODE ANN. § 31-11-1(a),(b) (West 2006).

48. See, e.g., DEL. CODE ANN. tit. 13, § 101(a) (1999); MONT. CODE ANN. § 40-1-401(1)(d) (2006).

49. ALA. CONST. amend. 774; ALASKA CONST. art. I, § 25; ARK. CONST. amend. 83; COLO. CONST. § 31; GA. CONST. art. I, § IV; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; LA. CONST. art. XII, § 15; KY. CONST. § 233A; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. VIII; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XVI, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29.

50. Estimates are inexact. For one made after the November 2006 election, see HUMAN RIGHTS CAMPAIGN, STATE PROHIBITIONS ON MARRIAGE FOR SAME-SEX COUPLE [sic] (2006), available at <http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=28225&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (counting Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virginia, and Washington as containing constitutional language “that does, or may, affect other legal relationships, such as civil unions or domestic partnerships”).

51. See *supra* note 6 and accompanying text.

marriage in the same resounding numbers.<sup>52</sup> Defense-of-marriage ballot initiatives thus appear to draw enemies of same-sex marriage disproportionately to the polls.<sup>53</sup> Supporters of same-sex marriage may be able to reverse this turnout pattern in future contests. To date, however, those who would condemn same-sex marriage in state constitutions have enjoyed unvarying victory in all state-level referenda but one.

It is easy, of course, to shrug off benighted state constitutions. Before they lowered themselves into amendments declaring rules about conjugal relationships that formed inside the state or outside its boundaries, they were infamous for trivia.<sup>54</sup> These little documents inspire none of the reverence in which the United States Constitution has been wretched for centuries.

Though puny in isolation, however, state constitutions gain potency wherever they join together to say the same thing. Provisions absent in national-level law but found in the majority of state constitutions—such as municipal home rule,<sup>55</sup> hymns to “open courts,”<sup>56</sup> free speech rights that are more expansive than what the

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52. “Depends on how you ask,” said ABC News, describing its survey of 1,036 American adults in January 2004 compared with the results of earlier surveys. See David Morris & Gary Langer, *Same-Sex Marriage: Most Oppose It, but Balk at Amending Constitution*, ABCNEWS.COM, Jan. 21, 2004, [http://www.abcnews.go.com/sections/us/Relationships/same\\_sex\\_marriage\\_poll\\_040121.html](http://www.abcnews.go.com/sections/us/Relationships/same_sex_marriage_poll_040121.html). ABC News concluded that approximately 55% of Americans appear to oppose same-sex marriage. *Id.* A 2006 survey found that a majority (54%) of Americans favor civil unions. Peter Steinfels, *The Combat of America’s “Culture Wars” Takes Place Within Political Parties Instead of Between Them*, N.Y. TIMES, Aug. 5, 2006, at A11.

53. Peter J. Wallison, *A Republican Country*, AM. SPECTATOR, Oct. 2005, at 18–23, available at [http://www.aei.org/publications/filter.foreign.pubID.23301/pub\\_detail.asp](http://www.aei.org/publications/filter.foreign.pubID.23301/pub_detail.asp) (expressing uncertainty on whether this factor tilted the 2004 presidential election, but noting that constitutional amendment proposals “brought to the polls large numbers of fundamentalist Christians and evangelicals who voted for President Bush and might otherwise have stayed home”).

54. James Gardner has pressed this point extensively. See, e.g., James A. Gardner, *Reply: What Is a State Constitution?*, 24 RUTGERS L.J. 1025, 1027 (1993); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

55. See Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL’Y 391, 392 (2004) (explaining the “municipal home rule” that “allows local governments to enact ordinances ‘without [specific] statutory authority’ from the state”) (alteration in original).

56. See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment*, 60 OHIO ST. L.J. 557, 560–61 n.12 (1999).

First Amendment provides,<sup>57</sup> and limits on how much debt a state can take on<sup>58</sup>—enjoy hefty authority.<sup>59</sup> This “motherhood” aura around precepts expressed in state constitutions may stem from a real consensus that underlies them, rather than any particular imprint attributable to constitutionalization. Alternatively, the provisions’ presence in constitutions might also increase, not just bespeak, their base of public support.

Even if the widespread constitutionalization of antipathy to same-sex marriage does not worsen tangibly the hardships of life for anyone, or make a federal amendment more likely, supporters of same-sex marriage ought to care about the civic lives of persons whose home-state constitutions denigrate same-sex relationships. These supporters should try to subvert through lawful means any state law—especially a constitutional provision—that demotes lesbian and gay male citizens to a second-class tier when they form couples. Anyone concerned about civil rights ought to resist the de jure oppression of a minority whose existence threatens no one and that has long suffered from invidious discrimination.

## II. A DIFFERENT OPPOSITIONAL STRATEGY

Experiences from marriage-policy reform in the United States (with a little help from Canada) form a new pattern against the endeavor to ban same-sex marriage in the United States. The first section in this Part dusts off the 2001 *Beyond Conjuality* report of the Ministry of Justice in Canada. Because the Canadian government

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57. See Evan G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1396 (1990).

58. See Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911–12 (2003).

59. When they can, commentators advocating for a particular shift in national policy invoke the embrace of their chosen position in a large number of state constitutions. See, e.g., Mark Neil Aaronson, *Ideas Matter: A Review of John Denvir’s Democracy’s Constitution*, 36 U.S.F. L. REV. 937, 966 (2002) (finding support for increased social rights in a provision, located in two-thirds of the state constitutions, that endorses the pursuit of happiness); William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 439 (1997) (using widespread state constitutionalization to support increased environmental protection).

never acted overtly to implement its recommendations, *Beyond Conjugality* may seem inert. It is no such thing, but it needs to be reread. The second section looks at the most explicit example of legal reform in the United States that effects the recommendations of this Article: the reciprocal beneficiaries provision of Hawaii and its sequellae, a handful of near-imitators. Hawaii's creation of a new status refutes any misgiving an activist might have about the impossibility of obtaining meaningful beyond-conjugality reform at the state level.

The third section of this Part builds on the first two. *Beyond Conjugality* gives a blueprint; new legal labels show the possibility of congenial state legislation. The next question for opponents of an anti-marriage amendment becomes "What is possible?" Accordingly, I survey various statutes and other legal developments, most of them relatively recent, that help to subvert the marriage-amendment crusade with policy reform. Like Molière's bourgeois gentleman who learned he had been speaking in prose while asking for his slippers and a nightcap,<sup>60</sup> these subversives do their work incidentally, along with their focus on other goals.

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60. MOLIÈRE, *LE BOURGEOIS GENTILHOMME* act 2, sc. 4.

MONSIEUR JOURDAIN

Quoi? Quand je dis: "Nicole, apportez- moi mes pantoufles, et me donnez mon bonnet de nuit," c'est de la prose?

PHILOSOPHY MASTER

Oui, monsieur.

MONSIEUR JOURDAIN

Par ma foi! Il y a plus de quarante ans que je dis de la prose sans que j'en susse rien, et je vous suis le plus oblige du monde de m'avoir appris cela.

MONSIEUR JOURDAIN

Oh, really, so when I say: "Nicole, bring me my slippers and fetch my nightcap," is that prose?

PHILOSOPHY MASTER

Most clearly.

MONSIEUR JOURDAIN

Well, what do you know about that! These forty years now, I've been speaking in prose without knowing it! How grateful am I to you for teaching me that!

### A. *The Blueprint: Beyond Conjuality*

#### 1. The Diminution of Conjuality Described

The Law Commission of Canada began its report with the declaration that adult relationships take many forms, and are not limited to the marriage of one man and one woman.<sup>61</sup> This statement appeared to be aimed at the Canadian controversy over same-sex marriage that was bubbling in late 2001. A year earlier, the House of Commons had enacted a DOMA-like federal definition in a resolution, calling marriage “the union of one man and one woman to the exclusion of all others,”<sup>62</sup> but the Supreme Court of Canada had also held in 1999 that same-sex couples were entitled to many of the benefits of marriage.<sup>63</sup>

As rhetoric, the bland reference to diversity sounded like an endorsement of same-sex marriage, or perhaps an extension of a set of lesser privileges to same-sex couples.<sup>64</sup> But the title of the report bespoke another direction. Diversity of close personal relationships among adults, said the Law Commission, went well beyond similarity versus difference in the adults’ reproductive anatomy.<sup>65</sup> The Commission gave adult siblings living together and disabled adults with their caregivers as two examples of close relationships that, though nonconjugal, resemble in pertinent ways the families that originate in sexual affiliation.<sup>66</sup>

Today, across the border, matrimonial conjuality remains a popular but far from universal way for adults to live.<sup>67</sup> In 2005 a

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61. BEYOND CONJUALITY, *supra* note 27, at 1.

62. 240 PARL. DEB., H.C. (1999) 1020, 1020-2255, available at <http://www2.parl.gc.ca/HousePublications.aspx?Language=E&Mode=1&Parl=36&Ses=1&DocId=2332947>. In Canada, marriage law is located substantively at the province level, although the federal government defines status.

63. *M. v. H.*, [1999] 2 S.C.R. 3 (Can.). A leading Canadian court, the Ontario Court of Appeals, would go on in 2003 to hold that the withholding of marriage from same-sex couples violated the Canadian constitution. *Halpern v. Canada*, [2003] 65 O.R. (3d) 161.

64. BEYOND CONJUALITY, *supra* note 27, at 32.

65. *Id.*

66. *Id.*

67. Kate Zernicke, *Why Are There So Many Single Americans?*, N.Y. TIMES, Jan. 21, 2007, § 4, at 1 (noting that only about half of adult men and women in the United States are now living with a spouse).

survey under the auspices of the Census Bureau looked at three million households in the United States and found that for the first time unmarried, rather than married, adults headed the majority of households.<sup>68</sup> The majority was tiny—50.3% versus 49.7%—but telling, and the decline of married-headed households has proceeded without reversal since 1950.<sup>69</sup> In 2006 the National Marriage Project reported a decline of 50% in the number of new marriages commenced per one thousand unmarried adult women from 1970 to 2004,<sup>70</sup> a datum consistent with a report from this group five years earlier that 45% of young adults believe that the government should not be involved in licensing marriage.<sup>71</sup> While conjugality remains a potent bond in the United States (the National Marriage Project findings suggest that many individuals who have retreated from marriage choose non-marital cohabitation as couples<sup>72</sup>), it takes a weaker form outside of licenses and ceremonies. Cohabitants feel freer than spouses to leave.<sup>73</sup>

## 2. The Diminution of Conjugality Prescribed

*Beyond Conjugality* shares themes with commentary suggesting that attention to sexual affiliation by the state as a basis for its categories of “marriage” and “family” may be obsolete.<sup>74</sup> In past eras,

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68. Thomas F. Coleman, *Unmarried Households in the United States*, UNMARRIED AM., Aug. 15, 2006, available at [http://www.unmarriedamerica.org/Census\\_1990-2001/unmarried-majority-table.htm](http://www.unmarriedamerica.org/Census_1990-2001/unmarried-majority-table.htm) (reporting Census data).

69. Thomas F. Coleman, *Drum Roll: New ‘Unmarried Majority’ Takes Center Stage*, UNMARRIED AM., Aug. 21, 2006, <http://www.unmarriedamerica.org/column-one/8-21-06-census-release-on-unmarried-majority.htm>.

70. NAT’L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 16 (2006) [hereinafter UNIONS 2006], available at <http://marriage.rutgers.edu/Publications/SOOU/SOOU2006.pdf>.

71. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 138 n.27 (2003) (citing NAT’L MARRIAGE PROJECT, *supra* note 70).

72. UNIONS 2006, *supra* note 70, at 19.

73. Steven L. Nock, *A Comparison of Marriage and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 56 (1995) (observing that marriage holds people together in various ways that differ from simple cohabitation, including the difficulty of fulfilling exit formalities and worries about having to comply with closer external oversight of one’s relations with one’s children).

74. Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002); see also Bernstein, *supra* note 71, at 135–36 nn.19, 20 (citing various writers who advocate the abolition of marriage as a legal status, notably Martha Fineman).



sexual intercourse—a force that can defy the wishes of participants to forestall or postpone the making of children—would often (and still sometimes does) generate a baby not reliably connected to any particular person as its father. This infant, along with one or both of its parents, cries out figuratively for state-enforced channeling and regulation of who forms the child, and so the connection of female and male bodies has led to a fundamental legal understanding of what makes a family.<sup>75</sup>

Technological developments have challenged that understanding. Contraception has become more available and reliable: today, supported to some faint degree by a nominal constitutional right to early abortion, this change has made parenthood more of a voluntary undertaking and less of a vulnerability that threatens to isolate and impoverish new mothers and their children as a wages-of-sin punishment for sexual agency. The state can also cheaply and accurately determine whether a putative father begot a child, reducing the need to ascribe a legal label of “husband” on the way to identifying a father.<sup>76</sup> With these venerable concerns about the welfare of children and parents now eased, continuing to ascribe legal consequences to sexual affiliation may make less sense. At least it requires attention from the state.

The authors of *Beyond Conjugalinity* attempted to furnish this attention by looking at the reasons that states care about relationships. The vulnerability of children seems undeniable, as does the correctness (at least most of the time) of assigning caregiving to their parents. Linking children legally to their parents called for no law

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75. In its decision refusing to extend same-sex marriage, the New York Court of Appeals curiously revived this rationale as a justification for restricting marriage to opposite-sex couples. See *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

76. My colleague Jeff Pennell has observed in conversation that the catchphrase ‘mommy’s babies, daddy’s maybes’ has been inverted by technology: Men cannot hide from the DNA test that produces a binary yes-no result, whereas a woman can gain a claim to biological parenthood either by furnishing a gamete, as a man does, or by gestation; giving birth will not always make one a (unitary) mother comparable to the way that all persons are deemed to have only one biological father. Daddy’s babies, mommy’s maybes. For one instance of the difficulties that follow, see Judith Berck, *Easing a Parent’s Anxiety: Jewish by Nature or Nurture?*, N.Y. TIMES, July 1, 2006, at B5 (noting that Orthodox Jews frequently put infants formed by anonymous egg donation and born to Jewish gestational mothers through a conversion ceremony, as a better-safe-than-sorry precaution reflecting the uncertain religious identity of the child, notwithstanding the rule that Jewish identity descends through the mother).

reform efforts. Relationships among adults, however, may or may not be the province of the state.

From this premise, the Law Commission proposed that when relationships “do not actually matter” to a governmental objective, the government should not take note of them.<sup>77</sup> As the Commission elaborated, such a change would promote the values of equality and autonomy: equality, because similarly situated persons would be treated alike; autonomy because the state would refrain from meddling with an individual’s decision to form or abandon a relationship.<sup>78</sup>

Relationships are of interest to the state, the Commission continued, only because of their “functional attributes.”<sup>79</sup> The two main functional attributes are “emotional intimacy and economic interdependency,” although a third, “a shared residence,” might be relevant too.<sup>80</sup> In some settings where relationships matter, the state might choose to establish a voluntary registration scheme; in others, ascription of a law-based relation, even perhaps over the objection of one partner, might be in order. But conjugality—a connection related to the ongoing or presumed past contact between the genitals of two adults—is none of the state’s business: “The existence of sexual relations within a relationship . . . is not relevant to legitimate state objectives.”<sup>81</sup>

### 3. Applications for Subversives

Years after the Canadian federal government politely pushed *Beyond Conjugality* off the policy table without responding to its rationalist challenge,<sup>82</sup> little cogent defending of conjugality as a

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77. *Id.* at 31. Following this premise, the Law Commission proposed revision of Canadian rules of evidence in criminal trials. *Id.*; see also *id.* at 55 (detailing a proposed new law of the marital communications privilege).

78. *Id.* at 13.

79. *Id.* at 36.

80. *Id.* at 34.

81. *Id.*

82. The only response available to the public appears in a Ministry of Justice report published the following year, which suggested that the recommendation to Canadian governments to stop using conjugality as a criterion for distributing obligations and benefits may have been premature. See Department of Justice Canada, *supra* note 34, at n.4 (claiming that “further study would be needed before Parliament can decide whether it is appropriate to

subject of legitimate state interest has emerged,<sup>83</sup> suggesting that the Law Commission may have offered compelling content in a weak medium or package. What might have been weak about the white-paper medium? Numerous confounding variables impede the search for a diagnosis. A hint appears, however, in the 2002 report that included a short obituary for *Beyond Conjugal*.<sup>84</sup> The Ministry of Justice of Canada, having made short work of the Law Commission thesis, went on to relate a host of legal changes in almost every province, even conservative Alberta, that extended governmental recognition of same-sex relationships.<sup>85</sup> Canadian law has not abandoned conjugality, but has shown some willingness to accept *Beyond Conjugal* writ small. Hence my hypothesis: Sweeping, comprehensive reexaminations of marriage might induce panic in voters and agents of governments. Modest, incremental changes (in Canada, mild endorsement of same-sex pairing has for some time been mainstream, rather than left of center) appear easier to enact.

In the balance of this Part, accordingly, I look for plurals rather than a singular. *Beyond Conjugal* offers no solitary application or lesson—only applications. Similarly, the next section of this Part considers implementations plural rather than any one implementation of a law and policy shift that would reduce state attention to conjugality and marriage. Consistent with this theme of diffusion, the final section moves away from state governments to look at what other innovators are achieving, most of them without knowing it, to subvert the defense-of-marriage crusade.

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treat non-conjugal relationships in the same way as spouses or common-law partners in all federal laws”).

83. Canadian marriage scholar Daniel Cere has taken on the task. *See generally* CTR. FOR MARRIAGE & FAMILIES, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA (2005); DANIEL CERE, REDEFINING MARRIAGE: A CASE FOR CAUTION (2003), available at <http://www.voteonmarriage.org/Cere-Redifining%20Marriage%20-%20A%20case%20for%20Caution.pdf>. Other writers offer less sweeping defenses of conjugality as an area of state concern. For example, Marsha Garrison does not take on conjugality directly, but argues that marriage is different from other unions that feature “relational intimacy or economic interdependency” in that a married couple has exchanged public vows. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 824–25 (2005).

84. *See* Department of Justice Canada, *supra* note 34.

85. *Id.*

*B. Examples of Subversive Implementations by  
United States Governments*

In numerous instances both federal and state governments have enacted policies that deny or abrogate conjugality in the furnishing of social-welfare benefits to citizens. This section gathers some examples of these divergent legal categories. The coexistence of formal marriage with a host of rival categories that often do not demand conjugality—including non-marital households, non-marital dependents, civil unions, domestic partnerships (the public and private kind, in various iterations), reciprocal beneficiaries, adult designees, and common law spouses—makes one wonder what exactly the self-appointed defenders defend. The label of Marriage looms over government policy like a balloon still vividly painted but leaking air. As the illustrations below indicate, governments can subvert the defense-of-marriage crusade without intending to do so, and subversive maneuvers predate the vintage-1996 crusade.

1. Food Stamps and the “Household Concept”

When the United States government started a comprehensive national food stamp program as part of the Great Society domestic policy shift of the 1960s,<sup>86</sup> Congress announced its desire to improve the lot of “low-income households.”<sup>87</sup> “Eligibility for participation in the program,” as Justice Brennan later wrote in *United States Department of Agriculture v. Moreno*, “is determined on a household rather than an individual basis.”<sup>88</sup> It fell to the Department of Agriculture to say what a household was and, for food-stamps purposes, the Code of Federal Regulations contains a section headed “Household concept.”<sup>89</sup>

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86. For an overview, see United States Department of Agriculture: About Food Stamps, [http://www.fns.usda.gov/fsp/about\\_fsp.htm](http://www.fns.usda.gov/fsp/about_fsp.htm) (last visited May 9, 2007).

87. 7 U.S.C. § 2011 (2000) (“It is hereby declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households.”).

88. 413 U.S. 528, 529 (1973).

89. 7 C.F.R. § 273.1 (2006).

The household concept, as rendered here, does not require a marriage. It pays heed to marital status only in its provision that spouses who live together must be considered members of the same household.<sup>90</sup> Instead of marriage, it speaks of the home and “home consumption” of meals, implying unity independent of matrimony<sup>91</sup>—and evoking the functional version of togetherness advanced in *Beyond Conjuality*.<sup>92</sup>

In another forward-looking take on the household, the Department of Agriculture regulations offer an anti-patriarchal twist on who heads it. On one hand, “household concept” regulations cling to the traditional requirement that each household must be headed,<sup>93</sup> and for some situations “the head of household shall be the principal wage earner.”<sup>94</sup> So far, the low-income household in the Code of Federal Regulations resembles the Victorian middle-class hearth. On the other hand, however, a household that receives food stamps enjoys a privilege unavailable to most American households: for most purposes, it can choose its own head.<sup>95</sup> Here the rules give an alternative-family scheme containing rich hints of deliberation, consensus, and a voice for all resident members.

The range of households presented here is of interest beyond the simple need of poor people to obtain better physical nourishment through government intervention. A skeptic might argue that putative households (or individuals insisting they do not live in households) who seek this government benefit are just packages that legal services lawyers arrange instrumentally, to put more food on the table for their clients. Sometimes, as was the case in *Moreno*, poor adults gain an

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90. See *id.* § 273.1(b)(1).

91. *Id.* § 273.1(a)(3).

92. Also suggestive of this functional approach is *Zayas v. Department of Health and Rehabilitative Services*, 598 So. 2d 257 (Fla. Dist. Ct. App. 1992), which involved a twenty-five-year-old, “totally disabled” woman who lived with her parents, yet maintained what the court deemed a separate household: “Although Ms. Zayas resides in the same home as her parents, she lives a separate life from them—financially, socially and otherwise. Ms. Zayas and her parents do not live together as one economic or social unit.” *Id.* at 258. In this reading, the Zayas family—made up of concerned, caregiving mother and father and relatively young, vulnerable daughter—became individuals rather than one unitary legal-economic unit.

93. 7 C.F.R. § 273.1(d).

94. *Id.* § 273.1(d)(2).

95. *Id.* § 273.1(d)(1).

advantage when they huddle together as one household<sup>96</sup>; at other times poor adults living together do better when designated as individuals.<sup>97</sup> In this view the extensive variations considered in the Code of Federal Regulations depict only strategies in the welfare game and signal no real diversity in the ways people can form a family.

Strategies, however, are not necessarily insignificant. Because so much of the defense-of-marriage crusade wages its fight over a label, and injures people in this fight, labels *do* matter. Food stamp regulations and the ensuing case law over how to classify groupings of individuals teach Americans that households—or, in a near-synonym, families—can form in varying permutations, with or without the consent of their members (as evidenced by litigation protesting the denial of food stamps based on the ascription of a household status), headed by either the one whom householders elect as their head or the person that a state government chooses, and marked by the same economic and emotional interdependency that *Beyond Conjugal* found dispositive. With the “household concept” so malleable, the boundaries of marriage also might be crumbling into functionality.

## 2. Dependents as Recognized by the Internal Revenue Code

In another federal law reference to the household, taxpayers can receive legal recognition of their families through the status of “dependent.”<sup>98</sup> Federal tax law identifies dependents as either qualified children or qualified relatives.<sup>99</sup> This recognition appears less than subversive at first, but the statute goes on to find that not only the taxpayer’s brother, stepfather, daughter-in-law, and so on will have enough of a “relationship” to the taxpayer<sup>100</sup>; equally

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96. The Court agreed with these claimants and held that the *Moreno* households were eligible to receive food stamps. *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 538 (1973).

97. *See* *Robinson v. Block*, 869 F.2d 202 (3d Cir. 1989) (holding that siblings living together have the burden of proof to establish their separate, non-household status); *see also* Siegel, *supra* note 57, at 1396–98 (discussing another case where the claimants preferred to be cast as individuals).

98. 26 U.S.C. § 152(a) (2000).

99. *Id.*

100. *Id.* § 152(d).

avored is “[a]n individual . . . who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household.”<sup>101</sup> A dependent must have income below a stipulated exemption amount, and the taxpayer must provide more than half of this person’s financial support.<sup>102</sup> No conjugality needed. One crucial benefit of this status is that the furnishing of workplace-based health insurance to the dependent does not generate taxable income.<sup>103</sup>

The annals of condoned dependents over the decades include a taxpayer’s vulnerable sister,<sup>104</sup> the father of the taxpayer’s common law wife,<sup>105</sup> and the children of the taxpayer’s opposite-sex, live-in companion.<sup>106</sup> Researchers have not counted how many same-sex sexual partners have been so designated on tax returns. Undoubtedly this designation has enjoyed some favor among the cohort,<sup>107</sup> even if “few same-sex spouses or domestic partners qualify as . . . dependent[s] for federal income tax purposes.”<sup>108</sup> Whether frequently or infrequently chosen by same-sex couples, however, the federal tax category of dependent lends indirect support to this civil rights quest. By focusing on dependency and a shared household rather than

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101. *Id.*

102. *Id.* § 152(d)(2)(H).

103. Frank S. Berall, *Tax Consequences of Unmarried Cohabitation*, 23 QUINNIPIAC L. REV. 395, 401 (2004). On the importance of access to workplace-based health insurance, see *infra* notes 197–201 and accompanying text.

104. *Miller v. Glenn*, 47 F. Supp. 794, 795 (W.D. Ky. 1942).

105. *Ross v. Commissioner*, TC Memo 1972-122 (1972).

106. See Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 831 n.254 (1989) (citing cases).

107. For whatever one anecdote may be worth: a same-sex couple of my acquaintance (high-income professionals most of the time) once discussed becoming taxpayer and dependent during an aberrant year of income inequality. Before the Supreme Court struck them down, sodomy statutes posed a potential obstacle to the dependent route for same-sex couples, as this status used to be denied to people in relationships “in violation of local law.” See 26 U.S.C. § 152(b)(5) (2000) (repealed in 2004). Although the public record includes no denial of dependency status on this basis, the Internal Revenue Service used to refer to this provision in its private letter rulings regarding domestic partnerships. Nancy J. Knauer, *Heteronormativity and Tax Policy*, 101 W. VA. L. REV. 129, 180 (1998).

108. Janice Kay McClendon, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples*, 36 N.M. L. REV. 99, 110 (2006). McClendon adds that generally “same-sex households are dual income households.” *Id.* at 111.

sexual affiliation, the Internal Revenue Code has taken public welfare policy beyond conjugality.

### 3. Labels for Nonconjugal Intimates in State and Local Law

The most famed legal label formed for beyond-conjugality coupledom is “reciprocal beneficiary,” inaugurated in Hawaii in 1997 following the publication of a report from the state Commission on Sexual Orientation and the Law.<sup>109</sup> After surveying the state-sponsored advantages of being married and then considering alternatives to marriage that included “comprehensive” and “limited” domestic partnerships, the report concluded that extending marriage to same-sex couples would be the best way to remove legal disabilities that the report attributed to discrimination on the basis of sexual orientation.<sup>110</sup> The state went on to reject the recommendation through a constitutional amendment banning same-sex marriage, but its legislature retained awareness of the numerous benefits that the commission had associated with this legal status, and, in 1997, Hawaii extended many of these benefits to registered reciprocal beneficiaries.<sup>111</sup> To become reciprocal beneficiaries under Hawaii law, two adult individuals must be prohibited from marrying each other (because they are of the same sex or already related) and not already married to anyone else.<sup>112</sup> They attain their status by registering with the state Vital Records Office.<sup>113</sup>

These criteria are extraordinarily liberal. A couple need not have any connection to Hawaii, nor resemble an opposite-sex married couple in any way, beyond being two-and-only-two people. As reciprocal beneficiaries, the couple when in Hawaii enjoys

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109. STATE OF HAW., REPORT OF THE COMMISSION ON SEXUALITY AND THE LAW (1995), available at <http://www.state.hi.us/lrb/rpts95/sol/>.

110. *See id.* chs. 3 & 4. The Hawaii Supreme Court held that denying marriage to same-sex couples violated the equal protection provision of the state constitution. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

111. HAW. REV. STAT. ANN. §§ 572C-1 to 572C-7 (2005).

112. *Id.* § 572C-4. Hawaiian law has not yet resolved the question of whether two individuals of the same sex who married in Massachusetts (or a foreign jurisdiction that recognizes same-sex marriage) can be reciprocal beneficiaries, nor whether such a couple applying for this status in Hawaii would have to declare themselves not married to each other.

113. *Id.* § 572C-5.



survivorship rights (for worker's compensation and state retirement benefits as well as inheritance), tenancy by the entirety, hospital visitation, automobile insurance coverage, family and bereavement leave, standing to bring wrongful death lawsuits, and a host of small miscellaneous benefits.<sup>114</sup>

When Vermont enacted civil unions in response to its state supreme court's directive to extend a marriage-like status to same-sex couples, the legislature provided in the same statute for a reciprocal beneficiary status, albeit a less expansive one.<sup>115</sup> Reciprocal beneficiaries in Vermont must be ineligible for marriage and civil unions, and must be "related by blood or by adoption."<sup>116</sup> The benefits list is abbreviated: reciprocal beneficiaries gain privileges that are confined mainly to medical care.<sup>117</sup>

The government of Salt Lake City recognizes "adult designees" of city workers, and offers them health insurance based on municipal employment. Neither the state's constitutional amendment barring same-sex marriage nor its DOMA legislation impedes the delivery of these benefits to a same-sex partner.<sup>118</sup> But the range of "adult designees" goes beyond couples. A story in the *Deseret News* summarizes the beyond-conjugality breadth of this label in Salt Lake City:

An adult designee is defined as anyone over age 18 who has lived in the city worker's household for a year and is either financially dependent upon the city worker, or has financial interdependence with that person. An "adult designee" could

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114. The Hawaii Family Forum, an anti-marriage organization, provides a more extended version of this summary. HAW. FAMILY FORUM, DOMESTIC PARTNERSHIPS, RECIPROCAL BENEFICIARIES: WHAT'S IT ALL ABOUT? (n.d.), <http://www.hawaiifamilyforum.org/issues/documents/MicrosoftWord-RBS.pdf>. Not all observers are pleased with this menu. See Partners Task Force for Gay & Lesbian Couples, *Marrying Apartheid: The Failure of Domestic Partnership Status* (2006), <http://www.buddybuddy.com/mar-apar.html> (last visited May 9, 2007) (calling the benefits of the statute "modest" and noting its failure to deliver the benefit its sponsors touted most, workplace insurance, after the state attorney general decided to invalidate that provision).

115. VT. STAT. ANN. tit. 15, §§ 1301–1306 (2002).

116. *Id.* § 1303(3).

117. *Id.* § 1301(a).

118. A Utah court so held. *In re Utah State Ret. Bd.*, No. 050916879 (Utah Dist. Ct. 2006), available at <http://www.aclutah.org/normanruling.pdf>.

be a sister or brother, a parent, a romantic partner or friend. The ordinance also applies to the designee's children.<sup>119</sup>

Taken together, adult designees in Salt Lake City and reciprocal beneficiaries in Hawaii show the beyond-conjugality possibilities that these legal labels can achieve. In Salt Lake City, an adult designee can receive workplace-based health insurance, a crucial benefit of the marriage-like status.<sup>120</sup> Hawaii withholds this key boon but offers much: easy registration requirements to win the label, few qualifying criteria, and a range of privileges. Both Hawaii and Salt Lake City decline to ask even implicitly about the sexual lives of applicants and focus instead on "reciprocal" relationships and interdependence, both of which, to these governments, signal the presence of a family.

#### 4. Domestic Partnerships and Civil Unions

As anyone reading this far already knows, a few states have subverted the marriage-amendment crusade by extending formal recognition to same-sex couples. The scorecard as of 2007 includes several recognitions, none of which joined the law books during the previous year of anti-recognition.<sup>121</sup> A man may marry a man and a woman may marry a woman in Massachusetts.<sup>122</sup> In Vermont and Connecticut, a woman-and-woman or man-and-man conjugal pair may obtain legal recognition of their relationship in the form of a civil union.<sup>123</sup> In California, Maine, and New Jersey, same-sex couples may form domestic partnerships.<sup>124</sup> It is likely that civil unions and domestic partnerships will gain a stronger hold in the

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119. Linda Thomson, *S.L. Can Offer Benefits to More Than Spouses*, DESERET MORNING NEWS (Salt Lake City, Utah), May 13, 2006, available at [http://findarticles.com/p/articles/mi\\_qn4188/is\\_20060513/ai\\_n16369634/pg\\_1](http://findarticles.com/p/articles/mi_qn4188/is_20060513/ai_n16369634/pg_1).

120. See Bernstein, *supra* note 71, at 179–80 (asserting that the superior health married women enjoy in comparison to single women can be explained entirely by married women's being "married to health insurance").

121. See *supra* Part I.

122. MASS. GEN. LAWS ch. 207 §§ 1–8, 14–17 (2004); see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

123. CONN. GEN. STAT. ANN. §§ 46b-38aa, 38bb (2004); VT. STAT. ANN. tit. 15, § 1201 et seq. (2002).

124. CAL. FAM. CODE § 297 (West 2004); ME. REV. STAT. ANN. tit. 24, § 2319-A (Supp. 2005); N.J. STAT. ANN. § 26:8A-4 (West Supp. 2006).

future; a majority of the American public now favors them,<sup>125</sup> and coexistence of civil union or domestic partnership provisions with DOMA laws in four of these states suggests that only the most severe bans, the kind that withhold recognition of any paired status, can block these two ways to recognize same-sex couples.

Supporters of same-sex marriage have mixed (at best) feelings about civil unions and domestic partnerships as consolation prizes in the marriage struggle. They have expounded on their dissatisfaction in numerous writings.<sup>126</sup> Here, rather than defend or attack these two lesser measures, I distinguish them from each other for purposes of subverting the defense-of-marriage crusade.

As a way to extend relationship recognition to same-sex couples at the state level, civil unions are the older of the two measures. They began in Vermont, where the state supreme court in 1999 invoked the Common Benefits Clause of the Vermont constitution when it ordered the legislature to extend the benefits of marriage to same-sex couples.<sup>127</sup> In response to this decision, the legislature had to choose between obeying the court (that is, extending either marriage or the privileges of marriage to same-sex couples) or beginning to enact a new constitutional amendment that would remove marriage from the Common Benefits Clause, a process that would have taken four years—during which time the state would have to recognize marriage for same-sex couples.<sup>128</sup>

The court pushed tiny Vermont down a lonely path in 1999. A majority of states had enacted their own DOMA laws when the Vermont Supreme Court issued its decision, and no state had

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125. See *supra* note 52; see also Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same Sex Marriage Cases*, 15 LAW & SEXUALITY 11, 42–43 (2006) (reporting poll data circa 2004 indicating that 21% of respondents supported same-sex marriage and 32% supported civil unions).

126. See, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001) (using liberal political theory to deem civil unions a failure); Andrew Sullivan, *State of the Union: Why “Civil Union” Isn’t Marriage*, NEW REPUBLIC (Wash., D.C.), May 8, 2000, at 18 (insisting that civil unions are inferior, not equivalent, to marriage); Partners Task Force for Gay & Lesbian Couples, *supra* note 114 (invoking “apartheid” to describe civil unions).

127. Lee Banville, *The Battle Over Same-Sex Marriage: Vermont’s Civil Unions*, PBS ONLINE NEWS HOUR, Apr. 30, 2004, [http://www.pbs.org/newshour/bb/law/gay\\_marriage/vermont.html](http://www.pbs.org/newshour/bb/law/gay_marriage/vermont.html).

128. *Id.*

purported to extend the benefits of marriage to same-sex couples. Rather than defy the supreme court, the Vermont legislature opted to write a civil union statute, which took effect in 2000. The Democrats lost the state senate that fall, the governor, Howard Dean, professed to be severely shaken by his decision to sign the new law,<sup>129</sup> and opinion polls circa 2000 reported that a majority of state residents opposed any legal recognition for same-sex couples.<sup>130</sup> Mild though they may look today, in sum, Vermont's civil unions were a big deal at the time they were enacted.

The domestic partnership alternative route has never attracted much attention or flak. Unlike civil unions—that is, marriage for same-sex couples in all but name—whose legal status is relatively clear, domestic partnerships can bestow much or little. There is no unitary definition of the term. Civil unions become available to couples only by state legislative action, but private employers and local units like municipalities as well as state governments can recognize domestic partnerships.<sup>131</sup> Not only same-sex couples sign up for the classification: In some cities and corporate human resources departments, opposite-sex couples who want recognition of their relationship but do not wish to marry can register as domestic partners.<sup>132</sup> California and New Jersey divide their unmarried opposite-sex resident couples into two categories: those under the age of 62, who may not become state-registered domestic partners, and those over 62, who may.<sup>133</sup> In the District of Columbia, blood relatives may register as domestic partners, an option unavailable in the states that recognize this status.<sup>134</sup> A law review comment titled *Mimicking Marriage* relates frustration over these divergences: “The

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129. *Id.*

130. MICHAEL MELLO, LEGALIZING GAY MARRIAGE 20 (2004).

131. Joanna Grossman, *The New Jersey Domestic Partnership Law*, FINDLAW'S WRIT, Jan. 13, 2004, <http://writ.news.findlaw.com/grossman/20040113.html> (noting that “[a]t least seventy municipalities” and “thousands of employers” recognize this status).

132. Erin Stefanec, Comment, *Mimicking Marriage: As the Evolution of the Legal Recognition of Same-Sex Marriage Progresses, Civil Unions Currently Represent the Best Alternative to Marriage*, 30 U. DAYTON L. REV. 119, 133–35 (2004).

133. Thomas F. Coleman, *Looking 'Beyond Marriage' for Equal Rights*, UNMARRIED AMERICA, Aug. 7, 2006, <http://www.unmarriedamerica.org/column-one/8-7-06-family-rights.htm>.

134. *Id.*

inconsistency among various jurisdictions and private entities generates unpredictability that is, perhaps, the greatest disadvantage of domestic partnerships.”<sup>135</sup>

Inconsistency could indeed be “the greatest disadvantage” for activists who pursue “mimicking marriage” and seek the defeat of “unpredictability.” Civil unions imitate marriage more closely than do the more varied manifestations present under the domestic partnership rubric.<sup>136</sup> But mimicry per se is not worth chasing,<sup>137</sup> and as for predictability, whenever a measure comes before American judges, legislatures, and voters purporting to extend recognition to same-sex relationships, the safest (if most dispiriting) prediction is that it will induce or manifest a homophobic response. Recognition measures tend to lose when taking forms that extend marriage-like benefits to same-sex couples, and tend to win when taking restrictive, rights-denying forms.<sup>138</sup>

In this battleground, the “disadvantage” of “unpredictability,” or insufficient resemblance to real marriage—or what one might call bad marriage-mimicry—becomes a stealth advantage. Observers who disagree on the issue of granting to same-sex couples legal parity with opposite-sex couples agree that for those same-sexers who seek substantive rights and privileges rather than “marriage mimicry,” definable as the highest-ranked label short of marriage, domestic partnership as practiced by the state government in California serves

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135. Stefanec, *supra* note 132, at 134.

136. See Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 43 (2000).

There is another more intangible way in which civil unions differ from domestic partnerships. To me the term “civil union” is more dignified than “domestic partnership.” Domestic partnership has the feel of a business relationship. It is very unromantic. Civil union, on the other hand, seems to successfully capture the spiritual aspect of the relationship. It suggests a committed and lasting relationship, something not necessarily evident in “domestic partnership” or certainly not in “reciprocal beneficiary,” which is open to brothers and sisters and other family members. The term “civil union” therefore stands a better chance of coming to stand for a relationship based on romance and deep spiritual commitment.

*Id.* (footnotes omitted).

137. It seems inherently a variation on separate but equal. See *supra* note 111 and accompanying text.

138. See *supra* Part II.

almost exactly as well as a civil union.<sup>139</sup> The uncertain meanings of domestic partnership make this innovation less likely to provoke backlash, and the accretion of numerous variations on a theme of domestic partnership makes each new measure so labeled less likely to draw attention.<sup>140</sup> Because of these advantages, same-sex marriage supporters might plausibly choose to favor—and pursue at the state, municipal, and corporate level—domestic partnership along with their current enthusiastic efforts to gain Massachusetts-style marriage, and their less enthusiastic efforts to obtain civil unions from state legislatures around the country.

One important beyond-conjugality contribution of both civil unions and state-level domestic partnerships is that these two legal statuses are both defined by relatively recent legislation: state statutes that do not implicitly contain, as “marriage” may, any reference to past or continuing sexual intercourse.<sup>141</sup> Provisions that deny these

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139. Compare, from the right, L. Lynn Hogue, *State Choice-of-Law Doctrine and Non-Marital Same-Sex Partner Benefits: How Will States Enforce the Public Policy Exception?*, 3 AVE MARIA L. REV. 549, 550 (2005) (commenting on the breadth of domestic partnership in California) with, from the left, Nancy D. Polikoff, *Making Marriage Matter Less: The ALL's Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 378 n.161 (calling the California domestic partnership statute “expansive” and quoting from the California Family Code: domestic partnership offers “the same rights, protections and benefits and . . . responsibilities, obligations, and duties under law as are granted to and imposed on spouses”).

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So why did the New Jersey law attract so little comment? The answer is probably that protections for domestic partners are becoming commonplace enough that each incremental development is no longer earth-shattering news. And the normalization of domestic partnerships is itself notable—the sign of a dramatic cultural sea change.

Grossman, *supra* note 131.

141. The closest they come to such a demand is occasionally requiring “a committed relationship of mutual caring,” see, for example, N.J. STAT. ANN. § 26:8A-4(b)(6) (West 2006), which may evoke a shared bed but is also consistent with the not-necessarily-sexual interdependency of *Beyond Conjugality*. Other versions of domestic partnership are less permissive and might be read to demand conjugality. See, e.g., Minneapolis Code of Ordinances ch. 142, <http://www.ci.minneapolis.mn.us/domestic-partnerregistration/docs/chapter142.pdf> (requiring that domestic partners be “committed to one another to the same extent as married persons and to each other,” except for the traditional marital status and solemnities); UNIV. OF WIS. SYS., AFFIDAVIT OF DOMESTIC PARTNERSHIP 2 (n.d.), available at [www.uwsa.edu/hr/benefits/ins/uws50.pdf](http://www.uwsa.edu/hr/benefits/ins/uws50.pdf) (asking domestic partners to declare that they participate in “the functional equivalent of a marriage . . . which includes all of the following,” and going on to recite marriage-mimicry of a precise and old-fashioned sort, including “mutual

two statuses to opposite-sex couples and blood relatives insist that neither party to the new couple already be married to someone and limit the number of participants in the status to two indicate that the intended beneficiaries of this statutory expansion are same-sex sexually connected couples rather than individuals bonded to other persons in nonsexual ways. Yet because legislatures write domestic partnership and civil union laws on a cleaner slate, their choice not to demand a sexual connection suggests possibilities for future expansion away from conjugality. A future reader of these early statutes might find them radical less for their tolerance of homosexual affiliation than for their explicit lack of interest in any anatomical fitting-together.

##### 5. Common Law Marriage for the Twenty-First Century

Following the lead of feminist legal scholar Cynthia Grant Bowman, who at the end of the twentieth century made feminist claims about what common law marriage might offer vulnerable women,<sup>142</sup> same-sex marriage activists can consider the usefulness of common law marriage to their cause. As an informal method of achieving the consequences of matrimony, common law marriage has not appeared progressive to most observers for decades. Reformers (some of whom talked about progress, even if their motives included eugenics, racism, or the protection of business interests) brought down common law marriage from its status as a majority rule in the nineteenth century to a minority rule today.<sup>143</sup> Bowman laments this development, contending that “the institution of common law

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caring and commitment” and “mutual fidelity,” apparently intended as synonymous with sexual exclusivity).

The role of sexual intercourse in the legal definition of marriage has never been clear. Lack of capacity to complete this act is the classic ground for annulment, but an unconsummated marriage remains valid as long as both husband and wife do not complain about the absence of sex. *See generally* Bernstein, *supra* note 71, at 133 n.7 (quoting the “definition” of family-law scholar Homer Clark: Marriage is “some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, a relationship which may be formed by consent of both parties and dissolved at the will of either”).

142. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

143. *Id. passim*.

marriage in fact was more effective at protecting the interests of women, especially poor women and women of color, than any of the theories suggested to handle the problems created by its abolition.”<sup>144</sup> So seen, common law marriage may not honor any ideal in principle, but can prove valuable for progressive ends.

The counterpart value for subverting the defense-of-marriage crusade is diffusion among state laws. When couples can become pairs before the law without licenses or ceremonies, the distinction between married and unmarried blurs, and the meaning of any state law foreclosing marriage to some group of persons becomes thinner. Advocates of same-sex civil rights should be heartened by my inability to recite an accurate count of the number of American jurisdictions that accept common law marriage. Nine easy ones appear on every list: Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Rhode Island, South Carolina (home of the notorious “Big Chill” set where, according to one plaintiff, the actor William Hurt became a common law husband, with consequences to him that he did not desire<sup>145</sup>), and Texas.<sup>146</sup> These states were part of the majority in the nineteenth century and simply declined to join the “heartbalm” abolition movement of the early twentieth.<sup>147</sup> Other states, including Massachusetts and Illinois, have for more than a century taken a hard line against common law marriage.<sup>148</sup> Opposite-sex couples who hold no license but fulfill the traditional criteria for common law marriage know where they stand in Boston and Chicago.

The abolition movement, however, sowed some valuable confusion. New York, for example, abolished common law marriage during the heartbalm 1930s<sup>149</sup> but as a state has never appeared to loathe it the way some other states do. New York judges will not

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144. *Id.* at 712.

145. The plaintiff lost; the court held that Jennings and Hurt did not fulfill the criteria for common law marriage. *Jennings v. Hurt*, 554 N.Y.S.2d 220 (N.Y. App. Div. 1990).

146. Demystifying Common Law Marriage, <http://www.unmarried.org/common-law-marriage.html> (last visited May 9, 2007).

147. See Bowman, *supra* note 142, at 731–54.

148. *Id.* at 710, 719–20.

149. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 998–99 (2000).



infrequently determine that New Yorkers became married while spending short periods in jurisdictions that recognize the doctrine, so long as these couples fulfilled the checklist criteria for common law marriage.<sup>150</sup> Elsewhere I have had occasion to note that one of the practical difficulties of “abolishing marriage” as a legal status is timing: If marriage will cease to enjoy recognition following abolition by the state, when do couples lose this status?<sup>151</sup> The timing problem applied to this form of marriage has caused difficulty for several states. Today a handful recognize common law marriage for old unions and deny it for new ones.<sup>152</sup> Oklahoma has had particular trouble trying to draw this line.<sup>153</sup> Another line-blurring compromise is the law of New Hampshire, where common law marriage has been abolished for all purposes except inheritance<sup>154</sup>; this tiny degree of retention likely has had the effect of keeping common law marriage alive in the eyes of its citizens.<sup>155</sup> Tennessee retains a unique variant on common law marriage, the doctrine of “marriage by estoppel,” although its courts have limited its application in recent decades.<sup>156</sup>

Same-sex marriage activists might gain ironic pleasure from the law of Utah, whose relatively recent statutory change on common law marriage demonstrates how state legislatures can undermine state laws that deny marriage to same-sex couples. If common law marriage has value for subverting the defense-of-marriage crusade because it blurs the line between being married and unmarried, and lack of clarity on the question in state law makes the line even blurrier, as I have suggested, then this extremely conservative jurisdiction has rendered aid to its adversary.

Utah’s provisions regarding common law marriage add up to the most perplexing law in the country on the subject. The Utah statute enacted in 1987, deems a man and a woman married without benefit

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150. Bowman, *supra* note 142, at 717.

151. Bernstein, *supra* note 71, at 204–06.

152. These include Georgia, Idaho, Ohio, and Pennsylvania. See *Demystifying Common Law Marriage*, *supra* note 146.

153. *Id.*

154. *Id.*

155. Bowman, *supra* note 142, at 711 n.6 (noting that lay persons, even law students, tend to believe that common law marriage is much more prevalent, and easier to form, than it is).

156. See *id.* at 771–72.

of ceremony if they have fulfilled the traditional requirements of common law marriage and “a court or administrative order establishes” that they are married.<sup>157</sup> The formal determination of common law marriage must be made during the relationship or within one year after it ends.<sup>158</sup>

By combining the rigidity of majority-rule formal marriage with a denial that couples need a wedding ceremony to be married, the legislature must have confused Utahns—who were already bedeviled by the persistence of semi-condoned plural marriage in pockets of the state—about whether they need a rite to be joined in the eyes of the law.<sup>159</sup> On its books this state has both a statute and a constitutional amendment denying marriage to same-sex couples, but on the question of common law marriage it has eschewed the boundary “defense” of sorting couples with a bright-line rule in the mode of Illinois. The persistence of common law marriage—and, lately in Utah, its renewal, which reminds us that changes in the doctrine are not unidirectionally limited to ‘heartbalm’ abolition—impedes legislative efforts to declare couples uncoupled in the eyes of the law. Ambiguity subverts the crusade.

### *C. Less Overt Implementations*

#### 1. The ALI Principles

In recent years, the American Law Institute has issued what it calls Principles (as an alternative to its more familiar Restatements) of particular bodies of law, to acknowledge an additional layer of ambition beyond extracting from case law the soundest judicial

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157. UTAH CODE ANN. § 30-1-4.5(1) (2006).

158. *Id.* § 30-1-4.5(2) (West Supp. 2006).

159. Bowman explains the Utah legislature’s maneuver as motivated by a desire to prevent couples from excluding one person’s income for purpose of calculating welfare benefits. Bowman, *supra* note 142, at 749–50. It may not have been necessary: for decades the law of Aid to Families with Dependent Children had had a category of “adult male assuming the role of spouse,” and anyone so labeled had an obligation to support his quasi-spouse’s children. *Id.* at 750. Thus “in California, while there are no common-law husbands under the Civil Code, there are common-law stepfathers under the Welfare and Institutions Code.” *Id.* (citing Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 620 (1965)).

decisions. As described by the director of the Institute, the Principles category seeks to “analyze all law on a subject—judicial, legislative, and administrative—as well as relevant research and expert views . . . and then speak” to a newly widened audience, including lawmakers in foreign countries.<sup>160</sup> In its Principles, the ALI makes “no pretense of being bound by existing law. [Principles] are explicit recommendations for change.”<sup>161</sup>

Published in 2002, *Principles of the Law of Family Dissolution* was the second volume in the ALI Principles series and the Institute’s first comprehensive work on family law.<sup>162</sup> Its three reporters, set free of the task of restatement, went throughout the volume where American courts and legislatures had not yet gone. Most dramatically, *Principles of the Law of Family Dissolution* recognizes domestic partners, a designation whose indeterminacy we have already noted. On dissolution, the work advocates treating domestic partners (for most purposes) as if they had been spouses.<sup>163</sup>

The *Principles* recommend focusing on whether two individuals had shared life as a couple. The black letter recommendation in Section 6.03, entitled “Determination That Persons Are Domestic Partners,” gives a list of nonexclusive criteria to consider for couples who had shared a residence.<sup>164</sup> Conjugalities appears on the list, but only at about eighth out of thirteen:

Whether persons share a life together as a couple is determined by reference to all the circumstances, including:

(a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship; (b) the extent to which the parties intermingled their finances; (c) the extent to which their

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160. LANCE LIEBMAN, AM. LAW INST., REPORT OF THE DIRECTOR: AMERICAN LAW INSTITUTE ANNUAL REPORT (2006), [www.ali.org/ali/pa-DirectorsRpt06.pdf](http://www.ali.org/ali/pa-DirectorsRpt06.pdf).

161. Harvey S. Perlman, *The Restatement Process*, 10 KAN. J.L. & PUB. POL’Y 2, 4 (2000).

162. Press Release, Am. Law Inst., American Law Institute Publishes Principles of the Law of Family Dissolution (May 15, 2002), available at <http://www.ali.org/ali/pr051502.htm>.

163. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, at ch. 6 (2002) (endorsing the application of family law, rather than contract law, to non-marital cohabitants, and advocating an emphasis on the character of the relationship as it developed over time rather than on statements of intention that the parties may have made).

164. *Id.* § 6.03(3).

relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other; (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together; (e) the extent to which the relationship wrought change in the life of either or both parties; (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan; (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person; (h) the emotional or physical intimacy of the parties' relationship; (i) the parties' community reputation as a couple; (j) the parties' participation in a commitment ceremony or registration as a domestic partnership; (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage; (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child; (m) the parties' maintenance of a common household, as defined by Paragraph (4).<sup>165</sup>

Assessing the *Principles*, family law scholar and beyond-conjugality activist-reformer Nancy Polikoff praises them for their important move from the sexual dyad and also notes a crucial way in which they do not move far enough: Polikoff observes that although the *Principles* recite their thirteen factors as flexible, the requirement of a shared residence is rigid.<sup>166</sup> A marriage license eliminates the burden of living together as a condition of winning recognition: "Married couples, of course, can live separately."<sup>167</sup> Polikoff also deems two of the reporters, Ira Mark Ellman and Grace Ganz Blumberg, insufficiently proud of their handiwork.<sup>168</sup> In her view, the

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165. *Id.* § 6.03(7).

166. Polikoff, *supra* note 139, at 353.

167. *Id.* at 356. Polikoff proposes that a shared residence be probative of domestic-partner status, rather than an absolute requirement. *Id.*

168. *Id.*

reporters should have reveled in the derogation of marriage that they wrote into Section 6.03, rather than agree with conservative critics that marriage is better than other ways of forming a relationship.<sup>169</sup> Quibbles notwithstanding, Polikoff acclaims the *Principles* for having declared boldly “that the decision to marry should matter little in distributing rights and responsibilities, both between partners and between the couple and the state,”<sup>170</sup> and, less explicitly, that conjugality vel non does not define a relationship.<sup>171</sup> These declarations will likely inform the law’s response to future dissolutions of all kinds of human unions, not just the conjugal sort.<sup>172</sup>

## 2. The Moving Hearth: Domestic Violence Reenvisioned

Just as Nancy Polikoff reinterpreted the centrist-progressive *Principles of the Law of Family Dissolution* as fitting into a more radical pattern that would eliminate conjugality from the law, Ruth Colker has spotted beyond-conjugality seeds in another garden where nobody intended to plant them: the law related to domestic violence.<sup>173</sup> Colker’s vision takes domestic violence from its more familiar classifications—social pathology, psychological devastation, and unevenly prosecuted crime—to a locus of privilege, recognition, and opportunity.

Following the lonely feminist struggles in the 1970s against the family-values religious right and an indifferent, if not hostile, law enforcement establishment, domestic violence leaped toward mainstream acceptance when the Reagan administration issued a report encouraging states to require warrantless arrests for family

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169. *Id.* at 362.

170. *Id.* at 379.

171. *Id.*

172. Published decisional law has not yet relied on the *Principles* for the dissolution of a nonconjugal relationship, but courts have started to cite them in the conjugal-but-non-marital context. *See, e.g., In re Custody of Kali*, 792 N.E.2d 635, 641 (Mass. 2003) (citing the *Principles* in a child custody dispute involving non-marital parents); *Stitham v. Henderson*, 768 A.2d 598, 602 (Me. 2001) (recognizing rights of non-marital father); *Rubano v. DiCenzo*, 759 A.2d 959, 974–75 (R.I. 2000) (noting that the court’s decision to recognize rights of a grandparent was consistent with the then-draft *Principles*’ emphasis on a caregiving history).

173. *See* Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841 (2006).

violence.<sup>174</sup> “By 1988, forty states had enhanced their criminal law policies with respect to domestic violence,” Colker notes, reciting the “seven types of measures” that states adopted: “mandatory arrest, primary aggressor language in mandatory arrest statute, warrantless arrest, mandatory arrest for restraining order violation, requirement that spousal abuse be considered in custody determinations, mandatory police training, and mandatory statewide data collection.”<sup>175</sup>

Current law now presumes “that domestic violence is worse than other kinds of violence,”<sup>176</sup> and current policy finances this presumption with such expensive goods as shelters and victim-assistance programs.<sup>177</sup> To Colker, these changes bespeak a dangerous “marriage mimicry” that leaves classes of women exposed and unprotected.<sup>178</sup> These classes include “women who have gone on a few dates with their abuser” but formed no long-term relationship; women who never lived with their abusers; “women who have been abused by men who are married to other women”; women who live very close to an abuser but not inside his household; and women in a range of family, quasi-family, and step-family relations with abusers.<sup>179</sup> Colker urges lawmakers to consider what really drives their budgets: it cannot be “intimate violence” or “household violence,”<sup>180</sup> but seems instead focused on what might be called marriage-mimicry violence. Reminiscent of *Beyond Conjugality*, in this domestic violence context Colker advocates what she calls a functional approach.<sup>181</sup>

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174. *Id.* at 1851–54.

175. *Id.* at 1854–55.

176. *Id.* at 1882.

177. See Allison Stevens, *Budget Falls Short for Domestic Violence Programs*, WOMEN'S E-NEWS, Feb. 17, 2006, <http://www.womensenews.org/article.cfm/dyn/aid/2641> (reporting that federal legislation authorized spending of up to a billion dollars on shelters and related programs during fiscal 2007).

178. Colker, *supra* note 173, at 1881.

179. *Id.*

180. *Id.* at 1868 (noting that “intimate violence” cannot be the concern because policies provide no recourse to women who rebuff advances after one date or who are battered by intimate partners married to other women, and that “household violence” does not work either, because the law does not protect a woman who is battered by a man with whom she is not intimate and who lives in her apartment or boarding house).

181. *Id.* at 1841.

Without differing with this critique of current laws and policies relating to domestic violence, one might also note the measures Colker describes that have taken critical steps toward functionality, even while mimicking marriage. As diction, “domestic violence” represents an improvement over the literally matrimonial “wife beating” and “battered wife,” phrases that appear to be on their way out of legal discourse.<sup>182</sup> Marriage-mimicking legal criteria that victims need to show when they want the benefits of domestic violence protection—such as “a substantive dating or engagement relationship” in Massachusetts,<sup>183</sup> “a dating relationship” where “the parties are romantically involved over time” in North Carolina,<sup>184</sup> and “residing together as if in a family” in Florida<sup>185</sup>—justifiably affront Colker because of their unwillingness to assist hurt individuals who fail the test<sup>186</sup> and their middle-class bias,<sup>187</sup> yet they also create opportunities to move the hearth. Similarly, when Colker disapproves of the test that some states use to determine whether a couple is cohabiting on the perfectly reasonable ground that vulnerable women have been deprived of an order of protection that would make them safer after judges faulted their compliance with the criteria,<sup>188</sup> she does not acknowledge the liberating possibilities of indeterminate, multi-factor criteria that can make an unmarried woman, for these limited purposes, as good as a wife.

A colleague of Colker’s at the Moritz College of Law found an application for subversives in her work. Marc Spindelman reviewed the clash between Ohio’s severe anti-marriage amendment, which prohibits the state from recognizing anything like marital status in persons who are not literally married, and the generous expansion of domestic-violence protections that Colker documented.<sup>189</sup> He

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182. To get a rough sense of the relative popularity of these two terms, I typed “battered wi! and date aft 2001” into the Allrev database of Lexis, and retrieved 163 hits. “Domestic violence and date aft 2001” yielded the “Error: More than 3000 Results!” response that Lexis gives searchers who ask for too much.

183. Colker, *supra* note 173, at 1859.

184. *Id.*

185. *Id.* at 1861.

186. *Id.* at 1860–61.

187. *Id.* at 1869.

188. *Id.* at 1863–65.

189. Marc Spindelman, *The Honeymoon’s Over*, LEGAL TIMES (Wash., D.C.), June 12,

reported that when opponents of the Ohio constitutional amendment had expressed worries that the measure would impede domestic violence protections, proponents “pooh-poohed” the concern, calling it “absolutely absurd” and “a lot of hypotheticals.”<sup>190</sup> Tellingly, however, the person credited as the author of Ohio’s harsh marriage amendment, David Langdon, filed an amicus brief in one of the state cases challenging the domestic violence law that took this “absurd,” lot-of-hypotheticals position: Ohio may not extend domestic violence protection to unmarried persons, Langdon argued, because under the amendment only the married can be so protected.<sup>191</sup>

If domestic violence victims are entitled to a protective exception from the harsh constitutional amendment, then the same reasoning would support relief for other unmarried-but-worthy claimants.<sup>192</sup> And if domestic violence victims can obtain no such clemency, under present attitudes that deplore domestic violence so intensely, the anti-marriage amendment and its proponents are at least embarrassed. No matter how courts resolve the clash between severe marriage amendments and domestic violence protections, Spindelman chortled, “cultural conservatives will lose.”<sup>193</sup>

### 3. Workplace Innovations

“The nuclear family has gone the way of soda fountain counters,” wrote journalist Susanna Duff in 1998, “and with it went the clear-cut definition of a dependent.”<sup>194</sup> Though perhaps rushing to inter heavy traditions before they were dead, in her news story Duff presented themes related to subverting the defense-of-marriage crusade. Similar to the clash in Ohio between domestic violence legislation and the state’s harsh anti-marriage amendment, controversies over employee

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2006, at 66.

190. *Id.* at 67 (quoting Phil Burress of the Ohio group Citizens for Community Values).

191. *Id.*

192. *Id.* (referring to another Ohio case in which opponents of same-sex relationships sought to invalidate the limited domestic-partnership benefits available at one of the state’s public universities).

193. *Id.* at 66.

194. Susanna Duff, *New Family Definitions Reach Dependent Coverage*, EMPLOYEE BENEFIT NEWS (Wash., D.C.), Dec. 1, 1998, reprinted at <http://www.unmarriedamerica.org/members/extended-family-article.htm>.



health benefits may have boxed in opponents of same-sex marriage. In 1996 San Francisco required all organizations doing business with the city to offer domestic partnership benefits to same-sex couples; the San Francisco Archdiocese of the Roman Catholic Church resisted.<sup>195</sup> Church and city reached accord in the bland designation of adult dependents, allowing Archdiocese employees to share their health insurance with persons other than homosexual lovers.<sup>196</sup> This tactical choice by the Church laid the groundwork for less marriage-centric employee benefits.

The concept of an “other adult dependent” now flourishes in a few brave human resources manuals around the United States: Bank of America, Prudential Insurance, State Street Bank, Merrill Lynch, and Citigroup have recognized the beyond-conjugality relation of one employed adult who is connected to a person outside the traditional, IRS-recognized categories of spouse and young child.<sup>197</sup> The policy installed at Merrill Lynch & Co. in 1999 is illustrative.<sup>198</sup> Each employee may extend her or his health insurance to cover one other adult.<sup>199</sup> This person may be a wife, husband, same-sex conjugal partner, or extended family member.<sup>200</sup> Being married does not constrain the choice: a married employee can extend this health insurance either to a spouse or another qualified adult.<sup>201</sup>

## CONCLUSION

Activists working in support of same-sex marriage appear to have fended off an anti-marriage amendment to the United States

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195. *Id.*

196. *Id.*

197. Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the “Beneficial Family” and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 72–74 (2005).

198. The Human Rights Campaign posts a detailed description of the Merrill Lynch plan on its website. Human Rights Campaign Foundation, Merrill Lynch & Co., [http://www.hrc.org/Template.cfm?Section=search\\_the\\_database&Template=/customsource/workNet/srch\\_dtl.crmsr chtype=QS&searched+1&orgid=1151](http://www.hrc.org/Template.cfm?Section=search_the_database&Template=/customsource/workNet/srch_dtl.crmsr chtype=QS&searched+1&orgid=1151) (last visited Nov. 11, 2006).

199. *Id.*

200. *Id.*

201. MERRILL LYNCH, QUESTIONS & ANSWERS ON QUALIFIED ADULT HEALTH COVERAGE (n.d.), available at [http://www.hrc.org/ContentGroups/Workplace1/Sample\\_Policies/merrill\\_lynch.pdf](http://www.hrc.org/ContentGroups/Workplace1/Sample_Policies/merrill_lynch.pdf).

Constitution, but also have been losing most of their direct, squared-off fights over state legislation and constitutional amendments. Continuing down this path of defeat would result in a large roster of state constitutions that classify same-sex couples as inferior to their opposite-sex counterparts in the eyes of the law. For better results, individuals who favor marriage equality should consider a contrary strategy, in the spirit of Emily Dickinson's injunction to "tell all the Truth but tell it Slant."<sup>202</sup>

This Article has advocated the tell-it-slant strategy of diffusion. Without ceasing to demand parity between same-sex and opposite-sex couples in marriage law and policy, believers in this civil rights cause should work to reform those areas of the law where marital status and resource distribution can be uncoupled.<sup>203</sup> This strategy, called "beyond conjugality" in the title of a Canadian government report, rests on a premise that sexual affiliation of itself does not generate much of interest to the state, but family conditions, especially dependency and support, do pertain to law and policy.

Numerous uncouplings in this direction already exist and can inspire reformers to continue.<sup>204</sup> One key truth about conjugality is that sexual pairing becomes the government's business only when it affects dependency and support. Telling this truth "slant" would subvert the defense-of-marriage crusade better than any of the state-level battles over marriage waged to date.

The strategy would have another incidental benefit: it eases an impasse that now divides marriage-rights activists over whether to

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202. Emily Dickinson, Tell all the Truth but Tell It Slant, *available at* <http://www.poemhunter.com/p/m/poem.asp?poem=0&poet=3053&num=773>.

Tell all the Truth but tell it slant—  
Success in Circuit lies  
Too bright for our infirm Delight  
The Truth's superb surprise  
As Lightning to the Children eased  
With explanation kind  
The Truth must dazzle gradually  
Or every man be blind—

*Id.*

203. *See supra* note 160.

204. *See supra* Part II (recounting areas in which American law has modified its emphasis on the conjugal family).

pursue marriage-and-only-marriage or abandon marriage as unattainable for the time being and seek less ambitious civil rights law reform, such as enacting civil unions and domestic partnership at the state level.<sup>205</sup> Scattering into remote corners of the law to change the boons and banes attached to marital status presents a third way—and, like other variants on “the third way,”<sup>206</sup> which I do not intend here to endorse, it escapes extremes. A diffusion strategy may be labeled both more conservative and more radical than prevailing tactics in the marriage wars: It is more conservative, because it makes no demands for new recognitions now withheld, and more radical, because it shakes the notion that matrimony should determine what individuals receive from their conjugal partners, third parties, and the state.

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205. For an overview of this disagreement, see James M. Donovan, *Baby Steps or One Fell Swoop? The Incremental Extension of Rights Is not a Defensible Strategy*, 38 CAL. W. L. REV. 1 (2001) (favoring the “one fell swoop” approach).

206. See, e.g., Democratic Leadership Council, *About the Third Way*, June 1, 1998, [http://www.ndol.org/ndol\\_ci.cfm?kaid=128&subid=187&contentid=895](http://www.ndol.org/ndol_ci.cfm?kaid=128&subid=187&contentid=895); Third Way: A Strategy Center for Progressives, <http://www.third-way.com>.