PARADIGMS OF MARITAL CHOICE

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[*Dear reader,*

This is a very early (and incomplete) draft of an article I hope to develop over the summer. As you will see, many citations are missing and I have not finished drafting the final Part of the article. I have also not had the opportunity yet to go over the whole article and make sure that the various parts cohere and that the arguments make sense.

Thanks for your patience—I look forward to hearing your thoughts.

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In the summer of 2014, thousands of same-sex couples in Washington found themselves married without formally saying "I do" or signing a marriage license.[1] A year-and-a-half earlier, the Washington State legislature legalized marriage between same-sex couples. The legislation, which survived a voter referendum in November of that year, provided registered same-sex domestic partners with three options. Couples could marry on their own, or they could dissolve their partnerships. Any partnerships in which a member was not over the age of 62 and that were not dissolved by the summer of 2014 would automatically be converted to marriages.[2]

This was not the first time that same-sex couples in alternate statuses like domestic partnerships and civil unions have found themselves married without having made a deliberate choice. Parties to civil unions in the states of Connecticut,[3] Delaware,[4] and New Hampshire[5] similarly saw their unions automatically converted when marriage became legal in their states. It is true that these parties, like the domestic partners in Washington, theoretically had the option to dissolve their unions, so they did not entirely

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[1] *See infra* notes __-__.

[2] *See generally* Act Concerning Civil Marriage and Domestic Partnerships, S.B. 6239, 2012 Legis., Reg. Sess. (Wash. 2012); *see id.* § 10(3)(a) (codified at WASH. REV. STAT. 26.60.100) ("[A]ny state registered domestic partnership in which the parties are the same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is *automatically merged into a marriage and is deemed a marriage* as of June 30, 2014.") (emphasis added).

[3] [Add citation]

[4] [Add citation]

[5] [Add citation]

lack agency regarding their nuptials. But the dissolution process in most of these states is not unlike a divorce: partners must negotiate or adjudicate property division, custody, and support.[6] The choice to do anything but accede to marriage would therefore be costly on a practical and emotional level, as perfectly happy couples would have to become legal adversaries in order to avoid marriage. It would be hard to characterize such a choice—opting out of marriage on pain of dissolution—as freely made.

The institution of marriage is in a historical moment of transition. In the coming months and years, many other jurisdictions will have to decide what the arrival of same-sex marriage, often the product of court decisions, will mean for the continued existence of their alternate statuses.[7] These decisions will impact tens of thousands of registrants, and could result in significant numbers of compulsory marriages.[8]

The legalization of same-sex marriage will give rise to other vexing transition problems. First, states will be asked to decide whether same-sex marriage applies retroactively. In Wisconsin, for example, the domestic partner regime offers only 43 enumerated rights, excluding, notably, community property.[9] Although the parties may have been officially married as of the date of legalization, they may try to argue that their rights and obligations began at some earlier time, for example the date they registered their domestic partnership.[10] Relatedly, some states, like Hawaii,

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[6] In Washington, for example, domestic partners would have to go through the same divorce proceedings as married couples unless the partnership met a restrictive set of requirements. *If* neither partner had minor children, any ownership interest in real property, and unpaid obligations in excess of $4000, *and if* the net fair market value of the community assets fell below $25,000, the partners could bypass formal dissolution procedures *as long as* the partners could agree upon a division of assets and they also waived rights to maintenance. *See* Act Expanding Rights and Responsibilities for Domestic Partnerships, H.B. 3104, 2008 Legis., Reg. Sess. (Wash. 2008), § 1001.

[7] x states have had their opposite-sex marriage requirements struck down by federal courts. [cite] The legislatures of many of these states will likely feel the need to confront transition issues left open by these court decisions. Additionally, __ states have created some range of benefits for individuals in same-sex relationships that fall short of an official registry or formal status. *See, e.g.*, ___. Arizona, for example, provided health care coverage for the same-sex partners of state employees. When the U.S. District Court for the District of Arizona struck down the state's opposite-sex marriage restriction, state employees were given a few weeks notice that they would have to marry their partners or lose their benefits.

[8] [It would be nice to identify those states with CUs or DPs that haven't converted and to see how many people are currently registered in those states.]

[9] *See* WIS. STAT. §§ 770.001 *et seq.* (specifically finding that the domestic partnership regime "is not substantially similar to that of marriage").

[10] In both California and Washington, a significant number of domestic partners registered at a time when they were granted only a limited set of rights. Although those states later

have premised statuses on the unavailability of legal marriage. Reciprocal beneficiaries are two adults who are prohibited by law from marrying;[11] does the later legalization of same-sex marriage affect existing reciprocal beneficiary relationships? Second, people who would have married but for the opposite-sex requirement may assert legal rights premised on the nature of their relationship before same-sex marriage was legalized in their states. People in a common law marriage state, for example, may argue that they would have satisfied the elements of a common law marriage except for the fact that marriage was legally unavailable to couples of the same sex.[12] Others might try to claim standing to sue for loss of consortium based on a relationship that the law did not allow them to formalize.[13]

Each of the transition problems above potentially involves conscription or ascription[14]—the act of bringing someone within the status of marriage in spite of some sort of formal limitation or deficiency at an earlier time. And this conscription can be voluntary—in the sense that all involved, including the partners, State, and third parties agree that the couple should be deemed married—or involuntary as the case may be. Choice, and what we mean

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amended their domestic partnership statutes to offer the legal equivalent of marriage, it is questionable whether the original registrants ever intended to sign on to marriage.

[11] [cite reciprocal beneficiaries law]

[12] Eight states—Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, and Texas—and the District of Columbia still recognize common law marriage. Even states that do not, however, may have to consider these issues because the validity of a marriage is often determined based on the laws of the forum in which that marriage was celebrated. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 716 (1996).

[13] This has already occurred in several states. *See* Mueller v. Tepler, __ N.E.2d __, (Conn. July 16, 2014) (holding that a woman who later entered into a civil union with her deceased partner could attempt to prove that she would have entered into a civil union at the time a malpractice cause of action accrued but for the fact that civil unions were not available until years later); Charron v. Amaral, 889 N.E.2d 946 (Mass. 2008) (holding that a partner could not assert claims for loss of consortium based on events that occurred before the state legalized same-sex marriage).

[14] Scholars have used both terms to describe the phenomenon of bringing a person into a family status against his or her will. *Compare* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 818 & n. 7 (2005) (settling on the term "conscriptive" to describe obligations that are "both compulsory and involuntary") *with* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 24-25 (2010) (noting that the act of imposing marital obligations on people who deny they are married would be ascriptive). Although I don't think the differences are significant, I will use forms of the verb "conscript"/"conscribe" rather than "ascript"/"ascribe" because, like Garrison, I want to feature the appropriating, confining, and recruiting aspects of marital status rather than the attributional or inclusionary aspects. *See* OXFORD ENGLISH DICTIONARY, http://www.oed.com (last visited Mar. 17, 2015) (defining "ascribe," "conscribe," and related verb forms).

when we invoke it, will be central to the resolution of these transition problems.

Although it might sound unusual for a person to find himself married without deliberately choosing to enter that status at the outset, that situation is not entirely unprecedented.[15] Throughout the nineteenth century, most states recognized common law marriage.[16] As a result of this recognition, the law would treat people who lived together as a married couple whether or not they formalized their relationship *ex ante*, if they held themselves out as a married couple. Although the touchstone of common law marriage was the parties' intent to marry,[17] this determination was usually made at the end of the relationship instead of at the beginning, for instance, when a common law husband had either died or deserted his putative wife.[18] Husbands on the losing end of a court decision recognizing a common law marriage might therefore have been surprised to find themselves married.[19]

Still, the trend in most jurisdictions has been towards *ex ante*, formal marriage.[20] It is this form of marriage that has captured the public imagination: the size of the wedding industry attests to that fact.[21] And all of the customary rituals and formalities—from the proposal to the assembly

[15] On the other hand, the outright elimination of a status based solely on legislative fiat, as opposed to the conduct of the parties, does seem quite unprecedented. I could locate no example quite like the situation in Washington, in which the state allowed people to voluntarily enroll in a highly regulated status that governed the parties' legal rights and obligations, then eliminated that status in favor of one with substantially different legal rights and obligations.

[16] *See* GROSSMAN & FRIEDMAN, INSIDE THE CASTLE 78 (2011).

[17] Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. REV. 957, 970 (2000) ("Intent to marry was central to common law marriage, a doctrine based on established principles of contract law."). Although the doctrine might have focused on the parties' intent, numerous scholars have argued that legitimating meretricious relationships was its central concern. *See id.* at 969 ("The doctrine allowed judges to efface the potentially threatening nature of nonmarital domestic relationships by labeling them marriages."); *see also* GROSSMAN & FRIEDMAN, *supra* note __, at 80 ("But, most importantly, [common law marriage] was a way to clean up the mess made by illicit sex.").

[18] *See id.* (Dubler) at 968-69. The critical distinction between common law marriage and formal marriage is that a common law marriage would usually be established *ex post*, most commonly upon divorce or death. In that sense, it would ascribe legal significance to conduct that had already taken place. *Cf.* Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 23-27 (2010).

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

[20] By "formal," I mean that the spouses have obtained a marriage license and have had their marriage solemnized by an appropriate officiant under state law.

[21] [cite]

of family and friends to the walking down the aisle—crescendo to the choice to marry, memorialized by the exchanging of vows and the public pronouncement that the couple is married. Part I of the Article explores this transition between *ex post* flexibility of common law marriage and the triumph of *ex ante* formality.

Given the rise of the formal, *ex ante* understanding of choice, it comes as a surprise that the judicial and legislative expansion of same-sex marriage has sometimes progressed with indifference to the actual wishes of members of that class. Indeed, the transition problems discussed above reveal that the law may simultaneously create, encourage, and even deny choice within the context of marriage. Accordingly, these transition problems present a timely opportunity to consider the broader relationship between choice and marital status. Looking at these transition problems collectively reveals that choice has taken on a variety of meanings in different contexts. Part II identifies these emergent paradigms of choice. Choice has been characterized as the way in which the law, society, and self identify their subjects—*choice as identity*. It has been used as a justification for denying legal benefits to those who did not formally opt into marriage—*choice as exclusion*. At the same time, however, one's choice cannot unfairly disrupt another's settled expectations—*choice as fairness*. Moreover, the automatic conversion of registered partners to married spouses indicates that choice has also been either devalued or assumed—*nudge as choice* or *choice as superfluousness*.

Part III of this Article brings together these paradigms of choice and argues that they articulate a theory of marital choice that encourages the formal, identity-defining choice to marry. At the same time, this theory of choice devalues the identity-defining choice *not* to marry. This one-way-street view of choice reveals the law's strong interest in marriage as a tool of identification, and the active promotion of marriage over non-marriage.

Having revealed this theory of marital choice, Part IV of the Article endeavors to criticize it. The rhetoric and reality of marriage have diverged. The rhetoric is that marriage is about individual choice; the reality is that the state still retains a substantial interest in regulating that choice. The rhetoric is that we protect the choice to marry in order to maximize personal autonomy; the reality is that the law sometimes denies a meaningful choice not to marry. I argue that reality should match the rhetoric. Courts and legislators must recognize that the failure to respect the choice not to marry equally interferes with the development of a person's sense of self. Properly balancing the choices to and not to marry can help us to see what is at stake in the looming transition problems on the road to marriage equality and can light the path to the proper outcomes.

I. Traditional Debate About Choice: Formal/*Ex Ante* or Functional/*Ex Post*?

Imagine a situation in which an older, wealthy man and a younger, attractive woman begin to date. The couple's relationship develops and the woman moves in. After a few years, the woman legally changes her surname to match the man's. During this period, she gives up her budding career and instead acts as a homemaker for their household. When they entertain guests at the home and go out in public, they act as one might expect a husband and wife to act. The man continues to amass income and property during this period; the woman does not. After five years, this relationship comes to an end. At no point in time did the couple actually obtain a marriage license from the state or have their union solemnized by an approved officiant.[22]

In this situation, the law might have good reason not to recognize the couple as married. The fact that the couple did not formalize their marriage in the first place might suggest that they never intended the law to treat them as married. One or both of the parties may have structured his affairs under the understanding that he was single. The parties might have wanted to avoid certain state- or employer-imposed obligations based on marriage. We might worry about the burden on the courts of having to determine on an ad hoc basis whether couples are married. We might even be concerned about whether legal recognition would result in incentives to make improvident economic decisions, especially by the more vulnerable party.

On the other hand, the couple, by its conduct, has in many respects functioned the way married couples do.[23] If the law would protect a spouse in an economically vulnerable position, it might protect the woman here.[24]

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[22] The facts of this hypothetical are derived from *Marvin v. Marvin*, 18 Cal. 3d 660 (1976), the landmark case involving cohabitation and palimony, but they resonate with various common law marriage cases such as *In re Erlanger's Estate*, 259 N.Y.S. 610 (N.Y. Surr. Ct. 1932), in which the court found that a common law marriage existed between a wealthy theater producer and a younger actress, and *Jennings v. Hurt*, 554 N.Y.S.2d 220 (App. Div. 1990), in which the court concluded that a former ballet dancer failed to establish that she and the actor William Hurt were in a common law marriage.

[23] "What married couples do" is open to debate, and several scholars have argued that the state's regulation of unmarried couples has contributed in significant respects to our understanding of marital norms. *See* Albertina Antognini; Courtney Cahill; Ariela Dubler.

[24] This vulnerability rationale is at the heart of an American Law Institute proposal to impose legal obligations on couples that cohabit for more than two years. *See* ALI; CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010) (proposing compulsory obligations to cohabitants unless they opt-out (sort of a reverse-*Marvin*); Ellman, *Marvin's Fatal Flaw*.

Doing nothing could unjustly enrich the man at the expense of the woman, or could result in the state having to assume responsibility for her support.[25]

A relationship like the one described here gives rise to countless choices spanning many years. Whether the law recognizes the relationship depends on the extent to which it insists upon a choice to formalize the relationship at the outset, or views the parties' conduct over the course of the relationship as a manifestation of the choice to marry. The key question, therefore, is not whether there was a choice, but which choice (or what form of choice) matters. The prevailing narrative is that the pendulum has swung in the favor of formal, *ex ante* choice.

A. Finding Oneself Married

During the heyday of common law marriage, a member of a cohabiting relationship, almost always a man,[26] could find himself married despite never formalizing the relationship.[27] Such a determination might not be exclusively conscriptive in the sense that at least one of the spouses would have requested it.[28] But it would have to be considered at least partially conscriptive to the extent the law treated the unwilling spouse as married even over his argument that he never intended to be.[29] It is all the more surprising, therefore, that the finding that such a marriage existed would

[25] Among its many functions, the family has always been seen as an important source of support for members of society, a kind of private welfare system. [cite] Some scholars have gone so far as to argue that this is the family's *primary* function. [cite; Laura A. Rosenbury, *Federal Visions of Private Financial Support*, 67 VAND. L .REV. 1835, 1866 (2014)]

[26] *See* Bowman, *supra* note __, at 711 (noting that common law marriage claims were almost universally brought by women).

[27] I focus here on cases in which a living putative spouse opposed a determination that he or she was married, not cases in which a putative spouse brought a claim against a deceased spouse's estate or a claim for benefits based on the alleged common law marriage. *See, e.g.*, Warren v. Warren, 63 So. 726 (Fla. 1913) (affirming the lower court's denial of a putative husband's demurrer to the wife's petition for alimony); Argiroff v. Argiroff, 19 N.E.2d 560 (Ind. 1939) (affirming an award of support *pendente lite* to a putative common law wife over the objection of the putative husband that the couple was ever married); Jourdan v. Jourdan, 179 So. 268 (Miss. 1938) (awarding divorce and alimony over the putative husband's objection); Brinkley v. Brinkley, 50 N.Y. 184 (N.Y. 1872) (affirming a temporary award of alimony during the pendency of a common law divorce action); *cf. supra* note __ (collecting several modern cases). Cases in which one of the common law spouses was dead could ascribe marriage where it might not have truly existed, but would not conscript an unwilling participant into the institution.

[28] *Cf.* Aloni, *Deprivative Recognition* (distinguishing between situations in which at least one spouse/partner requests legal recognition and situations in which the law makes a determination on its own).

[29] *See supra* note 14.

require the spouse's intent to marry—"[a] contract of marriage made *per verba de praesenti*."[30]

To overcome the absence of formalities at the beginning of the relationship and the denial of marriage at the end, courts would look to evidence that the parties had consented to marriage through their conduct. Acting like a married couple, holding themselves out to the public as married, and gaining community acceptance as husband and wife could evince the choice to marry.[31] Most jurisdictions further adopted evidentiary presumptions favoring marriage; as a result, cohabitation alone was often enough to prove the choice to marry.[32]

Zy v. Zy[33] provides a colorful example of the types of conduct sufficient to establish a marital relationship. In the case, a woman filed a petition for support against her putative common law husband.[34] They couple met at "an orgy arranged by a business man who presumably had the reputation of decency[,]" she as a "call-girl" and he as a participant.[35] Despite the fact that she was "a woman of easy virtue," the man importuned the woman to live with him and the couple moved into the same apartment within a year.[36] The subject of marriage repeatedly came up over the years without the parties ever formally committing to marriage. For example, the man at one point told the woman, "'I might as well marry you because I'm hooked anyhow'"—she laughed it off.[37] The kicker, for the court, was the fact that the couple represented themselves as married to family members over the years. At some point in the relationship, they went to live with the man's cousin for a bit and presented themselves as a married couple.[38] Four years in, the couple invited the man's mother to stay with them for a week; the court observed that "[s]ons usually do not bring their mothers . . . into the

[30] Fenton v. Reed, 4 Johns. 52, 54 (N.Y. Sup. Ct. 1809) (per curiam).
[31] Dubler, *Wifely Behavior*, *supra* note __, at 970-71.
[32] *See, e.g.*, Meister v. Moore, 96 U.S. 76, 81 (1877) (noting the presumption that state statutes prescribing certain formalities for entering marriage would be "held merely directory; because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as it has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law"); Gall v. Gall, 21 N.E. 106, 109 (N.Y. 1889) ("The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married.").
[33] 13 N.Y.S.2d 415, 418 (N.Y. Fam. Ct. 1939)
[34] *Id.* at 417.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 417-18.
[38] *Id.* at 418.

homes of their mistresses."[39] These facts established the existence of a common law marriage.[40]

There are various justifications for this conscriptive model of marriage. Public morality played a significant role. As scholars have noted, marriage shaped legitimate sexuality, so the state was actively interested in promoting it, especially as an alternative model might condone meretricious relationships.[41] States sometimes used criminal laws punishing extra-marital sexual conduct as a lever to compel its citizens to choose marriage or face criminal prosecution.[42] We might think of this as an *ex ante* choice, but a surprisingly coerced one. Common law marriage upped the ante in the sense that it allowed the state to deem a couple married even without the parties' *ex ante* commitment. It would re-cast an illicit relationship as a licit one, thereby purging the stain of immorality. The *Zy* court, for example, went so far as to say that "[f]ew, indeed, are the cases in which the parties have entered upon a common law marriage from the very beginning without some untoward or meretricious relationship existing at the time."[43] In converting the relationship of a call-girl and her paramour into a marriage, the court noted the power of the law to redeem immorality:

> Sinners are not condemned to sin in perpetuity. They are not condemned to sin throughout their lives because they had sinned. Since man has risen to the high cultural stature which is his, rehabilitation, reformation of the delinquent has become his objective.[44]

Marriage, to the court, was a path to redemption: a universal good that could redeem the woman's depravity.

There were also more practical justifications. As Ariela Dubler has observed, "[t]he vast majority of cases in which courts across jurisdictions pondered the validity and desirability of common law marriage shared a common sociological backdrop: female economic dependency."[45]

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[39] *Id.*

[40] *See id.* at 417-19 (examining additional evidence, for example, the fact that the man had obtained a life insurance policy naming the woman as his beneficiary).

[41] *See* GROSSMAN & FRIEDMAN, *supra* note __, at 78-79; Dubler, *supra* note __, at 969 (noting the ability of common law marriage to transform subversive relationships into traditional ones); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 6-7 (2012) ("[T]here was little space for sex outside the rubrics of marriage and crime.").

[42] *See* Murray, *Marriage as Punishment*, *supra* note __, at __. *See also, e.g.*, Jourdan v. Jourdan, 179 So. 268 (Miss. 1938) (husband claimed that he was married in order to avoid being charged with the statutory rape of his common law wife).

[43] Zy v. Zy, 13 N.Y.S.2d 415, 418 (N.Y. Fam. Ct. 1939).

[44] *Id.* at 419.

[45] Dubler, *Wifely Behavior*, *supra* note __, at 968.

Although the actual extent to which women were economically dependent on their husbands at this historical moment might be questioned, common law marriage reinforced the notion that "[a] woman was supposed to be dependent on her husband not on the state."[46] In addition to common law divorce and probate actions, a significant portion of common law marriage cases in the early twentieth century involved claims by alleged common law widows against their husbands' employers for survivor benefits.[47] Moreover, common law marriage legitimized children resulting from cohabiting relationships and made it possible for them to avoid the negative consequences of bastardy.[48]

Common law marriage also allowed some play in the joints of a restrictive regime of marriage and, especially, divorce. Many of the reported common law marriage cases involved spousal abandonment or desertion. For example, in one of the foundational common law marriage cases, *Fenton v. Reed*, Elizabeth Reed sought to be recognized as the widow of William Reed, a member of the Provident Society, in order to claim the $25 annual payment to which widows were entitled.[49] Elizabeth had been married to a different man, John Guest, in 1785, when Guest sailed "for foreign parts."[50] Guest went missing and was generally believed to be dead.[51] In 1792, Elizabeth married William Reed. Complicating matters, however, Guest returned to New York later that same year and continued to live there until his death in 1800, although he did not object to the Reeds' relationship.[52] The Reeds lived together until William's death in 1806, at which point Elizabeth sought payment from the Provident Society.[53] Under the law at the time, Elizabeth remained married to Guest despite his long absence.[54] Therefore, she could not have solemnized her marriage to William in 1792.[55] The doctrine of common law marriage, however, allowed the court to conclude that the Reeds were married based on their cohabitation

[46] Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1917 (1998); *see also id.* at 1894 (noting the interests of various state actors in privatizing dependency).
[47] *See, e.g.*, [cite cases involving widows bringing claims under the relatively new state worker's compensation acts]
[48] Dubler, *Governing Through Contract*, *supra* note __, at 1894-95; *see also* Pinkhasov v. Petocz, 331 S.W.3d 285, 293 (Ky. Ct. App. 2011) (explaining that public policy favors marriage because "'the law presumes morality and not immorality; marriage, and not concubinage; legitimacy, and not bastardy'").
[49] Fenton v. Reed, 4 Johns. 52, 52 (N.Y. Sup. Ct. 1809) (per curiam).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 53.
[55] *Id.*

following Guest's death despite the fact that they had not formally married after the impediment—Guest—no longer existed.[56] Without easy access to divorce, people with long-gone spouses might have trouble formally remarrying. Common law marriage allowed relationships that began under uncertain circumstances to attain legitimacy at a later time.[57]

Some justifications for common law marriage served the individual interests of the common law spouses—especially to the extent that they protected the expectations of the dependent spouse—while others, like morality and privatized dependency, primarily served the interests of the state. Diverse forms of marital choice served these ends. For the states that adopted common law marriage, formality was subservient to functionality. *Ex ante* choice also took a backseat to *ex post* determinations.

B. The Rise of Formal Choice

For the most part, contemporary accounts of marital relationships tend to think of choice as synonymous with the *ex ante* decision to marry. Indeed, the common landmarks—proposal on bended knee; wedding ceremony during which the couple says "I do"; the declaration by the officiant that the couple is now husband and wife (or husband-husband, wife-wife); signing of the marriage certificate—all focus our attention to the intention of the parties to marry. As a result, people feel differently the day after the wedding than they did the day before: they are *now* married. How did this account of choice gain prominence?

[I'm interested in this section with how the move towards the abolishment of CLM has coincided with the prominence of *ex ante* choice and the relationship, if any, with the case law.]

States abolished common law marriage for several loosely related reasons. They became increasingly concerned with the potential for fraud and abuse, especially by "adventuresses" after the estates of wealthy men.[58] With more and more governmental benefits and burdens determined based on marital status—tax filing and social security benefits being prime examples—formal marriage also enhanced administrability.[59] And states were loath to forfeit the perceived societal benefits that could accompany

[56] *Id.* at 54.
[57] *See, e.g.*, Renfrow v. Renfrow, 56 P. 534 (Kan. 1899) (involving an action to establish a marriage that began when the spouses were slaves); Gall v. Gall, 114 N.Y. 109 (N.Y. Ct. App. 1889) (involving the eligibility of a woman to marry when her previous husband was unlawfully married to another woman).
[58] Charlotte Goldberg article; Dubler article
[59] *See* GROSSMAN & Friedman, supra note __, at 84. For a critique of the sheer number of legal rights attached to marital status, see Kerry Abrams, *Marriage Fraud*

the ability to determine who could marry whom.[60] States therefore became more interested in encouraging responsible *ex ante* choices and making those choices legally significant.

[To be written]

II. Emerging Paradigms of Marital Choice

We have seen that when it comes to marriage, the law requires choice but accepts it in different forms. One cannot assume, then, that the choice to marry must necessarily refer to a formal or *ex ante* choice. Although formal, *ex ante* choice has largely become synonymous with the choice to marry, different paradigms of choice have re-emerged in the push for marriage equality. This Part describes the paradigms of choice through specific problems that have arisen with the availability of same-sex marriage. It begins with the most conventional paradigm—*choice-as-identity*—and moves on to the increasingly less heralded.

A. Choice as Identity

During the widely publicized trial regarding the validity of Proposition 8, California's same-sex marriage ban, plaintiff Paul Katami was asked what would change if he were allowed to marry his partner, Jeff Zarrillo.[61] Katami responded, "Being able to call him my husband is so definitive, it changes our relationship. . . . It is absolute, and also comes with a modicum of respect and understanding that your relationship is not temporal . . . . It is something you've dedicated yourself to and you're committed to."[62] When asked how it felt not to be able to choose to marry, he described "the struggle that we have validating ourselves to other people" and continued, "[u]nless you have to go through a constant validation of self, there's no way to really describe how it feels."[63]

Katami's testimony reflects the extent to which the choice to marry has become synonymous with identity, both public and private. The choice to marry makes a public statement and asks for public respect.[64] It is also a

[60] GROSSMAN & FRIEDMAN, *supra* note __, at 85-86.
[61] Transcript of Trial, Jan. 11, 2010, at 88, Perry v. Schwarzenegger, No. 09-2292-VRW (N.D. Cal. 2010).
[62] *Id.* at 89.
[63] *Id.* at 90-91.
[64] The other plaintiffs in the *Perry* case offered similar testimony: "Stier explained that marrying [her same-sex partner Perry] would make them feel included 'in the social fabric.' Marriage would be a way to tell 'our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment.'" *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 933 (N.D. Cal. 2010) (internal citations omitted).

means of self-identification, though: as Katami notes, it changes one's own "understanding" of one's relationship and impacts the way one "feels."[65] [Discuss *Obergefell*]

The paradigm of choice-as-identity that emerges in the same-sex marriage context reflects a broader constitutional understanding of the relationship between choice and marriage. The Supreme Court has repeatedly identified marriage as "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[66]

Early cases show that this "vital personal right" encompassed, in particular, the protection of conscience from state compulsion. *Meyer v. Nebraska*[67] involved the conviction of a German language teacher in violation of a state statute that criminalized the teaching of foreign languages to students who had not passed the eighth grade.[68] According to the state supreme court, the purpose of the law was to prevent immigrant parents from rearing their children in the "mother tongue," thereby "inculcating in them the ideas and sentiments foreign to the best interests of this country."[69] It accomplished this purpose indirectly by interfering with parents' abilities to arrange for professional instruction of their children, not by reaching directly into the home. Nonetheless, the Court found that this objective infringed the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, which encompassed the freedom "to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[70] The desire to

[65] Although I focus here on the significance of the choice to marry to the identity of the spouses, the *Windsor* court recognized that marriage influences the identities of the children of the couple as well. The Court stated that the Defense of Marriage Act's same-sex marriage ban "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their comminuty and in their daily lives." *Id.* at 2694.

[66] Loving v. Virginia, 388 U.S. 1, 12 (1967). Early Court decisions discussing marriage emphasized its fundamental importance in structural terms, describing it as "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), "fundamental to the very existence and survival of the race," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Of course, the institution of marriage could be the "foundation of the family and of society" quite separate from the individual's choice to take part in it. In fact, in *Maynard v. Hill*, the Court upheld a legislative act by the Territory of Oregon granting a divorce to a man without the knowledge of his wife, whom he had abandoned in Ohio, and against her wishes. *See Maynard*, 125 U.S. at 209-10.

[67] 262 U.S. 390 (1923).

[68] *See id.* at 397.

[69] *Id.* at 398.

[70] *Id.* at 399.

foster "civic development" and a "homogenous people with American ideals" could not justify the "coerc[ive]" means adopted by the state.[71] The Court's discussion of the right to marry must be understood in light of its concern about the effects of state coercion on its citizens' identity.[72]

Our understanding of marital choice has further depended on the linkage between marriage and cases involving procreational freedom. Cases involving contraception[73] and abortion[74] emphasize the significant impact that having children has on one's identity. The *Roe* Court, for example, observed that unwanted "[m]aternity, or additional offspring, may force upon the woman a distressful life and future," potentially causing "[p]sychological harm," and "stigma."[75] These statements reveal a sensitivity to how a person views herself—focusing on psychological harm and distress—and how the person is viewed by others—as a person with a disfavored identity.[76] The Court doubled down on this reasoning in *Casey*, stating that decisions falling within the "private realm of family life" are

> choices central to personal dignity and autonomy. . . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.[77]

Cases involving the restriction of a person's choice to marry have applied the concepts of conscience and personhood. *Zablocki v. Redhail*,[78] for example, involved a law requiring men with outstanding child support orders to get judicial approval before marrying.[79] In striking down this restriction, the Court reasoned directly from *Roe*: "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the

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[71] *Id.* at 401, 402.
[72] Cite Ristroph & Murray, *Disestablishing Marriage*, noting that the family would serve as a bulwark against authoritarianism.
[73] *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).
[74] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).
[75] *Roe*, 410 U.S. at 153.
[76] *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 753 (1989) (contending that the right to self-definition—what Rubenfeld calls the "personhood thesis"—has come to dominate the Fourteenth Amendment's right of privacy).
[77] *Casey*, 505 U.S. at 851 (plurality opinion).
[78] 434 U.S. 374 (1978).
[79] *See id.* at 375.

foundation of the family in our society. . . . The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child . . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection."[80] In *Turner v. Safley*,[81] the Court struck down a ban on prisoners' right to marry, except with the permission of the prison superintendent.[82] Due to their incarceration, prisoners lacked the ability to cohabit with their spouses or consummate their relationship. Nonetheless, the Court held that they retained their right to marry because many of the "important attributes" of marriage remained even despite those limitations: "inmate marriages, like others, are expressions of emotional support and public commitment," as well as an "expression of personal dedication."[83] Notably, the Court also appeared concerned with the ability of the superintendent to approve a marriage at his or her discretion.[84] The superintendent in the case, for example, testified that female prisoners were "overly dependent on male figures" and that "these women prisoners needed to concentrate on developing skills of self-reliance."[85] The attempt to shape the personality of the female inmates clearly offended the Court.[86]

The marriage equality movement taps into these understandings of choice. As the Supreme Court observed in *United States v. Windsor*,[87] marriage "is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community."[88] [I will draft this paragraph after the decision in *Obergefell*]

The choice-as-identity paradigm has gained such prominence in the context of marriage that it has, at times, seemed synonymous with the choice to marry. But the movement towards marriage equality has unearthed other paradigms of choice.

B. Choice as Exclusion

If choice can say something about oneself, not choosing has the potential to say something as well. The expansion of same-sex marriage and alternative

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[80] *Id.* at 386.
[81] 482 U.S. 78 (1987).
[82] *See id.* at 99-100.
[83] *Id.* at 95.
[84] *See id.* at 96-97 (noting that "generally only pregnancy or birth of a child is considered a 'compelling reason' to approve a marriage).
[85] *Id.* at 97.
[86] *Id.* at 99 (characterizing the rehabilitative objective as "lopsided," "excessive paternalism").
[87] 133 S. Ct. 2675 (2013).
[88] *Id.* at 2692.

relationship statuses has brought renewed attention to another function of marital choice: the use of *available* choice to justify the denial of benefits when that choice is not exercised. Under this *choice-as-exclusion* paradigm, inaction is interpreted as an active choice not to marry, allowing the law to deny privileges on that basis.

In California, for example, the failure to exercise marital choice has justified statutory discrimination. In *Holguin v. Flores*,[89] a man brought a wrongful death lawsuit against the driver of a big rig truck who sideswiped his cohabitant's car and crushed her under the truck's back wheels.[90] The wrongful death statute barred lawsuits by unmarried cohabitants but allowed suits by umarried domestic partners.[91] At the time of the accident, the couple had lived together for three years in "an intimate and committed relationship of mutual caring."[92] Although the couple had not married, the man asserted that they met all of the statutory requirements for a state domestic partnership except one: California's domestic partner law restricted the status to couples in which "[b]oth persons are members of the same sex" or at least one member was over the age of 62.[93]

These entrance requirements appear to discriminate on the basis of both sexual orientation and age, as heterosexuals under the age of 62 who wish to register a partnership are ineligible.[94] The court, however, rejected these arguments and focused on a different basis for discrimination: "the wrongful death statute does not discriminate against Holguin on the basis of his gender or age but on the basis of his marital status—unmarried *with the right to wed*."[95] According to the court, the domestic partnership law only corrected a previous legal inequity that left "functional[ly]" married couples without legal protections.[96] The couple, on the other hand, never suffered from this inequity "because they were never members of the class of

[89] 18 Cal. Rptr. 3d 749 (Ct. App. 2004).
[90] *Id.* at 750.
[91] *See id.* at 753.
[92] *Id*.
[93] *See* CAL. FAM. CODE § 297(b)(4)).
[94] Assembly Member Carole Midgen initially drafted the legislation without the age restriction for heterosexual couples but revised it based on pressure from Governor Gray Davis, who did not want to create an alternative to marriage for heterosexual couples. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1259 (2010); Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 572-73 n.41 (2000).
[95] *Holguin*, 18 Cal. Rptr. 3d at 756 (emphasis added).
[96] *Id.* at 756. Same-sex couples, of course, were legally prevented from marrying; older heterosexual couples, however, were only "practically" deprived of marriage because of the possibility that they might lose their Social Security or Supplemental Security Income if they were to marry. *See id.* at 751, 755, 756.

couples who, because of their gender or age, were barred from marrying . . . [they] always had the right to marry."[97] Never mind that the couple was as "functionally" married as those who entered into domestic partnerships, and might have had its reasons—practical or otherwise—not to marry. At the end of the day those reasons *did not matter*; the choice not to marry negated the statutory discrimination.[98]

Another example comes from the state of Arizona. In 2008, the state initially provided subsidized health benefits to an employee's domestic partner, defined as someone "of the same or opposite gender" who, among other things, had cohabited with the employee for at least a year and who could demonstrate financial interdependence.[99] However, in 2009, the state legislature eliminated coverage for domestic partners.[100] Both same-sex and opposite-sex partners were affected by this legislation. Following this

[97] *Id.* at 757. This reasoning is reflected in other decisions regarding the choice by heterosexual couples not to avail themselves of marriage, see, e.g., *Fitzsimmons v. Mini Coach of Boston, Inc.*, 799 N.E.2d 1256, 1257 (Mass. 2003) (declining to extend standing to recover for loss of consortium to a "person who could have but has declined to accept the correlative responsibilities of marriage").

[98] Interestingly, the court noted that "a legislative enactment or constitutional decision authorizing same-sex couples to marry (while also continuing to permit them the alternative or registering as domestic partners)" could give opposite-sex couples "a stronger claim of discriminatory treatment under the existing wrongful death provisions." *Id.* at 759 n.60. Those developments have come to pass. Moreover, the California Supreme Court has held, in no uncertain terms, that sexual orientation is a protected classification under California law. *See In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("[W]e conclude that sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny.") (overruled on other grounds by Proposition 8 (2008) (amending the constitution to define marriage as a union between one man and one woman)). If courts were to follow the logic of decisions subjecting discrimination based on race or sex to heightened scrutiny regardless of whether the statute discriminates on the behalf of a favored or disfavored group, *see, e.g.* [cite cases], the domestic partnership law's same-sex requirement would be ripe for invalidation.

[99] *See* Diaz v. Brewer, 656 F.3d 1008, 1010 (9th Cir. 2011); Collins v. Brewer, 727 F. Supp. 2d 797, 800 (D. Ariz. 2010). To demonstrate financial interdependence, the employee would have to provide proof of three of the following: "i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease; ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names; iii. Assuming joint liabilities; iv. Having joint ownership of significant property, such as real estate, a vehicle, or a boat; v. Naming the partner as beneficiary on the employee's life insurance, under the employee's will, or employee's retirement annuities and being named by the partner as beneficiary of the partner's life insurance, under the partner's will, or the partner's retirement annuities; and vi. Each agreeing in writing to assume financial responsibility for the welfare of the other, such as durable power of attorney; or vii. Other proof of financial interdependence as approved by the Director." *Id.*

[100] *See Diaz*, 656 F.3d at 1010.

development, Lambda Legal, the prominent LGBT rights legal organization ("Lambda"), filed suit on behalf of the same-sex couples, but not opposite-sex couples, whose benefits were threatened.[101] By representing only the same-sex couples, Lambda was able to advance the ultimately successful argument that its clients, unlike heterosexual couples, were precluded from choosing to marry and thus unfairly targeted by the Arizona legislation.[102]

Lambda opened its Ninth Circuit brief by emphasizing that the legislation would eliminate insurance benefits for "*only* lesbian and gay State employees, and *not* their heterosexual co-workers."[103] Because heterosexual domestic partners would in fact lose their benefits, Lambda's assertion only makes sense if we accept that the opposite-sex partners had the choice to marry but failed to exercise it. As Professor Nancy Polikoff has observed, Lambda upped the ante by contrasting the opposite-sex domestic partners, "heterosexual employees who have *chosen not to marry* their different-sex domestic partner," with the plaintiffs, all of whom "*would marry their life partner if allowed* by Arizona law."[104] The Ninth Circuit embraced this distinction in its equal protection analysis, noting that "different-sex couples wishing to retain their current family health benefits could alter their status—marry—to do so. The Arizona Constitution, however, prohibits same-sex couples from doing so."[105]

In these examples, the state of being unmarried when marriage is legally available—whether a conscious decision or not—is treated as an active choice not to avail oneself of governmental benefits. The mere availability of the formal choice to marry justifies exclusion notwithstanding conduct suggesting the establishment of a meaningful relationship. Under this paradigm, the choice to marry becomes part of a *quid pro quo* between eligible partners and the state: in order to receive this benefit, you must

[101] *See generally* Amended Complaint at 2, Collins v. Brewer, No. 09-2402 (D. Ariz. Jan. 7, 2010) (identifying plaintiffs as lesbian and gay employees with "committed same-sex life partner[s]"). Professor Nancy Polikoff has speculated that this decision was motivated by Lambda's efforts to win marriage equality nationwide and the need to maintain conceptual and rhetorical consistency regarding the superiority of marriage over other statuses. *See* Nancy D. Polikoff, *"Two Parts of the Landscape of Family in America": Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 735, 746-47 (2012) [hereinafter Polikoff, *Landscape of Family*].

[102] *See* Polikoff, *Landscape of Family*, *supra* note __, at 741-42.

[103] Polikoff, *Landscape of Family*, *supra* note __, at 741 (quoting Plaintiffs-Appellee's Brief at 2, Collins v. Brewer, 656 F.3d 1008 (9th Cir. 2011) (No. 10-16797)) (emphasis added).

[104] Plaintiffs-Appellee's Brief at 4, 4 n.3, Collins v. Brewer, 656 F.3d 1008 (9th Cir. 2011) (No. 10-16797) (emphasis added); Polikoff, *Landscape of Family*, *supra* note __, at 741.

[105] *Diaz*, 656 F.3d at 1014.

choose to marry.[106] Although this paradigm of choice may not be fully conscriptive, it is at least somewhat coercive.[107] The beneficiaries of Lambda's lawsuit learned this firsthand when Arizona's same-sex marriage ban was struck down several years later, in October 2014.[108] Within a month, same-sex employees who had been receiving domestic partner benefits received an email notifying them that "[b]ecause same-sex couples may now marry in Arizona, . . . same-sex domestic partners will no longer be eligible for coverage . . . effective January 1, 2015."[109] That cryptically worded email was followed on December 11, 2014, by an email from Lambda attorneys stating, in no uncertain terms, "[*i*]f *you have not married your same-sex domestic partner*, and you wish to retain family benefits for your partner and/or partner's children, you have *until December 31, 2014* to marry."[110]

Choice-as-exclusion reveals the state's active interest in encouraging—arguably coercing—marriage.[111] This paradigm of choice heightens the identity-defining aspects of marital choice by amplifying the consequences of the decision. But it also influences the choice by using marital rights as a thumb on the scale in favor of marriage and is therefore in tension with a conception of identity that is unconstrained.

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[106] Janet Halley has observed that states' family regimes can differ on the extent to which they involve "steep drop-offs," significant consequences for being married or unmarried, and that steeper drop-offs reinforce the status-feel of those statuses. *See* Halley, *supra* note __, at 33. The choice-as-exclusion paradigm, while technically resting on the availability of choice, helps to maintain the drop-off between marriage and non-marriage by justifying the different treatment accorded to each.

[107] Nancy Polikoff has pointed out that a decade before the *Collins/Diaz* case, Lambda filed an amicus curiae brief on behalf of an unmarried heterosexual employee of the Chicago public school system who was excluded from the Board of Education's same-sex-only domestic partner benefits scheme. *See* Nancy D. Polikoff, *What Marriage Equality Arguments Portend for Domestic Partner Employee Benefits*, 37 NYU REV. L. & SOC. CHANGE 49, 49 (2013). In its brief, Lambda argued that the plaintiff's exclusion raised the question "whether the state can force her to marry—that is, to change her decision about the exercise of a fundamental right that is available to her—as a condition of providing equal employment compensation and greater health security for her family . . . . No one's family health and security should depend on their constitutionally protected choice of whether to marry or not." *Id.* (citation and quotation marks omitted).

[108] *See* [AZ district court case].

[109] Email from ASU Benefits Communications, Nov. 6, 2014 (on file with author).

[110] Email sent to Staff and Faculty Group Supporting Gay, Lesbian & Bisexual Issues at ASU, Dec. 11, 2014 (on file with author) (emphasis in original).

[111] The *Holguin* court noted a long line of court decisions justifying the exclusion of cohabitants from the state's wrongful death statute in the name of "'the state's substantial interest in promoting and protecting marriage.'" Holguin v. Flores, 18 Cal. Rptr. 3d 749, 757 (Ct. App. 2004).

C. Choice as Fairness

The previous two paradigms both raise the stakes of choosing to marry in a way that favors clear, *ex ante* choice. But it is not always possible to exercise choice in this manner. Does a couple choose to marry by participating in a commitment ceremony before their state allows same-sex marriage? Should a couple be denied a legal entitlement arising on a particular date if they cannot marry on that date but marry later once the law allows it? Same-sex couples have faced the unique burden of making relationship decisions within a constantly shifting legal context. Courts have therefore had to consider the impact of legal instability on the enforceability of the parties' choices.

It has been said that there are three parties to every marriage: the two spouses and the state.[112] It makes sense, then, that questions about the meaning of marital choice under uncertain legal circumstances would arise between the putative spouses or the state. But marriage also affects true third parties in various respects. Employers, for example, may provide a different set of benefits to married or single employees.[113] A finding that someone is married might provide creditors access to additional marital or separate property.[114] And tortfeasors' duties could expand beyond the victim to a spouse or family. The Massachusetts and Connecticut supreme courts have already explored this last scenario, analyzing whether a partner can sue for loss of consortium based on injuries to a person she would have married if the law allowed. Although the courts come to different conclusions, they agree that the recognition of marital choice cannot come at the cost of disrupting the legitimate expectations of third parties.

In *Charron v. Amaral*,[115] Cynthia Kalish asserted a claim for loss of consortium against medical professionals who allegedly failed to biopsy a cancerous tumor in her wife, who later died.[116] The problem for Kalish was that the allegedly negligent conduct occurred in late-2002 or 2003, a year before the couple was legally allowed to marry in the Commonwealth of Massachusetts.[117] The couple had cohabited together since 1992,

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[112] [cite]
[113] [cite]
[114] *See* Kaiponanea T. Matsumura, Comment, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185, 199 (2006) (describing California laws allowing creditor access to community and separate property).
[115] 889 N.E.2d 946 (Mass. 2008).
[116] *See* Brief of Plaintiffs-Appellants at 4-6 & n.2, Charron v. Amaral, 889 N.E.2d 946 (Mass. 2008), 2007 WL 5434035.
[117] *Charron*, 889 N.E.2d at 948. The Massachusetts Supreme Judicial Court paved the way for same-sex marriage in its decision in *Goodridge v. Department of Public Health*, 798

exchanged rings in a commitment ceremony in 1994, jointly adopted a child in 1998, executed legal documents including powers of attorney and wills in 1999, and applied for a marriage license on the first day they were able in May 2004.[118] Although Massachusetts law required that a person be married at the time of the injury in order to sue for loss of consortium,[119] Kalish argued that the requirement should be excused because she "would have been married but for the legal prohibition."[120]

The facts of *Mueller v. Tepler*[121]were very similar to *Charron*. Charlotte Stacey sought to bring a loss of consortium claim based on a physician's alleged failure to properly diagnose her partner's cancer of the appendix between August 2001 and March 2004.[122] Stacey and Mueller had lived together as partners since 1985 and had entered into a Connecticut civil union in November 2005.[123] The trial court ultimately struck Stacey's loss of consortium claim based on the fact that the couple was not married prior to the injury, rejecting Stacey's argument that they would have married or entered into a civil union but for "legal impossibility."[124]

In both cases, the plaintiffs argued—and the facts tended to support—that they would have chosen to formalize their relationship if legally entitled to do so.[125] The *Charron* court, however, was unreceptive to this argument. To allow Kalish to bring her claim based on a legal decision *after* the injury occurred would be to apply the decision retroactively, something the court was unwilling to do.[126] The court worried that "to allow Kalish to recover for a loss of consortium if she can prove she would have been married but for the ban on same-sex marriage could open numbers of cases in all areas

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N.E.2d 941 (Mass. 2003). Although the court announced its decision in November 2003, it stayed its opinion for 180 days to allow the state legislature "to take such action as it may deem appropriate in light of [its] opinion." *Id.* at 970.

[118] *Id.* at 947-48.

[119] *See id.* at 948-49; *compare supra* notes __-__ (choice-as-exclusion paradigm).

[120] *Id.* at 950.

[121] 95 A.3d 1011 (Conn. 2014).

[122] *Id.* at 1015. The physician allegedly misdiagnosed the decedent with ovarian cancer and although the error was eventually discovered, it was too late to surgically remove some of the tumors. *See id.*

[123] *Id.* Same-sex couples could enter into civil unions starting in October 2005. *See* Act Concerning Civil Unions, 2005 Conn. Acts 10, § 1.

[124] *Muller*, 95 A.3d at 1017. The trial court made its ruling in 2007 without the benefit of the Connecticut Supreme Court's decision in *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), legalizing same-sex marriage.

[125] This argument accepts the choice-as-exclusion paradigm discussed in Part __ above by acknowledging that the absence of a choice to marry would justify the denial of legal benefits, but by arguing that the lack of choice was due to the state and not the parties.

[126] *Charron*, 889 N.E.2d at 950 ("It is obvious that *Goodridge* was intended to apply prospectively.").

of law to the same argument."[127] Such "uncertainty in the private as well as the public sphere about who is (or was) quasi married and for what purpose" could threaten the state's interest in maintaining "a clearly defined, unambiguous legal status for civil marriage."[128] The *Mueller* court saw things differently. It was less concerned about the unbounded expansion of tort liability, noting that the plaintiff would have to prove that the couple would have been married but for a legal impediment that was inconsistent with public policy, and that such claims would be naturally limited by statutes of limitation.[129] The court further reasoned that this limited expansion of liability would not "impair preexisting expectations or reliance interests in any serious way" because the rule limiting recovery to spouses would not have "guided the conduct of any potential tortfeasor."[130]

These cases together reveal an interesting debate about the relationship between marital choice and the ability of third parties to choose their own conduct within the bounds of the law. Underlying the *Charron* court's fear of opening the floodgates to a wide swath of claims by quasi-married couples are concerns about the scope of tort liability more broadly and on the ability of third parties to predict the legal consequences of their actions. On both of these issues, the *Mueller* court appears to have the better arguments. Realistically, the only class of people to whom causes of action would be expanded is same-sex couples that could prove they would have married at the time of the accident. The statute of limitations for tort actions would serve to narrow the claims even further: if Kalish had brought her lawsuit in 2006, for example, it would already have been barred.[131] Moreover, as the *Mueller* court reasoned, it is difficult to imagine that a physician would be more careful in treating a patient based on that patient's marital status: a cause of action for negligence is premised on the assumption that the defendant's conduct was unintentional.[132]

Both cases appear to be in agreement, however, that the law cannot retroactively recognize a party's claim that she would have chosen to marry

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[127] *Id* at 773. The court also noted that it created significant space for the legislature to craft an appropriate remedy for the constitutional violation it identified in the *Goodridge* decision, and the legislature did not provide a statutory remedy for people in Kalish's situation. *Id.* at 771, 772; *see also id.* at 775 (Marshall, C.J., concurring).

[128] *Id.* at 774-75, 776 (Marshall, C.J., concurring).

[129] Mueller v. Tepler, 95 A.3d 1011, 1026, 1030 (Conn. 2014).

[130] *Id.* at 1027; *see also id.* at 1028 ("[T]he defendants have not specifically identified any particular form of socially useful conduct that would be deterred if this court allowed Stacey to maintain a loss of consortium claim.").

[131] The statute of limitations for a medical malpractice action requires a plaintiff to bring suit within three years after the cause of action accrued. MASS. GEN. LAWS ANN. ch. 260, § 4 (West 2014).

[132] [cite Dobbs, etc.]

when that recognition would disrupt preexisting expectations or reliance interests.[133] The *Charron* court's concerns about uncertainty make more sense when we move outside the realm of tort law and into the realm of contract, where commitments might have been based on the contracting party's single legal status. If knowledge of the person's legal status changed the third party's primary conduct, he or she would have a reliance interest that would compel the court to apply the marital status prospectively only.[134] These third-party cases also indicate that the law should strive to settle expectations and provide certainty when considering the legal effect of the choice to marry.

D. Nudge as Choice

The final situation in which the question of choice has arisen also involves legal change. State legislators have had to consider what to do with alternative statuses such as domestic partnerships and civil unions upon the legalization of same-sex marriage in their states. The problem plays out as follows: It is probably safe to assume that most registrants would choose marriage. Some unknown number, however, might actually prefer to remain in the alternative status for a variety of reasons, ranging from greater tax liability, the loss of benefits, or ideological objections to being married.[135] Still other registrants might actually have ended their relationships without formally dissolving them.[136] Legislators confronting this problem have a range of options that largely boil down to two.[137] They

[133] Of course, those reliance interests should be legitimate. Someone who committed an intentional tort like assault might not be able to avoid liability even if she proceeded under the assumption that her victim was unmarried. [cite Munzer]

[134] [cite Fuller, *Landgraf* etc.] These situations would likely be few and far between. In many jurisdictions, for example, employers and landlords cannot base their decisions on marital status. That being the case, those parties would struggle mightily to argue that their primary conduct was based on a person's status as single as opposed to married. An employer being asked to pay benefits to a same-sex spouse retroactively, for example, could not say that she would not have hired the employee but for the fact that the employee was single.

[135] *See infra* notes __-__ (noting the differences between partnership and marriage; Cook County civil union survey; Forbes article on marriage penalty).

[136] *See Most Washington Domestic Partnerships to Convert to Marriages Under State's Same-Sex Marriage Law*, ASSOCIATED PRESS, June 29, 2014 (quoting a state official who acknowledged that some partners had previously broken up without realizing that they needed to formally dissolve their partnerships).

[137] When same-sex marriage has arrived as a product of a court decision, courts have either simply struck down opposite-sex requirements and enjoined state officials to offer the plaintiffs marriage licenses, *see, e.g.*, [Michigan; etc.], or they have allowed the state legislature to craft the appropriate remedy for the constitutional violation, *see, e.g.*, [Connecticut; New Jersey]. Therefore, courts have largely stayed out of the business of deciding whether to preserve or eliminate alternative statuses altogether; that job has been

may choose to do nothing, which would leave the alternative status in place and require couples wishing to marry to affirmatively opt into the status.[138] Or they may convert the alternative statuses to marriages, which would then require couples not wishing to marry to opt out.[139]

Although an opt-in rule might not be optimal from a policy perspective, it is uncontroversial when it comes to the issue of choice. That is because couples can simply choose to marry if they desire.[140] Choice becomes more interesting when an opt-out rule is pursued. Under such an approach, parties never formally choose to marry. Rather, their choice to register for the alternative status is treated as a proxy for the choice to marry.[141] Framing the issue in this way re-surfaces the basic question—familiar from common law marriage—whether we can treat as married two people who haven't formally made that choice. But common law marriage was premised on the existence of an agreement *to marry*, albeit informal.[142] And in common law marriage cases, at least one of the spouses was prepared to offer evidence of such an agreement, even if the other spouse disagreed. Mandatory conversion cases differ in that the spouses may agree that neither ever intended to marry. This Section focuses on Washington's 2012 same-sex marriage legislation to illustrate how the concept of choice has factored into these mandatory conversions.[143]

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taken up, if at all, by state legislatures. California is an example of a state whose same-sex marriage ban was struck down by a federal court, *see* [Hollingsworth], and whose legislature has not affirmatively made any changes to the state domestic partnership statute, *see* Scott Lucas, *So, What's Gonna Happen to My Domestic Partnership?*, S.F. MAGAZINE, June 28, 2013 (describing legislative inaction regarding domestic partnerships in the wake of the *Hollingsworth* decision).

[138] This has been the approach of several states including Hawaii and Illinois, as well as the District of Columbia. [cite]

[139] There are many variations to these two approaches. For example, a legislature could eliminate an alternative status altogether; or a legislature could open up the status to both same- and opposite-sex couples; or a legislature could convert some, but not other, partnerships to marriage (based on date of registration, etc.). At the end of the day, however, the approach will either require a couple to affirmatively make the choice to marry, or it will deem a couple married unless they opt out of the status.

[140] To my knowledge, no one has argued that the failure to automatically convert a partnership to a marriage has deprived him or her of the right to marry.

[141] These alternative statuses almost all require that the parties cohabit or provide some sort of mutual support. *See, e.g.*, [California].

[142] *See supra* notes __-__.

[143] I choose Washington for several reasons. First, it is the most recent example to date of a legislative decision to convert domestic partnerships to marriages. Second, and more importantly, none of the states that converted alternative statuses to marriage have useful, easily accessible legislative history materials explaining why they insisted on conversion. But I was able to speak to one of the two primary drafters of the Washington same-sex marriage legislation and therefore have more insights to the process as it unfolded in

Washington initially passed domestic partner legislation in 2007.[144] The state created a domestic partner registry granting registrants the right to visit a partner in the hospital and make medical decisions on his behalf, inherit a partner's property without a will, and sue for the partner's wrongful death.[145] Advocates hoped, and opponents feared, that the legislation would be a step on the pathway to marriage equality.[146] The primary sponsors of the legislation, state legislators Ed Murray and Jamie Pedersen, never hid this agenda from their colleagues.[147] At the same time, however, media coverage highlighted the fact that domestic partnerships offered only a limited handful of rights granted to married couples,[148] and the legislation itself stated that "[t]his act does not affect marriage."[149]

The legislature soon amended the domestic partnership law to add additional rights and obligations. Approximately a year after domestic partners were first allowed to register, the legislature added community property rights retroactive to the date of registration, and made domestic partnerships subject to the same dissolution process as marriages (with limited exceptions).[150] In 2009, the legislature made a further amendment, clarifying that domestic partners should be treated as married spouses for all purposes under state law.[151]

For state law purposes,[152] domestic partnerships essentially became marriage by a different name. In 2012, however, the legislature made the final push to legalize same-sex marriage.[153] The legislation changed the definition of marriage by eliminating gender-specific terms and defining

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Washington. Finally, Washington's approach to legalizing same-sex marriage was incremental and therefore sheds light on other states that took a similar approach.

[144] 2007 Wash. Legis. Serv. Ch. 156 (West).

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

[146] *See, e.g.*, John Iwasaki, *Domestic Partners Line up for Rights*, SEATTLE POST-INTELLIGENCER, July 20, 2007.

[147] [Pedersen interview]. Senator Pedersen felt that their incremental strategy depended on maintaining credibility with their colleagues, hence their forthrightness.

[148] *See id.* ("[D]omestic partnership 'comes with far fewer benefits than marriage.'"); Andrew Garber, *A Festive Scene in Olympia Today as Domestic Partners Register*, SEATTLE TIMES, July 23, 2007 (discussing the "limited handful of rights" provided by the legislation).

[149] 2007 Wash. Legis. Serv. Ch. 156, § 1 (West).

[150] 2008 Wash. Legis. Serv. Ch. 6, H.B. 3104 (West); WASH. B. ANALYSIS, H.B. 3104, at _ (2008) (summarizing provisions).

[151] 2009 Wash. Legis. Serv. Ch. 521, S.B. 5688 (West) (codified as amended at WASH. REV. CODE § 26.60.015).

[152] Before and after *Windsor*, the federal government has refused to treat domestic partnerships as marriages for purposes of federal law. [cite]

[153] 2012 Wash. Legis. Serv. ch. 3, S.B. 6239 (West).

marriage as "a civil contract between two persons."[154] It simultaneously redefined the entrance requirements for domestic partnerships, limiting that status to relationships in which "at least one of the persons is sixty-two years of age or older."[155] Finally, it created two options for same-sex couples no longer satisfying the requirements for a domestic partnership: they could either "apply and receive a marriage license and have such marriage solemnized," which would dissolve the existing partnership; or they could wait until June 30, 2014, at which point their partnership would be "automatically merged into a marriage and [would be] deemed a marriage."[156] In either case, the date of marriage for purposes of determining legal rights and responsibilities would be backdated to the date the partners registered their partnerships.[157] The legislation also required the state to mail two notices to registered partners notifying them about the impending conversion of their partnerships to marriages.[158]

Based on this chain of events, the choice by a couple in 2007 to enter into a domestic partnership providing a limited set of rights could lead to today's legal conclusion that the couple was *legally married* as of 2007 with no further action on their part. A subset of these couples would not have chosen to marry and so are, in some sense, married against their will.[159] How did the legislators explain this apparent lack of choice?

Essentially, the answer comes in the form of notice. Then-Senator Ed Murray argued that "[o]ver the years . . . we maintained that [domestic partnership] was a step toward marriage and that we weren't trying to create an alternative to marriage."[160] In other words, the partners should have known at the time they registered that they could eventually be married—

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[154] *Id.* § 1.
[155] *Id.* § 9.
[156] *Id.* § 10 (codified at WASH. REV. CODE § 26.60.100).
[157] *Id.* § 10(4) (codified at WASH. REV. CODE § 26.60.100(4)).
[158] *Id.* § 17.
[159] *See, e.g.*, Paige Browning, *Washington to Convert Domestic Partners to 'Married' in June*, OPBNEWS.ORG, Apr. 1, 2014 (interviewing a woman who never intended to marry her partner but acquiesced into marriage); Chris Henry, *Same-Sex Domestic Partnerships Will Convert to Marriage in 2014*, KITSAP SUN, Nov. 25, 2012 ("The committee [drafting the bill] actually heard from some younger couples who want nothing to do with marriage, an institution they see as tainted throughout history."); Lornet Turnbull, *State to Same-Sex Domestic Partners: You're About to Be Married*, SEATTLE TIMES, Feb. 15, 2014 (interviewing the president of the LGBT bar association, who said that many couples across the state were unaware of the conversion to marriages and some had "'signed up for the minimum'").
[160] Lornet Turnbull, *Little Outcry Over Plan to Shift Domestic Partners into Marriage*, SEATTLE TIMES, Feb. 2, 2012. *See also* [Pedersen interview] (making essentially the same claim). Senator Pedersen has noted that despite the legislator's attempts to be transparent, not everyone in the general public would have gotten the message. [Pedersen interview]

choice as retrospective prophecy.[161] Surely many of the registrants felt that they were "making the most significant legal commitment that the law allowed" and celebrated their partnerships as if they were marriages.[162] On the other hand, in 2007, same-sex marriage would have seemed a distant possibility to many; and some registrants objectively did not think of their partnerships in this way.[163] It seems unrealistic to expect couples seeking currently available legal rights offered to domestic partners (like hospital visitation) not to register to avoid the future (and hypothetical) arrival of all the rights and responsibilities of marriage. Yet the implication of Murray's statement is that parties finding themselves married against their will should be held responsible for failing to predict or anticipate subsequent changes in the law.

Second, the state mailed notice to registered partners on two occasions—in 2008 when the state added community property and formal dissolution, and in 2012 when the state provided for the conversion of partnerships to marriages.[164] The first notice provided partners with the choice to dissolve their partnerships or accept significantly greater rights and responsibilities. The second notice presented registered partners essentially with "three choices": "[g]et married," "[d]issolve your domestic partnership," or "[d]o nothing, which would mean that . . . your domestic partnership [would] automatically convert."[165] In these circumstances, the failure to dissolve a relationship would amount to a choice to marry.

To opt out of marriage on pain of divorce would be a difficult choice to make, though, especially if the couple were otherwise happy with the current status of their relationship.[166] We might expect that the higher emotional and practical costs of the first two options—to pick a wedding date or divorce, or even to discuss the future—would therefore channel people to the path of least resistance: doing nothing at all.[167] And in fact, in the days leading up to the mandatory conversion, approximately 60% of

[161] I have previously questioned the validity of reasoning backward from a known end to justify a particular legal result instead of looking at the information parties were faced with at the time of the choice. *See* Kaiponanea T. Matsumura, *Binding Future Selves* [cite].
[162] [Pedersen interview]
[163] *See supra* note __.
[164] [cite 2008 and 2012 acts].
[165] Eli Sanders, *What Happens if I'm Already Domestic Partnered in Washington State?*, THE STRANGER, Nov. 8, 2012 (quoting Sen. Pedersen).
[166] Even if the divorce were essentially uncontested, the couple would still have to discuss sensitive matters like property division, custody, and support. The requirement of judicial approval for their dissolution would likely lead to legal expenses as well.
[167] [cite nudge literature, Sunstein et al.]

registered domestic partners had not affirmatively opted into marriage.[168] The fact that a great number of registrants accepted marriage by operation of law rather than affirmative choice suggests that the selection of an opt-out rule nudged many into marriage.[169] If we believe that the couples retained the choice to marry under these circumstances, then we must accept a nudge to marry as a choice to marry.

III. A Theory of Marital Choice

Historically, marriage in the United States has always involved choice: there has never been a time in which two people were married without *any* say in the matter.[170] The paradigms of choice that have lately emerged in the movement towards marriage equality, however, reveal that the choice to marry need not be formal or unconstrained. These paradigms can vindicate different interests and serve different purposes. Many of these values harmonize; some are, superficially at least, at cross-purposes. In this section, I will argue that the paradigms of marriage point to a unified theory of marital choice. The theory that emerges is general and predictive[171]—that is to say that it may not hold true in every specific jurisdiction and in every instance, but it largely explains past results and predicts future ones where choice is relevant but uncertain.[172] The theory of marital choice unfolds along the following lines:

Identity—Identification. The identity interest is at its strongest when it coincides with the identification interest: *i.e.* when a person chooses to enter into a formal marriage and third parties and the state can rely on that marriage to treat the married individuals accordingly. The choice-as-exclusion paradigm helps to align identity and identification by steering

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[168] *The Impact* (TVW television broadcast June 26, 2014), *available at* http://sdc.wastateleg.org/pedersen/news) (interview of Sen. Pedersen at 11:45).

[169] The primary sponsors of the domestic partnership and marriage equality legislation were not primarily motivated by the desire to encourage marriage or streamline choice. Rather, the selection of an opt-out rule was primarily a political calculation based on two premises. First, the sponsors, especially then-Senator Murray, felt that marriage, and not an alternate status, was always the goal. This was in part based on views about the superiority of marriage and the fear that the creation of a viable alternative to marriage for heterosexuals might spark greater resistance from religious groups. Relatedly, to allow domestic partners to keep their status without extending it to heterosexual couples would give same-sex couples special rights and might make the legislation politically vulnerable on that basis. [Pedersen interview]

[170] *See* Halley, *supra* note __, at 17 (noting that there is no history in this country of completely arranged marriages).

[171] This theory is not necessarily normatively correct, as I will clarify in the next Part.

[172] Choice, of course, is not the sole determinant of whether the law will treat a couple as married; the law has always controlled who can make that choice (age, consanguinity, etc.).

people to make their identity-defining choice, and by separating those worthy of state recognition from those who are unworthy.

Choice to—Choice Not to. The nudge and exclusion paradigms are superficially in tension with the identity paradigm to the extent that the identity paradigm presumes an unconstrained choice. But this tension only exists so long as the identity-defining choice would be against marriage rather than for it. In other words, the right to choose marriage is valued more highly than the right not to choose marriage.

Stability—Instability. Courts protect a party's reliance on her choice to marry when it would also protect the reliance interests of those around her. It is less certain that a court will protect reliance on a choice, however, when such reliance would disrupt the settled expectations of another.

Like a Venn diagram, the concept of marital choice is most likely to protect a person's legal interests when the interests of marital choice align. The remainder of this Part will look at examples of how the theory functions in practice.

Illustrating the Theory

On Friday, March 21, 2014, the United States District Court for the Eastern District of Michigan struck down Michigan's Marriage Amendment, which prohibited same-sex marriage, and enjoined the State of Michigan from enforcing it.[173] The decision was announced after 5:00 p.m., and within ten minutes, the state Attorney General filed a motion for an emergency stay with the Sixth Circuit Court of Appeals, a development that was reported in news stories describing the district court decision.[174]

Notwithstanding the state's pending stay request, on Saturday morning, four local county clerks opened their offices, waived the three-day waiting period, and immediately began to issue marriage licenses.[175] The Sixth Circuit initially notified the plaintiffs in the case that they would have until Tuesday to file a response to the state's motion for a stay.[176] On Saturday afternoon, however, the Sixth Circuit issued a temporary stay, which was

[173] *See* DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014), *rev'd sub nom* 772 F.3d 388 (6th Cir. 2014), *cert. granted* 135 S. Ct. 1040 (Jan. 16, 2015).
[174] Kathleen Gray & Paul Egan, *Michigan AG Schuette Files for Stay on Gay Marriage Ruling, Citing Will of Voters*, DET. FREE PRESS, Mar. 22, 2014.
[175] Caspar v. Snyder, No. 14-CV-11499, __ F. Supp. 3d __, 2015 WL 224741, at *1 (E.D. Mich. Jan. 15, 2015).
[176] Paul Egan & Tresa Baldas, *Appellate Court Reverses Course, Issues Temporary Stay on Same-Sex Marriages Until Wednesday*, DET. FREE PRESS, Mar. 22, 2014.

later converted to a full stay pending appeal.[177] With that, the window for obtaining marriage licenses abruptly closed, but not before clerks had issued marriage licenses to approximately 300 same-sex couples in a few hours.[178]

Following the issuance of the full stay on March 26, Michigan Governor Richard Snyder announced that the state would not recognize the Saturday marriages "'until there's a removal of the stay or there's an upholding of the judge's opinion by the Court of Appeals or a higher court.'"[179] Governor Snyder conceded that the "'couples with certificates of marriage from Michigan courthouses . . . were legally married and the marriage was valid when entered into.'"[180] He argued, however, that the stay "'brings Michigan law on this issue back into effect'"[181]—the Marriage Amendment both rendered same-sex marriages "invalid" and prevented the state from "recogniz[ing]" them.[182]

In *Caspar v. Snyder*, same-sex couples who had married that Saturday, March 22, and were trapped in "legal limbo"[183] sued the state to recognize their marriages as valid under state law.[184] The plaintiffs married under uncertain circumstances (to say the least). It was widely reported that the state would appeal the decision and that a stay might be forthcoming. The licenses were issued by clerks who deviated from typical practices. And the whole business was shut down within 24 hours. Nonetheless, the interests underlying the theory of marital choice point in the direction of protecting the parties' choice to marry, which is what the court in fact did.

The district court noted that the lawsuit presented a unique legal issue—whether couples lawfully married due to a change in law (lasting mere hours in this case) could be deprived of their marital status due to a subsequent change in the law (bringing the law back to its original state).[185]

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[177] *See id.*
[178] *Caspar*, 2015 WL 224741, at *1.
[179] *Id.* at *2 (quoting the Governor's statements at a March 26 press conference).
[180] *Id.* (quoting a written statement from the Governor's office).
[181] *Id.*
[182] *See id*. at *1 n.1 (quoting the relevant provisions).
[183] *See* Paul Egan, *Michigan Gay Marriages Could Fall Into Legal Limbo*, DET. FREE PRESS, Mar. 22, 2014.
[184] *Caspar*, 2015 WL 224741, at *1. Plaintiffs alleged that the refusal to recognize their marriages as valid caused intangible harms such as "loss of dignity," "feelings of 'uncertainty and anxiety,'" "'loss of peace of mind,'" and "'hurt' and 'disheartenment,'" as well as tangible harms like the denial of health insurance benefits and the inability to adopt their partner's child. *Id.* at *2.
[185] *See id.* at *3 (stating the issue as "whether same-sex couples who were married pursuant to Michigan marriage licenses issued under Michigan law—as it stood at the time their marriages were solemnized—may, consistent with the Constitution, be stripped by the state of their marital status"); *see also id.* at *7.

Framed in this way, the effect of the stay, which was to restore the Marriage Amendment, changed the status quo, which was the lawful issuance of marriage licenses to same-sex couples. The state's refusal to recognize the marriages based on the restoration of the law would therefore be a retroactive application of the Marriage Amendment, and presumptively disfavored on that basis.[186] That is because, as the Supreme Court has observed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be disrupted."[187]

With this framing in mind—not at all a foregone conclusion given that the Marriage Amendment predated the couples' marriages and remained in force except for that critical 24-hour window—the *Caspar* court found the plaintiffs' choice to marry worthy of protection. To the court, the decision not to recognize the Saturday marriages as valid "could catastrophically undermine the stability that marriage seeks to create."[188] It would disturb both the way in which a couple explained their relationship to others, including their children, as well as their estate plans, pensions, and other financial arrangements.[189] "In terms of the personal ordering and orderliness of one's most fundamental affairs, nothing would be more destructive of 'ordered liberty.'"[190] Other courts considering whether to recognize marriages in analogous circumstances have come to similar conclusions. In *Evans v. Utah*, same-sex couples who had married in the period between a district court decision striking down Utah's same-sex marriage ban and a stay imposed by the United States Supreme Court sought a preliminary injunction compelling the state to recognize their marriages.[191] Similarly holding that the couples' marriages were legal and that the subsequent non-recognition of those marriages would unlawfully deprive the couples of the constitutionally protected rights and responsibilities of marriage,[192] the court emphasized that

> The State has placed Plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and

[186] *See id.* at *8-9 (noting Michigan's "firm policy against the retroactive application of legislation generally" and "the federal rule against retroactive application of legislation").
[187] Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 265 (1994).
[188] *Caspar*, 2015 WL 224741, at *9.
[189] *See id.*
[190] *Id.* Much of the court's analysis depends on the government's concession that the marriages that occurred were legal. *See id.* at *3.
[191] Evans v. Utah, 21 F. Supp. 3d 1192 (D. Utah 2014).
[192] *See id*. at 1209-10.

> fundamental rights associated with marriage. These legal uncertainties and lost rights cause harm each day that the marriage is not recognized.[193]

What would be so unfair, though, about not recognizing marriages entered into under such uncertain circumstances? Put another way, why shouldn't the couples share some responsibility for the legal uncertainty they faced? The district court opinions authorizing these marriages were on the books for only hours or days before they were stayed. It would seem impossible for this short duration to give rise to the "settled expectations" that the anti-retroactivity principle is designed to protect.[194]

Courts have identified several factors to assess whether one's expectations are settled, including "the extent of reliance upon the former law, the legitimacy of that reliance, [and] the extent of actions taken on the basis of that reliance."[195] These factors appear to point away from settled expectations rather than towards it. Practically speaking, how many changes to estate plans, pensions, and benefits could the couples have possibly have made before the district court decisions were stayed? In other legal contexts, scholars have argued that the law should promote responsible decisionmaking by encouraging parties to anticipate the possibility of legal change or forcing them to internalize the costs of poor decisions.[196] Reliance interests are weaker when the law is in a state of flux.[197] One cannot imagine that courts would encourage businesses or taxpayers to make impactful long-term decisions in a similar legal landscape.[198] Yet the *Caspar* and *Evans* opinions do not even question the legitimacy of the plaintiffs' reliance.[199]

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[193] *Id*. at 1210.

[194] *See* Landgraf v. USI Film Prods., Inc., 511 U.S. 244, 265 (1994); United States v. Carlton, 512 U.S. 26, 37-38 (1994) (O'Connor, J., concurring) (emphasizing the value of "settled expectations," "finality and repose") (citation and quotation marks omitted).

[195] Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009) (analyzing whether to invalidate 18,000 same-sex marriages occurring between the state supreme court's decision legalizing same-sex marriage and a voter-initiated constitutional amendment defining marriage as between a man and a woman).

[196] [Cite Graetz; Kaplow; Fisch]

[197] [Cite Fisch; Munzer]

[198] By ignoring questions regarding the legitimacy of the couples' reliance, these cases place the choice to marry on a different footing than purely economic decisions. *Compare* United States v. Carlton, 512 U.S. 26, 33 (1994) (suggesting, as part of its analysis, that a plaintiff's reliance on a previous version of the tax code would have to be legitimate); *see also id.* at 35-36 (O'Connor, J., concurring) (analyzing the legitimacy of reliance in more depth).

[199] This was also the case in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), the California Supreme Court case holding that 18,000 couples who married in a five-month window

The theory of marital choice explains the courts' willingness to uphold the marriages. It is true that some of the consequences of the choice to marry under uncertainty might have economic or legal implications, like estate and tax planning,[200] that might otherwise be subject to the analysis of settled expectations discussed above. But they are intertwined with others—like "the personal ordering and orderliness of one's most fundamental affairs"[201]—that bear on the identity of the spouses and are therefore held to a different standard. The *Caspar* court noted that "[s]ame-sex couples, like their opposite-sex-couple counterparts, have the same innately human impulse to maintain bonds of committed intimacy in a socially and legally recognized marriage."[202] Refusing to recognize otherwise lawful marriages strikes at the heart of identity by rejecting—after acknowledging—the couple's description of their relationship. The *Caspar* court analogized the situation to another involving self-authorship: cases in which surviving same-sex-spouses had requested (and district courts commanded) that the state issue death certificates identifying decedents as "married" to them over the states' refusal.[203] Collectively, these decisions suggest that the choice to marry, and the social and legal recognition that accompanies that choice, changes the way one sees oneself, and that the changes vest immediately and irrevocably.[204] Perhaps unlike a business decision, the choice to marry can transform one's identity on a dime.[205]

Second, these decisions suggest that certainty is of special importance with respect to intimate statuses because of their ability to identify individuals as

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during which same-sex marriage was legal in California could keep their marriages notwithstanding a subsequent voter initiative barring it. *See id*. at 122. Those marriages occurred despite widespread commentary that the initiative might render them invalid. *See, e.g.*, Kenji Yoshino, *Can California's Same-Sex Marriages Be Saved*, L.A. TIMES, June 30, 2008 (predicting that Proposition 8 would likely "void the marriages" "entered into between June and November").

[200] *See, e.g.*, Caspar v. Snyder, No. 14-CV-11499, __ F. Supp. 3d __, 2015 WL 224741, at *9 (E.D. Mich. Jan. 15, 2015); *see also* Evans v. Utah, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014) ("The State has placed Plaintiffs and their families in a state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage.").

[201] *Id.*

[202] *Caspar*, 2015 WL 224741, at *22.

[203] *Id.* at *21 (citing *Majors v. Jeanes*, __ F. Supp. 3d __, 2014 WL 4541173, at *6 (D. Ariz. Sept. 12, 2014) and *Baskin v. Bogan*, 983 F. Supp. 2d 1021, 1028 (S.D. Ind. 2014)).

[204] The *Caspar* court and the two other district courts all focused on the "loss of dignity and emotional injury" resulting from the state's non-recognition. *See Caspar*, 2015 WL 224741, at *21.

[205] Whether one's "personal" and "fundamental" commitments are experienced differently than the more practical commitments bears on the broader question of the extent to which family law should be treated as an exceptional area of the law. [Cite Halley et al.]

legal subjects. In *Strauss*, the California Supreme Court emphasized that the retroactive application of Proposition 8 to invalidate five months worth of marriages would "disrupt thousands of actions taken in reliance on the *Marriage Cases* by these same-sex couples, their employers, their creditors, and many others . . . potentially undermining the ability of citizens to plan their lives."[206] The *Caspar* court additionally noted the impact on children if their family "was no longer legally recognized."[207] The point here is that the choice to marry is not an isolated decision affecting just the parties, but fundamentally changes the way a person interacts with society as both a social and legal subject.[208] Because so many legal rights and obligations are bundled into the status of marriage,[209] the disruptive effect of uncertainty is magnified and can burden those around the marital couple: creditors, employers, children, and even the State. And this consideration for the interests of third parties reveals that marital choice goes beyond protecting identity; it also performs *identification*.[210] That is to say that a function of marital choice is not only to protect settled expectations, but actually to *settle* the expectations of the couple and others.

In *Caspar* and *Evans*, the plaintiffs' choice to marry aligned their identity interests with the identification interest of marital choice. Moreover, neither Michigan nor Utah could articulate a concrete interest that the recognition of the plaintiffs' marriages would harm.[211] As expected, the courts therefore resolved the novel legal issues in the plaintiffs' favor.

In contrast, the following example demonstrates what happens when these interests do not align. However much courts express solicitude for the identity-related aspect of choice, identity is but one of the concerns of marital choice and cannot alone command favorable legal treatment. The most powerful example of this proposition comes from those states like Washington that have converted domestic partnerships to marriages. In

[206] Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).
[207] *Caspar*, 2015 WL 224741, at *9.
[208] *See* Evans v. Utah, 21 F. Supp. 3d 1192, 1210 (D. Utah 2014) (identifying the "state of legal limbo with respect to adoptions, child care and custody, medical decisions, employment and health benefits, future tax implications, inheritance, and many other property and fundamental rights associated with marriage" as the irreparable harm justifying injunctive relief).
[209] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death."); [cite Abrams and others]
[210] *Cf. Goodridge*, 798 N.E.2d at 342-43 (describing marriage as a "vital organizing principle of our society").
[211] *See Caspar*, 2015 WL 224741, at **22-23 (pointing to confusion and uncertainty as the only harms to the state).

those states, the law has treated a person as married based on that person's choice to enter a different, non-marital status.[212]

Although there may be very little legal difference between those alternate statuses and marriage, litigants and the courts have insisted that the institutions are qualitatively different in a way that impacts identity: "The designation of 'marriage' is the status that we *recognize*. It is the principle manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it."[213] The designation of marriage matters because it is how the couple defines itself and society recognizes it.[214] If the choice to enter a domestic partnership cannot satisfy a state's constitutional obligations because "partnership" means something different than "marriage," then the choice to enter into an alternate status cannot *necessarily* mean the same thing as a choice to enter into a marriage.[215] It follows that the choice to enter into the partnership should not be treated as a choice to marry—at least as far as identity is concerned.

Yet conversions have proceeded notwithstanding that marriage would be an unwanted identity to some.[216] The fact that Washington had already made domestic partnerships the legal equivalent of marriages[217] proves that the legislators cared deeply about providing same-sex couples access to the designation of marriage. So it cannot be that the state thought of partnerships and marriages as one and the same. The automatic conversion therefore reveals that the state values the right to marry differently from the right not to marry.

We see weaker versions of this same principle in the cases involving choice-as-exclusion. An avowed purpose of denying people benefits

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[212] *See supra* Part __.

[213] Perry v. Brown, 671 F.3d 1052, 1079 (9th Cir. 2012) (emphasis added), *vacated by* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[214] *See id.*; *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (noting that "marriage . . . is not merely shorthand for a discrete set of legal rights and responsibilities" and that civil unions therefore failed to suffice); Opinions of the Justices to the Senate, 802 N.E.2d 565, 567, 570 (Mass. 2004) (noting that "'the decision whether and whom to marry is among life's momentous acts of self-definition,'" and advising the legislature that a civil union would not protect same-sex couples' constitutional rights to marry). Practically speaking, the fact that the federal government recognizes same-sex marriages and alternate statuses differently for the purpose of numerous federal laws creates a significant difference between marriages and alternate statuses even though they are substantially equivalent under state law. [cite]

[215] Even if the parties subjectively viewed the choice to enter into a partnership as equivalent to the choice to marry, the social meaning of the choice would be different.

[216] [cite articles; Pedersen interview]

[217] *See supra* note __.

because they have not married is to protect marriage.[218] Choice-as-exclusion accomplishes this goal by widening the chasm between marriage and other regimes, thereby enhancing its importance.[219] But merely creating distance between marriage and other statuses would not protect marriage if it did not also *encourage* the choice to marry. Building walls around marriage and shutting the door could lessen marriage's influence rather than expand it.[220] Choice-as-exclusion aims to be both a carrot and a stick. Court decisions invoking the paradigm often extol the benefits of marriage even as they punish those who have chosen not to marry: "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[221] Any choice other than the choice to enter into the "most productive," "sacred"[222] status of marriage is treated as less weighty and entitled to lesser respect.

When a person's identity-defining choice *to* marry aligns with the state's interest in identifying that person as married and does not disturb the rights of others, the law places maximum value on that choice, protecting it from disturbance. Peel away these interests and the value of choice in resolving legal disputes over marital status ebbs.

IV. Towards a New Unified Theory

With these parameters fleshed out, we can now evaluate the theory. That task is made difficult by the fact that the values served by the theory—autonomy, identification, certainty, privatized dependency, etc.—are both incommensurable and have always coexisted in varying degrees. In other words, choice has not and need not be evaluated along a single baseline. It would be fruitless to say, for example, that identity alone should be protected by marital choice, just as it would be to say that the state's interest in identification is the sole end. That said, the discussion in the previous two Parts reveals a particular imbalance. The Supreme Court has for a half-

[218] *See, e.g.*, Fitzsimmons v. Mini Coach of Boston, Inc., 799 N.E.2d 1256, 1257 (Mass. 2003) (To recognize a right to recover for loss of consortium by a person who could have but has declined to accept the correlative responsibilities of marriage undermines the "deep interest" that the Commonwealth has that the integrity of marriage "is not jeopardized.").
[219] *See* Halley.
[220] *Cf.* David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012 (noting that opposition to gay marriage had not slowed marriage's decline, and proposing a new consensus among straight and gay advocates of marriage that the institution of marriage should be promoted).
[221] Nieto v. City of Los Angeles, 188 Cal. Rptr. 31, 34 (Ct. App. 1982) (citation and quotation marks omitted) (holding that an unmarried cohabitant did not have standing to sue for wrongful death).
[222] *E.g.*, Evans v. Utah, 21 F. Supp. 3d 1192, 1206 (D. Utah 2014).

century elevated autonomy above conflicting values.[223] Yet, as we have seen, the law has failed to treat the choice not to marry as equal in importance to the choice to marry. If the choice not to marry shapes a person's identity in much the same way as the choice to marry, then the current theory of marital choice does not promote individual autonomy as it should. It is to this line of inquiry that I now turn.

A. Is the Choice Not to Marry Co-Extensive with the Choice to Marry?

Most people probably assume that they have a right not to marry that encompasses the choice not to marry. Indeed, although society might reap the benefits of the law pointing at two strangers and saying, "you two are married; now support each other!," the law has never gone so far.[224] What I have suggested in the previous Parts of this Article, however, is that courts and legislators have tested the far reaches of the right not to marry such that its existence cannot safely be assumed.

It is well established that the Constitution protects the right to marry,[225] and that the "decision to enter the relationship" is a necessary part of that right.[226] This affirmative right to choose to marry is the logical starting point to investigate whether protection of the choice to marry includes protection of the choice not to marry.[227] There is a long history of recognizing rights not to based on the existence of rights to, and vice versa.[228] For example, the Court in *West Virginia State Board of Education*

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[223] *See supra* notes __-__ and accompanying text.

[224] *See* Halley, *supra* note __, at 17. Of course, people have historically been pressured into unwanted marriages; the law, however, has never held people at gunpoint.

[225] *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

[226] *See* Zablocki v. Redhail, 434 U.S. 374, 384-86 (1978) (noting that the right of privacy protects the "decision to marry" and "freedom of personal choice in matters of marriage and family life") (citations and quotation marks omitted).

[227] The distinction between the right to marry and the choice to marry is a fine one. This Article is primarily concerned with the meaning of the choice to marry (or not to marry), less so with the right itself. In many respects, that is a distinction without a difference because of how closely the right to marry has been associated with the concept of choice. The practical consequence of the distinction is that I will focus on the policy implications of recognizing the choice not to marry rather than the legal implications where a state law arguably violates a constitutional right.

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

v. Barnette,[229] recognized a right of public school students not to salute the flag based on "the individual's right to speak his own mind."[230] The same "sphere of intellect and spirit" promoted by voluntary speech would be threatened by compulsion.[231] Some scholars, however, have cautioned that symmetry alone does not explain these outcomes.[232] Indeed, many constitutional rights, like the Sixth Amendment rights to a speedy and public trial, or the Thirteenth Amendment's right against involuntary servitude, do not imply equal and opposite rights, e.g., rights to a slow, private trial, or rights to be a slave.[233]

In a detailed analysis of the relationship between rights to and not to in American rights discourse,[234] Professor Joseph Blocher has argued that a right protects both a right to and not to—a "choice right" in his terminology—in two circumstances. The first is when the right is "purely personal"; that is to say that "the purpose of the right is to protect the autonomy of the individual rightsholders."[235] Examples include the rights to speak, associate, and practice religion, all of which imply rights not to.[236] The second is when the proposed right to or not to furthers a constitutional value independently of the existing right.[237] Blocher provides the example of a hypothetical right not to engage in sexual intercourse. While the right to engage in sexual intercourse might promote autonomy, the right not to engage in sexual intercourse would be justified not only by autonomy but also the interest in bodily integrity.[238]

This taxonomy is deceptive in its simplicity. For example, his first inquiry—whether a right is primarily "personal" or "public," that is to say "focused on the interests of the individual rightsholder" or "grounded in some broader social interest"[239]—depends not on agreed-upon

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[229] 319 U.S. 624 (1943).
[230] *Id.* at 634.
[231] *Id.* at 642; *see also* Riley v. Nat'l Federation of the Blind, 487 U.S. 781, 797 (1988) (noting that the term "freedom of speech" comprises "the decision of what to say and what *not* to say") (emphasis in original).
[232] Joseph Blocher, *Rights to and Not to*, 100 CAL. L. REV. 761, 764 (2012) [*hereinafter* Blocher, *Rights to and Not to*].
[233] *See* Blocher, *Rights to and Not to*, *supra* note __, at 784-86.
[234] Blocher emphasizes that his account is more descriptive than philosophical: the goal of his taxonomy of rights is to explain existing legal doctrine and apply the taxonomy to concrete legal disputes. *See id.* at 769-70.
[235] *Id.* at 767.
[236] *Id.* at 770.
[237] *Id.* at 768. Both rights might be necessary to protect the same value(s), as in the case of the rights to and not to speak, but they might also protect different values. The main point is that the opposite right should have an independent justification. *Id.*
[238] *Id.*
[239] *Id.* at 802.

characterizations, but "deeply normative, value-laden debates."[240] One might dispute, for instance, whether the right to speak *primarily* protects individual expression rather than the marketplace of ideas or the democratic process. Nonetheless, Blocher's analysis of legal doctrine provides several helpful doctrinal guideposts to determine whether the right to marry includes the right not to even if it cannot draw bright lines. Blocher makes explicit what scholars in other contexts have implicitly recognized: to determine whether a right to includes a right not to, courts look to the underlying functions or values those rights protect. The more a right values individual autonomy for its own sake, the greater the chance that courts will treat it as a choice right.[241] That is because the freedom to choose something would be eviscerated without the freedom not to. On the other hand, the greater the extent to which the rights are "grounded in some broader social interest," the more likely that they will go only in one direction.[242] Blocher describes the right to privacy as the quintessential choice right.[243]

At first glance, the right to marry would seem to straightforwardly fall in line with existing choice rights. The Court has repeatedly stated that "the right to marry is part of the fundamental 'right of privacy,'"[244] and that the choice to marry, in particular, is among the "decisions that an individual may make without unjustified government interference."[245] As I described in greater length in Part II.A, the Court has also emphasized the importance of this choice to the development of one's identity. If the choice to marry must be protected because of its impact on the identity of the person, then the choice not to marry must be protected as well. The state of being married is only significant as a defining characteristic if one has a choice about remaining unmarried.

But there are good reasons to dig more deeply. Marriage, after all, has historically promoted public morality[246] and has always served as a form of privatized dependency.[247] These public interests could explain why we might protect the choice to marry but not its opposite.

[Note to reader: This is the point at which I've stopped. What follows are just a few additional thoughts of where this paper might go.]

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[240] *Id.* at 794; *see also id.* at 809 ("[W]hat counts as personal and public is likely to be deeply contested.").
[241] *Id.* at 803.
[242] *Id.* at 802.
[243] *See id.*
[244] Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
[245] *Id.* at 385 (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).
[246] [cite]
[247] *See, e.g.*, Rosenbury, *supra* note __, at 1866; NeJaime, *Windsor*]

- The harms are not exactly the same. The harm stemming from the deprivation of the right to marry has been conceptualized as denigration—a statement that a relationship is unworthy or unequal. The harm stemming from the imposition of an unwanted identity is the harm to the individual's right to define his place in the world as he chooses.
- On the other hand, in both cases, the state interferes with the person's ability to identify himself to himself and others. And in both cases, there is denigration, although the form is slightly different. To say someone cannot marry is to say they are not worthy of the institution. To say someone must marry is to say that his choice is not worthy of respect. If anything, this infantilizes the person more than discrimination?
- In the automatic conversion cases, a person might not prefer to define herself in a certain way, but doesn't have such strong preferences. In other words, partnerships and marriage both reflect some level of commitment and that commitment is what defines that relationship to the person. If the law merely nudges her in the direction of marriage in the absence of strong preferences, and marriage is in society's (and possibly even that person's) best interests, then can we say that the law has really performed a disservice? The answer to the question would depend on our feelings about whether there are some decisions that are significant enough that we would not tolerate a nudge or indecision.
- A nudge-compatible view of marital choice would seem to be very out of step with how the choice is conceptualized in society. It would be strange to simultaneously talk about the importance of marriage yet admit that marriage is in some ways no big deal. Both camps—those who think that the law should be value-neutral with respect to marriage and those that think that marriage is superior and should be actively promoted—should find the assumptions underlying the nudge troubling here.
- The legitimacy of the system of privatized dependency depends in part on the voluntary aspect. This has to be true? Privatized support would not be accepted if the social meaning of marriage were based on government compulsion. Likewise, the moral basis for marriage would be eroded if it were less of an altruistic, individual commitment.
- The foregoing reasoning supports treating the choice not to marry as equal in significance to the choice to marry.

B. What Would the Modified Theory Look Like in Practice?

The modified theory of marital choice reveals that there is a significant difference between situations in which a couple's choice to marry aligns and the question is whether the government or some third party should recognize their choice, and situations in which at least one member of the couple did not choose to marry. In the latter situation, to recognize the marriage would be to ignore the choice not to marry.

[I plan to apply the modified theory to two scenarios: (1) whether we can retroactively deem partners to be married based on earlier registration; and (2) common law marriage cases in which (a) a putative spouse is making a claim against a decedent's estate, or (b) a putative spouse is attempting to establish a marriage over the objection of the other putative spouse.]

CONCLUSION

[To come]