THE STATUS OF MARRIAGE

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Forthcoming National Taiwan University Law Review 3d Symposium Issue for Academia Sinica's International Conference Beyond 748: Same Sex Marriage and Family

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INTRODUCTION

For the last thirty years, since my earliest days as a legal academic, I have researched, analyzed, and made predictions about the development of the law of marriage in the United States and elsewhere in the world.[2] That same period of time also encompasses, not the first legal claims for marriage rights by same sex couples (which, in the United States, date back a further several decades)[3] but their gradual acceptance by many courts and legislatures, as well as the development in various parts of the world of other forms of legal relationship recognition, such as registered and unregistered partnership for couples regardless of sex. I welcome the opportunity offered by this conference celebrating the future opened for marriage and family in Taiwan Beyond 748 to reflect broadly on the effect the same-sex marriage movement has had on marriage more generally as a legal and societal institution. My reflections will combine a defense of my longstanding normative commitments with an acknowledgement of how very incorrect some of the descriptive predictions I made decades ago turned out to be.

With apologies for the difficulties this may cause in translation to Chinese, I intend my title The Status of Marriage, to be a pun, a play on the multiple meanings of the English word "status," several of which I shall be discussing. Status can refer to a position in a hierarchy, as one up or one down; some institutions and some individuals can be seen to have a higher status, others a comparatively lower status. Marriage has historically had a higher status in this sense than most other forms of legally recognized coupled relationship, such as, for example, concubinage, and in many societies those individuals who are married are generally seen to be of higher status than individuals who are single, divorced, separated, or widowed. This notion that marriage is "an honorable estate,"[4] marking those

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[2] *See, e.g.,* 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 (1993) (discussing various then ongoing and recently decided cases concerning same-sex marriage and relationship recognition).

[3] The first same sex marriage case to reach the U.S. Supreme Court was Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). As I explained in *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005), that meant that the case arrived before the groundwork of substantive due process and equal protection jurisprudence that would undergird later, successful claims for same sex-marriage under the U.S. Constitution had been put in place. Like the individual plaintiff in J.Y. Interpretation 748, Chi Chia-Wei, who filed his first petition for same sex marriage in 1986, Jack Baker and his partner kept litigating until they ultimately won. See *Marriage Licenses* at 1759-64 and discussion below.

[4] I take this phrase from the Form of the Solemnization of Matrimony of the Church of England's Book of Common Prayer, whence derive the form of marriage vows most familiar to the English-speaking world, such as the vow to take one's spouse "for better, for worse, for richer, for poorer, in sickness and in health…" *See, e.g.*, *Form of the*

who have successfully entered into it as respectable and responsible adult members of their community, has driven much of the push for, as well as much of the opposition to, the opening up of marriage to same-sex couples. It is this notion of marriage as having a peculiarly high status that I had fervently hoped but wrongly predicted would be far more greatly diminished than it now is in many of the countries I study, including my own.

Status has other meanings also relevant to the development of the law of marriage. When English legal historian Sir Henry Maine famously wrote that "the movement of the progressive societies has hitherto been a movement from Status to Contract,"[5] he was specifically discussing the development of the law of persons as it pertains to the family and its members. At the time he was writing, in the second half of the nineteenth century, marriage in Anglo-American law was correctly described as a contract for entry into a status: the choice to enter into it was contractual on the part of the spouses, but "the relation once formed, the law steps in and holds the parties to various obligations and liabilities" which "rest not upon their agreement but upon the general law of the State, … which defines and prescribes those rights, duties, and obligations."[6] Over the course of the last century and a half, the law of marriage in many legal systems has increasingly allowed spouses to contract between themselves as to their obligations and to arrange their lives as suits them rather than as demanded simply by their legal status as Husband and Wife.[7]

Most importantly to me as a feminist, a status-like role differentiation in which the rights and duties of the partners in a marriage differ by sex as a matter of law has been eliminated in both the United States and Taiwan,[8] allowing for the sharing or division of roles within a marriage to be

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Solemnization of Matrimonie, BOOK OF COMMON PRAYER (1549), *available at* http://justus.anglican.org/resources/bcp/1549/Marriage_1549.htm.

[5] Henry Maine, ANCIENT LAW 100 (1917).

[6] Maynard v. Hill, 125 U.S. 190, 211 (1888) (citations omitted).

[7] Taiwan, like the United States, is among the many legal systems in which this has happened. As Chen Shao-Ju explained:

> The replacement of status rules with contract rules, as one of the products of the constitutionalization of family law, is the basic theme of the evolution of Taiwanese family law. Since family law is also called "the law of status" in Taiwan, this development can also be understood as the contractualization of "the law of status." The "old" family law featured status rules that reflected and constituted male supremacy. The "new" family law, celebrated as the achievement of a liberal feminist legal reform project launched in the 1990s, is dominated by contract rules that privilege private negotiation between free individuals, although such contractual freedom is not absolute and is subject to legal regulation
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> Chen Chao-Ju, *Becoming "Outsiders Within": A Feminist Social-Legal Study of Surname Inequality as Sex, Race, and Marital Status Discrimination in Taiwan*, 18 J. OF KOREAN L. 1 (2018).

[8] This end to sex-based distinctions with respect to rights and obligations in marriage came about through a combination of constitutional decision-making and legislative reform in both countries. In the United States, the constitutional revolution was led by Ruth Bader Ginsburg, later a Supreme Court Justice, while she was a litigator for the ACLU Women's Rights Project; this revolution was ultimately embraced by even the conservative Chief Justice William Rehnquist, who had initially strongly resisted it. *See, e.g.,* Mary Anne Case, *Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 386-389 (2009) (setting forth Rehnquist's early opposition and his later embrace of constitutional anti-stereotyping jurisprudence in his majority opinion in Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728–30 (2003)). In Taiwan, constitutional judicial decisions similarly prompted legislative reform in the direction of sex equality. *See, e.g.,* Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273, 282-88

individually determined by the members of the couple. Precisely this elimination of legally defined sex roles within marriage has set the stage and served as the precondition for opening up legal marriage to couples regardless of their sex.[9]

Though there is now much scope for freedom of contract between spouses within a marriage, marriage itself still appears status-like from the perspective of third parties, who often determine what legal treatment is to be given a couple (their access to certain legal benefits and the imposition on them of certain legal restrictions, for example)[10] by determining whether they are married to one another. In this way, as I will discuss, marital status functions similarly to the status of being a business corporation – registration with the state enables easy recognition not only by one's own and other governments, but by a host of private parties, facilitating legal relations with them, especially in circumstances when individually negotiated contractual arrangements are not practically possible.

Although the above senses of the word status will be of greatest relevance to my discussion, underlying the discussion will also be status in the sense of the situation of marriage. What kind of institution is marriage in this or any other society or legal system? Marriage today can be seen as either/ or, both/and, a legal, religious, and social institution, and this will affect how one looks at it and interacts with it. And finally, marriage can be seen as a natural right, as a constitutional right, as a democratically or legislatively granted privilege, as far more than a simple matter for private agreement by the members of a couple.

In addition to engaging with multiple meanings of the word status, I shall also in this article be considering the various senses in which the English word "recognition" has relevance to the status of

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(2016);.Yun-Ru Chen & Sieh-Chuen Huang, *Family Law in Taiwan: Historical Legacies and Current Issues*, 14 NAT'L TAIWAN U. L. REV. 157, 171-180 (2019). In Taiwan as well, feminist legal activism, such as that of the Awakening Foundation, played an important part in prompting legal change in the direction of sex equality in marriage. *See, e.g.*, Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273, 290-94 (2016); Grace Shu-Chin Kuo, *The Alternative Futures of Marriage: A Socio-legal Analysis of Family Law Reform in Taiwan*, in WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA 219, 230-31 (Deborah S. Davis & Sara L. Friedman eds., 2014).

[9] Thus, it no longer makes sense as a legal matter to ask of members of a same-sex couple applying for a marriage license "Which one of you is the wife?" as it did in 1971, when Jack Baker and Michael McConnell, who unsuccessfully took their case to the U.S. Supreme Court, first applied for one. For further discussion, see *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758, 1685-6 (2005). With all other legally enforceable sex stereotypes about the parties to a marriage having been struck down as a constitutional matter in countries like the U.S. and Taiwan, the notion that it took one of each sex to make a marriage was logically ripe to fall. For further discussion*, see, e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1488 (2000). As Judge Vaughan Walker found in declaring California's attempted elimination of same-sex marriage through the infamous Proposition 8 unconstitutional, the exclusion of same-sex couples from marriage "exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed. . . . Gender no longer forms an essential part of marriage; marriage under law is a union of equals." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992-3 (N.D. Cal. 2010).

[10] While attention is most often focused on the legal benefits attached to marriage, as will be discussed further below, it is more accurate to speak of the treatment accorded as a matter of law to marriage and those who are married. Whether this treatment is a benefit or instead a burden, restriction, or penalty on the members of the married couple depends on their particular circumstances.

marriage. As I shall discuss, recognition can refer both to what is familiar, socially and legally, and to what is validated, socially and legally. Making marriage available to same-sex couples facilitates their recognition in every sense of the word – it makes their relationship more easily legible to family members and society on the one hand,[11] and to the law in all its applications on the other. Additionally, same-sex marriage is often seen both in general as a matter of constitutional and human rights and as a goal for particular members of the LGBT community because it is seen to acknowledge the worth and dignity of LGBT individuals and their relationships. The various meanings of status thus intersect with the various senses in which recognition is on offer. While I shall by and large urge an emphasis on the practical, I shall acknowledge and discuss the importance symbolic aspects have played in the evolution of relationship recognition in the last several decades.

I intend this article on the status of marriage to be a counterpart to an article I published in 2005 called Marriage Licenses.[12] That title was also a play on words. A marriage license in the Anglo-American legal system is the document that a celebrant of a marriage ceremony (a justice of the peace or a member of the clergy or other authorized official) gets from the state as authorization to perform a ceremony marrying a particular couple in conformity with state law. But, in using this phrase as the title of a law review article, I treated it primarily, not as a plural noun with an adjective, but as a subject and a verb, as a complete sentence. I argued that in American law at the turn of the millennium, the institution of marriage licensed in the sense that it left couples freer to structure their own lives than any of the then available alternatives, for example registered and unregistered domestic partnership.[13] I set forth the ways in which I, particularly as a feminist, saw that as desirable, saw it as a move away from rigid enforcement of gender roles, whether those roles were hierarchical or not, and despite the fact that those roles, such as breadwinner or homemaker, were now able to be occupied by people of any sex.[14]

A central part of my earlier article was the prediction that the law of marriage would gradually follow a similar arc as that followed by the law of business corporations, as I will discuss further below. The English state had first asserted monopoly control over the entry into both marital and corporate status in the mid-eighteenth century.[15] The state's hold over corporations rapidly loosened, so that, by

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[11] This legibility can have downside for some couples, in light of the fact that behavior historically and stereotypically expected of spouses, even though it can no longer be legally required of them, can continue to be socially imposed.

[12] Mary Anne Case, *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758 (2005).

[13] I explained that, in contrast to the freedom, privacy, and flexibility offered by the then prevalent laws of marriage in the United States:

> The requirements of actual cohabitation in a shared residence and commingled finances are quite typical of most domestic partner registries. 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. *Id.* at 1774.

[14] *See, e.g.*, Orr v. Orr, 440 U.S. 268, 282 (1978) (holding that when "family units defied the stereotype and left the husband dependent on the wife," the wife could be ordered to pay the husband alimony on divorce).

[15] For marriage, the relevant law was the 1753 Act for the better preventing of Clandestine Marriages, popularly known as Lord Hardwicke's Act, by which the state exerted control through its Established Church. For further discussion*, see Marriage Licenses* at 1767. For business corporations, it was the Bubble Act of 1720, which forbade all joint-stock companies not authorized by royal charter.

the end of the nineteenth century in both the United Kingdom and the United States, general incorporation had replaced special incorporation – corporate status was no longer limited as it had been to the favorites of the state for certain specifically enumerated worthy purposes, but was available to almost anyone for almost any purpose, which need not even be specified so long as it was not illegal.[16] Businesses also had a growing variety of corporate and partnership forms from which to choose, with the state generally indifferent as to which they chose. Moreover, dissolving a particular form, and reconfiguring so as to make more productive use of one's assets, had become increasingly possible, as the laws of bankruptcy came to emphasize, no longer the shame of failure in one's enterprises, but the need to facilitate a fresh start.

As I shall discuss further below, I both predicted and hoped that the same flexibility and expansion in choices would soon be available to persons organizing their family lives. I applied to my analysis of the laws governing family relations the principles my law and economics colleagues had developed to analyze business relations, and, like my colleagues, found centering the value of efficiency to be useful. My hope was that a focus on efficiency as a central consideration for the law's approach to marriage would prove a more a helpful guide to concrete law reform than a more exclusive focus on, for example, human dignity or moral virtue.

What would it mean to look at the law of marriage from the perspective of efficiency? Let me illustrate by quoting two opinions concerning the role of the law in marriage, each set forth in the context of the debates about legal recognition of same-sex marriage. The first is from Vermont State Supreme Court Justice Denise Johnson's partial concurrence in her court's 1999 decision that it was unconstitutional for Vermont to "exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples." [17] Her colleagues in the majority, acknowledging the "deeply-felt religious, moral, and political beliefs"[18] they saw implicated in opening up marriage to same-sex couples, were themselves content not only to allow the state a period of time to develop a remedy for the exclusion, but also for the legislature to adopt as the remedy, not marriage itself, but instead a new status, called civil union, which would be limited to same-sex couples.[19] Johnson, by contrast, thought that the appropriate remedy was for marriage in Vermont to be immediately opened up to same-sex couples. She wrote:

> 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-

[16] *See, e.g., Marriage Licenses* at 1777.
[17] Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).
[18] Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).
[19] Civil unions for same-sex couples turned out to be only an interim, and, in the end, unsatisfactory solution for Vermont, however. Once other states, beginning with Vermont's neighbor state of Massachusetts in 2004, made marriage available to couples of any sex, the Vermont legislature followed suit in 2009, opening marriage to same-sex couples and discontinuing the ability to enter into civil union. *See, e.g.*, *Marriage and Civil Union Certificates*, VERMONT DEP'T OF HEALTH, *available at* https://www.healthvermont.gov/health-statistics-vital-records/vital-records-population-data/marriage-and-civil-unions (last modified Jan. 6, 2021).

> 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.[20]

Christiane Taubira, who was the Garde des Sceaux, the Justice Minister of France, responsible for shepherding the law opening marriage to same sex couples through the French legislative process, took a similar position. She said of "mariage pour tous" (marriage for all) in France, "Il ne revient pas à la puissance publique de dire ce qui est le bien ou ce qui est le mieux, il lui revient d'organiser. "[21] ("It is not up to the public authority to say what is good or what is the best. It is up to it to organize [things].")

I find this not only a descriptively true, but a normatively appealing view of state sponsored legal marriage. As I said above, marriage is many things to many people. It is a social institution, it is a religious institution, it is a cultural institution. But if we focus on it as a legal institution, I think it is and should be about the orderly allocation of benefits and obligations. Most modern societies under the rule of law have made a large number of benefits and obligations turn on the status of being married.[22] We can imagine a world in which things are not so structured around marriage, in which marriage is not so significant for what Christiane Taubira calls organization. But that is not the world in which we are living. We are living in a world in which marriage matters nationally and internationally, and immediate developments in the law of marriage must take that into account.

I. APPLYING THE TOOLS OF LAW AND ECONOMICS TO THE LEGAL INSTITUTION OF MARRIAGE

In focusing on efficiency when looking at the law's regulation of marriage, I am, of course, adopting the traditional focus of scholars in law and economics, something I sometimes joke that I am contractually obligated to do as a member of the faculty of the University of Chicago Law School, home to so many of the distinguished pioneers of the law and economics movement.[23] But my own analysis of what makes legal marriage an efficient institution bears no resemblance to that for which my late colleague Gary Becker won a Nobel Prize.[24] Becker's work, which focused mostly on decision-making

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[20] Baker v. Vermont, 744 A.2d 864, 898-99 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

[21] *Mariage pour tous : les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), *available at* http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira-12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

[22] Consider for example, the discussion below and in Marco Wan's article for this symposium of litigation for recognition of same-sex marriage in Hong Kong. Although to date the courts of Hong Kong have denied a general claim for access to same-sex marriage, a number of recent lawsuits there have successfully claimed for same-sex couples married abroad particular benefits the law of Hong Kong ties to marital status.

[23] In fact, I began thinking of marriage in these terms long before arriving at Chicago. The University of Virginia, where I taught in the 1990s, also had a strong commitment to law and economics, and my work drawing analogies between the law's regulation over time of marriages and of business corporations began as a collaborative project in legal history with my University of Virginia School of Law colleague Paul Mahoney, a scholar of corporate law with a generally libertarian approach to regulation, to whom I remain most grateful.

[24] See *This Year's Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human Behavior and Relations*, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 13, 1992), *available at* https://www.nobelprize.org/prizes/economic-sciences/1992/press-release/ (crediting Becker for having

within a family unit,[25] is rooted in a sex-role differentiated world, and his model of family decision-making is an ultimatum game in which the "husband-father-dictator-patriarch" can make a take-it-or-leave-it offer to other family members."[26]

My own inspiration comes, not from Becker, but from another of my late Nobel Prize winning colleagues, Ronald Coase, whom the Nobel Committee lauded for "specifying principles for explaining the institutional structure of the economy" through attention to "the costs of entering into and executing contracts and managing organizations…. commonly known as transaction costs."[27] I have long argued that Coase's theory of the firm[28] can fruitfully be applied to the family.[29] Coase's theory of the firm suggests that people in business choose how to organize their business depending upon the legal and social circumstances in which they find themselves and a comparison of the transaction costs involved in the alternative forms of organization available. They might incorporate or they might simply engage in a series of one-off contracts; they might form a sole proprietorship, a partnership, a limited liability company, or a franchise operation. Just as one is now generally free, as Coase observed, to structure one's business affairs as one finds most suitable, similarly both law and society now offer a variety of ways to structure one's personal life. The provision of sex and of care (for example, elder and child care) and the production of children can each be outsourced or internalized within a legally recognized family structure.[30] This has been true from time immemorial, as the Hebrew bible's description of the role of surrogacy in the generation of the twelve tribes of Israel[31] and the evolution of the legal treatment of concubines and their children in imperial China[32] both indicate. With families, as with businesses, the perceived costs and benefits of the available legal structures will influence individual and societal choices, and it should be the role of the legal system to offer structures that work well.

"formulated a general theory for behavior of the family" by applying to it "the principle of rational, optimizing behavior").

[25] *See, e.g.*, Gary Becker, A TREATISE ON THE FAMILY: ENLARGED EDITION (1981).

[26] I take this analysis of Becker from Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV. 240, 242–43 (1988) and I develop an alternative approach to Becker's in Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011) on which Pollock commented at 35 WASH. U. J OF L. & PUB. POLICY 261 (2011).

[27] *See Press Release*, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 15, 1991), *available at* https://www.nobelprize.org/prizes/economic-sciences/1991/press-release/.

[28] *See, e.g.*, Ronald Coase, THE FIRM, THE MARKET, AND THE LAW (1988).

[29] *See, e.g.*, Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 220 (2010); The University of Chicago, *Ronald Coase's Theory of the Firm and the Family*, YOUTUBE (Jun. 7, 2012) https://www.youtube.com/watch?v=Xho-x3ITgfM.

[30] Indeed, in the United States, a much fuller Coasean range of options than is provided for adult relationship recognition has long been legally available for parenthood given the range of legal possibilities for structuring marital and non-marital parentage, adoption, the new reproductive technologies, and market provision of child care. *See id*.

[31] *See* Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 222 (2010).

[32] *See, e.g.*, Lisa Tran, *The Concubine in Republican China: Social Perception and Legal Construction*, 28 ÉTUDES CHINOISES 119, 127 (2009).

At the time I first began to consider what it would mean to apply Coase's theory of the firm to the family, some feminist theorists were arguing for a complete abolition of all firm-like options for couples. Martha Fineman, for example, argued that

> we should abolish marriage as a legal category and with it any privilege based on sexual affiliation. … There would be no special legal rules governing the relationships between husband and wife or defining the consequences of the status of marriage as now exist in family law. … Instead, the interactions of female and male sexual affiliates would be governed by the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law.[33]

Others, like Nancy Polikoff and Paula Ettelbrick, who deplored both marriage's oppressive sexist history and the modern tendency of state and society to pile tangible and intangible benefits onto married couples to the exclusion of other relationships and individuals, argued that, not recognition of same-sex marriage, but rather a broader move toward legal recognition for a variety of functional family forms such as de facto domestic partnerships, should be the goal of LGBTQ activists like themselves.[34]

I shared these feminists' bleak view of marriage's history and their critical view of its privileges,[35] but I lacked their optimism that de facto relationship recognition would have the liberatory advantages they foresaw. I observed that, as it happened, courts and legislatures in the U.S. tended to impose on couples seeking de facto recognition a very conservative template of what it meant to be a couple, requiring them to, for example, share a domicile, commingle finances, hold themselves out publicly as a couple, and be sexually faithful; in other words courts and legislatures tended to demand of them what had traditionally been demanded by law of those who married.[36] By contrast, reform in the laws of marriage in the United States in the twentieth century meant:

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[33] Martha Albertson Fineman, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES, 228-229 (1994). Fineman is a graduate of the University of Chicago Law School. Her aim has long been to refocus the attention of family law away from sexual relationships and toward relationships centered on care and dependency, especially but not exclusively the parent- child relationship. In this keynote, I will, however, be generally limiting my discussion to what the Judicial Yuan saw to be at stake in its Interpretation 748, to wit the "creation of a permanent union of intimate and exclusive nature for the purpose of living a common life by two persons." Summary of J.Y. Interpretation 748 available at https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748. I therefore shall focus on the legal recognition of members of a couple as partners, not as parents. Many other articles in this symposium and elsewhere discuss the failure in Taiwan thus far to extend full parentage rights to same-sex married couples, and the need in general to offer full parentage rights to same-sex couples.

[34] Both these theorists have weighed in on these subjects in a number of works over a number of years. *See, e.g.,* 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); Nancy D. Polikoff, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

[35] Similar feminist criticisms were raised in Taiwan, but they seemingly had lost traction at the time of the 748 same-sex marriage decision. For discussion, *see* Chao-Ju Chen, *Migrating Marriage Equality Without Feminism:* Obergefell v. Hodges *and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L. J. 65 (2019).

[36] As an example of a court imposing a traditional template, I cited Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (1989) (granting rent control succession rights to survivor of a gay couple the court found had "all of the normal familial characteristics"). As an example of a legislature doing so, I cited the California and N.J. Domestic

> Married couples in this society are not required to do the[se] rather conservative things. A marriage certificate now allows heterosexual couples to have an open marriage, to live in different cities or in different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged…. [I]n our society marriage can be liberating rather more than it need be oppressive from the perspective of gender.[37]

My emphasis in making this claim, I must stress, was exclusively on the law, not on the social norms that still may constrain married couples. I looked to the work of two other University of Chicago law and economics colleagues, Frank Easterbrook and Daniel Fischel, for a way to understand this development in the law of marriage in Coasean terms. In a series of articles ultimately summarized in their book The Economic Structure of Corporate Law, which they dedicated to their "parents and to Ronald Coase," Easterbrook and Fischel argued that, despite the prevalence of the language of regulation, "the corporate code in almost every state is an 'enabling ' statute, … allow[ing] managers and investors to write their own tickets."[38] Although there are many differences in law and in fact between marriages and business corporations, I find it productive to apply a template similar to that articulated by Easterbrook and Fischel for business corporations to the law of marriage. Though Easterbrook and Fischel stress the role of specialization within the corporation,[39] as Gary Becker did specialization within marriage,[40] specialization is not a component of my analysis here. Rather I want to emphasize the way in which the laws governing both marital and corporate status today allow those acting within these statuses to "write their own tickets, to establish systems of governance without substantive scrutiny from a regulator."[41] While both Becker in his analysis of the family and earlier theorists of corporate law (including Coase himself) can be seen to stress hierarchical command and

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Partnership Laws, which explicitly required domestic partners (but not married couples) to have a common residence and to be jointly responsible for each other's basic living expenses. New Jersey in addition required 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," and it prohibited the partners from "modifying the rights and obligations to each other" that it has defined as "requirements for a domestic partnership." California in addition required that they "share one another's lives in an intimate and committed relationship of mutual caring." *See* Cal. Fam. Code 297(b) (1) (West 2005); N.J. Stat. Ann. 26:8A-4(b) (1) (West 2004) and discussion thereof in Case, *Marriage Licenses*, at 1772-4.

[37] 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. 1643,1665-6 (1993). My argument here was a direct response to Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage."*, 79 VA. L. REV. 1535 (1993), published in the same symposium volume.

[38] Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991), at 2.

[39] Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1425 (1989).

[40] *See, e.g.*, Gary S. Becker, *Chapter 2 (Division of Labor in Households and Families)*, *in* A TREATISE ON THE FAMILY (1981), at 30ff.

[41] Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1417, 1425 (1989).

control within the institutions they analyzed,[42] Easterbrook and Fischel instead saw the internal workings of a corporation as a "nexus of contracts."[43] They observed that this term was

> just a shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves. The form of reference is a reminder that the corporation is a voluntary adventure, and that we must always examine the terms on which real people have agreed to participate. The agreements that have arisen are wonderfully diverse, matching the diversity of economic activity that is carried on within corporations.[44]

What Easterbrook and Fischel say here of business corporations seems to me, *mutatis mutandis*, also true of marriage. I am in strong disagreement with the assertion with which Tolstoy opens his novel Anna Karenina that "[a]ll happy families are alike but an unhappy family is unhappy after its own fashion."[45] Whatever may be true of unhappy families, in my view, happy families, and in particular happy marriages, are also "wonderfully diverse, matching the diversity" of tastes and preferences of their members, and the diversity of living arrangements they reach to fulfill them. The law in the U.S. today facilitates this diversity in part through an increasing willingness to enforce the pre- and post-nuptial agreements reached by parties to a marriage,[46] but much more importantly through the complete abolition of status based, sex-differentiated mandatory rules such as that imposed on husbands and wives through the regime of coverture.[47] Virtually every rule that governs spousal relations in the U.S. today is a default rule, which the spouses are free to alter as best suits them.

The law in Taiwan seems to be moving in a similar direction.[48] As in the U.S., where Ruth Bader Ginsburg's work with the ACLU Women's Rights Project played a key role, so in Taiwan the feminist

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[42] For a summary of the evolution of the theory of the firm from a theory of hierarchical command as posited by Coase to one of a network of contracts, see Thomas S. Ulen, *The Coasean Firm in Law and Economics,* 18 J. CORP. L. 301, 318ff. (1993).

[43] See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989). Though they acknowledge taking the term from Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976), Easterbrook and Fischel have made it their own, the centerpiece of their theory. In adapting their theory for my purposes, I take no position on its accuracy as a description of corporate law, which is beyond the scope of this article and my competence.

[44] Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

[45] Leo Tolstoy, ANNA KARENINA (Rosemary Edmonds trans., 1954).

[46] One important difference between marriages and business corporations in American law remains that the bargains contractually reached within corporations, but not within marriages, can be legally enforced while the relationship is ongoing; marriages, but not corporations seem still to be subject to a rule another of my University of Chicago law and economics colleagues, Saul Levmore, called "Love It or Leave It." *See generally* Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (1995). I have argued against the continuing validity of that rule as applied to marriage in Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011).

[47] For an enumeration of some of these mandatory rules of coverture in the (legally unenforceable) marriage contract entered into in 1855 by two resisters to the unequal laws of marriage, see Jane Johnson Lewis, *Marriage Protest of Lucy Stone and Henry Blackwell*, THOUGHTCO. (last updated Jan. 16, 2020), *available at* https://www.thoughtco.com/marriage-protest-lucy-stone-henry-blackwell-3529568.

[48] As feminist theorists are right to remind us, a change in the law is, however, often not enough to change couples' behaviors, if it is not also accompanied by a change in social norms. *See, e.g.*, Chen Chao-ju, *Becoming "Outsiders Within": A Feminist Social-Legal Study of Surname Inequality as Sex, Race, and Marital Status*

Awakening Foundation played a key role in efforts "to equalize marriage by abolishing sex-specific provisions that privilege husbands and fathers, reshaping the marital property, … and enhancing the exit" from marriage.[49] Decisions of the Judicial Yuan also moved the law away from the legal enforcement of status based hierarchies within marriage.[50] Most recently, in May 2020, the Judicial Yuan reversed a fairly recent precedent and declared that criminal penalties for adultery were an unconstitutional violation of proportionality,[51] observing that the

> constitutionally guaranteed freedom of marriage without arbitrary state interference is increasingly valued, including the right of the individuals to decide for themselves "whether to marry," "whom to marry," "whether to divorce by mutual consent," and whether to form and manage their marital relationship with their spouses (e.g., intimate relationship between a couple, economic relationship, lifestyle, etc.). A marriage is established based on mutual affection, and whether it can be maintained harmoniously and satisfactorily depends on the efforts and commitment of the couple.[52]

The court further found that, in addition to interfering with privacy and personal (including sexual) autonomy and human dignity, criminalizing adultery could even have a negative impact on the marital relationship, and therefore constituted an unconstitutional "restriction on the autonomy of spouses in the marriage relationship."[53]

II. EFFICIENCY ADVANTAGES OF MARRIAGE AS A LEGAL STATUS

Discrimination in Taiwan, 18 J. OF KOREAN L. 1 (2018) (observing that, although in Taiwan "marital name law and children's name law have been reformulated in a gender-neutral fashion," the overwhelming majority of Taiwanese children still are given their father's surname).

[49] Chao-Ju Chen, *Migrating Marriage Equality Without Feminism:* Obergefell v. Hodges *and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L. J. 65, 112 (2019) ("Mobilized by married and divorced women's suffering and facing strong public opposition, women's movement focused not on the entry to but on the exit from marriage, as well as on rights and obligations during marriage."). *See also, generally,* Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273 (2016).

[50] *See, e.g.*, J.Y. Interpretation No. 410 (overruling, in reliance on 1985 Amendments to the Civil Code that were motivated by the constitutional requirement of sex equality, an earlier 1966 precedent that had held that property obtained by a wife during a marriage which cannot be proved separate property or contributed property belonged to the husband).

[51] J.Y. Interpretation No. 791 (Effect of the Offense of Adultery and Withdrawal of Charges). The Judicial Yuan had previously upheld the criminalization of adultery in 2002 in Interpretation No. 554. In addition to the justifications for reversal cited in the text, the court emphasized that a disproportionate number of those actually convicted of the crime of adultery were women, making an additional consideration for abolishing criminalization the state's obligation to eliminate sex discrimination and promote substantive equality between the sexes.

[52] This summary of a portion of J.Y. Interpretation No. 791 is taken from Tiffany Hsiao, *The One Not Loved Is the Other Man/Woman? A Perspective on the Decriminalization of Adultery Based on Judicial Interpretation No. 791 (Taiwan)*, LEXOLOGY (Sept. 1, 2020), *available at* https://www.lexology.com/library/detail.aspx?g=8a55d926-e86b-4f4a-bbc5-ad0032cde5fe.

[53] J.Y. Interpretation No. 791 (Effect of the Offense of Adultery and Withdrawal of Charges). The court noted that aggrieved spouses would retain the ability to seek civil remedies, for example through an action for the tort of infringement of spousal rights. *See also Awakening Foundation, Post Conference Press Release on Interpretation* 791 (May 29, 2020), *available at* https://www.awakening.org.tw/news/5454.

If the law of marriage now looks from the inside like a relational contract whose terms the parties are free to shape without much interference (although also sometimes without much possibility of legal enforcement) [54] by the state, why not then take up Martha Fineman's suggestion to abolish marriage as a status, and leave the spouses to the ordinary rules of contract, as well as tort and criminal law? The best reasons I can think of for not doing as Fineman suggests also sound in efficiency.

First, what marriage today offers to spouses is a series of off-the-rack rules, a package deal. Among the chief functions of civil marriage today 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, including such end of life questions as, "Who shall make decisions in the event of incapacity?" , "Who shall determine the disposal of the body on death?" and "Who shall inherit the bulk of my property?" In most countries, these designations are rarely any longer mandatory. For example, those married persons who want their property to pass upon their death to the children of their first marriage or to their favorite charity rather than to a surviving spouse can generally arrange this through appropriate pre-nuptial or post-nuptial agreement. And, if, in preparing for potential incapacitation through illness, you want to give your health care proxy to your sister the doctor, your power-of-attorney to your brother the lawyer, and the decision what to do with your remains after your death to an old friend, you today may usually do so by executing the proper paperwork. But, given that many people do seem to wish to choose their spouse as the designee for most of these rights and responsibilities, the institution of legal marriage offers an efficient package with which they can accomplish this.

Offering such an off the rack set of default rules to couples reduces a couple's own transaction costs. It helps answer a question Martha Fineman never in any detail addressed in her proposal that the members of a couple be governed by the rules of contract: what will the default rule be in the absence of an explicit contract between members of a couple? This is a particularly crucial question given that so few today do explicitly contract or are likely to. More importantly, it reduces the transaction costs of others who deal with the members of a couple, transaction costs which would approach infinity in those situations, not uncommon in modern life, when members of a couple find themselves interacting in circumstances and with third parties they cannot predict or control in advance.

A. MARRIAGE RECOGNITION AT THE BORDER BETWEEN LIFE AND DEATH

Consider, for example, the circumstances I happened to observe a decade ago while a passenger on a plane on its way to New York City. The plane made an emergency landing in the state of Virginia, to allow a passenger who had unexpectedly been taken seriously ill to be admitted for treatment to a hospital. The passenger herself and her traveling companion were protesting this decision, which caused me to turn to my seatmate and express the hope that the two were not a lesbian couple. I had in mind the fact that, in 2004, Virginia had passed a state law, denominated a "Marriage Affirmation Act," declaring void and unenforceable, any "civil union, partnership contract or other arrangement

[54] For a discussion of the perceived limits on enforcement in the U.S., see generally Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011).

between persons of the same sex purporting to bestow the privileges or obligations of marriage,"[55] regardless of where this arrangement had been entered into. Commentators at the time expressed the fear that the law could interfere "with wills, medical directives, powers of attorney, child custody and property arrangements, even perhaps joint bank accounts,"[56] although the sponsors of the bill disclaimed such a sweeping intent. The voters of Virginia in November 2006 had followed up this law with a constitutional amendment forbidding the state to "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage."[57]

The sick passenger being removed from the plane could have had no idea in advance that she would end up in the state of Virginia, let alone in the particular hospital to which she was being taken. Even had she had gone through all the proper steps to execute and then carry with her all the paperwork necessary in her home state to designate a partner to accompany her and make decisions, itself a cumbersome process, there was no guarantee such paperwork would be treated as valid in Virginia. Had her traveling companion been a man, he could have said he was her husband and likely been accepted with no questions asked or proof required. Few heterosexual married couples in the United States seem to carry around their marriage certificates and they are very rarely asked to produce them. Another woman might have better luck falsely claiming to be a sister than truthfully claiming to be a domestic partner.

By contrast, even when members of a same-sex couple have gone through the trouble of executing the necessary individual paperwork for matters such as hospital access and medical decision making, they have often found it to be disrespected. In the United States and elsewhere, well-publicized instances of such disrespect provided an impetus to law reform.

In the United States, the Obama administration was motivated on April 15, 2010 to issue a "Memorandum Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies"[58] after a widely publicized incident in which a member of a lesbian couple, while aboard a cruise ship with her partner of eighteen years and their adopted children, collapsed with an aneurysm, and was taken to a Miami, Florida trauma center, where, less than 24 hours

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[55] Code of Virginia § 20-45.3. Civil unions between persons of same sex. Repealed by Acts 2020, cc. 75 and 195 , cl. 1, and c. 900, cl. 2.

[56] Jonathan Rauch, *Virginia's New Jim Crow*, WASHINGTON POST (June 13, 2004), *available at* https://www.washingtonpost.com/wp-dyn/articles/A36314-2004Jun12.html.

[57] Similar fears were expressed about its potential reach, with law professor Kerry Abrams noting that "[t]he language in the amendment is broad and could affect the ability of an unmarried person to leave property to a significant other or child, to designate a partner as a medical proxy, or even visit a loved one in the hospital." Emily Williams, Pr*oposed Virginia Amendment May Strike Down More than Same-Sex Marriage, Panelists Say* (Sept. 25, 2006), *available at* https://www.law.virginia.edu/news/200609/proposed-virginia-amendment-may-strike-down-more-same-sex-marriage-panelists-say.

[58] Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), *available at* https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receive-visitors-and-designate.

later, she died.[59] The surviving partner was initially told she could be given no information on the patient's condition without a health care proxy.[60] Even when she had a copy of her proxy faxed to the hospital, she was, she claimed, given less information and less access to her dying partner than the patient's sister when she arrived many hours later.[61] As President Obama wrote in directing his Department of Health and Human Services to craft new rules on the subject, such failure by a hospital "means that a stressful and at times terrifying experience for patients is senselessly compounded by indignity and unfairness. And it means that all too often, people are made to suffer or even to pass away alone, denied the comfort of companionship in their final moments while a loved one is left worrying and pacing down the hall."[62]

While the number of people who should be allowed to visit a dying patient can be somewhat flexibly adjusted depending on the patient's condition and the capacities of the hospital, the same cannot be said of those authorized to make medical decisions when the patient is no longer able to do so. Recognizing exactly one person as clearly authorized to do so has efficiency advantages all around. Somewhat paradoxically, the example of end-of-life decision making therefore shows that a limited (some would say amoral) descriptive and normative focus on efficiency as a principal aim for 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.[63] If just one spouse is recognized, the hospital knows to whom to turn; not so if several, with competing visions and agendas, come forward, one demanding, for example, that all heroic measures be taken to revive the patient, another that the patient should not be resuscitated once there is no longer hope of full recovery.

If I am right that a principal function of state-sponsored marriage today is to provide an off-the-rack rule to structure certain relations between members of the couple and third parties (at least this is

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[59] *See, e.g.*, Tara Parker-Pope, *Kept From a Dying Partner's Bedside,* NY TIMES (May 18, 2009), *available at* https://www.nytimes.com/2009/05/19/health/19well.html.

[60] *Id.*

[61] *Id.*

[62] Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), *available at* https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receive-visitors-and-designate.

[63] In his dissenting opinion in Obergefell v. Hodges, for example, U.S. Chief Justice John Roberts correctly notes, "It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage," going on ask, 'If '[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices,' why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?" *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2621-2 (2015) (Roberts, J., dissenting) (citations omitted). As I have previously discussed, had Justice Kennedy framed his Obergefell opinion around the U.S. constitutional prohibition on sex discrimination, rather than around substantive due process and the right to marry, he could have avoided this challenge from Roberts. *See, e.g.*, Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 688 (2016). For a further explication of the sex discrimination argument as it applies to bans on same-sex marriage, *see, e.g.*, 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).

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. [64] 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. [65]

Situations such as those addressed in the 2010 Obama memo, where one member of a gay couple is dying in hospital and the other seeks to be by the bedside and to be consulted on medical decisions, bring together the warmly human and the coldly practical reasons to recognize same sex marriage, and perhaps for this reason they have been central to the marriage equality movement in Taiwan and other east Asian countries, as well as in the United States and in the Netherlands, the first country in the world to recognize same-sex marriage. They illustrate the observation made by comparativist Kees Waaldijk, looking at the development of legal recognition for same-sex couples across jurisdictions, that "bad-times rights," dealing with, for example, death and sickness, typically come before "good–times rights" and also generate more ready consensus, leading a "very large

[64]While the future of a legal status for polygamy is a subject well beyond the scope of this paper, let me simply note here that arguments against creating or recognizing a legal status for polygamous unions generally seem to focus on the likely "harm to women, to children, to society." *See, e.g.*, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paragraph 129 (upholding, after extensive expert submissions and testimony, the criminal prohibition of polygamy as applied to religiously motivated polygamists from the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) because of "a reasoned apprehension [of] a risk of such harms"). Monogamous marriage has been able to develop beyond its inegalitarian history of legally mandated submission of wives to husbands; but no legally recognized form of polygamy of which I am aware has yet made a similar transition, even as a formal matter. While it is certainly possible to imagine multipartner domestic relationships that do not in fact cause "harm to women, to children, to society," these, because of the complications involved when the number of persons exceeds two, remain more readily imaginable in the realm of contract than of legally recognized status.

[65] Of course, as litigants such as the United Kingdom's Burden sisters, as well as theorists and policymakers from a variety of perspectives have observed, it is wrong to assume or require that for two people to reciprocally wish to designate one another they need be in a sexual or romantic relationship. The Burden sisters, who had lived their entire lives together in a shared home, argued that they should be treated for inheritance purposes the way those in a civil union or a marriage were. They had not, however, sued to be granted access to civil union, and the courts of both the UK and the EU held that, however intertwined the lives and finances of the two sisters in fact were, they were "not in an analogous situation" to married or civilly united couples because they had "not made a financial commitment by entering into a formal relationship recognized by law." Burden and Burden v. the United Kingdom (application no. 13378/05) at § 49. No such formal relationship was on offer to the sisters, since UK civil unions had incest restrictions similar to marriages. But other jurisdictions have experimented with reciprocal beneficiary designations or partnership registrations that neither require a relationship to be in any sense conjugal nor foreclose two close relatives from accessing registration, and there is much to be said in favor of expanding such options.

majority of countries now [to] take the position that it would be unfair (and non-compassionate) to exclude same-sex partners from legal protections designed for such sad times."[66]

Though today these cases involve many different illnesses and causes of death, it is important to remember the role of the AIDS epidemic in bringing to public attention and gradually to legal acceptance the ways gay couples cared for one another in sickness and in health until death parted them. According to Dutch scholar Gert Hekma, it was the questions raised by the AIDS crisis ("Who inherits when a partner dies? … Who can visit me in the hospital? Who belongs to my family?") that led not only Dutch society, but a Dutch gay community initially skeptical or even hostile to marriage, to come to favor it. In the context of the recently overwhelmingly successful Swiss referendum on same-sex marriage,[67] Hekma recently told a Swiss interviewer that what led same-sex marriage to become popular in the Netherlands was the realization that through marriage it was possible to get all the rights at once.[68] Similarly, though other Dutch activists, such as those associated with the periodical Gay Krant, pushed a more romantic view, it was these practicalities, not romance, that Hekma said led him to marry his husband.[69]

In Taiwan, the push for the legalization of same-sex marriage gained strength among legislators, activists, and the public following the widely publicized 2016 suicide of Frenchman Jacques Picoux, a year after the death from cancer of his long-term same sex Taiwanese partner, Tseng Ching-chao.[70] Picoux, an artist and lecturer in French at the National Taiwan University, had lived in Taiwan since 1979,

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[66] *See, e.g.*, Kees Waaldijk, *More and more together: Legal family formats for same-sex and different-sex couples in European countries – Comparative analysis of data in the LawsAndFamilies Database*, FAMILIES AND SOCIETIES WORKING PAPER SERIES (2017) 1, 42 (noting that "[m]ost of the rights and responsibilities with the highest consensus … are about situations where one of the partners dies, or where the partners are hit by other seriously 'bad times'" and that a "very large majority of countries now take the position that it would be unfair (and non-compassionate) to exclude same-sex partners from legal protections designed for such sad times"). *See also,* summarizing Waaldijk's analysis and concluding that "relative slowness of access to reproductive rights seems to corroborate the 'bad times before good times' trend" at 42.

[67] The measure to approve same-sex marriage, dubbed, following the French example, "Marriage for All," passed with 64.1% of voters and a majority in all of Switzerland's 26 cantons in favor. In a country some of whose female citizens were only granted full local voting rights in 1991 but which has had same-sex civil partnerships since 2007, the new marriage laws will provide for access to adoption by same-sex couples and to assisted reproductive technology by female same-sex couples. See, e.g., *Swiss Voters Approve Same-Sex Marriage In A Nationwide Referendum*, ASSOCIATED PRESS (Sept. 26, 2021), *available at* https://www.npr.org/2021/09/26/1040761090/switzerland-same-sex-marriage-referendum?sc=18&f=&fbclid=IwAR1J41VPC-r-P18f1h3XhFC4gi8PiY_6EncweNAtK3pBfyk1dEcD-MOyElo.

[68] See Gert Hekma, *Interview with Salome Mueller: "Schwule und Lesben waren anfaenglich gegen die Ehe fuer alle" ("Gays and Lesbians were initially opposed to marriage for all")*, REPUBLIK (Sept. 19, 2021), *available at* https://www.republik.ch/2021/09/14/die-schwulen-und-lesben-waren-anfaenglich-gegen-die-ehe-fuer-gleich-geschlechtliche-paare?fbclid=IwAR2ussMQ5ZqvoN6vo4UqufmR0-M6J4NDA_MsNb-XNDfj5o8-UmRfMJheNgc. For further discussion of the advantages of getting all the rights at once, see discussion, *infra*, of Hong Kong litigations.

[69] *Id.* Especially given that Taiwan has yet to grant full adoption rights to same-sex married couples, it is important to add that Hekma also lists the lesbian baby boom as among the practical reason for marriage's popularity in the Netherlands.

[70] *See, e.g.*, Joe Williams, *Death of gay professor may lead to same-sex marriage in Taiwan*, PINK NEWS (Oct. 28, 2016), *available at* https://www.pinknews.co.uk/2016/10/28/death-of-gay-professor-may-lead-to-same-sex-marriage-in-taiwan/.

sharing a home and a life with Tseng for 35 years. When Tseng was dying, however, Picoux was excluded from participating in medical decisionmaking, with Tseng's family of origin authorizing emergency resuscitation which Picoux insisted Cheng would not have wanted. The family's claim, after Tseng's death, that Picoux had no rights in the apartment he and Tseng had shared further contributed to Picoux's ultimately fatal depression.[71] In the year of Picoux's death, Kaohsiung became the first city in Taiwan to register same-sex couples, with a city official explaining that the cards would make it easier to contact partners in emergencies and for hospitals to include partners in medical decisions.[72]

In Japan, the lead up to the first ever Japanese court decision, by the Sapporo District Court in March 2021, holding the Japanese government's failure to allow same-sex marriages to marry an unconstitutional violation of equality rights under Article 14 of the Japanese constitution,[73] included separate litigation by members of several long-term same-sex couples in situations similar to Picoux's. One elderly Japanese survivor of a long term gay couple had sued his deceased partner's sister in 2018 in Osaka District Court for damages arising from his exclusion both from participation in the funeral arrangements of the deceased and from their shared home and business.[74] And the lesbian couple of Miyuki Fujii and Rie Fukuda were motivated to bring their still ongoing marriage equality lawsuit in Tokyo after Fukuda was diagnosed with cancer. Told only family members were authorized for hospital visits, the two lied that they were cousins, but continued to worry that, if Fukuda should die, Fujii could be evicted from the apartment they shared, despite her contributions to mortgage payments.[75]

In Hong Kong, among the numerous couples who have gone to court to obtain at least partial recognition of same-sex marriages they have entered into in other countries, were Henry Li Yik-ho and Edgar Ng Hon-lam, two Hong Kong residents who, in January 2017, married in London, followed by a blessing service at a church in Hong Kong "so as publicly to declare their commitment to each other in a form which was dignified and socially recognized."[76] Their marriage, was not, however, legally recognized in Hong Kong, so, like other same-sex couples in Hong Kong legally married elsewhere, they sued for recognition of particular incidents of their marriage. The first of their lawsuits to be decided sought "clarification on whether the [Hong Kong] Government accepted that same-sex marriages performed according to the laws of foreign jurisdictions would be recognized as marriages for the

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[71] Among the many articles setting forth details of Picoux's situation, *see, e.g.*, *French ex-lecturer falls to death*, TAIPEI TIMES (Oct. 18, 2016), *available at* https://www.taipeitimes.com/News/taiwan/archives/2016/10/18/2003657410. I am also grateful to Yen-jong Lee, a friend of Picoux's and attorney for Picoux's family, for answering my questions about Picoux and Cheng's situation.

[72] *See, e.g.*, Chris Horton, *Taiwan May Be First in Asia to Legalize Same-Sex Marriage*, NY TIMES (Nov. 18, 2016), *available at* https://www.nytimes.com/2016/11/19/world/asia/taiwan-gay-marriage-legalize.html.

[73] Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach (describing the litigation).

[74] See, e.g., *Japanese man seeks damages after death of same-sex partner, claiming he was barred from cremation ceremony*, SOUTH CHINA MORNING POST (April 26, 2018), *available at* https://www.scmp.com/news/asia/east-asia/article/2143508/japanese-man-seeks-damages-after-death-same-sex-partner-claiming.

[75] Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach.

[76] Ng Hon Lam Edgar v. Secretary for Justice [2020] HKCFI 2412 at § 4.

purpose of probate, inheritance, and intestacy."[77] The particular concern was whether the government sponsored flat Ng had purchased as their matrimonial home could be passed on to Li in the event of Ng's death. In December 2020, a few months after Judge Anderson Chow ruled in Ng's favor, Ng, who had long suffered from depression, took his own life.[78] In April 2021, Judge Chow again ruled in the couple's favor, holding that it had also been discriminatory to deny same-sex partners joint occupancy and ownership rights in government sponsored housing.[79] Li has brought a third lawsuit as a result of his treatment by the authorities in the aftermath of Ng's death, when, according to his lawyers, he "had been barred by multiple ordinances in the city from handling matters arising from his spouse's death, ranging from identification of the deceased and taking part in an investigation into cause of death, to collection of the body to arrange the funeral, and burial or cremation."[80]

The named plaintiffs in both US. Supreme Court cases upholding constitutional rights for same-sex married couples, *U.S. v. Windsor*[81] and *Obergefell v. Hodges*, also each went to court to deal with questions arising on the occasion of the death of a same-sex spouse.[82] In Edie Windsor's case, the issue was inheritance taxes on the homes she had shared for decades with her deceased spouse Thea Speyer. Although some in the gay rights movement initially feared that a wealthy woman suing to lower her tax

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[77] *Id.* at § 8.

[78] *See, e.g.*, *Same-sex partners can own subsidised housing as court overturns Hong Kong's anti-LGBT housing policy*, AFP25 (June 25, 2021), *available at* https://hongkongfp.com/2021/06/25/same-sex-partners-can-own-subsidised-housing-as-court-overturns-hong-kongs-anti-lgbt-housing-policy/.

[79] Ng Hon Lam Edgar v. The Hong Kong Housing Authority [2021] HKCFI 1812; HCAL 2875/2019 (June 25, 2021).

[80] *See, e.g.*, Brian Wong, Hong *Kong widower launches legal bid for recognition after being denied right to organise his husband's funeral*, SOUTH CHINA MORNING POST (March 8, 2021), *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3124582/hong-kong-widower-launches-legal-bid-recognition-after. Although Li was initially given court permission to challenge the government pathologist's insistence that Ng's mother needed to authorize Li's role in identifying and disposing of Ng's body, the Hong Kong government sought to have this permission overturned, claiming there had simply been a misunderstanding, that Hong Kong had "no such policy of discriminating same-sex couples as alleged," and introducing an apologetic statement from the senior forensic pathologist, who insisted he had only wanted to make sure Ng's mother had no objection to Li's actions, not that he had any "intention … whatsoever to demean, disrespect or diminish the dignity of the marriage between the applicant and Mr Ng." Jasmine Siu, *Hong Kong man's legal fight over late husband's funeral faces fresh challenge*, SOUTH CHINA MORNING POST (June 9, 2021), *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3136665/hong-kong-mans-legal-fight-over-late-husbands-funeral.

[81] 133 S. Ct. 2675 (2013)

[82] From the time of the earliest U.S. court victories for same-sex couple recognition through the US. Supreme Court same-sex marriage cases, I have observed that "courts … accord[ed] the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect ha[d] perforce been removed due to the death, illness, or imprisonment of one of the members of the couple," perhaps because courts could then "focus on all the wonderful pair bonding without being threatened by the sexual implications of that pair bonding." Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 680 (2016), quoting 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, 1644 (1993). Among the early victories of the gay rights movement in the U.S. was Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (N.Y. 1989) (recognizing the survivor of a same-sex couple as a member of the deceased's family and hence eligible to succeed to tenancy rights in the rent-controlled apartment in which the two had lived because the life the two shared had "all of the normal familial characteristics").

burden might not be the most sympathetic of plaintiffs, the couple's love story, including years of Windsor nursing Speyer through her paralyzing and ultimately fatal multiple sclerosis, captured the nation's hearts.[83] A documentary film which premiered shortly after Speyer's death in 2009, Edie and Thea: A Very Long Engagement,[84] showed the progress of the couple's relationship from their early encounters on the dance floors of Greenwich Village through their still dancing together more than forty years later, when Speyer could only twirl around in a motorized wheelchair, with Windsor on her lap or holding her hand.

Jim Obergefell also nursed his spouse through a long illness resulting in death, and, as Windsor did with Speyer,[85] Obergefell accompanied his partner John Arthur, shortly before the latter's death, to a jurisdiction, which, unlike their home state at the time, would allow same-sex couples to marry. Upon their return to their home state, Obergefell and Arthur went to court to have their marriage recognized for reasons that had little to do with money. The couple's principal request of the court was that Arthur's death certificate, which was expected to be needed within a few weeks of filing the litigation, would list his status on death as married and Obergefell as his surviving spouse. Among the practical consequences would be the ability to file joint tax returns and claims for survivor's benefits. But equally importantly, only if Obergefell were designated as Arthur's spouse on his death certificate could the two be buried together in Arthur's family plot, where rules put in place by his maternal ancestors "limited burials and memorials to descendants and married spouses only."[86] As Obergefell testified, "We've been beside each other for more than 20 years, and we deserve to be beside each other in perpetuity."

Beyond these practical considerations, Obergefell stressed how "hurtful for the rest of time" it would be "that John would forever be listed as unmarried on his death certificate." As he put it in an affidavit, "It breaks my heart to think that this [last official record of his life] would omit the most important fact of his life--our marriage." Obergefell explained further:

> Our legacy as a married couple is very important to John and to me. Our present family and friends know we are committed to each other. But in two or more generations our descendants will not know who we are. Married couples, often through research based on death records, have recognition for their special status forever. I want my descendants generations from now

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[83] *See, e.g.*, Stephanie Fairyington, *Inside the Love Story That Brought Down DOMA*, THE ATLANTIC (Feb. 14, 2014), *available at* https://www.theatlantic.com/national/archive/2014/02/inside-the-love-story-that-brought-down-doma/283840/. ("The couple's love story, captured so compellingly in [the documentary film] Edie & Thea, played a huge role in the outcome.")

[84] Directed by Susan Muska and Gréta Olafsdóttir. The film made clear how active and fulfilling a sex life the two maintained throughout their lives together, something Windsor was eager to highlight though her lawyer urged her not to talk publicly about sex during the pendency of the litigation. For further discussion see Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 683-4 (2016).

[85] Windsor and Speyer flew to Canada to marry in 2007, four decades into their relationship and two years before Speyer's death, knowing that their home state of New York would recognize this out-of-state same-sex marriage. *See* U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

[86] Joint Appendix at 28, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (No. 1:13-cv-501) (quoting the trial testimony of Jim Obergefell).

who research their history to learn that I loved and married John and that he loved and married me. They will know that they had a gay ancestor who was proud and strong and in love.

It is only comparatively recently that the state, rather than the family itself or a religious institution, has maintained the authoritative version of such genealogical records. And it is rare for those with no direct descendants to be so focused on what place in a family future generations will see them as having occupied. But, as will be discussed further below, this form of recognition, which is also a form of validation, can be among the most important goals for some same-sex couples who seek to marry, and it helps account for why marriage has, contrary to my expectations, tended to crowd out other forms of relationship recognition.

B. MARRIAGE AS A PACKAGE DEAL

While some of the benefits and obligations now tied to the status of marriage are obviously and closely related to the historical purposes of marriage, others are not. A marriage certificate can thus be seen as somewhat analogous to a driver's license, at least as driver's licenses have come to be used in the United States, in Taiwan, and in a number of other countries. At their core, both a driver's license and a marriage certificate were initially intended to authorize holders to engage in heavily regulated, potentially dangerous, but also pleasurable and socially productive activities. 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, licensed cohabitation, and having children recognized as one's own.[87] Although marriage no longer holds a legal monopoly on sex, cohabitation, reproduction, or parenting, a marriage certificate, like a driver's license, has taken on functions far removed from what was earlier at its central core.[88] Because a driver's license today serves as a form of identification that, in the United States,

[87]As further explained in *Marriage Licenses*, 89 MINN. L. REV. at 1769, in the United States until the late twentieth century, "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." And at English common law, a child born out of wedlock was referred to as "fillius nullius" (no one's child) because ineligible to be the heir of either parent. *See* William Blackstone, *Of Parent and Child*, *in* COMMENTARIES ON THE LAWS OF ENGLAND (1765). In the United States today, however, "every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, cohabitation, re-production, parenting, etc.) seems, as a matter of constitutional right, no longer within the state's or marriage's monopoly control." *Marriage Licenses*, 89 MINN. L. REV. at 1769.

[88] Of course, a major difference between driver's licenses and marriage licenses is that to obtain the former, the would-be-driver has to demonstrate a certain level of relevant knowledge and skills. Much less is generally required by the state from those who marry today. 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). Experiments in incentivizing or mandating informative pre-marital counseling have been comparatively rare and seem not to focus on informing couples about the legal effects of marriage. See e.g Utah Code Ann. 30-1-34 (2021) (setting forth requirements for pre-marital counseling on, inter alia, "commitment in marriage" and "effective communication and problem-solving skills," and offering a reduced marriage license fee to who couples who certify completion of such counseling by approved counselors, who include clergy and mental health professionals).

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 behind the wheel of a car frequently find it useful to possess a driver's license. Similarly, as Jack Baker, a member of the first same sex couple to take their case for marriage to the United States Supreme Court explained, "the 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" among them "inheritance rights, property privileges [and] tax benefits," all provided directly by the state.[89] Additionally, nongovernmental actors, sometimes under state compulsion, provide a host of other rights and privileges 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 critically 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."[90]

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.[91] But, when it comes to the state's use of marriage as a distribution mechanism, it is important to remember that marital status, while often beneficial to married couples, is not always so. Even in distributing meager public funds, sometimes marriage disqualifies people,[92] by, for example, leading the state to combine their incomes in determining eligibility. The income tax laws of the United States, like those of Taiwan until recently,[93] have a long history of marriage penalties as well as marriage bonuses.[94] One of the arguments effectively made against DOMA, the U.S. Federal Defense of Marriage Act struck down by the U.S. Supreme Court in Windsor, was that anti-nepotism and other ethics laws[95] would not

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[89] Jack Baker, as quoted in Donn Teal, THE GAY MILITANTS 284 (1971).

[90] 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).

[91] 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).

[92] *See, e.g.*, *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (upholding the termination of a dependent child's social security benefit upon marriage because "it was rational for Congress to assume that marital status is a relevant test of probable dependency").

[93] *See* J.Y. Interpretation No. 696 (2015) (holding unconstitutional the requirement that a married couple file a joint tax return when the effect was a marriage penalty and giving the legislature two years to craft a remedy for this marriage penalty in the tax law).

[94] The current U.S. federal tax laws have eliminated the marriage penalty for all but the extremes of the tax scale (very high earners taxed at a 35% rate and those poor enough potentially to qualify for an Earned Income Tax Credit), but, in the years before 2017, couples with relatively equal incomes, whether they were both shift workers at a factory or both corporate lawyers, tended to face a higher tax rate upon marriage to one another than they would have if they were single. *See, e.g.*, *What are marriage penalties and bonuses?*, TAX POLICY CENTER (updated May 2020) *available at* https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses. Feminist critics of the U.S. federal income tax laws have observed that they tended to penalize married couples with relatively equal earnings as well as secondary earners (who are often wives) while favoring breadwinner/homemaker married couples. *See, generally, e.g.*, Edward J. McCaffery, TAXING WOMEN (1997); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011).

[95] 133 S. Ct. at 2695. As Judge Michael Boudin explained, in denying federal recognition to same-sex married couples, "DOMA's definition of marriage arguably undermines both federal ethics laws… and abuse reporting

apply to same-sex couples absent federal marriage recognition, thereby, according to Justice Kennedy, "divest[ing] married same-sex couples of the duties and responsibilities that are an essential part of married life."[96] The examples of tax and ethics laws show one respect in which the status of marriage is today like corporate status – both lead in law to a particular treatment which may or may not be advantageous, depending on the circumstances; the status is not simply a privilege.

Campaigners for same-sex marriage recognition were thus not quite accurate in their tendency to equate the thousands of laws that took marital status into account with thousands of benefits of marriage; marital status also came with legal restrictions and obligations. But marital status did provide benefits as a package, which in a variety of respects was much more efficient than providing them one at a time. This was the conclusion reached in 1995 by the state of Hawaii's Commission on Sexual Orientation and the Law. Tasked with "examining major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples [and] the public policy reasons to extend or not to extend all or some of such benefits to same-sex couples" and then with "recommending legislative action," the Commission concluded that "the simplest solution would be, amending the marriage statute to allow same-gender marriage and extend all the benefits and burdens of such status to those couples if they wished to assume them."[97] The people of Hawaii, however, rejected this recommendation at the time, and, despite the Hawaii court's pioneering state-constitutional same-sex marriage decision, same-sex couples could not legally marry in that state before 2013.

It is just as inefficient for the courts as it would be for the legislature to provide same-sex couples with the legal benefits associated with marriage piecemeal, as recent litigation in the courts of Hong Kong demonstrates. As discussed above, a single same-sex couple, Messrs Ng and Li, have already had to bring three separate lawsuits to have particular incidents of their marriage recognized. As Li said when the first of these lawsuits was decided in their favor, "It's very tiring, we have mounted two challenges just for our home."[98] Other same-sex couples married abroad have had similar success in litigation asking the government of Hong Kong to recognize their marriage for specific legal purposes,

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requirements in the military,… anti-nepotism provisions,.. judicial recusals, … restrictions on receipt of gifts, … and on travel reimbursement, … and the crimes of bribery of federal officials … and threats to family members of federal officials." Mass. v. HHS, 682 F.3d 1, 14 at n. 8 (2012) (citations omitted) (upholding a challenge to the constitutionality of DOMA brought by the state of Massachusetts and some of its citizens).

[96] 133 S. Ct. at 2695.

[97] *Report of the Commission on Sexual Orientation and the Law*, STATE OF HAWAII iii, iii-iv (Dec. 8, 1995), *available at* lrb.hawaii.gov/wp-content/uploads/1995_ReportOfTheCommissionOnSexualOrientationAndTheLaw.pdf. The Commission listed among the many tangible and intangible benefits of marriage available in law retirement 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.* at vii (Ch. 1).

[98] Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING POST (Sept. 19, 2020), *available at* Hong Kong / Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kong-activist-jimmy-sham-loses-high-court-bid-recognise.

from joint tax assessment to spousal medical and dental benefits,[99] and from spousal dependent visas[100] to public rental housing benefits.[101] But a lawsuit by activist Jimmy Sham Tsz Kit to have his foreign same-sex marriage recognized across the board was rejected[102] by the same judge, Anderson Chow, on the very same day Messrs Ng and Li won their first court victory. And, one year earlier, a claim that it was unconstitutional for the government of Hong Kong to provide neither same-sex marriage nor an alternate legal framework for the recognition of same-sex relationships to its residents had also failed.[103]

Jimmy Sham's lawyer's had responded to Judge Chow, who expressed concern about being "asked to draft a blanket legislation," "We should not burden Mr. Sham to come to court 100 times to fight for 100 benefits – it's simply unfair."[104] In addition to being unfair, I would argue that it is also inefficient, wasteful not only of the resources of litigants and the court system, but of those who must then craft individual legislative or administrative remedies for each individual benefit the court finds same-sex couples are entitled to. Sham himself put the same point more colorfully. "They won't sell you the entire strip of barbecue pork – but once chopped in pieces they'll let you purchase one by one," he said.[105]

To be sure, just as many people don't want to buy an entire strip of barbecue pork, but only one or two small pieces (indeed some want no pork at all in their diet) so there are many who may not want the package deal that marriage now provides,[106] and, as I will discuss further below, the law should do a better job accommodating them with alternatives than in most countries it now does. But so long as there are a significant number of people in the market for a bundle of benefits and obligations akin to marriage, as there now appear to be, it makes sense for the state to put it on offer as a legal status.

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[99] Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue, [2019] H.K.C.F.A. 19. Although Leung's spouse, Scott Adams, remains alive and well, Leung explained that he was motivated to sue for spousal rights when "his friend's long-term partner died in a watersports accident, but without the rights guaranteed by marriage, his friend was shut out from the funeral." Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546-7 (2020).

[100] QT v. Director of Immigration, [2018] H.K.C.F.A. 28.

[101] Infinger, Nick v. Hong Kong Housing Authority [2020] HKCFI 329.

[102] Sham Tsz Kit v Secretary for Justice [2020] HKCFI 2411.

[103] MK v. Government of the HKSAR [2019] 5 HKLRD 259.

[104] Jasmine Siu, *Lawyers for Hong Kong rights activist Jimmy Sham urge court to recognise his same-sex marriage*, South China Morning Post (May 29, 2020), *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3086771/lawyers-hong-kong-rights-activist-jimmy-sham-urge.

[105] Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING POST (Sept. 19, 2020), *available at* Hong Kong / Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kong-activist-jimmy-sham-loses-high-court-bid-recognise.

[106] Also using food-based imagery, Justice Ruth Bader Ginsburg described the effect of the U.S. Defense of Marriage Act as offering same-sex couples not "full marriage" but only a "sort of skim milk marriage." *See* Transcript of Oral Argument at 71, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). But, just as some people are vegetarian, others prefer skim milk to full fat milk. The grocery market has learned to accommodate diverse preferences in food; as will be discussed briefly below, the law should do a better job of those whose taste in relationship recognition does not extend to marriage as a preferred choice.

C. MARRIAGE RECOGNITION AT THE BORDER BETWEEN STATES

In the period between 2005, when same-sex marriage became a legal option throughout Canada, and 2013, when the U.S. Supreme Court struck down DOMA, allowing the U.S. federal government to recognize same-sex marriages, members of same-sex married couples spoke poignantly of their emotions during the moments at the border when immigration officers directed family groups to approach together – when crossing into Canada, they could do so with one another, as spouses, and this simple act of official recognition felt deeply meaningful to them, but, when crossing into the United States, they had to approach separately, as unattached individuals. For couples of citizens from either the U.S. or Canada, the practical effect was no more than the difference of a few minutes and the space of a few feet in crossing the border, but the symbolic effect was immensely powerful.

The ability to have one's marriage recognized when crossing a border has important practical consequences as well, however, especially at a time when so many lives cross borders, temporarily or permanently. Without the official recognition offered by marriage, multinational same-sex couples may simply find no nation on earth where they can legally build a life together. This is the realization to which American Richard Adams and his Australian partner Tony Sullivan came. Having overstayed his visitor visa to be with Adams in the 1970s, Sullivan faced deportation. Hearing that a county clerk in Colorado was offering marriage licenses to same-sex couples, the two obtained one in 1975, were married by a minister, and then applied for a spousal immigrant visa. The official response from the U.S. Department of Justice's Immigration and Naturalization Service (INS) was that the two had "failed to establish that a bona fide marital relationship can exist between two faggots[sic]."[107] Their appeal was unsuccessful, as was their attempt to persuade the Ninth Circuit to grant instead a hardship waiver that would suspend Sullivan's deportation so he could remain with Adams. The judge who, over a strong dissent, held that Sullivan had not shown the requisite "extreme hardship," nor could Adams because the latter was not under INS rules "a qualifying relative to whom hardship may be shown" was Anthony Kennedy.[108] When he appended to his majority opinion in Obergefell a list of federal court opinions addressing same-sex marriage, then Justice Kennedy put Adams and Sullivan's case at the top of the list.[109] As a Supreme Court justice deciding a constitutional case, Kennedy had more freedom to move beyond statutory precedent, but he also acknowledged for himself, the Court, and the nation that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[110]

These new insights came too late to allow Adams and Sullivan ever to live openly as a legally recognized couple in the United States, although they managed to stay together, abroad and then

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[107] *See, e.g.*, Robert Barnes, *40 years later, story of a same-sex marriage in Colo. remains remarkable*, WASHINGTON POST (April 18, 2015), *available at* https://www.washingtonpost.com/politics/courts_law/40-years-later-a-same-sex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfabc310_story.html.
[108] Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 611 (9th Cir. 1984) (citation omitted).
[109] *See* Obergefell v Hodges, 133 S. Ct. at Appendix A: State and Federal Judicial Decisions Addressing Same-Sex Marriage (citing Adams v. Howerton, 673 F.2d 1036, (9th Cir. 1982), the case first affirming Sullivan's deportation, notwithstanding his marriage to Adams).
[110] Obergefell v. Hodges, 133 S. Ct. 2584, at 2590.

underground back in the United States, until Adams died of cancer in December 2012. Only thereafter, more than forty years after their marriage, did Sullivan receive official U.S. government recognition of that marriage, a green card authorizing his residence and employment in the United States, and a letter of apology from León Rodriguez, President Obama's director of U.S. Citizenship and Immigration Services.[111]

In Taiwan, some multinational same-sex couples, those who do not both come from a country that recognizes same-sex marriage, still face the obstacles Adams and Sullivan did, because Taiwan to date will only allow foreigners from countries where their marriage would be legal to register their same-sex marriage in Taiwan. Chien Chih-chieh, the secretary-general of the Taiwan Alliance to Promote Civil Partnership Rights, called this "the final missing piece of the puzzle that we need to achieve marriage equality," explaining that" [m]any people have had to resort to using student or travel visas to stay here. It's causing a lot of anxieties and uncertainties." [112] Because the Legislative Yuan is considering amendments proposed by the Judicial Yuan to loosen restrictions on multinational same-sex marriages, and because Taiwanese courts have begun to rule in favor of some multinational same-sex couples, for example by accepting that both members of a couple are habitually resident in Taiwan or by rejecting the application of foreign laws prohibiting same-sex marriage because to apply them would lead to a violation of the public order or boni mores of Taiwan,[113] it can be hoped that this serious gap in Taiwan's recognition of same-sex marriage will soon be definitively remedied.

Taiwan's Act for Implementation of J.Y. Interpretation No. 748 allows two persons of the same sex to register their marriage so they may "create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together."[114] Because is difficult for a couple to fulfill the "purpose of living a common life"[115] when separated by a border, marriage recognition matters enormously to transnational couples. Marriage recognition also matters to national border and immigration authorities, because, in the absence of the clear status of marriage,[116] these authorities are

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[111] *See* Troy Masters, *United States Government says L.A. Gay Couple's 1975 Marriage is Valid*, THE PRIDE (June 7, 2016), *available at* http://thepridela.com/2016/06/united-states-government-says-gay-couples-1975-marriage-is-valid/.

[112] *See, e.g.*, Beh Lih Yi, *"Happily ever after" eludes Taiwan, a year after Asia's first gay marriages*, THOMPSON REUTERS (May 20, 2020), *available at* https://www.reuters.com/article/us-taiwan-lgbt-rights-feature-trfn/happily-ever-after-eludes-taiwan-a-year-after-asias-first-gay-marriages-idUSKBN22X03A (detailing the concrete situations faced by some such couples). Of course, there would then still remain the gap in recognition of full parental and family rights for same-sex couples to be remedied.

[113] *See, e.g.*, Keoni Everington, *Taiwan court ruling on Macau citizen opens door to international same-sex marriages*, TAIWAN NEWS (May 6, 2021), *available at* https://www.taiwannews.com.tw/en/news/4196648 (detailing results in two such cases and the Judicial Yuan's legislative proposals).

[114] *Press Release on the Same-Sex Marriage Case*, CONSTITUTIONAL COURT, REPUBLIC OF CHINA (TAIWAN) (May 24, 2017), *available at* https://cons.judicial.gov.tw/jcc/en-us/contents/show/p2kdmcuv4dakqngi.

[115] *Act for Implementation of J.Y. Interpretation No. 748, Article 2*, MINISTRY OF JUSTICE, REPUBLIC OF CHINA (TAIWAN), *available at* https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008.

[116] Of course, U.S. immigration authorities are generally authorized to investigate a couple's bona fides in marrying and to look beyond the formal legal validity of their marriage before granting spousal benefits to see if they really do propose to build a life together, but, as explained in Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975):

faced with the nearly unmanageable and potentially tragic task of using their discretion to evaluate which forced separations will result in "extreme hardship"[117] to those separated.

D. THE BUSINESS CASE FOR SAME-SEX MARRIAGE

The ability for a same-sex couple to cross a border together as partners in a legally recognized relationship matters not just to the couple themselves, but to employers of the members of the couple who wish to recruit talent and transfer it across borders on temporary or permanent assignments. This is among the principal reasons so many multinational corporations have in so many different venues made what has come to be known as the business case for same-sex marriage. Amicus briefs on behalf of hundreds of prominent corporations were submitted to the U.S. Supreme Court in support of the challengers to Proposition 8,[118] of Edith Windsor in her challenge to DOMA,[119] and of Jim Obergefell and his fellow petitioners for nationwide same-sex marriage.[120] In the case of *QT v. Director of Immigration*,[121] which involved the ultimately successful efforts of a British lesbian who had accepted employment in Hong Kong to obtain a dependent visa for her lesbian spouse, who could otherwise join her in Hong Kong only as a visitor and with no possibility of employment, "a group of 15 financial institution [and] a group of 16 law firms… had applied for leave to intervene in the appeal" in order "to draw to the Court's attention the fact" that Hong Kong's policy of non-recognition "had the effect of limiting the pool of foreign employees from which employers might wish to select and that this would adversely affect their interests as well as the wider interests of Hong Kong"[122] but the Hong Kong Court

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> 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.

[117] *See, e.g.*, Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 612 (9th Cir. 1984) (Pregerson, J., dissenting) (finding, contrary to Judge Kennedy, that the immigration authority's "conclusory treatment" of Sullivan and Adams's situation had dismissed their claim of "extreme personal and emotional hardship as mere 'general hardship and emotional adjustments,'" giving "no recognition to the strain Sullivan would experience if he were forced to separate from the person with whom he has lived and shared a close relationship for the past twelve years" or to the fact that, while "most deported aliens can return to their native lands with their closest companions" Sullivan could not).

[118] *See* Brief of American Companies as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

[119] *See* Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor, United States v. Windsor, 133 S. Ct. 2675 (2013), 2013 U.S. S. Ct. Briefs LEXIS 1149.

[120] *See* Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981.

[121] QT v. Director of Immigration, [2018] H.K.C.F.A. 28 .

[122] *Id.* at Paragraph 16.

of Final Appeal declined their intervention since it considered "that the perspective of the Banks and Law Firms was evident without requiring their intervention."[123]

Importantly, multinational banks and other corporate and business actors have a somewhat different perspective in making the case for same-sex marriage recognition than, for example, Amnesty International, who also sought to intervene on QT's behalf. To be sure, these business actors have also come out In favor of the human rights and dignity of LGBTQ persons.[124] But, when they do so, as they recently have in a series of national and multinational reports published by Open For Business, "a coalition of global companies organized as a charity with the objective of promoting LGBT+ inclusion,"[125] it has been with an emphasis on how much more prosperous countries, cities, regions, and businesses who welcome and legally recognize LGBTQ individuals and their relationships turn out to be overall and how important it is to these companies to be able to recruit, retain, freely transfer, and keep happy the best possible employees, many of whom are either themselves LGBTQ or care about LGBTQ inclusion.[126]

The business case for same-sex marriage also involves more purely practical considerations, which fall again under the rubric of efficiency around which I have tried to focus so much of my analysis. As a brief filed in the U.S. Supreme Court on behalf of 100 "Fortune ranked and other leading American businesses" put it:

> Recognizing the rights of same-sex couples to marry is more than just a constitutional issue. It is a business imperative. By singling out a group for less favorable treatment, [a ban on same-sex marriage] impedes businesses from achieving the market's ideal of efficient operations - particularly in recruiting, hiring, and retaining talented people who are in the best position to operate at their highest capacity [127]

I shall first set forth the case as businesses themselves have generally made it, and then go on, in the following section, to suggest ways I have long thought it could be expanded.

1. THE EMPLOYER CASE FOR SAME-SEX MARRIAGE

As the quotation above suggests, in the amicus briefs they filed in U.S. Supreme Court same-sex marriage cases as well as in the statements they have made concerning marriage recognition in other

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[123] *Id.* at Paragraph 17. For further discussion, *see* Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546 (2020).

[124] As one Japanese Goldman Sachs employee and gay rights activist put it in a recent editorial invoking a similar 2012 statement by the company's head, Lloyd Blankfein, "Fundamentally, freedom of marriage is a human rights issue. However, it can also be a positive driver for business." Masa Yanagisawa, I*t is time for Japan to say 'I do' to marriage equality*, NIKKEI ASIA (March 17, 2021), *available at* https://asia.nikkei.com/Opinion/It-is-time-for-Japan-to-say-I-do-to-marriage-equality.

[125] For links to the various country, regional, and other specialized reports and lists of the associated multinational companies, *see* https://open-for-business.org/.

[126] This emphasis on making LGBT employees feel welcome goes beyond legal and lobbying interventions. Thus, months before the Judicial Yuan had mandated legal recognition of same-sex marriage, the CEO of HSBC Taiwan stepped in to walk a lesbian employee down the aisle for her ceremonial (though not then legally registerable) wedding when her parents declined to do so. *See* Judy Lin, *HSBC Taiwan CEO walks lesbian employee down the aisle*, TAIWAN NEWS (March 10, 2017), *available at* http://www.taiwannews.com.tw/en/news/3113485.

[127] Brief of American Companies as Amici Curiae in Support of Respondents at *23, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

countries, businesses have generally stressed almost exclusively their role as employers. Their announced stake in same-sex marriage thus includes on the one hand, the desire to recruit talent and transfer it without resistance or complications across borders, whether from one state in the U.S. to another or from one country to another and whether temporarily or permanently,[128] and on the other hand the desire to minimize their own administrative burdens while achieving equity between employees.[129] An Amicus brief filed in Obergefell on behalf of nearly 400 business entities summarized the employers' argument:

> Discriminatory state laws force amici to implement inconsistent policies across the various jurisdictions in which we operate, our stated corporate principles of diversity and inclusion notwithstanding…. The patchwork of state laws applicable to same-sex marriage thus impairs our business interests and employer/employee relations. If the Court were to affirm the decision below, the costs and uncertainty imposed by inconsistent state marriage laws will only continue. In contrast, reversal will reduce current costs, administrative burden, and diversion of resources from our core businesses.[130]

The administrative burdens then detailed in the brief are those related to employees, such as "dealing with … immigration system that made it difficult for same-sex partners to immigrate"[131] and responding to tax and benefit inequalities to those in unrecognized marriages with "workarounds [that] impose additional and unnecessary business expense, while still not fully ameliorating the differential treatment of employees."[132]

This, from my perspective rather narrow, business case for same-sex marriage has shown itself to have a broad appeal in other business friendly jurisdictions, including Taiwan, where, about a month before the late May 2019 deadline the Judicial Yuan had imposed on the Legislative Yuan for legislating on same-sex marriage, some of the world's largest companies joined with companies based in Taiwan to endorse same-sex marriage, "not only because it is the right thing to do," but also because it can make both companies and society "stronger and more successful."[133] In Japan, the powerful Keidanren (Japan

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[128] *See, e.g.*, Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at *33f, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981 (enumerating disadvantages to "employee recruitment and retention" when seeking to hire "in the states that do `not allow same-sex couples to marry, or in asking current personnel to relocate to such states" where "their pre-existing marriages will not be recognized, and where they can expect to lose access to certain previously-enjoyed state-level benefits").

[129] *See, e.g.*, Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor at *8 ff, U.S. v. Windsor, 133 S. Ct. 2675, 2013 U.S. S. Ct. Briefs LEXIS 1149 (explaining that DOMA imposes "compliance burdens on employers" putting them "to unnecessary cost and administrative complexity, and regardless of … business or professional judgment forc[ing them] to treat one class of … lawfully married employees differently than another, when … success depends upon the welfare and morale of all employees").

[130] Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at *11-12, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), 2015 U.S. S. Ct. Briefs LEXIS 981.

[131] *Id.* at *36.

[132] *Id.* at *40.

[133] The companies included not only Microsoft Taiwan, whose spokesperson Patrick Pan made the quoted statement, but also Google, Airbnb, Deutsche Bank, EY, Mastercard and nine other companies. *See, e.g.*, Hugo Greenhalgh, *Multinationals see benefits in Taiwan same-sex marriage*, THOMPSON REUTERS (April 26, 2019), *available at* https://www.reuters.com/article/us-taiwan-lgbt-economy/multinationals-see-benefits-in-taiwan-same-sex-marriage-idUSKCN1S029C.

Business Federation) issued a statement in support of LGBT rights recognition in 2017, followed by the American Chamber of Commerce in Japan in 2019, which warned that the "the disparity in legal rights between heterosexual and same-sex couples 'makes Japan a less attractive option for LGBT couples, compared to many other countries vying for the same talent.'"[134] As of March 2021, when a Sapporo court first ruled in favor of a Japanese constitutional right to same-sex marriage, nearly 150 companies and organizations in Japan, including Panasonic and Fujitsu, had signed on to the Business for Marriage Equality initiative,[135] leading headlines to read "Japan Inc. embraces landmark same-sex marriage ruling."[136]

2. EXPANDING THE BUSINESS CASE FOR SAME-SEX MARRIAGE

For decades, I have been convinced that businesses large and small have a much greater efficiency interest in supporting legal recognition of same-sex marriage in the jurisdictions in which they operate than they have hitherto articulated. While the Employers' Brief in *Obergefell* was right to say that "the combined burden of administrative costs and tax consequences is significant" the brief, in my view, grossly underestimated "the 2015 estimated cost of marriage inequality to the private sector [in the United States at] $ 1.3 billion"[137] because it seems to have limited the calculation of costs to those related to businesses in their roles as employers. In my view, however, the case to be made that same-sex marriage recognition is efficient and good for business should not stop at a consideration of what pertains to the employees of that business.

For a wide variety of businesses, the marital status of their customers is as relevant as that of their employees. Marital status can matter in all manner of contracts, from those involving real estate (including purchase, rental, sublease or mortgage), insurance, banking, organizational membership,[138] even car rental agreements.[139] The words spouse, married, or marriage can appear as operative terms in any number of contracts, whether by the business's own choice or as a result of government regulation. For decades now, businesses have been struggling with how to deal contractually with

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[134] Rurika Imahashi, *Marriage equality in Japan: finally within reach? In the only G-7 nation to prohibit same-sex unions, the mood is changing*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach.

[135] For further information, *see* BME (BUSINESS FOR MARRIAGE EQUALITY) *at* https://bformarriageequality.net/.

[136] Rurika Imahashi and Francesca Regalado, *Japan Inc. embraces landmark same-sex marriage ruling*, NIKKEI ASIA (March 18, 2021), *available at* https://asia.nikkei.com/Spotlight/Society/Japan-Inc.-embraces-landmark-same-sex-marriage-ruling.

[137] Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at *40, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981.

[138] *See, e.g.*, Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824 (2005) (detailing decade long effort by lesbian member of a golf club to obtain spousal privileges for her partner, initiated before California offered an option for recognition to the couple, and ultimately won in litigation after the state had provided the two the possibility of registering as domestic partners with all the rights of spouses under state law).

[139] For example, those renting a car from Avis must pay a daily fee for each driver in addition to the person named in the rental contract. "A spouse or life partner can drive a rental car without an additional fee" but "[t]he additional driver fee does apply to friends and extended family members who want to drive the rental car as an additional driver." *See Can I Add Another Driver to my Car Rental?*, AVIS, *available at* https://www.avis.com/en/help/usa-faqs/additional-driver.

customers as well as employees in same-sex relationships where marriage is not an available option. Some of their efforts to specify what sorts of relationships qualified as the equivalent of marriage verged on the ridiculous, as when the University of Florida proposed to extend benefits to employees' domestic partners conditional on their executing an affidavit declaring not only that they intend to remain domestic partners indefinitely and that they have some joint financial obligations, but also that they "have been in a non-platonic relationship for the preceding 12 months." When media began to enquire whether this really meant that the partners had to pledge that they were having sex and how such a pledge would be enforced, the University quickly backed down.[140]

Once some governments began offering same-sex couples the opportunity to have their relationships legally recognized but not to call the resulting status marriage, a different set of problems arose for businesses. First it had to be determined which statuses (for example, civil unions, civil partnerships, domestic partnerships, pacts of civil solidarity, registered partnerships, life partnerships, reciprocal beneficiary relationships, durable unions, adult interdependent relationships, to name only some of the English language terms used in one or more jurisdictions) were sufficiently equivalent to marriage to lead to the same legal consequences, either as a matter of law or of business judgement. Then it might be necessary to amend contractual language so as to make clear which additional statuses would qualify. This all could be a cumbersome and expensive undertaking, especially when the same terminology could be associated with a radically different bundle of rights and obligations from one jurisdiction to another and from one time period to another, sometimes describing a legal status essentially identical to marriage in that jurisdiction at that time, at others a status very different from marriage.[141]

Nation states had and continue to have the same problem. Even today, decades after many of the nations of Western Europe began offering legal recognition to same-sex couples, private international law complications remain when sorting out how a particular status available in country A will be treated by Country B within the European Union. In 2013, the European Parliament proposed the mutual recognition of 'various legal partnerships and their rights' as part of an effort to facilitate free movement of workers, but the final legislation did not adopt this proposed amendment.[142] As a study commissioned by the European Parliament reported in March 2021, "it is anomalous that a same-sex

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[140] *See, e.g.*, Jack Stripling, *UF requirement for partner benefits: You must have sex*, GAINESVILLE SUN (Jan. 23, 2006), *available at https://www.gainesville.com/article/LK/20060120/News/604164525/GS*.

[141] For an example of how two different terms use by two different legal jurisdictions can in some cases have identical legal consequences, whereas the same term can be associated with a vastly different set of legal consequences in a single jurisdiction over time, consider the term "domestic partnership" under the laws of California. When first introduced by California cities, it afforded no rights; when then adopted by the state, it initially offered a small bundle of rights, but by 200_ it was basically equivalent to marriage but for the name and even more exactly equivalent to what the law of Vermont called civil union. For further discussion, *see, e.g.*, *Marriage Licenses* at 1775.

[142] *See* Ruth Lamont, *Registered Partnerships in European Union Law*, in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) 497, 509.

'spouse' must now be recognized by all Member States, but that a same-sex 'registered partner' may be ignored by (at least) 6 Member States."[143]

To be sure, the laws of marriage also differ in many of their details from country to country, but "international recognition is far more straightforward with marriage (which every country has, in one form or another)."[144] Thus, to cut down on paperwork, uncertainty, and other complications for governments and for private actors, and to facilitate recognition of the relationship status by others, a country is well-advised to do the efficient thing by using the term marriage for a legally recognized relationship status it makes available to same-sex couples.

E. NUMERUS CLAUSUS AND THE PLUG AND PLAY EFFICIENCIES OF MARRIAGE

From the perspective I have taken in this article, which focuses on the practicalities of legal recognition, it seems to me not in the least "anomalous," but rather easily predictable and explicable that a same-sex 'spouse' now has more universal access to recognition by EU member states than a registered partner. The legal theoretical concept of numerus clausus, or what Germans call *Typenzwang*, can be helpful here. Most well-developed for the law of property, but also applied to analyze family law and the law of business organizations, the numerus clausus principle suggests that while there can be an infinite variety of contracts, "the law will enforce as property only those interests that conform to a limited number of standard forms."[145] Theorists of law and economics have articulated a variety of explanations and justifications for this limitation, but have generally argued that "numerus clausus functions to promote the optimal standardization of property rights."[146]

What optimal standardization now looks like for family relationships is a matter for debate in many legal systems. But at the risk of overgeneralizing, let me suggest that there has been at least until recently a rigid numerus clausus for adult domestic relationship recognition, in that marriage was often the only recognized legal form such relationships could take in a given legal system, and only one form of marriage was usually available to a given couple.[147] Even resort to contract, foregoing legal status,

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[143] Alina Tryfinidou and Robert Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU*, EUROPEAN PARLIAMENT THINK TANK (Oct. 3, 2021), *available at* https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2021)671505.

[144] Kenneth McK. Norrie, *Registered Partnership in Scotland* in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) at 250 (arguing with respect to an imminent change in the law of Scotland that "insofar as names are important, that registered relationship has to be called 'marriage'" once it becomes "equally open to all .. irrespective of gender mix").

[145] Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000). Merrill and Smith are among the principle expositors and defenders of the numerus clausus principle for property in the law & economics literature in English, but they acknowledge that the concept was developed much earlier in German law and legal academic writing. *See Id.* at 4 n. 6 (citing to the BGB's definition of property and a number of German treatises and commentaries on the subject with publication dates ranging from the late nineteenth century through the turn of the millennium).

[146] *See* Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4, 38 (2000).

[147] Legal systems such as those of India and Israel, where marriage is a question of so-called personal law and governed by the rules of the religious group to which a person is deemed to belong, may offer a variety of marital

was not an option, because a contract between unmarried cohabitants was until recently treated as "meretricious," that is to say akin to a contract for prostitution and hence generally unenforceable, indeed possibly criminal.[148]

I will consider below the ways and places in which the numerus clausus for adult partner relationships has expanded beyond marriage, but now let me examine the efficiency advantages to continuing to use and make even more universally available to same-sex couples the readily recognizable legal statuses of "marriage' and "spouse." To recap the current state of the law I have described above: Today in most legal systems marriage can look like a network of contracts from the inside, but still like a status from the outside, recognizable to the state and to private actors. Marriage functions more or less like a black box,[149] available off-the-rack from the state. A couple, by registering for marriage, can opt for internal customization of the black box in many respects, but its shape, its status, is still recognizable from the outside, not only by their own state and those private actors with whom they do business, but also by other nation states and legal systems.[150] Moreover, to a lesser extent, the status of marriage in one country is a bit of a black box to other countries – at the border they recognize a couple as married without in general delving into detail as to the particular formalities required by the place the couple entered into marriage or the details of the marital property regime that governs them in their home state.

Although my limited knowledge of computing terminology may mean that I am using the terminology I have borrowed from the world of computing inaccurately, I have come to think of marriage in the world today as being a plug-and-play status. Just as a plug-and-play device or software

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regimes nationwide, but not a choice to a given couple, and severe complica tions for interfaith couples, one of whose members may be required or deemed to have converted to the religion of the other. In India, for example, the marriages of Hindu woman with Muslim men, occasionally demonized under the label "love jihad," have been the subject of hostile local legislation and judicial interference, but have been vindicated in at least on instance by a recent Indian Supreme Court decision. *See, e.g.*, *A New Law In India Is Making It Harder For Interfaith Couples To Get Married*, NPR (Sept. 10, 2021), *available at* https://www.npr.org/2021/09/14/1037096376/a-new-law-in-india-is-making-it-harder-for-interfaith-couples-to-get-married; Shafin Jahan v. Ashokan K.M., Crl.A 366/2018 (arising out of SLP (Crl.) 5777/2017) (the so-called Hadiya marriage case, in which the Indian Supreme Court reversed a lower court's annulment of the marriage between a Muslim man and a Hindu woman who had converted to Islam).

[148] For further discussion, *see, e.g.*, Mary Anne Case, *Pets or Meat?*, 80 CHI. KENT L. REV 1129, 1141 (2005) (explaining the development of the term "meretricious relationship"). *See also, e.g.*, Frederik Swennen, PRIVATE ORDERING IN FAMILY LAW: A GLOBAL PERSPECTIVE IN CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 1, 8 (Springer 2015, ed. Frederick Swennen) ("The principle of a *numerus clausus* of family formations has long stood in the way of the validity of contracts between cohabiting partners with regard to their pecuniary rights and duties. Such contracts were considered *contra bona mores* because they would organise sexual relations ('*pretium stupri*')).

[149] In many countries, the extent and the reasons for which the law will open the black box of marriage to intervene have changed radically in the last century, often for constitutional reasons and along feminist lines, – for example, previously protected activities like spousal battery or spousal rape are now generally seen as within the state's power and duty to intervene to control, whereas other sexual activities, like the use of contraceptives are protected. See e.g..Griswold v. Connecticut 381 U.S. 479 (1965) (holding that it would be an unconstitutional intrusion on marital privacy for the state to criminalize the use of contraceptives by a married couple).

[150] This is so notwithstanding that, unlike a business corporations, a marriage is not treated as a legal person.

only needs to be connected to a computer in order to function, without requiring additional action, such as manual reconfiguration, and also without the user's requiring knowledge of computer hardware, so "marriage" and "spouse" are terms for a legal status that can be plugged into an infinite variety of private contracts, laws, and regulations in every language, country, and legal system in the world today and, in general, function seamlessly as a matter of law. There are still important differences between the legal rules for and incidents of the status of marriage between nations and between legal systems (rules about, for example, age of entry, conditions of exit, marital property regimes, availability of and requirements for obtaining certain benefits under law) just as there are differences between certain of the internal workings of plug-and-play devices. But these differences do not hinder interoperability, in no small part because the words "marriage" and "spouse" are in such universal use and there is now sufficient agreement as to the meaning of the words as legal terms of art around the world. The exception that proves the rule is polygamous marriage, which for centuries now has had difficulty being recognized outside of the countries and legal systems that make it available. I continue to argue that, as a descriptive matter, obstacles to recognition of polygamy in law are at least as effectively attributable to the legal complexities it presents as to the moral objections that might be raised against it.[151]

None of the other names under which relationships resembling marriage are recognized today in any legal system has achieved anything like the plug-and-play portability of marriage itself, and they are too numerous and diverse for any to come close at any time soon.

Many have proposed that the name marriage be reserved to the religious institution, but there are a number of important reasons not to do this.[152] One is that it runs the risk of confusing people who enter into a religious ceremony as to what validity this has with the state or in secular law. For this reason, Lord Hardwicke's Act in eighteenth century England made it a criminal offense for clergy to perform a marriage without first complying with the legal formalities[153] (and today states in the U.S. do

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[151] Thus, in the classic old case denying recognition to even a potentially polygamous Mormon marriage, Hyde v. Hyde and Woodmansee, [L.R.] 1 P. & D. 130 (1866), the court began with the premise that "all that the Courts of one country have to determine is whether or not the thing called marriage – that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with – has been validly contracted in th other country where the parties professed to bind themselves," *id* at 134, observed that marriage "creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of 'husband' and 'wife' is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents" *id.* and concluded that "it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy." *Id*. at 135. Let me again stress, that a sufficient basis for the English courts not to recognize polygamous marriages as the court explains it is the complexity of legal rules the English legal system does not have ready to hand and would have to generate to deal with a polygamous marriage. In this, polygamy is quite unlike same sex marriage, which, by contrast, is statutorily and bureaucratically extremely easy to implement, whatever moral or policy objections it may give rise to.

[152] Part of the argument for this is that confusion between religious and civil marriage leads those faith traditions opposed to same-sex marriage, especially if they have no strong religious law tradition of enforcing and adjudicating marital status, to have particular cause to resist state recognition of same-sex marriage, whereas some might be less resistant to state recognition of same-sex couples under the name partnership or civil union. For further discussion of the ways in which some religions have come to depend on the state to enforce their religious marriage rules *see* Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-21 (Winnifred Fallers Sullivan ed., 2011).

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

the same); for this reason marriage licenses are required, to license the clerical officiant.[154] For this reason countries like Germany, despite an otherwise fairly high degree of cooperation between church and state, draw a sharp distinction between entry into civil and religious marriage;[155] the law mandates that the civil marriage be entered into before the religious and that the religious marriage itself has no civil effect.[156] For this reason the United Kingdom and many countries of the British Commonwealth are increasingly looking for solutions to the problems caused when a substantial percentage of their married Muslim population enters into a nikah, or Islamic religious marriage ceremony, without registering that marriage with the state and often without being aware that this means the marriage has no civil legal validity.[157] Another reason not to abandon the term marriage to religious bodies and laws, to be discussed further below, is that couples who are not themselves religiously affiliated increasingly seem to want the same sort of symbolic validation from state-sponsored marriage as religions offer those who marry within their faith, and these couples accordingly would strongly resist having this symbolically important terminology taken away from them.

From the perspective of efficiency, perhaps the most important reason not to cede the term marriage to religions is that the term marriage has become entrenched and comprehensible in secular law. There are significant differences among the various religions' conceptions of marriage and in the marriage laws of the various nations and states. But, with the aforementioned exception of polygamy, they are generally not of the kind to complicate cross border recognition of marriages or the use of the term marriage as a plug-and-play term in contracts and other legal documents that cross borders. If the name marriage were relegated to religions and therefore the secular legal world (from nation states to private actors) had to find another name for the institution they previously called marriage, the mere coordination difficulties settling on a name and making sure it is consistently and universally applied would be enormous. One would have to delve deep into the law of Taiwan, for example, to discover what an Article 2 relationship is,[158] so it seems advantageous all around for that such a relationship has

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[154] For further discussion, *see* Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-21 (Winnifred Fallers Sullivan ed., 2011).

[155] In the U.S. paradoxically despite a commitment to separation of church and state, religious and civil weddings are far more intertwined, so that simultaneously and seamlessly a cleric can perform both. *See id.*

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

[157] *See, e.g.*, Harriet Sherwood, *Most women in UK who have Islamic wedding miss out on legal right*, THE GUARDIAN (Nov. 20, 2017), *available at* https://www.theguardian.com/world/2017/nov/20/women-uk-islamic-wedding-legal-rights-civil-ceremony-marriage (detailing results of a survey indicating that more than 60% of women who have had a traditional Muslim wedding ceremony are not in legally recognised marriages, although most of these women wanted and expected their marriages to be recognized and many later face problems because it is not); Russell Sandberg, The House of Lords on marriages and sharia law, Law & Religion UK, 24 October 2019 available at https://lawandreligionuk.com/2019/10/24/the-house-of-lords-on-marriages-and-sharia-law/ (describing reaction in the House of Lords to the recommendation in a February 2018 independent review into the application of sharia law in England and Wales that there be created a criminal "offence that would apply to celebrants of religious marriages that do not confer legal rights").

[158] Because Article 2 of the Enforcement Act of Judicial Yuan Interpretation No. 748 authorized that "two people of the same sex may, to manage a life together, conclude a permanent union that is intimate and exclusive" and because the remainder of the act, for example in setting forth the rules for entry and the portions of the code applicable referred back to "a relationship concluded under article 2" rather than

come to be more generally referred to internally as well as externally as a marriage, albeit one entered into by two persons of the same sex. More generally, simply and consistently using the term "civil marriage" to refer to the status recognized in secular law should solve a lot of the religious confusion worldwide.

F. THE EFFICIENCY ADVANTAGES OF DIVORCE

The first same-sex couple to have brought their case to the U.S. Supreme Court, Jack Baker and Michael McConnell, are still together more than 50 years later (and were still litigating to have their marriage fully recognized well into the new millennium).[159] As discussed above, Sullivan's marriage to Adams lasted for more than 40 years until Adams's death. But the named plaintiffs in the case that first brought legally recognized same-sex marriage to a U.S. state, the Massachusetts couple of Hillary and Julie Goodridge, were divorced in 2009 after nearly twenty years as a couple but only five years of marriage. There was, however, good reason for Chief Justice Margaret Marshall's majority opinion in the *Goodridge* case to list access to "the equitable division of marital property on divorce [and] temporary and permanent alimony rights" as among the many "enormous… benefits accessible only by way of a marriage license."[160] According to Hillary Goodridge, "access to the protections provided through divorce were as important as being able to marry." As she explained in a TV interview while sitting on a couch next to her ex and the now grown child who had prompted them to marry,[161] "[h]aving divorce means there are rules …. At a time when you're craziest, it gives you a structure and a process and other people to help you dismantle this as fairly as possible."

Divorce is yet another aspect of marriage I think it valuable to examine from the perspective of efficiency more than from the traditionally moralistic perspective. This is indeed a turn the law has taken, in the U.S., Taiwan, and elsewhere. It is illuminating, I think, to compare the development of the law of divorce with that of corporate or business bankruptcy. For both divorce and bankruptcy, what had once been a heavily moralistic, indeed punitive legal framework has evolved to focus instead on

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using the term "marriage," on might argue that the status a same-sex couple can attain in Taiwan is that of being in an "article 2 relationship," not a marriage. For further discussion, see *See* Chao-Ju Chen, *A Same-sex Marriage that is Not the Same: Taiwan's Legal Recognition of Same-sex Unions and Affirmation of Marriage Normativity*, 20 AUSTL. J. OF ASIAN L., Article 5, 1 (2019).

[159] *See* McConnell v. United States, No. CIV.04-2711, 2005 WL 19458, 1-3 (D. Minn. Jan. 3, 2005) (litigation concerning filing of joint tax return).

[160] Goodridge v Dept. of Public Health, 798 N.E.2d 941, 955-6 (Mass. 2003).

[161] Both practical and symbolic forms of recognition were at the root of their daughter's leading the Goodridges to seek legal marriage. When she was born, both she and her birth mother Julie suffered complications and were in intensive care, leaving Hillary "stuck in the hospital's waiting room… [w]ith no legal relationship to either of them, ….unable to visit or help make medical decisions." And when she was three, she asked her parents, "If you love each other, then why aren't you married?" *See, e.g.*, Gabrielle Emanuel, *How Making History Unmade A Family*, NPR (May 16, 2019), *available at* https://www.npr.org/2019/05/16/723647834/how-making-history-unmade-a-family.

efficiency. The notion that failure is shameful, however much it may still permeate social norms attached to business or marital dissolution, no longer forms part of the law in these areas. Prison, public shaming rituals,[162] and heavy financial penalties no longer face either those who cannot pay their debts or those who cannot keep their marital vows. Both bankruptcy and divorce used to be deliberately made very difficult to obtain – just as only proof of specified fault grounds would allow a wronged spouse to seek divorce, so insolvency petitions could only to be brought by a creditor who could establish that the debtor had committed one or more statutorily enumerated "acts of bankruptcy." [163] Neither the guilty spouse nor the debtor could file a petition, although some petitions were the result of collaboration or collusion between debtor and creditor or between spouses.[164]

Today, neither fault grounds for divorce nor specified acts of bankruptcy are generally required for a petition. The aim of bankruptcy law these days 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. So it has come to be, *mutatis mutandis*, with the law of divorce. The assets in question for a marriage include a couple's sexual, reproductive, and domestic capacities, as well as their financial assets and earning power, and remarriage today is more readily facilitated where it was once forbidden or penalized. It is no accident that the notion of a "fresh start" is common today in both bankruptcy and divorce.[165]

III. LIMITS ON AN ANALOGY BETWEEN MARRIAGE AND THE BUSINESS CORPORATION?

When I first began, in the 1990s, to reflect on the future of the law of marriage, the law of divorce in the United States had already evolved in ways similar to the law of corporate bankruptcy in the ways above described. This was one of many reasons I then predicted that the status of marriage would continue to gradually to evolve in an arc analogous to the one the status of the business

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[162] For examples of some of the shaming penalties earlier imposed on insolvent debtors, including forced nudity in the public square, *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).

[163] For discussions of elements of the evolution of bankruptcy law relevant to my comparison with divorce, *see, e.g.*, Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI L. REV. 17, 21-31 (2006); Bruce H. Mann, REPUBLIC OF DEBTORS 228 ff. (2002); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 34-39 *(1986).* I am grateful to Douglas Baird for his generous assistance in helping me develop the comparison.

[164] Indeed, notorious instances of collusion between spouses eager to divorce but without a legitimate fault ground to do so were one of the motivating factors for no-fault divorce reform. For a description of some typical collusive schemes, *see, e.g.*, Nelson Manfred Blake, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 190-199 (1962).

[165] 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).

corporation had followed in Anglo-American law over the course of the last several centuries.[166] As I then saw it:

> "for both marriage and the corporation, a pivotal point [wa]s the eighteenth century, in which the state made its most aggressive attempt to assert monopoly control over both institutions…. 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 [at the turn of the millennium] 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 by moving closer to a system of default rules within which couples can structure their own lives. Admitting same-sex couples to civil marriage could be an important step in moving that trajectory forward.[167]

To this extent, my prediction has been borne out. I was correct to see the development of the law of marriage as akin to the development of general incorporation. Just as, on the one hand, a business venture no longer required the state's corporate imprimatur in order legally to be allowed to undertake certain particularly valuable activities,[168] so one no longer needed to be legally married to engage in lawful sex or produce legitimate children. Not only do laws of general incorporation allow a business corporation to be formed without a charter from the legislature, those who incorporate no longer have to limit themselves to a single registered business purpose or enterprise. Similarly, the law in most places does not now limit the purpose for which a couple marries - couples who are unable or unwilling to have children or even to have sexual intercourse are still generally free to marry.[169]

At least in the United States, marriage has also co-opted its competitors – while couples are afforded greater opportunities for enforceable private contract, there are very few status alternatives available in state law available to them, and most of them do not differ substantially from marriage in

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[166] I set out some of these predictions, together with an analysis of the history of the development of the law, in an unpublished working paper generated in a collaboration with my University of Virginia School of Law colleague, Mary Anne Case and Paul Mahoney, The Role of the State in Corporations and Marriage (1996).

[167] Marriage Licenses at

[168] For example, to explore the East Indies, as the British Crown had chartered the East India Company to do as a monopoly in the early modern period. *See e.g*. Frank Evans, *The Evolution of the English Joint Stock Limited Trading Company*, 8 Columbia L. Rev. 339, 342, ff (1908).

[169] For example, in Goodridge, the Massachusetts case that first brought same-sex marriage to one of the United States, the court observed that the claim that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation" was "incorrect." According to the court majority:

> Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.
> Goodridge 440 Mass. 309, 331 (2003).

anything but name.[170] But I also predicted that, just as the state now offered a variety of forms in which one could do business, including a variety of status-like forms each with their own off-the rack rules,[171] and had become in general indifferent to the form any particular business chose, so the state would come to offer a variety of forms, a menu of options, for adult relationship recognition, and develop in general a similar indifference as to what form a given couple chose. As I shall conclude this article by discussing, my prediction on this was wrong – not only did the menu of options not emerge in as many places as I might have predicted, marriage, certainly in the United States, albeit to a somewhat lesser extent in other countries, is still widely perceived as the gold standard for relationships.

My initial instinct was to see this divergence from my expectations with respect to the path followed by the status of marriage over the past thirty years as not only a failure of my predictive powers and a dashing of my normative hopes, but evidence of a significant limit to the analytic force of the analogy I had been trying to draw between the historical development of the status of marriage and corporate status. Further research into attitudes toward incorporation gave me renewed faith in the strength of the analogy, however. Specifically, I was intrigued to learn while reading about recent "proposals for the creation of a new legal form through which small businesses in the United Kingdom could operate" the following:

> There appears to be a perception amongst some sectors of the business community that incorporation bestows prestige and credibility. Any new form would need to carry similar status in order to be attractive. This perception seems odd to lawyers familiar with the true import of limited liability and may be unwarranted in many cases but cannot be ignored by those considering reform if it is a major motivating factor. The belief amongst incorporated firm owners that banks, suppliers and customers prefer dealing with limited companies may have some root in the simple fact of registration and increased visibility and disclosure. Again, any comfort given by this apparent transparency may be based on a misperception of its value, but this does not remove the importance of the belief as a motivating factor amongst those who incorporate.[172]

Surveys of businesses indicated that "the most often mentioned reason for incorporation after obtaining limited liability was prestige and credibility (50 per cent), well ahead of tax reasons (38 per cent) and ownership of property in the firm's name (26 per cent) [and o]ther textbook factors for preferring incorporation."[173] Moreover, there was an apparent "lack of understanding of what is obtained by incorporating and, indeed, what rights and obligations are created by the particular

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[170] For example, California domestic partnerships and Illinois civil unions now offer treatment under state law essentially identical to marriage, although not recognition under federal law. See further discussion below.

[171] For example, limited liability companies and limited partnerships.

[172] Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW 555, 563-4 (July 1994), *available at* https://www.jstor.org/stable/1096555.

[173] Id. at 561.

incorporation documents of the firm, suggests that business owners are not interested in this documentation prior to problems arising."[174]

If these survey results are at all representative, they reinforce the strength of analogies between incorporation and entry into the legal status of marriage even today. To begin with, empirical studies have shown that those who marry like those who incorporate often have a "lack of understanding of what is obtained … and, indeed, what rights and obligations are created by the particular" status.[175] Next and more importantly, just as "clearly there is a great deal of incorporation for reasons which do not fit the usual economic or legal analyses,"[176] so there is a great deal of marrying that is engaged in chiefly because of a perception that it "bestows prestige and credibility," rather than chiefly for economic and legal reasons.

A. MARRIAGE AS A SOCIALLY AND SYMBOLICALLY SIGNIFICANT STATUS

Whatever my normative preferences, and whatever the descriptive accuracy of Justice Denise Johnson's claim that "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"[177] and of Christiane Taubira's claim that the role of the state in marriage was "not to say what was good or bad but to organize things,"[178] I must acknowledge that a large percentage of couples who today choose to marry, including same-sex couples who have fought hard to attain the right to marry, do see marriage as an important source of recognition, not in the merely practical but in the deeply symbolic sense of the word. For them the "State's interest in licensing marriages is" more than merely "regulatory in nature."[179] It offers a sense of validation, as well as recognition. Nowhere have I seen this more clearly articulated than in the trial testimony of plaintiffs' witnesses in the *Perry* case, in which two gay couples argued that California's Proposition 8, which by referendum amended the California constitution so as to remove the right to marry from same-sex couples after that right had been recognized by the California Supreme Court, was unconstitutional.[180]

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[174] Id. at 565.

[175] 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 and high levels of confidence that their own marriages would avoid the problems of divorce).

[176] Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW at 561.

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

[178] *Mariage pour tous : les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), *available at* http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira-12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

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

[180] While the case ultimately reached the Supreme Court, where it was dismissed for lack of standing under the name Hollinsworth v. Perry, my discussion centers on the trial in the District Court, where the case was known as Perry v. Schwarzenegger, 704 F. Supp. 2d 921(N.D. Cal. 2010).

The testimony of these witnesses is not isolated and unrepresentative, despite their being involved in a lawsuit whose sole purpose was to reclaim the possibility that same-sex couples in California could give their relationship the legal name and hence the status of marriage. In the words of sociologist Andrew Cherlin, "marriage has become a trophy" for many couples in the U.S. today. Cherlin analyzed a 2013 Pew poll, in which, for example, only 46% gave access to "legal rights and benefits" as a very important reason to marry, with 84% naming "love" and 71% "companionship." [181]

In the *Perry* trial, even the proponents of Proposition 8 stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage,"[182] and each of the plaintiff couples testified that, although registered domestic partnership gave them the same rights as marriage under California law, they found domestic partnership to be a deeply unsatisfying institution. Sandra Stier, named plaintiff Perry's registered domestic partner, testified that "there is certainly nothing about domestic partnership * * * that indicates the love and commitment that are inherent in marriage." She gave this testimony notwithstanding that California's statutory definition of domestic partnership was "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring,"[183] while the statutory definition of marriage mentioned neither intimacy nor caring.[184] Marriage, according to Stier, would "make them feel included 'in the social fabric.' Marriage would be a way to tell 'our friends, our family, our society, our community, our parents * * * and each other that this is a lifetime commitment * * * we are not girlfriends. We are not partners. We are married."[185] This would, she said, make them feel of "proud" and "respected."

Related to the personal feelings of status boost these couples anticipate is the fact of marriage being a legible relationship, one that is socially recognizable in addition to being socially validated. As plaintiff Paul Katami testified:

> Being married allows us access to the language. Being able to call him my husband is so definitive, it changes our relationship. We currently struggle, in certain circumstances, about what to call each other. But "husband" is definitive. It's something that everyone understands. There is no subtlety to it. It is absolute, and also comes with a modicum of respect and understanding that your relationship is not temporal, it's not new, it's not something that could fade easily. … But, for us, marriage is so important because it solidifies the relationship. And we gain access to, again, that language that is global, … Because not everyone knows exactly what a domestic partnership is.... I can safely say that if I were married to Jeff, that I know that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated. I know how I felt when people have asked, "An LLC or an S Corporation"? No, not my business partner. My partner.[186]

Perhaps the most dramatic evidence that the symbolic status of marriage meant more to some than the legal status of domestic partnership came from the testimony in *Perry* of Chinese- American witness

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[181] Andrew Cherlin, Marriage has become a Trophy, The Atlantic March 20, 2018 available at https://www.theatlantic.com/family/archive/2018/03/incredible-everlasting-institution-marriage/555320/.

[182] Id. at 936.

[183] *Cal. Fam. Code 297(a)* (West 2005).

[184] Marriage in the California Code was at the time 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 "an unmarried male ... and an unmarried female of the age of 18 years or older, and not otherwise disqualified," id. 301.

[185] Id. at 936.

[186] Testimony of Paul Katami. Transcript of Trial at 88-89, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

Helen Zia, who compared her experience getting married in California in the so-called winter of love, when then San Francisco mayor Gavin Newsome offered marriage licenses to same-sex couples even though he had no legal authority to do so that all the resulting marriages were in short order invalidated by the California courts on the one hand with her experience of registering for a domestic partnership, even when that eventually provided her all the legal rights of marriage on the other hand. For Zia, registering for domestic partnership was

> a little anticlimactic. We were excited about being able to register as domestic partners. We came to City Hall. We went to a window that I would describe as… it's kind of all purpose postal window kind of thing, where I think they issued dog licenses as well as domestic partner licenses….I left feeling a little like, So this is -- this is domestic partnership? We walked away with a little certificate, the kind that a kid gets for perfect attendance that week…. But it didn't feel like … much at all. It wasn't the kind of thing we sent notice out to friends about, or sent invitations to a party or anything.[187]

It is important to remember that marriage licenses, too, are often given out at bureaucratic windows in the same way as are dog licenses, and that couples can marry without notifying their friends or having a party, conversely there is no formal obstacle to celebrating or widely announcing one's registration as domestic partners. Yet the impersonality of registering as partners compared with the ceremonial aspect of marrying has disturbed many. In France, for example, when the PACS was first introduced, it, too, was handed out in a back office and not celebrated in the much grander Salle des Mariages in a French City Hall. The process may have provided ample legal benefits, but it did not feel special or recognizable. Like Katami, Zia testified that when she would introduce her domestic partner to others at gatherings

> I can't count the number of times people say, "Oh, partner. Partner in what business?" And Lia and I got used to having to have an answer to that, to say, "Well, we're partners in life." And then we'd just get used to watching the look on their faces, to see whether they got it. And often it would just be this look of bewilderment: Oh, what business is life? Do you mean life insurance?[188]

By contrast, even though her winter-of-love marriage, unlike her domestic partnership, ended up having no legal force, and even though it was invalidated a week before their wedding reception, Zia testified that it "made a difference to our parents, to how our parents related to us. It made a difference to how we related to people." They did throw a big wedding party, and invited many family members, who suddenly seemed to understand and recognize their relationship and include her in her partner's family with familiar familial terms:[189]

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[187] Testimony of Helen Zia, Transcript of Trial at 235-6, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010). This initial registration took place when comparatively few legal rights and benefits were associated with registration. But even when domestic partnership status became legally equivalent to marriage in California, Zia felt she had nothing to celebrate when she" got another form back in the mail. And it said, "You 4 are now domestic partners in the State of California" Testimony of Helen Zia, Transcript of Trial at 1277, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[188] Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[189] E.g. "Auntie Lia, now you're really my auntie." Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

> my mother, before we would marry, would struggle and just say, "She's Helen's friend." And then it changed. And she would say, "This is Helen's" -- "This is my daughter-in-law." And they would get it. And whether they approved or disapproved, it didn't matter. They got it. It's like you don't insult somebody's wife. You don't insult somebody's mother. *** Our families related to each other differently because marriage is -- and I'm beginning to understand what I've always read -- marriage is the joining of two families.[190]

Zia testified that, as a daughter-in-law, she was then included in the immediate family circle for the hospice care of her partner's father, in the memorial hall for the funeral service, and in obituary notices.[191] This inclusion in an intergenerational family formation would have gratified Jim Obergefell, but it was in point of fact what allowed for Zia's inclusion was not any narrowly legal status, of the sort Obergefell was litigating, but the social status and recognizability of the term "marriage."

In Taiwan, unlike the United States heterosexual legal marriage is as a matter of law the joining of two families, forging legal ties beyond that of the couple to each other, but the Article 2 relationship that same-sex couples can now enter into, not only limits their ability to have intergenerational legal ties to children, it also does not create legal ties to in-laws, and has therefore been described as "same-sex marriage without family." For some Taiwanese, as well as some Americans, the ability to be incorporated into family is all important, but for others, in the LGBTQ (and also in the heterosexual community) it can be see as an advantage to be legally free of traditional family roles and obligations. For the former group, same-sex marriage without family does not go far enough (and not simply because it prevents the adoption of children and therefore the formation of a family including younger generations, but also because it excludes the possibility of a connection with ancestors). For the latter group any break from the traditional family configuration may be a step in the right direction. Hust as Helen Zia affirmatively wanted to be known as someone's wife, others may share the view of lesbian feminist theorist Paula Ettelbrick, who, despite spending much of her life in solidly coupled relationships, insisted, "Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as 'Mrs. Attached-To-Somebody-Else.'"[192]

B. THE EFFECT OF THE SAME-SEX MARRIAGE MOVEMENT ON THE STATUS OF MARRIAGE AND THE AVAILABILITY OF ALTERNATIVE FORMS OF LEGAL RECOGNITION

Over decades of public debates with those advocates of traditional marriage who say they oppose same-sex marriage because they fear that licensing it will contribute to the decline of marriage among heterosexuals and the decline in the status of marriage as an institution,[193] I have insisted to them that,

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[190] Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[191] Testimony of Helen Zia, Transcript of Trial at 1237, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[192] 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).

[193] I am referring here to those campaigners against same-sex marriage who disavow an aversion to homosexuality, but foreground a commitment to the status of marriage in their work, such as Maggie Gallagher, former head of the National Organization for Marriage.

as it happens, no group in the last thirty years has done more to preserve, indeed to elevate the status of marriage than the same-sex marriage movement. It is thanks to gay people far more than in spite of them that, for better or for worse, marriage remains so widely regarded as the gold standard for relationships. Nothing the traditional marriage movement has said or done has revitalized marriage in the United States the way the same-sex marriage movement has, both as a matter of law (in the sense that alternatives to marriage are much less talked about, and much less available than I predicted thirty years ago they would be) and as a matter of social practice, with the notion still socially current that everyone ought to be married, and that being married is prestigious. Let me make clear if I have not already that I deplore what researcher Bella de Paolo has dubbed "matrimania."[194] Of all the flowery prose and impassioned arguments in the various Justices' opinions in *Obergefell*, the passage that attracted my personal most heartfelt assent was in a footnote by Clarence Thomas:

> The majority also suggests that marriage confers "nobility" on individuals…. I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.[195]

Specious though it may be, the suggestion remains all too common. I also have to acknowledge as a descriptive matter that the marriage equality movement has sucked much of the air out of proposals to create alternate legal forms of family recognition in the United States. At present, only a tiny number of states have robust alternatives to marriage.[196] Other states have always focused on limiting options. Consider the changes over time to the laws applicable to couples registered in California as domestic partners. From the time the first statewide 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 in rights and obligations, effective January 1, 2005, conveyed to domestic partners virtually all the state-level rights and responsibilities of marriage. 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 remained 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.[197]

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[194] See e.g. Bella DePaulo, Singlism and Matrimania, Nov 7, 2018 available at http://www.belladepaulo.com/2018/11/singlism-and-matrimania/.

[195] Obergefell v. Hodges, 135 S. Ct. 2584 (2015)(Thomas, dissenting).

[196] For a list of available options, see e.g. National Conference of State Legislatures, Civil Unions and Domestic Partnership Statutes https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx.

[197] For further discussion see Marriage Licenses at 1777.

But unlike many other states, California has retained domestic partnership, even after the advent of same-sex marriage, and indeed has expanded its availability to include all those heterosexual couples for whom marriage is an option, not only, as it had earlier, only those one of whose members is a senior citizen.[198] This highlights what for me a significant factor that helps explains why, at least in the United States, my prediction about the development of a menu of options for relationship recognition status similar to that for businesses has not developed to the extent I had hoped. Wherever alternative relationship statuses were made available only to same-sex couples, they have withered on the vine. Where they were opened to all couples, they generally tended to remain as options, even after the advent of same-sex marriage, because they had robust heterosexual constituencies. This happened in, among other places the Netherlands,[199] Quebec, and perhaps most famously in France, whose situation when it comes to the status of marriage, which I see as in some respects the mirror image of the United States, I shall end by sketching briefly.

The first of many hints that beneath the surface in both France and the U.S. things may in complicated ways be the opposite of what they announce themselves to be comes when we begin by comparing what advocates for the legal recognition of same-sex couples in the respective countries called their movements. French advocates speak of 'Mariage pour tous" ("marriage for all") and those in the U.S. of "Marriage Equality," but each one's slogan better fits the other nation's movement. The effect of opening up marriage to same-sex couples in France is designed to have and has achieved equality of access to marriage (although importantly not immediately equality of filiation nor of access to a range of reproductive technologies) for same-sex couples. Yet there is little sense in France that marriage is indeed for all. President Francois Hollande himself, who shepherded the same-sex marriage bill through the legislature as a signature accomplishment of his administration, is not now nor has he ever been married, not to his partner of thirty years and the mother of his four children, fellow politician Ségolène Royal; nor to the woman who replaced her at his side, journalist Valérie Trierweiler, who was only finally divorced from her second husband several years after beginning her public relationship with Hollande; nor to actress Julie Gayet, whose affair with Hollande caused the dramatic end to his relationship with Trierweiler, who had been living with him in the presidential palace. More importantly, there is no sense that opening marriage to same–sex couples will bring an end to the legal availability or widespread popularity of either the PACS (the Pact for Civil Solidarity, through which both same sex and opposite sex couples may register for a bundle of rights and obligations less comprehensive than marriage) or of concubinage (an even less formal status for cohabitants with even fewer rights and responsibilities, which the courts had limited to opposite sex couples, but the legislature finally opened to same sex couples in 1999, coincident with the creation of the PACS). The availability of the PACS to opposite sex couples ensures not only its continued popularity but its

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[198] See California Family Code Sec 297 as amended November 2019.

[199] As the Dutch explained, ""The relatively high number of different-sex couples that contracted a registered partnership in 1998 ... makes it plausi-ble 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." See e.g. 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)

conceptual fidelity to French anti-communitarian principles – it is not an institution limited to a defined subset of the population but available to all.[200]

When proponents of same sex marriage in the United States speak in terms of the Freedom to Marry or of Marriage Equality, they are sending a distinct message to two different constituencies. On the one hand, in speaking to those outside the gay community who may not yet be supporters, these slogans build, not only on abstract commitments to liberty and equality, but on the very specific resonances each has in U.S. history, particularly the history of the African-American civil rights movement. The freedom to marry was an important consequence of emancipation for freed slaves in the nineteenth century; the freedom to marry the person of one's choice, even across racial lines, followed as a constitutional guarantee nearly a century later. To claim precisely marriage, rather than an alternative legal status with equivalent rights and benefits like civil union or domestic partnership resonates with the hard-won American repudiation of the concept of "separate but equal" in the context of race relations. On the other hand, speaking of the Freedom to Marry and of Marriage Equality is carefully respectful of those many people in the gay rights movement and elsewhere on the American left who are doubtful that marriage should have the central role it does in American law and life. The implicit suggestion is that to be free to marry also entails the freedom not to marry and that to call for marriage equality is not to call for marriage, but merely to argue that if there is going to be marriage, then it should be equally open to same-sex couples. Nevertheless, somewhat paradoxically, marriage equality has turned into "marriage for all" in the United States.

To the extent that there are general lessons to be derived from the experience of France and the United States, this seems to me to put proponents of the preservation of marriage as the gold standard for relationships into a somewhat paradoxical position. They seem to me to be well-advised to do as Taiwan has done – to immediately open up the status of marriage to same-sex couples without yet offering alternative statuses. If they were also to take what I hope is an immediate next step for Taiwan and grant full parentage rights to married same-sex couples, they might also be more likely to achieve their goal of maximizing the number of children who are born to or grow up with married parents.

CONCLUSION

Although I have in the past written extensively about constitutional arguments for same-sex marriage,[201] and although much of the discussion around the world today in the academy, in courts and legislatures, and even in popular media focuses on the question of marriage as a constitutional right under particular constitutions or as a human right under various treaties and convention, I have in this keynote set such questions to one side. My effort has instead been to analyze the functionality and usefulness of the legal status of marriage today for couples and legal systems, as well as the advantages of making it available to same-sex couples. I have to acknowledge that my normative preference to

[200] For further discussion see Mary Anne Case, Comparative Sexual Democracy

[201] *See e.g.* Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation* 57 UCLA L. Rev. 1199 (2010).

view the status of marriage from the perspective of efficiency more than that of dignity is not yet widely shared, but I nevertheless to continue to believe in its descriptive helpfulness and normative desirability, and to advocate for it.