

## **MARRIAGE APOSTATES: WHY HETEROSEXUALS SEEK SAME-SEX REGISTERED PARTNERSHIPS**

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### *Abstract*

Same-sex marriage is now a reality across Western countries. While this was a positive achievement for the LGBTQ community, some crucial questions remain unanswered. One of these questions concerns the future of registered partnerships, such as domestic partnerships or civil unions. After the legalization of same-sex marriage, most states are simply phasing such partnerships out.

I argue against this trend. Based on an original analysis of empirical data and case law, I contend that these partnerships retain value for non-traditional families. In fact, states must introduce registered partnerships open to couples regardless of gender, including adult friends and relatives. To support this argument, I present two analyses.

First, I survey empirical research showing that (1) less traditional families, including opposite-sex couples, are signing up for registered partnerships at increasingly high rates, where available; (2) interest in such partnerships is growing even among same-sex couples in countries where same-sex marriage has existed for a long time.

Second, I outline the legal and theoretical justifications for extending same-sex legal partnerships to all couples. To this end, I analyze recent strategic litigation in Europe initiated by heterosexual couples who sought access to registered partnerships reserved for same-sex couples. The analysis allows me to identify three approaches: a status recognition approach, a utilitarian approach, and a choice-based approach.

Ultimately, I offer guidance to groups willing to engage in legal mobilization and to policymakers in crafting a registered partnership that would be suitable for modern couples. Families that do not resemble the traditional marital family model continue to fly under the radar of the law. Resurrecting these laws can fix the problem of their legal invisibility.

## INTRODUCTION

Same-sex marriage is now recognized in several jurisdictions in the West.<sup>1</sup> This result is ascribable to the untiring work of LGBTQ groups that have utilized much of their energies to attain it. However, pervasive forms of discrimination on the basis of sexual orientation are still in place, such as legislation restricting access to foster and adoption services. But there is little doubt that marriage equality constituted a watershed moment for LGBTQ politics.<sup>2</sup> As Justice Kennedy's immortal words in *Obergefell* attest to, "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union two people become something

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<sup>1</sup> By "West" I narrowly refer to Europe, North America, and Oceania. For instance, within the twenty-seven member states of the European Union, thirteen legally recognize same-sex marriage. Canada recognized same-sex marriage in 2005 through the Civil Marriage Act S.C. 2005, c. 33 (Can.). In the United States, same-sex marriage became legal nationwide after the decision in *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). Several states had, however, legalized this form of marriage well before the Supreme Court stepped in. Amongst these were Massachusetts (2003), Connecticut (2008), Iowa, Vermont, New Hampshire, the District of Columbia (2009), New York (2011), Washington, Maryland (2012), California, New Jersey, New Mexico, Rhode Island, Delaware, Minnesota, Hawaii, Illinois (2013), and Oregon and Pennsylvania (2014). In Australia, same-sex marriage became legal in December 2017, and in New Zealand, in August 2013.

<sup>2</sup> Same-sex marriage was hailed as a historic victory for the movement. See, e.g., Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> [<https://perma.cc/56YR-F74F>]; Jess Bravin, *Supreme Court Rules Gay Marriage Is a Nationwide Right*, WALL ST. J. (June 26, 2015), <https://www.wsj.com/articles/supreme-court-rules-in-favor-of-same-sex-marriage-1435180972> [<https://perma.cc/WBV8-FJQB>]; Richard Wolf & Brad Heath, *Supreme Court Strikes Down Bans on Same-Sex Marriage*, USA TODAY (June 26, 2015), <https://www.usatoday.com/story/news/nation/2015/06/26/supreme-court-gay-lesbian-marriage/28649319/> [<https://perma.cc/VC93-4VLU>].

greater than once they were.”<sup>3</sup> After the Supreme Court’s decision in *Obergefell*, gay and lesbian couples could also finally create this most profound of all unions, and cease being second-class citizens.

Since marriage was seen by many as “the final stop for ‘full equality’ for lesbians and gay men,”<sup>4</sup> a question lurked behind these events: “What now?” The question has various ramifications.<sup>5</sup> “What now?” within the LGBTQ movement? Since the final objective has now been reached, the structure, financing, and strategies of the LGBTQ movement are inevitably changing.<sup>6</sup> A second, more crucial “what now?” bears upon the future of family law and policy. It concerns the fate of registered partnerships, which in many places have been erased at the stroke of a pen after marriage equality.<sup>7</sup> By the term “registered partnerships” (also “RPs”), I refer to all recognition models whereby two persons take affirmative steps to register their relationship and gain a bundle of legal benefits, rights, and obligations: civil partnerships, domestic partnerships, civil unions, reciprocal beneficiary laws, civil pacts of solidarity, etc. My argument in this Article is that these laws are still very much relevant. More specifically, I contend not only that they should be retained or reintroduced for same-sex couples but, more generally, that they should be

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<sup>3</sup> *Obergefell*, 576 U.S. at 681. On which see, e.g., Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 147–48 (2015) (describing the implications of the decision for substantive due process jurisprudence); Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L. J. 1263 (2019) (offering a critique of *Obergefell*’s emphasis on ideals of perfect love and complementarity). A separate issue concerns whether *Obergefell* will be under attack by the current more conservative Supreme Court. While this is a legitimate concern, at present, the Supreme Court has not taken steps to overrule this precedent, and there seems to be room for arguing that it will not overrule it anytime soon. Steve Sanders, *Relationship Check-in: LGBTQ People and the Supreme Court*, ACS EXPERT F. (June 30, 2021), <https://www.acslaw.org/expertforum/relationship-check-in-lgbtq-people-and-the-supreme-court/> [<https://perma.cc/SHS3-3LRS>].

<sup>4</sup> NICOLA J. BARKER, NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE 2 (2013). See also Gwendolyn M. Leachman, *Media, Marriage, and the Construction of the LGBT Legal Agenda*, 69 RUTGERS U. L. REV. 691, 691–92 (2017) (explicating how the issue of same-sex marriage gained disproportionate media coverage compared to other issues on the LGBT legal agenda, likely due to the appeal of culture wars for the public).

<sup>5</sup> See generally AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP (Robert Leckey ed., 2015).

<sup>6</sup> See generally QUEER ACTIVISM AFTER MARRIAGE EQUALITY (Joseph Nicholas DeFilippis, Michael W. Yarbrough & Angela Jones eds., 2018).

<sup>7</sup> See Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449, 451–52 (2016); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1510 (2016); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 794–95 n.12 (2010) (noting that it is commonplace to eliminate alternate statuses after the introduction of same-sex marriage).

available to all couples that eschew the paradigm of the traditional family, including two committed friends or two relatives.

Marriage equality seems to have sounded the death knell for many of these laws. This outcome was somewhat predictable, as registered partnerships had come to be seen as either “useless” or “odious”—useless as they exhausted their role of being a temporary fix before “full” marriage equality; odious as gay and lesbian couples perceived them as second-class statuses for second-class citizens.<sup>8</sup> Consequently, once same-sex marriage became legal nationwide in 2015, the seemingly natural reaction has been registered partnerships’ erasure.<sup>9</sup> This occurred through a variety of techniques. A standard reaction has been a gradual phasing out of legal partnerships. Other jurisdictions have opted for their forcible conversion into marriage. Others yet have asked couples to marry by a certain date to avoid losing their family benefits. We should sharpen our critical edge and ask whether indulging a dynamic whereby legislatures erase registered partnerships is beneficial to modern couples. There seems to be something special about these laws that renders them more attuned to the values of modern families.

Registered partnerships can promote a more pluralistic model of relationship recognition<sup>10</sup> and, as I will argue, offer legal protection to families that eschew the paradigm of the traditional marital family. An examination of jurisdictions that have adopted similar laws as an alternative to marriage demonstrates this point. A registered partnership is viewed as an alternative to marriage when both opposite- and same-sex partners can sign up.<sup>11</sup> The rationale for alternatives to marriage is not that they offer a separate-but-equal regime for same-sex couples, but rather that they offer a distinct regime that *any* couple can choose in lieu of marriage. Examples of jurisdictions adopting these laws in the United States are Illinois, Hawaii, and Colorado; and outside of the United States, France, Belgium, the Netherlands, and Luxembourg.<sup>12</sup> Interestingly, in these jurisdictions, not only are partnerships being preserved, but they are also becoming

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<sup>8</sup> See *infra* Section I.B.

<sup>9</sup> See *infra* Section I.B.

<sup>10</sup> E.g., Cyril Ghosh, *The Emergence of Marriage Equality and the Sad Demise of Civil Unions*, 73 *STUD. L. POL. & SOC’Y* 1 (2017).

<sup>11</sup> Jens M. Scherpe, *Quo Vadis, Civil Partnership?*, 46 *VICTORIA U. WELLINGTON L. REV.* 755, 759 (2015).

<sup>12</sup> See *infra* Section I.A.

increasingly popular amongst opposite- and same-sex couples.<sup>13</sup> Empirical research further shows that registered partnerships are especially appealing to couples that eschew the model of the archetypical marital family.<sup>14</sup> These include couples disenchanted with the ideal of fidelity or the imperative of having children, as well as those who live in less traditional financial arrangements.<sup>15</sup>

There is a second powerful demonstration of the relevance of these laws to modern couples. “Heterosexuals” across Europe are now engaging in strategic litigation in order to access same-sex registered partnerships, i.e., regimes only open to same-sex couples.<sup>16</sup> This might be surprising at first sight. How ironic that after gay and lesbian couples have fixed their perceived main source of discrimination—their exclusion from marriage—“privileged” or “mainstream” heterosexuals are now appropriating the language of equality to take over registered partnerships. My analysis, however, demonstrates that these heterosexual partners are not mainstream at all. There is a non-traditional component to their family arrangement that is slipping under the radar and deserves protection through means other than marriage.

In light of this development, this Article contends that the role for registered partnerships in a world with same-sex marriage is that of offering a legal structure to less traditional family arrangements (through RPs open to all couples, including friends and relatives). This Article then makes a second distinctive contribution. It systematizes the motives that drive couples to claim access to these laws and describes how these motives morph into *legal* arguments. Much literature has addressed the problem of the fate of registered partnerships on both sides of the Atlantic.<sup>17</sup> Yet, what is still missing is a detailed

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<sup>13</sup> See *infra* Section II.A. As to the low likelihood that states repeal partnerships that are an alternative to marriage see Matsumura, *supra* note 7, at 1519.

<sup>14</sup> By “archetypical marital couple” I will refer to a relationship of two persons, heterosexual, nuclear, sexual, exclusive, and based on a for-life commitment. NAUSICA PALAZZO, *LEGAL RECOGNITION OF NON-CONJUGAL FAMILIES: NEW FRONTIERS IN FAMILY LAW IN THE US, CANADA AND EUROPE* 3 (2021).

<sup>15</sup> See *infra* notes 106–109, 111–115 and accompanying text.

<sup>16</sup> To refer to these laws, I adopt the term “same-sex partnerships” used in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW* 437 (Robert Wintemute & Mads Andenæs eds., 2001).

<sup>17</sup> See, e.g., John G. Culhane, *After Marriage Equality, What’s Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 376–77 (2015) [hereinafter Culhane, *After Marriage Equality*] (assessing which registration regime “deserves” to be retained and which does not); John G. Culhane, *Civil Unions Reconsidered*, 26 J. CIV. R. & ECON. REV. 621 (2012) [hereinafter Culhane, *Civil Unions Reconsidered*]; Melissa Murray, *Paradigms Lost*:

account of how the expansion of these laws to all couples regardless of gender can occur.<sup>18</sup> American litigation is of little help in this regard, because opposite-sex couples in the United States have not mobilized to gain access to civil unions or domestic partnerships. In contrast, Europe is a site of considerable experimentation and (sometimes involuntary) innovation. Especially instructive is the experience of states opening their partnerships to all couples from the beginning—including non-romantic couples in Belgium—and the recent U.K. litigation through which “heterosexuals” gained access to same-sex civil partnerships.<sup>19</sup>

European case law helps discern the legal-philosophical reasons that inform opposite-sex couples’ claims in the courtroom. I organize such motives around three approaches: a status-based, a utilitarian, and a choice-based approach. If the couple pursues social status recognition, the argument is that the partners suffer from expressive harms because of their exclusion from the regime. A utilitarian argument stresses the need for the couple to have

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*How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 296–98 (2013) (discussing how the potential of these laws to pluralize lifestyles was curtailed by the LGBTQ movement’s decision to embrace marriage equality as the final goal); Ghosh, *supra* note 10 (describing the demise of civil unions as harmful to marriage-rejecting couples that nonetheless wish to formalize their union); Matsumura, *supra* note 7 (assessing the contours of a constitutional right not to marry and its implications in terms of resisting the forcible conversion or termination of civil unions and domestic partnerships); Mary Charlotte Y. Carroll, *When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society*, 130 YALE L.J. 478 (2020); Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statutes in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 51 (2014). As to Europe and especially the U.K., where the issue has attracted relatively broad attention due to the launch of an equal civil partnerships campaign, see, e.g., Scherpe, *supra* note 11, at 762–68; FROM CIVIL PARTNERSHIP TO SAME-SEX MARRIAGE: INTERDISCIPLINARY REFLECTIONS (Nicola Barker & Daniel Monk eds., 2015); Andy Hayward, *Relationships with Status: Civil Partnership in an Era of Same-Sex Marriage*, in SAME-SEX RELATIONSHIPS, LAW AND SOCIAL CHANGE 189, 190 (Frances Hamilton & Guido Noto La Diega eds., 2020) and Alexander Maine, *The Hierarchy of Marriage and Civil Partnerships: Diversifying Relationship Recognition in SAME-SEX RELATIONSHIPS, LAW AND SOCIAL CHANGE* 189, 190 (Frances Hamilton & Guido Noto La Diega eds., 2020); Lucinda Ferguson, *The Curious Case of Civil Partnership: The Extension of Marriage to Same-Sex Couples and the Status-Altering Consequences of a Wait-and-See Approach*, 28 CHILD & FAM. L.Q. 347 (2016); Ruth Gaffney-Rhys, *Same-Sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 Be Extended to Opposite-Sex Couples?*, 26 CHILD & FAM. L.Q. 173 (2014).

<sup>18</sup> As I will explain in this Article, the ideal registration scheme must be available to conjugal and non-conjugal couples alike, including two adult relatives or friends.

<sup>19</sup> By the term “heterosexuals” I narrowly refer to the claimants that have engaged in strategic litigation in Europe (described in Part III), since they happened to display this sexual orientation. However, I acknowledge that some opposite-sex couples might also include bisexual persons and persons with other non-normative sexual orientations. This methodological choice aims to avoid the epistemological flaw of bisexual erasure. See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). Thus, I shall use the more accurate term “opposite-sex couples” outside Part III.

access to a more flexible and lighter legal regime. A choice-based approach argues that adding options to the menu of family regimes is a value *per se*, due to its ability to accommodate different conceptions of the good life.

The systematization of these approaches is especially needed if one considers the patchwork landscape of registered partnerships. It is of reduced utility to discuss their (re)introduction in abstract terms. For instance, some laws are “light” and only confer a pared-down list of benefits while others mimic marriage.<sup>20</sup> Some regimes are still in place and others have been repealed (an outcome that hinges on whether change is pursued through courts or policymakers). Some are already available to all couples regardless of gender, while others are not.<sup>21</sup> In light of this variation, examining how the litigation strategies of heterosexuals unfolded differently along these lines is a more fruitful exercise. Organizing these approaches in a tripartite manner is also a novel contribution beneficial to future mobilization strategies.

Before moving any further, I shall provide a detailed roadmap. Part I offers a primer on RPs. Part II describes why RPs are increasingly appealing to modern couples, from both an empirical and normative perspective. Part III explicates the philosophical and legal grounds on which the extension of same-sex partnerships to opposite-sex couples can occur. For each approach, I first offer relevant examples of European judicial cases from which it emerges. Second, I provide an assessment of the potential weaknesses of each approach. I discuss my insights and offer some advice for policymaking in Part IV.

## **I. Registered Partnerships: An Overview**

Sections I.A and I.B sketch out the different types of partnerships currently available, and illustrate how these laws have fared after same-sex marriage became legal.

### **A. Definition and Models**

Laws introducing registered partnerships can vary significantly in terms of their personal and material scope. I use the term “registered partnerships” as an umbrella concept to identify all the schemes where two parties take affirmative steps to gain legal benefits linked to their relationship status. These legal partnerships are formal mechanisms of recognition. Unlike functional mechanisms of recognition, they do not (forcibly) ascribe

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<sup>20</sup> See *infra* Section I.A.1.

<sup>21</sup> See *infra* Section I.A.2.

couple status. They instead require parties to affirmatively seek the recognition of the law. The terms “registration,” “registration schemes,” and “registration regimes” are also used as synonyms.

I also include within the umbrella term those schemes of a more contractual nature, such as the French *pacte civil de solidarité* (Pacs) and Belgium’s *cohabitation légale*.<sup>22</sup> For instance, Pacs is a contractual partnership through which two persons can govern some aspects of their relationship under agreed-upon terms and register their agreement.<sup>23</sup> The fact that these contracts require registration renders the use of the term registered partnerships less problematic—while the use of the term “status” when referring to them is more controversial.<sup>24</sup>

RP is thus a broad category. It encompasses a plethora of schemes that can substantially vary in their layout as well as personal and material scope.

### 1. What Is the Content of the RP? Weak and Strong Models

The first variable is the content of registered partnerships. They can carry the same incidents of marriage, as many civil unions do.<sup>25</sup> Alternatively, they can offer a pared-down

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<sup>22</sup> Jens M. Scherpe & Andy Hayward, *The Future of Registered Partnerships: An Introduction*, in *THE FUTURE OF REGISTERED PARTNERSHIPS: FAMILY RECOGNITION BEYOND MARRIAGE* 3 (Jens M. Scherpe & Andy Hayward eds., 2017). See also Ilaria Pretelli, *Équivalence et reconnaissance du statut civil des personnes faisant ménage à deux* [*The Equivalence and Recognition of the Civil Status of Two Persons*], 11 CUADERNOS DE DERECHO TRANSNACIONAL [CDT] 8 (2019) (Fr.).

<sup>23</sup> See Joëlle Godard, *PACS Seven Years on: Is It Moving Towards Marriage*, 21 INT’L J.L. POL’Y & FAM. 310 (2007).

<sup>24</sup> By “status” I refer to the acquisition of a new position in society and before the law (with partners being no longer seen as single) and of a bundle of rights and benefits that are applicable *erga omnes*. Considering some characteristics (such as the prohibition to enter into another Pacs), some scholars argued that Pacs can be considered as conferring family status. See generally Ian Curry-Sumner, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in *LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES* 76 (Katharina Boele-Woelki & Angelika Fuchs eds., 2d ed. 2012). See also Godard, *supra* note 23, at 317. In the field of private international law, the same conclusion was reached in an attempt to ensure legal continuity and certainty when families cross borders (a certainty that mere contracts would not ensure). Cf. *LOI SUR LE DROIT INTERNATIONAL PRIVÉ: CONVENTION DE LUGANO* [LAW ON INTERNATIONAL PRIVATE LAW: THE LUGANO CONVENTION], 542 n.3 (Andreas Bucher ed., 2011) (Fr.).

<sup>25</sup> Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 591 (2013).



list of rights and obligations, as the French Pacs does.<sup>26</sup> Based on this variable, one can distinguish “strong” and “weak” registration models.<sup>27</sup> Under a strong registration model, the rights and obligations of partners are equal to that of spouses. In contrast, under a weak model the parties only gain limited legal benefits, such as property rights, mutual obligations of support, and some fiscal privileges.<sup>28</sup> The regime does not affect their personal law, including names, citizenship status, parental authority rights, and inheritance law.<sup>29</sup>

Illustrative examples of “weak” models are those in force in France, Belgium, and Luxembourg. For instance, Belgium’s regime, which was enacted in 1999, is known as *cohabitation légale*. The regime promotes a form of minimum solidarity by granting a limited bundle of rights and obligations.<sup>30</sup> Important legal benefits, such as the survivor’s pension or a reserved portion of the estate, are excluded.<sup>31</sup> Likewise, when France enacted Pacs in 1999, the legislature sought to draw a clear distinction between marriage and Pacs, inspired as it was by a “*principe différentialiste*” (principle of differentiation).<sup>32</sup> Over time, the substantive content of Pacs became richer.<sup>33</sup> Yet important differences from marriage remain.<sup>34</sup>

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<sup>26</sup> *Id.* at 594.

<sup>27</sup> Curry-Sumner, *supra* note 24, at 82.

<sup>28</sup> *Id.* at 82–83.

<sup>29</sup> *Id.*

<sup>30</sup> The limited array of rights and obligations includes tenancy rights upon the death of one of the two parties, a duty to contribute to household expenses, and the applicability of matrimonial property rules. See Geoffrey Willems, *Registered Partnerships in Belgium*, in *THE FUTURE OF REGISTERED PARTNERSHIPS*, *supra* note 22, at 392.

<sup>31</sup> *Id.*

<sup>32</sup> Wilfred Rault, *Entre droit et symbole: Les usages sociaux du pacte civil de solidarité* [Between Law and Symbol: Social Usages of the Civil Pact of Solidarity], 48 *REVUE FRANÇAISE DE SOCIOLOGIE* [REV. FR. SOCIO.] 555, 562 (2007) (Fr.).

<sup>33</sup> Examples include the exemption from the succession tax as well as the partial exemption from the tax on donations between partners. See Godard, *supra* note 23, at 315–16.

<sup>34</sup> Differences to marriage include the inability of Pacs to establish kinship, the lack of maintenance obligations upon dissolution of the relationship, the absence of the special inheritance rights created by marriage, the lack of certain social benefits such as survivor’s pensions, and the absence of rights when it comes to children such as the right to joint adoption of a common child. Laurenze Francoz Terminal, *Registered Partnerships in*

A comparative analysis between the United States and Europe offers additional insights into the content of these laws. Based on such analysis, one notices that some models are “stronger” than others. U.S. civil unions mirrored marriage in all respects (they were marriage by another name).<sup>35</sup> In contrast, European instruments ascribable to strong models (such as those in force in Sweden, Norway, and Denmark) offered the same legal benefits of marriage but lacked provisions on filiation<sup>36</sup>—these laws tended to only recognize the horizontal relationship of the two partners. Research, however, shows how these European states ended up recognizing provisions on filiation a few years after the enactment of the law.<sup>37</sup>

The reverse trend occurred in the United States. There, the recognition of vertical parent-child relationships came before that of horizontal adult-adult relationships<sup>38</sup>—a pattern that polyamorous unions also seem to be following.<sup>39</sup> As of 2002, apart from

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*France*, in *THE FUTURE OF REGISTERED PARTNERSHIPS*, *supra* note 22, at 169–80. Pacs partners with children are treated in the same way as cohabitants as far as the legal recognition of the child-parent relationship is concerned. *Id.* at 178.

<sup>35</sup> In the United States, civil unions were marriage by another name because they were created as a remedy to the exclusion of same-sex partners from marriage. CONTEMPORARY FAMILY LAW 296 (Douglas E. Abrams et al. eds., 5th ed. 2019).

<sup>36</sup> Scherpe, *supra* note 11, at 757.

<sup>37</sup> Ingrid Lund Andersen, *Registered Partnerships in Denmark*, in *THE FUTURE OF REGISTERED PARTNERSHIPS*, *supra* note 22, at 19.

<sup>38</sup> There are some limited examples of European jurisdictions that followed this path too. For instance, in England and Wales, gay and lesbian couples could adopt since 2002, i.e., two years before the law recognized them as a family (Civil Partnership Act of 2004). Also, in 2001, the Netherlands became the only country in the world to bestow adoption rights upon same-sex couples (to be distinguished from second-parent adoption, which was also recognized in many U.S. states). See YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* 119–20 (2002).

<sup>39</sup> In this regard, it is interesting to note that polyamorous unions seem to follow a similar pattern. The recognition of multi-parenting—and thus vertical parent-child relationships—is preceding the official recognition of the horizontal relationship between the partners. See Angela Chen, *The Rise of the Three-Parent Family*, *THE ATLANTIC* (Sept. 22, 2020) <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421/> [<https://perma.cc/J8QX-LP8T>]. See also Andrew Solomon, *How Polyamorists and Polygamists Are Challenging Family Norms*, *NEW YORKER* (Mar. 22, 2021), <https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms> [<https://perma.cc/6GGC-JZ8P>]. The legalization of multi-parenting is especially advanced in Canada. Ontario, British Columbia, and Saskatchewan permit the recognition of three or more intentional parents. See Lois Harder, *How Queer!? Canadian Approaches to Recognizing Queer Families in the Law*, 4 *WHATEVER* 303 (2021).

Vermont's civil unions and a few reciprocal beneficiary laws,<sup>40</sup> legislation and case law on same-sex relationships were mostly concerned with parental rights.<sup>41</sup>

Overall, registered partnerships tend to be easier to dissolve compared to marriage.<sup>42</sup>

## 2. Who Can Register? Functional Equivalent or Alternative to Marriage

A second variable regards who can enter into the union. First, to date, only two persons have been allowed to register together. There are only marginal exceptions at the local level, such as two municipalities in Massachusetts that recently opened municipal domestic partnerships to multi-party relationships.<sup>43</sup> Second, usually only conjugal couples can register.<sup>44</sup> This is to say that, save for limited exceptions, only couples in a sexual relationship are eligible. Having outlined these two implicit norms, an additional variable concerns the gender of the (dyadic, conjugal) couple. Based on this variable, one can distinguish laws that are *functionally equivalent* to marriage from laws that introduce an *alternative* regime to marriage. The former category refers to registration schemes only open to same-sex couples. The latter refers to schemes open to both opposite- and same-sex couples.

Several jurisdictions only introduced registration for same-sex couples to specifically address the problem of their legal invisibility. In such cases, the scheme was meant to be a separate marriage-like regime, only lacking the name "marriage." Due to their origins, this

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<sup>40</sup> These laws include a minimal list of rights, usually open to conjugal and non-conjugal couples alike. Jurisdictions with reciprocal beneficiary laws are Hawaii, Colorado, the District of Columbia (D.C.), Maine, and Maryland. For instance, D.C. refers to "any two people in a mutually caring relationship." See D.C. CODE § 32-701 (2006).

<sup>41</sup> MERIN, *supra* note 38, at 276-77.

<sup>42</sup> See *infra* note 247.

<sup>43</sup> *Second Massachusetts City to Recognize Polyamorous Relationships*, CATH. NEWS AGENCY (Mar. 20, 2021), <https://www.catholicnewsagency.com/news/246980/second-massachusetts-city-to-recognize-polyamorous-relationships> [<https://perma.cc/2CGN-ZX43>].

<sup>44</sup> See generally PALAZZO, *supra* note 14. As to the exceptions, including schemes open to non-conjugal couples, see Nausica Palazzo, *Queer and Religious Convergences Around Non-Conjugal Couples: 'What Could Possibly Go Wrong?'*, in QUEER AND RELIGIOUS ALLIANCES IN FAMILY LAW POLITICS AND BEYOND s.1 (Nausica Palazzo & Jeffrey A. Redding eds., forthcoming July 2022) [hereinafter, Palazzo, *Queer and Religious Convergences*].

functional equivalence is basically the rule for these “civil unions.”<sup>45</sup> From time to time, states would also reserve or nearly reserve domestic partnerships for same-sex couples only.<sup>46</sup> For instance, the domestic partnership currently in force in Oregon is solely open to same-sex couples.<sup>47</sup>

Civil unions in Colorado,<sup>48</sup> Illinois,<sup>49</sup> and Hawaii,<sup>50</sup> and domestic partnerships in New Jersey<sup>51</sup> and New York are alternatives to marriage open to all couples regardless of gender.<sup>52</sup> Some states also offer lighter regimes that are virtually open to non-romantic couples as well, such as close relatives.<sup>53</sup> These regimes are called designated or reciprocal beneficiary schemes. Belgium also offers a legal option for relatives or friends to register their union and gain a limited array of rights.<sup>54</sup>

Alternatives to marriage usually “make more sense” if their content is distinct from that of marriage (since these alternatives are options that all couples can choose in lieu of marriage). French *Pacs*, Belgian *cohabitation légale*, and the various reciprocal/designated beneficiary laws demonstrate this point by coming up as lighter, more flexible options. But this is not always the case. Consider the example of Dutch registered partnerships.

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<sup>45</sup> See *supra* note 35.

<sup>46</sup> Some states also feature hybrid forms of domestic partnerships whereby eligible couples include same-sex couples and, in addition, opposite-sex couples who are sixty-two years of age or older. See, e.g., N.J. STAT. ANN. §§ 26:8A-1 to 26:8A-13 (West 2021).

<sup>47</sup> OR. REV. STAT. ANN. §§ 106.300-106.325 (West 2021).

<sup>48</sup> COLO. REV. STAT. ANN. §§ 15-22-101 to 15-22-112 (West 2021). Civil unions in Colorado have the same substantive content of marriage in terms of legal benefits attached thereto.

<sup>49</sup> 750 ILL. COMP. STAT. ANN. 75/1 to 75/90, 80/1 (LexisNexis 2021). Civil unions in Illinois have the same substantive content of marriage in terms of legal benefits attached thereto.

<sup>50</sup> HAW. REV. STAT. §§ 572B-1 to 572B-11 (2021).

<sup>51</sup> N.J. STAT. ANN. § 26:8A-2 (West 2021).

<sup>52</sup> N.Y. PUB. HEALTH LAW § 2961(6-a) (LexisNexis 2021).

<sup>53</sup> See Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families*, 25 MICH. J. GENDER & L. 161, 195–97 (2018).

<sup>54</sup> C. CIV art. 1475(1) (Belg.).

Registered partnerships in the Netherlands are open to all couples yet mirror marriage.<sup>55</sup> While the content of the registered partnerships was also lighter than that of marriage at the beginning, there has been an equalization process between the two through waves of legislation over the last twenty years. After these reforms, the two regimes basically carry the same legal incidents.<sup>56</sup> This is to say that alternatives to marriage open to all couples can also mirror marriage.

The next section summarizes legislatures' attitudes towards registered partnership laws after they enacted same-sex marriage.

### B. Fate After Same-Sex Marriage

After same-sex marriage became legal throughout the U.S.,<sup>57</sup> the seemingly "natural" reaction has been the erasure of registered partnerships.<sup>58</sup> Either because they were deemed "useless"<sup>59</sup> or "odious,"<sup>60</sup> most partnerships did not manage to survive the furor of marriage equality.

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<sup>55</sup> The legal regime is now included in Title 1.5A. Art. 1:80a BURGERLIJK WETBOEK BOEK 1 [BWB1] [TITLE 1.5A. of the first Book of the DUTCH CIVIL CODE]. Ian Sumner, *Registered Partnerships in the Netherlands, in THE FUTURE OF REGISTERED PARTNERSHIPS*, *supra* note 22, at 123. In 2001, the Netherlands became the first country in the world to legalize same-sex marriage. Therefore, both marriage and registered partnerships are available for all couples.

<sup>56</sup> Sumner, *supra* note 55, at 129.

<sup>57</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015) legalized same-sex marriage nationwide in 2015, although several states had already legalized this form of marriage well before the Supreme Court stepped in. For a list of states legalizing same-sex marriage before the Supreme Court decision, see *supra* note 1.

<sup>58</sup> Carroll, *supra* note 17, at 539 (noting how Connecticut, Delaware, New Hampshire, Rhode Island, Vermont, Washington, and Wisconsin no longer offer these legal regimes).

<sup>59</sup> The redundancy argument was especially visible in Nordic European countries in the aftermath of marriage equality (Hayward, *supra* note 17, at 195) and, more generally, in jurisdictions adopting a nonmarital regime as the functional equivalent of marriage (see Scherpe, *supra* note 11, at 761). The idea of their redundancy is further attested by case law that views registered partnerships as fulfilling a "transitional purpose" (Steinfeld v. Sec'y of State for Educ. [2017] EWCA (Civ) 81 [172] (Eng.)).

<sup>60</sup> See, e.g., Sue Wilkinson & Celia Kitzinger, *In Support of Equal Marriage: Why Civil Partnerships is Not Enough*, 8 PSYCH. WOMEN SECTION REV. 54, 54 (2006) (describing these laws as a "painful compromise").

The historical context of these laws' creation explains why they became useless after same-sex marriage was legalized.<sup>61</sup> Since the 1990s, Western jurisdictions have become more receptive to same-sex couples' demands for legal recognition.<sup>62</sup> At one point, RPs represented a win-win situation for both social conservatives and progressives.<sup>63</sup> Social and religious conservatives wished to avoid the expansion of marriage to gay and lesbian couples. The introduction of RPs was aimed, from their vantage point, at pleasing the demands of the LGB community while at the same time preserving traditional marriage.<sup>64</sup> As more courts demanded "some form" of legal recognition, compromising around these regimes seemed appropriate.<sup>65</sup>

On the other side, progressives also had their stakes in the introduction of registered partnerships. These reforms finally offered legal protection to intimate relationships between gay and lesbian couples that had attracted (and continued to attract) much social contempt. These laws were surely important to the LGBTQ community. Yet they were not enough. The accepted wisdom is that registered partnerships were indeed a "necessary" step towards the full legalization of same-sex marriage.<sup>66</sup> I here refer to the incrementalist paradigm or "law of small change."<sup>67</sup> The paradigm had strong normative overtones: it conveyed the idea that the best way forward globally was to pursue incremental changes.

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<sup>61</sup> As to the United States, for a primer of the different origins of domestic partnerships and civil unions see Abrams et al., *supra* note 35.

<sup>62</sup> The Hawaii Supreme Court ruled in 1993 that the exclusion of same-sex couples from marriage triggered the highest standard of scrutiny, strict scrutiny. The standard response to LGB groups' mobilization, however, has been the introduction of RPs. These include Vermont's civil unions (1999), Hawaii's Reciprocal Beneficiary Act (1997), and civil unions in Denmark (1989), Norway (1993), Sweden (1995), and Iceland (1996).

<sup>63</sup> Culhane, *After Marriage Equality*, *supra* note 17, at 376.

<sup>64</sup> *Id.*

<sup>65</sup> E.g., *Baker v. State*, 744 A.2d 864, 886–89 (Vt. 1999) (leaving how to recognize gay and lesbian couples up to the legislature's discretion). The techniques right-wing actors came up with to oppose marriage equality reached a peak of creativity in North America when Alberta, Hawaii, and Vermont enacted registration schemes open to gay couples as well as friends and/or relatives to symbolically dilute the import of recognizing same-sex partners. Palazzo, *supra* note 53, at 195.

<sup>66</sup> See Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105 (2010).

<sup>67</sup> Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 16, at 437; Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*,

Not all scholars, however, are at ease with this narrative. Some reclaim the central role of RPs in the context of LGB activism.<sup>68</sup> Such scholars describe the first wave of registered partnerships as laws deliberately enacted by queer activists to recognize the richness of family forms outside of marriage (and outside of the mold of the marital family). John D’Emilio, for instance, praised the set of domestic partnerships enacted in the 1980s as creative tools for the recognition of the multifold reality of family arrangements—tools which were utilized before the movement dismissed the goal of family pluralism to embrace marriage equality.<sup>69</sup> In similar terms, Melissa Murray noted how, at the outset, these laws were supposed to offer an additional model of relationship recognition beyond marriage.<sup>70</sup> Looking at the other side of the Atlantic, Erez Aloni also noted that several LGB organizations were in favor of registration schemes instead of marriage.<sup>71</sup> He thereby rejected the applicability of the incrementalist paradigm in the European context as well.

This demonstrates that the history of RPs is non-linear. However, one can confidently argue that RPs were especially aimed at tackling a specific social issue: the lack of legal recognition of same-sex couples.<sup>72</sup> The disagreement within the LGB community focused on whether these laws were meant to be endpoints themselves or intermediate steps towards marriage. The latter view—such laws being stepping-stones to marriage—seems to have prevailed.<sup>73</sup> Melissa Murray identifies this twist as occurring in the 1990s, when same-sex

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5 JUD. STUD. INST. J. 104, 112 (2005). See also WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115–18 (2002).

<sup>68</sup> John D’Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV. 10, 10–11 (2006). See also Nancy D. Polikoff, *Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 713–14 (2000) (rejecting the applicability of Waaldijk’s sequence to the United States for reasons including the distinctive role of the judiciary in the United States). I here use the term LGB since the transgender rights movement was then emerging and, in any case, was less involved in these social struggles.

<sup>69</sup> D’Emilio, *supra* note 68, at 10.

<sup>70</sup> Murray, *supra* note 17, at 300–01. See also Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1256 (2010).

<sup>71</sup> Aloni, *supra* note 66, at 109.

<sup>72</sup> Even when open to both same-sex and opposite-sex couples, these laws were still the result of efforts to especially secure rights for same-sex couples. Murray, *supra* note 17, at 294.

<sup>73</sup> See Murray, *supra* note 17, at 297; Carroll, *supra* note 17, at 500–01. See also Cummings & NeJaime, *supra* note 70, at 1258.

couples obtained a largely unexpected judicial victory bearing upon same-sex marriage.<sup>74</sup> According to Murray, activists were galvanized by the victory and subsequently changed strategy nationwide. They started depicting RPs as a temporary fix.<sup>75</sup> Once RPs became a mere stepping-stone to marriage, in addition to the temporary-fix narrative, a second narrative emerged: the inferior-status narrative.<sup>76</sup> Some activists depicted these laws as unfair regimes confining gay and lesbian couples to a status of second-class citizens. Analogies were drawn both with the separate-but-equal regime imposed on the African American community (*Brown* analogy)<sup>77</sup> and with anti-miscegenation laws prohibiting interracial marriages (*Loving* analogy).<sup>78</sup> As much as these laws were premised on an ideology of white supremacy and race, exclusion from same-sex marriage was claimed to be premised on heteronormativity and homophobia.<sup>79</sup>

There might also be a third, less obvious, reason behind their erasure: the view that marriage is the gold standard, inviting the question as to why we would need a “lame” version of marriage.<sup>80</sup> This view is engrafted into law, through rules such as the form-hierarchy voidness rule.<sup>81</sup> Janet Halley coined this term to refer to the automatic dissolution of reciprocal beneficiary unions if any party gets married or enters a civil union (both considered superior statuses). By the same logic, any time a party to a civil union or domestic partnership gets married, the regime that “prevails” is marriage. RPs are indeed traditionally seen as second-rate regimes compared to the institution of marriage, which

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<sup>74</sup> Murray, *supra* note 17, at 296–300.

<sup>75</sup> *Id.* at 296.

<sup>76</sup> *Id.*

<sup>77</sup> MERIN, *supra* note 38, at 283–90.

<sup>78</sup> Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 162–63 (1988); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 114 (1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 66–69 (1997); WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE 153–63 (1996).

<sup>79</sup> MERIN, *supra* note 38, at 288.

<sup>80</sup> *Wilkinson v. Kitzinger* [2006] EWHC (Fam) 2022 [6] (Eng.).

<sup>81</sup> Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 41 (2010).



fully retains its “moral superiority” in our intellectual imaginaries *and* the law.<sup>82</sup> Hence, there is little doubt that the repeal of RPs is also the result of an internalized, scarcely articulated hierarchy amongst family regimes that puts marriage steadily on top.

All these reasons created the perfect storm that led to the dismissal of RPs through a variety of techniques. A first response involved phasing out. Through this technique, the law did not admit new entrants after a certain date, although it left in force existing unions. Vermont followed a similar route.<sup>83</sup> This reaction was quite popular in Europe as well, with jurisdictions following this path including Ireland, Germany, and the Nordic countries (Norway, Iceland, Sweden, Denmark, Finland).<sup>84</sup> For instance, Ireland is phasing out civil partnerships after a national referendum legalized same-sex marriage and proscribed new civil partnerships after November 16, 2015.<sup>85</sup> Germany also barred new life partnerships<sup>86</sup> starting from October 1, 2017, following the legalization of same-sex marriage.<sup>87</sup>

Some jurisdictions were more trenchant. After the legalization of same-sex marriage, existing unions in a registered partnership were forcibly converted into marital unions.<sup>88</sup> Partners were not given an opportunity to choose between the two regimes; they woke up married the day after the state law took effect. The states that opted for forcible conversions

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<sup>82</sup> Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225 (2004).

<sup>83</sup> VT. STAT. ANN. tit. 15, § 1301(A) (repealed 2013, Adj. Sess. No. 164).

<sup>84</sup> Andy Hayward, *New Models of Registered Partnership Reform: Embracing Family Recognition Beyond Marriage*, in *EXPLORING NORMS AND FAMILY LAWS ACROSS THE GLOBE* 4 (Melissa Breger ed., forthcoming 2022).

<sup>85</sup> Marriage Act 2015 (Act No. 35/2015) (Ir.), <https://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/html> [<https://perma.cc/RUH7-RA45>].

<sup>86</sup> Lebenspartnerschaftsgesetz [LPartG] [Act on Registered Life Partnerships], Feb. 16, 2001, BUNDESGESETZBLATT, TEIL I [BGBl I] at 266 (Ger.).

<sup>87</sup> Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts [Eheöffnungsgesetz] [Act Introducing the Right of Marriage for Same-Sex Couples], July 20, 2017, BGBl I at 2787 (Ger.).

<sup>88</sup> E-mail from Naomi Cahn, Dist. Prof. L. Va. U., to Nausica Palazzo, Assistant Prof., NOVA Sch. of L. (July 26, 2021, 9:34 PM IDT) (on file with author) (containing Excel file titled “Domestic Partnerships and Other Status Relationships Chart”); *Civil Unions and Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES, (Mar. 10, 2020), <https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [<https://perma.cc/VGP3-NF2F>].

include Connecticut,<sup>89</sup> New Hampshire,<sup>90</sup> and Delaware.<sup>91</sup> Washington has restricted existing domestic partnerships to couples in which either or both parties are above the age of sixty-two.<sup>92</sup> All other couples in Washington could either marry, dissolve their union, or do nothing, in which case their union would automatically merge into marriage.<sup>93</sup> Arizona opted for a third, more radical option: a flat-out termination of legal benefits unless the partners married by a certain date (more or less within a month).<sup>94</sup>

As previously seen, the erasure of registration schemes has not occurred in jurisdictions that have adopted regimes open to all couples regardless of gender.<sup>95</sup> This can mostly be explained by the substantive content of these laws, which usually differed from marriage. In this sense, they constituted a valid alternative to marriage for all conjugal couples, including opposite-sex ones. This aspect made their repeal politically costly: numerous (mostly opposite-sex) couples had invested in similar laws and were not willing to lose the status they had acquired.<sup>96</sup> By contrast, same-sex only registered partnerships tend now to be a thing of the past.<sup>97</sup>

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<sup>89</sup> CONN. GEN. STAT. § 46b-38rr (2009).

<sup>90</sup> N.H. REV. STAT. ANN. § 457:46 (2010).

<sup>91</sup> DEL. CODE ANN. tit. 13, § 218 (2013).

<sup>92</sup> WASH. REV. CODE § 26.60.010 (2014). The reason stated in the law is that, for these couples, marriage may be impractical in light of current social security and pension laws.

<sup>93</sup> *Id.* § 26.60.100.

<sup>94</sup> Matsumura, *supra* note 7, at 1510–11.

<sup>95</sup> Section I.A.1 has mentioned laws in Europe (like Pacs and legal cohabitation) as well as in the United States (like reciprocal and designated beneficiary laws) that are still in force despite the introduction of same-sex marriage. The reciprocal beneficiary law in Vermont is an exception to this and was repealed in 2013. *See supra* note 83.

<sup>96</sup> *Cf.* Murray, *supra* note 17.

<sup>97</sup> It is worth recalling that, in the United States, the only exception is Oregon, which has maintained (or rather not yet repealed) its same-sex domestic partnership status. OR. REV. STAT. § 106.300–106.325 (2021). Exceptions also exist in Europe and include civil unions in Italy. *See* Legge 20 maggio 2016, n.76, G.U. Magg. 21, 2016, n.119 (It.) [Act no. 76 of 2016], titled “Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze” (Law on Same-Sex Civil Unions and Cohabitation).

## II. The Role of RPs in a World with Same-Sex Marriage

The next two sections demonstrate the ongoing significance of registered partnerships to modern families. More specifically, Section II.A explains their relevance in light of some recent empirical trends and Section II.B explicates how these trends tie in nicely with modern family values—as well as how such relevance might grow even bigger.

### A. An Empirical Account: The Growing Interest of Modern Families in RPs

European registration schemes open to all couples regardless of gender are becoming more appealing to opposite-sex pairs, particularly to less traditional ones. French Pacs are emblematic in that regard. The popularity of Pacs has increased steadily,<sup>98</sup> unlike marriage, whose figures continue to sink. While in 1997, nearly 284,000 couples got married, from 2013 on, totals never went above 225,000, with a new low of 212,000 married couples in 2019.<sup>99</sup> The number of registered Pacs is almost nearing the number of marriages. If these trends continue, it would not be surprising if one day the number of Pacs surpasses the number of marriages.

According to the *Institute National des Études Démographiques* (INED), the largest share of Pacs is opposite-sex couples.<sup>100</sup> For instance, in 2010, the number of new opposite-sex *pacsés* couples reached 196,405 while the number of new same-sex couples was 9,145. But this ratio is not considerably different from the ratio of same-sex couples in marriages.<sup>101</sup> What is more interesting is that the introduction of same-sex marriage in 2013 did not have a tangible impact on this ratio. The latest available statistics demonstrate that, in 2019, there were 188,014 opposite-sex *pacsés* and 8,356 same-sex *pacsés*.<sup>102</sup> Further,

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<sup>98</sup> There has been a constant increase in the number of Pacs. The only exception was the year 2011, when a fiscal reform was approved. Magali Mazuy, Magali Barbieri & Hippolyte d'Albis, *L'évolution démographique récente en France: la diminution du nombre de mariages se poursuit* [Recent Demographic Evolutions in France: Marital Rates Continue to Decrease], 69 POPULATION (FRENCH EDITION) 313, 328 (2014).

<sup>99</sup> *Marriage and Nuptiality*, INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES (2021), [https://www.ined.fr/en/everything\\_about\\_population/data/france/marriages-divorces-pacs/marriage-nuptiality/](https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/marriage-nuptiality/) [https://perma.cc/6EF8-PVDR].

<sup>100</sup> *Pacs*, INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES (2021), <https://www.ined.fr/fr/tout-savoir-population/chiffres/france/mariages-divorces-pacs/pacs/> [https://perma.cc/93UB-C2YJ].

<sup>101</sup> See *Marriage and Nuptiality*, *supra* note 99.

<sup>102</sup> *Pacs*, *supra* note 100.

except for the first three years after the introduction of same-sex marriage (2013, 2014, 2015) when same-sex marriages surpassed same-sex Pacs, the enthusiasm for marriage somehow vanished. Starting in 2016, the number of Pacs created by same-sex couples exceeded the number of same-sex marriages.<sup>103</sup>

The case of Pacs is paradigmatic of the ongoing relevance of RPs for less traditional couples. Empirical data shows that Pacs tend to attract couples that display distinct social and demographic characteristics, and that are less aligned with the model of the archetypical marital couple.<sup>104</sup> By “archetypical marital couple,” I refer to a relationship of two persons that is heterosexual, nuclear, sexual, exclusive, and based on a for-life commitment.

Research conducted by sociologist Wilfred Rault over the last two decades of the life of Pacs compellingly illustrates this point.<sup>105</sup> *Pacsés* couples display more liberal attitudes towards sex and sexual orientation.<sup>106</sup> They are more at ease with the idea of “casual sex,” that is, a dissociation between sexuality and affection. They are less attached to the ideal of for-life fidelity, with only 42% of couples adhering to the ideal, compared to 64% of spouses.<sup>107</sup> Rault argues that the disenchantment with heteronormativity, including the norm of heterosexuality, might correlate with the fact that Pacs itself challenged this norm—as it was also open to homosexual couples.<sup>108</sup>

The beliefs of *pacsés* couples also tend to be more egalitarian when it comes to gender norms. While half of *pacsés* couples think that parents should raise male and female

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<sup>103</sup> Compare *Pacs*, *supra* note 100 with *Marriage and Nuptiality*, *supra* note 99. Both in 2018 and 2019, Pacs exceeded by nearly 2,000 unions the number of marriages.

<sup>104</sup> This is especially so because these partners often choose Pacs over marriage due to their disenchantment with the marital ideal.

<sup>105</sup> See *infra* notes 106–109, 111–115 and accompanying text.

<sup>106</sup> Wilfred Rault, *Is the Civil Solidarity Pact the Future of Marriage? The Several Meanings of the French Civil Union*, 33 INT’L J.L., POL’Y & FAM. 139, 142 (2019).

<sup>107</sup> Wilfried Rault et al., *Les orientations intimes des premier.e.s pacsé.e.s* [*Intimate Orientations of First Pacsés Couples*], 66 POPULATION (FRENCH EDITION) 343, 356 (2011).

<sup>108</sup> *Id.* at 355–56.

children in the same fashion, this idea is only shared by 37% of married couples.<sup>109</sup> Further, registered partners may be less interested in having children and more inclined to embrace a “pure relationship” model (grounded in utilitarian ideals of self-satisfaction and personal blossoming).<sup>110</sup> While having children is an imperative under the model of the nuclear family—that is part and parcel of the archetypical model of family—*pacsés* couples oftentimes think that they can lead successful lives without children (“*on peut reussir sa vie sans enfant*”).<sup>111</sup> It is emblematic in this regard that the law introducing *Pacs* does not even mention children.<sup>112</sup> This might constitute evidence that the law itself may have contributed to debunking this traditional family norm, i.e., the “nuclear imperative.” Similarly, *pacsés* couples show more positive attitudes towards feminism (63%), compared to married spouses (47%).<sup>113</sup> These findings are consistent with the rationale of the U.K. Equal Civil Partnership Campaign, where one of the grounds for seeking the expansion of the law to opposite-sex relationships was the “feminism factor.”<sup>114</sup>

Empirical research on *Pacs* also shows the parties’ interest towards material benefits such as property rights. Compared to married couples, registered partners more often show little or no interest in the expressive benefits of recognition, which include the sanctioning of the social relevance of the relationship.<sup>115</sup> They might be more inclined to keep finances separate and enter into less “traditional” financial arrangements.<sup>116</sup> This might be explained

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<sup>109</sup> *Id.* at 360. Within marriage, husbands tend to be more conservative than wives. Disaggregated data show that only 32% of men would raise girls and boys alike, compared to 41% of women. *Id.* at 361.

<sup>110</sup> See generally ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992) (coining the notion of “pure relationship model” and describing the growing influence of a logic of self-fulfillment to building intimate relationships).

<sup>111</sup> Rault, *supra* note 107, at 368. See also Estelle Bailly & Wilfried Rault, *Are Heterosexual Couples in Civil Partnerships Different from Married Couples?*, 497 *POPULATION & SOC’YS* 1, 1–2 (2007) (describing how *Pacs* partners aged twenty-five to thirty-nine years tend to be more often childless compared to spouses).

<sup>112</sup> Rault, *supra* note 106, at 142.

<sup>113</sup> Rault, *supra* note 107, at 361, Table 7.

<sup>114</sup> Catherine Fairbairn & Oliver Hawkins, *The Future of Civil Partnership* 11 (House of Commons Library, Briefing paper No. 07856, 2018), <https://www.parliament.uk/globalassets/documents/commons-library/The-future-of-civil-partnership-CBP-7856.pdf> [<https://perma.cc/BRT4-W3JH>].

<sup>115</sup> Rault, *supra* note 106, at 143.

<sup>116</sup> Cf. Sophie Ponthieux, *Income-Sharing by Couples*, INSEE PREMIERE, NO. 1409 (2012), <https://www.insee.fr/en/statistiques/1281045> [<https://perma.cc/69BJ-NY4Q>] (noting that, in 2010, two thirds

by the way in which Pacs and laws similar to it are drafted. For instance, in regimes such as those enacted in France, Belgium, and Luxembourg, separation of property is the default regime that applies to partners,<sup>117</sup> whereas community property is usually the default regime for marriage.<sup>118</sup> Under separation of property regimes, the presumption of *indivisum*—whereby courts conclude that property is jointly owned—only applies if the parties cannot prove exclusive ownership.<sup>119</sup> A similar regime is also explained by the fact that registered partners are more inclined to have a “double income and no kids.”<sup>120</sup> Joint property often seeks to reward a non-working spouse for domestic work that is not financially compensated, including child-rearing activities. Yet, understanding whether the law influenced the shape of these family arrangements or whether families with these characteristics are simply attracted by these laws (creating a phenomenon of “positive selection”) is perhaps a chicken and egg problem. It is unquestionable that there is a positive interplay between more modern legal regimes and modern family arrangements.

Belgium also confirms the impression that RPs are increasingly popular.<sup>121</sup> The total number of declarations has increased steadily from an average of 6,623 between 2000–2004, to 26,942 between 2005–2010, and 40,047 between 2011–2019.<sup>122</sup> For the first time,

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of French couples reported full-income sharing and that full sharing is more common amongst married couples).

<sup>117</sup> In France, for instance, partners can adopt a community property regime (“régime de l’indivision”) either by the initial agreement or by subsequent agreement. FRÉDÉRIQUE GRANET & PATRICE HILT, *DROIT DE LA FAMILLE* [FAMILY LAW] 112, ¶241 (6<sup>th</sup> ed., 2018) (Fr.). But, after a 2006 reform, the default regime is separation of property under art. 515. Code civil [C. Civ.] [Civil Code] art. 515-5. Terminal, *supra* note 34, at 169.

<sup>118</sup> Frederik Swennen & Sven Eggermort, *Same-Sex Couples in Central Europe: Hop, Step and Jump*, in *LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE*, *supra* note 24, at 35 (citing KATHARINA BOELE-WOELKI, IAN CURRY-SUMNER, MIRANDA JANSEN & WENDI SCHRAMA, *HUWELIJK OF GEREĞISTREERD PARTNERSCHAP* [MARRIAGE OR REGISTERED PARTNERSHIP] 152 (2006)).

<sup>119</sup> See, e.g., Belgium (C. Civ., art. 1478, par. 2), and France (C. Civ., art. 515–5).

<sup>120</sup> Swennen & Eggermort, *supra* note 118.

<sup>121</sup> Data can be downloaded in the “figures” section of *Declarations of Legal Cohabitation*, STATBEL, <https://statbel.fgov.be/en/themes/population/partnership/declarations-legal-cohabitation#panel-12> [<https://perma.cc/Y26X-F3SR>].

<sup>122</sup> Starting from 2011, the total number of declarations of *cohabitation légale* has been relatively stable: 38,921 in 2011, 39,038 in 2012, 39,970 in 2013, 40,054 in 2014, 40,080 in 2015, 40,184 in 2016, 40,608 in 2017, 40,770 in 2018, 40,801 in 2019. *Id.*

in 2020, the number of declarations of *cohabitation légale* has surpassed the number of marriages.<sup>123</sup> Once again, unions of the opposite sex constitute the largest share of couples by far,<sup>124</sup> but the ratio is similar within marriages.<sup>125</sup>

While there is no research on the “nature” of Belgian *cohabitation légale* relationships comparable to the research on Pacs, the case of Belgium is telling in another respect. *Cohabitation légale* is also open to non-conjugal couples (friends and relatives), which could be a hint that these schemes are well suited for less traditional families. Yet, understanding how many non-conjugal couples register is an arduous task. Statistics only single out close relatives: a parent and a child or two siblings.<sup>126</sup> For instance, in 2019, out of 40,801 declarations, 160 had been made by close relatives.<sup>127</sup> However, the Bureau of Statistics does not capture pairs of friends or pairs that include relatives outside of the mentioned degrees of consanguinity, so at present we still do not have conclusive figures regarding non-conjugal couples.

Empirical data from the Netherlands is revealing of yet another trend. First, Dutch registered partnerships mimic marriage.<sup>128</sup> This might tempt us to think that very few couples would still register. Since registered partnerships have the same features as marriage, logic has it that it is better to get the golden version instead of the copy. Yet, this is not what happened, at least not in the last few years. While at the beginning, few

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<sup>123</sup> *Compare Marriages*, STATBEL, <https://statbel.fgov.be/en/themes/population/partnership/marriages#panel-12> [<https://perma.cc/H7K3-FNVN>], with *Declarations of Legal Cohabitation*, *supra* note 121.

<sup>124</sup> For instance, in 2017, out of 39,038 declarations, 37,727 were made by persons of the opposite sex. In 2019, out of 40,801 declarations, 39,384 were made by persons of the opposite sex. *Declarations of Legal Cohabitation*, *supra* note 121.

<sup>125</sup> According to the most recent statistics, out of 32,779 marriages, 909 were same-sex marriages, and out of 36,329 legal cohabitations, 1,364 were same-sex unions. *Compare Marriages in 2020* (downloads section) in *Marriages*, *supra* note 123, with *Déclarations de cohabitation légale 2020* (downloads section) in *Declarations of Legal Cohabitation*, *supra* note 121.

<sup>126</sup> The Directorate-General Statistics offers data regarding the number of close relatives, namely those in a parent-child relationship or siblings. In 2018, out of 38,921 registrations, only fifty-eight regarded those in a parent/child relationship and 112 siblings. Likewise, in 2019, out of 40,801 declarations, seventy-five have been made by a parent and a child, and eighty-five by siblings. *Compare Marriages*, *supra* note 123, with *Declarations of Legal Cohabitation*, *supra* note 121.

<sup>127</sup> *Id. Compare Marriages*, *supra* note 123, with *Declarations of Legal Cohabitation*, *supra* note 121.

<sup>128</sup> *See generally* Sumner, *supra* note 55.

opposite-sex couples registered, the latest survey from 2020 illustrates a marked upward trend.<sup>129</sup> In 2009, registered partnerships accounted for 10.5% of opposite-sex couples' formalized relationships (including marital relationships). In 2016, the share rose to 19.1% and reached 32.1% in 2020. The popularity of this form of union is also markedly on the rise within the LGBTQ community. In 2020, 38.9% of formalized lesbian relationships and 43.6% of formalized gay relationships were registered partnerships, while in the first years following its enactment, the popularity of RPs amongst gay and lesbian partners was significantly lower.<sup>130</sup>

The three examples of France, Belgium, and the Netherlands attest to the significant growth in popularity of RPs amongst both opposite- and same-sex couples. However, data from the Netherlands is illustrative of two additional points: (i) couples might still want a registered partnership even when it mimics marriage, and (ii) same-sex couples are veering back to such laws in a country where "choice" between registration and marriage has been available for many years. In the Netherlands, same-sex marriage became legal in April 2001. While it is too early to make any prediction in this regard, it might well be the case that the Netherlands is illustrative of a broader trend "backward" in the area of LGBTQ families, whereby such couples veer back to registered partnerships precisely for the reasons this Article outlines (registered partnerships' ability to accommodate less traditional families). In the next few years, data coming from the U.K.<sup>131</sup> and Austria<sup>132</sup> will allow the opportunity to test this hypothesis. The two countries have recently extended "marriage-like" civil partnerships to all couples. The terms of comparison will therefore be homogeneous, unlike France and Belgium, which have in place much lighter registration schemes.

It is not easy to interpret this growing interest in registration. Specifically, its potential ramifications on the future of marriage and cohabitation are unclear. First, the growing popularity of registration does not necessarily sound the death knell for marriage. Marriage

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<sup>129</sup> *20 Years of Gay Marriage in the Netherlands: 20 Thousand Couples*, CBS.NL (Mar. 31, 2021), <https://www.cbs.nl/en-gb/news/2021/13/20-years-of-gay-marriage-in-the-netherlands-20-thousand-couples> [<https://perma.cc/MXU4-A9DX>].

<sup>130</sup> *Id.*

<sup>131</sup> In England and Wales, opposite-sex couples could register starting from December 31, 2019, in Northern Ireland from January 13, 2020, and in Scotland from July 28, 2020.

<sup>132</sup> In Austria, opposite-sex couples could register their union starting from January 1, 2019.



is very much alive and continues to be attractive to a large number of couples.<sup>133</sup> Second, it is unclear whether registration schemes can become a viable solution to the lack of recognition of cohabitants. Some scholars argue that they cannot.<sup>134</sup> While I acknowledge these potential parallel implications to the growing interest in registration, I do not engage them in this Article. I limit myself to outlining this growing popularity and explicating that these laws are especially valuable to a certain type of family: couples in less-traditional family arrangements.

The next section helps locate these empirical shifts within a new normative framework. It shows how similar changes might be explained by these families valuing different things compared to the past.

### **B. A Normative Account: RPs Are More Attuned to the Values of Modern Couples**

Major normative shifts are affecting the relationship between modern families and family law. Processes of individualization, secularization, pluralism, and the increasing influence of egalitarianism are widely known to family law scholars and sociologists of the family.<sup>135</sup> These patterns are changing the way individuals experience intimacy and, in turn, affecting the way they approach the law. After a cursory primer of these trends, this section investigates whether marriage or registration is better suited to accommodate them.

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<sup>133</sup> Marriage continues to be more popular than registration, and the ideology of marriage continues to survive. BARKER, *supra* note 4, at 22. However, recent statistics suggest that marital rates are declining across the West. Decreasing marital rates are especially visible in a number of Western countries. I here provide four examples taken from the Euro-American context: Canada, the United States, the U.K., and Italy. As to Canada, see JULIEN D. PAYNE & MARILYN A. PAYNE, *CANADIAN FAMILY LAW* 2 (6th ed. 2015). As to the United States, see *HANDBOOK OF MARRIAGE AND THE FAMILY* 528 (Gary W. Peterson & Kevin R. Bush eds., 2013). As to England and Wales, see Claire Miller, *Number of People Getting Married is Falling—and Here's the Reason Why*, MIRROR ONLINE (Apr. 27, 2016), [<https://perma.cc/3GW6-2LMD>]. As to Italy, see *Matrimoni, Separazioni e Divorzi*, ISTAT (Nov. 14, 2016), [<https://perma.cc/ZAF4-2WVF>].

<sup>134</sup> Joanna Miles, *Financial Relief Between Cohabitants on Separation: Options for European Jurisdictions*, in *EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW* 269 (Katharina Boele-Woelki & Tone Sverdrup eds., 2008). *But see* Feinberg, *supra* note 17, at 61 (arguing that “[w]ith marriage in decline, cohabitation on the rise, and the number of children born to cohabiting couples increasing at a rapid pace, ... [e]xpanding rights and protections on the basis of a status other than marriage is likely to have a number of positive effects.”).

<sup>135</sup> *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1508 (1992); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1226–28 (1998); ULRICH BECK & ELISABETH BECK-GERNSHEIM, *INDIVIDUALIZATION: INSTITUTIONALIZED INDIVIDUALISM AND ITS SOCIAL AND POLITICAL CONSEQUENCES* 88 (2002).

It concludes that registration schemes are more suitable because they are consistent with and the likely consequence of these shifts.

Processes of individualization are prominent in Western family law. One of the main individualism theorists, Anthony Giddens, has compellingly described the movement towards individualization in conceptions of family.<sup>136</sup> Pursuant to the trend, the family is increasingly seen as a sum of individuals. Not only do individuals therein retain their full legal capacity (without dispersing it into the familial unit), but they also take center stage in the relationship, bringing their set of aspirations, utilitarian goals, and particular logic of personal blossoming.<sup>137</sup> Processes of pluralization in family law whereby a menu of regimes replaces the “monopoly” of marriage are also relevant. Such processes have been steadfast and have contributed to the pluralization of lifestyles. After the decriminalization of “fornication,” cohabiting relationships became not only accepted but also legally visible; after the decriminalization of so-called sodomy laws nonmarital regimes open to same-sex couples were introduced.<sup>138</sup>

Egalitarian, secularizing, and individualism-driven trends have irreversibly affected the law of the family. Rights discourse and its focus on the individual members (spouse, child, parent, etc.) as opposed to the family unit, which is not a rights-bearer, has also played an indisputable role in transforming the legal framework. As a consequence of these concomitant trends, the law’s focus is no longer on the family unit but on the individuals therein, who are seen as independent and separate from each other.

The trend has garnered criticism by scholars conceiving of the family as a unit of its own from which rights and obligations should flow.<sup>139</sup> Canadian scholar Jean-François

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<sup>136</sup> GIDDENS, *supra* note 110.

<sup>137</sup> *Id.* at 58; *see also* BECK & BECK-GERNSHEIM, *supra* note 135, at 22; JOHN WITTE JR, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 209 (1997) (describing marriage as “a terminal sexual contract designed for the gratification of the individual parties.”).

<sup>138</sup> William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L. J. 1884, 1927 (2012). *See also infra* Section III.D.

<sup>139</sup> *See, e.g.,* Jean-François Gaudreault-DesBiens, *Le droit constitutionnel comme vecteur de transformation sociale: le cas de la conjugalité au Canada* [Constitutional Law as a Vehicle of Social Change: The Case of Conjugalities in Canada], in CONJUGALITÉS ET DISCRIMINATIONS [CONJUGALITIES AND DISCRIMINATIONS] 11 (Alain Charles Van Gysel ed., 2012) (Fr.); Jean Carbonnier, *Cinquante années de transformation de la famille française (1917-1967)* [Fifty years of Transformations of the French Family], L’ANNÉE SOCIOLOGIQUE [ANNÉE SOCIO.] (1967), reprinted in ÉCRITS 1908-2003 [WRITINGS OF 1908-2003] (2008) (Fr.).

Gaudreault-DesBiens, an exponent of this school of thought, maintains that the focus on rights and personal aspirations disintegrates families.<sup>140</sup> Utilitarian ideals, he argues, have rendered the family unit more precarious than ever. This precariousness is a consequence of the “trivialization” of the relationship’s breakup, which is in turn a consequence of the decreasing influence of duties within families.<sup>141</sup> With contract, autonomy, and utilitarian ideals taking center stage in intimate arrangements, people’s own aspirations become “the alpha and omega” of the relationship. In his view, these forces feed self-indulgent narcissism, best typified by the metaphorical utterance of modern couples, “I want the world and I get it now!”<sup>142</sup>

He more specifically refers to an attitude whereby couples instrumentally resort to legal tools to satisfy their demands. Instrumental attitudes are visible in these couples’ attempts to promptly amend legal tools not suited to fully satisfy their needs (as if there were an à la carte menu from which to order the dishes of choice).<sup>143</sup> This phenomenon is described as a form of patronage-based conjugality (“*conjugalité clientéliste*”).<sup>144</sup> To curb it, he proposes a more traditional model of marriage, one in which conjugality works as a key-in-hand or “turnkey contract.”<sup>145</sup> This is a type of contract where the construction company executes the work in its entirety, with the customer “taking the key” and entering the house as it is.<sup>146</sup>

Gaudreault-DesBiens’s attempt to curb individualism by opposing modern couples’ instrumental attitudes towards law is noteworthy. His proposal, however, is not workable. Not only is it debatable that we could actually put an end to these monumental shifts in family law, but there is also a question as to why we would do so. For those committed to more egalitarian values and secular legal institutions, including me, the new framework merits accommodation. Given the premise that recent trends are not reversible and merit

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<sup>140</sup> Gaudreault-DesBiens, *supra* note 139, at 14–15.

<sup>141</sup> *Id.* at 14–15.

<sup>142</sup> *Id.* at 49.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 14.

<sup>145</sup> *Id.* at 15.

<sup>146</sup> *Id.*

accommodation, the issue remains whether marriage or registration is the most appropriate vehicle to do so. There are reasons to believe that marriage does not pass muster. Marriage is met with disenchantment by a growing number of couples. The way in which modern couples articulate this disenchantment might explain why marriage is not the answer.

First, marriage as an institution has patriarchal roots and is not fully secularized.<sup>147</sup> Historically, the institution of marriage has been a site of oppression for women. Younger generations are increasingly aware of these issues due to growing exposure to gender studies in academia, media, and social networks. These studies have shown how women were absorbed into marriage. The common law doctrine of coverture posited that they had no legal personality after marriage.<sup>148</sup> Their rights were subsumed under those of the husband, with the consequence that women could not own property, conclude contracts, sue, or even buy anything. Not only did women become legally obscured within marriage, but their subjectivity also became obscure. Only through marriage and child-rearing could they justify their station in life.<sup>149</sup>

Looking at post-revolutionary America, Lisa McIntyre noted a second overlooked consequence of the so-called “cult of domesticity”: “the idea that society had a stake in the family.”<sup>150</sup> Families did not exist for their own good. They were not overtly aimed at meeting the utilitarian goals of their members but those of society, as “[families] were the basis of civilization and our hope for the future.”<sup>151</sup> Marriage still is a repository of social values and is charged with a multitude of social and personal expectations. It is a public good in many ways.<sup>152</sup> When examining the European context, for instance, one notices that the vestiges of this glorious past are visible in a number of constitutions, where the

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<sup>147</sup> Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

<sup>148</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*442. The doctrine posits that “[b]y marriage, the husband and wife are one person in law: that is, the very being or existence of a woman is suspended during marriage or at least is incorporated and consolidated into that of the husband.”

<sup>149</sup> NANCY COTT, THE BONDS OF WOMANHOOD: “WOMEN’S SPHERE” IN NEW ENGLAND, 1780-1835, 94 (1977). Exceptions whereby marriage started to also involve companionship and affection started to appear in the first half of the eighteenth century. However, they mostly concerned upper-class families and were soon obfuscated by a revival of conservatism. MERIN, *supra* note 38, at 23–24.

<sup>150</sup> Lisa McIntyre, *Law and the Family in Historical Perspective: Issues and Antecedents*, in FAMILIES AND THE LAW 15 (Lisa McIntyre et al. eds., 1995).

<sup>151</sup> *Id.*

<sup>152</sup> Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015).

traditional family is depicted as “the cornerstone of the preservation and the advancement of the Nation”<sup>153</sup> or even “the basis of the nation’s survival.”<sup>154</sup>

The patriarchal roots of marriage are much less visible today. They have been obfuscated by provisions sanctioning the legal equality of the spouses. Yet, they have not been fully eradicated. Accounts of marriage as a *sexist* institution show how some legacies of marriage’s past have an impact on the life of women. Those who critique marriage as a sexist institution have demonstrated for instance that wives live fewer years and are less healthy compared to their husbands.<sup>155</sup>

Further, marriage has yet to emerge as a full-fledged secular legal status. As argued by Elizabeth Scott, “[v]estiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders, and cause concern for those who are committed to secular legal institutions.”<sup>156</sup> By contrast, registration schemes are not seen as institutions with transcendent meaning but as a (mere) “construct of statute.”<sup>157</sup> They are less loaded with the heavy expectations that society poured into marriage and are, as a “thoroughly modern, secular construction,”<sup>158</sup> more attuned to present-day conceptions of family.<sup>159</sup>

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<sup>153</sup> 1975 Syntagma [Syn.] [Constitution] art. 21 (Greece). The English translation is available on the website of the Greek Parliament, [https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/\[https://perma.cc/F5ZF-TJMTBRC2-6T2U\]](https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/[https://perma.cc/F5ZF-TJMTBRC2-6T2U]).

<sup>154</sup> 2011 Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény, art. L, 1 ch. ‘Foundations’ (Hung.). The English translation is available on the website of constituteproject.org, [https://www.constituteproject.org/constitution/Hungary\\_2011.pdf](https://www.constituteproject.org/constitution/Hungary_2011.pdf) [https://perma.cc/488X-JX7M2Q8D-G4P9].

<sup>155</sup> JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 37 (1972).

<sup>156</sup> Elizabeth S. Scott, *A World Without Marriage*, 41 *FAM. L.Q.* 537, 538 (2007).

<sup>157</sup> *R v Bala & Others* [2016] EWCA (Crim) 560 [8] (Eng.). However, it must be noted that that many couples mimic wedding ceremonies when registering, including symbols such as the wedding cake and the white dress. See, e.g., Emily Jupp, *Just Civil Partnered!*, BOUNDLESS, <https://unbound.com/boundless/2019/12/31/just-civil-partnered/> [https://perma.cc/8TAH-4EZ6].

<sup>158</sup> Scott, *supra* note 156, at 551.

<sup>159</sup> Culhane, *Civil Unions Reconsidered*, *supra* note 17, at 636; Greg Johnson, *Civil Union: A Reappraisal*, 30 *VT. L. REV.* 891, 905–06 (2006).

One set of couples is thus ideologically opposed to marriage due to its historical vestiges as well as ongoing sexism embedded in it.<sup>160</sup> Meanwhile, other couples might not like that marriage seems to be characterized by a certain rigidity relative to registration.<sup>161</sup> By way of example, registration regimes are oftentimes easier to dissolve. They can also carry fewer legal obligations compared to marriage. The enhanced flexibility of registration sits well with the observed attitude whereby couples instrumentally resort to legal tools to satisfy their demands. Rigidity runs contrary to modern utilitarian norms as it prevents people from injecting their own values into the law and contributing to the crafting of their legal regime.

This point regarding the “relative” rigidity of marriage, however, needs nuance. It unfolds differently along two variables: (i) the extent to which marriage lends itself to customization, and (ii) the content of registration schemes compared to that of marriage. As to the latter aspect, since it refers to a relative property, increased flexibility will depend on the extent to which the registration scheme differs from marriage. A law that resembles marriage in all respects except the name will not be more flexible.<sup>162</sup> As to marriage itself, it is undeniable that it is no longer the rigid institution we used to know. A fixed set of rights and obligations once accrued through marriage and the law only allowed a limited departure from its rigid legal framework. This is no longer the case in the U.S., as couples can opt out of marital rights and obligations and opt into new ones if they like.<sup>163</sup> The opportunities for departing from legal baselines have significantly increased, with a telling example being the enforceability of pre-nuptial and post-nuptial agreements.<sup>164</sup>

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<sup>160</sup> An ideological opposition to marriage seems to be a common reason for registering instead of marrying in states that opened registration regimes to opposite-sex couples, such as Illinois. See John Culhane, *No to Nuptials: Will Opposite-Sex Civil Unions Spell the End of Traditional Marriage?*, SLATE (Jan. 3, 2012), <https://slate.com/news-and-politics/2012/01/are-states-that-experiment-with-opposite-sex-civil-unions-offering-a-way-to-opt-out-of-oppressive-ideas-about-marriage.html> [https://perma.cc/672Y-QGFJ]. The survey John Culhane refers to is available here: *Opposite-Sex Civil Unions: Motives for Not Marrying*, COOK CNTY. CLERK (2011), <https://www.cookcountyclerkil.gov/sites/default/files/pdfs/Opposite%20Sex%20Civil%20Union%20Report%20Final%2012.19.11.pdf> [https://perma.cc/EDE9-YKKV].

<sup>161</sup> Halley, *supra* note 81, at 39–44 (discussing certain civil unions that allow greater contractual freedom).

<sup>162</sup> This is why, as we shall see *infra* Section III.C, the European Court of Human Rights did not “buy” the argument that Austria’s civil partnerships were too rigid compared to marriage.

<sup>163</sup> See Eskridge, *supra* note 138.

<sup>164</sup> Martha M Ertman, *Marital Contracting in the Post-Windsor World*, 42 FLA. ST. U. L. REV. 479 (2014).

But private ordering is not unfettered: not everything can be contracted out. The common law has a long catalogue of non-negotiable marital terms. The items of this catalogue are called “essentials” of marriage because they go to the substance (“essence”) of what it means to be married.<sup>165</sup> U.S. courts have prevented parties from altering during marriage matters as varied as sexual relations,<sup>166</sup> mutual financial support,<sup>167</sup> and domestic services.<sup>168</sup> Contracts casting marriage as temporary (and jeopardizing a commitment to marital permanence) were also declared void.<sup>169</sup> On a more general level, intimate agreements can encounter significant obstacles due to the fact that the state is still eager to police them based on public policy considerations.<sup>170</sup> These public policy considerations are grounded in a certain vision of appropriate marital roles, and limit the possibility for spouses to alter spousal duties. A new, carefully drafted registration regime might not encounter similar problems. To conclude, in many situations, marriage law can be less flexible than the law governing registration.

A third reason for which couples do not want to marry is the perception that marriage is too “committing.”<sup>171</sup> Nicola Barker’s notion of marriage “ideology” is useful in understanding this point.<sup>172</sup> By that term, she refers to the web of social understandings that are conjured up by the word marriage. These understandings possess some kind of

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<sup>165</sup> See generally Anita Bernstein, *Toward More Parsimony and Transparency in “The Essentials of Marriage”*, 2011 MICH. ST. L. REV. 83 (2011); Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEMINISM 1 (2003).

<sup>166</sup> See *Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App. 1976), *cert. denied*, 431 U.S. 966 (1977) (refusing the enforcement of contracts concerning sexual relations between spouses).

<sup>167</sup> The doctrine confines the duty of support during marriage to necessities as applied to medical expenses. See Bernstein, *supra* note 165, at 100. Yet the duty of support has a second function: it conceptually justifies subsequent alimony obligations. *Id.* at 100. See also *Mani v. Mani*, 869 A.2d 904, 908–10 (N.J. 2005).

<sup>168</sup> See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 17 (Cal. Ct. App. 1993).

<sup>169</sup> Bernstein, *supra* note 165, at 101.

<sup>170</sup> Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 162–63 (2013).

<sup>171</sup> MERIN, *supra* note 38, at 275 (reporting how same-sex couples choosing registration over marriage believe that the former is less “binding”); Culhane, *supra* note 160 (describing a report compiled by the Cook County clerk’s office, where some respondents argued that the reason for entering into the civil union was a problem with “commitment/labels”).

<sup>172</sup> BARKER, *supra* note 4, at 22.

“obvious, even universal” flavor, and especially include the commitment and stability associated with marriage.<sup>173</sup> This should explain why, in wishing to express commitment, we might use the vernacular of marriage even without being married. As a consequence of marriage’s ideology, some couples simply think that tying the knot is a form of excessive commitment. At the same time, the possibility of marriage at a later stage is not excluded. The Pew Research Center has demonstrated that unmarried persons, including partners in a nonmarital regime, might want to marry at some point and certainly do not rule out this possibility.<sup>174</sup> Research on French Pacs and Belgian *cohabitation légale* confirms that these regimes are oftentimes stepping-stones or trials before marriage.<sup>175</sup>

“Too committing” might also mean too financially committing. As explained by Ruth Gaffney-Rhys, a factor that might hold back couples from marrying is the cost of wedding ceremonies as well as “the enormity of the event.”<sup>176</sup> So, couples want “something”—e.g., solving some basic administrative or financial issues—but not marriage, which is too much.

Of course, these rationales for avoiding marriage are often not easily discernable: they can overlap and intersect by creating a complex web of reasons (or perhaps instincts) backing the decision not to marry.<sup>177</sup> The analysis also helps understand why modern couples might be more interested in registration instead. This consequence does not necessarily flow from these couples’ skepticism towards marriage. Couples could opt for

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<sup>173</sup> *Id.*

<sup>174</sup> D’Vera Cohn, *Love and Marriage*, PEW RES. CTR. (Feb. 13, 2013), <http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/> [<https://perma.cc/7BHE-9VU7>].

<sup>175</sup> Cf. Terminal, *supra* note 34, at 160 (footnote omitted); *Le nombre de cohabitations légales et de cessations augmentent en 2019* [*The number of legal cohabitations and dissolutions increases in 2019*], STATBEL (Oct. 22, 2020), <https://statbel.fgov.be/fr/themes/population/partenariat/cohabitation-legale> [<https://perma.cc/ZD7B-6YTL>].

<sup>176</sup> Gaffney-Rhys, *supra* note 17, at 190 (“The expectations placed on couples to hold an elaborate marriage ceremony and reception should not be underestimated . . . The enormity of the event can discourage the self-conscious from marrying, while the cost of the wedding will deter many more.”).

<sup>177</sup> See, e.g., Owen Bowcott, “How to Get Hitched as a Feminist”: Mixed Sex Civil Unions to Begin, THE GUARDIAN (Dec. 1, 2019), <https://www.theguardian.com/uk-news/2019/dec/01/how-get-hitched-feminist-mixed-sex-civil-partnerships-begin-england-wales> [<https://perma.cc/KR7W-6SAB>] (describing civil partnerships, i.e., the target of the U.K. equal civil partnerships campaign, as a “simpler arrangement without what they believe is the accumulated baggage of arcane rituals, excessive expenditure and a history of patriarchal dominance.”) (emphasis added).



mere contracts or to simply avoid any encounters with the law. Yet, registration, unlike contracts or legal invisibility, can indeed offer major benefits. The main benefit is the default regime that comes with it, which is useful to better address financial and administrative issues.<sup>178</sup> When registration confers status, it also offers higher certainty when moving across borders.<sup>179</sup> Further, compared to contracts, registration could confer a wider array of legal benefits, especially in the realm of public law. For instance, in the United States, social security benefits or rights under the Family and Medical Leave Act cannot be freely assigned through contracts.<sup>180</sup>

However, at present, the described link between modern families and registration has not been established in a clear and unequivocal manner. This gap has produced severe consequences, including the described automatic disestablishment of registered partnerships after same-sex marriage. Part III offers guidance to activists and policymakers to reverse this course of action, by outlining the legal and philosophical reasons that support the introduction of gender-neutral registered partnerships.

### III. Three Approaches to Expanding Same-Sex RPs

To date, research has not ventured to systematize the distinct approaches to claiming equal access to registered partnerships. This might be due to the relative lack of litigation. Registration did not seem to be a major concern for American opposite-sex couples. In Europe, too, the issue has slipped beneath the radar until recently, when “heterosexuals” started bringing legal claims in both domestic and international courts to access these regimes. Sections III.A–D engage in a comparative analysis to investigate why opposite-sex couples have sought these laws and how they have articulated their motives.

Organizing their approaches has a two-fold utility. First, the work can assist policymakers and courts in grasping the new phenomenon. Ideally, courts should cease to consider similar claims as frivolous. Legislatures, on their part, should identify a social issue that has flown under the radar and a new “constituency” whose demands warrant redress. Second, the work aims to assist modern families and LGBTQ groups in teasing out their mobilization strategies.

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<sup>178</sup> Palazzo, *supra* note 53, at 188–90.

<sup>179</sup> See *supra* note 22 regarding scholarship arguing that more contractual regimes like Pacs should also be considered as status-based with a view to enhancing legal certainty when crossing borders.

<sup>180</sup> Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).

Analysis of the case law reveals multiple, overlapping motives behind past mobilization. In my analysis, I identify three main approaches to expanding same-sex partnerships to all couples:

- i. A status recognition approach, whereby opposite-sex partners point to the expressive harms of non-recognition (with status referring to social status).
- ii. A utilitarian approach, based on which opposite-sex partners claim more flexibility in crafting their legal regime, a flexibility that only registration grants.
- iii. A choice-based approach, under which adding options to the menu of relationship-recognition mechanisms is valuable *per se*.

These approaches are not strictly legal, but theoretical and philosophical: the legal structure of the claim will hinge on the specific jurisdiction where the claim is pressed. Let me demonstrate this point by taking the example of the utilitarian approach. When the two partners are driven by utilitarian ideals, they believe that a certain registered partnership offers increased opportunities for them to tailor the law to their needs. Implied in this way of thinking is a conviction that marriage cannot accommodate their needs. Claiming flexibility and a lighter regime in the courtroom would, however, bear resemblance to policy arguments that courts dislike. The matter—the creation and modulation of different legal-regulatory family regimes—usually falls under the exclusive province of the legislature. Thus, claimants must first ensure that there is a credible legal underpinning for their claim.

In Europe, the matter has been couched in terms of discrimination. The heterosexual couple in *Ratzenböck and Seydl v. Austria*—a case decided by the European Court of Human Rights (ECtHR or Court of Strasbourg) which I discuss below—wished to access civil partnerships.<sup>181</sup> At the time, Austrian civil partnerships offered more opportunities for customization as well as shorter statutory limits to dissolve the union compared to marriage.<sup>182</sup> By pointing out these two aspects, the opposite-sex couple advanced a typical utilitarian argument. But they framed it in terms of discrimination based on sexual orientation, an option that was available since same-sex couples had access to this “better law.”<sup>183</sup>

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<sup>181</sup> *Ratzenböck & Seydl v. Austria*, App. No. 28475/12 Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng?i=001-177916> [<https://perma.cc/4DVH-88CG>].

<sup>182</sup> See *infra* note 257 and accompanying text.

<sup>183</sup> See generally *infra* Section III.B.

Despite the eventual dismissal of the claim, the decision of the litigants to frame the issue as one involving discrimination was doctrinally sound. Both European supranational courts—the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)—display a penchant for accepting equality-based lines of arguments.<sup>184</sup> This also explains why, in Europe, all three approaches appear under the guise of equality claims. For instance, before the ECtHR, this involves invoking a violation of the following Articles of the European Convention of Human Rights (ECHR or the Convention): Article 8 (right to respect for one’s family life) and Article 14 (banning discrimination).<sup>185</sup> Therefore, the theoretical and philosophical justification for mobilization is distinct from the legal structure of the claim, which is contingent on the jurisdiction within which litigation occurs. After sketching out the U.S. case law in the field, this Article turns its attention to Europe to outline these approaches.

### A. The Less-Developed U.S. Case Law

There are very few relevant cases brought by American heterosexual couples. Some of these cases raised constitutional arguments,<sup>186</sup> while others pressed statutory ones under antidiscrimination codes.<sup>187</sup>

In *Irizarry*, litigants pressed both equality- and liberty-based lines of argument under the Constitution. The *Irizarry* case was filed in Illinois by an unmarried heterosexual couple who could not legally enter into a domestic partnership, but had no desire to marry. The couple challenged the policy of the Chicago Board of Education that at the time only recognized “domestic partners” of the same sex and opposite-sex *spouses* for purposes of

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<sup>184</sup> PALAZZO, *supra* note 14, at 146.

<sup>185</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 8 and 14 [ECHR].

<sup>186</sup> See *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 611 (7th Cir. 2001). On which see generally 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 (2012).

<sup>187</sup> See *Putnam/N. Westchester Bd. of Coop. Educ. Servs. v. Westchester Cnty. Human Rights Comm’n*, 917 N.Y.S.2d 635, 637 (N.Y. App. Div. 2011) (upholding a school board’s decision to only recognize same-sex registered domestic partners for purposes of health care benefits and exclude opposite-sex registered domestic partners by applying a human rights law prohibiting discrimination based on marital status and sexual orientation).

conferring health benefits to employees' partners.<sup>188</sup> However, the Court was not convinced by either argument. The liberty-based argument was bizarrely framed and thus quickly rejected.<sup>189</sup> As for the equal protection argument, the Court concluded that heterosexual couples merely trigger the most deferential scrutiny, reasoning that

[o]nly when the plaintiff in an equal protection case is complaining of a form of *discrimination that is suspect because historically it was irrational or invidious* is there a heavier burden of justifying a difference in treatment than merely showing that it is rational (citations omitted). *Heterosexuals cohabiting outside of marriage are not such a class*. There is a history of disapproval of (nonmarital) cohabitation, and some states still criminalize it (citations omitted). . . . But the disapproval is not necessarily irrational or invidious (citation omitted), given the benefits of marriage discussed earlier.<sup>190</sup> (emphasis added)

According to the Court, while it is true that disapproval of "heterosexuals cohabiting outside of marriage" still exists, it is not necessarily irrational. The Court indeed embarked on a lengthy description of the reasons for which nudging heterosexual couples into marriage is an acceptable state interest, along with the interest in avoiding the increase in expenditures that an expansion of the definition of domestic partners entails.<sup>191</sup> It is not clear whether the case engaged the expressive harms of non-recognition, the desire for a more suitable legal framework, or the value of choice. The motives of the parties are insufficiently articulated.

What is, by contrast, clear is the reduced traction of equality-based lines of argument more generally, unlike in the European context. The idea the American Constitution judicially protects minorities from discrimination might *inter alia* explain why. This idea is embedded in the famous footnote four of *Carolene Products*.<sup>192</sup> The footnote refers to

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<sup>188</sup> The parties contended that the Board's violation of local law (prohibiting marital status discrimination) constituted *per se* a form of deprivation of property (the legal benefit they sought). *Irizarry*, 251 F.3d at 606.

<sup>189</sup> *Id.* at 610–11.

<sup>190</sup> *Id.* at 610.

<sup>191</sup> *Id.* at 607–09.

<sup>192</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). This decision inspired the influential political process theory informing judicial review created by John Ely. The theory mandates that courts can substantively review political decisions affecting due process liberties or the equal protection of the law only

minorities that lack power or numbers to seek redress for their grievances through the political process—which the Supreme Court dubbed “discrete and insular minorities.”<sup>193</sup> Only in the 1970s did the Court start delineating the concept, by speaking of groups “saddled with . . . disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>194</sup>

One could hardly make the case that heterosexual couples are such a minority under the current constitutional doctrine. U.S. claimants might thus wish to explore alternative routes. Can, for instance, a liberty-based line of argument offer legal “shape” to their motives?<sup>195</sup> The answer is mixed and depends on the factual circumstances. I shall make a distinction between a situation where claimants wish to access same-sex partnerships and a situation where claimants seek to resist the forcible termination of the registered partnership (following the introduction of same-sex marriage).

In both cases, there is an opportunity to invoke a right to privacy under the substantive due process clause of the Fourteenth Amendment, as same-sex couples have in *Obergefell*.<sup>196</sup> The clause safeguards the most fundamental liberties of all individuals. It protects liberties that are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>197</sup> It could hence be argued, along the lines of what same-sex couples stated in *Obergefell*, that access to these laws on a gender-neutral basis pertains to such fundamental liberties. However, seeking the expansion of same-sex legal partnerships through the Due Process Clause, in my view, would be a doctrinally weak claim.<sup>198</sup> This

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if the political process does not work normally. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). See generally Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991). For a critique of the theory see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

<sup>193</sup> *Carolene Prods. Co.*, 304 U.S. at 152-53 n.4

<sup>194</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

<sup>195</sup> The parties in *Irizarry* attempted to make one, but it was bizarrely framed and hence soon rejected. Therefore, the rejection does not testify to the likelihood of success of liberty-based arguments.

<sup>196</sup> See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>197</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

<sup>198</sup> PALAZZO, *supra* note 14, at 61–63.

claim would conjure up the sort of affirmative duties on the part of the state that judges are reluctant to uphold as a matter of constitutional law.<sup>199</sup> *Obergefell* is an exception in this regard.<sup>200</sup> Yet, it is an exception not amenable to analogization, because it involves the most cherished and historically relevant institution, marriage.<sup>201</sup> By contrast, new institutions such as civil unions and domestic partnerships will not attract the same due process protection as marriage, precisely because they are “new.”<sup>202</sup> Therefore, an opposite-sex couple in Oregon, i.e., the only jurisdiction that has not yet “fully” repealed its same-sex partnership, could hardly invoke this liberty to expand the regime to opposite-sex couples.<sup>203</sup> This would result in claiming affirmative obligations on the part of the state that courts tend to reject and would likely not involve due process liberties that same-sex couples fruitfully invoked.

In contrast, resisting the conversion of registered unions one has already entered into has a more solid doctrinal basis. In his article *The Right Not to Marry*, Kaiponanea Matsumura offers reasons as to why the forcible conversion of such partnerships is potentially unconstitutional. Matsumura argues that after the Supreme Court decision in *Obergefell*, there is at least *some* corollary right to not marry.<sup>204</sup> In this sense, he carves out from constitutional doctrine a negative right to “be free from state-imposed marriage.”<sup>205</sup> This argument is an important resource for couples who are already in a registration regime and wish to prevent its automatic conversion. Take the example of opposite-sex couples in Illinois, Hawaii, and Colorado that have registered a civil union. Should the state decide to transform these unions into marriages they could brandish the due process sword to claim their negative liberty to remain registered.<sup>206</sup> Yet, except for this specific circumstance,

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<sup>199</sup> See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–66 (1986).

<sup>200</sup> PALAZZO, *supra* note 14, at 61–63.

<sup>201</sup> The decision of the Supreme Court is replete with passages underlying the transcendent nature of the institution. See *Obergefell*, 576 U.S. at 681.

<sup>202</sup> PALAZZO, *supra* note 14, at 63.

<sup>203</sup> I use the term “fully” since other jurisdictions have barred new entrants from entering into civil unions, but existing civil unions are still in force. Therefore, a claim aimed at enlarging the partnerships to all couples may still be pressed. See, e.g., WIS. STAT. ANN. § 770.07 (West 2018); VT. STAT. ANN. Tit. 15, § 1206 (2021).

<sup>204</sup> Matsumura, *supra* note 7, at 1512.

<sup>205</sup> *Id.* at 1513.

constitutional law hardly offers an aegis to registration. It is, for instance, unclear whether the phasing out or flat-out repeal of the regime *without* forcible conversion would attract any constitutional protection.

In Sections III.B–D, I look at the European context, where the motives that drive opposite-sex couples’ mobilization surface more clearly.

### B. Status Recognition Approach

I shall call the first approach a “status recognition approach,” with status referring to social status, not family status. A status recognition approach seeks to counter the expressive harms of non-recognition. On this point, it is useful to recall Nancy Fraser’s dualist perspective, according to which cultural and economic injustices can be dealt with separately.<sup>207</sup> In her view, recognition addresses those cultural or expressive harms from which a social group seeking to have its collective identity recognized suffers.<sup>208</sup> Redistribution, by contrast, addresses economic injustice or “disadvantage.” Status recognition hence refers to the struggle taking place whenever a social group seeks to have its collective identity acknowledged by society.

I shall now apply this notion to the situation of opposite-sex couples seeking access to registration. When adopting a status recognition approach, heterosexual couples essentially argue that they feel diminished by a state decision to deny heterosexuals access to a legal regime to which they attach value: registration. Think of a young couple in a progressive urban center. This couple might hold fast to more egalitarian conceptions of intimacy and feel offended by marriage’s historical exclusion of women. By denying access to the modern and secular institution of domestic partnerships, for instance, and forcing the partners to gain the protection of the law only through marriage, the state is inflicting expressive harms.<sup>209</sup> Interestingly, in such a case, expressive harms are also indirectly

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<sup>206</sup> OR. REV. STAT. ANN. § 106.310 (2021).

<sup>207</sup> NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7–9 (2003). In Fraser and Honneth’s view, the market can influence yet not determine the social status of individuals. In this sense, they contend that the oppression of women, for instance, cannot be understood through the lenses of a logic of class. *See also* Estelle Ferrarese, *Nancy Fraser and the Theory of Participatory Parity*, BOOKS & IDEAS 9 (2015) (book review).

<sup>208</sup> FRASER & HONNETH, *supra* note 207.

<sup>209</sup> *Cf.* Swennen & Eggermort, *supra* note 118, at 27.

inflicted upon same-sex couples. As noted in the context of the enactment of Dutch civil partnerships, “to open up the registered partnership to opposite sex couples would emphasize the equal value of same-sex partnerships.”<sup>210</sup>

Since the gist of the argument is that the state must acknowledge these couples’ personal beliefs, an alternative tag could have been “ideological approach.” However, with this term, I holistically refer to both the parties’ and court’s approach. Therefore, it would be odd to refer to a court’s ideological approach. An additional reason is that U.K. campaigners disliked and rejected the label “ideological.”<sup>211</sup>

The main example of a lawsuit embracing a status recognition approach can be found in the U.K. Reference is made to *Steinfeld*,<sup>212</sup> the lawsuit that led to the extension of civil partnerships to all couples.<sup>213</sup>

The procedural posture of the case is peculiar. More than one approach emerged as the case went up from the High Court (the court of first instance) to the Supreme Court (the apex court). Whereas the U.K. Supreme Court placed more emphasis on choice,<sup>214</sup> the applicants’ ideological opposition to marriage played a more substantial role in litigation before lower courts.<sup>215</sup> In the original complaint and decisions of the High Court and Court of Appeal, emphasis was placed upon the discrimination suffered by heterosexual couples

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<sup>210</sup> *Id.* at 27 (footnotes omitted).

<sup>211</sup> While the *Steinfeld* couple, who launched the equal partnership campaign, and the High Court in the *Steinfeld* litigation discussed below explicitly referred to the parties’ ideological objections to marriage, the parties seemed to subsequently avoid the term, by referring more generally to marriage not being “the right fit for them.” Bowcott, *supra* note 177. On this point *see also* e-mail from Andy Hayward, Assoc. Prof. Durham L. School, to Nausica Palazzo, Assistant Prof., NOVA Sch. of L. (Jul. 11, 2021, 9:34 PM IDT) (on file with author).

<sup>212</sup> *R (Steinfeld & Keidan) v. Sec’y of State for Int’l Dev.* [2018] UKSC 32 (appeal taken from Eng.) [*Steinfeld*].

<sup>213</sup> Following the Supreme Court’s declaration of incompatibility, Parliament enlarged civil partnerships in England and Wales from December 31, 2019, through the Civil Partnership (Opposite Sex Couples) Regulations 2019. In Scotland, the Civil Partnership (Scotland) Bill introduced them starting from July 28, 2020, and, in Northern Ireland, the Northern Ireland (Executive Formation etc.) Act 2019 made them available from January 13, 2020.

<sup>214</sup> *Steinfeld*, UKSC 32.

<sup>215</sup> *See, e.g.,* the High Court judgment in *Steinfeld & Keidan v. Sec’y of State for Educ.* [2016] EWHC (Admin) 128 [*Steinfeld & Keidan*].



ideologically opposed to marriage.<sup>216</sup> The High Court, despite rejecting the claim, engaged at length with the issue of whether exclusion from civil partnerships constituted a form of “humiliation, derogatory treatment or any other lack of respect for their private lives.”<sup>217</sup>

Before the Court of Appeal, the parties’ desire to access civil partnerships was justified on the ground that such a regime “would reflect their values and give due recognition to the equal nature of their relationship.”<sup>218</sup> Unlike marriage, the parties argued, civil partnerships reflect more egalitarian conceptions of family. They hence wished that their child could grow up in an environment where the relationship was “one of total equality reflecting the equal independent contribution which both parties make.”<sup>219</sup>

The Court of Appeal’s decision then quoted various witness statements from same-sex couples in a civil partnership “confirming” the more egalitarian and secularized nature of these unions. A first witness stressed that “the term ‘civil partnership’ reflects the pragmatism, respect, loyalty, friendship and teamwork that is at the core of [their] relationship, added to which the secular, un-solemnised process of forming a civil partnership suits [them] perfectly.”<sup>220</sup> A second witness, a lesbian partner in a thirty-five-year-long relationship, started by clearly articulating her objection to marriage.<sup>221</sup> She then pointed to the injustice associated with leaving out of protection all those “young cohabitees with children” that potentially were in the same situation as her.<sup>222</sup> Here, there are several signposts of a status recognition approach. First are continuous references to the values to which the heterosexual applicants hold firm; second is the sense of diminishment and denial of equal social status that ensues from their inability to access civil partnerships.

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<sup>216</sup> See *infra* notes 217–32 and accompanying text.

<sup>217</sup> *Steinfeld & Keidan*, EWHC (Admin) 128 [38]. The Court eventually answered in the negative to the question whether an exclusion from civil partnerships constituted a form of “humiliation, derogatory treatment or any other lack of respect for their private lives.”

<sup>218</sup> *Steinfeld & Keidan v. Sec’y of State for Educ.* [2017] EWCA (Civ) 81 [5] [*Steinfeld EWCA*].

<sup>219</sup> *Id.*, ¶ 5.

<sup>220</sup> *Id.*, ¶ 5.

<sup>221</sup> *Id.*, ¶ 6.

<sup>222</sup> *Id.*

The Court of Appeal went along with the arguments submitted by the applicants and ruled in their favor. The centrality of the status recognition approach is evident from a number of passages. Emblematic is Lady Justice Arden's analogization with the *Oliari* decision for the purpose of determining if the right to respect for family life under Article 8 ECHR applied.<sup>223</sup> *Oliari* is a landmark precedent of the ECtHR, where the Court held that same-sex couples in Italy have a right to a "specific legal framework" (meaning a right to at least a form of recognized legal partnership).<sup>224</sup> Yet, until recently, it was unclear whether a full-fledged right to registration existed under the ECtHR: when issuing *Oliari*, the ECtHR placed much emphasis on the "special" circumstances of Italy.<sup>225</sup> The existence of a similar right has now been confirmed by a recent decision issued against Russia, where the European Court reaffirmed the right to legalized unions for same-sex couples (through, at minimum, registration).<sup>226</sup> Zooming out, we can notice that: (i) the ECtHR context is very unique, and this new right to registration is the likely consequence of the reluctance of the Court to carve out a (more problematic) right to same-sex marriage, due to the lack of consensus amongst Contracting Parties, and (ii) despite the unique circumstances leading to the emergence of a right to registration, this is an important legal precedent that could be invoked by domestic courts in Europe and outside of Europe to buttress the existence of a similar right.

The U.K. Court of Appeal is an additional resource for arguing that the right to registration concerns all couples, not only gay and lesbian ones. While the ECtHR has only upheld the right to registration for same-sex couples, the U.K. Court of Appeal also applied the ECtHR's legal precedent from *Oliari* in the context of heterosexual couples' mobilization. In greater detail, in Lady Justice Arden's decision, the analogy with *Oliari* is followed through by placing emphasis on the invidiousness of any difference in treatment between same- and opposite-sex couples.<sup>227</sup> In her view, the applicability of *Oliari* entails that the state has a positive obligation to "respect" the private and family life of every

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<sup>223</sup> *Id.*, ¶ 45 (citing *Oliari & Others v. Italy*, Appl. nos. 18766/11 & 36030/11, Eur. Ct. H.R. (2015), [<https://perma.cc/B9DX-G5WL>] [*Oliari*]). It is to be noted that, in *Oliari*, same-sex couples lacked access to any legal regime, while in *Steinfeld*, opposite-sex couples could marry. However, in Arden LJ's view, the availability of marriage to opposite-sex couples was not sufficient to rule out the analogy. *Id.*, ¶¶ 127, 35–44.

<sup>224</sup> *Oliari*, Eur. Ct. H.R. ¶ 185 ("the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.").

<sup>225</sup> See *infra* note 299 and accompanying text.

<sup>226</sup> *Fedotova & others v. Russia*, Appl. Nos. 40792/10 Eur. Ct. H.R. (2021), [<https://perma.cc/7ZMN-9KUC>].

<sup>227</sup> *Steinfeld & Keidan v. Sec'y of State for Educ.* [2017] EWCA (Civ) 81 [37] [*Steinfeld EWCA*].

person, with civil partnerships being a “modality” through which the obligation can be fulfilled. Arden LJ went on to emphasize the significance of legal recognition *per se* as well as that of the rights flowing therefrom. As with *Oliari*, these two aspects were considered key “facets of an individual’s existence and identity.”<sup>228</sup> She then pointed, more specifically, to the significance of civil partnerships, by mentioning the “intrinsic value” that civil partnerships had for cohabiting same-sex partners, as attested to by the jurisprudence of the ECtHR.<sup>229</sup>

When assessing the proportionality of the government’s choice to exclude heterosexuals from the purview of the law, Arden LJ found a lack of proportionality. In so doing, she further stressed that the objection that heterosexuals can marry has no traction: a potential infringement of the right to access civil partnerships can occur regardless of whether the partners can already marry.<sup>230</sup> This passage is another important resource to reject arguments to the effect that heterosexual couples can already marry.

Ultimately, Lady Justice Arden addressed the objection that marriage and civil partnerships had the same material scope. The objection boiled down to arguing that the parties were complaining about a petty problem of “labels.” She firmly rejected this argument, stating that “[i]f the name of an institution for recognition of their relationship is treated by Parliament as significant for same-sex couples,” referring to marriage, “the name of another institution for that purpose may have significance for other couples too.”<sup>231</sup> This part of the judgment is significant given that the objection that these couples are spoiled, or worse, pedantic persons wrestling with problems of labels, is recurring.<sup>232</sup>

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<sup>228</sup> *Steinfeld EWCA*, EWCA (Civ) 81 [62], citing *Oliari*, Eur. Ct. H.R. ¶ 177.

<sup>229</sup> *Id.* citing *Oliari*, Eur. Ct. H.R. ¶ 174.

<sup>230</sup> *Id.*, ¶¶ 127, 35–44.

<sup>231</sup> *Id.*, ¶ 45.

<sup>232</sup> Tom Utley, *A Straight Couple Whining Because They Can’t Have a Civil Partnership? Give Me Strength!*, THE DAILY MAIL (Dec. 5, 2014), <https://www.dailymail.co.uk/debate/article-2861612/TOM-UTLEY-straight-couple-whining-t-civil-partnership-strength.html> [<https://perma.cc/4T35-6DLL>]. See also David Mitchell, *Heterosexual Civil Partnerships are for Better, not Worse*, THE GUARDIAN (July 1, 2018), <https://www.theguardian.com/commentisfree/2018/jul/01/heterosexual-civil-partnerships-david-mitchell-comment> [<https://perma.cc/JTW2-V3BA>] (“[M]y instinctive reaction was that it was a waste of time. It seemed like a pedantic point on which to insist on equality – like a lacklustre attempt at a sequel to the triumph for civilisation of equal marriage.”).

## 1. Potential Limits of the Approach

A status recognition approach has some advantages but also disadvantages to be aware of when contemplating employing it. The clearest advantage is that pointing out expressive harms is an effective legal strategy. There is nothing more odious than stripping a social group of its dignity or equal status in society. The case of same-sex couples is emblematic in this regard. In the Euro-American context, LGBTQ couples adopted a litigation strategy that focused on the symbolic and cultural harms of non-recognition of their intimate relationships. This strategy partly moved other problems to the background, such as lack of access to financial resources (redistributive harms), that remains a severe problem within the LGBTQ community,<sup>233</sup> although it was largely understandable.

The heightened traction of this line of argument weighs in favor of employing a status recognition approach. Even so, heterosexuals have yet to demonstrate that they can fruitfully invoke the approach. Cultural and expressive harms are especially visible when they affect the “powerless, excluded and disadvantaged.”<sup>234</sup> It seems that, in the end, protecting historically disadvantaged groups is the *raison d’être* of equality laws. There is indeed a sense that whenever traditionally privileged groups are able to invoke the protection of the equality guarantee, this is an anomaly. Martha Fineman puts it succinctly by arguing that “incidental” inclusion within a prohibited ground of discrimination—e.g., “I am a privileged man, but I can still avail myself of the ground of sex to challenge a certain law”—lends itself to exploitation by persons that are not being discriminated against: it potentially allows everyone to claim equality and “excel, even triumph in a ‘white man’s world.’”<sup>235</sup>

This point emerges more clearly from the debate in jurisdictions adopting an anti-discrimination approach to equality around whether the protection against discrimination should be “symmetric” or “asymmetric.” The debate concerns whether discrimination laws should only protect marginalized identities under a certain umbrella (e.g., gay and lesbian persons within “sexual orientation”) or all identities under it.<sup>236</sup> The first category refers to asymmetrical systems, while the second refers to symmetrical ones. The design choice of

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<sup>233</sup> LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018).

<sup>234</sup> Women’s Legal Education and Action Fund (LEAF), Intervener factum, in *Andrews v. Law Soc’y of British Columbia*, [1989] 1 S.C.R. 143, ¶¶ 23–24, 33 (Can.).

<sup>235</sup> Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 16 (2008).

<sup>236</sup> See generally SANDRA FREDMAN, DISCRIMINATION LAW 104–05, ch. 5 (2d ed. 2011).

which social groups we wish to shield from discrimination is salient.<sup>237</sup> It gets at the heart of what it means to have an anti-discrimination system in place, and what kind of discrimination as a society we want to eradicate. For instance, asymmetrical anti-discrimination laws only protect a sub-group falling under the relevant category. The sub-groups are typically identified based on social disadvantage. They include “[r]acial and ethnic minorities, women, the elderly, and the disabled” as “groups that have been viewed to have been burdened in the distribution of societal costs and benefits.”<sup>238</sup>

Antidiscrimination laws, including constitutional equality guarantees, are usually symmetrical.<sup>239</sup> Yet, differences may exist depending on the ground. Disability is a typical example where we almost reflexively assume that the law should only protect the sub-group “people with disability.”<sup>240</sup> Age discrimination is a more borderline example, with some jurisdictions designing laws symmetrically and others asymmetrically.<sup>241</sup>

Even when a symmetrical ground of sexual orientation is adopted, however, there are reasons militating against heterosexual couples invoking discrimination. These reasons pertain to the (instinctual) refusal to allow traditionally privileged groups to invoke the protection of the equality guarantee. The idea that we would allow heterosexuals to “excel, even triumph in a ‘[heterosexual’s] world’” seems unpalatable. In the end, we still live in a world where discrimination towards LGBTQ people is pervasive, and structures of power systematically deny them equal citizenship.

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<sup>237</sup> The debate on symmetry is vivid, although most of the literature focuses on grounds separately. See, e.g., Cary Franklin, *The Antistereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 101 (2010) (sex); Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397 (2000) (disability); but see Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69 (2017) (attempting to provide a comprehensive analysis around symmetry in antidiscrimination law).

<sup>238</sup> Schoenbaum, *supra* note 237, at 78.

<sup>239</sup> For instance, since Title VII of the Civil Rights Act of 1964 bans employment discrimination based on sex, both men and women can invoke its protection. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, & 42 U.S.C.).

<sup>240</sup> The Americans with Disabilities Act (ADA) states the *prohibition* of interpreting the law in a symmetrical way. See 42 U.S.C. § 12201(g) (2009).

<sup>241</sup> The Age Discrimination in Employment Act (ADEA) shields from discrimination employees above the age of forty, and only if any such worker is disfavored as compared with younger workers. See 29 U.S.C. §§ 621-34 (2021).

This explains why the litigants in *Steinfeld* placed emphasis on another “facet” of their identity: their genuine objection to marriage. Legally, this stance still entails invoking sexual orientation discrimination to protect opposite-sex couples.<sup>242</sup> But the denounced cultural harms derive more specifically from a state failure to recognize that some couples might hold genuine convictions against marriage, not from a historical, structural discrimination against the group as such.<sup>243</sup>

Absent this emphasis on the ideological objections to marriage, opposite-sex couples will have a hard time persuading the court. An illustration of this reluctance is a decision in 2011 of the Constitutional Court of Austria.<sup>244</sup> In rejecting the claim that the two heterosexual partners, Ms. Ratzenböck and Mr. Seydl, should be able to access Austrian civil partnerships, the Constitutional Court offered a potpourri of laconic reasons. These reasons were so short (less than a line each) that the main takeaway was that the Court barely felt compelled to articulate them in the first place. Amongst them was the contention that heterosexual couples are not a historically discriminated group.<sup>245</sup> This case gave rise to litigation before the ECtHR, which will be examined below as emblematic of a utilitarian approach to the expansion of registered partnerships.<sup>246</sup>

### C. Utilitarian Approach

A second approach is the utilitarian approach. It posits that opposite-sex partners must gain access to a registered partnership because they have a (legally relevant) need for a more flexible and “lighter” regime compared to marriage, meaning a regime with fewer obligations and rights. The philosophy behind their mobilization is that they should be able to better tailor the applicable legal regime to their aspirations. They might, for instance,

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<sup>242</sup> A separate issue—which lies outside the scope of this paper—regards whether a legal system would accept this narrow sub-category “heterosexuals who object to marriage” as a distinct ground of discrimination. In the United States, the answer is likely no. The category which comes closer to this sub-category is that of conscientious objectors, a group which the Supreme Court has refused to recognize as a constitutionally protected “discrete and insular minority.” *Johnson v. Robison*, 415 U.S. 361 (1974). In the case of conscientious objectors, the Court found, the mentioned “traditional indicia of suspectedness” were not present. *Id.* at 375 n.14.

<sup>243</sup> See *supra* Section II.B.

<sup>244</sup> Verfassungsgerichtshof [VfGH] [Constitutional Court], Sept. 22, 2011, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSLG] No. 19492/2011 (Austria).

<sup>245</sup> *Id.* ¶ III.1.6.

<sup>246</sup> See *infra* Section III.C.

desire to dissolve the relationship without the lengthy and cumbersome procedures set forth for marital couples.<sup>247</sup> They might want to enjoy broader freedom to contract out of specific obligations or opt into others that better align with their view of intimacy.<sup>248</sup> Ultimately, they might want to enjoy the more favorable tax regime of partnerships.<sup>249</sup> This approach uses the label “utilitarian” as it is ultimately grounded in ideals of self-fulfillment.<sup>250</sup>

The ECtHR’s case *Ratzenböck and Seydl v. Austria* instantiates this approach.<sup>251</sup> This was the first case in which the Court was faced with a question of discrimination in accessing a legal-regulatory family regime from the viewpoint of opposite-sex couples. All applications had been lodged by same-sex couples, who still suffered from pervasive discrimination in the member states of the Council of Europe. The case was brought by two unmarried heterosexuals with Austrian citizenship, Ms. Ratzenböck and Mr. Seydl, who sought to register in a civil partnership, the so-called *Eingetragene Partnerschaft*.<sup>252</sup> Yet, the regime was only open to same-sex couples, as it had been introduced in 2010 to specifically tackle the problem of gay and lesbian couples’ legal invisibility.<sup>253</sup> Before the

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<sup>247</sup> Registered partnerships tend to have less cumbersome procedures for their dissolution. They can sometimes be terminated by unilateral decision, notice of which is given to the other party, as in the case of Hawaii’s Reciprocal Beneficiary Law (HAW. REV. STAT. ANN. § 572C-7 (West 2012)) and Italian civil unions (Legge 20 maggio 2016, n.76 art. 1, par. 24, G.U. May 26, 2016, n.118 (It.)). When separation is consensual, RPs usually do not require a judicial intervention, as is the case with Dutch Registered Partnerships. Sumner, *supra* note 55, at 148.

<sup>248</sup> See *supra* Section II.B.

<sup>249</sup> See Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1547, 1559 (2008) (reporting substantially lower income tax liability at the federal level for same-sex marriages, civil unions, and domestic partnerships). While Seto’s analysis was conducted prior to 2008, fiscal advantages at the federal level and, in certain cases, state level continue to exist. E-mail from Theodore P. Seto, Chair & Prof. L. Loyola L. School, to Nausica Palazzo, Assistant Prof., NOVA Sch. of Law (Oct. 30, 2021, 9:38 PM CEST) (on file with author).

<sup>250</sup> On the growing significance of customization regarding one’s legal regime see Eskridge, *supra* note 138, at 1886.

<sup>251</sup> *Ratzenböck & Seydl v. Austria*, App. No. 28475/12 Eur. Ct. H.R. (2017).

<sup>252</sup> *Eingetragene Partnerschaft-Gesetz* [EPG] [Registered Partnership Act] BUNDESGESETZBLATT I [BGBl.] no. 135/2009, <https://www.ris.bka.gv.at/eli/bgbl/I/2009/135> [<https://perma.cc/TSC4-CDDN>] (Austria).

<sup>253</sup> *Verfassungsgerichtshof* [VFGH] [Constitutional Court], Dec. 4, 2017, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VfSLG] No. 20225/2017. A summary of the decision in English is available here: [<https://perma.cc/R9Y9C-XTJC>].

ECtHR, the two heterosexual applicants argued discrimination based on sexual orientation (under Articles 8 and 14 of the ECHR).<sup>254</sup>

The historic posture of the case illustrates the motives driving Ms. Ratzenböck and Mr. Seydl. Before the domestic administrative court and then Constitutional Court, the partners argued that marriage “was not a suitable option for them, as it was substantially different from a civil partnership.”<sup>255</sup> Unlike marriage, “a registered partnership was in many ways more modern and ‘lighter’ than marriage.”<sup>256</sup> When Austria’s law on civil partnerships was enacted in 2010, civil partnerships substantially differed from marriage in terms of their content.<sup>257</sup> Before domestic courts, the two applicants thus had an opportunity to point out the many ways in which civil partnerships were better suited to their circumstances. Since its enactment, the regime, however, underwent continuous innovations. In particular, the legislature closed the gap between marriage and civil partnerships in the area of parenting.<sup>258</sup> When the case reached the ECtHR, the differences between the two regimes were no longer sizeable.<sup>259</sup> Nonetheless, civil partnerships remained slightly more flexible compared to marriage.<sup>260</sup>

Before the ECtHR, Ms. Ratzenböck and Mr. Seydl continued to argue, as they had in domestic courts, that they wished to access civil partnerships because “marriage was not a

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<sup>254</sup> Ratzenböck, Eur. Ct. H.R. ¶ 3.

<sup>255</sup> *Id.* ¶ 9.

<sup>256</sup> *Id.*

<sup>257</sup> At the time, the regime had a shorter statutory time-limit for dissolution, distinct alimony payment obligations, distinct rules concerning trust, fidelity duties and contributions to the household, and ultimately distinct consequences upon the death of one of the two parties. *Id.* ¶ 9.

<sup>258</sup> In the span of a few years, it granted same-sex couples adoption rights (Adoptionsrechts-Änderungsgesetz 2013 [Adoption Law Amendment Act 2013], BGBl no. 179/2013), access to artificial insemination (VfGH, Dec. 10, 2013, VfSLG No. 19824/2013), and access to stepchild adoption (VfGH, Dec. 11, 2014, VfSLG No. 19942/2014), cited in Ratzenböck, Eur. Ct. H.R. ¶16.

<sup>259</sup> Ratzenböck, Eur. Ct. H.R. ¶5.

<sup>260</sup> The first difference was that spouses could not contract in or out of the different regimes concerning the time-limits for divorce and dissolution (which remained less lengthy and burdensome for civil partners). *Id.* ¶ 16. The second difference concerned the distinct post-mortem legal consequences of the declaration of death of one of the spouses or partners. *Id.*



suitable alternative for them.”<sup>261</sup> In its legal analysis, the ECtHR first conceded that opposite-sex couples are “in principle” in a comparable position to same-sex couples as far as their need for legal recognition is concerned.<sup>262</sup> Yet, the Court also went on to argue that the claim must be assessed against the backdrop of the actual legal framework governing the relationship of the applicants.<sup>263</sup> In conducting this assessment, the Court concluded that the parties are not in a comparable or relevantly similar situation to same-sex couples: while LGBTQ couples *need* a registered partnership because they are ineligible to marry, heterosexuals can access marriage.<sup>264</sup> The reasoning of the Court is relatively simple: there is no need for legal recognition because Ms. Ratzenböck and Mr. Seydl can marry, and this prerogative is sufficient to rule out a violation of the Convention.

A second ground for rejecting their application concerned the parties’ duty to demonstrate that they have been personally affected by a differential treatment under marriage law—what the Court called a “more specific need” for their legal recognition.<sup>265</sup> The Court found that, based on their complaint, the applicants failed to demonstrate this.<sup>266</sup> For instance, they did not argue that they were penalized because of the different statutory periods for dissolving marriage.<sup>267</sup>

However, this passage is at best circular. The applicants were two unmarried cohabiting partners, who (predictably) had their request to access civil partnerships rejected by domestic authorities. Thus, they could not possibly invoke any specific legal provision affecting them personally in a way that would satisfy the Court’s requirement to qualify as “personally affected.” This is a peculiar catch-22 situation: either the parties sacrifice their personal interests and get married to meet the condition or they indulge their convictions by remaining unmarried without, however, meeting the condition.

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<sup>261</sup> *Id.* ¶ 17.

<sup>262</sup> *Id.* ¶¶ 34, 35, 39.

<sup>263</sup> *Id.* ¶ 40.

<sup>264</sup> Ratzenböck, Eur. Ct. H.R. ¶ 40.

<sup>265</sup> *Id.* ¶ 41.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

The ECtHR ended its judgment there without moving to the proportionality stage. The heterosexual couple is not in a relevantly similar or comparable situation with same-sex couples.<sup>268</sup> Yet, if the Court moved forward to an assessment of the proportionality of the measure, chances are high that it would have also rejected the claim. The ECtHR usually grants a certain margin of appreciation—meaning discretion whose exercise is policed by the Court—to Contracting Parties when they make substantive policy decisions.<sup>269</sup> The breadth of the discretion the states enjoy will hinge on several factors. One of the main factors is a consensus of the member states around a certain issue. If a consensus is traceable, their discretion shrinks.<sup>270</sup> At present, consensus around the expansion of registered partnerships to heterosexuals is still relatively weak. At the time the judgment was handed down, the states with similar laws in force were Belgium, France, the Netherlands, Luxembourg, and Greece.<sup>271</sup> More recently, Malta introduced gender-neutral partnerships in 2014, Cyprus in 2015, and Estonia in 2016. While the group of states enlarging their registered partnerships to all couples is growing, we might not yet be able to speak of a clear European consensus around the issue.<sup>272</sup> Hence, the Contracting Parties will continue to enjoy broad discretion on whether to open up their registered partnerships to all couples.<sup>273</sup>

## 1. Potential Limits of the Approach

Utilitarian norms nowadays play an influential role in family regulation. This is especially true in the United States. The whole fabric of American family law has been

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<sup>268</sup> *Id.* ¶ 42.

<sup>269</sup> See generally KANSTANTIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015).

<sup>270</sup> *Id.*

<sup>271</sup> Ratzenböck, Eur. Ct. H.R. ¶26.

<sup>272</sup> At present, a consensus on the need to extend RPs to heterosexuals is at best “emerging,” but not yet consolidated. On the notion of emerging consensus see Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHI. J. INT’L L. 393, 399 (2018).

<sup>273</sup> In addition to the lack of consensus, decisions involving economic and social policy, such as the ones at issue, warrant the broadest margin of appreciation unless “manifestly without reasonable foundation.” See, e.g., *James v. United Kingdom*, App. No. 8795/79, 8 Eur. H.R. Rep. 123 (1986) ¶ 46.

changed so as to allow the parties themselves to shape their legal-regulatory regime.<sup>274</sup> Several scholars have observed the “contraction” of family law to make way for people’s own legal choices.<sup>275</sup> In this sense, this approach ties nicely with one of the most powerful forces in modern family law: utilitarianism itself. Judges might thus be sympathetic or at least not hostile to similar claims.

However, there are also downsides to adopting this approach. The first downside is that utilitarian motives are harder to couch in legal terms than the motives informing a status recognition approach. While the philosophy behind a utilitarian stance is easily understood, giving it a legal structure can prove complicated. Without a convincing legal basis, judges will ascribe the claim to the realm of policy rather than law, as it touches at the heart of legislatures’ power to craft and modulate distinct family law regimes. It is well-known that lawmakers are much better suited to make such delicate decisions involving social and economic policy.

The second shortcoming emerges from the ECtHR’s contention in *Ratzenböck* that the couple lacked a “need for legal recognition.”<sup>276</sup> It seems that the judges were unclear about why the two Austrian heterosexual applicants were mobilizing and “what the big deal” was. Judges may think similarly situated parties are pursuing a frivolous claim. This aspect also emerged from public debates surrounding the equal civil partnerships campaign in the United Kingdom. The campaign was constantly underplayed as involving a group of spoiled, white, middle-class, young people.<sup>277</sup> A potential explanation for this reaction refers to the internalization of the hierarchy rule.<sup>278</sup> The internalized view that registered

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<sup>274</sup> Eskridge, *supra* note 138. Within marriage, this movement has entailed a shift “away from the natural law norm of procreative marriage and strongly toward the utilitarian norm that emphasizes individual flourishing.” *Id.* at 1887. Outside of marriage, it has led to the expansion of the menu of family regimes from which couples can choose. *Id.* at 1889.

<sup>275</sup> See, e.g., NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010); J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997); Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991). At the same time, scholars noted an expansion of status to new groups, the most relevant example being homosexual couples. See Frederik Swennen, *Private Ordering in Family Law: A Global Perspective*, in CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 1 (Frederik Swennen ed., 2015) (describing this expansion as part of the “perpetual pendular movement of family law between status and contract.”).

<sup>276</sup> *Ratzenböck*, Eur. Ct. H.R. ¶41.

<sup>277</sup> See *supra* note 232.

partnerships are an inferior regime compared to marriage likely prevents the Court from even grasping the genuine nature of the parties' complaint. It conjures up Gaudreault-DesBiens' warning that couples are becoming increasingly spoiled and inclined to embrace the selfish rhetoric of rights over duties, captured by the adage "I want the world and I get it now!"<sup>279</sup>

A second explanation for the idea that there is no need for legal recognition concerns the ongoing, unresolved tension between need and desire. It more specifically concerns the idea that desires do not belong in law in the sense that they are not suitable for backing legal claims. It's one thing to need a regime, it's quite another to desire it. This tension is, for instance, visible when it comes to homosexual couples' attitudes towards the issue of equal civil partnerships.<sup>280</sup> In the United Kingdom, some members of the LGBTQ community think that requiring access and desiring access are two fundamentally different things and thus refuse to support the cause of expanding U.K. civil partnerships to heterosexuals.<sup>281</sup>

A further limitation of the utilitarian approach is that it only "stands a chance" if the two comparator terms (marriage and the registered partnership) are different in a meaningful way.<sup>282</sup> This is why the Strasbourg Court had an easy time rejecting the parties' complaint in *Ratzenböck*.<sup>283</sup> The fact that civil partnerships mimic marriage also rendered the parties' claim somewhat frivolous in the eyes of the Court. Observing that, unlike *Ratzenböck*, the U.K. kissing cousin case *Steinfeld* succeeded might suggest that other approaches are more effective when RPs mirror marriage.

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<sup>278</sup> See *supra* Section I.B.

<sup>279</sup> Gaudreault-DesBiens, *supra* note 139, at 49.

<sup>280</sup> See Adam Jowett & Elizabeth Peel, "A Question of Equality and Choice": Same-Sex Couples' Attitudes Towards Civil Partnerships After the Introduction of Same-Sex Marriage, 8 PSYCH. & SEXUALITY 69 (2017).

<sup>281</sup> *Id.*

<sup>282</sup> See *infra* Part IV.

<sup>283</sup> *Ratzenböck & Seydl v. Austria*, App. No. 28475/12 Eur. Ct. H.R. ¶40 (2017) ("[T]he institutions of marriage and the registered partnership are essentially complementary in Austrian law.").

### D. Choice-Based Approach

When, in January 2020, California enacted a new partnership law open to all couples regardless of gender, a San Francisco resident commented, “It’s a personal choice, but at least there’s another option out there, options are good right?”<sup>284</sup> Under a choice-based approach, the plurality of legal regimes is a value *per se* (“more is good”). Choice matters because we acknowledge that nowadays it is legitimate to pursue different lifestyles and values. Put differently, the plurality of legal regimes is a way to mirror the plurality of ways in which individuals arrange their family relationships and the beliefs that constitute the foundation on which these relationships stand.<sup>285</sup> The centrality of plural values to the architecture of modern family law led some scholars to point to a “movement in family law from an era of privatization to an era of pluralism.”<sup>286</sup> Pluralism in family law has, however, an ambiguous meaning.<sup>287</sup> It now tends to refer to the plurality of family regulatory regimes, and to be used in connection with personal autonomy.<sup>288</sup> Registration is of course one of the many ways through which this value is put to work. Another one would be, for instance, the introduction of a range of state-created contracts to recognize different forms of intimate relationships.<sup>289</sup>

There are several similarities between a choice-based approach and a utilitarian one.<sup>290</sup> First of all, the fact that they are both used in connection with personal autonomy might

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<sup>284</sup> Lyanne Melendez, *Heterosexuals Can Choose Between Marriage or Domestic Partnership Under New California Law*, ABC7 NEWS (Jan. 2, 2020), <https://abc7news.com/domestic-partnership-california-domestica-in-ca-what-is/5805848/> [<https://perma.cc/YR8T-EPLS>].

<sup>285</sup> Abdullahi Ahmed An-Na'im, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 EMORY INT'L L. REV. 785 (2011).

<sup>286</sup> Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J. GEN. & L. 101, 102 (2016).

<sup>287</sup> Linda C. McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 309, 309–10 (Joel A. Nichols ed., 2012).

<sup>288</sup> Aloni, *supra* note 286, at 107.

<sup>289</sup> HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 105, 125–126 (2017). For a critique of the theory see Sharon Shakargy, *Family, Contracts, Autonomy and Choice: A Comment on Dagan and Heller's The Choice Theory of Contracts*, 20 JERUSALEM REV. LEGAL STUD. 90 (2019) (book review).

<sup>290</sup> On the linkage between individualism and (anti-dogmatic) pluralism see DAPHNA HACKER, *LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION* 55–56 (2017).

induce us to think that they necessarily have the same philosophical matrix. However, this section demonstrates that one could also invoke choice in a context where other social groups have more options, and thus point to the dignitary harms flowing from this kind of discrimination. Under these circumstances, the approach would pivot more explicitly on a desire to be free from discrimination than a desire to uphold personal autonomy. The similarities between a choice-based and utilitarian approach, however, continue to be evident. As with the utilitarian approach, the approach here analyzed is also on the edge of the realm of policy. Furthermore, it does not lend itself to be couched in legal terms easily.<sup>291</sup>

Looking at the relevant case law, the U.K. Supreme Court upheld choice-based arguments, while the Court of Strasbourg declined to do so. The parties in *Chapin and Charpentier v. France*, a major case before the ECtHR, foregrounded a choice-based approach.<sup>292</sup> The application was filed by Mr. Stéphane Chapin and Mr. Bertrand Charpentier, a French same-sex *pacsés* couple. Although the case was not initiated by an opposite-sex couple, it shines a spotlight on the position of the European Court regarding choice-based arguments. The applicants argued discrimination based on sexual orientation because “heterosexuality” granted access to three options: *concubinage* (cohabitation), *Pacs*, and marriage.<sup>293</sup> When, in 2016, the case was decided in Strasbourg, French same-sex couples had already gained access to marriage.<sup>294</sup> Yet, at the time the lawsuit was lodged, French same-sex partners only had two options: becoming *pacsés* or remaining cohabitants. Therefore, their marriage application was rejected by the municipal registrar. The Court, however, was not prepared to issue a decision that somehow implied a right to same-sex marriage.<sup>295</sup> This is why the judges spilled considerable ink on the issue of the

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<sup>291</sup> As previously seen, in the system of the ECHR, the only suitable legal basis to employ this argument is the discrimination ban (Article 14 ECHR) taken in conjunction with the right to respect for one’s family life (Article 8 ECHR). Therefore, one cannot demand more options *tout court*, but must first point to a group that has more options than her.

<sup>292</sup> *Chapin & Charpentier v. France*, App. No. 40183/07 Eur. Ct. H.R. (2016), [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-163436%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163436%22]}), [<https://perma.cc/9GYP-DBRW>] (text only available in French) [*Chapin*].

<sup>293</sup> *Id.* ¶ 3.

<sup>294</sup> Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 opening marriage to same-sex couples], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], MAY 18, 2013 (Fr.).

<sup>295</sup> The two decisions are *Oliari & Others v. Italy*, Appl. nos. 18766/11 & 36030/11, Eur. Ct. H.R. (2015) and *Hämäläinen v. Finland*, App. No. 37359/09 Eur. Ct. H.R. 369 (2014).

lack of a European consensus around “homosexual marriage” while moving the issue of choice to the background.<sup>296</sup>

One passage, however, clarifies the position of the Court vis-à-vis the value of choice: the reason for the compatibility of the impugned measure with the Convention was that the French applicants had access to at least one legal regime.<sup>297</sup> As long as the parties had access to *some form* of legal recognition, the Court reasoned, the requirements of the Convention would be satisfied. To corroborate this conclusion, the Strasbourg Court was forced to draw the line between the factual circumstances underlying the case and those underlying *Oliari* and *Vallianatos*, where a violation of the Convention was found.<sup>298</sup> In the latter cases, same-sex couples lacked *any* form of legal recognition—they lacked what, in *Oliari*, the Court identified as a “specific legal framework” for their legal recognition.<sup>299</sup> Therefore, unlike the applicants in *Vallianatos* and *Oliari*, the applicants in *Chapin and Carpentier* had options, although not their preferred ones.

This idea that any formalized partnership will satisfy the Convention was explicitly articulated in *Ratzenböck*. In rejecting the opposite-sex couple’s claim that they should have access to civil partnerships, the Court observed that

[i]n the case of *Vallianatos* . . . different-sex couples, unlike same-sex couples, could have their relationship legally recognised even before the enactment of the law governing the civil union. . . . Consequently, the Court concluded that same-sex couples would have a particular interest in entering into a civil union, since it would afford them, unlike different-sex

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<sup>296</sup> *Chapin*, Eur. Ct. H.R. ¶ 36-39. On the notion of European consensus see generally KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015).

<sup>297</sup> *Chapin*, Eur. Ct. H.R. ¶ 49.

<sup>298</sup> See *Chapin*, Eur. Ct. H.R. ¶ 50 (citing to *Oliari*, Eur. Ct. H.R. ¶125 and *Vallianatos & Others v. Greece*, App. Nos. 29381-09 and 32684/09, Eur. Ct. H.R. 125 (2013)).

<sup>299</sup> *Oliari*, Eur. Ct. H.R. ¶ 185. In *Vallianatos*, the Greek government introduced an extra option for opposite-sex couples (civil partnerships), although at the time same-sex couples lacked access to any other legal framework. *Vallianatos*, Eur. Ct. H.R. 125. The *Oliari* case challenged Italy’s continued reluctance to legally recognize lesbian and gay relationships even after the Italian Constitutional Court admonished the government to do so. *Oliari*, Appl. nos. 18766/11 & 36030/11, Eur. Ct. H.R. ¶¶ 16–17.

couples, *the sole basis in domestic law* on which to have their relationship legally recognized.<sup>300</sup> (emphasis added)

A caveat is in order. The framework of the ECHR is an international legal system. As an international legal system, it is relatively advanced, as it also includes an individual complaint mechanism. However, the judicial body enforcing the Convention cannot be equated to a full-fledged domestic court in terms of its role and powers. For this reason, the Court presents itself as only having a “subsidiary role” and exercises self-restraint in sensitive areas where a European consensus is not yet discernible.<sup>301</sup> Therefore, while the ECtHR worked up the courage to protect same-sex couples through registration in cases where they lacked *any* form of legal recognition, it might not be willing to take this argument one step further and grant a right to registered partnerships to couples that already enjoy legal recognition. Domestic courts might be better suited to do so. They would be unbound by the pragmatic concerns of international courts.

I offer two examples with opposite outcomes to demonstrate the extent to which domestic courts might be receptive of choice-based arguments. Notably, I refer to the case before the French Constitutional Council (“Conseil constitutionnel” or “Conseil”) giving rise to the *Chapin* litigation before the ECtHR, that was rejected, and the U.K. Supreme Court decision in *Steinfeld*, that eventually granted equal civil partnerships for all couples.

In the constitutional petition before the French Conseil, a gay couple wanted access to marriage. The approach was fashioned in terms of negative liberty to conduct a “normal family life,” an equality right, and individual liberty (that of marrying).<sup>302</sup> In its decision, the Conseil refused to find an incompatibility between same-sex couples’ exclusion from marriage and the French Constitution. An important strand of the judges’ reasoning concerns the application of the notion of “normalcy” to family life (“*droit à mener une vie familiale normale*”),<sup>303</sup> which had been inferred from the Preamble to the Constitution of 1946.<sup>304</sup> According to the Conseil, the exclusion of same-sex marriage does not interfere

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<sup>300</sup> Ratzenböck & Seydl v. Austria, App. No. 28475/12 Eur. Ct. H.R. ¶36 (2017).

<sup>301</sup> See, e.g., James Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT’L & COMPAR. L.Q. 459 (2005).

<sup>302</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-92QPC, Jan. 28 2011, J.O. 1894, 1895, ¶ 4 (Fr.), <https://www.conseil-constitutionnel.fr/decision/2011/201092QPC.htm> [<https://perma.cc/8PWK-LWHP>].

<sup>303</sup> *Id.* ¶ 8.



with the right to lead a normal family life, as same-sex couples can still live as cohabitants or *pacsés* couples, and enjoy the legal benefits thereof.<sup>305</sup> While the Conseil does not articulate it explicitly, the implicit assumption is that anytime a couple has access to a formal mechanism of recognition, this will satisfy the French Constitution.

Moving on to the second example, the decision in *Steinfeld*, Section III.B has outlined the complex posture of the case. It is worth recalling that litigants adopted multiple approaches at once. This notwithstanding, the case litigated before the U.K. Supreme Court had a noticeable choice-based component.<sup>306</sup> The parties eventually downplayed the argument that pivoted on the expressive harms of non-recognition to argue that discrimination only arises from the day same-sex couples could (also) marry.<sup>307</sup> Discrimination, consequently, does not directly flow from the fact that heterosexuals are excluded from civil partnerships. It arises from same-sex couples' suddenly having more options than opposite-sex couples.<sup>308</sup>

In truth, ideological objections to marriage still lurk in the background and overlaps with the ideological approach exist. The status recognition approach seems, for instance, to resurface when the Court analogizes the case to *Vallianatos*—the judgment where the ECtHR concluded that discrimination ensues from the lack of recognition of the equal worth of certain couples (same-sex couples) which is a consequence of lack of access to legalized unions.<sup>309</sup> However, the U.K. Supreme Court concluded that there is no intrinsic discrimination in excluding opposite-sex couples from civil partnerships.<sup>310</sup> Discrimination

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<sup>304</sup> The Preamble is part of the so-called *bloc de constitutionnalité*, i.e., the set of constitutional principles and values against which the *Conseil* assesses the constitutionality of laws.

<sup>305</sup> Dec. no. 2010-92, J.O. at 1895, ¶ 8.

<sup>306</sup> R (Steinfeld & Keidan) v. Sec'y of State for Int'l Dev. [2018] UKSC 32 [3]–[4] (appeal taken from Eng.) [Steinfeld] (“[S]ame sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not - and is not - available to heterosexual couples . . . It is also accepted by the respondent Secretary of State that the inequality of treatment of heterosexual couples requires to be justified from the date of its inception, *ie* the coming into force of MSSCA.”).

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* ¶ 46 (speaking of a “new form of discrimination [that] was introduced by the coming into force of MSSCA [law on same-sex marriage].”).

<sup>309</sup> *Id.* ¶¶ 35–40.

<sup>310</sup> *Id.* ¶ 40 (“The government and Parliament must be taken to have realised that, when MSSCA came into force, an inequality of treatment would inevitably arise.”).

materializes only after another social group acquires more routes for legal recognition.<sup>311</sup> This induces me to classify this decision as mainly informed by a choice-based approach.

### 1. Potential Limits of the Approach

The principal argument in favor of choice contends that this value already informs our legal reality because we translated into law the normative forces underpinning it. The process whereby family law became more plural has been relatively unidirectional, and steadfast, and nowadays marriage is no longer the only regime available for (dyadic, romantic) couples.<sup>312</sup> One can, therefore, contend that it is simply untimely and inopportune to interrupt (and interfere with) this process of pluralization, by repealing registration regimes, or by refusing their expansion to a larger set of families.

The degree of acceptance of this line of argument, however, varies. The argument has very little traction at the international level.<sup>313</sup> Hardly will an international court interfere with a state decision regarding the number of legal regimes to enact (marriage, registration, etc.). This differs sharply from the decision whether to have *at least one* recognition mechanism for a social group, which seems to trigger stricter scrutiny even before an international court.<sup>314</sup> The degree of receptivity of choice-based approaches increases at the domestic level. It might well be the case that a domestic court understands that if the state has a certain number of options to recognize families, these options should be available to *all* families. This is especially true in a post same-sex marriage world. If the special reasons linked to tradition prevented states from opening marriage to gay and lesbian couples based on similar arguments (see the *Chapin* case mentioned above),<sup>315</sup> these tradition-related reasons for refusing enlargement are simply absent when it comes to registration.<sup>316</sup>

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<sup>311</sup> *Id.* ¶ 40.

<sup>312</sup> Eskridge, *supra* note 138.

<sup>313</sup> *See supra* Section III.D.

<sup>314</sup> *See e.g.*, *Oliari & Others v. Italy*, Appl. nos. 18766/11 & 36030/11, Eur. Ct. H.R. (2015).

<sup>315</sup> *Chapin & Charpentier v. France*, App. No. 40183/07 Eur. Ct. H.R. (2016).

<sup>316</sup> Scott, *supra* note 156, at 551 (“The civil union, in contrast, is a thoroughly modern, secular construction, and as such, is less likely to be defined by the historical traditions and values that surround marriage.”).

However, the case law analysis also sheds light on the limits of a choice-based approach. I noted that the ECtHR keeps rejecting similar claims on the ground that the applicant already has access to one recognition mechanism.<sup>317</sup> A hurdle to grasping why these parties seek RPs concerns the value of legal pluralism *per se*. According to the Court in *Ratzenböck*, access to an institution (in that case, marriage,) satisfies the parties' "principal need" for recognition.<sup>318</sup> The Court's attitude suggests that the alleged need to access a further legal regime is secondary to the principal need for legal recognition. It further suggests that once you have access to one means of recognition, you are satisfied. Therefore, while the choice-based approach might accommodate values to which Western societies largely subscribe, there are some doctrinal limits to be aware of when contemplating its employment.

#### IV. Analysis

I would like to tease out some final takeaways from the work. Section IV.A outlines the main takeaways in the area of strategic courtroom litigation. Section IV.B offers final thoughts regarding the future of policymaking in the area of registered partnerships. It argues that the ideal registration scheme must be open to a larger number of families, including non-conjugal couples, and that its content must be meaningfully different from marriage.

##### A. Courtroom Litigation

Part III has classified the various approaches to expanding same-sex partnerships. The three approaches do not have clear-cut theoretical boundaries and overlap in practice. Yet, the proposed classification has offered an orderly overview of past litigation. The major finding is that there is no one-size-fits-all approach. Registered partnerships differ in terms of their content, personal scope, or historical context in which they were enacted. Understanding which approach is more suitable to obtaining access to a certain type of legal partnership seems like a more fruitful exercise, as opposed to discussing the resurrection of these laws in abstract terms.

In general terms, the case law analysis reveals that each approach has certain advantages. Status-based arguments are powerful, and hard to rebut when there is evidence

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<sup>317</sup> See *supra* Section III.D.

<sup>318</sup> *Ratzenböck & Seydl v. Austria*, App. No. 28475/12 Eur. Ct. H.R. ¶41 (2017) ("The applicants, as a different-sex couple, have access to marriage. This satisfies – contrary to same-sex couples before the enactment of the Registered Partnership Act – their principal need for legal recognition.").

that a group does not enjoy equal status. Utilitarian forces are also important, and are shaping our family laws in a way that makes utilitarian arguments palatable and in line with the widely accepted notions of individualism and self-actualization. Choice is also connected to utilitarian norms. The idea that we should enjoy choice and a menu of relationship-recognition mechanisms ties nicely with these normative forces.

There are also limits of which to be aware. The main problem with the status recognition approach is that opposite-sex couples do not belong to a historically disfavored group. Hence, emphasis is to be placed on the invidiousness of excluding a sub-set of heterosexual couples: those ideologically opposed to marriage. Even in this circumstance the outcome of the case is uncertain. Our instincts suggest that heterosexuals should not enjoy the benefits of equality laws. The problems with a utilitarian approach are also numerous. It is especially difficult to couch this argument in legal terms. Also, I noted that this argument can only succeed if the desired registered partnership is meaningfully different from marriage—which is not often the case with same-sex partnerships, due to the equalization with marriage that many of these laws underwent in recent years. Ultimately, as to the choice-based approach, the main hurdle is that courts struggle to comprehend the “need” behind heterosexual couples’ mobilization, especially since heterosexuals have access to the “first-class regime” of marriage. This shortcoming also applies to utilitarian claims.

The case law review demonstrates that a couple wishing to go to court must carefully consider the content of the desired partnership. The suitability of the approach to adopt will hinge on several factors. The content of the regime is likely the most significant one. The couple should hence check if the law’s content mirrors that of marriage, or if it offers a minimal list of benefits. Within this macro-categorization, there are approaches that, in principle, are suitable and unsuitable. The suitability in practice of these approaches will, in turn, depend on another feature: their “elasticity” or “inelasticity” regarding the differences between marriage and the registered partnership. In economics, the term elasticity refers to the measurement of a variable’s sensitivity to a change in another variable. I will appropriate the term to simply refer to the degree to which the suitability of an approach is sensitive to changes in the legal content of the registered partnership—and notably, to whether the gap between marriage and the partnership increases or decreases. If it is sensitive to these changes, it is elastic; if it is not sensitive to these changes, it is inelastic. These amendments, where adopted, have historically followed one trajectory: the RPs become richer in content and, especially, more akin to marriage. Therefore, the third column refers to the scenario in which the gap between marriage and the RP is closed.

TABLE 1. APPROACHES TO EXPANDING REGISTERED PARTNERSHIPS BASED ON THEIR CONTENT

Approach(es)	Approach is suitable if:	Elasticity/inelasticity if the gap between marriage and the RP is closed
Status recognition	<ul style="list-style-type: none"> <li>• RP has a distinct content</li> <li>• RP mirrors marriage</li> </ul>	Inelastic
Utilitarian	RP has a distinct content	Highly elastic
Choice-based	<ul style="list-style-type: none"> <li>• RP has a distinct content</li> <li>• RP mirrors marriage (suitable only if closer to a status recognition approach)</li> </ul>	<ul style="list-style-type: none"> <li>• Elastic (if closer to a utilitarian approach)</li> <li>• Inelastic (if closer to a status recognition approach)</li> </ul>

### 1. Suitability of the Approach

Based on the analysis conducted in Part III, when marriage and a certain RP are different in a meaningful way, all three approaches potentially apply. Lack of access to the RP could be challenged based on status-related reasons, utilitarian reasons, or by invoking choice.

I would like to consider the opposite scenario in which RPs mirror the content of marriage. The status recognition approach is still applicable. Whether it is a reciprocal beneficiary law that only confers health-care prerogatives or a broader civil union that confers nearly all marital rights, expressive and cultural harms flowing from exclusion are still present. Skeptics might wonder why a heterosexual couple would want a nonmarital regime that resembles marriage in all respects in the first place. The analysis illustrates that even if the law were to carry the same legal incidents of marriage, parties might still dislike the *label* marriage. These parties are what Anne Barlow and Janet Smithson have dubbed

the Ideologue couples.<sup>319</sup> On the one hand, Ideologues might hold genuine objections regarding the institution of marriage; on the other, they might not want to remain legally invisible or sign private contracts, that is to say: they might want to enjoy the obvious benefits of registration.<sup>320</sup> Courts in Europe have embraced this stance by noting that even if marriage and the RP carry the very same legal incidents, the specific *label* still matters to many couples.<sup>321</sup>

If the regimes have nearly the same content, then the utilitarian approach will have, by contrast, limited traction. What is the point in asking for a more flexible and distinct regime if the regime is not distinct at all? The choice-based approach warrants a separate conclusion. When asking whether the approach is suitable in a situation where the two regimes mirror each other, the answer depends on how the claim is framed:

- (i) Where the claim is explicitly grounded in ideals of personal autonomy and thus resembles a utilitarian approach, it might be less persuasive: since there is no tangible difference between regimes, it may be unclear why access to the regime is necessary.
- (ii) If the claim places emphasis on discrimination and on the injustice ensuing from another social group having more options, a different conclusion is warranted. In those cases, the choice-based approach resembles a status recognition approach. In such cases, the actual differences between marriage and an RP are immaterial. Choice is choice, and if one social group has more options, another group is also entitled to the same number of options.

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<sup>319</sup> Anne Barlow, Carole Burgoyne & Janet Smithson, *The Living Together Campaign - An Investigation of Its Impact on Legally Aware Cohabitant* 8 (Ministry of Justice Research Series 5/07, July 2007), <http://www.lawcom.gov.uk/app/uploads/2015/03/living-together-research-report.pdf> [<https://perma.cc/4GCZ-MRED>].

<sup>320</sup> As seen, registration usually comes with a comprehensive default regime, it can confer—unlike contracts—public law benefits, etc. *See supra* Section I.B, especially notes 150–52.

<sup>321</sup> *See* R (Steinfeld & Keidan) v. Sec’y of State for Int’l Dev. [2018] UKSC 32 (appeal taken from Eng.) [Steinfeld] (citing Oliari & Others v. Italy, Appl. nos. 18766/11 & 36030/11, Eur. Ct. H.R. (2015); Vallianatos & Others v. Greece, App. Nos. 29381-09 and 32684/09, Eur. Ct. H.R. 125 (2013)). As to case law acknowledging the expressive harms inherent in withholding the label *marriage* from gay couples, *see, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 443 (Cal., 2008); *Lewis v. Harris*, 908 A.2d 196, 226–27 (N.J., 2006) (Poritz, C.J., concurring and dissenting).

## 2. Elasticity of the Approach

The third column in Table 1 refers to the elasticity of each approach to subsequent amendments to the content of RPs. Notably, it refers to the scenario in which the RP becomes more like marriage in terms of its substantive content.

The status recognition approach is relatively inelastic to this circumstance. Exclusion from the registered partnership creates a feeling of rejection and diminishment that needs to be remedied.

By contrast, the utilitarian argument is highly dependent on the actual differences between the two regimes and how these change over time (as was the case with the civil partnership in Austria). Closing the gap between marriage and RPs will have implications on the seriousness of the claim and even the credibility of parties. While the two heterosexual partners in *Ratzenböck* were “credible” as they initiated their domestic lawsuit targeting civil partnerships with a distinct, lighter, and more flexible content compared to marriage, their argument became weaker once legal reforms rendered RPs more like marriage.<sup>322</sup> This in turn impacted the credibility of parties because the court seemed to imply that they were pursuing a frivolous claim.

As to the choice-based approach, I argued above that the plausibility of the claim hinges on the content claimants give to choice. The same caveat applies when assessing the elasticity of the approach. If partners argue that lack of choice is causing expressive harms to them as a group (mixed approach with a status-recognition one) the success of the argument will not depend on how different marriage and the RP become. Once again, labels matter irrespective of this.<sup>323</sup> If, by contrast, they claim choice because they aspire to more options on the menu of relationships and their drivers are, therefore, mostly utilitarian, then the plausibility of their claim will be impacted by the narrowing differences between the two regimes.

### B. Political Avenues of Change

There is a positive interplay between strategic litigation and political avenues of change. In the cases where heterosexuals went before courts, as in the United Kingdom

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<sup>322</sup> See *supra* notes 257–259.

<sup>323</sup> *Steinfeld & Keidan v. Sec’y of State for Educ.* [2017] EWCA (Civ) 81 [127] [*Steinfeld EWCA*] (mentioning the “intrinsic value” of civil partnerships).

and Austria, legislatures have eventually widened their registered partnerships to all couples. Therefore, litigating RPs seems to be a powerful tool to “motivate” policymakers to enact legal reform. Other European litigants could follow this route to expand same-sex partnerships. It could be, for instance, followed by opposite-sex couples in Italy who, at present, lack access to civil unions and are considering taking legal action.<sup>324</sup> At the same time, however, I acknowledge that this route is less relevant to American couples. In the United States, same-sex partnerships have been dismantled, with the exception of Oregon—and a couple of other jurisdictions that, however, bar new entrants from registering.<sup>325</sup> Thus, the very object of litigation is missing and mobilizing couples would most likely need to address policymakers.

Therefore, I wish to outline some takeaways that specifically bear on policymaking.

### 1. Marriage-Like or with Distinct Content?

First, the Article warns against reforms in which registered partnerships suffer from the gravitational pull of marriage. If newly introduced regimes were to constitute a mere replica of marriage (in terms of their substantive content and procedural rules to access or dissolve the union), the potential of the law to accommodate non-conventional families would dwindle.<sup>326</sup> Registered partnerships must be crafted in a way that distinguishes them “meaningfully” from marriage to attract a larger number of couples.<sup>327</sup>

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<sup>324</sup> Certi Diritti, a renowned nonprofit organization active in the area of civil rights is contemplating taking action in light of the irrational discrimination suffered by both same-sex couples unable to access marriage and opposite-sex couples unable to access civil unions. Daniele Tarozzi, *A tu per tu con la libertà: i diritti civili e i sex workers in Italia e non solo—Amore Che Cambia* #23 [Face to Face with Freedom: Civil Rights and Sex Workers in Italy and Beyond—Love that Changes #23], ITALIA CHE CAMBIA (Sept. 9, 2021), <https://www.italiachecambia.org/2021/09/battaglie-certi-diritti/> [<https://perma.cc/9YZQ-V6BZ>].

<sup>325</sup> See *supra* note 203 and accompanying text.

<sup>326</sup> See Naomi Cahn & Barbara Atwood, *Nonmarital Cohabitants: The US Approach*, HOUSTON J. INT’L L. 16 (forthcoming 2022) (noting that “[i]f the registration scheme mimics marriage, couples may be more likely to simply marry.”). See also Giovanna Savorani, *Due Cuori e Una Capanna nel Terzo Millennio: Fuga dal Matrimonio e Contratti di Convivenza* [Love on a Shoestring: Escape from Marriage and Cohabitation Agreements], POLITICA DEL DIRITTO 37, 43 (2014) (explaining how, in Italy, proposals to introduce alternative regimes to marriage failed as influenced by same-sex couples’ desire to receive equal treatment, thereby creating a replica of marriage that has no appeal on couples who do not wish to marry).

<sup>327</sup> For some reflections regarding which requirements to retain and which to drop see Palazzo, *Queer and Religious Convergences*, *supra* note 44 (examining the ongoing relevance of conjugality, exclusivity, the requirement to have children, financial interdependence, etc.). For a critique of registrations that are “marriagemimic” see Aloni, *supra* note 286, at 150.



The case of the Netherlands is somewhat unique in this regard. Both opposite- and same-sex couples are registering at growing rates at a time in which the substantive gap with marriage has almost been closed.<sup>328</sup> At first glance, this seems to suggest that introducing a RP with the same content of marriage is also a viable option. Yet, there are two potential interpretations for the popularity of Dutch registered partnerships. First, registered partnerships are appealing precisely because they are marriage-like. Partners might not register were they to lose something (that is, some legal benefits). However, this interpretation is contradicted by the large number of opposite- and same-sex couples opting for RPs in countries where their content differs from that of marriage, such as France and Belgium. This lends credence to a second interpretation: *even* in countries where the two regimes are nearly the same, there is still a sub-set of couples that will opt for registered partnerships (mostly couples who reject the label of marriage or the higher commitment associated with marriage). Through an *a fortiori* argument—meaning with greater reason—one can conclude that if the two regimes are meaningfully different a larger number of couples could sign up: not only Ideologues, but also those that are driven by utilitarian ideals and material interests that marriage-like regimes cannot accommodate.

## 2. What Does “Meaningfully Different” Mean?

A separate issue concerns what the tag “meaningful” means in practice. For policymakers, this is a central question. Understanding which provisions to drop, retain, or add when crafting a RP would go well beyond the scope of the paper. However, it seems that any intervention would require policymakers to act on two fronts: the provisions in marriage law that reflect the troubling history of marriage, and the need for increased flexibility in crafting one’s legal regime.

The first set of interventions must concern those legacies of marriage history that could reflexively be included in RPs. Think of name laws where one spouse (the woman) must take on the name of the other spouse<sup>329</sup> or the archaic habit of only listing the occupation

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<sup>328</sup> It is worth recalling that since 2001, in the Netherlands, both opposite- and same-sex couples can freely choose between marriage and registered partnerships. While the interest in these partnerships has usually been low, the most recent statistics attest to the growing attraction of registered partnerships for all couples. *See supra* Section II.A.

<sup>329</sup> In Austria, for instance, the *eingetragenen Partner/Partnerinnen* may change their name to acquire the name of the other partner. By contrast, married couples must change their name to acquire the “family name” (*familiennamen*). ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 93 (Austria). *See Effects of a Registered Partnership*, AUSTRIA’S DIGIT. GOV’T AGENCY (2021), [https://www.oesterreich.gv.at/en/themen/familie\\_und\\_partnerschaft/eingetragene\\_partnerschaft/Seite.1890200.html](https://www.oesterreich.gv.at/en/themen/familie_und_partnerschaft/eingetragene_partnerschaft/Seite.1890200.html) [<https://perma.cc/NP2Y-Y5BT>].

of the husband on the marriage certificate.<sup>330</sup> Considering that RPs should be open to all couples, including same-sex ones, these requirements will not only be out of date, but also irrational: it will be arbitrary to choose whose name to “impose” or whose occupation to list.<sup>331</sup> A more concrete example is fidelity requirements. For instance, in Italy, fidelity is no longer required within same-sex civil unions, despite LGBTQ couples’ advocacy for its inclusion. This move was the result of an attempt by a conservative party to insult same-sex couples by arguing that they are not sexually exclusive.<sup>332</sup> Yet, other commentators noted that the abandonment of the requirement of fidelity is a positive move towards the modernization of family law.<sup>333</sup> The choice of avoiding similar references also ties nicely with the type of couples that tend to be attracted by these laws, i.e., couples that are less attached to ideals of “for-life” fidelity.<sup>334</sup>

Another related aspect is the dismissal of the requirement of conjugality, meaning a sexual relationship.<sup>335</sup> The ideal registered partnership should drop the requirement that parties must have sex to deserve legal benefits.<sup>336</sup> Adult relatives and friends must also be eligible to register. Not only is this policy decision more consistent with normative and

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<sup>330</sup> Catherine Fairbairn, *Mothers’ Details on Marriage Certificates* (HC Library, Briefing Paper No. 07516, 2018).

<sup>331</sup> In addition to the fact that same-sex couples are of the same gender, empirical research seems to confirm that they report more “egalitarian ways of dividing up labor.” Charlotte Patterson, *Family Lives of Lesbian and Gay Adults*, in *HANDBOOK OF MARRIAGE AND THE FAMILY* 659, 661 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013).

<sup>332</sup> Andrea Carugato, *Unioni civili, Renzi: “Accordo fatto”. Dopo la stepchild adoption, salta anche l’obbligo di fedeltà. La vittoria di Alfano* [Civil Unions, Renzi: “Deal Reached.” After Stepchild Adoption, Fidelity Duties Are Also Removed from the Law. Alfano Wins], *HUFFPOST* (Feb. 24, 2016, 8:40 AM CET), [https://www.huffingtonpost.it/2016/02/24/unioni-civili-salta-fedelta\\_n\\_9307750.html](https://www.huffingtonpost.it/2016/02/24/unioni-civili-salta-fedelta_n_9307750.html) (It.) [https://perma.cc/E45X-7Z2M].

<sup>333</sup> Marco Gattuso, *Cosa C’è nella Legge Sulle Unioni Civili: Una Prima Guida* [What Is the Content of the Law on Civil Unions: A Primer], *ARTICOLO29* (Feb. 25, 2016), <http://www.articolo29.it/2016/cosa-ce-nella-legge-sulle-unioni-civili-una-prima-guida/> (It.) [https://perma.cc/CM56-SMER].

<sup>334</sup> Rault, *supra* note 107, at 356.

<sup>335</sup> *Conjugal*, *CAMBRIDGE DICTIONARY*, <https://dictionary.cambridge.org/dictionary/english/conjugal> [https://perma.cc/3T5M-X4RY] (defining it as “connected with marriage or the relationship between two married people, especially their sexual relationship”).

<sup>336</sup> PALAZZO, *supra* note 14.

empirical trends in family law,<sup>337</sup> it would also respond to principles of rationality that should inform the legal system.<sup>338</sup> Looking at the rationale of most legal benefits (e.g., a survivor's pension) the requirement of conjugality does not pass muster as it is not connected to the aim the benefit pursues (compensating the surviving partner for the support provided while the other one was active on the job market, to follow through with the previous example).

This route has been followed in Hawaii, Vermont, Colorado, Maine, D.C., and Maryland, which have enacted designated and reciprocal beneficiary laws.<sup>339</sup> A thorough study of these laws and of the problems that hinder their applicability to non-conjugal pairs is in order. For instance, conjugality—even when formally dropped as a requirement—continues to inform understandings of partners' behavior as well as provisions of legal benefits to which the partnership law refers, as in Belgium.<sup>340</sup> Eliminating the requirement is thus a necessary yet insufficient condition to overcome the pull of conjugality.

The second line of intervention concerns the accommodation of the need for increased flexibility. It would be a missed opportunity to enact a registered partnership that does not display flexibility, and that is not “creative.”<sup>341</sup> The main example in this regard concerns the regime for the dissolution of the union. These laws must not have the same cumbersome dissolution procedures as marriage.<sup>342</sup> Second, they must display increased opportunities for contracting out of default provisions.<sup>343</sup> A related concern is the need to understand that

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<sup>337</sup> PALAZZO, *supra* note, 14, at 7–14.

<sup>338</sup> LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS xii (Dec. 7, 2001), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1720747&rec=1&srcabs=1524246&alg=7&pos=3](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747&rec=1&srcabs=1524246&alg=7&pos=3) [<https://perma.cc/L23K-K3H3>].

<sup>339</sup> D.C., Maine, and Maryland do not use the tag reciprocal beneficiary law but that of domestic partnerships. Yet, eligibility to register is articulated in such a way that these laws seem to be open to non-conjugal pairs.

<sup>340</sup> Frederick Swennen, *Un-Coupling Family Law: The Legal Recognition and Protection of Adult Unions Outside of Conjugal Coupledness*, 28 FEMINIST LEGAL STUD. 39, 41 (2020) citing SVEN EGGERMONT, DE JURIDISCHE BESCHERMING VAN PRIVATE RELATIES [*THE LEGAL PROTECTION OF PRIVATE RELATIONSHIPS*] (2016).

<sup>341</sup> Aloni, *supra* note 286, at 151.

<sup>342</sup> For instance, in Wales and England, the same dissolution procedures of marriage apply to civil partnerships.

<sup>343</sup> In the United States, this would entail critically assessing the so-called essentials of marriage that cannot be contracted out by the parties. See *supra* notes 165–169 and accompanying text.

differences between RPs and marriages are not a problem that needs fixing. As seen above, legislators tend to gradually equalize RPs and marriage.<sup>344</sup> This trend is the consequence of the misplaced, reflexive conviction that any difference between marriage and RPs, *even when both laws are open to all couples*, is discriminatory.<sup>345</sup> Yet, differences cannot be discriminatory especially considering that access to marriage is not barred. Therefore, we might simply see the two regimes as accommodating different lifestyles.

### 3. Bringing to Light the “Queer” in Modern Families

One last set of reflections concerns opposite-sex couples being an important vector of change to revitalize registered partnerships. As seen, they are not ideal litigants because they belong to a traditionally privileged group. However, many seemingly mainstream couples are in fact non-traditional and not mainstream at all. They can depart from the traditional marital model of family in many ways. A desire not to marry “now” due to uncertainties surrounding the intensity of commitment is a departure from such baseline. A desire to not uphold traditional norms within marriage is another departure. An interest in easier dissolution procedures because one does not believe in the “till death do us part” norm is another way to defy the model. This is to say that the label “non-traditional” does not only apply to more radically non-heteronormative family forms, as, for instance, polyamorous relationships. It might also apply to Jack and Hanna, a seemingly mainstream heterosexual couple that for some such reason does not wish to marry. In these cases, there is a “queer” component, if you like, that slips beneath the radar. By queer component, I mean a form of resistance to the gravitational pull of the traditional marital family.<sup>346</sup> All these practices in fact align with the queer ambition to decentralize this traditional model of family. Bringing the non-traditional component of these couples to light is a first necessary step.

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<sup>344</sup> As to French Pacs see Hayward, *supra* note 84, at 7, citing Hugues Fulchiron, *Le mariage est-il soluble dans le partenariat (et réciproquement)? [Is Marriage Soluble into Pacs and Vice Versa?]*, in MÉLANGES EN L'HONNEUR DE JEAN HAUSER [COLLECTION IN HONOR OF JEAN HAUSER] 125 (2012) (Fr.). Austria and the Netherlands are additional examples in this regard and have been dealt with respectively in Section III.B. and Section II.A.

<sup>345</sup> See, e.g., Austria, ATLAS, [https://www.euro-family.eu/atlas\\_scheda-at](https://www.euro-family.eu/atlas_scheda-at) [<https://perma.cc/U4Y8-MLE5>] (describing any difference between marriage and civil partnerships under the heading “Discriminatory rules”).

<sup>346</sup> DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995) (defining “queer” as “whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers.”).

Second, the link between registered partnerships and non-traditional families must be consolidated further. These non-traditional families are interested in legal recognition, yet not marriage. The problem is that when the couple has access to marriage, courts and likely policymakers struggle to see a “need” for legal recognition through other means. A stronger link between these partnerships and non-traditional families will allow them to grasp the reasons behind opposite-sex couples’ quest for same-sex partnerships. It might also allow them to understand why, in the future, same-sex couples might seek registration in lieu of marriage.

## CONCLUSION

California’s extension of domestic partnerships to opposite-sex couples was received with enthusiasm by state residents. Many of them even wondered why the state had not thought about it before.<sup>347</sup> There are many advantages to registration: more choice, greater flexibility, and a more neutral history compared to marriage. Nonetheless, registered partnerships are on the decline. Their demise now seems like a grim reality. After same-sex marriage became legal, many jurisdictions began jettisoning them.

This Article took issue with the dismantling of registered partnerships. In an attempt to inject some life back into these laws, it showed how valuable they are to modern families, especially those that eschew the model of the marital family. It showed how popular registered partnerships are becoming in European countries where both same- and opposite-sex couples can register—to the point that in Belgium, *cohabitation légale* has surpassed marriage, and it seems that in France, *Pacs* might soon do the same. Initial clues indicate interest even amongst same-sex couples in countries that have long permitted same-sex marriage. The strategic litigation to access these laws that has started to take hold in Europe is additional evidence of their ongoing relevance. Opposite-sex couples are suing the state for discrimination, arguing that it unjustly bars access to the regime. This Article overcomes the narrative of the “spoiled kids” litigants to put forward a new narrative whereby couples mobilizing for same-sex partnerships are more modern, even subversively queer. Their demands, therefore, merit redress.

I am aware that some obstacles exist. The case law is at an early stage of development. Couples are encountering several hurdles in convincing decisionmakers and the general public that this *is* a big deal. Yet, looking at empirical data and normative patterns, it appears that registration as a phenomenon that challenges marriage is on the rise and that, likely, the best is yet to come. Registration might even replace marriage as the dominant

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<sup>347</sup> Melendez, *supra* note 284.

mode of recognition in the span of a few decades. Through an original analysis of emerging case law, this Article aimed to push future conversations in a direction that duly accounts for these empirical and normative shifts. Same-sex marriage is a symbolically important victory for the LGBTQ community. Yet it may be a short-lived one, considering the chances that, in the future, families may just register and live happily ever after.