

## Lecture

# Marriage Licenses \*

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Like a marriage license itself, the title of this Lockhart Lecture can have a variety of meanings. I intend it first and foremost to be read as a complete sentence in the present tense: subject, “marriage”; verb, “licenses.” A central theme I shall address is the variety of ways over time and at present mar-

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riage has been seen to license participants in the institution. Of course, the title can also be read as a plural noun, referring to more than one, or more than one kind of, marriage license, the document once defined by *Black's Law Dictionary* as "permission granted by public authority to persons who intend to intermarry, usually addressed to the minister or magistrate who is to perform the ceremony [and] . . . in most jurisdictions . . . made an essential prerequisite to the lawful solemnization of marriage."<sup>1</sup>

A plurality of marriage licenses have been in the news lately. Over the course of the past year alone, these include, in addition to the two licenses issued to singer Britney Spears, the thousands issued to same-sex couples—more than 4000 during the so-called Winter of Love initiated in San Francisco by Mayor Gavin Newsom just before Valentine's Day 2004; nearly 3000 in Multnomah County, Oregon; a handful in places like New Paltz, New York and Sandoval County, New Mexico; an unknown number to American citizens in Canada; and, since May 17, 2004, nearly 5000 to Massachusetts residents and at least a half dozen to nonresidents in the Bay State. These also represent a plurality of kinds of marriage licenses, for some simply because there is seen to be a difference in kind between licenses issued to a couple consisting of a female and a male as bride and groom and one issued to couples whose two members are of the same sex, who present themselves instead as "first applicant and second applicant."<sup>2</sup> There is also a distinction to

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1. BLACK'S LAW DICTIONARY 877 (5th ed. 1979).

2. I myself incline to the view articulated by Evan Wolfson that what all these same-sex couples were seeking license to obtain was not "something lesser or different" called "gay marriage" or "same-sex marriage" but simply "marriage . . . with the same duties, dignity, security, and expression of love and equality as [their] non-gay brothers and sisters have." See, e.g., EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND GAY PEOPLE'S RIGHT TO MARRY 17 (2004). Yet I must concede that even those male or female couples in Massachusetts married pursuant to valid licenses have not yet achieved their goal of simply marriage, that there remains a difference in kind between their marriage licenses and those of male-female couples, so long as the Defense of Marriage Act is enforced so as to deny all federal recognition to their marriages and other states are also free to disregard them. Cf. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572–75 (Mass. 2004) (Sosman, J., dissenting) (finding, contrary to the opinion of a majority of the Supreme Judicial Court, that there was a rational basis for denying the title "marriage" and instead applying the proposed title "civil union" to state-licensed unions of same-sex couples "when the obligations they are undertaking and the benefits they are receiving are, in practical effect, so very different" from those of opposite-sex married couples due to the fact that the federal

be drawn between licenses authorized by and issued in conformity with state law and those issued in contravention of the law on the books. Thus, whatever else critics of same-sex couples who were married in their home state of Massachusetts on or after May 17, 2004 may say, the critics can no longer claim that the licenses issued to these couples are not valid under state law.<sup>3</sup> By contrast, the licenses issued to same-sex couples in California and Oregon were declared invalid by the supreme courts<sup>4</sup> of their respective states.<sup>5</sup>

Doubtless among the thousands of these licenses are as well plural licenses issued to members of a single couple, who, like a couple of Midwestern women who traveled to San Francisco to marry, “plan on going from state to state collecting marriage licenses ‘like wallpaper’ until one sticks.”<sup>6</sup> This Lec-

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government and “most States will refuse to recognize a ‘marriage’ license issued by Massachusetts to a same-sex couple”).

3. A final challenge to Massachusetts’s issuance of marriage licenses to same-sex couples was put to rest when the U.S. Supreme Court denied review of the claim, previously rejected by the First Circuit, that, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court had violated the State’s guaranteed federal constitutional right to a republican form of government. See *Largess v. Supreme Judicial Court*, 373 F.3d 219, 229 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 618 (2004).

4. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 488 (Cal. 2004); *Li v. State*, CC 0403-03057 et al., 2005 WL 852319, at \*10 (Or. Apr. 14, 2005). It is important to note that the *Lockyer* and *Li* decisions were both limited to questions of institutional competence over the issuing of marriage licenses. Neither the California nor the Oregon Supreme Court has yet addressed the issue of the constitutionality of the state’s denial of licenses to same-sex couples. On March 14, 2005, San Francisco County Superior Court Judge Richard Kramer, citing, *inter alia*, *Perez v. Sharpe*, 198 P.2d 17 (Cal. 1948), the groundbreaking California miscegenation case, held that to deny same-sex couples license to marry violated their right to equal protection under the state constitution. See *In re Coordination Proceeding*, Special Title [Rule 1550(c)], Marriage Cases, No. 4365, 2005 WL 583129, \*9–12 (Cal. Super. Ct. Mar. 14, 2005).

5. Still sub judice are the handful of licenses issued by Massachusetts municipalities to out-of-state couples who express no intention of moving to the State. See, e.g., *Cote-Whitacre v. Dep’t of Pub. Health*, No. 042656G, 2004 WL 2075557 (Mass. Sup. Aug. 18, 2004) (considering the challenge by an out-of-state same-sex couple to a 1913 state law applied to restrict their ability to obtain licenses and enter into valid marriages in Massachusetts).

6. Marc Hansen, *Question of Rights for Wed-Unwed Gay Couple*, DES MOINES REG., Oct. 30, 2004, at 1B (quoting Emily Renaud and Sara Graham, Drake students whose first marriage license was “one of more than 4,000 granted in San Francisco” and subsequently invalidated by the California Supreme Court), available at <http://desmoinesregister.com/apps/pbcs.dll/article?AID=/20041030/OPINION01/410300321> (last visited Mar. 30, 2005).

ture will focus on one famous example of multiple licenses sought by members of a single same-sex couple, not last year, but over thirty years ago, and not in San Francisco or Provincetown or Portland, but in Hennepin County and then in Blue Earth County, Minnesota.

The couple in question, Jack Baker and Michael McConnell, could have been typical audience members at a Lockhart Lecture. At the time they first sought to be legally married, Baker was a law student at the University of Minnesota Law School, of which Lockhart was then Dean, and McConnell, whom Baker had met when both were graduate students in Oklahoma and who had been his partner for three and a half years, had just accepted a job as head of cataloging at the University's St. Paul campus library.<sup>7</sup> On the day McConnell moved to Minneapolis to join Baker, May 18, 1970,<sup>8</sup> the two applied for a marriage license in Hennepin County, where they resided. Their application was accepted by the clerk, Gerald Nelson, but, on advice of counsel, he declared himself "unable to issue the marriage license" because "sufficient legal impediment lies thereto prohibiting the marriage of two male persons."<sup>9</sup> The couple applied for a writ of mandamus to require that a license be issued, but, on January 8, 1971, a state district judge instead "specifically ordered [Nelson] not to issue a marriage license to the petitioners."<sup>10</sup> Thereafter, the couple pursued a two-track strategy toward licensing their marriage.

On one track, they appealed the denial to the Minnesota Supreme Court, which, in an en banc opinion filed October 15, 1971, held first, that Minnesota Statute section 517 governing marriage did "not authorize marriage between persons of the same sex and that such marriages are accordingly prohibited"<sup>11</sup>

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7. See Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); Jack Star, *The Homosexual Couple*, LOOK, Jan. 26, 1971, at 69.

8. Petition for a Writ of Certiorari at 3, *McConnell v. Anderson*, 405 U.S. 1046 (1972) (No. 71-978). Coincidentally this was almost to the day sixteen years after the Supreme Court's first decision in *Brown v. Board* on May 17, 1954 and thirty-four years before the first marriage licenses were issued to same-sex couples in Massachusetts pursuant to the *Goodridge* decision on May 17, 2004. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Goodridge*, 798 N.E.2d 941.

9. Jurisdictional Statement at 4, *Baker* (No. 71-1027).

10. Order of Judge Tom Bergin of Hennepin County Quashing the Writ, Jurisdictional Statement at 12a-13a, *Baker* (No. 71-1027).

11. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

and second, that “Minn. St. c. 517 does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution,”<sup>12</sup> and that *Griswold v. Connecticut* and *Loving v. Virginia* “upon which petitioners . . . rely [do] not militate against this conclusion.”<sup>13</sup> According to the Minnesota Supreme Court:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.<sup>14</sup>

In response to the petitioners’ Equal Protection claim, the court said, “in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”<sup>15</sup>

On the other track, in early August 1971, the couple obtained an order from Judge Lindsay Arthur of the Hennepin County Juvenile Court “granting the legal adoption” of Baker by McConnell, permitting Baker “to change his name from Richard John Baker to Pat Lynn McConnell.”<sup>16</sup> On August 16, in Mankato, Blue Earth County, Minnesota, Michael McConnell alone applied for a marriage license for himself and Baker, under his new adoptive name.<sup>17</sup> The “bisexual name of Pat

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12. *Id.* at 187. The couple’s Eighth Amendment claim, which the Minnesota Supreme Court “dismiss[ed] without discussion,” *id.* at 186 n.2, began with the premise that “if one of the[m] . . . became a female by way of a surgical operation altering the sex organs, the appellants would then be able to marry each other” and argued that “[t]he mandate by the State that one of the appellants have his penis cut off before issuance of a marriage license is ‘conduct that shocks the conscience.’” Appellants’ Brief at 53–54, *Baker* (No. 43009).

13. *Baker*, 191 N.W.2d at 187.

14. *Id.* at 186 (citations omitted).

15. *Id.* at 187.

16. Jurisdictional Statement at 5–6 n.3, *Baker* (No. 71-1027). Adoption, which created a legal relationship more indissoluble than marriage, was a route other same-sex couples attempted to use to formalize their ties as a family. See, e.g., *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 425 (N.Y. 1984) (denying petition for adoption filed by adult male couple who had “resided together continuously for more than 25 years” in a “homosexual relationship” on grounds that legal adoption proceedings in New York were “plainly not a quasi-matrimonial vehicle to provide nonmarried partners with a legal imprimatur for their sexual relationship, be it heterosexual or homosexual”).

17. Jurisdictional Statement at 5–6 n.3, *Baker* (No. 71-1027). Minnesota

Lynn McConnell doubtless kept the clerk from making any inquiry about the sexes of the parties.”<sup>18</sup> But, after Judge Arthur made public the adoption, the County Attorney of Blue Earth realized it had issued a marriage license to two males and “declared the license void on statutory grounds” on August 31.<sup>19</sup> Nevertheless, on September 3, 1971, Baker and McConnell were married in a private ceremony by a Methodist minister and the following week the duly executed license was sent for filing to Blue Earth County.<sup>20</sup>

Because of publicity surrounding the first license application, the Regents of the University of Minnesota, after a hearing, determined not to approve McConnell’s appointment at the library. He appealed this determination all the way through the federal courts, receiving a favorable decision from the district judge which was reversed on appeal and denied review by the Supreme Court.<sup>21</sup> Baker and McConnell also sought Supreme Court review of the Minnesota Supreme Court decision concerning their marriage license, but, on October 10, 1972, the Supreme Court dismissed their appeal “for want of a substantial federal question.”<sup>22</sup>

This was by no means the end of Baker and McConnell’s efforts through litigation to have their marriage legally recognized. Baker’s claim for increased veterans’ “benefits for the period from September 27, 1971, to June 15, 1972, on grounds that McConnell was his dependent spouse”<sup>23</sup> was rejected in 1976 by the Eighth Circuit, which agreed with the Veterans’ Administration that “McConnell was not the spouse of veteran

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Statute section 517.07 (1971) required that a license be obtained from “the county in which the woman resides, or, if not a resident of this state” then from any county. It is not clear on what basis the couple believed that Blue Earth County was an appropriate county for them to obtain a license. The adoption itself would not, at the time, have presented a legal obstacle to the marriage. Although the current version of Minnesota Statute section 517.03 prohibits “marriage between an ancestor and a descendant . . . by adoption,” the rule in effect before 1978 limited the prohibition to those related by “the half or whole blood.” Compare MINN. STAT. § 517.03 (2004), with MINN. STAT. § 517.03 (1976).

18. Jurisdictional Statement at 5–6 n.3, *Baker* (No. 71-1027).

19. *Id.*

20. *Id.*; KAY TOBIN & RANDY WICKER, *THE GAY CRUSADERS* 150 (1972).

21. *McConnell v. Anderson*, 316 F. Supp. 809, 814–15 (D. Minn. 1970), *rev’d* 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

22. *Baker v. Nelson*, 409 U.S. 810 (1972).

23. *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (per curiam).

Baker”<sup>24</sup> because federal law looked to state law—here Minnesota’s—to determine “the validity of appellants’ purported marriage.” *Baker v. Nelson* had decided that issue adversely to the couple,<sup>25</sup> moreover “the Supreme Court’s dismissal of the appeal . . . constitute[d] an adjudication of the merits which is binding on the lower federal courts,” so that the couple, having “had their day in court” were “collaterally estopped.”<sup>26</sup> Then, on the thirty-fourth anniversary of their initial application for a marriage license, the couple filed suit to contest the IRS rejection of an amended tax return for the year 2000, amended to change McConnell’s marital status from “unmarried individual” to “married, filing jointly” and seeking a refund of \$793.28.<sup>27</sup> In January 2005, a federal district judge affirmed the decision by the IRS and a federal magistrate to deny the claim, inter alia on grounds of claim preclusion resulting from the 1976 Eighth Circuit case, to which the IRS had at one time been a party.<sup>28</sup>

I shall return to more specific details of the history of Baker and McConnell’s marriage licenses later in the Lecture and use them as jumping off points for discussion. Because the couple’s litigation history encapsulates virtually the full range of GLBTQ<sup>29</sup> rights issues, it helps illuminate not only how marriage licenses for same-sex couples are connected to broader constitutional commitments against sex discrimination, the establishment of religion, and unwarranted governmental intrusion into intimate decisions; but also how inextricably they can be linked to claims by gay men and lesbians to employment nondiscrimination and equality in other benefits and obligations of citizens, from taxation to military service.

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24. *Id.*

25. *Id.* (citing *Baker*, 191 N.W.2d at 186, 187).

26. *Id.* at 56.

27. See *McConnell v. United States*, No. CIV.04-2711, 2005 WL 19458, at \*1–3 (D. Minn. Jan. 3, 2005). In his brief for McConnell, Baker did not simply argue that “we are still married,” cf. GARRISON KEILLOR, WE ARE STILL MARRIED (1990), but rather that the receipt of a “lawful license to marry [from Blue Earth County] . . . gave rise to a contract to which the government is a third party benefactor.” Memorandum in Support of Plaintiff’s Objections to the Report and Recommendation of the Magistrate Judge, *McConnell* (Civil No. 04-2711), 2004 WL 3014486. According to the couple, “a lawful license gives rise to a special relationship that is recognized by the U.S. Constitution. Whether it is called a marriage or a civil union or a rose is beside the point.” *Id.*

28. *McConnell*, 2005 WL 19458, at \*2–4.

29. Gay/Lesbian/Bisexual/Transgender/Queer or Questioning.

First I want to examine more generally the ways in which the institution of civil marriage functions as a licensing scheme and the things marriage licenses. I will do this in part by drawing analogies to the licensing the state provides for the drivers of automobiles and the owners of dogs and, most importantly, to its provision of corporate charters. In all four of these cases, the underlying activities involved could be and were at times carried on without state involvement, but the state at one point asserted monopoly control over licensing and, because, *inter alia*, of efficiency advantages from its involvement, the state is unlikely to retreat completely from the field.

Marriage has always licensed, but what marriage licenses has changed over time. Marriage once licensed a husband's control over his wife, her body, and the products of her labor, from the children she bore to her earnings and property.<sup>30</sup> Marriage was also once the exclusive means of licensing sex and all that went with it—procreation, cohabitation, and the control of children. While it once bound couples together indissolubly for life in a heavily regulated status relationship, virtually all of whose terms were mandatory and imposed by the state, marriage now licenses in a new way—a married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.<sup>31</sup>

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30. See CAROLINE NORTON, *CAROLINE NORTON'S DEFENSE: ENGLISH LAWS FOR WOMEN IN THE NINETEENTH CENTURY* (Joan Huddleston ed., 1982) (polemic supporting law reform by wife whose husband, after suing unsuccessfully for divorce, seized her earnings and denied her access to her children).

31. This is true even under the immigration laws, although immigration authorities are authorized to investigate a couple's bona fides in marrying and look beyond the formal legal validity of their marriage before granting spousal benefits. See, e.g., *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975). As the Ninth Circuit explained:

The concept of establishing a life as marital partners contains no federal dictate about the kind of life that the partners may choose to lead. Any attempt to regulate their life styles, such as prescribing the amount of time they must spend together, or designating the manner in which either partner elects to spend his or her time, in the guise of specifying the requirements of a bona fide marriage would raise serious constitutional questions. Aliens cannot be required to have more conventional or more successful marriages than citizens.

*Id.* at 1201 (citations omitted).

The state has been a relative latecomer in the regulation of marriage, however, and, Henry Maine to the contrary notwithstanding, the history of marriage in Anglo-American law seems thus far to have been one of movement from contract to status and only part way back again. Legal historians have noted that the earliest English laws concerning marriage treat it as, in effect, a contract for the purchase of a wife, a purely private transaction, with “no trace of any such thing as public license or registration; no authoritative intervention of priest or other public functionary. It is purely a private business transaction.”<sup>32</sup> Moreover, such control as was exercised was in the hands of the Church and the canon law, not the state. Even as the Church sought, in the high middle ages, to increase its control over marriage, however, canon law resoundingly endorsed marriage’s fundamentally private and contractual character, with Pope Alexander III declaring it to be the law of the Church that “a contract by words of present consent” sufficed to form a valid marriage. Nothing further, in particular no public ceremony of any kind, was necessary for the marriage’s validity; although formalities such as the publication of banns and the blessing of a priest were required to make a marriage fully licit and a couple could be punished for failure to observe these formalities.<sup>33</sup>

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32. 1 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 285 (1904).

33. Alexander III’s canon law is the ancestor of what in the United States today is called common law marriage, in which a couple holding themselves out as married are treated (under the law of a shrinking minority of states) as legally married for all intents and purposes, notwithstanding their failure to undergo the formalities (e.g., obtaining a license) ordinarily required by law. After a period of disfavor, common law marriage has recently attracted more favorable reviews from legal academics. Cynthia Bowman, for example, has published *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996), claiming that it better protects women’s expectations. The modern term “common law marriage” is somewhat misleading, given that canon law marriage as defined by Alexander III was precisely not marriage at common law and would often not suffice to give members of a couple the rights and obligations the common law extended to married people. From the Norman conquest on down, greater observance of formalities, and, increasingly over time, greater involvement by the state, was generally required to make a marriage fully a marriage for purposes of the common law. This divergence between legality and validity remained an important theme for English marriage law in the medieval and early modern period. Complying with all the formalities so as to make one’s marriage fully legal as well as valid was much like obtaining a charter from the state—while initially not required, it provided certain advantages at the price of certain restrictions. Thus, for example, only with a charter could a corporation obtain monopoly status and only

When, the English state finally and definitively asserted control over marriage, it did so through its Established Church. The first systematic reform of English marriage laws, the 1753 Act for the Better Preventing of Clandestine Marriages, popularly known as Lord Hardwicke's Act after the Lord Chancellor who shepherded it through Parliament, represented the apex of the English state's assertion of monopoly control over the formation of marriage.<sup>34</sup> The Act declared null and void all marriages not preceded by the issue of an official ecclesiastical license or by the calling of banns in the Anglican church<sup>35</sup> of the parish where one of the marriage partners had resided for a specified period. It required that marriages be witnessed and set forth detailed requirements for their entry in specially prepared marriage registers.<sup>36</sup> Most violation of the Act's provisions by a clergyman was made a felony subject to fourteen years deportation to the colonies, but falsification of a marriage register subjected offenders to the death penalty.<sup>37</sup> Each one of these provisions was designed to remedy perceived abuses in the application of the law of marriage over the preceding century. The eighteenth century also saw a rise in state control over the dissolution of marriage paralleling attempts to achieve similar results far more simply and cheaply by private contract of separation.<sup>38</sup>

At the time Hardwicke's Act first made a marriage license an obligatory precondition for a valid marriage in England, a predominant view of what it was that marriage licensed was contemporaneously set forth by William Blackstone in his *Commentaries on the Laws of England*.<sup>39</sup> On this view, a mar-

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with a formally and publicly solemnized marriage *in facie ecclesiae* could a wife obtain dower rights at common law.

34. See Act for the Better Preventing of Clandestine Marriages, 1753, 26 Geo. 2, ch. 33 (Eng.).

35. See *id.* § 8. Thus the state's monopoly power was put, not in secular hands, but in the hands of its Established Church. Special provisions were made for the marriage of Quakers and Jews, but none for those of Catholics, Dissenters, or non-Christians. See *id.* § 18.

36. Not only was the form of words for individual entries specified, but the quality of the paper, the manner of numbering the pages, and the requirement that every numbered page "be ruled with lines at proper and equal distances from each other." See *id.* § 14.

37. See *id.* §§ 8, 16.

38. A fuller account appears in Mary Anne Case & Paul Mahoney, *The Role of the State in Corporations and Marriage*, an unpublished paper on file with the author.

39. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* ch. 15, *Of Husband and*

riage license could be seen to have functioned, in ways loosely analogous to a modern dog license, as something like a certificate of ownership of the wife, entitling the husband to her property, her body and its products, including the labor she engaged in for wages and the labor that produced offspring;<sup>40</sup> obliging him to provide for her care and feeding;<sup>41</sup> giving him a cause of action against those who injured her or his interest in her; making him responsible for her actions and giving him the right to control her.<sup>42</sup> She did not have the same rights over and duties to him, although she was obliged to provide him domestic services and sexual access and to share his residence.<sup>43</sup> Just as dog licenses require that the animal wear a collar and tag with its owner's name, so, as late as the 1970s, many U.S. states required by law that a wife take her husband's name; she was obliged to be known after marriage as Mrs. Husband's Name, and customarily always wore a wedding ring. A husband did not ordinarily take his wife's name, or indicate his marital status in his name or title in any way; nor, in much of U.S. society for long periods of history, did husbands tend to wear wedding rings.<sup>44</sup> This asymmetry of roles, duties, and privileges in law, although on the decline since at least the passage of the first Married Women's Property Acts in the mid-nineteenth century, remained, as will be discussed further below, very much a part of the legal landscape when Baker and McConnell first applied for a marriage license, and presented real obstacles to the recognition of their marriage.

In at least two other respects also relevant to Baker and McConnell's application for one, a marriage license can be seen

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*Wife.*

40. See, e.g., NORTON, *supra* note 30. For an analysis of similarities in attitudes toward pets, slaves, and wives, see Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. (forthcoming 2005).

41. Compare the doctrine of necessaries, under which a husband's obligation could be terminated through a notice placed in the papers concerning a wife who had run away. See, e.g., HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 156, 157 (2000) (describing the husband's obligation to support his wife).

42. See 3 BLACKSTONE, *supra* note 39, at ch. 15.

43. See, e.g., *People v. Greenleaf*, 780 N.Y.S.2d 899, 901 (Just. Ct. 2004) ("The inferior [the wife] hath no kind of property in the company, care or assistance of the superior [the husband] as the superior is held to have in those of the inferior." (quoting *Van Allen v. Allen*, 159 N.E. 656, 658 (N.Y. 1927) (quoting 3 BLACKSTONE, *supra* note 39, at \*143))).

44. See generally, e.g., Joan S. Kohout, *The Right of Women To Use Their Maiden Names*, 38 ALB. L. REV. 105 (1973).

as analogous to a driver's license.<sup>45</sup> First, just as the precondition for the lawful operation of a motor vehicle is these days ordinarily the possession of a valid driver's license, so, until quite recently, a valid marriage was the prerequisite to engaging lawfully in most any form of sexual activity: while marriage licensed a husband's sexual access to his wife (unconstrained even by the law of rape), criminal laws prohibited fornication and adultery (i.e., nonmarital and extramarital vaginal intercourse), homosexual and heterosexual oral and anal sex, bestiality, even access to masturbatory aids and pornographic materials. Marriage was also seen as a prerequisite to licensed cohabitation, with both criminal laws and zoning ordinances prohibiting unmarried persons from sharing a dwelling. Today, although not yet in 1970, every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, cohabitation, reproduction, parenting, etc.) seems, as a matter of constitutional right, no longer within the state's or marriage's monopoly control.<sup>46</sup>

Although Baker and McConnell steadfastly resisted any attempt to reduce their relationship to the sex or their marriage license to a necessary license to engage in otherwise prohibited sexual activity,<sup>47</sup> it is important to remember that, at the time they first sought to marry, *Griswold* had given married couples license to engage in constitutionally protected non-procreative sex, but *Eisenstadt v. Baird*<sup>48</sup> had not yet extended that liberty to unmarried persons. In Minnesota at the time, consensual sodomy was a criminal offense, a fact the Regents of the University of Minnesota stressed in the litigation over McConnell's job in their library. Their lawyer sought to question McConnell

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45. Of course, drivers' licenses require a minimum demonstrable level of knowledge and skill, something not now generally required of applicants for marriage licenses, despite efforts in some states to institute mandatory premarital counseling. See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993) (reporting on surveys indicating low level of knowledge of marriage laws among recently married Virginia couples); see also UTAH CODE ANN. § 30-1-33 (2004).

46. For further discussion, see Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 55 SUP. CT. REV. 75, 137-41 (2003).

47. See, e.g., Appellants' Brief at 13, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (No. 43009) ("[A]ny argument that a marriage license is state-granted permission for sexual activity is groundless. The conclusion is that the license will neither encourage nor deter sexual activity."); see also *infra* note 127 and accompanying text.

48. 405 U.S. 438 (1972).

in detail as to his sexual practices, as well as asking, "What activity is it that you could pursue in marriage that you don't do now?"<sup>49</sup> "On cross-examination he denied that he had ever practiced or committed the crime of sodomy within the state of Minnesota, though he is presently living at the same address as his intended 'spouse.'"<sup>50</sup> As Georgia Attorney General Michael Bowers was to do with Robin Shahar a quarter century later,<sup>51</sup> the Regents sought to draw an unbreakable connection between announcing one's desire to marry someone of the same-sex, sodomy, and unsuitability for public employment.

A marriage license, like a driver's license, also has taken on functions far removed from its central core of authorizing the holder to engage in potentially dangerous, heavily regulated activities. Because a driver's license today facilitates activities as diverse and far removed from operating a motor vehicle as boarding a commercial airplane, cashing a check, and purchasing an alcoholic beverage, even those who rarely get

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49. Appendix at 79, *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971) (No. 20583).

50. *McConnell v. Anderson*, 316 F. Supp. 809, 811 (D. Minn. 1970). At the time, Minnesota Statute section 609.293 defined sodomy as "carnally knowing any person by the anus or by or with the mouth." MINN. STAT. § 609.293 (1967). As Baker and McConnell pointed out in their Minnesota Supreme Court brief, "not all sexual acts are proscribed in all states. In Minnesota, for example, it is not illegal for two persons to indulge in mutual masturbation." Appellants' Brief at 12, *Baker* (No. 43009).

51. See *Shahar v. Bowers*, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997) (en banc) (upholding Georgia Attorney General's withdrawal of job offer from lawyer for participating in Jewish lesbian wedding ceremony intended to have only religious, not legal validity, because it "could undermine confidence about the Attorney General's commitment to enforce the State's law against homosexual sodomy (or laws limiting marriage and marriage benefits to traditional marriages)"). Attorney General Bowers testified in a deposition that "the natural consequence of a marriage is some sort of sexual conduct, I would think to most people, and if it's homosexual it would have to be sodomy." Memorandum in Support of Defendant's Motion for Summary Judgment at 32, *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993) (No. 1:91-CV-2397-RCF) (quoting Bowers Deposition at 80-81). See Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1659 (1993). The question of marriage was also interwoven with the question of public employment for another early gay rights litigant, John Singer. Compare *Singer v. Hara*, 522 P.2d 1187, 1194-97 (1974) (rejecting claim that state ERA prevented denial of marriage license to a same-sex couple), with *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247, 255 (9th Cir. 1976) (upholding Singer's discharge from a job at the EEOC because of his "openly and publicly flaunting his homosexual way of life," *inter alia* by applying for a marriage license). For further discussion of the *Singer* case, see Case, *supra* note 46, at 102-04.

behind the wheel of a car frequently find it useful to possess a driver's license. Similarly, explaining why he wished to marry, Baker said, "[t]he institution of marriage has been used by the legal system as a distribution mechanism for many rights and privileges [which] can be obtained only through a legal marriage."<sup>52</sup> On Baker's list were "inheritance rights, property privileges [and] tax benefits,"<sup>53</sup> all provided directly by the state.<sup>54</sup> He might have added a host of rights and privileges nongovernmental actors, sometimes under state compulsion, provide on account of marriage, from insurance benefits for employees' spouses, to spousal privileges at institutions ranging from hospitals and nursing homes to country clubs and automobile rental agencies. As Paula Ettelbrick observed, marriage "has become a facile mechanism for employers to dole out benefits, for businesses to provide special deals and incentives, and for the law to make distinctions in distributing meager public funds."<sup>55</sup> Just as a valid driver's license will help get you onto a plane even if you have not driven in thirty years, so "a simple certificate of the state, regardless of whether the spouses love, respect, or even see each other on a regular basis, dominates and is supported."<sup>56</sup>

Like many other supporters of gay rights critical of an emphasis by gay and lesbian couples on achieving entry into the legal institution of marriage as it is currently constructed, Ettelbrick would prefer, not only for benefits to be disaggregated

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52. DONN TEAL, *THE GAY MILITANTS* 284 (1971). Like Paula Ettelbrick and myself, *see infra* notes 55–58 and accompanying text, Baker did not approve of piling benefits onto couples merely because they were married. Although he would have preferred tax breaks to be given only to couples "straight or gay, who are actually raising children," and not to "childless heterosexual married couples," he insisted that "if society refuses to do that, then Michael and I are going to get in on couples' tax breaks too." TOBIN & WICKER, *supra* note 20, at 145.

53. TEAL, *supra* note 52, at 284.

54. As noted above, Baker and McConnell ultimately sought to use their marriage license to obtain veterans' as well as tax benefits. *See supra* notes 23–28 and accompanying text.

55. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN AND THE LAW* 721, 724 (2d ed. 1997). I share Ettelbrick's opposition to the extent to which benefits, particularly those provided through an employer, are accorded on the basis, not of need or desert, but of mere marital status. *See* Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1763–67 (2001).

56. Ettelbrick, *supra* note 55, at 724.

from marital status, but also for there to be increased legal recognition of other forms of relationship, notably domestic partnership.<sup>57</sup> As a theoretical matter, I share this desire for recognition of a variety of supportive family forms offering persons of all sexes and orientations the opportunity to structure their families and live their lives as best suits them. But as a practical matter, I must observe that the “many lesbian and gay families who do not, and never will, fit neatly into the marriage model”<sup>58</sup> are even less likely to fit into existing domestic partnership models or any other currently accepted “functional” model of the family. As compared with most current alternatives and competitors in the United States, from registered domestic partnership under the auspices of states like California and New Jersey, to ascriptive domestic partnership as proposed by the American Law Institute (ALI),<sup>59</sup> to functional family definitions such as those adopted by courts like the New York Court of Appeals,<sup>60</sup> marriage in many respects licenses greater flexibility and less state intrusion into family life.<sup>61</sup>

For good, as well as for ill,<sup>62</sup> marriage now licenses couples to structure their lives as best suits them without losing recognition for their relationship. Some may find it disturbing that a couple that does not “even see each other on a regular basis” is still licensed by marriage to receive a host of benefits or that “marriage laws do not condition receipt of public and private financial benefits to married couples on a demonstration of financial dependence on each other; the benefits are available to married individuals regardless of whether they mingle their finances or actually depend on each other for support.”<sup>63</sup> Although I find it unfortunate that so many public and private benefits depend on marriage, I, by contrast, find much that is

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57. See *id.* at 725 (“The domestic partnership movement has been an important part of this progress . . .”).

58. Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POLY 107, 109 (1996).

59. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, 36–37, §§ 6.02, 6.05, 6.06 (2000).

60. See, e.g., *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 54 (N.Y. 1989) (granting rent control succession rights to survivor of a gay couple the court found had “all of the normal familial characteristics”).

61. This is a claim I first made in *Couples and Coupling*. Case, *supra* note 51, at 1664–66.

62. Cf. Ettelbrick, *supra* note 55, 1756–57; Ettelbrick, *supra* note 58, 122–30.

63. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 946 (Mass. 2003).

good in the fact that a marriage certificate now allows heterosexual couples to have an open marriage,<sup>64</sup> to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged.

Although married couples need no longer behave like Baron and Feme to be recognized, the same license is not given to same-sex couples under most of the domestic partnership schemes now available legislatively, judicially, administratively, or from private firms or organizations such as employers.<sup>65</sup> Consider, for example, the requirements for domestic partnership California and New Jersey now impose as a precondition for according to those eligible same-sex couples and elderly heterosexual couples that register many, but not all, the benefits of legal marriage. Both states require that “both persons [in the partnership] have a common residence”<sup>66</sup> and that both persons agree to be jointly responsible for each other’s basic living expenses during the domestic partnership. New Jersey in addition requires that both persons “are otherwise jointly responsible for each other’s common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property,”<sup>67</sup> and it prohibits the partners from “modify[ing] the rights and obligations to each other” that it has defined as “requirements for a domestic partnership.”<sup>68</sup> Although, until recently, the comparative license granted married couples

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64. At least in those jurisdictions that do not prosecute adultery.

65. Civil unions in Vermont and Connecticut, by contrast to most domestic partnership schemes, are not more restrictive in their requirements than marriage; under the laws of these two states, civil union and marriage are procedurally and substantively virtually identical.

66. CAL. FAM. CODE § 297(b)(1) (West 2005); N.J. STAT. ANN. § 26:8A-4(b)(1) (West 2004). California defines domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.” CAL. FAM. CODE § 297(a) (West 2005). By contrast, marriage is defined as “a personal relation arising out of a civil contract between a man and a woman,” *id.* § 300, and those eligible to marry are described only as “[a]n unmarried male . . . and an unmarried female of the age of 18 years or older, and not otherwise disqualified,” *id.* § 301.

67. See N.J. STAT. ANN. § 26:8A-4(b)(1)(2) (West 2004). The domestic partners must demonstrate financial interdependence “by at least one of the following: (a) a joint deed, mortgage agreement or lease; (b) a joint bank account; (c) designation of one of the persons as a primary beneficiary in the other person’s will; (d) designation of one of the persons as a primary beneficiary in the other person’s life insurance policy or retirement plan; or (e) joint ownership of a motor vehicle.” *Id.*

68. *Id.* § 26:8A-4.

to structure their ongoing relationship was balanced by lesser license on termination, New Jersey, for example, now requires domestic partners to undergo a termination procedure similar to a divorce, although the partners are not afforded the same rights.<sup>69</sup>

The requirements of actual cohabitation in a shared residence and commingled finances are quite typical of most domestic partner registries.<sup>70</sup> Ascriptive or functional recognition schemes may also weigh additional requirements, such as that a couple be monogamous or be known as a couple to family and neighbors. Which is a greater restriction on my ability freely to structure my life with my partner—the requirement that I must marry that partner and on rare occasions produce the marriage license to third parties, or the requirement that we must reside together, be sexually faithful to one another, commingle our finances, hold ourselves out to the world as a couple, and provide to third parties the details of how we live our lives, as domestic partnership ordinances and judicially enforced “functional” family definitions often require? But for the lingering cloud of repressive history hanging over marriage, it would be clear that marriage today provides far more license, and has the potential to be far more flexible, liberatory, and egalitarian than most available alternatives.<sup>71</sup>

In other respects, too, the developing domestic partnership laws in the United States are not providing the range of options

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69. *Id.* § 26:8A-10. While dissolution requirements for domestic partnerships have been getting more restrictive, not only by statute as in New Jersey, but in proposals such as the ALI's, married couples have been granted increasing license to enter into binding prenuptial agreements governing the terms applicable on dissolution. *See* AM. LAW INST., *supra* note 59, at 36–37, §§ 6.02, 6.05, 6.06.

70. Path dependence helps account for some restrictive features, given that most early recognition schemes for domestic partnership, such as those set up by employers offering benefits to the partners of employees, wished to avoid free riding and fraud, and, therefore, in the absence of the legally binding commitments a marriage license produced, substituted inquiry into the specific facts of the couple's interrelationship. Given that state registration schemes such as California's now do impose substantial legal obligations—the obligations of a spouse—on partners, additional restrictions such as cohabitation no longer are needed as a proxy for commitment, but only serve to force couples into a traditional form as the price for recognition.

71. Of course, the law is not the only constraint placed on couples. It may well be that no matter how much license the law gives married couples to structure their lives, societal expectations and traditions, which envelop marriage far more than they do domestic partnership, will leave married persons comparatively constrained.

Ettelbrick and I might wish for. To begin with, only marriage in Massachusetts is open on the same terms to all couples regardless of sex. All other states to date who offer any formal legal recognition at all to same-sex couples have set up separate regimes for them and put those regimes off limits to the mine run of male-female couples. Unless one of them is a senior citizen, a male-female couple is ineligible for either the New Jersey or the California domestic partnership registry. Same-sex couples, by contrast are limited to domestic partnership in those states and denied the opportunity to marry.<sup>72</sup> In Vermont<sup>73</sup> and Connecticut,<sup>74</sup> although civil union offers “all the same benefits, protections and responsibilities under [state] law . . . as are granted to spouses in a marriage,”<sup>75</sup> only same-sex couples may form civil unions. As I have previously argued,<sup>76</sup> these bifurcated regimes send a message of subordination to both gays and lesbians on the one hand and heterosexual women on the other, while reaffirming patriarchy. Withholding from same-sex couples the opportunity to marry devalues their unions both symbolically and practically, while restricting marriage to male-female couples and male-female couples to marriage forces women who wish to unite themselves to men under state law to do so in an institution whose legal history is one of subordinating wives both practically and symbolically, an institution reserved for them alone because of and not in spite of its “traditional” (i.e., patriarchal) significance. Although the expressive harm may come most sharply into focus when the legal regimes differ in little but name (as in Vermont and Connecticut), the addition of substantive and procedural differences (as

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72. Similarly, the Hawaii reciprocal beneficiaries law is open only to couples who are otherwise unmarried and “legally prohibit[ed] from marrying one another,” that is to say to all same-sex couples, but only to those male-female couples too closely related to one another to marry. See HAW. REV. STAT. § 572C-4 (2003).

73. VT. STAT. ANN. § 1204(a) (2004).

74. See An Act Concerning Civil Unions, 2005 Conn. Pub. Act No. 05-10, available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00010-R00SB-00963-PA.htm> (last visited Apr. 25, 2005).

75. VT. STAT. ANN. § 1204(a).

76. See Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CAL. L. REV. 765, 788–89 (2002). For further discussion, see Mary Anne Case, *What Stake Do Heterosexual Women Have in the Same-Sex Marriage/ Domestic Partnership/ Civil Union Debates?*, an unpublished paper on file with the author.

in California and New Jersey) additionally increases complication and confusion.<sup>77</sup>

Moreover, instead of increasing the range and menu of options available to a given couple, states like California are focused on keeping options limited. Consider the changes recently made to the laws applicable to couples registered in California as domestic partners. From the time the first state-wide partner registry went into effect on January 1, 2000, the State has gradually increased the benefits and obligations of such partners. As of January 2002, such partners had rights including access to stepparent adoption procedures and wrongful death suits, as well as medical decision making, sick leave, and insurance benefits, on account of a partner. The most recent change, effective January 1, 2005, conveyed to domestic partners virtually all the state-level rights and responsibilities of marriage.<sup>78</sup> Previously registered partners were, however, presented by the new law with an up-or-out choice. Either they dissolved their partnership before January 1, 2005 or they were automatically subject to the new regime of benefits and burdens. Not made available was the option of remaining with the bundle of rights and obligations available under the earlier regime. In other words, although the size may have grown larger over time, domestic partnership in California remains one size fits all. Not only could young heterosexual couples never avail themselves of the more limited form of partnership provided to same-sex couples before 2005, even same-sex couples can do so no longer.

Had California intended its laws to provide options and alternatives, it would have followed the example of the Netherlands. That country, which began by gradually granting certain rights to cohabiting same-sex as well as opposite-sex couples, first allowed these couples to register their partnership in 1998, and then, as of 2001, allowed same-sex couples to marry. But, unlike California, the Netherlands opened registered partner-

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77. Among the many difficulties caused are those associated with violation of the principle of *numerus clausus*. I am grateful to Lee Anne Fennell for first urging me to focus on these difficulties. For an explanation of the principle, see, e.g., Thomas W. Merrill and Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000).

78. For an overview of the changes over time to domestic partnership law in California, see, e.g., MARY KEARNY STROUBE, *I DO . . . DON'T I? A GUIDE TO UNDERSTANDING THE CALIFORNIA DOMESTIC PARTNER RIGHTS AND RESPONSIBILITIES ACT FOR COUPLES AND PROFESSIONALS* (2005).

ship to opposite-sex as well as same-sex couples. And, also unlike California, it did not abolish older options when it made new ones available. Thus both unregistered and registered partnership and marriage are now available to all. For at least a five-year period, registered partnership and marriage will both exist as options for Dutch couples of any sex. “The relatively high number of different-sex couples that contracted a registered partnership in 1998 . . . make[s] it plausible that there is a need for a marriage-like institution devoid of the symbolism attached to marriage. Therefore, the [Dutch] government wants to keep the institution of registered partnership in place, for the time being.”<sup>79</sup>

To understand better what a genuine menu of options for relationships might look like, as well as how thin the legal conception of marriage in the United States has come to be and why it nevertheless may be useful for the state to stay involved in licensing marriage, consider a final analogy, between marriage licenses and corporate charters. Corporate charters in the United States used to be issued only to the favorites of the state and only for a limited number of enumerated worthy purposes, but, like marriage licenses, gradually became available to almost anyone and for purposes the state no longer required be enumerated or inquired into so long as they were lawful. Over time as well, the menu of options for those starting a business has increased. In addition to an increasing variety of corporate forms, they could choose from among noncorporate forms such as partnership, without, in the mine run of cases, having the state dictate a form. They could also choose a state in which to incorporate, even if that state were not their principal place of business. A similar range of flexibility is not yet available to couples, but perhaps it should be.<sup>80</sup>

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79. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 457–58 (Robert Wintemute & Mads Andenaes eds., 2001) (translating the explanatory memorandum accompanying the original bill on the opening up of marriage for same-sex partners, Parliamentary Papers II 1998/1999, 26672, No. 3 (July 8, 1999)). For a discussion of the development of the Dutch law, see *id.* at 437–64; YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 111–29 (2002).

80. Unfortunately, the range of options available to unmarried couples, whether of the same or of different sexes, may in very important respects be shrinking rather than expanding. At the start of 2004, virtually all states allowed members of cohabiting couples to enforce certain obligations toward one

Compared with that of marriage, the legal history of the corporation is infinitely shorter, simpler, and more complete.<sup>81</sup> In a few brief centuries, Anglo-American corporate law was born; faced resistance and some growing pains; and reached what most regard as a fairly satisfactory equilibrium, subject to comparatively trivial variations, a few minor open questions, and some carping around the edges. By contrast, the law of marriage is now, and has been for millennia, an unstable and unsatisfactory morass.<sup>82</sup> Over the same quarter century that saw the ascendancy of the contractual theory of the corporation, scholars of family law, like Hamlet and Polonius studying the clouds,<sup>83</sup> have debated without resolution the most appropriate legal analogy for marriage, with partnership,<sup>84</sup> contract,<sup>85</sup> and labor law considered and rejected both normatively and descriptively. Meanwhile the law of marriage, as usual, has been in flux: the same quarter century, like the millennia that preceded it, saw wide swings of the pendulum on many fundamental questions concerning the formation, dissolution, and incidents of marriage.

If the law of marriage has failed to reach equilibrium, this is in part because the sorts of enterprises marriage entails carry with them far more social and emotional, moral, and religious weight than those engaged in by corporations. But it is

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another by express or implied contract and to obtain benefits as a couple from third parties such as employers. As part of the backlash against same-sex marriage, a spate of state constitutional amendments and laws has thrown the previously settled expectations of such couples into disarray. No one yet knows how the variously phrased prohibitions on recognition of relationships other than marriage will be interpreted. *See, e.g.*, MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

81. In addition to conversations with Paul Mahoney and Dan Fischel, I rely for my sense of the history of Anglo-American corporate law principally on James Willard Hurst’s *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970* (1970) and H.A. Shannon’s *The Coming of General Limited Liability*, 6 *ECON. HIST.* 267 (1931).

82. This is intended as a purely descriptive assertion. Dissatisfaction with the law of marriage seems to be a universal, although the reasons for this dissatisfaction vary widely over time and across the ideological spectrum.

83. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. ii, at 379–88 (Tucker Brooke & Jack Randall Crawford eds., Yale Univ. Press 1947).

84. *See, e.g.*, Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 *U. CHI. L. REV.* 67 (1993).

85. *See, e.g.*, Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *CAL. L. REV.* 204 (1982).

also, in my view, because the law of marriage has not yet finished evolving. It is my contention that the law of marriage has followed a trajectory similar to the law of corporations, but with a substantially more gradual arc, so that the trajectory is not yet complete. The path covered by the law of corporations in a few centuries parallels that of Anglo-American marriage law over the last millennium. For both marriage and the corporation, a pivotal point is the eighteenth century, in which the state made its most aggressive attempt to assert monopoly control over both institutions, through Lord Hardwicke's Act and the Bubble Act, respectively. In the case of the corporation, that attempt was rapidly acknowledged to be a failure. The state then co-opted the private network of contracts it had begun by resisting. The end result was more state control than in a world of purely private ordering, but much more flexibility than in the original state-sponsored status institution. Marriage today seems to be where corporations were in the nineteenth century, and one optimistic vision for its future is that it complete the trajectory followed by the law of corporations, co-opting competitors<sup>86</sup> by moving closer to a system of default rules within which couples can structure their own lives.<sup>87</sup> Admitting same-sex couples to civil marriage could be an important step in moving that trajectory forward.

It is at least equally uncertain in the case of marriage as in that of corporations whether state involvement to date has done more harm than good. But the thought experiment of imagining the development of marriage over the last several centuries without the state's strong concessionary and regulatory involvement requires speculation about a different evolutionary path for a wide variety of substantive and procedural legal rules. This is so even though all aspects of the law as to

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86. Among them, domestic partnership and express and implied contracts for cohabitation.

87. Contrary to popular assumption, this would not necessarily entail a weakening of marital ties. The current marital status regime limits a couple's ability to opt in as well as to opt out of obligations. Couples generally cannot, for example, opt into enforcement of the vows recited on their wedding day; they generally do not have an option to get, in effect, expectation damages for the breach of such promises as to remain together for richer, for poorer, in sickness and in health, forsaking all others. If couples were more free to structure their relationship, some might choose a structure that moves closer to making available reliance or expectation damages (as with other personal service contracts, not specific performance). For further elaboration of this point, see Mary Anne Case, *Comments on Cohabitation After Marvin* (1996 AALS Annual Meeting, tape on file with the AALS, transcript on file with author).

which the legal institution of marriage was once thought to be central, notably the legal relationship between parents and their children<sup>88</sup> and the criminal law governing sex acts,<sup>89</sup> have now evolved away from a dependence on marriage. The thought experiment of eliminating state-sponsored marriage,<sup>90</sup> like that of eliminating state chartering of corporations, may have little practical value. While it is theoretically possible with some changes in the law to achieve through a network of private contract many of the benefits of marriage, marriage may have some efficiency advantages, especially given how much of the law is currently structured around it.<sup>91</sup> But the involvement of

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88. The legal rights and duties of parents with respect to their children under current American law are increasingly independent of whether a child's parents are now or have ever been married to one another. *But see* Michael H. v. Gerald D., 491 U.S. 110, 121–32 (1989) (Scalia, J., plurality opinion) (upholding against a due process challenge the conclusive presumption that a child born to a married woman residing with her husband is a child of the marriage and thus depriving the biological father of any opportunity to claim legal rights with respect to the child). Marital and nonmarital fathers (albeit under somewhat different procedural constraints) can have imposed on them the same obligations of support and can obtain the same rights, from custody and visitation to inheritance. This is, of course, a substantial change from the days when an illegitimate son was *fillius nullius*.

89. Thus the laws of fornication and adultery, sex crimes that depended on the marital status of the participants, are in desuetude or have been abolished throughout the country. And, while the law of rape in many jurisdictions still does take into consideration whether victim and perpetrator are married to one another, the evolution of the law of rape is away from the classic definition of rape as forcible and nonconsensual sexual intercourse with a woman not one's wife. This evolution is not only by way of allowing charges of marital rape, but also by occasionally extending the marital privilege to unmarried cohabitants or lovers.

90. It is important to note that, when I speak in this Lecture of the abolition of marriage or the prospect that “we will have no more marriage,” SHAKESPEARE, *supra* note 83, sc. i, at 150–51, I am not speaking of an end to long-term voluntary unions of couples drawn together by such things as love and affection, sexual attraction, and the desire to make a shared life. Nor am I speaking of the institution of marriage as established in various religions. Marriage in both of these senses existed long before the state claimed any role and would doubtless survive even the complete withdrawal of the state from the field. What is at issue in this Lecture is only the role of the state in the formation, governance, and dissolution of marriage.

91. This was the conclusion of the Report of the Hawaii Commission on Sexual Orientation and the Law, which endorsed marriage as a more efficient way than alternatives, including private contract and domestic partnership, of extending to same-sex couples the benefits and burdens Hawaii and federal law now extend to those who marry. *See* STATE OF HAWAII, REPORT OF THE COMMISSION ON SEXUAL ORIENTATION AND THE LAW ch. 2 (1995), available at <http://www.state.hi.us/lrb/rpts95/sol/> (last visited Mar. 31, 2005). The Commission listed among the many benefits of marriage embodied in the law re-

the state in marriage has also led to numerous inefficiencies, as an examination of its history demonstrates.<sup>92</sup>

Like corporate status, civil marriage today serves as an off-the-rack rule. Its principal legal function, at least while the relationship is ongoing, may not be to structure relations between the members of the marital couple, but instead to structure their relations with third parties; to license not just a select group of worthy activities or individuals, but almost anyone to do almost anything otherwise legally permissible. Justice Denise Johnson's opinion in *Baker v. Vermont* puts this point well:

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory in nature. . . . The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for state-conferred benefits. In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status.<sup>93</sup>

Like corporate charters, marriage licenses used to function as a grant of monopoly. Not only did members of a marital couple have a bilateral monopoly on the use of each other's sex organs,<sup>94</sup> but marriage more generally had monopoly control over sexual activity given that there was, in most U.S. states until quite recently, no legal means of having sex outside of marriage—laws prohibited adultery, fornication, sodomy, and other “unnatural” sex acts, lewd, and lascivious conduct. Marriage also gave husbands a form of monopoly control over children

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tirement benefits, health insurance benefits, state and federal tax advantages, inheritance rights, spousal support, hospital visitation, divorce, confidential privilege, wrongful death actions, and the right to decide the disposition of the body of one's spouse. *See id.* A state constitutional amendment prevented Hawaii from opening marriage to same-sex couples, but the state provided “certain rights and benefits [previously] available only to married couples to couples composed of individuals who are legally prohibited from marrying under state law” through its Reciprocal Beneficiaries Law. *See* HAW. REV. STAT. § 572C (2003).

92. That history is examined in greater detail in Case & Mahoney, *supra* note 38.

93. *Baker v. Vermont*, 744 A.2d 864, 898–99 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

94. *Cf.* IMMANUEL KANT, THE SCIENCE OF RIGHT tit. I, ch. 27 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1887) (defining marriage as “the union of two persons of different sex for life-long reciprocal possession of their sexual faculties”), available at <http://etext.library.adelaide.edu.au/k/kant/Immanuel/k16sr/> (last visited Mar. 31, 2005).

born to their wives during marriage at a time when children were seen as belonging in the first instance to their father.<sup>95</sup>

Both descriptively in present day American law and in my own normative view, the laws governing marriage today are far more like those governing business corporations than those governing nonprofits. What I mean by this is that we do not only license those marriages entered into only for certain enumerated or even only for worthy purposes. We ask little more of incorporators and couples marrying than that they comply with otherwise applicable law. To the extent that anything remains of government promotion of “human goods”<sup>96</sup> through marriage or incorporation, it is the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends. Perhaps at some extremely high level of generality this accords with the scriptural injunction that “two are better than one, because they have a good reward for their labor,”<sup>97</sup> but it is hardly a thick and rich ethical vision that is presently being given state sponsorship.

Consider a further analogy—between the law of corporate bankruptcy and the law of divorce. The aim of corporate bankruptcy law these days<sup>98</sup> is not to minimize the number of bankruptcies but to see that assets are put to productive use, to see that those firms that should fail do so expeditiously and with a minimum of dead-weight loss and those that have a chance of succeeding be given the time and flexibility they may need to do so. It is no accident that the notion of a “fresh start” is common today in both individual bankruptcy and divorce.<sup>99</sup> Moreover, the notion that failure is shameful, however much it may

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95. For further discussion, see Case, *supra* note 46.

96. See, e.g., Stephen Macedo, *Morality and the Constitution: Toward a Synthesis for “Earthbound” Interpreters*, 61 U. CIN. L. REV. 29, 46 (1992) (“We should extend the right of privacy to homosexuals to acknowledge that homosexual relationships often embody many of the same human goods present in heterosexual relations, not because homosexual relations share with marriage the morally empty feature of being forms of self-definition.”).

97. *Ecclesiastes* 4:9.

98. I rely for my understanding of these aims principally on conversations with Douglas Baird.

99. In making this descriptive observation I do not mean to endorse the full extent to which the perceived desirability of a fresh start informs the law of divorce nor thereby to reject out of hand the many thoughtful feminist suggestions for reform. See, e.g., Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

still permeate social norms attached to business or marital dissolution, no longer forms part of the law in these areas.<sup>100</sup>

Paradoxically, this limited (some would say amoral) descriptive and normative view of the aims of state-sponsorship of marriage may provide a strong brake to the slide down the slippery slope toward polygamy to which opponents of same-sex marriage so often point a cautionary finger. If I am right that the principal function of state-sponsored marriage in our law is to provide an off-the-rack rule to structure certain relations between members of the couple and third parties (at least this is the part of marriage that is these days most difficult to achieve by other means, such as private contract), then recognizing polygamous unions could not easily be justified under existing law by the best arguments used in support of same-sex marriage. This is because much of what a marriage license now accomplishes—i.e., the designation, without elaborate contracting, paperwork or other complications, of a single other person third parties can look to in a variety of legal contexts, could not be achieved as neatly if more than two persons are involved. Rather, with more than two persons, one is almost necessarily in a realm closer to contract or at least of choice among multiple options with no clear default choice. Take one everyday example, medical decision making in the event of incapacity. If a single spouse is recognized, the hospital knows to whom to turn; not so if several, with competing visions and agendas, come forward.

Among the chief functions civil marriage today serves is as a series of reciprocal default designations—I designate you, my spouse, and you designate me, at least as a default, as the answer to a wide variety of questions from “Who shall make decisions in the event of incapacity?” to “Who shall determine the disposal of the body on death?” The convenient opportunity it affords for simple reciprocal pointing by one spouse at the other and back makes efficiency, that virtue beloved of the law and economics community, perhaps the best justification both for the state’s continuing involvement in licensing marriage and

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100. See, e.g., James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1873–83 (1996). Just as the law required proof of one of a limited and enumerated set of fault grounds as a precondition for divorce, so, under early English statutes, “a person was still only subject to bankruptcy if he performed certain prohibited acts.” See Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 34–39 (1986).

the state's ability, if it wishes, to stop at two in setting the number of partners for a marriage. But just as, these days, the state makes available various corporate and partnership forms to persons organizing their businesses, without, in the mine run of situations, expressing a normative preference for which form is chosen, so perhaps the state should similarly leave to individuals the choice of structure for their personal lives, even while it continues to offer its assistance when it is helpful in matters such as registration and default rules.<sup>101</sup>

Although today the mutual pointing over by members of a married couple at each other is largely only by default and perfectly reciprocal, in 1970, it was far more mandatory and asymmetrical. In their jurisdictional statement to the U.S. Supreme Court, Baker and McConnell note that "they were asked orally at the time of application which was to be the bride and which was to be the groom . . . [although] the forms for application for a marriage license did not inquire as to the sex of the applicants"<sup>102</sup> and although they "were not questioned as to which physical sex classification they belonged."<sup>103</sup> The clerk did ask, however, "Where is the female in this marriage?"<sup>104</sup> and a reporter waiting outside the county clerk's office insisted on knowing "'who's going to be the wife.' . . . 'We don't play those kind of roles' came the reply."<sup>105</sup> The *Look* magazine spread on the couple, in an issue dedicated to The American Family, reinforced this answer, observing:

In many respects, the Baker-McConnell household is like that of any young marrieds except that there is no male-female role playing. Nei-

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101. Some readers might be anxious to insist here that the state also retains an interest in regulating both business and intimate relationships to avoid oppression or unfairness to one of the parties or to third parties. Of course it does, but vindicating this interest can be a conceptually distinct matter from the question of state provision of a licensing scheme. Even in the absence of a licensing or registration scheme, the state can monitor relations between intimates as well as business associates, for example for unconscionability or fraud. And even when a licensing scheme is in place, the state may decline to intervene in the licensed relationships to ensure fairness. *See, e.g.,* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) ("The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said on his behalf.").

102. Jurisdictional Statement at 4, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

103. Alternative Writ of Mandamus, Hennepin County District Court, Jurisdictional Statement at 11a, Baker (No. 71-1027).

104. TOBIN & WICKER, *supra* note 20, at 145.

105. *Id.*

ther is a limp-wristed sissy. "I do the dishes," says Baker, "because I don't like to cook." "And I do the cooking," says McConnell, "because I cook better than Jack." Expenses are usually split four ways between Baker, McConnell and the young architect and lawyer who share the pad. Baker, as befits a man with a business degree, keeps the financial records in a stenographer's notebook, and keeps an eye out for bargains in the supermarket.<sup>106</sup>

The repudiation of sex-roles was reaffirmed in the couple's wedding ceremony, when, dressed in identical white knit suits, one said to the other, "Touch me, I am your lover, brother, sister, and friend."<sup>107</sup> At the time, the Minnesota law governing the solemnization of marriages specified that "no particular form shall be required, except that the parties shall declare in the presence of a person authorized . . . to solemnize marriages, and the attending witnesses that they take each other as husband and wife."<sup>108</sup> It is important to remember that, in 1970, more than a form of words was legally at stake and the reporter's question as to which one would be the wife could be far more than a facetious put-down or an inquiry into potential effeminacy. Which one would be the wife had serious legal consequences at a time when legally enforced sex-role differentiation in marriage was firmly entrenched in law and not yet seen as constitutionally problematic.<sup>109</sup>

The wife, after all, was the one to whose household services the husband was entitled, such that her loss, not necessarily

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106. Star, *supra* note 7, at 69, 70. There is evidence that Baker was willing to play with stereotypes of gay men as effeminate or androgynous in a poster for his successful campaign for president of the University of Minnesota Student Association, which depicted him "in a shirt and tie and jeans [and] a woman's high heeled shoes" with the slogan "Put Yourself in Jack Baker's Shoes." See DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 71 (1999).

107. TOBIN & WICKER, *supra* note 20, at 150. At the risk of stating the obvious, let me note how perfectly these identical outfits combined the bride's traditional color with the groom's traditional garb.

108. MINN. STAT. § 517.09, *quoted in* Jurisdictional Statement at 6a, *Baker* (No. 71-1027). Like so many of the legal technicalities surrounding the obtaining and use of McConnell and Baker's Blue Earth County marriage license, it is unclear whether this technical requirement was complied with in the solemnization. To comply with a similar requirement in California law, Reverend Troy Perry, the Metropolitan Community Church leader who, on June 12, 1970 performed "what *The Advocate* termed 'the first marriage in the nation designed to legally bind two persons of the same sex'" had one of the two women declare that she took her partner "to serve in the office of husband" while the other "made the same vow except to say 'wife' instead of 'husband.'" TEAL, *supra* note 52, at 282-83.

109. Although not all the legal consequences described below were part of Minnesota law in 1970.

his, gave rise to a claim for loss of consortium by the survivor; the process by which state courts and legislatures made consortium claims reciprocal was still underway in 1970.<sup>110</sup> The wife was the one presumed to be dependent, and who as a result could be eligible and make her husband eligible for benefits; not until a series of cases beginning with *Frontiero v. Richardson* in 1973 did the U.S. Supreme Court begin to dismantle on constitutional grounds the asymmetry in law between what a wife was entitled to on account of her husband and what a husband was entitled to on account of his wife.<sup>111</sup> The wife was the one the husband was obligated to support during marriage and who could be entitled to alimony on divorce; not until *Orr v. Orr* in 1979 did the Supreme Court insist that husbands be eligible for alimony equally with wives, holding that the state's purpose of reinforcing a model of "allocation of family responsibilities under which the wife plays a dependent role . . . can no longer justify a statute that discriminates on the basis of gender."<sup>112</sup> The wife was also the one whose share of jointly owned property could be disposed of by her husband as "head and master" of the marital community without her knowledge or consent; not until *Kirchberg v. Feenstra* in 1981 did the U.S. Supreme Court hold that state statutes giving the husband such exclusive control violated the Equal Protection Clause.<sup>113</sup>

As stunning as the declaration that a "homosexual is . . . a human being, and a citizen . . . as much entitled to the protection and benefits of the laws and due process fair treatment as are others," made by the district judge considering McConnell's challenge to his denial of employment by the University of Minnesota library<sup>114</sup> was the proposition that "[a] woman is a 'person' entitled to the equal protection of the laws against invidious discrimination on the basis of sex," a proposition the American Veterans Committee and the NOW Legal Defense and Education Fund had to remind the Supreme Court of in

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110. Minnesota wives had been accorded claims for loss of consortium before 1970, see *Thill v. Modern Erecting Co.*, 170 N.W.2d 865, 869 (Minn. 1969), but, as late as 1977, a Minnesota treatise noted that this remained one of the "legal remedies unavailable [to wives] in most States." ELLEN DRESSELHUIS, *THE LEGAL STATUS OF HOMEMAKERS IN MINNESOTA* 6 (1977).

111. See *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973).

112. *Orr v. Orr*, 440 U.S. 268, 279–80 (1979) (striking down an Alabama statute providing alimony on divorce only to wives, never husbands).

113. See *Kirchberg v. Feenstra*, 450 U.S. 455, 459–60 (1981).

114. *McConnell v. Anderson*, 316 F. Supp. 809, 814 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971).

their brief in *Reed v. Reed*, nearly a year after Baker and McConnell first applied for a marriage license.<sup>115</sup>

It is crucially important to remember that Baker and McConnell's legal challenge to the sex distinctions in the marriage laws began before the U.S. Supreme Court had held *any* sex-respecting rule to be constitutionally problematic and ended before the now well-established doctrinal structure governing claims of denial of equal protection on grounds of sex was put in place by that Court. Thirty-five years and two dozen Supreme Court cases later, it is well-established that "fixed notions concerning the roles and abilities of males and females"<sup>116</sup> are forbidden under U.S. constitutional law as a basis for state action.

In his legal opinion recommending the denial of a license to the couple, Hennepin County Attorney George Scott stressed the fact that, if one assumed from the issuance of a marriage license:

that the parties receiving such license are to become married to one another, there is another great body of law which takes effect over such parties as being married to one another. . . . The distinctions between a husband and wife, a man and a woman, and the rights and duties which are placed upon each . . . are too numerous to set forth in this opinion. Suffice it to say that both our statutory and case law in the State of Minnesota is replete with references to the distinction of husband and wife as being male and female with different rights, duties and obligations accorded to each.<sup>117</sup>

According to Scott, "if one were to permit the marriage of two male persons, it would result in a complete confusion as to the rights and duties of husband and wife, man and woman, in the numerous other sections of our law which govern the rights and duties of married persons" and "result in an undermining and destruction of the entire legal concept of our family structure in all areas of law."<sup>118</sup> As of 1970 these claims might well have

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115. Joint Brief of Amici Curiae American Veterans Committee, Inc. and NOW Legal Defense and Education Fund, Inc. at i, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

116. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

117. Appellee's Motion to Dismiss Appeal and Brief at 12-13, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (No. 71-1027). Scott listed "the area of divorce, the probate code, inheritance and income tax statutes, husband and wife, public welfare, and many others." *Id.* at 20.

118. *Id.* at 21; *see also* Petition for a Writ of Certiorari at RA-3, *McConnell v. Anderson*, 405 U.S. 1046 (1972) (No. 71-978); *Homosexual Marriage License Denial Urged*, MINNEAPOLIS STAR, May 23, 1970, at 5A. The prospect that their marriage would "force the legislature to take a fresh look at a lot of statutes on the books" and that "it definitely helps women's liberation" . . . by call-

had merit. In the interim, of course, virtually all the laws that speak in a legally differentiated way in terms of husband and wife, except those governing entry into civil marriage, have been “undermin[ed] and destroy[ed]” by the U.S. Supreme Court’s decisions holding such differentiation an unconstitutional deprivation of equal protection on grounds of sex.<sup>119</sup> In ways not foreseen by the Minnesota Supreme Court as it decided *Baker*,<sup>120</sup> the Fourteenth Amendment was indeed “a charter for restructuring” the “historic institution” of marriage so as to guarantee to men and women the equal protection of the laws.

Thirty-five years after Scott recommended denying a marriage license to a couple of males, another County Attorney in another state, Agnes Sowle of Multnomah County, Oregon, relying on the jurisprudence that had developed in the interim, declared instead that “[r]efusal to issue marriage licenses to same sex couples” would be an unconstitutional denial to them of equal state privileges and immunities.<sup>121</sup> As a result, more

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ing into question laws that treat husbands and wives unequally” was a plus for Baker, who, with McConnell, “both wear women’s liberation buttons.” See TOBIN & WICKER, *supra* note 20, at 153.

119. For the Supreme Court to say that embodying sex-based role differentiation in the law of marriage is no longer constitutionally permissible is by no means to outlaw legal rules based on role differentiation in marriage, however. Indeed, the claim Baker and McConnell brought for veterans’ spousal benefits in the 1970s clearly depended on such differentiation, as did their recent application for a tax refund. There may not have been a “wife” in the Baker/McConnell marriage, but there was a “dependent spouse,” *McConnell v. Nooner*, 547 F.2d 54, 55 (8th Cir. 1976) (per curiam), under the statutes governing veterans benefits in 1971 and a secondary earner under the tax code in 2000. Had there not been, there would have been no point to the couple’s bringing suit. Equal earning couples get a marriage penalty, not a refund, for changing their tax status to “married, filing jointly.” See *McConnell v. United States*, No. 04-2711, 2005 U.S. Dist. LEXIS 1313 (D. Minn. Jan. 3, 2005). And increased benefits were only awarded to veterans whose spouses depended financially on them. There might be objections from a feminist or other standpoint to the extent to which the law, particularly the tax law, disfavors equal earning couples and encourages marital role differentiation along the lines of the traditional role differentiation of husband and wife. But the importance of “fixed roles” in marriage no longer being legally assignable by sex should not be underestimated. Precisely because from time to time they may play different roles, without “male-female role playing” and despite both being men, Baker and McConnell in their spousal relationship embody the mandate against “fixed notions concerning the roles and abilities of men and women.”

120. See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

121. Confidential Memorandum from Agnes Sowle, County Attorney of Multnomah County, Oregon (Mar. 2, 2004), available at <http://pub.bna.com/fl/sowleopn.pdf> (last visited Apr. 1, 2005).

than 3000 same-sex couples in Multnomah County were issued the license denied Baker and McConnell by Hennepin County, Minnesota.<sup>122</sup>

Importantly, the cases County Attorney Sowle relied on were state constitutional cases, from her home state of Oregon, but also from Massachusetts and Vermont; her opinion discussed no federal constitutional claims.<sup>123</sup> Under the circumstances facing proponents of same-sex marriage today, the existence of the precedent of *Baker v. Nelson*, appeal dismissed, is a double-edged sword. Notwithstanding the massive tectonic shift in the constitutional law of discrimination on grounds of sex since Baker and McConnell's appeal was dismissed, the decision in their case retains some precedential value, albeit less than that to be accorded a decision reached after briefing and argument.<sup>124</sup> Some might still criticize the couple for having sued too soon, allowing the creation of a bad precedent to block state and lower federal courts from developing, on the basis of Supreme Court cases decided in the interim, federal due process and equal protection claims which, whatever their status in 1971, are nothing if not "substantial" today.

In the peculiar political climate surrounding same-sex marriage, it may not be regrettable that federal claims can be dodged while state constitutional jurisprudence develops, however. Like Justice Scalia, I can see no principled way under existing constitutional doctrine to avoid the conclusion that de-

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122. Although in *Li v. State*, CC 0403-03057 et al., 2005 WL 852319 (Or. Apr. 14, 2005), the Oregon Supreme Court held that Multnomah County's decision to take Sowle's advice and issue licenses to same-sex couples exceeded the county's authority under state law, it did not evaluate the merits of Sowle's privileges and immunities analysis. On Election Day 2004, the voters of Oregon passed a constitutional amendment declaring, "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." OR. CONST. art. XV, § 5a.

123. See Confidential Memorandum from Agnes Sowle, *supra* note 121, at 4–5 (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)). A concurrence in Vermont's *Baker* decision had, in turn, invoked the Oregon court's analysis in *Hewitt v. State Accident Insurance Fund Corp.*, 653 P.2d 970 (Or. 1982), and *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Or. Ct. App. 1998), for the propositions that classifications on the basis of respectively sex and sexual orientation were suspect. *Baker*, 744 A.2d at 892–93 (Dooley, J., concurring).

124. See, e.g., *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979) (describing such decisions as "no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision").

nial of license to marry merely on the ground that both parties are of the same sex is unconstitutional. Scalia draws this conclusion from his reading of the majority's opinion in *Lawrence v. Texas*.<sup>125</sup> I am of the view that, long before *Lawrence*, the Supreme Court's sex discrimination jurisprudence compelled the same result.<sup>126</sup> The same sense of legal inevitability and political controversy overshadowed the question of the constitutionality of bans on interracial marriage in the years before *Loving v. Virginia*, leading the Supreme Court to employ specious procedural objections in order to avoid a decision on the merits in *Naim v. Naim*, a 1956 challenge to the very same miscegenation statute the Court was to strike down eleven years later.<sup>127</sup>

It is worth highlighting that the Supreme Court extended constitutional equal protection guarantees to interracial sex three years before it extended those same guarantees to interracial marriage.<sup>128</sup> Similarly, with *Lawrence v. Texas*, the Court has now vouchsafed same-sex couples the right to have consensual sex but not to marry. Especially given the historical relationship between the licensing of marriage and sex in American law, what does it say about the Court's attitude toward a couple when the Court finds it easier to protect their sexual activities than to license their marriage? In resisting the use of the term "homosexual" in Minnesota's Human Rights Act, which was to ban certain forms of discrimination on grounds of "homosexual orientation," Baker objected that "'homosexual' implies strictly sexual activity."<sup>129</sup> "[W]e have a right to expect our government to provide solutions to our problems in a manner that does not deprive us of our dignity as persons," he said.<sup>130</sup> He would probably say to the Justices in the majority in *Lawrence* that it is not enough in order that same-sex couples "retain their dignity as free persons" for the Court "to ac-

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125. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

126. See Mary Anne Case, "The Very Stereotype the Law Condemns": *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1486-90 (2000).

127. Compare *Naim v. Naim*, 350 U.S. 891, 891 (1955), with *Loving v. Virginia*, 388 U.S. 1 (1967).

128. Compare *McLaughlin v. Florida*, 379 U.S. 184, 188-96 (1964), with *Loving*, 388 U.S. 1.

129. See Lars Bjornson, *Baker Rejects 'Homosexual' in Gay Rights Amendment*, THE ADVOCATE, May 23, 1973, at 6. Said Baker, "I consider that word insulting, equivalent to and on a par with the word 'cocksucker.'" *Id.*

130. *Id.*

knowledge that [as] adults [they] may choose to enter upon this relationship in the confines of their homes and their own private lives.”<sup>131</sup> When their sexual “conduct can be but one element in a personal bond that is more enduring,”<sup>132</sup> their dignity as free persons also requires them not to be denied a marriage license.

There is every indication that the current Supreme Court shares the *Naim* Court’s reluctance to decide the constitutional question of who may marry. By including, in his majority opinion determining that lack of standing as a parent precluded Michael Newdow from obtaining a decision on the merits of his Establishment Clause challenge to the words “under God” in the Pledge of Allegiance, a long and detailed reaffirmation of the Court’s deference to the states and its custom of declining “to intervene [in] the realm of domestic relations,” Justice Stevens may have bought his brethren time on not just one, but two, controversial questions, the pledge and same-sex marriage.<sup>133</sup> The timing of the *Newdow* opinion at the height of congressional consideration of a constitutional amendment and a jurisdiction-stripping statute both designed to take questions of same-sex marriage out of the hands of judges, sent the following reassuring signal that at least the Supreme Court was disinclined to be “activist”:

Long ago we observed that “the whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the States and not to the laws of the United States.” . . . We have also acknowledged that it might be appropriate for federal courts to decline to hear a case involving “elements of the domestic relationship” . . . “when a case presents ‘difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.’” . . . Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, e.g., *Palmore v. Sidoti*, in general it is appropriate for the federal courts to leave delicate issues of domestic law to the state courts.<sup>134</sup>

The signal may be reinforced by the fact that, although the law “of husband and wife,” though not directly relevant to the *Newdow* case, is specifically mentioned as reserved to the states, only *Palmore v. Sidoti*, not *Loving* nor any of the Court’s consti-

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131. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

132. *Id.*

133. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2309 (2004).

134. *Id.* (citations omitted).

tutional sex discrimination cases concerning state marriage laws, is cited as the exceptional case requiring intervention into the state law of domestic relations.

Just as the same evasive solution may, at least temporarily,<sup>135</sup> work for the Court in both the pledge and same-sex marriage cases, so the same fear may underlie its desire to duck the two questions—fear of massive popular resistance, much of it explicitly rooted in religious principles. In the final sentence of their brief successfully urging the U.S. Supreme Court to dismiss Baker and McConnell's appeal of the Minnesota Supreme Court decision holding that Hennepin County need not issue them a marriage license, the Hennepin County attorneys wrote, "Our country, and its Constitution, were founded upon basic religious principles and one of the most basic of such principles is that marriage is an institution ordained by God and that such institution is to be entered into by a man and a woman as husband and wife."<sup>136</sup>

There is every indication that Jack Baker and Michael McConnell shared the view that "marriage is an institution ordained by God." The first of five grounds Baker listed in justifying his right to marry McConnell was:

At two of the three passages [in the Book of Genesis which speak of marriage], the Bible speaks of marriage in terms of a love bond or a love union between two people. That's how we look at marriage. We feel it's the relationship, i.e., the love and concern that is important—not procreation. We look at marriage as a commandment of God to love one's companion. . . . We feel that the state is out of line with both the Constitution and the Bible to insist that there must be children involved or contemplated in a relationship before it will recognize a marriage. . . . We believe love knows no gender.<sup>137</sup>

Baker, raised Roman Catholic, and McConnell, raised Southern Baptist, were reported to "never miss Mass at the [University of Minnesota] campus Catholic chapel"<sup>138</sup> during the years in which they were seeking to obtain a marriage license.

One Sunday, Baker stunned the worshippers during a sermon about the openness of Christ in accepting people when he asked the priest:

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135. Newdow, unsurprisingly, has gathered together plaintiffs who do not share his standing problems and is headed back to court.

136. Appellee's Motion to Dismiss Appeal and Brief at 8, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (No. 71-1027).

137. TEAL, *supra* note 52, at 283–84 (quoting a letter from Jack Baker to the author (Oct. 21, 1970) (contrasting *Genesis* 2:18 and 2:24 with *Genesis* 1:28)).

138. Star, *supra* note 7, at 71.

“Do you feel that if two people give themselves in love to each other and want to grow together with mutual understanding, that Jesus would be open to such a union if the people were of the same sex?” . . . The priest hesitated a long moment and finally answered: “Yes. In my opinion, Christ would be open.”<sup>139</sup>

During the early 1970s, Father William Hunt, chaplain of the Catholic Newman Center at the University of Minnesota “engaged in friendly public dialogues about homosexuality with Jack Baker and with clerics of other faiths.”<sup>140</sup> According to Hunt, “homosexuality ‘was much more threatening to the Biblical world than to the contemporary world. In my opinion, the state could well recognize homosexual marriages without leading to the destruction of marriage, but I am not so sure the Church should do the same.’”<sup>141</sup>

When it came time actually to solemnize their marriage pursuant to the license McConnell had obtained from Blue Earth County, the couple chose Methodist ministers to perform the ceremony and sign the legal certificate.<sup>142</sup>

The differing roles played by Catholic and Protestant clergy in facilitating the union of Baker and McConnell illuminate both the peculiar relationship between religious and civil marriage in this country and its connection to one particular widely voiced objection to state recognition of same-sex marriages, as I shall explain. Note that the Catholic priest voiced the view that the state could and should recognize same-sex marriage even though his church could not and that the Methodist minister performed a ceremony that he did everything in his ministerial<sup>143</sup> power to give both spiritual and legal validity.

It may seem a paradox that the United States, with a much greater commitment to separation of church and state, conflates civil and religious marriage to a far greater extent than some continental European countries in which church-state cooperation is constitutionally secured. In Germany, for

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139. *Id.*

140. CLENDINEN & NAGOURNEY, *supra* note 106, at 233.

141. *Id.*; see also *Priest Says State, Not Church, Might Sanction Gay Marriages*, MINNEAPOLIS STAR, Sept. 25, 1971, at 13A; *St. Paul Clergy, Homosexuals Hold 2nd Symposium*, MINNEAPOLIS STAR, Nov. 4, 1972, at 8A.

142. TOBIN & WICKER, *supra* note 20, at 150 (describing the ceremony being solemnized by “[a] Methodist minister and friend of the couple, Roger Lynn”). McConnell recalls, “We were legally married by two Methodist ministers. Both signed the documents, and they were properly filed . . .” JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 165 (2001).

143. Pun intended.

example, despite a long and continuing history of close cooperation between church and state on many matters, civil and religious marriage are kept rigorously separate by law. Only civil marriage has the force of law and it may be performed only by a civil registrar. German couples are free to have an entirely separate religious ceremony performed by clergy, but, this ceremony “has no legal effect under German law.”<sup>144</sup> The peculiar U.S. situation in which members of the clergy, as authorized agents of the state, can virtually simultaneously and seamlessly perform a ceremony of religious and civil marriage and the resulting conflation of religious and civil marriage create many difficulties and confusions under U.S. law.<sup>145</sup> As suggested above by the discussion of Lord Hardwicke’s Act, which not only asserted for the first time the state’s monopoly over marriage, but did so in conjunction with the Established Church of England,<sup>146</sup> the roots of the American conflation between religious and civil marriage lie deep in Anglo-American legal history. In Puritan New England, by contrast to the rest of the United States, members of the clergy came late into participation in the licensing of marriage.<sup>147</sup> Marriage in New England was from the start a civil contract solemnized by a civil magistrate, perhaps in imitation of the Dutch model of marriage some colonies’ founders had experienced while in Leiden.<sup>148</sup> It is tempting to see some connection between this his-

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144. See, e.g., FAMILY LAW IN EUROPE 297 (Carolyn Hammond & Alison Perry eds., 2d ed. 2002).

145. Consider, for example, that the laws of many states make it a criminal offense for anyone authorized to perform marriages, including members of the clergy, to do so in the absence of a valid civil marriage license. A man and woman who wish to be married in the eyes of their faith, but not of the state, risk making criminals of clergy who accommodate their wish. Consider, for example, a couple of California senior citizens, widow and widower, who wish to enter only into registered domestic partnership under state law, and not into a new civil marriage, so as not to lose Social Security, pension, and other benefits accrued through their deceased spouses. If they also wish to avoid living in sin in the eyes of their faith or to be married to each other under a chuppah, California makes it difficult for their minister or rabbi legally to accommodate them because, unlike same-sex couples, these two senior citizens can clearly enter into a legal marriage. The situation their clergy face is different from that faced by ministers such as those in New Paltz, New York who claim themselves called by their faith to perform for same-sex couples marriage ceremonies they intend to be legally binding notwithstanding an inability to obtain state marriage licenses.

146. See *supra* notes 34–38 and accompanying text.

147. 2 HOWARD, *supra* note 32, at 138.

148. *Id.* at 127–32.

tory and New England's vanguard role in the state licensing of same-sex couples, with Vermont the first state to give them the benefits of marriage through civil union, Massachusetts the first state to license their marriages, and Connecticut most recently extending civil union to them by legislative initiative unprompted by court order.<sup>149</sup>

What is the relationship between the most virulent opposition to same-sex marriage in the United States and the paradox that this country, with a much greater commitment to separation of church and state, conflates civil and religious marriage to a far greater extent than countries like Germany? Opponents of state recognition for same-sex marriage often insist that such recognition would undercut their own, heterosexual marriages, and are widely mocked in the press and public debates for doing so. I think much can be learned about the peculiarly American way in which marriage is licensed by taking such claims seriously. In my view, the following is the best explanation of opposition to legal recognition of same-sex marriage on the part of evangelical Protestant religious conservatives who claim such recognition would undercut their own marriages: Unlike observant Jews and Roman Catholics, who clearly understand that civil marriage and marriage within their faith are not the same, such that one can be married in the eyes of the state and not the faith and vice versa, Protestant denominations in the United States have essentially abdicated the definition, creation and, above all the dissolution of marriage to the state. There is, for example, nothing like the get or annulment available to or required of Protestants. This leaves religiously conservative Protestants far more dependent on the state's regulation of marriage, far less able to distinguish conceptually between marriage as their religion defines it and as state law does and, unsurprisingly, far more opposed on a percentage basis to same-sex marriage than conservative Catholics and Jews who otherwise, according to poll data, share their opposition to homosexuality.<sup>150</sup> According to a representative poll taken in July 2003, for example, while 64% of Protestants oppose "gay

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149. An Act Concerning Civil Unions, 2005 Conn. Pub. Act No. 05-10, available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00010-R00SB-00963-PA.htm> (last visited Apr. 25, 2005).

150. A fuller account appears in Mary Anne Case, *From Before Hardwicke's Act to After the Defense of Marriage Act* (unpublished manuscript, on file with author and delivered at the 2005 Annual Meeting of the American Historical Association).

marriage,” “Catholics also oppose it, but by a smaller margin than the entire population,” 50% of Catholics as compared to 55% of the population as a whole.<sup>151</sup> And according to survey results released by the Pew forum in October 2004, 55% of Jews supported same-sex marriage, while opposition reached 48% among white Roman Catholics, “52% among Latino Catholics, 71% among Latino Protestants, 72% among Black Protestants and 75% among white evangelical Protestants.”<sup>152</sup>

For evangelical Protestants today, therefore, state-licensed marriage may function in somewhat the same way as state-sponsored public schools did for Protestants in the past. In each case a formally secular institution could be put in service of sectarian ends by groups that substituted capture of the state institution for development of their own clearly religious alternatives. Then, while Catholics and Jews, shut out of state education funding, founded private sectarian schools, the curriculum in the ostensibly secular public schools often tended to be infused with Protestant principles, including readings from the King James Bible. Accustomed to and dependent on this, some Protestants, beginning with the nineteenth century Bible wars<sup>153</sup> and continuing to this day in a host of Establishment Clause cases concerning the public schools,<sup>154</sup> resisted mightily any perceived attempt to make the institution of public education more neutral and secular and less clearly an embodiment of their values. Nowadays, similarly, evangelical Protestants’ dependence on the state to articulate and enforce their view of marriage is manifest, not only in the zeal with which they seek to enshrine covenant marriage in state law,<sup>155</sup> but, most dra-

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151. *Poll: Legalize Same-Sex Marriage?*, CBSNEWS.COM, July 30, 2003, at <http://www.cbsnews.com/stories/2003/07/30/opinion/polls/main565918.shtml> (last visited Apr. 1, 2005). Thus, the high percentage of Catholics in Massachusetts and Connecticut may, in an apparent paradox, have combined with the Puritan heritage of civil marriage to make those states fertile ground for same-sex couples’ claims for license to marry or enter civil unions.

152. *Poll: Strong Religious Opposition to Same-Sex Marriage*, ADVOCATE.COM, at [http://www.advocate.com/print\\_article.asp?ID=13661&sd=09/11/04-09/13/04](http://www.advocate.com/print_article.asp?ID=13661&sd=09/11/04-09/13/04) (last visited Mar. 29, 2005).

153. For further discussion, see, e.g., Linda Przybyszewski, *Competing Theories of Church and State: The Cincinnati Bible War of 1869–1872* (unpublished manuscript, on file with author and delivered at the 2005 Annual Meeting of the American Historical Association).

154. The issues presented in these cases range from the pledge to prayer in the schools, and from the teaching of evolution to the posting of the Ten Commandments.

155. See, e.g., Scott L. Feld et al., *Christian Right as Civil Right: Covenant*

matically, in their comparatively more virulent opposition to same-sex marriage.

This suggests that disaggregating the religious from the secular licensing of marriage-producing, in yet another sense, marriage licenses in the plural, may be at least a useful, if not a necessary, precondition to settling the question of the civil licensing of marriages like Baker and McConnell's, if not "under God" then in "one nation, with liberty and justice for all."

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*Marriage and a Kinder, Gentler, Moral Conservatism*, 44 REV. OF RELIGIOUS RES. 173, 178 (2002) (detailing leading role in passing Louisiana's covenant marriage law of conservative evangelical Protestant activists, including Tony Perkins, who thought the legislation a "politically more palatable" alternative to their preferred option of generally reinstating state laws "limiting access to divorce and restoring the requirement that someone must be to blame"). The Louisiana covenant marriage law, in addition to tightening divorce requirements for couples who choose it as an option, required of such couples "premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor, which counseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties." See LA. REV. STAT. ANN. § 9:273 A(2)(a) (West 2004). This mobilizes the mechanisms of state law to achieve some of what the Catholic Church, through the pre-Cana counseling it requires of couples who seek to marry in the Church, has long done without governmental reinforcement.