Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage

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In the wake of the celebration of the U.S. Supreme Court's decision in United States v. Windsor, *it seems obvious that the LGBT movement is intent on securing marriage. But the relationship between LGBT advocacy and marriage was not always so clear. In fact, before the movement began to make explicit claims to marriage in the 1990s, leading advocates engaged in a vigorous debate about whether to seek marriage. This debate went beyond mere strategic disagreement and instead focused on ideological differences regarding the role of marriage and its relationship to LGBT rights, family diversity, and sexual freedom. Those opposing the turn to*

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marriage urged the movement to continue pursuing nonmarital rights and recognition, including domestic partnership, as a way to decenter marriage for everyone. Critics of today's marriage equality advocacy point to this history as a lost alternative past worthy of reclamation. Today's marriage-centered movement, they argue, channels relationships into traditional forms and marginalizes those who fail to fit the marital mold. Instead of continuing down this road, these critics contend, movement advocates should recover their earlier roots and embrace pluralistic models of family and intimacy outside of marriage.

This Article challenges the assumptions that structure today's debate over the role of marriage in LGBT advocacy. It does so by uncovering the centrality of marriage even during the time when LGBT advocates worked entirely outside of marriage and built nonmarital regimes. Through a case study of domestic partnership work in California in the 1980s and 1990s, this Article shows that the relationship between nonmarital advocacy and marriage was dialogical. Marriage shaped LGBT advocacy for nonmarital recognition, and that advocacy in turn shaped marriage. To gain support for nonmarital rights and benefits, advocates cast same-sex relationships as marriage-like and built domestic partnership in reference to marriage, thus reinscribing—rather than resisting—the centrality of marriage. Yet, at the same time, this nonmarital advocacy contributed to an ascendant model of marriage characterized by adult romantic affiliation, mutual emotional support, and economic interdependence—a model of marriage capable of including same-sex couples.

Revisiting this earlier time in LGBT advocacy sheds light on the current marriage-centered moment. By uncovering how marriage anchored advocacy on nonmarital recognition, the case study demonstrates the difficulty in escaping marriage's regulatory pull and thereby challenges normative and prescriptive claims pushing away from marriage in LGBT advocacy. And by showing how advocates shaped marriage's meaning in the space outside marriage, it reveals how nonmarital advocacy built the foundation for today's marriage equality jurisprudence.

INTRODUCTION

Today, it seems as though marriage is synonymous with the lesbian, gay, bisexual, and transgender (LGBT) movement.[1] As events in the wake of the U.S. Supreme Court's decisions in *United States v. Windsor*[2] and

1. Although I generally use the term "LGBT" throughout this Article, I am mindful that work characterized as "LGBT advocacy" does not necessarily serve the interests of the entire LGBT community. Moreover, I recognize that I am using this common contemporary term to describe work in an earlier era. Therefore, at various points in the case study I use the term "lesbian and gay" to reflect characterizations at the time. *See, e.g.*, Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, *in* TRANSGENDER RIGHTS 141, 145–46 (Paisley Currah et al. eds., 2006).

2. 133 S. Ct. 2675 (2013).

Hollingsworth v. Perry[3] underscore, LGBT advocates and constituents have embraced marriage as a movement priority. But this was not always the case. Years earlier—before the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*[4] launched same-sex marriage to national prominence and compelled LGBT leaders to engage marriage directly—advocates debated whether the movement should pursue marriage at all. In fact, prominent activists rejected marriage and sought to resist and destabilize marriage as a model of family recognition and sexual regulation.

Critics of the movement's current devotion to marriage articulate some of the earlier ideological objections to marriage in today's more thoroughly marriage-centered moment. They argue that instead of advocating for family pluralism and sexual liberty, today's advocates box same-sex couples into the confines of marriage and position marriage as the appropriate mechanism for the distribution of rights and benefits. Under this view, LGBT advocates reinscribe the power and prestige of marriage and marginalize families and sexual affiliations that fail to fit the marital mold.[5]

Many of these critical scholars suggest that had advocates remained committed to the marriage resistance of the 1980s and early 1990s, the current landscape would look drastically different.[6] Instead of marriage mattering more for family-based rights and the social meaning of intimate relationships, it would matter significantly less. In making such claims, these scholars emphasize the ways in which work in the 1980s and early 1990s pushed against

3. 133 S. Ct. 2652 (2013). For an account of the *Perry* litigation, see Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012).

4. 852 P.2d 44 (Haw. 1993).

5. *See, e.g.*, Katherine Franke, *Public Sex, Same-Sex Marriage, and the Afterlife of Homophobia*, *in* PETITE MORT 156, 158 (Carlos Motta & Jonathan Lubin-Levy eds., 2011) [hereinafter Franke, *Public Sex, Same-Sex Marriage, and the Afterlife of Homophobia*] (arguing that the "new emplotment of gay life, one animated by characters who are kin not hookups, whose connection is romantic not sexual, is taken up in the briefs in the marriage equality cases"); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 242 (2006) [hereinafter Franke, *The Politics of Same-Sex Marriage Politics*] (arguing that in some of the central arguments made by proponents of same-sex marriage, "marriage is figured as the ideal social formation in which responsible reproduction can and should take place"); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 59 (2012) [hereinafter Murray, *Marriage as Punishment*] ("The self-regulating, disciplined plaintiffs identified by the marriage equality movement suggest the . . . transformation [of the space between marriage and crime] from a potential respite from state regulation of sex and sexuality into an annexation of that regulatory project."); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 433 (2012) [hereinafter Murray, *What's So New About the New Illegitimacy?*] (arguing that instead of finding common ground with "single parent-headed families, families that include or rely upon extended families or fictive kin, urban 'tribes' of friends, and polyamorous groups, to name a few," advocates have distanced same-sex couples "from the deviant families who have willfully elected to live outside of marriage"); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 203 (2003) ("By constantly hammering at the injustice of excluding same-sex couples from the benefits and obligations of marriage, [the marriage equality] movement, perhaps inadvertently, solidifies the differential treatment of the married and unmarried.").

6. *See infra* Part IV.A.

marriage. More specifically, they point to the proliferation of domestic partnership policies before *Baehr* as evidence of the success of movement efforts to destabilize marriage. Under this view, the mid-1990s marked a strikingly normative—more than strategic—shift in LGBT work; advocates did not simply change tactics, but rather reshaped movement politics. Some of these critics urge today's advocates to reclaim the pre-*Baehr* past and accordingly minimize the role of marriage in contemporary LGBT advocacy.

This Article challenges the assumptions that structure the ongoing scholarly debate over LGBT advocacy and marriage. By revisiting the earlier era on which today's critical assessments often rest, it uncovers marriage's centrality even before marriage became a formal part of the movement's agenda. Through a case study of California-based LGBT advocacy on behalf of nonmarital relationships, specifically domestic partnerships, this Article shows that in the 1980s and early 1990s—before *Baehr* and the marriage advocacy that would follow—marriage shaped nonmarital recognition and, conversely, nonmarital recognition shaped marriage. Ultimately, LGBT work outside of marriage in significant ways built, rather than opposed, the case for marriage that we see today.

In this earlier era, marriage anchored advocacy aimed at nonmarital recognition.[7] Even if advocates wished to destabilize marriage—and certainly some did—they were constrained by a legal, political, and cultural framework that prioritized marriage in the recognition of familial and sexual relationships. Government actors, employers, insurers, and countermovement forces appealed to marriage to understand and frame domestic partnership and other measures aimed at nonmarital families. Accordingly, many LGBT advocates willingly used marriage to argue for and define nonmarital recognition. And these advocates represented constituents who valued marriage as both a legal and cultural matter. Ultimately, work often remembered for destabilizing marriage accepted and prioritized key elements of marriage.

Yet marriage did not simply constrain advocates and define nonmarital recognition. Instead, by appealing to marital norms to gain nonmarital support, LGBT advocates contributed to an ascendant model of marriage capable of including same-sex relationships. By stressing adult romantic affiliation, mutual emotional support, and economic interdependence over gender differentiation, procreative sex, and biological, male-female parenting, advocates both shaped the meaning of marriage—which had been shifting dramatically in the second half of the twentieth century—and located same-sex couples within that shifting meaning. They did so, remarkably, through work outside of marriage.

This Article's account attempts not only to fill in the historical record, but also to shed light on the present moment and its relationship to ongoing

7. I am grateful to Jane Schacter for suggesting the anchoring image.

scholarly debates.[8] Given the Supreme Court's recent intervention and the growing sense that same-sex marriage is inevitable, it is an especially crucial time to understand both the forces that constrained paths leading away from marriage and the impact that same-sex couples had—and may continue to have—on marriage. Viewing earlier nonmarital advocacy through the lens of marriage resistance masks both the role of marriage as an anchoring principle in work outside marriage and nonmarital advocacy's contribution to the contemporary model of marriage advanced by today's advocates and adopted in *Windsor*. Accordingly, this Article's historical account suggests that influential critiques of marriage equality work often ascribe too much agency to LGBT advocates, implying that advocates can escape marriage's power if only they try. And these critiques give advocates too little credit, obscuring the ways in which their work influences marriage. Ultimately, this Article's examination of LGBT work in nonmarital spaces demonstrates the regulatory reach of marriage, while at the same time revealing how the content of marriage itself is produced.[9]

This Article proceeds in five Parts. Part I briefly sketches the historical backdrop against which 1980s LGBT nonmarital advocacy in California emerged. It pays particular attention to changes in intimate relationships over the second half of the twentieth century, mobilizations around family and sexuality on the left and right, and changing legal and political conditions. With this context, Part II then lays out the standard account of the trajectory of marriage advocacy in the LGBT movement. It focuses on the distinction between work outside of marriage in the 1980s and early 1990s and marriage-centered work beginning in the mid-1990s. It then devotes special attention to an articulation of this history, prevalent among critics of contemporary marriage equality advocacy, emphasizing the relationship between nonmarital recognition in the 1980s and early 1990s and ideological resistance to marriage. This reading of the movement's history tends to equate work *outside* marriage with work *against* marriage.

Part III constitutes the heart of the Article, furnishing a case study of California-based work on nonmarital relationship recognition, and domestic partnership in particular, from the early 1980s through the late 1990s.[10]

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8. *See* Christopher L. Tomlins, *Expanding Boundaries: A Century of Legal History*, *in* A CENTURY OF AMERICAN HISTORIOGRAPHY 78, 89 (James M. Banner Jr. ed., 2010) ("[H]istory's promise for law . . . lies in bringing that better-understood legal past into an improved conjunction with law's present.").

9. *See* Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 47 (2012); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 961 (2000).

10. Scott Cummings and I constructed an account of California marriage equality advocacy between 1999 and 2008. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010). This Article undertakes similar work, though with different normative aims, for the era between 1980 and 1999. The case study employs a social movement lens. For scholarship in a similar vein, see William N. Eskridge Jr., *Some Effects of Identity-Based Social*

Through archival sources—including task force reports, local ordinances, election materials, municipal studies, meeting minutes, public testimony, state legislation, employer policies, insurance determinations, judicial decisions, legal briefs, advocates' statements, and media coverage—this Part provides a historical account that reveals the centrality of marriage in earlier LGBT advocacy.[11] A close analysis of early local activism—missing in most accounts of LGBT rights work[12]—produces a more accurate understanding of the trajectory of nonmarital recognition and its relationship to marriage and, at the same time, fills a substantial gap in the literature by providing a genealogy of domestic partnership.

By exposing both the power of marriage over social movements and the power of movements to shape marriage, this Article's case study has implications for several conversations. It speaks to the place of marriage advocacy in the LGBT movement, the relationship between law and social change, and the history of marriage itself. Accordingly, Parts IV and V analyze the California case study's implications for extant scholarly debates, exploring first the case *against* marriage and then the case *for* it. Part IV shows that the case study challenges the historical assumptions underlying critiques of contemporary marriage equality work. By uncovering marriage's powerful regulatory pull on nonmarital advocacy, it complicates normative and prescriptive claims pushing away from marriage in current LGBT organizing. Part V shows that in mining the space outside marriage, LGBT advocates in the 1980s and 1990s both constructed same-sex relationships as marriage-like and contributed to emerging marital norms capable of accommodating same-sex couples. By doing so, advocates built the foundation for today's claims to marriage, as contemporary marriage equality jurisprudence, including the recent *Windsor* decision, demonstrates. While this Article does not directly engage the implications of the case study for debates on law and social change, the Conclusion briefly points to questions raised for those debates.

Movements on Constitutional Law in the Twentieth Century, 100 MICH. L. REV. 2062, 2065–66 (2002); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 570 (2006); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006).

11. In a few instances, interviews were necessary to supplement relevant archival sources.

12. Work by David Chambers and Barbara Cox represent important exceptions. Both Chambers and Cox analyzed local efforts to support nonmarital same-sex relationships. *See* David L. Chambers, *Tales of Two Cities: AIDS and the Legal Recognition of Domestic Partnerships in San Francisco and New York*, 2 LAW & SEXUALITY 181, 182–99 (1992); Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1, 33–39 (1986).

I.
SETTING THE STAGE: DEMOGRAPHIC SHIFTS, LEGAL RESPONSES, AND MOBILIZATIONS AROUND MARRIAGE, FAMILY, AND SEXUALITY

LGBT advocacy on nonmarital recognition did not write on a blank slate. To understand the context in which the 1980s campaign for domestic partnership in California emerged, this Part situates us in an earlier time, covers developments that are national in scope, and includes mobilizations beyond the LGBT movement. Shifting demographic patterns, corresponding legal developments, and powerful mobilizations reshaped norms around family and sexuality over the second half of the twentieth century. Profound changes in intimate relationships challenged tradition and fueled social movements on the left, but were eventually met with a powerful rejoinder that sought to restore traditional forms of family and sexuality. Rather than provide a detailed account of these developments, the following discussion merely attempts to furnish the necessary context for the domestic partnership work at the heart of this Article. It allows us to see both the opportunities that LGBT advocates enjoyed and the constraints that they, like others on the left, faced. Clearly, the relationship between domestic partnership advocacy and the broader developments described below would benefit from further excavation.

The modern LGBT movement is commonly traced to the close of the 1960s—a decade that witnessed powerful challenges to authority by movements on the left organized around race, gender, sexual expression, antiwar politics, and economic justice. More specifically, increased mobilization around gender equality and sexual liberty both seized on and furthered dramatic changes in Americans' intimate lives. Advances in the pharmaceutical industry, namely the commercialization of the birth control pill in the early 1960s, contributed to some of these developments.[13] Access to oral contraceptives provided vast numbers of women greater control over reproduction, which translated into greater freedom in both their sexual lives and their work lives.[14] After leaders from Planned Parenthood joined medical authorities to challenge laws prohibiting contraception, the U.S. Supreme Court in 1965 struck down such a law as applied to married couples[15]—effectively bestowing on married couples a right to have nonprocreative sex. And in 1972, the Court extended these privacy protections to unmarried individuals in ways that challenged marriage as a marker of state-sanctioned sexual morality.[16] As

13. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY 249 (2005).

14. *See id.*; NANCY F. COTT, PUBLIC VOWS 202 (2000).

15. Griswold v. Connecticut, 381 U.S. 479 (1965).

16. Eisenstadt v. Baird, 405 U.S. 438 (1972); *see* COTT, *supra* note 14, at 199; Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1298 (2009); *see also* Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's* Freedom's Law, 65 FORDHAM L. REV. 1313, 1325 (1997). West, however, argued that by deriving "individual sexual liberty" from rights rooted in "familial authority and autonomy," the Court "obscured what would otherwise be meritorious implications of the only true principle

nonmarital sex became more common and less stigmatized, the number of unmarried, cohabiting, different-sex couples rose dramatically.[17]

The modern LGBT movement emerged against this backdrop of increasing sexual freedom in heterosexual life. Most accounts trace the modern movement to the 1969 Stonewall Riots, even though the pre-Stonewall movement experienced internal radical challenges in the 1960s that laid the groundwork for its post-Stonewall counterpart.[18] After Stonewall, the radical politics of gay liberation became a widespread animating principle of LGBT mobilization as lesbians and gay men found common cause with other New Left movements.[19]

The Gay Liberation Front ("GLF"), which was founded in Stonewall's wake, argued in its 1971 Manifesto against traditional notions of gender and sexuality rooted in the marital family: "The oppression of gay people starts in the most basic unit of society, the family[,] consisting of the man in charge, a slave as his wife, and their children on whom they force themselves as the ideal models. The very form of the family works against homosexuality."[20] Accordingly, GLF activist Ralph Hall declared that instead of embracing marriage, lesbians and gay men should "attack the marriage system."[21] Lesbian feminists also articulated radical critiques of marriage and the heterosexual family.[22] The 1970 Radicalesbians statement, *The Woman-Identified Woman*, argued that marriage, and heterosexuality more generally, constituted a relationship that defined women through their subordination.[23]

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behind *Griswold* and *Eisenstadt*—the principle that married and single people have a constitutionally protected right to engage in affectionate non-reproductive sex." West, *supra* at 1325. For another perspective casting doubt on the progressive nature of these decisions, see MARC STEIN, SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM *GRISWOLD* TO *ROE* 48–49 (2010). For an additional critical examination of the "right to sex" reading of these cases, see David B. Cruz, *"The Sexual Freedom Cases"?: Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299 (2000).

17. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 93–97 (2010).

18. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 158–75 (1983). While Stonewall is often credited with sparking the movement, lesbian and gay mobilization emerged after World War II, with the 1950s formation of the Mattachine Society and Daughters of Bilitis.

19. On Stonewall, see *id.* at 231–32; see also LINDA HIRSHMAN, VICTORY: THE TRIUMPHANT GAY REVOLUTION 107–08 (2012); Elizabeth A. Armstrong & Suzanna M. Crage, *Movements and Memory: The Making of the Stonewall Myth*, 71 AM. SOC. REV. 724, 744 (2006). On the transition from pre- to post-Stonewall legal organizing, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1558–89 (1993).

20. GAY LIBERATION FRONT, MANIFESTO 1 (1971, rev. 1978), *available at* http://www.fordham.edu/halsall/pwh/glf-london.asp.

21. Ralph Hall, *The Church, State and Homosexuality: A Radical Analysis*, GAY POWER, no. 14, 1970.

22. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE 19 (2008).

23. *See* RADICALESBIANS, THE WOMAN-IDENTIFIED WOMAN, *reprinted in* GAY FLAMES PAMPHLET NO. 2 (1970) ("In exchange for our psychic servicing and for performing society's non-profit-making functions, the man confers on us just one thing: the slave status which makes us legitimate in the eyes of the society in which we live.").

Yet some same-sex couples began to challenge their exclusion from marriage in a series of lawsuits in the early 1970s[24]—before the LGBT movement had a robust public interest law infrastructure.[25] Jack Baker and Michael McConnell, a Minnesota same-sex couple, pushed their marriage lawsuit to the U.S. Supreme Court.[26] The high court of Minnesota had rejected their claim, reasoning that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."[27] In a one-line order in 1972, the Supreme Court dismissed the couple's appeal "for want of a substantial federal question."[28]

Although these marriage lawsuits traditionally have been understood as orthogonal to gay liberation,[29] mobilization around marriage in some ways grew out of post-Stonewall activism. As William Eskridge and Darren Spedale have recounted, in 1970 the Reverend Troy Perry married same-sex couples in religious ceremonies in Los Angeles.[30] And in 1972 the National Coalition of Gay Organizations protested laws "restrict[ing] the sex or number of persons"

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24. *See* Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974). William Eskridge has devoted substantial attention to same-sex couples' claims to marriage throughout the second half of the twentieth century, including the marriage lawsuits in the 1970s. *See* WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE 6–9 (2002) [hereinafter ESKRIDGE, EQUALITY PRACTICE]; WILLIAM N. ESKRIDGE JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? 16–17 (2006); WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 44–49, 54–57 (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE]. Jane Schacter has also noted that "[w]hile history will record 1993 as the key start date . . . it was, in fact, only a few years after the Stonewall uprising . . . that the first marriage-equality lawsuits were launched." Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1188 (2013) (reviewing MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013)); *see also* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1212–13 (2009) [hereinafter Schacter, *Courts and the Politics of Backlash*].

25. *See* Cummings & NeJaime, *supra* note 10, at 1248. Lambda Legal Defense and Education Fund formed in 1973. *History*, LAMBDA LEGAL, http://www.lambdalegal.org/about-us/history (last visited Oct. 23, 2013). Other leading LGBT legal organizations sprung up throughout the late 1970s and 1980s.

26. *See* Baker v. Nelson, 409 U.S. 810 (1972). For an insightful recounting, see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1761–64 (2005).

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

28. *Baker*, 409 U.S. at 810.

29. As historian George Chauncey explains:

> From the earliest days of gay liberation, some activists demanded the right to marry. This may surprise some, who imagine that gay liberationists were united in denouncing marriage as a discredited patriarchal institution. But the messy complexity as well as the fervent politicization of the gay liberation years is part of what made them so generative and influential.

GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 89 (2004).

30. ESKRIDGE & SPEDALE, *supra* note 24, at 16.

allowed to marry.[31] Moreover, in the communities where marriage lawsuits emerged, many understood them as consistent with both radical gay politics and critiques of marriage.[32] In fact, Baker and McConnell suggested that their lawsuit might turn marriage "upside down."[33] Given the highly gendered concept of marriage under attack by feminists at the time, claims to marriage by same-sex couples posed a powerful challenge to marriage's sex-differentiated content.[34]

Some lawmakers responded to the threat of same-sex marriage by explicitly codifying marriage's different-sex requirement. In California, same-sex couples sought marriage licenses from county clerks based on a 1971 statutory change deleting the marriage law's sex-specific language. These attempts prompted a 1977 statutory revision clarifying that "[m]arriage is a personal relation arising out of a civil contract between a man and a woman."[35]

Like LGBT activists, feminists also took different approaches toward marriage and its role in mobilization. The Redstockings, a radical feminist group formed the same year as the Stonewall Riots, claimed that marriage made women "domestic servants" and "breeders."[36] Yet while radical activists lodged forceful critiques of marriage, other second-wave feminists connected more equal relationships between women and men in marriage, family, and work to sex equality more generally.[37] Demographic and economic shifts had contributed to changes in the relationships between women and men in marriage. By the 1970s, the majority of newly employed women were

31. ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 24, at 54 (quoting demands by the National Coalition of Gay Organizations (State Demand Number 8) in February 1972).

32. *See* Michael Boucai, *When Gay Marriage Was Radical*, HUFFINGTON POST (July 23, 2013, 4:17 PM), http://www.huffingtonpost.com/michael-boucai/when-gay-marriage-was-radical_b_3636437.html.

33. *See id.*

34. *See id.*; *see also* Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 771–72 (2012).

35. Cal. Civ. Code § 4100 (West 1977) (repealed in 1993 to move definition of marriages to Family Code Section 300).

36. *See* REDSTOCKINGS, REDSTOCKINGS MANIFESTO (1969), *available at* http://www.redstockings.org/index.php?option=com_content&view=article&id=76&Itemid=59; *see also* Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 J.L. & SOC. INQ. 941, 975 (1995).

37. *See* COTT, *supra* note 14, at 204–05; POLIKOFF, *supra* note 22, at 19. These reformers, including prominent African American feminists, drew on the civil rights movement's struggle, both legally and culturally, to frame sex discrimination. *See* SERENA MAYERI, REASONING FROM RACE 3, 22–24 (2011); Siegel, *supra* note 10, at 1376. The civil rights movement, of course, had also engaged marriage. The California Supreme Court had ruled its state's interracial marriage ban unconstitutional in 1948. *See* Perez v. Sharp, 198 P.2d 17 (Cal. 1948). Legislatures in other states had repealed their restrictions. *See* RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE 84 (2001). But it was not until 1967 that lawyers achieved a nationwide victory with the Supreme Court's *Loving v. Virginia* decision. 388 U.S. 1 (1967). As Rachel Moran has explained, "*Loving* capitalized not just on changing ideology about race but also on shifting mores about sexual and marital freedom." Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663, 1678 (2004).

married,[38] and two-earner marriages became increasingly common.[39] Yet women continued to carry the burden of household and parenting responsibilities.[40] In 1970, the National Organization of Women ("NOW") organized a forty-city strike in which activists demanded ratification of the federal Equal Rights Amendment ("ERA"), abortion rights, and free childcare centers, thus connecting gender equality to both reproductive rights and the ability to participate equally in the labor force.[41]

Feminist advocates enjoyed considerable success at the start of the 1970s,[42] but they were eventually met with intense opposition that formed around the battle over the ERA. As Reva Siegel's work shows, this powerful conservative countermobilization influenced how far activism on the left would reach into the family. ERA opponents in the 1970s, most notably Phyllis Schlafly's STOP ERA campaign, argued that the ERA threatened the family by upending traditional gender roles.[43] The proposed amendment, Schlafly insisted, was "anti-family" and would harm women by devaluing their important caregiver role.[44] Countering feminists' centering of working women, Schlafly focused on women as "wives and mothers."[45]

Anti-ERA forces not only framed the Amendment as a threat to women's roles in the family, but also linked the ERA to same-sex marriage and abortion in ways that mobilized social conservatives to oppose all three as related evils.[46] For their part, many feminists responded by denying these connections. At the 1977 International Women's Day conference in Houston, ERA advocates adopted a plank urging ratification but including a declaration that the "*ERA will NOT* have any impact on abortion laws."[47] And they forcefully disclaimed any connection between the ERA and same-sex marriage even as

38. *See* COONTZ, *supra* note 13, at 259.

39. *See id.* at 262.

40. *See* ARLIE HOCHSCHILD & ANN MACHUNG, THE SECOND SHIFT 2–3 (1989).

41. *See* Siegel, *supra* note 10, at 1375.

42. *See id.* at 1377–79.

43. *See id.* at 1391–92.

44. *See id.* These activists found a voice inside the federal government. William Rehnquist, then a lawyer in the Justice Department, saw in ERA proponents a "dislike and distaste for the traditional difference between men and women in the family unit." *See id.* at 1379 (quoting Memorandum from William Rehnquist, Assistant Attorney General, to Leonard Garment, Special Counsel to the President (1970)). As conservative activists increasingly mobilized around the family, the Nixon administration shifted toward positions opposing and cutting back on feminist advances. *See id.* at 1388–89. In 1971, Nixon vetoed legislation that would have created a national day care network. Leo P. Ribuffo, *Family Policy Past as Prologue: Jimmy Carter, the White House Conference on Families, and the Mobilization of the New Christian Right*, 23 REV. POL'Y RES. 311, 318 (2006).

45. Siegel, *supra* note 10, at 1391.

46. *See id.* at 1390–93.

47. *See* NAT'L COMM'N ON THE OBSERVANCE OF INT'L WOMEN'S YEAR, THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN'S CONFERENCE, AN OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES 51 (1978) [hereinafter OFFICIAL REPORT TO THE PRESIDENT]; *see also* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 792 (2004).

they adopted another plank supporting legislation to eliminate discrimination based on sexual orientation.[48] ERA advocates argued that the "ERA *will NOT* require the States to permit homosexual marriage . . . . [It] has nothing to do with sexual behavior or with relationships between people of the same sex."[49]

While Schlafly led a well-attended and highly publicized counterrally across town,[50] some of her followers served as delegates at the International Women's Conference. They produced a minority report declaring "that the definition of a family should never be extended to in any way include homosexuals or biologically unrelated, unmarried couples or otherwise accord to them the dignity which properly belongs to husbands and wives."[51] For social-conservative activists, lesbian and gay rights constituted part of a broader attack on the primacy of the marital family in a time when divorce, nonmarital cohabitation, and nonmarital parenting were becoming more common and acceptable. After California initiated no-fault divorce in 1969,[52] the no-fault regime spread across the country in the 1970s, contributing to a view of marriage rooted in romantic affiliation and personal fulfillment.[53]

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48. *See* OFFICIAL REPORT TO THE PRESIDENT, *supra* note 47, at 51, 89.

49. *Id.* at 51. In 1969 and 1970, NOW's leadership had opposed lesbian rights as part of the organization's agenda, but the organization became more receptive in the early 1970s under pressure from lesbian activists. *See* POLIKOFF, *supra* note 22, at 19. Lesbian feminists challenged the homophobia of some feminist organizations both through protest and by forming their own organizations. *See* HIRSHMAN, *supra* note 19, at 113; Nan D. Hunter, *Contextualizing the Sexuality Debates: A Chronology 1966–2005*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 15, 18 (Lisa Duggan & Nan D. Hunter eds., 2006).

50. *See* Judy Klemesrud, *Equal Rights Plan and Abortion Are Opposed by 15,000 at Rally*, N.Y. TIMES, Nov. 20, 1977, at 32.

51. *See* OFFICIAL REPORT TO THE PRESIDENT, *supra* note 47, at 271 (1978). In linking sex equality to same-sex marriage in her writings, Schlafly acknowledged changes to marriage that made it more conducive to same-sex couples. Because procreative, heterosexual sex no longer enjoyed a "close relationship" with "the institution of legal marriage as it is now permitted," Schlafly argued, the state could not justify the exclusion of same-sex couples in a post-ERA world. Phyllis Schlafly, *ERA and Homosexual "Marriages,"* 8 PHYLLIS SCHLAFLY REP. 2 § 2 (Sept. 1974). Moreover, Schlafly claimed, "the belief that two persons having the same primary sexual characteristics *cannot* benefit from many of the emotional, social and legal consequences of the legal status of marriage is factually untrue." *Id.* Even as Schlafly believed that "the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived," her reasoning about the ERA and same-sex marriage reflected shifts in the meaning of marriage itself. Schlafly suggested that even if the courts ultimately recognized a "quasi-marital" status for same-sex couples by extending to them some of the legal benefits of marriage, such a status would maintain the "stigma of deviance." *Id.* Courts, she feared, would reject that stigma if the ERA were passed. *See id.*

52. *See* COTT, *supra* note 14, at 205. Before the twentieth century, separations allowed spouses to leave marriages. Formal divorce rates began to rise throughout the twentieth century. *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 277 (2000). On divorce before the no-fault regime, see Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000).

53. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 852 (2004); *see also* ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 3 (2007) ("That I can leave a marriage, relatively costlessly, directly implies that the ongoing value of the marriage—is this still a good deal for me?—is always a live question, always on the table, always something I can, and should, negotiate, and reevaluate, again and again, with my spouse or without.");

Around the same time, courts began to enforce prenuptial agreements,[54] which signaled both the increasing acceptance of divorce and the emergence of a more privatized, personal, contractual model of marriage.[55] Meanwhile, rates of nonmarital cohabitation rose,[56] as did the number of births outside marriage.[57] A series of Supreme Court decisions in the 1960s and 1970s struck down distinctions based on "illegitimacy,"[58] and in some ways weakened the legal relationship between marriage and parenting.[59] State legislatures in turn revamped their family codes to remove distinctions between marital and nonmarital children.[60]

While the ERA initially appeared likely to succeed, Schlafly's campaign against it contributed to its defeat. Nonetheless, the Supreme Court's equality jurisprudence came to embody significant sex-equality principles that the Amendment sought to advance.[61] Women's rights advocates convinced the Court to remove many formal sex-based distinctions in marriage and the family.[62] Yet, as Siegel has shown, the resulting law of sex equality also included the limitations on reproduction and sexuality pressed by ERA opponents.[63] Constitutional equal protection doctrine did not remedy pregnancy discrimination, and abortion rights were protected under the rubric of privacy.[64]

William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Defaults, and Override Rules*, 100 GEO. L.J. 1881, 1955 (2012) ("[N]o-fault divorce has changed the fundamental nature of marriage—not only undermining the aspiration that marriage is 'until death do we part' but also recasting marriage as a choice-based relationship.").

54. *See, e.g.*, *In re* Marriage of Dawley, 551 P.2d 323 (Cal. 1976); Posner v. Posner, 233 So. 2d 381 (Fla. 1970).

55. *See* COTT, *supra* note 14, at 209; *see also* Andrew J. Cherlin, *The Growing Diversity of Two-Parent Families: Challenges for Family Law*, *in* MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 287, 289 (Marsha Garrison & Elizabeth S. Scott eds., 2012); Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1257 (1998).

56. *See* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1128–29 (1981).

57. *See* COTT, *supra* note 14, at 202–03.

58. *See* Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); *see also* COONTZ, *supra* note 13, at 257. On the implications of illegitimacy in the LGBT context, see generally Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 721 (2012).

59. Though, as Melissa Murray has shown, the decisions privileged marriage-like relationships in ways that may have propped up marriage. *See* Murray, *What's So New About the New Illegitimacy?*, *supra* note 5, at 393–99.

60. Yet legal and social distinctions based on nonmarital birth continue. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350–78 (2011).

61. *See* Siegel, *supra* note 10, at 1404–06.

62. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); *see also* Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1864 (2012).

63. *See* Siegel, *supra* note 10, at 1407.

64. *See* Geduldig v. Aiello, 417 U.S. 484 (1974); Roe v. Wade, 410 U.S. 113 (1973).

Moreover, gender equality in the 1970s did not extend to same-sex marriage, as the Supreme Court's dismissal of *Baker* made clear.[65]

Of course, the defeat of the ERA did not settle the battle over legal and cultural norms governing family and sexuality. By the late 1970s and early 1980s, the "traditional family values" movement had become a powerful political and cultural force.[66] And rather than merely draw on fears of same-sex marriage to defeat feminist efforts, a growing segment of the movement focused specifically on rolling back gay rights advances.[67] In 1977, Anita Bryant's "Save Our Children" campaign recorded a major victory with the repeal of a sexual orientation antidiscrimination ordinance in Dade County, Florida.[68] The day after the Dade County vote, Florida's governor signed a ban on lesbian and gay adoption.[69] From there, Bryant fueled successful campaigns to repeal pro-gay ordinances in Saint Paul, Minnesota; Eugene, Oregon; and Wichita, Kansas.[70]

As the 1980s began, the White House Conference on Families illustrated the fierce cultural and political battle being waged around the family.[71] "Pro-family" conservatives feared that the planned conference would provide another occasion for activists on the left to push their agenda.[72] Yet rather than boycott the conference, many conservatives participated.[73] The conference report, issued in November 1980, evidenced the impact of Christian Right mobilization. The report declared that for those "concern[ed] for traditional families," "[t]heir voices and votes were heard": a "traditional definition of a family was the only definition adopted."[74]

Around the same time, former California Governor Ronald Reagan, who had become the leading candidate of the New Right,[75] won the presidential

65. *See* Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971), *cert. dismissed*, 409 U.S. 810 (1972) (dismissing for want of a substantial federal question).

66. *See* Matthew D. Lassiter, *Inventing Family Values*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 13 (Bruce J. Schulman & Julian E. Zelizer eds., 2008).

67. *See id.* at 23–24; *see also* Morton Kondracke, *Anita Bryant Is Mad About Gays*, NEW REPUBLIC, May 7, 1977, at 13. While Bryant did not attend Schlafly's 1977 Houston rally, she sent a videotaped message that was played at the event. *See* Klemesrud, *supra* note 50.

68. *See* POLIKOFF, *supra* note 22, at 40.

69. *See id.*

70. *See id.* at 42.

71. In 1976, then-presidential candidate Jimmy Carter vowed to convene a White House Conference on the American Family, but the (relabeled) conference did not occur until 1980. *See* Ribuffo, *supra* note 44, at 311.

72. Beverly LaHaye, who founded Concerned Women of America in 1979, worried that the conference was "geared up toward changing the definition of the family." *Id.* at 325.

73. The three national meetings—in Baltimore, Minneapolis, and Los Angeles—included many conservative Christian delegates. *See id.* at 326.

74. WHITE HOUSE CONFERENCE ON FAMILIES, LISTENING TO AMERICA'S FAMILIES: ACTION FOR THE 80'S, REPORT TO THE PRESIDENT, CONGRESS, AND FAMILIES OF THE NATION 11 (Nov. 1980).

75. *See* Ribuffo, *supra* note 44, at 330.

election.[76] At that year's Republican National Convention, the party adopted a platform that, to Christian Right leaders' delight, vowed to "protect[] and defend[] the traditional American family"[77] and to appoint judges "who respect traditional family values and the sanctity of innocent human life."[78] In 1984, when Reagan was reelected, the platform maintained this "pro-family" flavor.[79] Marrying "traditional family values" with economic policy, New Right leaders continued to chip away at the welfare state and emphasized the family's private welfare function.[80]

Yet during the Reagan administration, LGBT advocates were confronted with a devastating health crisis that would require strong government intervention. In 1981, doctors began to see gay men with what would come to be known as HIV/AIDS.[81] By 1983 the Centers for Disease Control reported deaths of "1,112 and Counting."[82] The federal government did little in response,[83] and Reagan did not give a speech on HIV/AIDS until it had claimed the lives of 20,000 Americans.[84]

The HIV/AIDS epidemic brought countless gay men out of the closet, united lesbians and gay men behind a common cause, and profoundly shaped the organization of the LGBT movement.[85] On one hand, the epidemic brought

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76. As Linda Greenhouse and Reva Siegel have shown, Republican leaders successfully united Protestant Evangelicals and Catholic abortion opponents under the party's "pro-family" banner. Republican strategists, along with Paul Weyrich, a Catholic conservative who co-founded the Heritage Foundation, lent their support to Jerry Falwell's Moral Majority, founded in 1979. *See* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2065–66 (2011); *see also* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 420–21 (2007).

77. *See* Ribuffo, *supra* note 44, at 330.

78. *See* Post & Siegel, *supra* note 76, at 420 n.221.

79. *See id.*

80. *See* Murray, *What's So New About the New Illegitimacy?*, *supra* note 5, at 431. Scholars have also linked Republican policy in the 1980s, and particularly the attack on welfare, to a revival of the 1965 Moynihan Report's pathologization of African American families. *See* Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856 (1989). The controversial Moynihan Report, which civil rights and women's rights activists forcefully criticized, had attributed economic disparities between African Americans and other groups to "family structure" that failed to map onto the patriarchal, marital form. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (Mar. 1965), *available at* www.dol.gov/oasam /programs/history/webid-meynihan.htm.

81. *See* HIRSHMAN, *supra* note 19, at 189.

82. *Id.*

83. Reagan held two meetings on AIDS in 1983, one of which was with representatives from the Moral Majority. *See id.* at 176. Religious conservatives blocked safer-sex efforts. *See id.* at 178. And some situated AIDS as a sign of, in Newt Gingrich's words, "the cost of violating traditional values." *See* URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION 69 (1995).

84. *See* CHAUNCEY, *supra* note 29, at 41. Even as the federal government did little to address HIV/AIDS in the early years of the epidemic, support emerged at the state and local levels as both San Francisco and the state of California devoted funds to the emerging crisis. *See* HIRSHMAN, *supra* note 19, at 185.

85. *See* HIRSHMAN, *supra* note 19, at 183.

into question the politics of sexual liberation. As Ginny Apuzzo, the executive director of the National Gay Task Force put it, "AIDS robbed us of the sexual liberation piece, because everybody in the world said, 'That killed you. You're crazy to want to continue along those lines.'"[86] Indeed, Eskridge has argued that the AIDS crisis supported the impulse toward long-term, committed relationships.[87] On the other hand, some activists challenged the turn away from liberation and the tacit acceptance of sexual shame. They related HIV prevention to the celebration of same-sex sex,[88] even as the Supreme Court upheld its criminalization. While many states had repealed their antisodomy laws over the previous two decades,[89] in 1986 the Court in *Bowers v. Hardwick* ruled that such laws were constitutional.[90] Both *Bowers* and governmental inaction on HIV/AIDS elicited powerful protests from LGBT activists.[91] Sympathetic lawmakers and officials began to channel more funding and support to HIV/AIDS research and treatment.[92]

As gay men were treated as legal strangers to their partners, the AIDS crisis made painfully clear the consequences of the lack of recognition for same-sex relationships.[93] At the same time, the dramatic increase in the number of lesbian couples having children in the 1980s also brought a greater sense of urgency to legal issues surrounding family formation and recognition.[94] Reproductive technology in general presented new challenges to legal determinations of parentage,[95] but lesbian mothers in particular faced barriers to securing parental rights. LGBT advocates pressed legal concepts, such as second-parent adoption, to achieve parental rights for non-biological lesbian co-parents.[96]

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86. *See* VAID, *supra* note 83, at 68.

87. *See* ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 24, at 58.

88. *See* VAID, *supra* note 83, at 85; *see also* MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 50–51 (1999).

89. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 106 & n.8 (2000). In the mid-1970s, California's consenting adult law removed the state's criminal prohibition on same-sex sex. 1975 Cal. Stat. 131–36.

90. 478 U.S. 186 (1986). On the ways in which antisodomy laws legitimated discrimination against lesbians and gay men in this era, see generally Leslie, *supra* note 89, 135–68.

91. *See* HIRSHMAN, *supra* note 19, at 188; Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 985–86 (2011).

92. *See* HIRSHMAN, *supra* note 19, at 192, 204.

93. *See* CHAUNCEY, *supra* note 29, at 96–102.

94. *See id.* at 105–09; *see also* CARLOS A. BALL, THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD 6–7 (2012); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 465–66 (1990).

95. *See* Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2, 4 (2009). Without legislation addressing these developments, courts struggled to develop rules for families formed through reproductive technology. While the New Jersey Supreme Court in 1986 famously refused to enforce surrogacy agreements as against public policy, California courts eventually upheld such agreements and made intent, rather than biology, central to determinations of parentage. *Compare In re* Baby M. 537 A.2d 1227 (N.J. 1988), *with* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

96. *See* Polikoff, *supra* note 94, at 466–67; *see also* CHAUNCEY, *supra* note 29, at 109–10.

It is with this historical backdrop in mind that I turn to LGBT advocacy on relationship recognition in the 1980s and 1990s. As this brief exploration makes clear, laws regulating family and sexuality grew increasingly conducive to LGBT life because of changing norms, demographics, and legal reforms relating to both marital and nonmarital heterosexual relationships.[97] LGBT advocates leveraged those changes as best they could to advance their cause. At the same time, advocates were limited by the same countermobilizations that pushed back against feminism, sexual liberty, and reproductive rights. And soon after the LGBT movement rolled into the 1980s, it faced a health crisis that required a swift and powerful response. How exactly LGBT advocacy on nonmarital recognition fits within this broader trajectory is in many ways at the core of this Article.

II.
THE LGBT MOVEMENT BEFORE AND AFTER THE TURN TOWARD MARRIAGE

The standard account of marriage's trajectory in LGBT legal advocacy traces today's marriage claims to the mid-1990s, specifically to shifts, both inside and outside the movement, related to the *Baehr* litigation in Hawaii. Before *Baehr*, some advocates declined to pursue marriage for strategic and pragmatic reasons. Others refused to pursue marriage because of ideological objections. Therefore, LGBT leaders in the 1980s and early 1990s debated whether the movement should view marriage as a long-term goal. Even as they did, they pursued rights and recognition for nonmarital relationships, including through domestic partnership. Eventually, the impact of *Baehr* largely cut off the intra-movement marriage debate as advocates were forced to devote attention and resources to the marriage issue.

This Part first outlines this standard account of marriage in the LGBT movement. It then discusses how some scholars, particularly prominent critics of contemporary marriage equality advocacy, articulate an influential reading of this history that emphasizes ideological, rather than pragmatic, objections to marriage in LGBT advocacy before *Baehr*. Accordingly, they generally conceptualize the work outside marriage in the 1980s and early 1990s as contributing to the case against marriage.

A. The Path Toward Marriage

While social movements on both the left and right directly engaged marriage over the second half of the twentieth century,[98] the organized LGBT movement did not officially seek marriage rights until the 1990s. Instead, advocates pursued nonmarital recognition, including domestic partnership,

97. *See* Cherlin, *supra* note 55, at 298; *cf.* Suzanne B. Goldberg, *Why Marriage?*, *in* MARRIAGE AT THE CROSSROADS, *supra* note 55, at 224, 237.

98. *See supra* Part I.

throughout the 1980s and into the 1990s.[99] And during that time lawyers at the leading LGBT legal organizations warned against litigation challenging marriage laws.[100]

While some movement leaders resisted marriage for pragmatic reasons, others opposed marriage on ideological grounds.[101] Accordingly, advocates vigorously debated the normative position of marriage on the LGBT agenda. The seminal 1989 exchange between Paula Ettelbrick, then the legal director of Lambda Legal, and Tom Stoddard, the organization's executive director, framed the issue.[102] Stoddard argued that the movement should pursue access to marriage as a route to true equality.[103] Ettelbrick, on the other hand, rejected marriage as a goal. She claimed that the turn to marriage would focus the movement on assimilationist objectives, hitch the cause to an institution steeped in gender hierarchy, and marginalize vulnerable LGBT families.[104] Ettelbrick urged advocates to continue down the path of domestic partnership as an alternative to marriage.[105]

The intra-movement debate over marriage's normative significance continued even as same-sex couples challenged Hawaii's marriage law in the early 1990s,[106] explicitly against the advice of movement leaders.[107] Lawyers from Lambda Legal and the American Civil Liberties Union ("ACLU") had urged the plaintiffs to resist the temptation to litigate. Only when the case

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99. Eskridge and Darren Spedale explain that while "gay-radicals supported or acquiesced in [domestic partnerships] because they represented a novel, nonmarriage family form," "most gay-liberals supported [them] because they reduced the formal inequality of lesbian and gay couples." ESKRIDGE & SPEDALE, *supra* note 24, at 18.

100. On this point, see *id.* at 15–18; ESKRIDGE, EQUALITY PRACTICE, *supra* note 24, at 5; David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, *in* CREATING CHANGE 271, 282–89 (John D'Emilio et al. eds., 2000); Carlos A. Ball, *Symposium: Updating the LGBT Intracommunity Debate over Same-Sex Marriage: Introduction*, 61 RUTGERS L. REV. 493, 495–97 (2009); William N. Eskridge Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1489 (1993); Arthur S. Leonard, *Going for the Brass Ring: The Case for Same-Sex Marriage*, 82 CORNELL L. REV. 572, 579 (1997) (reviewing ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 24.); Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 394 (2009).

101. *See* CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM 164 (2010) ("There were two main reasons for the unwillingness to pursue same-sex marriage . . . . The first reason was pragmatic. . . . A second objection . . . was ideological rather than pragmatic."); *see also* Eskridge, *supra* note 53, at 1936 ("In the early 1980s, gay marriage was not politically viable, but gay rights leaders devised another strategy to secure legal recognition of their relationships, namely, domestic-partnership ordinances adopted at the municipal level, where lesbian and gay political power was greatest.").

102. Eskridge and Spedale link this debate to Denmark's 1989 Registered Partnership Act, which gave same-sex couples most of the rights of marriage. "American gay rights leaders," they explain, "started to rethink their priorities." ESKRIDGE & SPEDALE, *supra* note 24, at 18.

103. *See* Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989, at 9.

104. *See* Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, at 14.

105. *See id.*

106. *See* Hunter, *supra* note 49, at 11–12.

107. *See* Cummings & NeJaime, *supra* note 10, at 1250.

moved up the appellate chain did Lambda Legal assume a formal role by filing an amicus brief.[108]

The Hawaii Supreme Court's surprising 1993 *Baehr* decision is considered the opening shot in the modern battle for same-sex marriage.[109] Finding that the marriage law constituted a sex-based classification, the court remanded the case with instructions to apply the most rigorous standard of state constitutional review.[110] The ruling transformed marriage into an increasingly realistic goal. Lambda Legal established its Marriage Project the following year.[111]

Outside the LGBT movement, *Baehr* activated a powerful countermobilization that sought to prevent same-sex couples from accessing marriage.[112] In 1996, Congress passed the Defense of Marriage Act.[113] The following year, the Hawaii legislature voted to put on the November 1998 ballot a constitutional amendment authorizing the legislature to limit marriage to different-sex couples. At the same time, the legislature enacted a "[r]eciprocal [b]eneficiary" regime extending limited rights and benefits to same-sex couples and other pairs, such as blood relatives, legally excluded from marriage.[114] Hawaii voters ultimately passed the constitutional amendment.[115] While the trial court on remand had found the marriage law unconstitutional,[116] the state supreme court vacated that ruling in light of the intervening amendment.[117]

Baehr looms large in leading accounts of the LGBT movement's path to marriage. The post-*Baehr* landscape of the mid-1990s crystallized the distinction between the movement's pro- and anti-marriage paths. As Carlos Ball explains:

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108. *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 55 (2013). After the Hawaii Supreme Court's decision, Lambda Legal, and specifically Evan Wolfson, became co-counsel in the case. *See* ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 179 (2005). Wolfson, an early marriage proponent, had informally assisted in the earlier phase of the litigation.

109. *See, e.g.*, Schacter, *supra* note 100, at 380. The couples sought marriage licenses in December 1990 and filed suit in May 1991. The trial court ruled in the state's favor in October 1991. *See* Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 705–10 (2011). A same-sex couple in Washington, D.C., also challenged their exclusion from marriage in the early 1990s. Eskridge served as counsel. *See* Leonard, *supra* note 100, at 575. A fractured appellate court ultimately rejected the claim. Dean v. District of Columbia, 653 A.2d 307, 309 (D.C. 1995).

110. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

111. *See* KLARMAN, *supra* note 108, at 176.

112. *See* Schacter, *Courts and the Politics of Backlash*, *supra* note 24, at 1183–85.

113. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2012) and 1 U.S.C. § 7).

114. *See* HAW. REV. STAT. ANN. § 572C (LexisNexis 2005).

115. HAW. CONST. art. I., § 23.

116. Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

117. Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

> [B]y the mid-1990s, the gay rights movement reached a paradigmatic "fork in the road" moment. On one side of the fork was the possibility of expanding the institution of marriage by including same-sex couples within its ambit. On the other side was the possibility of reducing the importance of marriage by seeking alternative forms of legal recognition for a wide variety of familial arrangements, including those of LGBT people.[118]

Under this view, the new path toward marriage that *Baehr* opened stood in contrast, at least in part, to work on nonmarital recognition that had been pushing against marriage.

As the 1990s wore on, marriage gained traction in the LGBT movement, and activists who opposed marriage on ideological grounds found the environment increasingly inhospitable. As Jane Schacter explains, *Baehr* cast marriage as a "showdown issue" between pro- and anti-gay forces such that "the option to continue critiquing marriage became distinctly unpalatable to pro-equality marriage skeptics within the LGBT movement."[119] Indeed, at the time, Nancy Polikoff, a prominent marriage critic, LGBT advocate, and scholar, worried that the Hawaii marriage fight was stifling ideological arguments against marriage.[120] Seeking to articulate common ground and resist the turn toward marriage, she argued that "[o]ne thing our community can stand for . . . is a principle that expands the definition of family and does not place a monogamous relationship with one partner at the pinnacle of all human relationships."[121] She hoped that *Baehr* would "not wipe out the arguments for working towards different goals and towards a different vision of lesbian and gay liberation."[122]

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118. Ball, *supra* note 100, at 493; *cf.* Schacter, *supra* note 100, at 395 ("[A]t an early point, LGBT political forces might have chosen to set their sights on some version of domestic partnership, expand it to the state and/or federal level, and put its energies into deciding who should be protected (same-sex couples only or opposite sex couples as well? Romantically-attached couples only or other relationships in need of legal protection?). This course might have been charted before or after *Baehr*.").

119. Schacter, *supra* note 100, at 394; *see also* Paula L. Ettelbrick, *Legal Marriage Is Not the Answer*, 4 HARV. GAY & LESBIAN REV. 34, 35 (1997) ("Those who 'oppose' the current strategy have been marginalized as a few radical lesbian-feminist-leftists—and we know how far those labels get you in the current political climate.").

120. As Evan Wolfson framed it, "[t]he question at this point . . . is not, '*Should* we fight for our freedom to marry?' but instead, 'How can we best reach out to the non-gay public . . . to support our equality in marriage . . . ?'" Evan Wolfson, *How To Win the Freedom To Marry*, 4 HARV. GAY & LESBIAN REV. 29, 30 (1997). Andrew Sullivan, who consistently made a more conservative case for same-sex marriage, played a prominent role in pro-marriage argumentation in the 1990s. When asked in 1997 about Polikoff's critique, Sullivan responded that opposition existed "in the early 80's or mid-80's, but not now." Andrew Sullivan, *Interview, 'We're Talking About the Right To Choose,'* 4 HARV. GAY & LESBIAN REV. 25, 26 (1997).

121. *See* David W. Dunlap, *Some Gay Rights Advocates Question Effort to Defend Same-Sex Marriage*, N.Y. TIMES, June 7, 1996, at A12.

122. Nancy D. Polikoff, *Marriage as Choice? Since When?*, 21 GAY COMM'Y NEWS 26 (1996).

By the late 1990s, however, the organized movement began to affirmatively push for marriage and moved forward with carefully orchestrated litigation. Gay & Lesbian Advocates & Defenders ("GLAD") participated in a marriage challenge in Vermont, resulting in civil unions that provided the state-law rights and benefits of marriage to same-sex couples.[123] In neighboring Massachusetts in 2003, GLAD lawyers secured full marriage rights under state law.[124] By this point, advocates increasingly framed civil unions and domestic partnerships as inadequate substitutes for marriage.[125] By the early 2000s, the movement for marriage equality was well underway, and the following decade would witness a series of battles—both in and out of court—over same-sex couples' right to marry.[126]

B. Emphasizing the Case Against Marriage

The standard account described above devotes relatively scant attention to the content and meaning of domestic partnership advocacy before *Baehr*.[127] Therefore, it does little to specify the substantive, as opposed to strategic, relationship between nonmarital advocacy and marriage.[128]

In contrast, a variation of this account emphasizes ideological marriage resistance in earlier LGBT advocacy and therefore stakes out a more oppositional relationship between marriage and nonmarital recognition. While acknowledging the intra-movement debate that occurred, this view nonetheless relates domestic partnership in the 1980s and early 1990s to a movement vision pushing away from, rather than toward, claims to marriage. Critics of contemporary marriage equality advocacy have most forcefully and extensively articulated this reading of the LGBT movement's trajectory. Yet elements of this view appear across a range of scholarly treatments. Indeed, Ball's summation of the post-*Baehr* moment, described above, suggests how this

123. Baker v. State, 744 A.2d 864 (Vt. 1999); VT. STAT. ANN. tit. 15, § 23 (1999).

124. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). The court clarified that only marriage would remedy the constitutional violation. *See In re* Opinion of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

125. *See* Douglas NeJaime, *Framing In(Equality) for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184 (2013); *cf.* Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013).

126. *See* Schacter, *Courts and the Politics of Backlash*, *supra* note 24, at 1187–93.

127. For work on nonmarital advocacy, see Chambers, *supra* note 12; Cox, *supra* note 12; William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 93–94 (1991).

128. Eskridge and Nan Hunter, however, explicitly relate movement advocates' push for nonmarital recognition to burgeoning claims to marriage in the 1990s. *See* ESKRIDGE, EQUALITY PRACTICE, *supra* note 24, at 12–15; ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 24, at 58–60; Eskridge, *supra* note 53, at 1936–37; Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, *in* SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 105, 106 (Lisa Duggan & Nan D. Hunter eds., 2006); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 23–25 (1991).

conceptualization of pre-*Baehr* nonmarital advocacy structures discussions of the LGBT movement and its relationship to marriage.[129]

Through this more radical lens, advocacy outside marriage in the 1980s grew out of the post-Stonewall marriage critique of the 1970s.[130] As "advocates for lesbian and gay families" headed into the 1980s, "[t]he overarching goal was facilitating social, legal, and economic support for diverse family forms outside the patriarchal family; *less marriage*, not *marriage*, was consistent with that vision."[131] Accordingly, advocates translated their ideological views into legal and political claims made outside the register of marriage.[132] As Kath Weston recounts, "during the 1980s . . . lesbians and gay men . . . began to speak widely of chosen families" and to seek "legal protections" for those families.[133] LBGT advocates worked, in Angela Harris's description, to "queer the family."[134]

Understood through the lens of marriage resistance, domestic partnership in the 1980s constituted an important step to destabilize marriage by creating an alternative available regardless of sexual orientation.[135] According to Melissa Murray, who has powerfully critiqued the prioritization of marriage in the domains of both family recognition and sexual regulation, local domestic

129. *See supra* note 118 and accompanying text.

130. Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 530 (2009) (situating nonmarital advocacy as part of marriage resistance and explaining that in the post-Stonewall years LGBT activists argued that marriage "channeled everyone into only one approved relationship, . . . regulated the lives of men and women along gender lines, and . . . policed the boundary between acceptable and unacceptable sexual expression"); *see also* Shannon Gilreath, *Montana Case Shows Split in Gay Rights Movement*, JURIST – FORUM (Dec. 14, 2011), http://jurist.org/forum/2011/12/shannon-gilreath-gay-liberation.php; Mary Ziegler, *Defining the Parental Rights of Same-Sex Spouses*, JURIST – FORUM (Jan. 14, 2012), http://jurist.org/forum/2012/01/mary-ziegler-parental-rights.php.

131. *See* POLIKOFF, *supra* note 22, at 48; *see also* WARNER, *supra* note 88, at 132.

132. *See* Chai R. Feldblum, *Keep the Sex in Same-Sex Marriage*, 4 HARV. GAY & LESBIAN REV. 23, 24 (1997) (explaining the "broad-based story" that before the mid-1990s "most of the gay leadership considered marriage irredeemably 'heterosexist' and incompatible with freedom from sexual and social oppression"). As Cain explains, the liberationist groups emerging from Stonewall "did not turn immediately to the courts, but rather turned out into the streets." Cain, *supra* note 19, at 1582.

133. Kath Weston, *Families in Queer States: The Rule of Law and the Politics of Recognition*, 93 RADICAL HIST. REV. 122, 130 (2005); *see also* KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP 107 (1991).

134. Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL. RTS. J. 1539, 1568 (2006) (internal quotation marks omitted); *see also* Ettelbrick, *supra* note 119, at 35 ("Lesbians and gay men have long challenged normative definitions of the institution of the family. Through our success creating different kinds of families, we have shown that groups of people can constitute a family without being heterosexual, biologically related, married, or functioning under a male head-of-household.").

135. *See* Leonard, *supra* note 100, at 580 ("Those who opposed same-sex marriage from within the lesbian and gay movement on theoretical grounds advocate[d] domestic partnership, a form of nonmarital legal recognition . . . .") (footnote omitted); *see also* Eskridge, *supra* note 100, at 1491 ("Our emphasis on families we choose fuels the gaylegal interest in domestic partnership . . . as a better way of protecting many of our relationships than same-sex marriage.").

partnership ordinances in the 1980s "were not intent on mimicking marriage" but instead were "consciously framed as distinct from—and less than—marriage."[136] Similarly, Polikoff, who has articulated highly influential critiques of both marriage and contemporary LGBT advocacy, suggests that "[t]he early 1980s ... push for a status called 'domestic partnership' ... available to both same-sex and different-sex couples" made marriage "matter less."[137] She claims that throughout that decade "[a]dvocates and employers alike did not distinguish between those who could not marry and those who chose not to marry,"[138] such that recognition of unmarried different-sex couples and same-sex couples were "two sides of the same coin."[139]

Those who emphasize the more destabilizing dimensions of nonmarital recognition point to the inclusion of non-intimate relationships to show that activists successfully resisted the marriage paradigm. Polikoff, for example, notes that the Los Angeles Task Force on Family Diversity recommended domestic partnership without a requirement of romantic affiliation[140]: "The Los Angeles report urged government to define families to reflect the way people actually live.... It recommended flexible definitions of family, a ban on marital-status discrimination, and domestic partnership status for two people who lived together and shared the 'common necessities of life.'"[141]

In sum, this emphasis on marriage resistance in earlier LGBT advocacy suggests that, to a significant degree, activism in the 1980s and early 1990s destabilized marriage. Ettelbrick, for instance, argued in the 1990s that movement advocates did "not challenge[] the underlying assumptions of family

136. Murray, *supra* note 125, at 301; *see also* Ettelbrick, *supra* note 119, at 35 ("We have confronted and begun to change a marriage-centered family ideology, one that denied us basic economic and social benefits, such as health benefits and bereavement leave.").

137. Polikoff, *supra* note 130, at 530, 532; *see also* Julie Shapiro, *Reflections on Complicity*, 8 N.Y. CITY L. REV. 657, 663 (2005).

138. *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, 738 (2012).

139. Polikoff, *supra* note 130, at 532.

140. *See* POLIKOFF, *supra* note 22, at 55. She also notes that ordinances in Madison, Wisconsin, and Washington, D.C., included "nonconjugal relationships." *Id.* at 51.

141. *See* Polikoff, *supra* note 130, at 533 (footnote omitted). For Polikoff, movement litigation during the 1980s reflected the same impulse as domestic partnership work and contributed to "coalition advocacy on behalf of diverse family structures." *See* POLIKOFF, *supra* note 22, at 55. In New York, for example, lawyers convinced the state's highest court to adopt a functional, rather than formal, model of "family" for purposes of the rent control law. *See* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989). This victory "came under the banner of support for diverse families." *See* Polikoff, *supra* note 130, at 553. Murray, however, notes that the *Braschi* court "used the normative concept of marriage to inform its understanding of family." *See* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1256 n.89 (2010); *see also* Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 394 (2009). On this point, see Dubler, *supra* note 9, at 1020. For additional analysis of *Braschi*, see Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664–65.

just to build toward the holy grail of marriage."[142] Instead, movement leaders' work had "been charged by [their] conviction that it is unjust, irrational, and injurious to privilege marital families over non-marital ones."[143] Under this view, domestic partnership and other measures to support nonmarital families constituted significant achievements that resisted, rather than accepted, the privileging of marriage.

Stressing marriage resistance in earlier nonmarital work situates *Baehr* as contributing to a dramatic normative—much more than strategic—shift in LGBT advocacy.[144] Under this view, when advocates pivoted toward marriage, they changed the meaning of domestic partnership itself. According to Lisa Duggan and Richard Kim, domestic partnership—once a goal for an LGBT movement "committed to household diversity"—transformed into a "second-class substitute[] for marriage equality."[145] For Murray, who ascribes less influence specifically to *Baehr*, the late-1990s shift from local to state-level advocacy for nonmarital relationship recognition contributed to this shift in domestic partnership's meaning.[146]

To a large extent, the emphasis on marriage resistance in earlier LGBT advocacy, most forcefully articulated by critics of contemporary marriage equality work, structures current scholarly debates over marriage and its role in LGBT rights. But as the case study in the next Part shows, this reading of the movement's past underestimates the centrality of marriage as an anchoring principle for domestic partnership in the 1980s and early 1990s and obscures the dialogical relationship between nonmarital recognition and marriage. As the next Part demonstrates, by looking closely at how domestic partnership emerged, succeeded, and gained meaning, we can appreciate the influence of marriage on nonmarital advocacy in the 1980s and 1990s as well as the impact of that work on marriage.

Before moving on, it is important to note that even the more radical rendering of the movement's past includes many accurate claims about the movement's trajectory, including some of the strategic moves occurring in *Baehr*'s wake. But by overemphasizing the way in which movement advocates

142. Ettelbrick, *supra* note 119, at 35.

143. *Id.*

144. Polikoff has argued that "the increased prominence of the right to marry as a goal of our movement is attributable entirely to the 1993 Hawaii Supreme Court decision." *See* Polikoff, *supra* note 122, at 26. Other scholars do not state the claim this strongly, and in more recent work Polikoff herself pairs *Baehr* with the rise of conservative gay thought in the early 1990s and the contemporaneous emergence of domestic partnership policies limited to same-sex couples. *See* POLIKOFF, *supra* note 22, at 61, 83. Nonetheless, this constellation of related developments in the 1990s "shift[ed] [the] framework of legal arguments concerning LGBT families." *Id.* at 83. Polikoff also points to external political developments, including the spread of conservative family policy and rhetoric in the 1990s. *See id.* at 63–70.

145. Richard Kim & Lisa Duggan, *Beyond Gay Marriage*, THE NATION (June 29, 2005), http://www.thenation.com/article/beyond-gay-marriage?page=full.

146. *See* Murray, *supra* note 125, at 296–97.

resisted and rejected marriage, this reading of the movement mistakes some of those strategic moves for normative shifts. Moreover, it fails to fully appreciate the constraints that confronted advocates who sought to challenge a system that privileged marriage. In doing so, it obscures the prominence of the more pro-marriage positions that many advocates took, both for normative and strategic reasons, and overestimates the destabilizing impact of early nonmarital initiatives. Consequently, viewing earlier LGBT advocacy primarily through the lens of marriage resistance tends to situate more recent marriage advocacy as a new phenomenon that defied, rather than sprung from, earlier work. In reality, today's marriage claims in many ways grew out of, rather than contradicted, the earliest claims to nonmarital recognition.

III.
THE CALIFORNIA CASE STUDY: NONMARITAL RECOGNITION, MARRIAGE, AND SAME-SEX COUPLES

The following case study looks closely at work on behalf of same-sex couples in the 1980s and 1990s in California. California constituted a significant front in the LGBT movement, and advocates there were incredibly successful as compared to those in other states. Indeed, the concept of domestic partnership traces its roots to California. Developments in the state influenced events across the country, as lawmakers attempted to replicate California's innovations. Of course, California continued to serve as a central site for LGBT activism into the twenty-first century. Recently, the Supreme Court's decision in *Hollingsworth v. Perry* resolved the battle over marriage by effectively restoring marriage equality to California.[147] Now, same-sex couples in the most populous state possess the right to marry.

This Part's case study traces advocacy across a range of institutional domains, at multiple levels of policymaking, and influenced by a number of relevant actors, to understand the role of marriage in LGBT organizing. It begins with local domestic partnership efforts in the early 1980s—well before marriage occupied an official position on the LGBT movement agenda—and ends with the achievement of domestic partnership on the state level in 1999, years after *Baehr* launched marriage to national prominence.

The case study demonstrates that, because of both internal movement dynamics and external legal, political, and cultural constraints, marriage anchored nonmarital advocacy in the 1980s and 1990s. Throughout that time, advocates did not speak in one voice, nor did they occupy a position that was clearly pro- or anti-marriage. Different frames and arguments informed domestic partnership work. For example, the notion of domestic partnership as

147. The Court held that the proponents of Proposition 8—California's constitutional ban on marriage for same-sex couples—lacked standing to appeal the district court's ruling invalidating the ban. 133 S. Ct. 2652 (2013).

a distributive mechanism, which emphasized equal access to benefits, dovetailed with a recognition frame, which stressed the status that domestic partnership conferred specifically on same-sex couples. Ultimately, the centrality of marriage influenced the resonance of each frame and the types of relationships domestic partnership would cover.

Non-movement actors, who generally prioritized marriage, significantly shaped the legal and political context that simultaneously offered opportunities and imposed constraints on LGBT advocates. Employers, insurers, and local officials used marital norms to conceptualize and define the terms of nonmarital recognition. State-level actors, including judges and legislators, looked to marriage to justify maintaining legal distinctions between different-sex and same-sex couples. And social-conservative activists located domestic partnership within a broader attack on marriage and the family.

Accordingly, to achieve nonmarital recognition, advocates appealed to marriage's conventions, pointed to the unique exclusion of same-sex couples from marriage, and stressed same-sex couples' commonality with married couples. In building domestic partnership, they emphasized marital norms—such as adult romantic affiliation, mutual emotional commitment, and economic interdependence—capable of including same-sex couples. By challenging marriage's primacy while arguing for recognition in terms defined by marital norms, advocates contested, accepted, and ultimately shaped the institution of marriage while simultaneously portraying same-sex relationships as marriage-like.

Much of the activity covered in the case study occurred during the Reagan administration, when the New Right was particularly influential. Certainly the powerful conservative ideology shaping the national political scene had implications for the contest over nonmarital recognition. Yet much of the work relating to domestic partnership in the 1980s occurred at the local level and tended to arise either in progressive towns and cities or in large metropolises with strong Democratic leadership and sizable LGBT populations. Therefore, even as social-conservative activists limited some local advances, LGBT advocates enjoyed considerable room at the municipal level in California to push forward the cause. But at the state level, where the New Right exerted greater influence, advocates enjoyed less room for affirmative work.

Overall, it is important to keep in mind the larger political and cultural backdrop against which LGBT work on nonmarital recognition operated while still appreciating that the influence of that backdrop varied geographically. Of course, even if conservative forces did not directly curtail LGBT work in specific cities, the influence of those forces may have shaped the claims and arguments of LGBT advocates and their allies in subtle ways. That is, the national shift to the right over the 1980s and into the 1990s may have limited the horizons of possible arguments by forces on the left, including LGBT advocates.

A. The Origins of Domestic Partnership—Marriage Equivalence and Sexual-Orientation Equality

In its earliest iteration, domestic partnership harnessed sexual-orientation nondiscrimination principles to offer a pragmatic solution to the problem posed by same-sex couples' lack of access to marriage. Rather than purporting to unsettle marriage, domestic partnership advocates tended to emphasize a practical route for same-sex couples to obtain benefits. And from its inception, domestic partnership's terms were suggested by comparison to marriage.

Domestic partnership advocacy sprang from municipalities' nondiscrimination policies. While Anita Bryant's "Save Our Children" campaign was rolling back gay rights ordinances in Florida, Minnesota, Oregon, and Kansas,[148] progressive cities in California adopted antidiscrimination provisions that provided a basis to seek rights for same-sex couples. Nonetheless, even in San Francisco, religious opposition to gay rights proved powerful.

In 1978, San Francisco enacted a sexual orientation nondiscrimination ordinance that included employment, housing, and public accommodations.[149] Berkeley passed a similar ordinance later that year.[150] Matt Coles, who would eventually head the ACLU's LGBT Project,[151] was the primary drafter of both laws.[152] The following year, in response to Berkeley's ordinance, city employee and gay activist Tom Brougham urged the city to provide healthcare coverage to his same-sex partner.[153] Brougham argued it was unfair to use marriage as the sole criterion for benefits eligibility and suggested that the city create a "domestic partnership" designation to remedy the inequity.[154]

In San Francisco, Harry Britt, an openly gay city supervisor, picked up Brougham's proposal.[155] In 1981 and 1982, Britt worked with Coles to draft a domestic partnership ordinance; Brougham also participated in the San

148. *See supra* Part I.

149. S.F., CAL., ORD. NO. 178-78 art. 33, § 3301–10 (1978); *see also* Les Ledbetter, *Bill on Homosexual Rights Advances in San Francisco*, N.Y. TIMES, Mar. 22, 1978, at A21.

150. Berkeley City Code §13.28.010–13.28.040 (1978); *see also Berkeley Council Approves Strong Gay Rights Law*, L.A. TIMES, Oct. 12, 1978, at B28.

151. *See* Cummings & NeJaime, *supra* note 10, at 1254.

152. Telephone Interview with Matt Coles (Apr. 13, 2013) [hereinafter Coles Interview].

153. *See* Leland Traiman, *A Brief History of Domestic Partnerships*, 15 GAY & LESBIAN REV. 23, 23 (2008). From 1979 to 1981, Brougham and others had pressed—unsuccessfully—for domestic partner health insurance coverage at the University of California at Berkeley. *See* 1 KAREN MOULDING, SEXUAL ORIENTATION AND THE LAW § 5:50 n.1 (Roberta Achtenberg orig. ed., 2010). Brougham belonged to, and at one point led, the East Bay Lesbian/Gay Democratic Club. *See* CITY AND CNTY. OF SAN FRANCISCO, HUMAN RIGHTS COMM'N, INVESTIGATION INTO DOMESTIC PARTNERSHIP, MARITAL STATUS, AND EXTENDED FAMILY POLICIES: FINDINGS, RECOMMENDATIONS, AND APPENDICES 9 (Aug. 1989) (on file with author) [hereinafter HRC INVESTIGATION].

154. *See* Traiman, *supra* note 153, at 23.

155. *See* Wallace Turner, *Couple Law Asked for San Francisco*, N.Y. TIMES, Nov. 28, 1982, at 31.

Francisco effort.[156] The earliest draft defined domestic partners as "two individuals" who "reside together," "share the common necessaries of life," and "declare that they are each other's sole domestic partners."[157] The language explicitly invoked the California common-law duty making spouses responsible for the "common necessaries of life."[158] This language was particularly important to insurance carriers, who resisted adding domestic partnership coverage without assurances that this new relationship status would be characterized by a marriage-like level of commitment.[159]

The draft ordinance also included rights subject to municipal authority: hospital and jail visitation, sick and bereavement leave, and public housing eligibility.[160] In a separate section aimed at securing health coverage for city employees' domestic partners, the drafters provided that a "City employee who has enrolled a domestic partner may not enroll a different domestic partner until six months after notifying the Health Service System that the first domestic partner is no longer to be enrolled."[161] This length of time deliberately tracked the time between an interlocutory and final decree of divorce in the marriage context.[162]

In submitting a subsequent, revised draft ordinance to the Board of Supervisors in October 1982, San Francisco's city attorneys expressed "uncertainty regarding its full scope and impact."[163] Beyond city facilities, such as hospitals and jails, they were unsure about "the effect of domestic partnerships."[164] Accordingly, questions would "have to be resolved on a case by case basis as claims that the domestic partner is entitled to the same status as the spouse are made."[165] Despite these reservations, the Board of Supervisors adopted the ordinance, which defined domestic partners as "[t]wo individuals,"

a. "not related by blood,"
b. "[n]either is married, nor are they related by marriage,"
c. who "share the common necessaries of life,"
d. "declare that they are each other's principal domestic partner," and

156. Coles Interview, *supra* note 152.

157. An Ordinance to Create a Record of Domestic Partnerships (Draft) (1982) (on file with author) [hereinafter 1982 Draft].

158. Follansbee v. Benzenberg, 265 P.2d 183, 189 (Cal. Ct. App. 1954).

159. Coles Interview, *supra* note 152.

160. 1982 Draft, *supra* note 157, at 3.

161. An Ordinance to Extend Coverage of Health Plans to Domestic Partners of City Employees (Draft) (1982) (on file with author).

162. Coles Interview, *supra* note 152. Based on the same logic, Berkeley's ordinance used similar timing. *See* HRC INVESTIGATION, *supra* note 153, at 11.

163. Memorandum from Burk E. Delventhal & Thomas J. Owen, Deputy City Attorneys, to John L. Taylor, Clerk of the Board of Supervisors 1 (Oct. 28, 1982) [hereinafter 1982 Delventhal Memo] (on file with author).

164. *Id.*

165. *Id.*

e. "[n]either has, within the last six months[,] declared to any City department that he or she has a different domestic partner."[166]

Even though the proposed language included both same-sex and different-sex couples, Coles drew distinctions between the two in his own efforts to build support for the ordinance. To counter opposition, he emphasized that "opposite-gender couples may marry if and when they choose. Their temporary, voluntary exclusion when they do not choose to marry is not equal to [same-sex couples'] permanent, involuntary, and categorical exclusion."[167] Moreover, Coles stressed that the ordinance worked with, not against, marriage. Those proposing the ordinance, he maintained, sought "to obtain equal rights and benefits—not to attack marriage."[168] "[T]he problem," he noted, "is not marriage per se, but the unfair use of marriage as the sole criterion for eligibility."[169]

Both supporters and opponents of the ordinance framed domestic partnership in relation to marriage. The Catholic leadership in San Francisco situated its opposition to the ordinance in more generalized objections to recognition of nonmarital families. Writing to Mayor Dianne Feinstein, San Francisco Archbishop John Quinn claimed that "to reduce the sacred covenant of marriage and family by inference or analogy to a domestic partnership is offensive to reasonable persons and injurious to our legal, cultural, moral and societal heritage."[170] After the Board of Supervisors passed the ordinance in 1982, Feinstein vetoed it.[171] She complained that the provision requiring domestic partners to be treated like spouses was "inconclusive and unclear" and potentially "subject to various interpretations."[172] For his part, Britt characterized that element as "the heart of the legislation."[173] The battle lines over domestic partnership had been drawn through marriage. A domestic partner was not any family member; she was a spousal equivalent.

Fresh off defeat, Coles and Britt attempted to rework the ordinance to satisfy Feinstein. In January 1983, the city attorneys approved the draft

166. Domestic Partnerships, Amending San Francisco Administrative Code by Adding Chapter 45 Thereto, Establishing Domestic Partnerships and Requiring Boards, Commissions and Departments of the City and County of San Francisco to Afford to Domestic Partners the Same Rights and Privileges as Spouses, at 1 (1982) (on file with author); *see also* 1982 Delventhal Memo, *supra* note 163.

167. Personal Notes of Matt Coles, Points to Remember when Countering Opposition or Criticism (1982) (on file with author).

168. *Id.*

169. *Id.*

170. David Morris, *SF Mayor Vetoes Domestic Partners Bill*, GAY COMMUNITY NEWS, Dec. 25, 1982, at 1.

171. *Id.*

172. *Id.*

173. *Id.*

legislation and made additional revisions.[174] They included a definition of "'common necessaries of life' drawn from California case law"[175]—"those things which are commonly required by persons for the sustenance of life regardless of their employment or status."[176] This reflected continuing efforts to make the responsibilities of domestic partners track those of spouses, thereby ensuring a commensurate level of commitment. Responding to the mayor's concerns about uncertain scope, the ordinance explicitly provided only for hospital and jail visitation.[177] And it addressed the fact that, under the city charter, the Board of Supervisors did not possess authority over important public employment benefits. Accordingly, the ordinance simply "request[ed] that the Mayor urge the Health Service System Board to develop a plan, or plans, as necessary, for the health insurance coverage of domestic partners of city employees."[178] Similarly, it "urg[ed] the Civil Service Commission to submit for adoption certain rules and regulations regarding sick and bereavement leave for city employees and their domestic partners."[179] When it became clear that Feinstein intended to veto the revised ordinance, Britt and Coles abandoned attempts to advance it.[180] It would be several years before San Francisco would enact a domestic partnership law.

Meanwhile, efforts in Berkeley gained steam as advocates learned from the San Francisco experience. Their work focused exclusively on city employees, first targeting the school board and eventually the city.[181] In 1983, representatives from Berkeley's LGBT community made a presentation to the city's Human Relations and Welfare Commission ("HRWC"), showing that the "marriage criterion" used for employment benefits had a discriminatory effect on lesbians and gay men.[182] Later that year, HRWC held a public hearing at which Brougham, Coles, and representatives from various LGBT groups voiced their support for a domestic partnership policy.[183] Their comments framed the issue around sexual orientation discrimination inherent in a system that uses marriage for social provisioning, and yet categorically excludes same-sex couples from marriage. Accordingly, they asked that "lesbian/gay couples receive [their] fair share and not be excluded from 'spousal benefits.'"[184] The

174. Memorandum from Burk E. Delventhal & Thomas J. Owen, Deputy City Attorneys, to Dana Van Gorder, Sup. Harry Britt's Office (Jan. 17, 1983) [hereinafter 1983 Delventhal Memo] (on file with author).

175. *Id.* at 1.

176. *Id.* at 3 (attachment of a draft ordinance).

177. *Id.* at 9 (attachment of a draft ordinance).

178. *Id.* at 11 (attachment of a draft resolution).

179. *Id.* at 13 (attachment of a draft resolution).

180. Coles Interview, *supra* note 152.

181. *Id.*

182. Memorandum from Human Relations and Welfare Commission to Hon. Mayor and Members of the City Council 1 (July 17, 1984) [hereinafter HRWC Memo] (on file with author).

183. *See id.* at 4–6.

184. *Id.* at 4.

public hearing revealed overwhelmingly positive responses to domestic partnership, as thirteen of the fourteen speakers favored a domestic partnership policy.[185]

The following year, HRWC recommended the adoption of a domestic partnership policy to the mayor and City Council.[186] Leland Traiman, a gay activist who sat on HRWC, chaired the Domestic Partner Task Force that produced the policy.[187] Coles helped draft it,[188] using the language from the San Francisco ordinance as a starting point.[189]

In making its recommendation, HRWC framed the problem that domestic partnership sought to solve primarily as one posed by marriage laws' different-sex requirement. Its "Description of the General Situation" opened by declaring: "In All States, Only Opposite-Gender Couples are Permitted to Marry."[190] It explained that while "[s]ome same-gender couples have performed private ceremonies and described themselves as married . . . these marriages are not recognized by the law."[191] Accordingly, HRWC focused on sexual-orientation equality and marriage access, explaining that while "[a]ll unmarried opposite-gender couples are able to move voluntarily across the 'marriage barrier[,]' [a]ll same-gender couples are unable to move across the 'marriage barrier'—forever, and regardless of their will."[192]

Rather than contesting the basic logic of the benefits system, HRWC merely sought to extend benefits to more "bona fide couple[s]."[193] In fact, it urged the City Council to defer any broader consideration of whether need, rather than coupled status, should govern benefits.[194] Since the proposal responded "to a particular set of complaints" from "members of the lesbian/gay community," HRWC explained that its "role should be . . . to make the benefits program specifically more equal," not "generally better."[195]

Unsurprisingly, then, HRWC recommended that domestic partnership "approximate the current marriage criterion."[196] Indeed, it explained that even as it left open the option of including both same-sex and different-sex couples, it was "rejecting the possibility of creating a new criterion which is substantially easier than the marriage criterion."[197] Similar to the language used in San Francisco, HRWC suggested a domestic partnership definition that

185. *Id.*
186. *See id.* at 20.
187. *See* Traiman, *supra* note 153, at 23.
188. *See* Cummings & NeJaime, *supra* note 10, at 1254.
189. Coles Interview, *supra* note 152.
190. HRWC Memo, *supra* note 182, at 1.
191. *Id.*
192. *Id.* at 9.
193. *Id.* at 12.
194. *See id.* at 10.
195. *Id.* at 18.
196. *Id.*
197. *Id.*

included two people "not related by blood closer than would bar marriage" who "reside[] together and share the common necessities of life" and are "responsible for [each other's] common welfare."[198]

After defeat in San Francisco, advocates succeeded in Berkeley. In 1984, the city adopted HRWC's proposed domestic partnership policy, making it applicable to city employees in same-sex and different-sex nonmarital relationships. After some initial hurdles, employees' domestic partners became eligible for dental and health benefits.[199]

In Southern California, Los Angeles lawmakers also considered domestic partner benefits. Councilman Zev Yaroslavsky pushed the issue in 1985, and concerns over cost soon shaped the internal debate among city officials.[200] The city administrative officer estimated that "[f]or health insurance alone, the additional costs would be between $1.7–$3.4 million."[201] Insurance carriers' reluctance to provide coverage further clouded the debate. An earlier inquiry by the city attorney in 1980 revealed that some insurers would refuse to provide domestic partner coverage while others would only do so "if an adequate definition of the relationship could be developed."[202] Neither the 1980 nor 1985 discussions produced a domestic partnership policy, but they laid the groundwork for the Los Angeles Task Force on Family Diversity, discussed below, which formed in 1986 as an attempt to advance such a policy.

Meanwhile, in 1985, the newly incorporated city of West Hollywood passed a domestic partnership ordinance, allowing both same-sex and different-sex couples to register with the city.[203] A relatively small, urban, and progressive community, West Hollywood had a sizable lesbian and gay population. And the city leadership included prominent LGBT activists. In fact, Valerie Terrigno, the mayor at the time, was the first openly lesbian mayor of an American city.[204] Unsurprisingly, then, few signs of opposition emerged within the city to a domestic partnership policy.

Unlike the Berkeley policy, which was initially limited to city employees, the West Hollywood ordinance provided an open registry. This broader coverage aimed to allow domestic partners to lobby any employer for benefits

198. *Id.* at 20.

199. Kaiser Permanente offered insurance. *See* Milt Freudenheim, *Rising Worry on "Partner" Benefits*, N.Y. TIMES, Aug. 16, 1989, at D1. Berkeley offered registration to the public in 1991. *See* City Clerk, *Domestic Partnership Information*, CITY OF BERKELEY, http://www.ci.berkeley.ca.us/Clerk/Home/Domestic_Partnership.aspx (last visited Oct. 26, 2013).

200. *See* Memorandum from Keith Comrie, City Administrative Officer, to Zev Yaroslavsky, Councilman, Fifth District (Mar. 4, 1985) (on file with author).

201. *Id.* at 1.

202. *Id.*

203. West Hollywood, Cal., Ordinance 22 (Feb. 21, 1985) [hereinafter West Hollywood Ord. 22] (on file with author).

204. *See Ex-Mayor is Convicted in West Hollywood Case*, N.Y. TIMES, Mar. 16, 1986, at 27.

coverage.[205] Nonetheless, as in Berkeley, the West Hollywood status was limited to couples "not related by blood closer than would bar marriage" who "share the common necessities of life" and are "responsible for each other's welfare."[206] These requirements satisfied councilmembers who demanded "some kind of commitment" to avoid the provision of benefits "to anyone who is not a true dependent."[207] Thus, at this early stage, advocates in both Northern and Southern California constructed domestic partnership in a way that mapped onto a model of marriage characterized by exclusive adult coupling, mutual support and obligations, and economic interdependence.

While open to same-sex and different-sex couples, the West Hollywood domestic partnership registry was intended to provide legal and social validation for the relationships specifically formed by lesbians and gay men—a powerful constituency in the small city. In this way, the West Hollywood registry framed domestic partnership around recognition—specifically for same-sex couples. As Mayor Terrigno explained, "[a]llowing domestic partners to register is a way of saying that the relationship is equal to marriage in the eyes of the city."[208] In fact, city officials developed an official domestic partnership certificate "suitable for framing."[209] In this sense, for most couples, the law offered more symbolic than substantive significance.

The ordinance initially provided only hospital and jail visitation rights.[210] Hospital visitation addressed an issue raised directly by the growing HIV/AIDS epidemic. Terrigno explained: "I've heard all kinds of horror stories about people who were not allowed in to visit their partners because they were not immediate family. . . . [The ordinance] would give domestic partners the same visitation rights that married couples get."[211] Yet given that West Hollywood contained no major hospitals, Terrigno anticipated using the domestic partnership ordinance to negotiate with nearby Cedars-Sinai Medical Center.[212]

Not until 1989 did West Hollywood extend healthcare coverage to the (same-sex and different-sex) unmarried partners of city employees.[213] After several unsuccessful attempts to convince private insurers to include coverage

205. *See* Arthur S. Lazere, *Update on the Status of Domestic Partnerships Legislation*, EQUAL TIME, July 24, 1985, at 14.

206. *Id.* at 1.

207. Stephen Braun, *West Hollywood Law Would Expand Rights of Unmarried Couples*, L.A. TIMES, Jan. 31, 1985, at W1 (internal quotation marks omitted).

208. *Id.* In 1993, a West Hollywood couple unsuccessfully challenged California's marriage law. *See* Kathleen Kelleher, *Gay Couple Challenge State Laws on Marriage*, L.A. TIMES, Apr. 21, 1993, at B3; *West Hollywood: Court Denies Gay Couple's Marriage License Petition*, L.A. TIMES, May 22, 1993, at B2.

209. Stephen Braun, *Law Lists Rights, Lacks Teeth*, L.A. TIMES, Feb. 28, 1985, at W14.

210. West Hollywood Ord. 22, *supra* note 203, at 3.

211. Braun, *supra* note 207.

212. *See* Braun, *supra* note 209.

213. *See* West Hollywood City Council Meeting, Minutes 3 (Feb. 6, 1989); *see also* Ron Russell, *W. Hollywood Will Insure Partners of Single Employees*, L.A. TIMES, Feb. 22, 1989, at B3.

for domestic partners, the city self-insured.[214] When extending health coverage to domestic partners, city officials added criteria to "most closely parallel a legally recognized marriage."[215] Domestic partners would now "sign an affidavit that they share a mutual obligation of support for the common necessities of life."[216] The assistant city manager noted that "[t]his is the portion of obligation to each other that a married couple cannot give away through contracts or agreements during the relationship."[217] The marriage statute itself provided that "[h]usband and wife contract toward each other obligations of mutual . . . support."[218] The West Hollywood affidavit converted that obligation into gender-neutral language. Even in domestic partnership's earliest iterations, marriage provided the terms with which to understand and define the new status.

B. Early Domestic Partnership Litigation—Framing Same-Sex Relationships as Marriage-Like

At the same time that advocates advanced rights for unmarried couples at the local level, the California courts considered extending rights at the state level. In litigation challenging the denial of rights to unmarried couples, marriage furnished the norms that defined the claims. State law privileged marriage, and accordingly LGBT advocates attempted to paint same-sex relationships as marriage-like. Ultimately, though, marriage's status provided the basis for denying same-sex couples' claims to recognition outside marriage.

Litigation on behalf of same-sex couples operated against the backdrop of the courts' increasing attention to unmarried different-sex couples. In the 1970s, the California Supreme Court had become a leader in accommodating the rise of nonmarital cohabitation. In its groundbreaking 1976 *Marvin v. Marvin* decision, the court held that upon dissolution of unmarried relationships, courts could enforce cohabitation agreements, whether express or implied.[219] Nevertheless, as Grace Blumberg has shown, *Marvin*'s contractual lens ultimately limited the extension of rights to unmarried couples.[220] In

214. Letter from Kevin M. Fridlington, Human Res. Off., City of West Hollywood, to Thomas F. Coleman, Spectrum Institute (Nov. 12, 1992), *in* REPORT OF THE ANTI-DISCRIMINATION TASK FORCE OF THE CALIFORNIA INSURANCE COMMISSIONER, A CALL TO END UNFAIR INSURANCE DISCRIMINATION AGAINST UNMARRIED CONSUMERS 57 (July 1993) [hereinafter ANTI-DISCRIMINATION TASK FORCE REPORT] (on file with author).

215. West Hollywood, Cal., Consent Calendar: Domestic Partner Medical Coverage 1 (Feb. 6, 1989).

216. *Id.* at 2.

217. *Id.*

218. CAL. FAM. CODE § 5100 (1970).

219. 557 P.2d 106 (Cal. 1976).

220. *See* Blumberg, *supra* note 56, at 1159–70; *see also* Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1293–99 (2001) (explaining criticism of *Marvin*'s contractual approach and documenting the American Law Institute's status-based alternative). The *Marvin* court's

particular, the contract theory restricted unmarried couples' ability to assert rights against third parties. In its 1988 *Elden v. Sheldon* decision, the California Supreme Court held that a man in a cohabiting, unmarried relationship who witnessed the death of his female partner could not recover for loss of consortium and negligent infliction of emotional distress.[221] Distinguishing *Marvin*, which announced rights *inter se*, the court concluded that allowing recovery against a third party would "[inhibit] the state's interest in promoting marriage."[222] The litigation detailed in this Section occurred after *Marvin* but before *Elden*, at a time when the California courts were working out the relationship between unmarried cohabitants' rights and the state's interest in marriage.[223]

In 1982, the California Department of Personnel Administration refused to provide dental benefits for the same-sex partner of Boyce Hinman, a state employee.[224] In response, Hinman sued and was represented by Roberta Achtenberg of the Lesbian Rights Project (the predecessor to the National Center for Lesbian Rights).[225] Marriage framed Hinman's claim, as he argued that his marriage-like relationship with his partner, Larry Beatty, should qualify them for benefits.[226] Indeed, Hinman and Beatty stated they "would marry if they were not prohibited from doing so by state law."[227]

Achtenberg stressed Hinman and Beatty's commonality with married couples:

> They share a home, combine their incomes and assets, and jointly own real and personal property. They enjoy meals together, attend church and social occasions together, and enjoy vacations and recreation together. They have friends together, have a feeling of belonging together, and are looked upon by themselves and by friends and family

space for theories of implied contract, however, can be read as a quasi-status concept. *See* Eskridge, *supra* note 53, at 1930. As Charlotte Goldberg has argued, "couples whose relationship is most like a traditional marriage are likeliest to exhibit an implied agreement to share property." Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 488 (2007).

221. 758 P.2d 582, 586 (Cal. 1988).

222. *Id.*

223. LGBT advocates hoped that same-sex couples could capitalize on the *Marvin* doctrine. *See Big Ruling on Unmarried Couples*, S.F. CHRONICLE, Dec. 28, 1976, at 1. But results in court were mixed. *Compare* Jones v. Daly, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981) (holding that plaintiff, who performed household duties, could not recover after his same-sex, cohabiting partner's death because any agreement was "explicitly and inseparably based upon his services as a paramour"), *with* Whorton v. Dillingham, 202 Cal. App. 3d 447, 454 (1988) (allowing recovery by a man who provided chauffeur and secretarial services to his same-sex, cohabiting partner).

224. Hinman v. Dep't of Pers. Admin., 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

225. *Id.* Two other lawsuits in California challenged the lack of benefits for same-sex couples. *See* Brinkin v. S. Pac. Transp. Co., 572 F. Supp. 236 (N.D. Cal. 1983); Chamberlin v. Frontier Airlines, Inc., No. 310989 (Cal. Super. Ct., filed Dec. 22, 1983). For a description of these cases, see Cox, *supra* note 12, at 36–37.

226. *See* Brief for Appellants at 18, *Hinman*, 213 Cal. Rptr. 410 (No. 3-23749).

227. *Id.* at 1.

> as having a responsibility for each other in case of accident or illness. They are the beneficiaries of each other's wills and life insurance policies, and have made mutual commitments of emotional support and legally enforceable commitments of economic support.[228]

This, of course, is a particular model of marriage—one rooted in adult affiliation, emotional commitment, and financial interdependence. And it recasts the gender-specific "mutual support" language of the marriage statute in gender-neutral terms. Achtenberg claimed that "[t]he only difference between Petitioner Hinman and his fellow state employees with spouses is that Petitioner Hinman is a homosexual," and therefore he and his partner "are forbidden by California law to marry."[229] Achtenberg, then, did not reject marriage; instead, she argued that even if same-sex couples were excluded from marriage as a legal matter, they were sufficiently like married couples to be granted some of the same benefits.

At the same time, Achtenberg distanced her client from different-sex unmarried couples, portraying different-sex nonmarital relationships outside the norms of commitment, mutual support, and financial interdependence that characterized the relationships of both married couples and Hinman and Beatty.[230] She claimed that "many unmarried heterosexual couples do not take on the total economic integration and permanent commitment manifested in Appellant Hinman's relationship and the relationship of married couples."[231]

This suggests that Achtenberg and her clients were not seeking to unsettle marriage; rather, their primary goal was to address the discriminatory treatment of same-sex couples who functioned like married couples. Of course, to make that claim, Achtenberg articulated a particular model of marriage that fit same-sex couples' lives. At this early stage, we see both the construction of same-sex relationships as marriage-like and the articulation of a model of marriage capable of including same-sex couples.

Rather than contest marital-status distinctions generally, Achtenberg argued that the benefits policy discriminated "against homosexuals by use of the status 'spouse.'"[232] This focus on sexual orientation, rather than marital status, reflected constraints imposed by the relevant doctrinal landscape. In its 1983 *Norman v. Unemployment Insurance Appeals Board* decision, the California Supreme Court limited employment claims alleging marital-status

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228. *Id.* at 9.

229. *Id.*

230. *See* Reply Brief for Appellants at 3–4, *Hinman*, 213 Cal. Rptr. 410 (Cal. Ct. App. 1985) (No. 3-23749).

231. Brief for Appellants, *supra* note 226, at 10.

232. *Id.* at 45. At the same time that governing case law and executive orders favored sexual-orientation claims, constitutional norms created greater opportunities for arguments focused on sexual orientation rather than marital status. Achtenberg attempted to map the factors that governed suspect-class status onto same-sex couples. *See id.* at 13–28.

discrimination.[233] Relying on "the state's legitimate interest in promoting marriage," the court upheld the denial of unemployment benefits to a woman who had left her job to accompany her fiancé to another state.[234] In doing so, the court erected a substantial barrier to the claim that tying benefits to marriage was legally impermissible and constructed a doctrinal framework forcing LGBT rights lawyers to distinguish their claims from those based more generally on marital status. For its part, the state attempted to leverage *Norman* so as to group lesbian and gay employees with the larger (unprotected) class of unmarried employees.[235]

Accordingly, LGBT advocates' best prospect relied on showing that, because of marriage access, same-sex and different-sex couples were not similarly situated. Achtenberg, therefore, argued that while

> [t]he state's legitimate interest in promoting marriage may warrant the denial of family dental benefits to heterosexual state employees who choose, for whatever reasons, not to marry their partners, . . . [i]t does not warrant denial of such benefits to Appellant Hinman who would marry his partner if legally allowed to do so.[236]

Achtenberg's claim was not that marriage should cease to be the relevant dividing line; rather, marriage may be the dividing line, but same-sex couples were more like married couples than unmarried (different-sex) couples and thus should be included on the side of marriage.

The ACLU's amicus brief supported Achtenberg's sexual orientation-based focus on marriage access over marriage choice. Coles, who represented the ACLU as a private civil rights attorney at the time, argued that since "California prohibits marriage between individuals of the same gender," the regulation at issue divides state employees into three groups:

> (1) those who are married and qualify for the family partner benefit if they wish it;
>
> (2) those who are not married, but are legally able to marry and qualify for the benefit if they wish it; [and]
>
> (3) those who are not married, and are legally unable to marry and qualify for the benefit.[237]

Since "[a]ll members of the first two groups are heterosexual, and . . . [a]ll members of the third group are homosexual, . . . the regulation creates a 'pure'

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233. 663 P.2d 904 (Cal. 1983).

234. *Id.* at 908. The following year, the court found that an unmarried woman established "good cause" for leaving her job when she moved to accompany her unmarried partner and their child. The existence of the child, however, was a crucial distinguishing factor. *See* MacGregor v. Unemployment Ins. Appeals Bd., 689 P.2d 453, 458 (Cal. 1984).

235. *See* Respondents' Brief at 6, 27–28, 42, *Hinman*, 213 Cal. Rptr. 410 (No. 3-23749).

236. *See* Brief for Appellants, *supra* note 226, at 34.

237. Brief of the American Civil Liberties Union of Northern California as Amicus Curiae in Support of Appellants at 3, *Hinman*, 213 Cal. Rptr. 410 (No. 3-23749) (alteration in original).

distinction between heterosexual state employees and gay state employees."[238] In the eyes of the ACLU, the relevant distinction was not "between those who do and those who do not receive the benefits," but rather "between those who may, if they wish, receive the benefits, and those who may not."[239]

The California Court of Appeal accurately described the plaintiffs' argument that marriage's sexual-orientation-based exclusion distinguished lesbian and gay employees from other unmarried state employees.[240] Nevertheless, the court rejected the plaintiffs' claim, finding there was no classification on the basis of sexual orientation and instead grouping lesbians and gay men with all other unmarried individuals: "Homosexuals are simply part of the larger class of unmarried persons, to which also belong the employees' filial relations and parents, for example . . . . Rather than discriminating on the basis of sexual orientation, therefore, the dental plans distinguish eligibility on the basis of marriage."[241] Consequently, the court found that "plaintiffs are not similarly situated to heterosexual state employees *with* spouses."[242] Even as the marriage-like nature of Hinman and Beatty's relationship formed the basis of their claim, their exclusion from marriage rendered them more like siblings than spouses in the eyes of the law, and therefore ineligible for benefits.

Ultimately, the court concluded that the plaintiffs' complaint was with the marriage statute,[243] which they had not formally challenged.[244] Marriage constituted the dividing line that kept benefits from same-sex couples; yet, in litigation that did not directly contest same-sex couples' exclusion from marriage, the *Hinman* court could justify the denial of benefits by resorting to the marriage law.[245] As the concurrence noted, marriage both distinguished the plaintiffs' claims from those of other unmarried individuals and "compel[led] the result."[246]

C. Task Force Work—Making the Case For and Against Marriage

During the late 1980s and early 1990s, LGBT advocates in California focused their attention on both municipal policy and state-level legislative reform. A series of task forces, led by LGBT rights lawyers, contextualized the needs of lesbians and gay men within broader attempts to accommodate the

238. *Id.* at 3–4.

239. *Id.* at 4. As Eskridge has argued, "The structure of American public law played a role in a process by which marriage became the situs for cutting-edge gaylegal reform." ESKRIDGE, EQUALITY PRACTICE, *supra* note 24, at 5.

240. *Hinman*, 213 Cal. Rptr. at 411–12.

241. *Id.* at 416.

242. *Id.*

243. *Id.* at 419–20.

244. *Id.* at 415.

245. *Id.* at 419–20.

246. *Id.* at 420 (Blease, J., concurring).

shifting shape of the family. In significant ways, task force leaders attempted to resist marriage as a relevant reference point for the distribution of rights and benefits. Yet, at the same time, the results of the task force efforts show that marriage both distinguished same-sex couples from their different-sex unmarried counterparts and constructed the terms of nonmarital recognition. That is, competing and often inconsistent frames characterized the position of marriage as it related to same-sex couples. In fact, the now-familiar frame of domestic partnership as an inferior stopgap measure specifically for same-sex couples emerged at this early juncture—even though domestic partnership included different-sex couples and provided a much more limited bundle of rights.

This Section details task force efforts at both the local and state levels. Los Angeles led the way with its Task Force on Family Diversity. Advocates built on this work through subsequent initiatives in Los Angeles, as well as similar efforts in San Francisco and the state legislative arena. Local efforts evidenced more substantial attempts to address the needs of lesbian and gay families. In contrast, the state-level body, which included religious leaders opposed to LGBT rights, resisted accommodating same-sex couples. Even in San Francisco, though, efforts to roll back gains for unmarried couples demonstrated the impact of the "pro-family" movement's mobilization against LGBT rights.

1. Los Angeles

a. Task Force on Family Diversity

While domestic partnership efforts fizzled in the early 1980s,[247] Los Angeles had become a leader on family-policy reform by the later part of the decade. In 1986, Councilmember Michael Woo convened the Los Angeles Task Force on Family Diversity ("Family Diversity Task Force").[248] Thomas Coleman, a gay lawyer who advocated for the rights of unmarried individuals, had urged Woo to form the task force in an effort to extend employee benefits to domestic partners.[249] Coleman conceptualized LGBT family recognition as part of a broader framework of family-based reform.

The Family Diversity Task Force, which included Coleman as a special consultant, issued its final report in 1988.[250] The report reflected a functional vision, adopting a definition of family that focused on "mutual

247. *See supra* notes 200–02 and accompanying text.

248. *See* Letter from Michael Woo, Councilman, to Thomas F. Coleman, Dir., Domestic Partner Equity Fund (Mar. 5, 1986) (on file with author).

249. *See* THOMAS F. COLEMAN, THE DOMINO EFFECT 77–78 (2009).

250. TASK FORCE ON FAMILY DIVERSITY, CITY OF LOS ANGELES, FINAL REPORT: "STRENGTHENING FAMILIES: A MODEL FOR COMMUNITY ACTION" (1988) [hereinafter L.A. TASK FORCE REPORT] (on file with author).

interdependency" and included "unmarried persons not related by blood, but who are living together and who have some obligation, either legal or moral, for the care and welfare of one another."[251] Indeed, it noted that a majority of Los Angeles adults were unmarried.[252]

When the Family Diversity Task Force turned more comprehensively to unmarried, cohabiting couples—what it termed "domestic partnership families"[253]—it both grouped same-sex couples with other unmarried couples and distinguished such couples by their lack of marriage access:

> There are a variety of reasons why couples decide to live together outside of marriage. For same-sex couples, there are legal obstacles to marriage. For young opposite-sex couples, "trial marriages" may be prompted by fear of making a wrong decision, a fear perhaps justified by the high divorce rates. Long periods, sometimes years, of cohabitation may provide an answer for divorcees trying to avoid renewing old mistakes. For elderly widows or widowers, unmarried cohabitation may be a matter of economic survival, since remarriage can trigger the loss of marital survivor benefits. Economic disincentives or so-called "marriage penalties" prevent many disabled couples from marrying.[254]

While the task force situated many different-sex couples' unmarried cohabitation as either a precursor to marriage or a solution to failed marriage, same-sex couples, along with older and disabled couples, experienced their unmarried status based on their lack of meaningful access to marriage. More specifically, the report explained that "[n]o matter how long they live together, same-sex couples are excluded from marital benefits because the law specifically defines marriage in terms of opposite-sex relationships."[255]

Leaders from the LGBT community also focused on the relationship between sexual orientation and marriage. In testimony regarding employee benefits, Joyce Nordquist, from Los Angeles Lawyers for Human Rights, a lesbian and gay bar association, explained:

> If I were a married woman with a husband, my employer would pay about $650 more a year for my benefits, providing insurance for my husband[,] than they do for me as a single person. As a lesbian I don't expect to get married in the near future so I'm stuck without this and that's my focus.[256]

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251. *Id.* at 18–19 (endnote omitted).

252. *See id.* at 24.

253. *Id.* at 79.

254. *Id.* (endnote omitted).

255. *Id.* (endnote omitted).

256. Testimony of William Weinberger & Joyce Nordquist on Employee Benefits for Domestic Partners, Los Angeles Lawyers for Human Rights, *in* TASK FORCE ON FAMILY DIVERSITY, TRANSCRIPT OF PUBLIC HEARINGS 185, 185 (1987) [hereinafter L.A. TRANSCRIPT] (on file with author).

Marriage both offered a route to benefits for non-gay employees and represented an unrealistic hope for their gay colleagues. For Nordquist, domestic partner benefits constituted a remedy to the sexual-orientation discrimination inherent in using marriage to determine benefits.

The Family Diversity Task Force's own research reflected the importance of marriage access and situated domestic partnership as a stopgap measure specifically for same-sex couples. The Research Team on Gay and Lesbian Couples noted that while the problem of marital-status discrimination "can be overcome in the case of heterosexual couples by getting married . . . no such formal option exists for homosexual couples, since marriage is prohibited to them."[257] In one report, it explained that "marriage does not need to be the primary interest here, since public recognition of marriage as a heterosexual stronghold is so fierce. But there are benefits and a status that marriage bestows on a couple that homosexuals must eventually achieve."[258] This reasoning reflected both distributive and recognition frames for understanding domestic partnership.

The research team positioned nonmarital recognition as a practical measure to aid same-sex couples in a time when marriage recognition seemed unrealistic. It explained that even though "[t]he obvious solution . . . would seem to be a relaxing of the marriage laws[,] . . . it is likely that the public debate would be, at the very least, heated and divisive."[259] Therefore, the team recommended

> a middle course, which provides recognition of gay and lesbian relationships, documents and binds their commitment in a manner that can satisfy the courts, or any agencies which might have a genuine interest in the existence and legitimacy of such relationships, and yet does not encroach on the sensitive territory of heterosexual marriage.[260]

Same-sex couples' lack of recognition was framed in part by their lack of access to marriage; domestic partnership—even when open to same-sex and different-sex couples—constituted a moderate, compromise position that sounded more in the register of sexual-orientation equality than family diversity.[261] Even at this early point, domestic partnership seemed like an inferior status carved out for same-sex couples to avoid recognizing same-sex marriage and yet offer some form of recognition.

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257. Task Force on Family Diversity, Research Team on Gay and Lesbian Couples, City of Los Angeles, *in* CITY OF LOS ANGELES, TASK FORCE ON FAMILY DIVERSITY, SUPPLEMENT (PART ONE), REPORTS OF RESEARCH TEAMS, at S-192, S-216 (1987) (on file with author).

258. *Id.* at S-209.

259. *Id.* at S-216.

260. *Id.*

261. *See* Memorandum from David Link, to Los Angeles City Task Force on Family Diversity 3 (Dec. 1, 1986), *in* CITY OF LOS ANGELES, TASK FORCE ON FAMILY DIVERSITY, SUPPLEMENT (PART TWO), REPORTS OF RESEARCH TEAMS, at S-832, S-834 (1987) (on file with author).

In some ways, the reports reflected Coleman's own views on domestic partnership and marriage for same-sex couples. The research team was composed of University of Southern California law students working under the direction of Coleman, who served as an adjunct professor.[262] Coleman began advocating for unmarried individuals after he discovered he could not marry his same-sex partner. They held a wedding in 1981 while emphasizing its lack of legal effect.[263]

While Coleman remained committed to a vision that made marriage less important to the distribution of rights and benefits, he also wanted same-sex couples to have access to marriage.[264] To the media and the public, Coleman framed his efforts as a supplement to, rather than denigration of, marriage.[265] Domestic partnership constituted both an alternative to marriage for all couples and an expedient solution for same-sex couples. Coleman took a long view of marriage as an LGBT goal. In 1989, he called a proposal by the California State Bar Conference of Delegates to open marriage to same-sex couples a "nice academic exercise . . . too far ahead of its time."[266] Indeed, in *Baehr*'s aftermath, Coleman traveled to Hawaii to urge lawmakers to pass an inclusive domestic partnership law as a way to both decrease the importance of marriage and sidestep the question of same-sex marriage.[267]

After receiving wide-ranging public testimony and extensive research reports,[268] the Family Diversity Task Force recommended providing domestic partner benefits for unmarried couples. In addressing problems of definition and authentication, its leaders felt pressure to make domestic partnership sufficiently marriage-like to encourage officials and employers to adopt the concept. The task force recommended a definition that included two individuals

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262. *See* Prof. Thomas F. Coleman, University of Southern California Law Center, Rights of Domestic Partners, Syllabus 1 (1988) (on file with author).

263. *See* COLEMAN, *supra* note 249, at 100–02. In 2008, the couple legally married in California. *See id.* at 116.

264. *See id.* at 106–07.

265. *See* Michael D'Antonio, *Unmarital Bliss*, L.A. TIMES MAG., Apr. 9, 2000, at 20; Philip S. Gutis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, N.Y. TIMES, Nov. 5, 1989, at E24.

266. *See* COLEMAN, *supra* note 249, at 106. Lesbian and gay bar associations "expressed surprise and excitement over passage of the resolution," which had been proposed by a heterosexual member. Pamela Wilson, *Marital Rights for Same-Sex Couples Pushed*, SAN DIEGO DAILY TRANSCRIPT, Sept. 20, 1989, at 37. Ettelbrick explained, "Nobody was even pushing that issue in the gay community in California . . . . It was well meaning straight people who took the debate away from us." Gutis, *supra* note 265.

267. *See* COLEMAN, *supra* note 249, at 108–10; Thomas F. Coleman, *The Hawaii Legislature Has Compelling Reasons To Adopt a Comprehensive Domestic Partnerships Act*, 5 LAW & SEXUALITY 541, 544–45 (1995); *see also* David Link, Marriage Wars 6 (1995) (unpublished manuscript) (on file with author) (explaining that Coleman believed "public support for gay marriage [was] a good ten years off" and "want[ed] to use domestic partnership in the interim to keep the political temperature down").

268. *See generally* L.A. TASK FORCE REPORT, *supra* note 250; L.A. TRANSCRIPT, *supra* note 256.

who "reside in the same household," "share the common necessities of life," "have a mutual obligation of support," are at least 18, unmarried, and unrelated.[269] The definition did not require an intimate relationship, but the restriction on blood relatives and the adoption of language in the California marriage law evidence contemplation of the marriage-like couple.

Furthermore, the supporting arguments and underlying testimony demonstrate that the Family Diversity Task Force had in mind intimate, coupled relationships. Achtenberg, the Lesbian Rights Project's directing attorney,[270] supplied influential testimony that hewed to the marital model. In providing recommendations on eligibility and authentication that shaped the guidance issued by the Family Diversity Task Force,[271] Achtenberg explained:

> If Susie lives with Aunt Maud and Aunt Maud is somebody who should be eligible for this kind of benefit—we are talking about the truth of most peoples [*sic*] living situations, we're talking about their mated relationships and we are talking about the ability of an adult to provide for his or her mate and in that respect, I don't believe that the argument about Aunt Maud is a valid one. We would have to figure out how people can provide for extended families in order to answer this particular question. I don't think that's a viable solution. Including Aunt Maud basically would guarantee that the price tag would be so high that there's no way that you could extend the benefit to those for whom I believe it should be intended.[272]

To make her case convincing both to officials dealing with city budgets and employers and insurers considering costs, Achtenberg drew a line between those unmarried families that looked like married couples ("mated relationships") and those that did not (such as the aunt/niece pair). Even if Achtenberg held more capacious views on family policy, she provided testimony to accommodate concerns by influential stakeholders. Focusing on marriage-like relationships provided the best way of doing so. Following Achtenberg's advice, the Family Diversity Task Force recommended domestic partner benefits for city employees, whether in "same-sex or opposite-sex relationships."[273]

b. Consumer Task Force on Marital Status Discrimination

Following up on recommendations by the Family Diversity Task Force, the Los Angeles city attorney convened the Consumer Task Force on Marital

269. L.A. TASK FORCE REPORT, *supra* note 250, at xxv.

270. Testimony of Roberta Achtenberg, Directing Attorney, Lesbian Rights Project, Gay and Lesbian Couples/Families, *in* L.A. TRANSCRIPT, *supra* note 256, at 253.

271. *See* L.A. TASK FORCE REPORT, *supra* note 250, at 79.

272. Testimony of Roberta Achtenberg, *supra* note 270, at 257.

273. L.A. TASK FORCE REPORT, *supra* note 250, at 100. In 1992, the city implemented the recommendation for family leave when an employee's domestic partner is ill or dies. L.A., CAL. ORDINANCE 168,238 (Oct. 17, 1992).

Status Discrimination ("Consumer Task Force"), which Coleman chaired.[274] Rights of unmarried individuals and couples, one of many areas addressed by the earlier body, became the sole charge of the new group.

The Consumer Task Force mission and its subsequent report reflected resistance to marriage's special status. As the Family Diversity Task Force had done, the Consumer Task Force opened its Final Report, issued in 1990, by announcing that "[t]he majority (55%) of adults in the City of Los Angeles are not married."[275] Thus, lesbians and gay men were understood as part of a broader group of unmarried individuals who were harmed by the public and private privileging of marriage.[276]

The report also explained the various ways in which many individuals were channeled away from marriage: "Economic disincentives and so-called 'marriage penalties' discourage many elderly or disabled adults from marrying. Gay men and lesbians, of course, can't marry their partners because the law does not recognize same-sex marriage."[277] Even as lesbian and gay singleness was defined by exclusion from marriage, lesbians and gay men were seen as part of a broader constituency lacking meaningful access to marriage.

Public testimony received by the Consumer Task Force revealed a competing perspective—one that viewed marriage access as a meaningful distinction that both harmed same-sex couples and distinguished them from their different-sex unmarried counterparts. LGBT community representatives highlighted the unique plight of same-sex couples and the salience of sexual orientation. William Bartlett of AIDS Project Los Angeles testified that while marital status discrimination may "pose serious problems for unmarried heterosexual couples affected by AIDS, . . . there is a distinct difference. For heterosexuals, marital status is a matter of choice. . . . For a gay or lesbian couple, marital status is not a matter of choice but a matter of restriction."[278] The HIV/AIDS epidemic demonstrated the need for family recognition for gay male couples by highlighting the punitive effects of the state's restrictive marriage law.[279] Bartlett explained that many individuals living with

274. OFFICE OF THE CITY ATTORNEY, LOS ANGELES, CA, CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, FINAL REPORT: "UNMARRIED ADULTS: A NEW MAJORITY SEEKS CONSUMER PROTECTION" 1 (Mar. 1990) [hereinafter CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, FINAL REPORT] (on file with author).

275. *Id.* at vi.

276. At the state level, Coleman urged families to register as "unincorporated nonprofit associations," but this did not produce tax or legal benefits. Laurie Becklund, *The Word "Family" Gains New Meaning*, L.A. TIMES, Dec. 13, 1990, at A3.

277. CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, FINAL REPORT, *supra* note 274, at 9.

278. William Bartlett, Asst. Prog. Mgr., Case Mgmt., AIDS Project Los Angeles, Testimony to the Consumer Task Force on Marital Status Discrimination (Jan. 29, 1990), *in* CONSUMER TASK FORCE ON MARITAL STATUS DISCRIMINATION, SUPPLEMENT TO FINAL REPORT (SOURCE MATERIALS) 256, 256 (Mar. 1990) (on file with author).

279. *See* CHAUNCEY, *supra* note 29, at 104.

HIV/AIDS bear "the burden of discrimination for not partaking in an institution from which by law they are excluded."[280] Even as the Consumer Task Force attempted to define the primary injury in terms of marital-status discrimination, other movement activists considered sexual-orientation discrimination to be at the heart of a regime organized around marriage.

2. State-Level Work: The Legislature's Joint Select Task Force on the Changing Family

While local Los Angeles stakeholders noted their lack of power to remedy many inequalities experienced by same-sex couples, including legal exclusion from marriage,[281] state-level efforts largely skirted issues related to same-sex couples and did not contemplate including them in the marriage law. Such silence, however, should not be read as building the case against marriage. Rather, despite LGBT advocates' efforts, work at the state level largely sought to channel more different-sex couples into marriage while continuing to exclude same-sex couples.[282]

In 1987, the California legislature established the Joint Select Task Force on the Changing Family ("Joint Select Task Force").[283] The Joint Select Task Force issued its First Year Report in April 1989.[284] Before the First Year Report was issued, the task force's Couples Workgroup submitted its own 1988 report to the larger body.[285] The Couples Workgroup included only three members: Democratic state senator David Roberti, Coleman, and William Wood, the executive director of the California Catholic Conference.[286] At the outset, the report included a disclaimer explaining that "[t]he views contained [in the report] are not necessarily shared by all Task Force members."[287]

The Couples Report focused mostly on channeling different-sex couples into marriage. After an extensive discussion of the importance of married couples, the report made recommendations for strengthening marriage.[288] To push different-sex couples into marriage, it urged recognition of common law

280. Bartlett, *supra* note 278, at 256.

281. L.A. TASK FORCE REPORT, *supra* note 250, at 82.

282. *See* COLEMAN, *supra* note 249, at 81–82. This resonates with Margot Canaday's concept of the "legal regime of heterosexuality," in which the state "punish[es] homosexuality and reward[s] marriage." Margot Canaday, *Heterosexuality as a Legal Regime*, *in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 442, 443 (Michael Grossberg & Christopher Tomlins eds., 2008).

283. JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, COUPLES WORKGROUP, PRELIMINARY REPORT: "CALIFORNIA COUPLES: RECOGNIZING DIVERSITY AND STRENGTHENING FUNDAMENTAL RELATIONSHIPS" (1988) [hereinafter COUPLES REPORT] (on file with author).

284. JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, FIRST YEAR REPORT: PLANNING A FAMILY POLICY FOR CALIFORNIA (April 1989) [hereinafter PLANNING A FAMILY POLICY] (on file with author).

285. COUPLES REPORT, *supra* note 283.

286. *See id.* at first unnumbered text page.

287. *See id.*

288. *See id.* at 10–25.

marriage. It argued that rather than "channel people into formal, ceremonial marriages," the "abolition of common law marriage" allowed couples "to cohabit without the obligations and benefits of formal marriage."[289] Accordingly, "legalizing common law marriage would discourage cohabitation."[290] The Couples Workgroup thus prioritized marriage and denigrated unmarried cohabitation as it recommended a way to legally marry more different-sex couples.

For those who could marry, the message was clear: they should. The report recommended a "Vesper Marriage Act" for older couples, for whom "remarriage may be economically unfeasible because of legal rules that end survivor benefits upon remarriage."[291] This "form of marriage" would be "limited to persons age 60 and older" and would allow them to be treated as single for tax and pension purposes.[292] Similarly, the report recommended removing the "marriage barrier" experienced by disabled (different-sex) couples by virtue of "deeming."[293] Normally, the entirety of a non-disabled spouse's income is presumed available to the disabled spouse for purposes of determining the disabled spouse's public benefits eligibility. This, of course, could discourage marriage because of its potential for drastically reducing the amount of public benefits provided.[294]

While the workgroup also explained problems same-sex couples faced because they lacked marriage access, it did not recommend such access.[295] Instead, it merely attempted to show that same-sex couples form "family relationships."[296] Still, the workgroup recommended that "domestic partners," which included both same-sex and different-sex couples, be included in laws governing wrongful death actions—a right denied by *Elden*—and insurance discrimination.[297]

When the Joint Select Task Force itself eventually issued its own report, it acknowledged that "[t]he profile of California's families has changed dramatically in the last three decades," and that "[f]ewer than one in ten families presently fits the 'traditional family' model—breadwinner father, homemaker mother, and two or more children."[298] Accordingly, the report made numerous recommendations regarding work-life balance, aiming

289. *Id.* at 27. For an exploration of the abolition of common law marriage in California and its potential revival through recognition of cohabitation agreements, see generally Goldberg, *supra* note 220.

290. COUPLES REPORT, *supra* note 283, at 27.

291. *Id.* at 31.

292. *Id.*; *see also* PLANNING A FAMILY POLICY, *supra* note 284, at 80, 83.

293. COUPLES REPORT, *supra* note 283, at 32–33.

294. *Id.*; *see also* PLANNING A FAMILY POLICY, *supra* note 284, at 80, 83–84.

295. COUPLES REPORT, *supra* note 283, at 33–34.

296. *Id.* at 34.

297. *See id.* at 40–44.

298. *See* PLANNING A FAMILY POLICY, *supra* note 284, at 3 (endnote omitted).

specifically to support working mothers.[299] And it sought to improve access to healthcare for families across the state.[300]

Yet the Joint Select Task Force made no recommendations explicitly aimed at "domestic partners" or same-sex couples, even though it declared that couples in "long-term domestic partnerships outside of marriage . . . whether opposite sex or same sex . . . benefit from clarity and agreement regarding their relationship and the commitment it implies."[301] The task force focused only on recommendations aimed at strengthening marriage and channeling more different-sex couples into marriage.[302] It specifically recommended the removal of barriers to marriage for "disabled, elderly, and poor couples"[303]— but not for same-sex couples. In fact, it failed to route the needs of same-sex couples through government action, instead encouraging them to "utilize legal contracts such as wills, the durable power of attorney, and express written or verbal cohabitation agreements."[304]

Ultimately, the Joint Select Task Force resisted a vision that either protected unmarried couples qua unmarried couples or meaningfully included same-sex couples as part of family-law reform.[305] In contrast to local efforts in Los Angeles, pro-marriage politics—which both denigrated nonmarital relationships and excluded same-sex couples—powerfully shaped state-based work.[306] This may reflect the influence of social-conservative advocates at the state, as opposed to local, level. In fact, the Joint Select Task Force heard testimony from James Dobson, head of the national Christian Right organization Focus on the Family, and Beverly Sheldon, the wife of Traditional Values Coalition founder Louis Sheldon.[307] And Dobson, along with David Blankenhorn, founder of the social-conservative Institute for American Values, sat on the task force's National Advisory Committee.[308] As compared to local task force work, social-conservative advocacy—specifically on the position of

299. *See id.* at 26–28.

300. *See id.* at 71.

301. *See id.* at 79.

302. *See id.* at 83–84.

303. *See id.*

304. *See id.* at 80.

305. The California Commission on Personal Privacy, a 1982 task force that included Coleman, recommended that the legislature "enact procedures allowing members of California's 'alternative families' . . . to declare their family status." REPORT OF THE STATE OF CAL. COMM'N ON PERSONAL PRIVACY, EXECUTIVE SUMMARY 89 (Dec. 1982) (on file with author).

306. It is worth noting that the New Right had gained influence in California. *See* Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201, 210 (2013) (linking former California Governor Ronald Reagan to the New Right). Although Jerry Brown succeeded Ronald Reagan and served as governor of California from 1975 to 1983, the Republican administrations of George Deukmejian and Pete Wilson covered 1983 to 1999.

307. *See* PLANNING A FAMILY POLICY, *supra* note 284, at Appendix, Presenters to the Task Force, at g–h.

308. *See id.* at Appendix, National Advisory Committee, at c.

marriage and the relationship of same-sex couples to family policy—meaningfully contributed to state-level work.

3. San Francisco

Meanwhile, local work in San Francisco offered more hope to LGBT advocates. Domestic partnership efforts, which had emerged in San Francisco in the early 1980s, gained steam again by the close of the decade. As it had before, the centrality of marriage both provided the reference point for those pushing the concept and animated the objections of those opposed. And while domestic partnership proposals included all unmarried couples, much attention—both supportive and hostile—focused on same-sex couples.

a. Reviving Domestic Partnership

In 1988, Supervisor Britt announced his intention to introduce domestic partnership legislation once again.[309] In response, the San Francisco Human Rights Commission ("HRC") held a public hearing on the topic on March 8, 1989.[310] The testimony, which was overwhelmingly supportive, revealed potentially competing arguments and goals. While some speakers focused specifically on rights and recognition for same-sex couples, others conceptualized such couples as part of a broader group of families harmed by a system organized around marriage.

In his testimony, Britt emphasized the importance of "primary relationships" and claimed that "the major force of discrimination against Gays and Lesbians has been the denial of... legal recognition."[311] Yet Cynthia Goldstein, an attorney with National Gay Rights Advocates in San Francisco, stressed that "this issue goes beyond just the Lesbian and Gay community."[312] Like some of her counterparts in Los Angeles, Goldstein grouped same-sex couples with elderly couples and single parents living with another adult. "Most of these people," she claimed, "are unable to marry under California law, regardless of their commitment to each other, or how financially and emotionally bound they are."[313] In this sense, Goldstein conceptualized the ability to marry not simply in legal terms, but also in practical and economic ones. She also included families defined by mutual support but not romantic affiliation. Achtenberg, the Lesbian Rights Project attorney who delivered influential testimony in Los Angeles, explained how nonmarital families in general are harmed by their exclusion from marital benefits. Yet her examples focused specifically on discrimination against same-sex couples, including

309. *See* HRC INVESTIGATION, *supra* note 153, at iii.
310. *See id.* at Appendix C.
311. *Id.* at 4.
312. *Id.* at 5.
313. *Id.* at 6.

Hinman and his partner.[314] Brougham and Coles, the pioneers of domestic partnership legislation, also testified.[315] While Brougham detailed the process and results in Berkeley, Coles covered the range of domestic partnership policies that cities and employers had adopted. Coles explained that some policies referred to "spouse equivalents" while others, like Berkeley's and West Hollywood's, "define[d] criteria in considerable detail."[316]

Even as LGBT advocates desired protections for same-sex couples, many of them urged a relatively inclusive version of family reform. Yet representatives from the healthcare and insurance industries voiced concerns that suggested limiting domestic partnership to intimate, coupled relationships. Kaiser Permanente's Robert Zimmerman testified that "when the restriction, 'not related by blood or marriage,' is taken out, carriers . . . lose interest."[317] When Mayor Art Agnos asked "why including blood relatives would destroy the program," Zimmerman explained that allowing "parents, grandparents, elderly uncles, nieces, etc. . . . [to] enter, . . . actuarially throws it off."[318] That is, "[t]he selection element—adding relatives who have the greatest need for health coverage—would drive up the costs" in a way that counseled in favor of limiting domestic partnership coverage to intimate, coupled relationships.[319]

As it had earlier in the decade, the Catholic leadership registered its opposition. In fact, the only recorded opposition to domestic partnership at the public hearing came from the Archdiocese of San Francisco. Its representative worried that "putting Domestic Partnership on a par with marriage would erode marriage" and could "legitimize temporary or transient relationships."[320] Once again, the church's position situated domestic partnership within more general attacks on marriage. The church's opposition, however, was relatively measured. In response to questions, the Archdiocese's representative explained that the church was more concerned with the "recognition" provided by domestic partnership registration than with the provision of employment benefits to nonmarital families.[321] In other words, from the official Catholic perspective, the recognition frame was more troubling than the distributive, social provisioning frame.

In its subsequent report, HRC took a relatively capacious view of reform, making clear that the "alternative family situations" in need of protection included both domestic partnerships and units "consist[ing] of siblings, or an aunt, or other blood relative[s]."[322] Nonetheless, HRC referred to a "domestic

314. *See id.* at 7.
315. *Id.* at 9, 15.
316. *Id.* at 15.
317. *Id.* at 14.
318. *Id.*
319. *Id.*
320. *Id.* at 34.
321. *Id.* at 37.
322. *Id.* at iii.

partner" as a "significant other," showing that domestic partnership specifically signaled intimate couples.[323] The report invoked both distributive and recognition frames, explaining that domestic partners "share the commitment and necessities of life of any couple, but the lack of a marriage license stands in the way of equality of benefits and recognition of their relationships."[324] Still, this conceptualization included both same-sex and different-sex couples. In its findings, HRC explained that "although domestic partnerships affect Lesbians and Gay men, many different family units and family needs can be addressed by changes in legislation."[325]

In 1989, pursuant to the HRC recommendation, the Board of Supervisors again passed a domestic partnership ordinance—seven years after Mayor Feinstein vetoed the city's first attempt.[326] The legislation would have enabled unmarried same-sex and different-sex couples to register with the city. It defined domestic partners as "two people who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together and have signed a Declaration of Domestic Partnership in which they have agreed to be jointly responsible for basic living expenses."[327]

Even as the ordinance embraced a relatively inclusive notion of nonmarital recognition, it targeted intimate couples in a way that reflected insurers' concerns. The ordinance provided that "the two may not be related to each other in a way which would bar marriage in California."[328] Furthermore, marriage helped to define the contours of domestic partnership. The six-month post-termination waiting period contained in the original 1982 proposal appeared in the 1989 ordinance.[329] An exception making clear that the period "does not apply if the earlier domestic partnership ended because of the death of one of its members" only further cemented the analogy to marriage and divorce.[330]

The largely symbolic ordinance would have provided few substantive rights. Without meaningful benefits, the public conversation around the ordinance focused on recognition specifically for same-sex couples and ascribed marital tropes to domestic partnership. Journalists reporting on the new ordinance noted that same-sex couples entering domestic partnerships were seeking "to get married."[331] The ordinance itself allowed couples to file

323. *Id.* (internal quotation marks omitted).

324. *Id.*

325. *Id.* at 48.

326. Morris, *supra* note 170, at 1; S.F., CAL., ORD. § 4001 (1989) (repealed Nov. 7, 1989).

327. S.F., CAL., ORD. 176-89, § 4002(a) (approved June 5, 1989) (repealed Nov. 7, 1989) (on file with author).

328. *Id.* § 4002(b).

329. *Id.*

330. *Id.*

331. Elaine Herscher, *New Trend for Gays—Getting Married*, S.F. CHRON., June 24, 1989, at A1.

their "Declaration of Domestic Partnership" with the county clerk.[332] The *San Francisco Chronicle* announced that "[s]cores of gay couples, who see the opportunity for a symbolic marriage, plan to register en masse at City Hall and follow the event with a giant wedding reception."[333]

Still, officials hoped to pave the way for health insurance and bereavement leave for city employees in domestic partnerships. To that end, the Board of Supervisors simultaneously passed a resolution urging the mayor to form a "task force to examine [the] feasibility of extending health benefits to domestic partners of city employees."[334] Echoing Britt's earlier testimony, the resolution focused on same-sex couples and their right to form "primary relationships."[335] It announced that "[t]he right of every person to form private relationships of mutual caring and economic interdependence . . . continues to be denied to lesbian and gay couples."[336] Accordingly, the Board of Supervisors urged the city "to end discrimination against people whose relationships are not socially sanctioned, particularly lesbian and gay couples who are denied recognition given to other couples."[337] It asked that the task force be charged with developing a plan "for adoption by the Health Services System, under which lesbian and gay couples and other nonmarital couples may be accorded the benefit of the City's Health Benefits Plan."[338] It also asked that the task force "[s]ystematically examine all policies and practices of the City, identify those which disadvantage lesbian and gay couples and other nonmarital couples, and propose changes to end that discrimination."[339]

While LGBT advocates celebrated the domestic partnership ordinance, social conservatives, who objected to the perceived endorsement of same-sex relationships, led an initiative campaign against it.[340] The Orange County-based Traditional Values Coalition, a conservative Christian organization, drove the San Francisco referendum effort.[341] While proponents of the ordinance stressed that it provided rights for gay male couples in the midst of the AIDS crisis, opponents raised the specter of increased insurance costs, implying that the

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332. S.F., CAL., ORD. 176-89, § 4002(e).

333. Herscher, *supra* note 331.

334. S.F. RESOLUTION 385-89, Task Force to Examine Extension of Health Benefits (approved May 25, 1989) [hereinafter S.F. RESOLUTION] (on file with author); *see also* Miranda Kolbe, *Domestic Partners Law Imminent in S.F.*, GAY COMMUNITY NEWS, May 21–27, 1989, at 1.

335. S.F. RESOLUTION 385-89.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. Valerie Basheda, *Domestic Partnership Ordinance Stalls*, L.A. TIMES, July 7, 1989, at 3 (quoting Del McLaughlin, an Eagle Forum member who participated in the initiative campaign).

341. Victor F. Zonana, *Gay Agenda Takes Beating—Even in San Francisco*, L.A. TIMES, Nov. 9, 1989, at A1.

public would bear the costs of medical care needed specifically by gay men.[342] In November 1989, voters narrowly defeated the law.[343]

The San Francisco campaign constituted part of the Traditional Values Coalition's broader push across the state to repeal local pro-gay legislation. On the same day that voters rolled back San Francisco's domestic partnership ordinance, Irvine voters excluded sexual orientation from the city's human rights law and Concord voters repealed an ordinance that protected individuals with AIDS from discrimination.[344] As one activist put it, "there is an entity as strong as or stronger than the gay voting block in San Francisco: conservatives and religious people who believe in traditional family values."[345]

LGBT activists, who had recently fended off a series of anti-gay AIDS initiatives at the state level,[346] were surprised by the defeats.[347] For his part, Coleman saw the San Francisco results as an indication that "'gay advocates of domestic partnership should try to build coalitions with other groups who would benefit from such measures.'"[348] In other words, Coleman thought a more inclusive policy and strategy would improve advocates' chances for success.

The San Francisco task force, which had been initiated through an independent resolution and would come to be called the Mayor's Task Force on Family Policy, remained in place even after the domestic partnership defeat in San Francisco.[349] Like its counterpart in Los Angeles, the San Francisco task force emerged from LGBT advocates' domestic partnership activism within local government channels.[350] Supervisor Britt had ushered domestic partnership and the related task force resolution through the Board of Supervisors. And Achtenberg, a prominent LGBT rights lawyer, would chair the task force itself.

b. The Mayor's Task Force on Family Policy

The Mayor's Task Force on Family Policy ("Mayor's Task Force") issued its report in 1990, a few months after the domestic partnership ordinance's

342. *See* Chambers, *supra* note 12, at 188.

343. Zonana, *supra* note 341.

344. *See id.*

345. *Id.* at A34.

346. *See* VAID, *supra* note 83, at 83 (describing the defeat of three statewide initiatives from 1986 to 1989).

347. *See* Zonana, *supra* note 341, at A1.

348. *Id.*

349. *See* Marc Sandalow, *New Benefits for Unwed Partners*, S.F. CHRON., Mar. 29, 1990, at A1.

350. Letter of Transmittal from Roberta Achtenberg, Esq., to Art Agnos, Mayor, and People of San Francisco (June 13, 1990), *in* APPROACHING 2000: MEETING THE CHALLENGES TO SAN FRANCISCO'S FAMILIES: THE FINAL REPORT OF THE MAYOR'S TASK FORCE ON FAMILY POLICY (June 13, 1990) [hereinafter APPROACHING 2000] (on file with author).

defeat at the polls.[351] The report presented a family-diversity vision that accommodated San Francisco's non-traditional families while recognizing the enduring legacy of the conventional, married family.[352] As its predecessor in Los Angeles had, the Mayor's Task Force defined "family" broadly as

> a unit of interdependent and interacting persons, related together over time by strong social and emotional bonds and/or by ties of marriage, birth, and adoption, whose central purpose is to create, maintain, and promote the social, mental, physical and emotional development and well being of each of its members.[353]

The task force advanced a concept of family that stressed mutual support and blurred the lines between marital and nonmarital families. All such families were seen to serve similar socially significant purposes.

While the Mayor's Task Force concluded that "it is not feasible for the City to provide health care benefits to all extended family members at this time," it recommended providing health insurance benefits to the partners and children of city workers.[354] The workers would be eligible for domestic partner benefits if they could provide a sworn affidavit attesting that they "live[d] in the same household," "share[d] the common necessities of life," and were not "related by blood to one another closer than would bar marriage."[355] The Mayor's Task Force declared that "[t]he obligations and financial responsibilities embodied in the affidavit are exactly the same as those assumed by husbands and wives under California law."[356] Indeed, "in order to enroll a domestic partner for health insurance, a City employee [would] have to assume the same financial obligations assumed by married couples."[357] The terms of the proposed affidavit thus described family and dependency in relation to marriage. As it had in Los Angeles, marriage made domestic partnership legible.

These requirements sought to ensure a committed relationship and prevent presumably more casual relationships from obtaining costly benefits. In doing so, they situated the concept of domestic partnership as marriage-like rather than a more expansive model of recognition. Not only were those outside of intimate, coupled relationships beyond the scope of the proposed domestic partnership scheme, but the relationships within the ambit of domestic partnership were expected to act like married couples. In fact, the task force report assured the mayor that since city employees "will become liable for food, shelter and medical care for the domestic partner[,] employees will be

351. *Id.*
352. *See id.* at 1.
353. *Id.*
354. *Id.* at 27–29.
355. *Id.* at 30–31.
356. *Id.* at 31.
357. *Id.* Of course, given that state rather than local law principally governed marriage, officials in San Francisco could do little to enforce marital obligations against domestic partners.

unwilling to assume this obligation for mere friends, just as they would be unwilling to marry a mere friend in order to provide health insurance."[358]

Of course, the appeal to marriage as a benchmark addressed the reluctance of insurers to provide domestic partner coverage, particularly in light of the HIV/AIDS epidemic.[359] On one hand, the AIDS crisis highlighted the need for the rights conferred by domestic partnership;[360] healthcare coverage, medical decision making, hospital visitation, and survivors' rights for same-sex couples took on a new sense of urgency.[361] On the other hand, HIV/AIDS complicated the demand for domestic partner coverage by heightening the financial concerns voiced by insurance carriers and employers. Some employers worried that domestic partnership provisions would allow individuals to cover ailing friends. As a benefits manager at a San Francisco company put it, "An employee could say to a friend who was dying of AIDS, 'Yes, you'll be my partner for the remainder of your life.'"[362]

Members of the Mayor's Task Force responded to these concerns by expressing their willingness "to set the rules of what a domestic partner is so close to a spouse that [insurers and employers] don't really expand [their] risk very much."[363] Proponents thought the marriage-like domestic partnership standard would minimize some of the risk assumed by insurers and reduce the number of individuals fraudulently claiming domestic partnership status to obtain health insurance.[364] Even then, insurance carriers expressed concern over healthcare costs for gay couples who met the domestic partnership qualifications.[365] As a compromise, the task force reached agreement with an insurer to include an increased premium for domestic partners and require the annual reporting of HIV-related costs to the city.[366]

Once released, the recommendations of the Mayor's Task Force quickly drew opposition from social conservatives. As the *San Francisco Chronicle* observed, "Several of the proposals are nearly identical to elements of the landmark domestic partners law that was rejected by voters in November,

358. *Id.*

359. *See id.*

360. *See* Chambers, *supra* note 12, at 184 ("AIDS had brought home the price that gay men and lesbians had been paying for the social and legal nonrecognition of their relations."); Rubenstein, *supra* note 127, at 91. While HIV/AIDS highlighted the legal needs of gay male couples, the increasing number of lesbian couples with children focused attention on family recognition and parental rights for those couples. *See* CHAUNCEY, *supra* note 29, at 105 ("The complex legal issues raised by the lesbian baby boom provided another powerful impetus to the campaign to secure legal recognition of lesbian and gay families.").

361. *See* Chambers, *supra* note 12, at 184–85.

362. Freudenheim, *supra* note 199, at D5.

363. *Id.*

364. *See* APPROACHING 2000, *supra* note 350, at 31–32.

365. *See id.* at 31.

366. *See id.* at 34–35.

eliciting immediate criticism from opponents."[367] Echoing the position of social-conservative groups, one activist objected: "The voters have spoken. . . . I see no reason why those people would change their minds. As far as I'm concerned, [domestic partnership] undermines traditional marriage because it brings other relations on par."[368] Nonetheless, Mayor Agnos defended the recommendations by reappropriating social conservatives' language to describe the results as "progressive, *pro-family* policy."[369]

Overall, the task force efforts at both the local level in Los Angeles and San Francisco and at the state level reveal competing logics and considerations in the push for rights for same-sex couples. For those supporting rights and recognition for unmarried couples, same-sex couples occupied two positions that could lead in different directions. LGBT advocates frequently situated lesbians and gay men within a much larger population harmed by the special treatment of marriage. Through this lens, the government should distribute rights and benefits without regard to marital status. At the same time, LGBT leaders also distinguished lesbians and gay men from other unmarried individuals by stressing same-sex couples' unique exclusion from marriage and their inability to obtain the status conferred by state recognition. Under this view, delivering rights and recognition to same-sex couples constituted a primary goal. Of course, these positions were not mutually exclusive. Advocates sought to minimize the importance of marriage even as they drew on marital norms, invoked same-sex couples' categorical exclusion from marriage, and emphasized the importance of recognition to advance and define domestic partnership.

Actors outside the LGBT movement influenced the shape of nonmarital recognition. Forces that would support domestic partnership in some form also sought to limit the reach and impact of domestic partnership. Accordingly, they embraced the position that viewed domestic partnership as reflecting, rather than rejecting, marriage. Insurance carriers, for instance, resisted terms that broadly opened benefits to nonmarital families and thereby constrained the potential of domestic partnership to unseat marriage. All the while, "traditional family values" activists limited the space for LGBT gains of any sort.

D. Bridging Marital and Nonmarital Norms: The Enactment of Domestic Partnership in San Francisco and Los Angeles

While domestic partnership gained traction in smaller, progressive cities during the 1980s, the task force work in Los Angeles and San Francisco laid the foundation for breakthroughs in these cities in the early 1990s. As domestic partnership finally became a reality, marital norms furnished important

367. Marc Sandalow, *Cost Estimate on Domestic Partners Policy*, S.F. CHRON., June 13, 1990, at A1.

368. Sandalow, *supra* note 349.

369. Sandalow, *supra* note 367 (emphasis added).

guideposts for both local officials and insurance carriers. And within LGBT constituencies, marriage provided resonant symbols with which to understand and celebrate domestic partnership. The major developments detailed in this Section occurred throughout the 1990s, both before and after marriage became an explicit priority of LGBT movement leaders. It is telling that during this time little changed in terms of how both supporters and opponents of domestic partnership deployed marital norms.

1. San Francisco

News that Supervisor Britt planned to bring the issue of domestic partnership back to voters in November 1990 surfaced the same day the Mayor's Task Force released its report.[370] Voters eventually approved domestic partnership just one year after they rolled it back.[371] Proposition K, which embodied a key proposal of the Task Force, provided for domestic partnerships between "two unmarried, unrelated people over the age of 18 who live together and agree to be jointly responsible for their basic living expenses."[372]

While both same-sex and different-sex couples would be able to register under Proposition K, the public discussion prior to its passage focused on the city's lesbian and gay population and same-sex couples' specific exclusion from marriage. Deploying a recognition frame, the official voter information pamphlet noted that "[t]here is no process for lesbians and gay men to formally establish and record their relationships."[373] The proponents' official arguments explained that "lesbian and gay couples cannot get married," yet "[l]ike all couples, they want visible recognition from their friends, families and neighbors."[374] Social-conservative opponents, who argued that domestic partnership "places even the most temporary of human relationships on the same level as marriage and family," failed to convince a majority of voters.[375]

370. Marc Sandalow, *Britt Wants New Vote in November on Gay Couples Issue*, S.F. CHRON., June 14, 1990, at B8. Even before voters weighed in again, the Civil Service Commission adopted a family-leave policy that included the definition of "family" urged by the Task Force. *See* Kathy Bodovitz, *S.F. Refines Family Leave Policy*, S.F. CHRON., Oct. 16, 1990, at A6.

371. *See* S.F., CAL., MUN. CODE § 62.1 (1991). In that election, voters also elected Achtenberg to the Board of Supervisors. *See* Marc Sandalow, *Gays Celebrate "Lavender Sweep" in San Francisco Election*, S.F. CHRON., Nov. 8, 1990, at A17.

372. SAN FRANCISCO VOTER INFORMATION PAMPHLET & SAMPLE BALLOT 153 (Nov. 6, 1990) [hereinafter VOTER INFORMATION PAMPHLET]. Some local leaders on AIDS policy worried that the language of joint financial responsibility would allow creditors to pursue individuals caring for a dying partner or friend and thus yielded "[o]bligations without [b]enefits." Chambers, *supra* note 12, at 190. That language, though, had been included to assure insurance carriers that they would only be covering relationships with a level of commitment similar to the married relationships already covered. *See id.*

373. *See* VOTER INFORMATION PAMPHLET, *supra* note 372, at 153.

374. *Id.* at 154.

375. Marc Sandalow, *Small S.F. Majority for Domestic Partners Measure*, S.F. CHRON., Oct. 8, 1990, at A4.

By the end of the year, the Health Services Board voted to extend health benefits to domestic partners.[376]

On February 14, 1991, the first day that couples could register their domestic partnerships, the scene mirrored many of marriage's ceremonial elements. Reflecting the recognition frame used to win domestic partnership, same-sex couples walked alongside different-sex couples who had come to City Hall to get married on Valentine's Day.[377] Over the years, this marriage symbolism continued as government-sponsored ceremonies incorporated both legal and cultural elements. In 1996, under an ordinance authorizing public officials to perform domestic partnership ceremonies, Mayor Willie Brown presided over a mass ceremony in which couples took vows of partnership as the mayor declared them "lawfully recognized domestic partners."[378] Supervisor Carole Migden, the ordinance's openly gay author, explained, "It's a joyful occasion that can be celebrated by family and loved ones. It's fair to say it's a wedding of sorts."[379] Even as domestic partnership included all unmarried couples, the ceremonial and cultural aspects focused on recognition specifically for same-sex couples. In fact, only one different-sex couple participated in the 1996 ceremony.[380]

2. Los Angeles

Task force work in San Francisco had removed many of the insurance barriers to a meaningful domestic partnership policy, such that the ordinance adopted in 1990 could be implemented with relative ease. But the Los Angeles struggle for domestic partnership in the early 1990s reveals the ongoing significance of insurance carriers' resistance to the concept and the resulting difficulties with implementation. The centrality of marriage both informed such resistance and provided the arguments used to overcome it.

City officials in Los Angeles began exploring domestic partner benefits soon after the Family Diversity Task Force issued its report. But it was not until 1993 that the City Council passed a resolution, pushed by openly gay Councilmember Jackie Goldberg, providing health and dental benefits to city employees' unmarried (same-sex or different-sex) partners.[381] Then, in 1995, the County Board of Supervisors voted to extend healthcare benefits to its

376. Chambers, *supra* note 12, at 191.

377. Katherine Bishop, *Not Quite a Wedding, but Quite a Day for Couples by the Bay*, N.Y. TIMES, Feb. 15, 1991, at A16.

378. Richard C. Paddock, *165 Gay Couples Exchange Vows in S.F. Ceremony*, L.A. TIMES, Mar. 26, 1996, at A1.

379. Richard C. Paddock, *S.F. to Allow Civil Ceremonies for Gay Couples*, L.A. TIMES, Jan. 30, 1996, at A3.

380. They commented: "We've thought about [getting married], but one of us always chickens out." Paddock, *supra* note 378.

381. *Benefits for Unmarried Partners OKd by Council*, L.A. TIMES, Nov. 24, 1993, at B2.

employees' unmarried (same-sex or different-sex) partners.[382] It had previously voted to extend dental benefits in 1992.[383]

Despite these eventual victories, insurance carriers—vital participants in employment-based domestic partnership schemes—had long resisted coverage that departed from a model rooted in the marital family. Accordingly, the city and county had struggled to find insurers willing to offer coverage. Indeed, a 1993 report of the Anti-Discrimination Task Force of the California Insurance Commissioner, chaired by Coleman, documented the repeated refusal of insurers to provide domestic partner coverage.[384] A representative from Cigna informed the county in 1992 that it would "not expand or customize the definition of eligible dependents" unless required by law.[385] Kaiser Permanente of Southern California, which formed a Domestic Partners Task Force to consider the issue, concluded in 1992 that it would "not expand or customize the definition of eligible dependents."[386] It grouped domestic partners with other "dependent relationships that do not fall into our current definition of an eligible dependent," including "parents and other relatives, some children and significant others."[387]

In response, those seeking to convince insurers to offer coverage compared domestic partnerships to covered relationships—marital families—and distinguished them from other excluded relationships. As a union representative argued to Kaiser Permanente's division manager in 1991, "the nuclear family is the basis for the current definition of dependent . . . [,] [which] includ[es] a subscriber's legal spouse and dependent children."[388] But the "nature of the nuclear family in the United States has changed dramatically in the last two decades, creating many households comprised of domestic partners and the children of one or both partners."[389] Accordingly, expanding "the definition of dependent to include domestic partners would . . . be consistent with the traditional focus on employer-supported health insurance

382. L.A., CAL., CODE OF ORDINANCES § 2.210 (1999); *see County Extends Health Benefits to Employees' Domestic Partners*, L.A. TIMES, Dec. 20, 1995, at B4.

383. James Rainey, *Goldberg to Seek Benefits for Unmarried Partners*, L.A. TIMES, Nov. 16, 1993, at B3. In 1999, the County opened its (inclusive) domestic partnership registry to the general public. *See* Nicholas Riccardi, *County to Form Domestic Partner Registry*, L.A. TIMES, Mar. 24, 1999, at B1.

384. *See* ANTI-DISCRIMINATION TASK FORCE REPORT, *supra* note 214, at 3.

385. Letter from Kenneth R. Goulet, Senior Marketing Rep., Cigna, to Bud Treece, Vice Chair, Coalition of County Unions (Aug. 7, 1992), *in* ANTI-DISCRIMINATION TASK FORCE REPORT, *supra* note 214, at 62–63.

386. Letter from Darleen Cho, Manager, Special Accounts, Kaiser Permanente, to Bud Treece, Vice Chair, Coalition of County Unions (Aug. 10, 1992), *in* ANTI-DISCRIMINATION TASK FORCE REPORT, *supra* note 214, at 61.

387. *Id.*

388. Letter from Phil Ansell, Senior Field Rep., SEIU Local 535, to Michael Leggett, Division Manager, Kaiser Permanente (July 11, 1991), *in* ANTI-DISCRIMINATION TASK FORCE REPORT, *supra* note 214, at 59.

389. *Id.*

for an employee and his/her nuclear family."[390] Under this reasoning, Kaiser Permanente could provide coverage for domestic partners "without extending it even further to include a subscriber's parents, for example."[391]

As these arguments demonstrate, even before LGBT advocates made claims to marriage, dialogue among union representatives, government officials, and insurance carriers cast domestic partners as like spouses—and as unlike other family relationships. To overcome financial objections raised by insurers and employers, domestic partners gained support by distinguishing themselves from other dependency relationships that could also have benefited from expanded coverage.

E. Domestic Partnership in the Private Sector—Same-Sex Couples and Marriage Equivalence

Advocates and local officials anticipated that domestic partnership recognition, while providing few governmental rights, would help unmarried individuals access employer-sponsored healthcare coverage for their families. Private companies, they hoped, would recognize their employees' domestic partnerships. In this way, the interaction between legal recognition and employer-sponsored healthcare coverage created a mutually constitutive relationship between public and private norms.[392] Proof of local domestic partnership registration could pressure employers to provide benefits, and some employers required an official domestic partnership registration.

For their part, private companies, colleges, and universities led the way on domestic partner benefits.[393] Because family healthcare—an expensive proposition—was tied to employment, lesbians and gay men had concrete incentives to push for employer recognition of their relationships. Meanwhile, employers had financial incentives to limit recognition.[394] The United States' privatized, employer-centered healthcare regime created a system in which both private and public employers attempted to balance equity and retention concerns with cost management.[395] Limiting recognition to same-sex couples—and thereby bolstering the priority of marriage as the relevant criterion—constituted a workable (and increasingly popular) strategy.

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390. *Id.*

391. *Id.*

392. *See* Blumberg, *supra* note 220, at 1267 (explaining how "the family acts as a conduit for benefits from the employee welfare state").

393. *See generally* Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998).

394. *See* Blumberg, *supra* note 220, at 1267–69 (noting the disproportionate impact same-sex couples have had on the phenomenon of extending rights and benefits to nonmarital couples generally).

395. *See* CHAUNCEY, *supra* note 29, at 74–75.

The developments detailed in this Section occurred throughout the 1990s. The emerging focus on same-sex couples in pre-1993 workplace policies suggests little change in the relevance of marriage once the LGBT movement turned more explicitly toward marriage after *Baehr*. In fact, the focus on same-sex couples appears to reflect the impact of specific arguments in earlier domestic partnership work at the municipal level. While local ordinances included both same-sex and different-sex couples, the work that produced those ordinances relied on arguments regarding same-sex couples' unique lack of access to marriage. Workplace policies increasingly followed this argument to its logical conclusion—policies geared exclusively to same-sex couples.

In 1982, New York's Village Voice became the first employer in the country to offer domestic partner benefits, and it included all unmarried partners.[396] In 1991, Lotus Development Corporation in Cambridge, Massachusetts, became the first company to offer same-sex-only benefits.[397] This tension between inclusive and limited policies also played out in California. In Los Angeles in 1992, MCA became the first Hollywood studio to offer benefits to employees' same-sex partners.[398] The following year, MCA president Sidney Sheinberg and media mogul Barry Diller campaigned for the benefits industry-wide. In a letter to studio executives, they situated marriage access, rather than choice, as central: "Basing benefits on marriage is not mandated by law and a benefit that recognizes marriage as the only vehicle for extending benefits to the partners of employees is a criterion that not all can meet."[399] Other studios followed MCA's lead, with Paramount, Sony, Warner Bros., Walt Disney, and MGM providing same-sex partner benefits by 1996.[400] Some studios made benefits available to all unmarried couples, but most provided coverage only to same-sex partners.[401]

High-tech companies in Northern California also became leaders in providing domestic partner benefits. While some adopted inclusive policies,[402] others limited benefits to same-sex couples.[403] When in 1996 IBM became the largest U.S. company to do so, a spokesperson explained that the company excluded unmarried different-sex partners because those couples had the option

396. POLIKOFF, *supra* note 22, at 49.

397. Polikoff notes the significance of this move. *See id.* at 61.

398. Scott Collins, *Companies Offer Benefits to Same-Sex Partners of Employees*, L.A. TIMES, Nov. 6, 1995, at B8; *Better Benefits*, L.A. TIMES, Jan. 4, 1996, at B5.

399. Collins, *supra* note 398.

400. *See id.*

401. *Better Benefits*, *supra* note 398; Chris Kraul, *Workplace Is Key to Push for Lesbian, Gay Rights, Activists Say*, L.A. TIMES, Oct. 16, 1995, at D1; *Warner Bros. Extends Medical Coverage to Same-Sex Partners*, L.A. TIMES, July 1, 1993, at D2.

402. *See Software Maker Extends Benefits to Unmarried Spouses*, L.A. TIMES, July 15, 1992, at D2.

403. *See Genentech Inc. Offers Benefits to Gay Domestic Partners*, L.A. TIMES, May 26, 1994, at B2.

to get married.[404] To obtain benefits, same-sex couples were required to sign an affidavit declaring that their relationship approximated marriage—that they were in a long-term, committed relationship in a shared household.[405]

In constructing domestic partnership as a substitute status—rather than a true alternative to marriage—employers suggested that marriage and domestic partnership shared central features grounded in mutual support and commitment. Indeed, extension of benefits to same-sex couples via domestic partnership policies encouraged the same type of economically interdependent relationships that employer policies incentivized for different-sex married couples.[406]

Even before LGBT movement advocates made explicit claims to marriage, many colleges and universities adopted domestic partnership policies that emphasized lack of access to marriage over individual choice and used marriage as the relevant comparator for determining which relationships should be eligible. In 1992, Stanford became one of the first major universities in the country to offer domestic partner benefits. Its policy, which went into effect in 1993, covered

> [t]wo individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive commitment similar to that of marriage, in which the partners agree to be financially responsible for each other's well-being and each others' debts to third parties.[407]

Securing domestic partner coverage at public universities represented a different struggle, since the battles were heavily influenced by state law and government officials.[408] Conservative leaders at the state level attempted to

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404. Rajiv Chandrasekaran, *IBM To Offer Benefits Plan to Gays' Partners*, L.A. TIMES, Sept. 20, 1996, at B1.

405. *Id.*

406. *See* Widiss, *supra* note 34, at 737–38.

407. M.V. Lee Badgett, *Equal Pay for Equal Families*, ACADEME, May–June 1994, at 26, 29 (quoting the Stanford policy). Though, as Blumberg has pointed out, these employer policies granted benefits "without any corresponding [legal] obligation running from one cohabitant to the other." *See* Blumberg, *supra* note 220, at 1274.

408. In 1988, the University of California at Irvine rejected proposals, pushed by the university's Advisory Committee on the Status of Lesbians and Gays, to open married student housing to unmarried couples. *UCI Rejects Married Units Use by Gays*, L.A. TIMES, Feb. 11, 1988, at 16. After it became clear that some unmarried couples had received "family" campus housing, the university faced pressure regarding its stated policy and ultimately reiterated its marriage requirement. Dianne Klein, *University Sweeps Away UCI's Domestic Revolution*, L.A. TIMES, Jan. 26, 1990, at B1. Campus activists objected, noting that students in same-sex relationships could never qualify for such housing because they lacked access to marriage. *See* Eric Lichtblau, *UCI Acts To Clarify Gay Housing Issue*, L.A. TIMES, Feb. 1, 1990, at B2. Chancellor Jack Peltason fell back on state law: "I understand your desire to have domestic partnerships be incorporated into the benefits and housing policy, but that cannot happen at this time . . . . Your lobbying efforts need to be directed at changing the state law to recognize these partnerships." Danica Kirka, *Homosexual Activists To Rebuild UCI Shanties*, L.A. TIMES, Mar. 3, 1990, at B6. Similarly, in 1989, the chancellor of the University of California at Berkeley rejected a proposal to provide married student housing to unmarried couples. *See Housing*

block domestic partnership advances by situating objections within broader attempts to protect the marital family. Yet even as Republican Governor Pete Wilson objected that domestic partner benefits "devalu[ed] the institution of marriage and the family," the University of California Board of Regents in 1997 voted to extend healthcare benefits to an employee's same-sex domestic partner or blood relative—both pairs legally excluded from marriage.[409] In 1999, the California State University trustees extended healthcare benefits to same-sex partners of employees and different-sex partners sixty-two or older—couples either completely excluded from, or facing significant financial barriers to, marriage.[410]

The expansion of domestic partnership policies by private employers began before same-sex marriage captured national attention and continued in earnest after LGBT advocates explicitly pursued marriage. While it is tempting to link the growing preference for same-sex-only policies to the impact of *Baehr* and the resulting focus on same-sex marriage, the timing of coverage in California shows that the shift toward more restrictive policies predates these developments. Indeed, arguments that influenced the adoption of inclusive policies by local governments may have supported the shift to restrictive policies in the private sector. Even inclusive policies—adopted before marriage constituted an express movement goal—reflected both the salience of marriage access for same-sex couples and the centrality of marriage in constructing domestic partnership.

F. State Domestic Partnership in a Post-Baehr World

Progress on domestic partnership at the state level did not begin until the mid-1990s. Thus, even after same-sex marriage became a national policy issue, LGBT advocates continued to press for nonmarital recognition for both same- and different-sex couples. Yet in these efforts, marriage shaped the fight for domestic partnership, and domestic partnership shaped the fight for marriage. Proponents and opponents of LGBT rights waged battle over domestic partnership, even as it was conceptualized as part of a broader attempt to devalue marriage. Moving from the local to the state level again meant greater influence by Christian Right organizations and leaders in California. Eventually, even some Democratic leaders supportive of domestic partnership credited social-conservative concerns regarding the marginalization of

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Closed to Gay Couples at UC Berkeley, L.A. TIMES, Feb. 11, 1989, at 26. Chancellor I. Michael Heyman defended his decision: "I am aware of no legal authority for the university to create a new class of personal or familial relationships or the sanctioning or recognition of committed personal relationships outside of our existing marriage laws." *Id.*

409. Kenneth R. Weiss, *Partner Benefits for Gay UC Staff Advance*, L.A. TIMES, Nov. 21, 1997, at A3; *see also* Blumberg, *supra* note 220, at 1288–89 (documenting the same-sex domestic partner and adult dependent relative policies adopted by the Regents of the University of California).

410. *See* Kenneth R. Weiss, *Cal State Panel OKs Giving Health Benefits to Partners*, L.A. TIMES, Nov. 17, 1999, at A3.

marriage. Ultimately, the normative weight of marriage—and its role in movement-countermovement conflict—constructed the terms of domestic partnership and limited the inclusion of different-sex couples.[411]

1. Coupling Issues—Marriage and Domestic Partnership

In 1994, the California legislature narrowly passed Assembly Bill ("AB") 2810, a domestic partnership bill that would extend rights to both same-sex and different-sex couples.[412] The bill defined domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."[413] By focusing on intimate couples committed to mutual care and support, the proposed law constructed domestic partners as idealized versions of a modern concept of marriage. Though the marriage law did not contain the specific elements imposed on domestic partners, the domestic partnership language translated marriage's social attributes into legal requirements for unmarried couples.[414]

Opposition quickly focused on the inclusion of same-sex couples. Assemblymember Bernie Richter complained that "[t]he real purpose of this bill is to establish a state-sanctioned relationship for all people, but particularly for the homosexual community, that is equal to marriage."[415] Supporters countered that the bill was "not even close" to "a same-sex marriage bill."[416] And they marketed the bill's impact on older different-sex couples.[417]

Opponents also connected the domestic partnership bill to a broader attack on marriage. Christian Right leaders in California conceptualized domestic partnership for same-sex couples as detracting from the heterosexual, married family. They argued that the inclusion of different-sex couples denigrated marriage by providing an alternative for those who could (and presumably should) get married. Sheldon, the head of the Traditional Values Coalition that had successfully defeated LGBT gains at the local level in the late 1980s,

411. To the extent that this Section demonstrates the intense state-level opposition to domestic partnership and the concessions required to pass even a meager statewide domestic partnership law, it is in some ways consistent with Murray's focus on the significance of domestic partnership's shift from the local to the state level. *See* Murray, *supra* note 125. Nonetheless, the analysis here posits more commonality between local and state level claims, objections, and constraints.

412. Assem. B. 2810, 1994–95 Reg. Sess. (Cal. 1994). In 1991, a California legislator introduced a bill to legalize same-sex marriage, but it did not garner support in the Assembly Judiciary Committee. *See* Assem. B. 167, 1991–92 Reg. Sess. (Cal. 1991).

413. Assem. B. 2810, *supra* note 412.

414. As Mary Anne Case has argued, the functional definition that nonmarital recognition requires of unmarried couples is not mandated in marriage. *See* Case, *supra* note 141, at 1774. Therefore, even as popular understandings of marriage may have become more functional, marriage itself requires none of the indicia of functionality explicitly covered in nonmarital schemes.

415. Jerry Gillam, *Assembly OKs Rights Bill for Unwed Couples*, L.A. TIMES, June 1, 1994, at A3.

416. *Id.* (quoting Assemblymember John Burton).

417. Carl Ingram, *Senate OKs Bill on Rights for Unwed Couples*, L.A. TIMES, Aug. 24, 1994, at A21.

claimed that domestic partnership "infringe[d]" on the principle of "the man-woman relationship in the context of marriage."[418] Through this lens, the domestic partnership proposal blurred the line between marriage and nonmarriage and, by replicating marital norms in a nonmarital status open to same-sex couples, threatened to supplant the gendered definition of marriage itself. Ultimately, Governor Wilson vetoed the legislation, declaring: "Government policy ought not to discount marriage by offering a substitute relationship that demands much less."[419]

In 1996, in response to *Baehr*, Republican Assemblymember William "Pete" Knight introduced AB 1982, which would prohibit California from recognizing same-sex marriages from other states.[420] The Hawaii marriage fight had ignited an intense and successful countermobilization at both the federal and state levels. In California, Knight led the anti-same-sex-marriage effort in the state legislature. In response, Democratic opponents implemented a "poison pill" strategy, amending the bill to recognize limited domestic partnership rights for same-sex and different-sex couples.[421]

Knight, who opposed domestic partnership on the ground that it would "redefine marriage,"[422] complained that "[t]he amendments make this a terrible bill."[423] Objections merged concerns over the devaluation of marriage with those over recognition of LGBT rights. Republican Senator Ray Haynes remarked: "A piece of garbage by any other name still smells. All you are doing is calling a same-sex marriage something else."[424] Social-conservative activists echoed those remarks. The Campaign for California Families' Randy Thomasson declared, "Either you believe marriage should be between a man and a woman or you don't . . . . Domestic partnership is tantamount to pseudo-gay marriage."[425] Through this lens, domestic partnership constructed a different kind of marriage—one that made gender differentiation irrelevant and could therefore accommodate same-sex couples. Social-conservative opponents believed that the creation of domestic partnership—even in a very limited form—implicated the very constitution of marriage.

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418. Daniel M. Weintraub & Bettina Boxall, *Ballot Fallout Expected from Wilson's Veto*, L.A. TIMES, Sept. 13, 1994, at A3.

419. GOV. PETE WILSON, AB 2810 VETO MESSAGE (Sept. 12, 1994); *see also* Weintraub & Boxall, *supra* note 418, at A3.

420. Assem. B. 1982, 1995–96 Reg. Sess. (Cal. 1995); *see also* Ed Bond, *Irreconcilable Differences on Gay Marriage*, L.A. TIMES, Feb. 20, 1996, at B3.

421. *See* Assem. B. 1982; *see also* Carl Ingram, *Bill Opposing Gay Marriages Weakened*, L.A. TIMES, July 11, 1996, at A3.

422. Carl Ingram, *Senate Panel OKs Bill Targeting Gay Marriages*, L.A. TIMES, Aug. 13, 1996, at A3.

423. Ingram, *supra* note 421 (internal quotation marks omitted).

424. Carl Ingram, *Same-Sex Nuptials Prohibition Stalls*, L.A. TIMES, July 10, 1996, at A3 (internal quotation marks omitted).

425. Andrew D. Blechman, *Area Lawmaker Rejects Same-Sex Marriages but Backs Partnership Role*, L.A. TIMES, July 10, 1996, at B4 (internal quotation marks omitted).

At the same time, the bill did not have the consistent support of LGBT leaders, who objected to a separate designation for same-sex couples. The legislature's first openly lesbian member, Assemblymember Sheila Kuehl, voiced her complaint with the combined bill: "The message of this bill, as far as I'm concerned, is: 'Well, there are the real people, the human beings, and they get to get married. And then there is you guys. Instead of letting you get married, we'll give you something a little bit less.'"[426]

With marriage on the political radar after *Baehr*, the lines drawn around domestic partnership reflected broader positions specifically regarding same-sex couples' access to marriage. By putting domestic partnership side-by-side with a prohibition on same-sex marriage, the legislation framed domestic partnership through the lens of sexual-orientation equality (and inequality). Republicans opposed the new version of AB 1982, and after it narrowly passed, Knight withdrew it to avoid enacting domestic partnership.[427]

2. Domestic Partnership Breakthrough (for Some)

California eventually enacted a domestic partnership law in 1999, and it took effect on January 1, 2000.[428] The law, AB 26, provided only two benefits—hospital visitation and health insurance coverage for state employees.[429] Migden, who had been elected to the state assembly, attempted to include both same-sex and different-sex couples.[430] At the time, advocates had not reached consensus on whether to attempt to build domestic partnership to replicate marriage for same-sex couples or to maintain it as an alternative open to everyone.[431]

Once Democratic Governor Gray Davis weighed in, however, the path toward domestic partnership as an end in itself—an alternative open to all—became much less viable. Reflecting the influence of social-conservative opposition to domestic partnership, Davis expressed his resistance to a bill that included different-sex couples because such inclusion threatened to minimize the importance of marriage by providing a nonmarital choice to those who could otherwise marry.[432] His position was especially striking in light of his tiebreaking vote on AB 1982[433] and his support as a gubernatorial candidate for

426. Ingram, *supra* note 421.

427. *See* Carl Ingram, *Davis Breaks Tie, Backs Domestic Partner Registry*, L.A. TIMES, Aug. 20, 1996, at B8.

428. *See* Assem. B. 26, 1999–2000 Reg. Sess. (Cal. 1999). In 1995 and 1997, domestic partnership bills failed to emerge from the assembly. When the state enacted a domestic partnership law, twelve California cities had domestic partnership ordinances. *See* Carl Ingram, *Senate OKs Benefits for Same-Sex Partners*, L.A. TIMES, May 26, 1999, at A3.

429. Assem. B. 26, §§ 3–4.

430. Senator Kevin Murray's competing bill also included same-sex and different-sex couples. *See* Mark Gladstone, *Davis Likely To Sign Domestic Partners Bill*, L.A. TIMES, Sept. 3, 1999, at A3.

431. *See* Cummings & NeJaime, *supra* note 10, at 1258.

432. *See id.* at 1259.

433. Ingram, *supra* note 427.

an inclusive domestic partnership bill.[434] Now, for Davis and the political constituencies he looked to satisfy, same-sex couples' lack of access to marriage distinguished them from other unmarried couples and mediated the relationship between domestic partnership and marriage. His press secretary declared: "For everybody else . . . , there's another process and it's called marriage."[435] While inclusion of same-sex couples did not threaten marriage since those couples could not marry, inclusion of different-sex couples detracted from marriage's channeling function.

While Migden favored an inclusive domestic partnership law, she ultimately reached a compromise with Davis: in addition to same-sex couples, the bill would include different-sex couples in which both members were over sixty-two.[436] Accordingly, the final version used the same definition from AB 2810 (the 1994 bill)—"two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring"—but added the different-sex age restriction.[437] Since older couples often lacked meaningful access to marriage, as the earlier task forces documented,[438] their inclusion solidified the idea of domestic partnership as open to those for whom marriage was not a realistic choice. And it added a sympathetic constituency.[439]

At the same time that lawmakers enacted a limited domestic partnership regime, Christian Right advocates' campaign to pass a voter initiative prohibiting the recognition of same-sex marriages gained steam. The Proposition 22 campaign grew out of then-Senator Knight's failed attempts to legislate a marriage prohibition.[440] The new domestic partnership law lent the effort a greater sense of urgency. Even as the campaign claimed that Proposition 22 would not affect domestic partnership rights, initiative supporters complained that domestic partnership represented a backdoor route to altering marriage.[441] Senator Knight and other conservative Republican lawmakers charged that the domestic partnership law would both weaken the institution of marriage and pave the way for same-sex marriage.[442]

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434. *See* GRAY DAVIS, CANDIDATE SURVEY ON FAMILY DIVERSITY, DOMESTIC PARTNERSHIP, AND MARITAL STATUS DISCRIMINATION 2 (1998) (on file with author).

435. Martin Wisckol, *Partner Benefit Limited to Gays*, ORANGE COUNTY REG., Sept. 7, 1999, at B1 (internal quotation marks omitted).

436. *Id.* Migden's chief of staff explained that "these were things that the governor asked that she change, and she's just trying to be practical and get something that he will sign." *Id.* In 2001, lawmakers included different-sex couples with *one partner* over sixty-two. Assem. B. 25, 2001–02 Reg. Sess. (Cal. 2001).

437. Assem. B. 26 § 2, 1999–2000 Reg. Sess. (Cal. 1999).

438. *See, e.g.*, COUPLES REPORT, *supra* note 283, at 31.

439. *See* Cummings & NeJaime, *supra* note 10, at 1259.

440. *See id.* at 1260.

441. *See* Amy Pyle, *State Begins Accepting Gays' Domestic Partner Sign-Ups*, L.A. TIMES, Jan. 4, 2000, A1.

442. Ingram, *supra* note 428.

The decade that followed witnessed two successful voter initiatives prohibiting marriage for same-sex couples—Proposition 22 in 2000 and Proposition 8, the constitutional amendment challenged in *Perry*, in 2008.[443] Throughout that time, legislators expanded domestic partnership, ultimately providing essentially all the state-law rights and benefits of marriage.[444] Countermovement actors unsuccessfully challenged the domestic partnership regime as marriage by another name.[445] The formulation of domestic partnership as a second-class status for same-sex couples became firmly entrenched as LGBT advocates and their allies pushed for marriage while their opponents wielded domestic partnership as a substitute to satisfy constitutional requirements.[446]

* * *

The remainder of this Article explores how Part III's account of LGBT organizing in California informs the extant scholarly conversation around marriage and LGBT advocacy. Marriage—and the legal, political, and cultural context that privileged it—shaped work on nonmarital recognition, and conversely, work on nonmarital recognition participated in shaping marriage. As Part IV argues, the California case study casts doubt on the historical underpinnings of some influential critiques of LGBT marriage advocacy. And by suggesting the difficulty of escaping the legal and cultural weight of marriage, it complicates the broader normative and prescriptive claims animated by such critiques. Yet, as Part V claims, the case study also brings to light previously unacknowledged LGBT contributions to marriage itself and the line between marriage and nonmarriage. In doing so, it shows how earlier nonmarital work built the foundation for today's marriage equality jurisprudence.

IV.
RECONSIDERING THE CASE *AGAINST* MARRIAGE

A. The Case Against Marriage (Advocacy)

Influential family-law and sexuality scholars have articulated compelling critiques of marriage's primacy. A legal system that uses marriage to distribute rights and benefits leaves unsupported a growing number of dependency

443. *See* Cummings & NeJaime, *supra* note 10, at 1257–96.

444. *See* CAL. FAM. CODE § 297.5 (West 2010); Assem. B. 2216, 2001–02 Reg. Sess. (Cal. 2001); Assem. B. 25 § 3, 2001–02 Reg. Sess. (Cal. 2001). For a detailed account, see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

445. *See* Knight v. Superior Court, 26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005).

446. *See generally* NeJaime, *supra* note 125.

relationships existing outside marriage.[447] And privileging sexual affiliations that meet the coupled, exclusive, committed norms of marriage limits the space for nonnormative relationships.[448] Yet rather than explore either the general arguments against a system that prioritizes marriage or the substantial contributions marriage critics have made, this Part focuses on how some scholars have channeled their arguments through a critique of contemporary LGBT advocacy.[449]

As part of their broader marriage critique, these scholars level powerful claims against the LGBT movement's ongoing marriage equality campaign. They argue that LGBT advocates legitimate the state's use of marriage in extending rights and benefits.[450] For instance, Polikoff claims that instead of knocking marriage from its pedestal—"a development that would honor all relationships"—the LGBT movement "seeks privileges for gay and lesbian

447. *See* POLIKOFF, *supra* note 22, at 123–29; *see also* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 143 (1995). For arguments from a more philosophical perspective, see ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW (2012); Claudia Card, *Gay Divorce: Thoughts on the Legal Regulation of Marriage*, 22 HYPATIA 24 (2007).

448. *See* Murray, *Marriage as Punishment*, *supra* note 5, at 59–62.

449. By leveling compelling claims against legal regimes privileging marriage, prominent marriage critics not only have made significant theoretical interventions, but also have contributed to important legal reforms. Some of the most noteworthy examples have emerged in the family law context. Polikoff played an influential role in the development of second-parent adoption, which allows for the legal recognition of nonbiological lesbian and gay parents. *See* Polikoff, *supra* note 94, at 522–27. More broadly, Martha Fineman centered dependency in ways that demonstrated the need for greater support for vertical, rather than horizontal, relationships. *See* FINEMAN, *supra* note 447, at 143. And Murray elaborated principles for understanding the networked family, bringing attention to caretaking relationships that exist outside of and in addition to traditional parent-child attachments. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008). Moreover, these critics have influenced the development of legal rules designed to support dependency relationships, rather than promote marriage. Indeed, by demonstrating that marriage provides an inappropriate dividing line for many statutory schemes, Polikoff's arguments have supported legal innovations in, for example, the contexts of medical decisionmaking, family leave, wrongful death, and survivor benefits. *See* POLIKOFF, *supra* note 22, at 126–43, 167–68, 171–72, 195–96, 198. In the sexuality context, scholars including Katherine Franke, Janet Halley, and Judith Butler have questioned the politics of recognition more generally, exploring the ways in which movements moderate their claims when they turn to the state for legitimacy. *See* Judith Butler, *Is Kinship Always Already Heterosexual?*, *in* LEFT LEGALISM/LEFT CRITIQUE 229, 241 (Wendy Brown & Janet Halley eds., 2002); Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 5, at 245; Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97, 99 (Robert Wintemute & Mads Tønnesson Andenæs eds., 2001). In doing so, these scholars have made substantial historical and theoretical contributions. For example, Franke's work on post-Civil War regulation of former slaves' marriages illuminates the ways in which recognition allows the state to "domesticate" otherwise "more fluid and more communal" kinship structures. *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J. L. & HUMAN. 251, 253 (1999).

450. *See* Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1549 (1993); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMPLE L. REV. 709, 777 (2002).

relationships that mirror heterosexual marriage."[451] This, she argues, "is not optimal family policy."[452] Under this view, by demanding marriage instead of functional family policy, advocates disclaim other families that exist outside of marriage.[453] For example, Murray argues that the claim that children are harmed by the denial of marriage to same-sex couples "marginalizes attempts to render legible as 'families' kinship structures that depart from the nuclear marital family."[454]

Furthermore, these critics maintain that by presenting marriage as the family policy solution to the dilemmas that lesbians and gay men confront, advocates affirm the neoliberal trend to privatize caretaking responsibilities.[455] In this vein, Murray suggests that "an implicit assumption of the [marriage equality] campaign and its strategy is the uncritical acceptance of marriage as the de facto social safety net through which the needs of vulnerable individuals are accommodated."[456] In this way, advocates bolster what Martha Fineman has termed "the sexual family"—"the traditional or nuclear family . . . unit with a heterosexual, formally celebrated union at its core"[457]—as the proper object of family recognition and the appropriate target of state support.[458]

This family-centered critique relates closely to a sexuality-based critique, which maintains that affirming marriage as the privileged site for intimate relationships marginalizes nonnormative sexuality and pushes same-sex relationships into the confines of heterosexual institutions.[459] As Katherine Franke explains, the subjects of LGBT advocacy are "same-sex *couples*, not persons who seek nonnormative kinship formations or individuals who engage

451. *See* Polikoff, *supra* note 5, at 203; *see also* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 198 (2007) ("[A]cknowledgment that state constructions and recognition of marriage privilege some family forms over others has caused some family law scholars to question whether advocating for same-sex marriage is wise.").

452. *See* Polikoff, *supra* note 5, at 203.

453. *See* POLIKOFF, *supra* note 22, at 107; *see also* Lisa Duggan, *Holy Matrimony!*, THE NATION (Mar. 15, 2004), at 14, 18, *available at* http://www.thenation.com/article/holy-matrimony#.

454. Murray, *What's So New About the New Illegitimacy?*, *supra* note 5, at 433; *see also* Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 5, at 242 (arguing that advocates portray "the non-married parent . . . as a site of pathology, stigma, and injury to children").

455. *See* Harris, *supra* note 134, at 1557–58; *see also* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 60–61 (2011); Halley, *supra* note 449, at 110–11.

456. Murray, *What's So New About the New Illegitimacy?*, *supra* note 5, at 433; *see also* Urvashi Vaid, *"Now You Get What You Want, Do You Want More?,"* 37 N.Y.U. REV. L. & SOC. CHANGE 101, 109 (2013).

457. FINEMAN, *supra* note 447, at 143.

458. *See* Angela P. Harris, Loving *Before and After the Law*, 76 FORDHAM L. REV. 2821, 2843 (2008). Through this lens, even attempts to include same-sex and different-sex unmarried, intimate couples in alternative recognition regimes "merely reinforce the idea of the sexual family." FINEMAN, *supra* note 447, at 143.

459. *See, e.g.*, Teemu Ruskola, *Gay Rights Versus Queer Theory: What Is Left After* Lawrence v. Texas, 23 SOC. TEXT 235, 245 (2005); *see also* Ruthann Robson, *Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms*, 17 N.Y.L. SCH. J. HUM. RTS. 703, 703–06 (2000).

in nonnormative sex."[460] Cast in assimilationist terms, lesbians and gay men gain recognition to the extent they are "like straights."[461]

Armed with these critiques, scholars advance prescriptive claims urging LGBT advocates to deemphasize marriage as the remedy to the lack of same-sex relationship recognition. For instance, Polikoff encourages advocates to work toward solutions that help a variety of family relationships rather than promote legal rules that reward marriage.[462] And Franke argues that "efforts to secure marriage equality for same-sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire."[463]

These prescriptive claims support broader normative frameworks that would abolish, reposition, or significantly minimize marriage in legal regimes governing family and sexuality. For example, Polikoff's "valuing-all-families" approach would replace marriage with a "civil partnership" system characterized by varying rules for different types of families, distinguishing those with children from those without.[464] Her approach also would supplant marriage as the legally salient dividing line and instead connect the specific purpose of a law to the relationships the law covers.[465]

To support these normative and prescriptive claims, some scholars emphasize ideological marriage resistance in pre-*Baehr* organizing—invoking the reading of the movement's trajectory described in Part II.B. In doing so, they distinguish between advocacy against marriage in the 1980s and early 1990s and current advocacy for marriage. These scholars introduce a predictive dimension, suggesting that if LGBT advocates had remained committed to their earlier vision, the current landscape would look drastically different. For these marriage skeptics, the story of organizing in the mid-1990s to the present is one of missed opportunities.[466]

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460. *See* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1414 (2004); *cf.* Halley, *supra* note 449, at 100 ("Unmarried adults, and their sex lives, would become *weirder*.").

461. *See* Dean Spade, *Under the Cover of Gay Rights*, 37 N.Y.U. REV. L. & SOC. CHANGE 79, 84 (2013); *see also* Ruskola, *supra* note 459, at 243; Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1374 (2005); Nelson Tebbe et al., *Debate: The Argument For Same-Sex Marriage*, 159 U. PA. L. REV. PENNUMBRA 21, 30 (2010) (Gilreath contribution).

462. *See* POLIKOFF, *supra* note 22, at 210–14.

463. Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2686 (2008).

464. *See* POLIKOFF, *supra* note 22, at 132–33.

465. *See id.* at 126.

466. It is important to note that some influential scholars of the LGBT movement are more hesitant to make claims regarding the viability of paths leading away from marriage. For instance, in suggesting that the "debate about same-sex marriage might have unfolded differently had the marriage skeptics within the LGBT community prevailed and persuaded the movement to pursue a different path," Schacter nonetheless recognizes the obstacles to alternative routes. Schacter, *supra* note 100, at 383.

Under this view, domestic partnership in particular represented a significant opportunity to create true alternatives to marriage. Yet rather than dedicate themselves to cultivating domestic partnership and other nonmarital innovations, advocates ultimately denigrated such alternatives as second-class designations.[467] For instance, in 2006, historian John D'Emilio contemplated what could have been:

> Had we tried to devise a strategy that took advantage of the force of historical trends, we would, as a movement, have been pushing to further de-center and de-institutionalize marriage. Once upon a time, we did. In the 1980's and early 1990's, imaginative queer activists invented such things as "domestic partnership" and "second-parent adoption" as ways of recognizing the plethora of family arrangements that exist throughout the United States.[468]

For these marriage skeptics, marriage equality advocacy that developed throughout the 1990s and 2000s "represents at best backpedaling from, and at worst abandonment of, a vision of family pluralism that once imbued advocacy for gay and lesbian families."[469] LGBT families were, Kaaryn Gustafson argues, "perfectly situated to fight for the recognition of all families rather than the mere recognition of marriage."[470] Yet "much of the LGBT rights movement has been focused on marriage in the last few years, reinforcing rather than re-envisioning notions of family."[471] As Michael Warner sees it, "the crucial founding insights behind several decades' worth of gay and lesbian politics are now being forgotten."[472]

Under this view, the LGBT shift from nonmarital to marital advocacy constituted not primarily a strategic shift, but a profoundly normative one. Warner's summation captures the connection between the historical account and its normative implications: "Marriage became the dominant issue in lesbian and gay politics in the 1990s, but not before. If marriage is so fundamental to a program of rights, why did gay men and lesbians resist it over the twenty-five

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467. *See* Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y. L. SCH. J. HUM. RTS. 753, 761 (2000); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 835, 839 (2010). For a powerful critique of domestic partnership from a family-law perspective, see Blumberg, *supra* note 444, at 1568 (explaining that, because of the formality requirement, many cohabiting couples who have formed committed relationships nonetheless receive none of the benefits arising from California's domestic partnership law).

468. John D'Emilio, *The Marriage Fight Is Setting Us Back*, 13 GAY & LESBIAN REV. 10 (2006).

469. Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 585–86 (2005); *see also* Vaid, *supra* note 456, at 104.

470. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 300 (2009).

471. *Id.*

472. WARNER, *supra* note 88, at 91.

year period of their most defiant activism?"[473] Warner, of course, is suggesting that marriage can and should be detached from an LGBT rights project and that LGBT advocacy before *Baehr* provides useful guidance.

Overall, this historical narrative and its predictive dimensions bolster the prescriptive claims resisting the prioritization of marriage in LGBT organizing and support the normative frameworks challenging marriage.[474] For instance, in 2006, a number of scholars, including Polikoff, Franke, and D'Emilio, signed a joint statement, *Beyond Same-Sex Marriage*, pushing advocates to focus less on marriage and more on family diversity. Encouraging activists to reclaim their roots, the signatories argued that their position "follows in the best tradition of the progressive LGBT movement, which invented alternative legal statuses such as domestic partnership and reciprocal beneficiary."[475] More recent interventions employ a similar logic. For example, in arguing for "relationship recognition pluralism," Murray looks to 1980s domestic partnership efforts in California as a model for future work.[476] She argues that while in recent years domestic partnership's "transformative potential was eroded as it was modified to replicate marriage in all but name," at this earlier moment it constituted "an innovation that sought to challenge marriage's primacy."[477]

While many marriage skeptics focus on *Baehr* and its aftermath, others trace changes in LGBT advocacy to distinct but related developments. Murray attends specifically to shifts in the levels of government LGBT advocates targeted in seeking relationship recognition. She argues that "[t]he transformation of domestic partnership from a marriage alternative to a cut-rate marriage counterfeit can be explained by its migration from the local level to the state level in the late 1990's."[478] Nonetheless, she links state-level advocacy aimed at marriage substitutes to the Hawaii litigation, which suddenly made marriage seem like a realistic goal.[479]

Franke, on the other hand, concentrates less on *Baehr* and more on *Lawrence v. Texas*,[480] the 2003 U.S. Supreme Court decision invalidating Texas's anti-sodomy law and overturning *Bowers v. Hardwick*.[481] She connects the movement's radicalism to the post-Stonewall era of criminalization, expressing "nostalgia for the fantasmatic possibilities that were enabled by

473. *Id.* at 87.

474. *See, e.g.*, POLIKOFF, *supra* note 22, at 132; Franke, *supra* note 463, at 2686.

475. Beyond Same-Sex Marriage: A New Strategic Vision, Executive Summary 2 (2006) (on file with author).

476. Murray, *supra* note 125, at 296.

477. *Id.* at 300.

478. *Id.* at 296.

479. *See id.*

480. 539 U.S. 558 (2003).

481. 478 U.S. 186 (1986); *see* Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 5, at 244 (arguing that "the *Lawrence* decision need not have inaugurated a politics of, or desire for, recognition in the gay community").

being an outlaw in the 1970s and 1980s."[482] Franke argues that in leveraging *Lawrence*'s decriminalization to achieve legal recognition,[483] recent LGBT advocacy has "abandoned some of the more radical strategies and goals grounded in a politics that sought to destabilize dominant forms of sexuality and kinship, rather than seeking to be stabilized by them."[484] In this sense, Franke lodges a broader critique of recognition, rather than simply marriage.[485] In fact, she notes the difficulty in articulating a recognition project that is not defined in reference to marriage.[486]

Regardless of which points in the historical narrative they emphasize, these marriage critics tend to view the current marriage-focused moment with dismay and look fondly at an earlier era—before marriage constituted an explicit LGBT movement goal. They attempt to identify and understand how and why the movement went astray. As Franke asks, "How did we get to this curious place, a place with a politics that would be almost unimaginable to the sexual freedom fighters of Stonewall?"[487] The California case study provides some answers.

B. Lessons from California

The case study challenges critics' historical premises by revealing the constraints that marriage imposed on advocacy aimed at nonmarital recognition throughout the 1980s and 1990s. LGBT advocates worked within a larger legal, political, and cultural context that prioritized marriage. And a powerful movement dedicated to what it termed "traditional family values" further constrained advocates' ability to destabilize marriage. While in many ways advocates had little choice but to define domestic partnership in relation to marriage, prominent advocates themselves also envisioned a marriage regime that included same-sex couples. They represented constituents who valued marriage and, in the 1980s and early 1990s, rendered domestic partnership marriage-like. Accordingly, many advocates viewed domestic partnership through a "both/and" rather than "either/or" lens, working *both* toward an inclusive domestic partnership system *and* laying the groundwork for same-sex couples' inclusion in marriage.

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482. Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 5, at 245.

483. *See* Franke, *supra* note 460, at 1413–14; *see also* Murray, *supra* note 125, at 302; Murray, *Marriage as Punishment*, *supra* note 5, at 59.

484. Franke, *supra* note 460, at 1418.

485. *See id.*; Franke, *supra* note 463, at 2698, 2701; *see also* Butler, *supra* note 449, at 241.

486. *See* Franke, *supra* note 463, at 2689. This constitutes a noteworthy point of departure from other critics, who tend to distinguish between progressive nonmarital recognition, on one hand, and regressive marital and nonmarital recognition, on the other hand. For Franke, advocacy aimed at government recognition in general overlooks more transformative possibilities *outside the state*. *See* Franke, *The Politics of Same-Sex Marriage Politics*, *supra* note 5, at 245.

487. Franke, *Public Sex, Same-Sex Marriage, and the Afterlife of Homophobia*, *supra* note 5, at 158.

Looking first to external constraints, the case study exposes marriage's regulatory reach and totalizing influence on the legal and cultural environment. Even for activists resisting marriage, marriage functioned like a riptide.[488] Advocates were swimming with *and* against marriage, often at the same time. That is, they challenged marriage's role even as they submitted to its pull. LGBT advocates' claims did not simply succeed or fail on their own, but were met with reactions from a range of relevant actors who shaped the content and influenced the viability of those claims. Government actors, including judges and lawmakers, privileged marriage in law and policy. Countermovement activists, who influenced officials and mobilized voters, sought to both restore the centrality of marriage and cut back on LGBT rights. And private institutions, including employers and insurers sympathetic to sexual-orientation equality, acted on financial incentives to limit the types of nonmarital relationships that would qualify for benefits. Overall, then, marriage constituted a deeply entrenched legal norm, a powerful but controversial cultural priority, and a well-understood limiting principle. Both supportive and hostile responses filtered LGBT claims through the lens of marriage, and such responses often redirected advocates' energy and constrained potentially more transformative visions.[489]

With marriage as the dominant legal and cultural framework, nonmarital recognition was constructed in what Ariela Dubler has labeled "the shadow of marriage."[490] Marriage rendered intimate couples the appropriate targets of reform. Those who mapped onto a particular notion of the marital family gained support by distinguishing themselves from other relationships that failed to fit the marital mold. Furthermore, marriage distinguished same-sex couples from their different-sex, unmarried counterparts. This produced an emphasis on marriage access over marriage choice in ways that gradually propped up marriage as an LGBT movement goal. Indeed, supportive allies frequently cast domestic partnership as a compromise solution that avoided the more radical possibility of same-sex marriage.

Accordingly, the power of marriage as a legal and cultural norm structured claims, debates, and outcomes regarding family reform such that advocates did not—and could not—simply reject marriage. Even if advocates hoped otherwise, domestic partnership in many ways solidified, rather than resisted, the power of marriage. Ultimately, the case study demonstrates the difficulty of counteracting the regulatory force of marriage. By doing so, it counsels against normative frameworks that simply reject the powerful role of

488. I am grateful to Melissa Murray for suggesting this trope.

489. *Cf.* William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 487 (2001) (explaining how law-based, inclusion-focused organizing privileges moderate movement visions over more radical ones).

490. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

marriage and challenges prescriptive claims urging advocates to replicate earlier activism. Pre-*Baehr* efforts—and the results they produced—did not exist in the way they are commonly imagined. And resisting the regulatory force of marriage is more difficult than often assumed.

Turning next to internal movement dynamics, the case study demonstrates that advocates did not simply accede to marriage's power because of forces outside the movement. Many LGBT advocates themselves envisioned a state marriage regime that would include same-sex couples. As they sought to make marriage less important to the distribution of rights and benefits, they also contested same-sex couples' exclusion from marriage—often indirectly—and situated marriage as a status that should include same-sex couples. For instance, when Achtenberg represented Hinman in his attempt to secure benefits for his same-sex partner, she avoided a direct challenge to California's marriage law; in the early 1980s, this was a wise strategic decision. Yet Achtenberg highlighted Hinman's desire for marriage and differentiated unmarried different-sex couples in ways that situated marriage as a goal of LGBT advocacy.[491] While her arguments reflected important strategic decisions, they also evinced a normative orientation toward marriage that departs from contemporary accounts of earlier marriage resistance. Even Coleman, one of the most forceful critics of a marriage-centric regime, sought marriage for himself and believed marriage should include same-sex couples.[492]

Furthermore, the case study shows that advocates acted on behalf of LGBT constituents who valued marriage. Indeed, the resonance of the recognition frame used to advance and celebrate domestic partnership underscores the desire for the status conferred by marriage. Many same-sex couples enacted marriage in their legally unrecognized relationships and imposed the symbolic elements of marriage onto domestic partnership.[493] Same-sex couples often experienced their exclusion from marriage not simply as a family-based harm but as an affront to sexual-orientation equality. For many of them, marriage was part of the solution, not part of the problem. Even as advocates resisted explicit claims to marriage, they translated constituents' push for marriage into claims to nonmarital recognition.

Accordingly, the California case study suggests that, in some ways, today's marriage critics overestimate both the agency of LGBT advocates and the pervasiveness of radical politics. In framing advocacy in the 1980s and early 1990s, they emphasize marriage critique and resistance. Yet this view

491. *See supra* Part III.B.

492. *See supra* Part III.C.1.a.

493. Sociologists report that lesbians and gay men experience legal relationship recognition—and particularly marriage—as social validation and a sign of equality. *See* KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 116 (2006); Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 372 (2010); *see also* ROSIE HARDING, REGULATING SEXUALITY: LEGAL CONSCIOUSNESS IN LESBIAN AND GAY LIVES 66 (2011).

does not fully account for either the strategic constraints advocates faced (and continue to face) or the competing normative preferences of both advocates and constituents.[494] Marriage critics' theoretical contributions shed important light on the costs of using marriage to distribute rights and benefits and to regulate sexual relationships. Yet in seeking to translate those insights into on-the-ground legal reform and advocacy models, it is important to attend to the constraints imposed by the surrounding legal and cultural environment, as well as to the influence of various state actors, private parties, countermovement activists, and LGBT constituents who approach marriage and family policy with competing goals, values, and motivations.

V.
TOWARD A MORE NUANCED VIEW OF THE CASE *FOR* MARRIAGE

Even as scholarly critiques of LGBT advocacy tend to overestimate the pervasiveness and effectiveness of marriage resistance in earlier organizing, they tend to underestimate LGBT advocates' historical impact on marriage itself—and its role in organizing familial and sexual relationships. Indeed, even the standard account described in Part II.A generally situates movement claims to marriage as a development emerging in the mid-1990s in ways that may obscure the dialogical relationship between marriage and earlier nonmarital work. While the California case study reveals the centrality of marriage in nonmarital advocacy, marriage did not merely cast a shadow over nonmarital recognition.[495] Rather, the case study reveals how the construction of nonmarital spaces influenced the changing contours of marriage. In the space outside marriage, LGBT advocates contributed to a marital model capable of including same-sex couples, whose relationships now appeared marriage-like.

A. Shaping Marriage Outside Marriage

An important and growing body of legal scholarship resists the conventional assumption that marriage simply defines nonmarital life in a one-way direction. Instead, it exposes the interactive relationship between marriage and nonmarriage.[496] As Courtney Cahill argues, "central forms of intimacy and

494. Eskridge has argued that Polikoff's "critique of same-sex marriage . . . romanticizes the movement, . . . which is not nearly so radical as Polikoff and others envision it." Eskridge, *supra* note 100, at 1489; *see also* William N. Eskridge Jr., *The Ideological Structure of the Same-Sex Marriage Debate (And Some Postmodern Arguments for Same-Sex Marriage)*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIP, *supra* note 449, at 113, 119 ("[M]ost gay people are not as radical in their aspirations as Polikoff and Ettelbrick . . . .").

495. *See* Franke, *supra* note 463, at 2697 ("[T]hose who fall within marriage's shadow find themselves locked into a social field in which the attachments we take up have meaning already determined by the state.").

496. *See* Cahill, *supra* note 9, at 47; Dubler, *supra* note 9, at 961. In some ways, this tracks Brenda Cossman's powerful argument that the same-sex marriage debate on the left "misses the messiness, ambivalence and multiplicity of the inclusions and exclusions of citizenship." BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING

family," including marriage and parenting, "often take shape in the shadow of their marginal counterparts."[497] Demonstrating this point in rich detail, Ariela Dubler's study of widows' rights in the late nineteenth and early twentieth centuries revealed that "[t]he legal regulation of unmarried women . . . played a constitutive and contested role in legal constructions of the meaning of marriage."[498] In other work on single women's claims in the nineteenth century, Dubler has shown that beyond marriage's "formal reach," "judges and lawmakers forged the meaning of marriage itself."[499] Of course, in the period Dubler analyzed, nonmarital regulation participated in the construction of marriage as a highly gendered institution,[500] unlike the contemporary model shaped by LGBT nonmarital advocacy. Indeed, this contrast underscores the dynamic nature of marriage and the way it is actively constructed in nonmarital spaces.[501]

In the more modern LGBT context, Cahill explains how "domestic partnership statutes operate as a vehicle through which the law expresses its most aspirational commitments about all relationships."[502] Under this view, nonmarital recognition elucidates expectations for both married and unmarried relationships, even as the requirements formally target only the latter.[503] Indeed, while the state has increasingly taken what Mary Anne Case has labeled a "thin" view of marriage,[504] it has more "thickly" defined domestic partnership by imposing specific, concrete terms with financial and affective requirements.[505] Case inverts the conventional understanding of domestic partnership and marriage, showing that marriage may offer more, not less, space for flexibility.[506] Yet at the same time, the state may actually elaborate

160 (2007). While Cossman focuses on the concept of sexual citizenship, the sense of dynamism and contingency that she brings to her analysis is consistent with the analysis of marriage and nonmarriage, particularly as it relates to LGBT work, in this Article.

497. Cahill, *supra* note 9, at 52.

498. Dubler, *supra* note 490, at 1646.

499. Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family,"* 4 THEORETICAL INQUIRIES L. 797, 800 (2003).

500. *See id.* at 809.

501. *See* Dubler, *supra* note 9, at 1019.

502. Cahill, *supra* note 9, at 59.

503. *See id.* at 59–60.

504. *See* Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1205–06 (2010) ("[A] thin view of civil marriage makes it a legal shell that couples can fill with their own normative meaning and internal structure . . . .") (footnote omitted).

505. *See* Case, *supra* note 141, at 1773–74; *cf.* Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 1, 12 (1996) (noting that "eligibility for the benefits of domestic partnership may be more restrictive than marriage").

506. *See* Case, *supra* note 141, at 1772. Indeed, Case suggests that marriage critics, who are "concerned about state interference with and control over the details of adult consensual relationships, . . . may find that the existing laws governing marriage are not the most worrisome or restrictive." *See* Case, *supra* note 504, at 1204.

the meaning of marriage through the regulation of domestic partnership.[507] That is, even when the law takes a "thin" view of marriage, the law of nonmarriage may powerfully communicate a "thicker" view. In this way, domestic partnership specifies the content of marriage for everyone.

The California case study brings a social movement perspective to this important body of work, showing that not simply the state, but also advocates and grassroots constituents themselves shape the content of marriage in the spaces outside its borders. Of course, they do so as part of an interactive process involving other actors, including opponents. Ultimately, the production of marital meaning emanates not only from the margins but also from below, as individuals in unrecognized and stigmatized relationships seek rights and support. By comparing same-sex relationships to the legal and social standard—marriage—advocates highlighted norms that offered points of commonality between their unmarried constituents and married couples. LGBT advocates' impact on marriage from the outside ultimately allowed them to stake claim to the inside. While some surely sought to construct nonmarriage so as to elude marriage, others actively deployed nonmarriage in ways that built the case for a reshaped version of marriage—one capable of including same-sex relationships.

Same-sex couples became appropriate subjects of nonmarital recognition to the extent they resembled—and fulfilled the same functions as—married couples. If same-sex couples deserved recognition because they functioned like married couples, the specific ways in which they did—romantic affiliation, mutual emotional support, and economic interdependence—became important to both LGBT identity and the very definition of marriage. In casting same-sex relationships as marriage-like for the purpose of securing nonmarital rights, LGBT advocates ultimately constructed same-sex couples as marriage-worthy and marriage itself as LGBT-inclusive. They did so against the backdrop of a broader fight, involving multiple movements, over marriage's meaning and its role in organizing sexual and familial relationships. Even as LGBT advocacy on domestic partnership in some ways—and counterintuitively—furthered the centrality of marriage, it elaborated the content of marriage and consequently contributed to a model of marriage capable of including same-sex relationships.

B. Today's Case for Marriage

By looking closely at contemporary marriage equality jurisprudence, we can see that the specific attributes that justified same-sex couples' inclusion in nonmarital recognition now support their inclusion in marriage. When courts rule in favor of marriage equality, they articulate a model of marriage that looks

507. *See* Katz, *supra* note 55, at 1269. This is in some ways consistent with an expressive account of family law. *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1929 (2000).

in many ways like domestic partnership and that is equally applicable to same-sex and different-sex relationships.

In *Goodridge v. Department of Public Health*, the first state supreme court decision opening marriage to same-sex couples, the Massachusetts Supreme Judicial Court declared that "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[508] Articulated by the court in 2003, this conceptualization grew out of both the mapping of LGBT identity onto marital norms and broader changes in marriage itself. Marriage had grown to reflect important demographic shifts and legal changes wrought by advocates for a variety of social movements, including the LGBT movement.[509] The notion of marriage rooted in gender complementarity, procreative sex, and biological parenting—a notion that justified same-sex couples' exclusion—no longer resonated.[510] Understood in these terms, it becomes clear that in important ways the earlier era of nonmarital advocacy laid the groundwork for the current era of marriage equality advocacy.

In California, the supreme court conceptualized marriage in a way that resonated with years of LGBT advocacy seeking nonmarital recognition. It explained in its 2008 *Marriage Cases* decision that "gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children."[511] Adult coupling and chosen families, rather than biological reproduction and dual-gender parenting, had come to constitute not only the foundation of nonmarital status but also of marriage itself.[512]

More specifically, the relationship between the emotional and economic elements of marriage—a key move in nonmarital recognition—assumes a central role in contemporary marriage equality jurisprudence. In finding Proposition 8 unconstitutional in a decision that would ultimately become the definitive ruling in the case, the district court in *Perry* declared: "Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."[513] The court's language mirrored the definition of domestic partnership from its earliest articulation. Moreover, in striking down Proposition 8 on narrower grounds, the Ninth Circuit—in a

508. 798 N.E.2d 941, 961 (Mass. 2003).

509. *See supra* Part I; *see also* Jeremiah Egger, Note, Glucksberg, Lawrence, *and the Decline of* Loving*'s Marriage Precedent*, 98 VA. L. REV. 1825 (2012).

510. *See* Eskridge, *supra* note 53, at 1885; *see also* COSSMAN, *supra* note 496, at 174.

511. *In re* Marriage Cases, 183 P.3d 384, 420, 428 (Cal. 2008).

512. *See* COSSMAN, *supra* note 496, at 174–75; David B. Cruz, *Heterosexual Reproductive Imperatives*, 56 EMORY L.J. 1157, 1167–68 (2007); Hunter, *supra* note 62, at 1856.

513. *See* Perry v. Schwarzenegger *(Perry I)*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010), *aff'd sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

decision eventually vacated by the Supreme Court—explained in *Perry* that "because we acknowledge the financial interdependence of those who have entered into an 'enduring' relationship," "[w]e allow spouses but not siblings or roommates to file taxes jointly."[514] When forced to specify the attributes of marriage, the *Perry* courts named qualities—emotional commitment and economic support—that had come to explicitly define domestic partnership and linked those qualities as mutually constitutive.

The Supreme Court dispatched *Perry* on standing grounds and therefore offered little insight into the meaning of marriage and its relationship to same-sex couples.[515] Yet its decision in *United States v. Windsor*, which struck down Section 3 of DOMA and thereby opened federal rights and benefits to married same-sex couples, elaborated an understanding of marriage that resonates with earlier domestic partnership advocacy.[516] Rather than focus on procreative sex and gender differentiation, Justice Kennedy's majority opinion drew on core attributes that apply equally to same-sex and different-sex couples.

Indeed, Justice Alito in dissent noted the contest over the meaning of marriage itself. He observed the majority displacing the traditional, "conjugal" model of marriage—which he explained is an "intrinsically opposite-sex institution"—with a model in which "gender differentiation is not relevant" and therefore "the exclusion of same-sex couples from the institution [looks like] rank discrimination."[517] Justice Alito labeled this "newer view" the "'consent-based' vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons."[518] This articulation of a model of marriage capable of including same-sex couples maps neatly onto earlier domestic partnership regimes. Justice Alito's delineation of the two visions of marriage at stake in *Windsor*—and in the broader fight for same-sex marriage—reveals how the attributes that defined domestic partnership and justified same-sex couples' nonmarital recognition ultimately define marriage in ways that support same-sex couples' inclusion.

Looking more closely at Justice Kennedy's conceptualization of marriage, we see that he emphasized both marriage's private welfare function—marriage as a mechanism to channel mutual obligations and support—and its public dimensions—marriage as recognition.[519] Both of these frames proved crucial in pressing and securing domestic partnership in earlier LGBT advocacy. In *Windsor*, Justice Kennedy employed these same frames to describe marriage

514. Perry v. Brown (*Perry II*), 671 F.3d 1052, 1078 (9th Cir. 2012), *rev'd sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

515. *See Perry*, 133 S. Ct. 2652.

516. 133 S. Ct. 2675 (2013).

517. *Id.* at 2718 (Alito, J., dissenting) (internal quotation marks omitted).

518. *Id.*

519. *See* Douglas NeJaime, Windsor*'s Right To Marry*, 123 YALE L.J. ONLINE 219, 230–31 (2013).

and relate it to same-sex couples. He explained that marriage involves both "benefits and responsibilities" as the state uses marriage to distribute "certain statutory benefits" and, more importantly, to impose responsibilities on the partners.[520] Indeed, Justice Kennedy's declaration that same-sex couples "would be honored to accept"[521] the duties and obligations of marriage reflects years of LGBT advocacy demonstrating that same-sex couples form the same types of self-sufficient family units as different-sex married couples.[522] At the same time, his focus on the state acknowledgment and community recognition that marriage confers reflects both early appeals to recognition in domestic partnership advocacy and the later rejection of domestic partnership as an inadequate mode of recognition.[523] While domestic partnership at one point sought to bestow "status and dignity"[524] on same-sex couples, now it seems only full marriage recognition will suffice.

Windsor of course did not involve a challenge to a nonmarital recognition regime like domestic partnership. Still, Justice Kennedy's focus on the "stigma"[525] perpetrated by DOMA's non-recognition suggests that he may view nonmarital substitutes with suspicion.[526] *Perry*, on the other hand, directly implicated the question of domestic partnership's constitutional status. Yet because the standing issue proved dispositive, the Court did not engage this question. Nonetheless, the lower court decisions in *Perry* demonstrate not only that the arguments through which advocates achieved nonmarital recognition support arguments for marriage, but also that nonmarital recognition regimes divest marriage laws of rationales previously understood to justify the exclusion of same-sex couples.

By extending rights to same-sex couples because they act like married couples, domestic partnership in California exposed marriage's raw sexual-orientation-based distinction and dislodged justifications for that distinction.[527] Given that same-sex couples gained nonmarital rights based on their performance of marital norms, courts and legislatures increasingly understood same-sex and different-sex couples as similarly situated with regard to marriage. In other words, nonmarital recognition ultimately positioned same-sex couples' exclusion from marriage as, in Justice Alito's terms, "rank discrimination."[528]

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520. *Windsor*, 133 S. Ct. at 2692–93.
521. *Id.* at 2695.
522. *See* NeJaime, *supra* note 519, at 237–39.
523. *See id.* at 246.
524. *Windsor*, 133 S. Ct. at 2689.
525. *Id.* at 2693.
526. *See* NeJaime, *supra* note 519, at 246.
527. *See In re* Marriage Cases, 183 P.3d 384, 435. (Cal. 2008); *see also* NeJaime, *supra* note 3, at 724.
528. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting).

Furthermore, rationales rooted in procreation and parenting, which historically supported the different-sex requirement in marriage, receded precisely because of work regarding nonmarital relationships. Indeed, California's domestic partnership statute itself eventually included parental presumptions for children born into domestic partnerships.[529] LGBT advocates would ultimately emphasize the relationship between marriage and childrearing to support same-sex couples' claims to marriage—and Justice Kennedy made much of this childrearing aspect of marriage in *Windsor*.[530] Nonetheless, the legal separation of parenting and marriage, which grew out of trends in heterosexual family formation but was seized on by LGBT advocates, has provided an important legal basis for marriage equality.

After the California Senate passed the 1975 bill that would become the state's Uniform Parentage Act, the bill's author, Senator Anthony Bielenson, declared that "parent and child rights would be based on the existence of a parent and child relationship rather than solely on the marital status of the parents."[531] This crack in the legal relationship between marriage and parenthood eventually provided openings for LGBT advocates, who sought to protect the rights of (unmarried) lesbian and gay parents.[532] Ultimately, as the Ninth Circuit reasoned in *Perry*, California's "laws governing parentage, which are distinct from its laws governing marriage," provide rights and responsibilities to nonmarital parents in ways that erase distinctions based on marital status and thereby erode the connection between marriage and parenting used to justify marriage's exclusive nature.[533]

Similarly, California's favorable treatment of nonbiological parents weakened the biological-parenthood rationale for the marriage restriction.[534] The distinction between parental status and biology stemmed both from trends in reproductive technology and from doctrinal innovations, including de facto parenthood and parenthood by estoppel. LGBT advocates' efforts to assign rights and obligations to nonbiological co-parents leveraged and furthered these developments.[535] Internalizing these important changes in *Perry*, the Ninth Circuit explained that "in California, the parentage statutes place a premium on the 'social relationship,' not the 'biological relationship,' between a parent and a child."[536]

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529. *See* CAL. FAM. CODE § 297.5(d) (West 2010).

530. *Id.* at 2694–95 (majority opinion).

531. Press Release, Senator Anthony C. Beilenson Statement on Senate Bill 347 (Oct. 2, 1975) (on file with author).

532. *See, e.g.*, K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

533. *Perry II*, 671 F.3d 1052, 1086 (9th Cir. 2012).

534. *See id.* at 1087.

535. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005).

536. *Perry II*, 671 F.3d at 1087.

Even if parenting is no longer exclusively linked to marriage and biology, the proponents of laws restricting marriage for same-sex couples argue that such laws support an optimal childrearing environment—married, biological parents of each sex.[537] In rejecting the link between marriage and dual-gender childrearing, courts have relied not only on the parental rights of unmarried parents, including those in same-sex relationships, but also on the erosion of sex stereotypes inside marriage—a shift pushed by women's rights advocates and elaborated by LGBT advocates. As the *Goodridge* court explained, the argument based on dual-gender childrearing "hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective 'proper spheres' can be rigidly and universally delineated."[538] And the *Perry* district court connected the legacy of sex-differentiated roles in marriage and the family to the prohibition on marriage for same-sex couples.[539] Rejection of the former supported rejection of the latter.

Seen in these terms, the fight over the very definition of marriage—and the impact of nonmarital advocacy on that fight—reveals itself. Whereas social-conservative activists and commentators opposed to same-sex marriage fault LGBT advocates for "redefining" marriage, even those supporting marriage equality recognize the definitional stakes. Indeed, in casting its decision as "a significant change in the definition of marriage,"[540] the *Goodridge* court framed marriage as "an evolving paradigm" and acknowledged the extent to which its view of marriage diverged from an earlier model rooted in procreation and gender differentiation.[541]

Of course, this is not simply the product of LGBT work, either inside or outside marriage. Rather, this definitional fight relates to broader changes in family demographics and legal norms occurring over the latter part of the twentieth century and to mobilizations, on both the left and right, around marriage, family, and sex.[542] Within that broader context, we can locate the changing shape of marriage in an earlier era of LGBT organizing, in which advocates mapped same-sex relationships onto emerging *marital* norms in

537. *See* Opening Brief for Defendant-Intervenors-Appellants at 77–81, *Perry II*, 671 F.3d 1052. On this argument, see Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467 (2013).

538. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 n.28 (Mass. 2003); *see also* Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 92–95 (2013); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 495–96 (2007).

539. *Perry I*, 704 F. Supp. 2d 921, 975, 992–93 (N.D. Cal. 2010). On the relationship between sex and sexual-orientation discrimination, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

540. 798 N.E.2d at 965.

541. *Id.* at 967; *see also* COSSMAN, *supra* note 496, at 175.

542. *See supra* Part I; *see also* COSSMAN, *supra* note 496, at 174.

order to gain *nonmarital* support. By working in the space outside marriage and in a time before marriage constituted an official movement goal, LGBT advocates contributed to the attributes that would come to define marriage for everyone.

CONCLUSION

Exploring and understanding from where we have come is essential to appreciating and comprehending both where we stand and how we move forward. The insights that emerge from this Article's case study suggest the benefits of recalibrating the normative debate over marriage in ways that attend to the immense regulatory power of marriage, the changing meaning of marriage, and the specific impact of same-sex couples.

Understanding the dialogical relationship between marital norms and same-sex relationships suggests that further changes may be on the horizon.[543] Same-sex couples' participation in marriage may continue to direct the meaning of marriage away from one rooted in procreative sex and gender differentiation and toward one rooted in adult romantic affiliation and mutual emotional and economic support.[544] Even if children constitute a central feature of marital families, the earlier focus on procreation may be giving way to a focus on parenting more generally.[545] Moreover, the delinking of marital sex and LGBT childrearing may further complicate social and legal understandings of parenthood.[546] This is not to suggest that a world in which same-sex couples marry inevitably pushes us in progressive directions. Indeed, the model of both domestic partnership and marriage that LGBT advocates helped to construct privatizes support in ways that may minimize the push for public interventions.[547] And marriage itself may affect the lives of same-sex couples in deeply constitutive ways. Nonetheless, at a minimum, this Article's account of the relationship between marriage and LGBT advocacy shows that the shifting shape of marriage may integrate and advance, rather than simply reject and stunt, broader changes relating to family and sexuality.

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543. *See* Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 61 (2011); Edward Stein, *Marriage or Liberation?: Reflections on Two Strategies in the Struggle for Lesbian and Gay Rights and Relationship Recognition*, 61 RUTGERS L. REV. 567, 592 (2009); *cf.* Courtney Megan Cahill, *Celebrating the Differences That Could Make a Difference:* United States v. Virginia *and a New Vision of Sexual Equality*, 70 OHIO ST. L.J. 943, 998 (2009) (pointing toward marriage equality work's progressive potential if advocates accentuate differences between same-sex and different-sex relationships). Suzanne Kim's "skeptical marriage equality" and Edward Stein's "both/and" approach suggest cultivating the progressive potential in marriage while continuing to look for space outside marriage.

544. *See* Eskridge, *supra* note 53, at 1898; *see also* Ettelbrick, *supra* note 467, at 760.

545. In future work, I plan to explore the reconfiguring of procreation to include same-sex couples.

546. *See* BALL, *supra* note 94, at 131.

547. *See* Murray, *What's So New About the New Illegitimacy?*, *supra* note 5, at 433; NeJaime, *supra* note 125, at 247–48.

This Article's analysis—and specifically its focus on the mutually constitutive relationship between LGBT advocacy and marriage—speaks to broader questions in the study of law and social change. A movement's trajectory and impact depend not only on the ideological commitments and strategic decisions of movement activists but also on the broader institutional context in which the movement operates and against which it makes claims. That is, our understanding of the relationship between advocacy and social change cannot hinge on an analysis of the volitional choices of social movement advocates, but rather must attend to the constitutive and disciplining impact of the dominant institutions with which the movement interacts. Marriage, much like law itself, shaped the available ways to understand and articulate LGBT grievances and remedies. Indeed, the very impulse to prioritize relationship recognition reflects marriage's power. Of course, dominant institutions shape not only the movement's priorities and demands, but also responses by those outside the movement. Marriage provided the framework through which to articulate both support and opposition to LGBT claims.

Yet this Article also shows that even as a social movement wrestles with a powerful, entrenched institution that changes the movement, the movement itself may change that institution. Through LGBT contestation, as well as through challenges wrought by other forces, marriage grew more conducive to same-sex relationships. And as marriage now slowly moves to include same-sex couples, we see shifting articulations of marriage's core attributes. Nonetheless, these shifts in the content and meaning of marriage may accommodate the LGBT movement's claims in ways that assure marriage's continued power.[548]

While this Article's analysis specifically related the interaction between LGBT advocacy and marriage to debates in family law and sexuality scholarship, the case study could be used to directly engage questions in sociolegal theory. The dynamics that this Article uncovers likely exist in other movement contexts. Exploring the relationship between law, social movements, and legal and cultural institutions not only in the LGBT context but also in other settings may ultimately point toward more generalizable theories of law and social change.

548. On this dynamic, see Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).