

MARRIAGE AS A STATE OF MIND:
FEDERALISM, CONTRACT, AND THE EXPRESSIVE
INTEREST IN FAMILY LAW

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TABLE OF CONTENTS

INTRODUCTION49
I. DEMOGRAPHICS, CULTURE, AND FAMILY LAW54
II. SAME-SEX MARRIAGE AND MUNICIPALITIES AS POLITICAL
ACTORS59
III. MUNICIPAL SUPPORT FOR SAME-SEX MARRIAGE: A
CATALOGUE OF OPTIONS66
A. New York: Recognition of Out-of-State Marriages68
 1. *Recognition of Out-of-State Marriages*69
 2. *Civil Ceremonies*70
 3. *Counseling*70
 4. *Conclusion*71
B. New Jersey: Recognition of Out-of-State Marriages as
Domestic Partnerships72
C. Colorado: Designated Beneficiary Registries73
D. Philadelphia: Cities Offering Domestic Partnership Registries75
E. Michigan: The Role of E-marriage in Hostile States77
CONCLUSION82

INTRODUCTION

Family law has always involved competing objectives. Central among them is what Barbara Glesner Fines describes as the fact that we “care too much,” when in fact we can do so little.¹ We—as individuals, communities, states, and a nation—“care too much” about family because it provides a

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1. Barbara Glesner Fines & Cathy Madsen, *Caring Too Little, Caring Too Much: Competence and the Family Law Attorney*, 75 U. MO.-KAN. CITY L. REV. 965, 998 (2007). In a classic article on the limitations of family law, Carl Schneider hailed the “channelling function” in family law precisely because the state’s power to compel particular behavior was so limited. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

foundation for society and determines the well-being of the next generation. We can do so little because the state has only a limited ability to shape intimate behavior. Instead, family law has historically sought to channel private conduct, such as sex and childbearing, into approved pathways, such as marriage,² and to shape individual conduct through creating and reinforcing shared norms.³

The latter objective, which can be termed the “expressive interest” in family law, poses difficulties during times of disagreement.⁴ The American colonies started with different religious, political, and cultural orientations toward the family, and those differences continued to divide the country after independence. They have increased during times of social change that introduce new—and often controversial—approaches to family practices. At the same time, the determination of the status-based issues in family law—who is married or divorced, who counts as a parent, who owns what property, etc.—requires a measure of certainty.

The Constitution resolved the tension between the competing purposes of family law by assigning responsibility for domestic relations to the states. The result involved a compromise; on the one hand, the states are sufficiently different from each other to permit recognition of cultural differences, whether defined by the different settlers in colonial New England versus the plantation South or today’s differences between the independent West, the wealthy mid-Atlantic states, and the evangelical heartland. On the other hand, the states are sufficiently well established as political and legal entities to confer a degree of certainty for family status; intrastate relocation is more common than interstate relocation. The Constitution accordingly entrusts the states with the responsibility to develop their own family law and the discretion to delegate selective parts of that responsibility to smaller local units or to individual choice.

The precise meaning of this “family law federalism,” however, is open for renegotiation. Brian Bix, for example, has suggested that state responsibility for family law is an accident, and many of the same factors that compel state versus federal responsibility also support deference to municipal

2. See, e.g., Schneider, *supra* note 1; Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2133 (2007).

3. See, e.g., Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1923 (2000).

4. For discussion of the role of expression in family law, see June Carbone & Naomi Cahn, *Autonomy to Choose What Constitutes Family: Oxymoron or Basic Right?*, 13 IUS GENTIUM 1, 20-21 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935418. See also Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 265-67 (2000) (summarizing discussion including Bruce Hafen, Carl Schneider, and Mary Ann Glendon about the law’s expressive function and the communitarian critique of individualism).

versus state norms.⁵ At the same time, divisions over same-sex marriage have increased interest in what Alice Ristroph and Melissa Murray call “disestablishing the family” and creating more space for individual freedom in the design of family relationships.⁶ Marc Poirier cautions, however, that Justice Antonin Scalia is right in the notion that today’s disputes constitute a “Kulturkampf,” in which the warriors invoke universal norms (human rights versus naturally or divinely ordained institutions) to make “truth” claims and care more about establishing the dominant discourse than about the immediate consequences of partnership or parenthood rules.⁷ Within this culture war, control of expression becomes more important than practical consequences or institutional legitimacy.

This Article will consider the fight over the expressive interest in family in the context of state recognition of E-marriages between same-sex couples.⁸ In doing so, it will assume that jurisdictions willing to authorize E-marriage can do so,⁹ and it will consider instead the possibilities for recognition in other jurisdictions. The question of extraterritorial recognition will focus on the appropriate locus for legal authority, and it will consider that locus along two axes. The first involves public promotion of shared values. Values expression, to be effective, needs a large measure of uniformity; it cannot be responsive to endless variation.¹⁰ It should, therefore, be decentralized in the absence of a larger consensus. A number of municipalities, for example, mandate pre-marital education as a prerequisite for

5. Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON L. REV. 337, 339 (2005).

6. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1236, 1240 (2010).

7. Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 387-88 & n.3 (2008).

8. This article will defer to the definition of E-marriage and the description of the practice provided in the article by Mae Kuykendall and Adam Candeub. See Mae Kuykendall & Adam Candeub, *Symposium Overview, Perspectives on Innovative Marriage Procedure*, 2011 MICH. ST. L. REV. 1.

9. That is, the article assumes that an individual jurisdiction can choose to grant a license to a couple who will be married through a ceremony that takes place with the officiant located in the jurisdiction that grants the license and a marrying couple located in a different jurisdiction but connected to the officiant through the internet or other technology that broadcasts the ceremony. The granting jurisdiction would presumably control the terms on which it will recognize the marriage and requirements (such as residency) necessary for a court of that jurisdiction to grant a divorce. The home jurisdiction of the couple in contrast would have the choice to recognize or not recognize the marriage in the same way that jurisdictions today may recognize or refuse to recognize same-sex marriage that take place in other jurisdictions. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 58 (2006).

10. Carbone & Cahn, *supra* note 4, at 20-22 (state inculcation of shared values necessarily involves efforts to undermine opposing views).

obtaining a marriage license without anyone suggesting that such education is appropriate only if it is uniform across a state.¹¹ Values expression, however, has its limits; municipalities have greater ability to *encourage* shared norms than to *impose* majoritarian values on private conduct.¹² They also enjoy greater latitude where the state has not acted than where the municipality seeks to promote values at odds with those of the state. A municipality may nonetheless be able to recognize out-of-state marriages in a variety of ways even if it cannot recognize them as legal marriages within the state. Other municipalities, however, may try to express disapproval of same-sex marriages that they cannot prohibit. The battle over expression could become as intense as the battle over legal recognition.¹³

The second axis considers individual ability to choose among competing legal regimes. Here, the issue of locus is in many ways more complex. Family law—to the extent it has focused on divorce, property, or custody—has been largely determined by the location of the parties.¹⁴ Marriage, however, unlike family conflicts over divorce or custody, is a contractual arrangement between two parties who very much want to form such a relationship. The breakup of marriage usually involves conflict between two parties who do not necessarily want the marriage to dissolve or who often disagree about the division of property or custody. The parties have opposing interests, and the ability to forum shop introduces strategic considerations that advantage one party over another.¹⁵ The long history of divorce involves the use of jurisdictional rules to manage interstate conflicts.

Marriage, in contrast, involves a voluntary action that necessarily requires the agreement of both parties. As Candeub and Kuykendall indicate, state marriage license regimes do not typically impose residency requirements and, with the rise of destination weddings, many couples choose loca-

11. See, e.g., Pam Belluck, *States Declare War on Divorce Rates, Before Any 'I Dos,'* N.Y. TIMES (Apr. 21, 2000), <http://www.nytimes.com/2000/04/21/us/states-declare-war-on-divorce-rates-before-any-i-dos.html> (observing that some counties offer premarital counseling).

12. Carbone & Cahn, *supra* note 4, at 22-23 (reviewing Nozick and the distinction between expression and conduct).

13. See, e.g., Erik Eckholm, *In Efforts to End Bullying, Some See Agenda*, N.Y. TIMES (Nov. 6, 2010), <http://www.nytimes.com/2010/11/07/us/07bully.html?emc=eta1>.

14. That location, however, has been subject to strategic moves as well, as one party has historically sought to pick a jurisdiction more favorable to divorce. The results have been determined in accordance with conventional jurisdiction requirements such as residency requirements, limits on ex parte determinations, and full faith and credit determinations. See, e.g., Ann Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL OF RTS. J. 381, 384-89 (2007) (reviewing history of jurisdictional conflicts over family law regulation) [hereinafter *Divorce*].

15. *Id.* (history of individual exploitation of jurisdictional differences).

tions for the ceremony with no continuing connection to either spouse.¹⁶ Candeub and Kuyendall argue that states that recognize same-sex marriage could further ease their marriage requirements to facilitate the marriages of out-of-state couples.¹⁷ These partners could couple the marriage that their home state refuses to recognize with a contract incorporating the terms of their out-of-state marriages. While such agreements by themselves could not resolve issues of parentage or custody, they could create a contractual regime to govern financial matters.¹⁸ The new contracts could make specific provisions for property ownership, support, and inheritance, and they could refer to the out-of-state marital regime to supply default terms to resolve unanticipated disputes. In addition, the partners could incorporate compulsory arbitration provisions that allow them to select gay-friendly decision-makers to resolve future disputes.¹⁹ The results would allow greater recognition of same-sex couples and allow them to dissolve their relationships in states that otherwise refuse to recognize their marriages; the contractual regime would combine public expression in one state with private dispute resolution in another.

The two axes of expression—municipal and individual—could come together to provide greater recognition for same-sex couples. In some states that do not permit same-sex marriage, municipalities have created domestic partner registries, civil commitment ceremonies, or opportunities to designate medical visitors or those with health care powers-of-attorney.²⁰ These gay-friendly municipalities might substitute out-of-state marriages for local registration as a basis for benefits, or they could provide educational manuals or otherwise facilitate the creation of contracts designed to incorporate the terms of out-of-state marriages into legally enforceable private arrangements. Historically, the states might have declared such contracts void as against public policy. Yet, most states today recognize palimony agreements, and given the holdings of *Lawrence v. Texas*,²¹ which invalidated

16. See generally Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735 (2011).

17. *Id.* at 790-95 (proposing legislation).

18. In some states, however, the contracts, particularly if combined with a valid marriage or civil union in another state, might strengthen an argument for parenthood-by-estoppel. See, e.g., *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) *petition for cert. filed*, (recognizing parentage of same-sex partner on the basis of a Vermont civil union). Compare *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (recognizing same-sex parenthood on an estoppel basis), with *White v. White*, 293 S.W.3d 1 (Mo. Ct. App. 2009) (rejecting use of estoppel to establish parenthood).

19. See Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1706-08, 1738 (1997) (arguing that “disputes between same-sex couples may fall into a category of cases involving parties [that] heavily disfavor litigation”).

20. See *infra* Section III.A.

21. 539 U.S. 558 (2003).

criminalization of same-sex sodomy, and *Romer v. Evans*,²² which prohibited measures singling out gays and lesbians for less favorable treatment, it is difficult to imagine a constitutionally permissible ruling that would invalidate such agreements. If courts were to declare portions of the Defense of Marriage Act that preclude federal recognition of validly performed same-sex marriages unconstitutional, the incentive to combine contract and out-of-state marriage would increase further.²³

Combining out-of-state marriage, municipal recognition, and/or contractual incorporation would extend to same-sex couples the emotional experience of a marriage ceremony together with public validation in their home community and private enforceability. It would further lay the groundwork for more equal recognition of their commitments. At the same time, it would allow state and local governments to manage the public expression of family values in a manner consonant with the sensibilities of the locale. The result would allow the country to realize the benefits of a federal system in an era in which expression matters as much as immediate legal consequences.

This Article will consider the locus of family law by examining, first, the relationship between cultural division and family law; second, the nature of the divisions over same-sex marriage; third, the ability of municipalities to act independently of the state in recognizing same-sex relationships; and, fourth, the ability of individuals to choose marital regimes to govern their intimate relationships through contract rather than family law.

I. DEMOGRAPHICS, CULTURE, AND FAMILY LAW

As Justice Felix Frankfurter wrote in 1942, the Constitution of the United States reserves authority over marriage and divorce to the states, and “each state has the constitutional power to translate into law its own notions

22. 517 U.S. 620 (1996).

23. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376-77 (D. Mass. 2010); *Commonwealth v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d 234, 234 (D. Mass. 2010) (declaring federal denial of recognition to Massachusetts same-sex marriages unconstitutional). Among the interesting issues that might arise is tax treatment. If a couple is validly married in one state, but lives in a state that will not recognize their marriage, what federal law applies? To date, the answer has been that the federal government will not recognize same-sex marriage at all even if the home state recognizes the couple as married. If this provision proves unconstitutional, however, it is likely that the federal government will recognize validly performed same-sex marriages for federal tax and other purposes. This, of course, raises the question of whether a couple validly married in one state will lose federal recognition when they move to a state that does not recognize their marriage. For advice on the implications for drafting domestic agreements, see Jerry Simon Chasen, *Is Doma Doomed?*, 25 PROB. & PROP. 22, 26-27 (2011).

of policy concerning the family institution.”²⁴ Because of the potential that a couple might be viewed as married in one state and not in another, entrusting family law to the states has long been controversial. Measures were introduced in Congress in almost every session from the 1880s until the late 1940s to amend the Constitution to permit Congress to regulate domestic relations.²⁵ Indeed, Canada and Australia, influenced by the U.S. Constitution in other respects, expressly entrusted the determination of marriage and divorce to their national legislatures.²⁶

Nonetheless, as Ann Estin observes, the colonies took different approaches to marriage and divorce from the earliest period of American history, and the differing influence of various religious groups in different parts of the country has prevented a uniform approach in every era since.²⁷ At one time, nationalization would have been associated with modernization; today, a federal approach may be a better vehicle for the introduction of progressive reforms.²⁸ From either perspective, uniformity in the determination of marriage and divorce remains politically unattainable, cementing the conclusion that family law is the province of the states.²⁹

Yet, almost all of the arguments for state regulation of family law support further decentralization.³⁰ If family law is to be entrusted to the states to make it more consonant with different cultural values, then why not further localize the determinations, letting cities, counties, or other municipalities determine their own approaches? If the states continue to be valuable as venues for experimentation, why not allow localities to experiment on their own? And, if localized expression defuses cultural tensions by tailoring practices to particular sensibilities, why not let municipalities determine

24. *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring). Frankfurter further observed that “neither the crudest nor the subtlest juggling of legal concepts could enable us to bring forth a uniform national law of marriage and divorce.” *Id.*

25. *Divorce*, *supra* note 14, at 390.

26. *Id.* at 384 n.14.

27. *Id.* at 383. Estin explains that:

The New England colonies treated divorce as a civil matter and began granting divorces during the seventeenth century. The southern colonies followed the ecclesiastical law pattern and generally refused to permit divorce. This diversity and experimentation continued in the years after independence and remains an unusual feature of American divorce law.

Id. at 383-84.

28. See, e.g., Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *BROOK. L. REV.* 1277, 1288-91, 1295-1301 (2004); see generally Richard Schragger, *The Progressive City* (Virginia Pub. Law and Legal Theory Research Paper Ser. No. 2009-16, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471430.

29. NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 117-38, 155-69 (2010) (concluding that the meaning of marriage differs in red states and blue states, making uniformity impossible).

30. See Bix, *supra* note 5, at 338; discussion *infra* Part II.

not only what intimate unions to recognize but how public to make the recognition? Without legislation at either the national or state level, for example, many local courts approve second-parent adoptions, oversee domestic partnerships, and enforce anti-discrimination laws with minimal publicity or protest.³¹

Gay-friendly localities, in short, may be ideally suited and inclined to take the lead in recognizing same-sex relationships for the same reason that they have long served as refuges for lesbian, gay, bisexual, and transgendered (LGBT) people. First, cities typically contain the highest percentage of residents with college and/or advanced degrees in a region.³² Second, they are more diverse, often more open to immigrants and, as Richard Schragger observes, there is some evidence that “[cities] are more tolerant of difference.”³³ Third, urban residents tend to be younger, and everywhere in the country, young people are more supportive of same-sex rights.³⁴ Finally, cities tend to be farther along what social scientists term the “second demographic transition”; that is, the change from traditionalist to modernist families, with the latter marrying later, reducing overall fertility, being more flexible in the assignment of gender roles, and more readily embracing non-marital cohabitation and childrearing.³⁵

31. See discussion of *Romer v. Evans*, *infra* Section III.C (describing how Colorado cities had enforced anti-discrimination provisions for twenty years before the issue arose at the state level).

32. Schragger, *supra* note 28, at 6. But see Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts*, 17 AM. U.J. GENDER SOC. POL'Y & L. 1, 5 (2009) (observing that the largest percentage increases in same-sex couples between 2000 and 2005 occurred in the mid-west and mountain west, with many suburban areas gaining at the expense of the cities).

33. Schragger, *supra* note 28, at 7 (citing RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS (2005)). Bill Bishop observes further that the high tech sectors of the country, such as the Boston corridor, Silicon Valley, Austin, Texas, and the Research Triangle in North Carolina tend to attract more mobile, better educated, and generally more liberal residents, and that they have grown faster in both population and wealth than other parts of the United States. BILL BISHOP, THE BIG SORT 131-33 (2009). Complementing the idea of the city is the quite different construction of the urban. See, e.g., Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE L. REV. 767 (2011).

34. Schragger, *supra* note 28, at 6. See CAHN & CARBONE, *supra* note 29, at 134, Figure 8.2 (2010) (citing Jeffrey Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. R. 367 (2009)).

35. See RON LESTHAEGHE & LISA NEIDERT, POPULATION STUDIES CTR., THE “SECOND DEMOGRAPHIC TRANSITION” IN THE U.S.: SPATIAL PATTERNS AND CORRELATES 3 (2006), <http://www.psc.isr.umich.edu/pubs/pdf/tr06-592.pdf>; Ron Lesthaeghe & Lisa Neidert, *Voting and Families: America's Second Demographic Transition*, NEW GEOGRAPHY (Dec. 11, 2008), <http://www.newgeography.com/content/00461-voting-and-families-america%E2%80%99s-second-demographic-transition> (showing concentration of modernist families, defined by a composite number, in urban areas such as Miami, Detroit, Austin, Denver, and Seattle as well as the Northeast and California more generally).

Municipalities, of course, are neither uniform nor uniformly supportive of same-sex marriage, but this strengthens the case for local determinations. Brian Bix observes that:

A certain view of federalism seems a natural fit with the regulation of marriage and family life. This approach to federalism sees it as a means of simultaneously allowing local control and encouraging the development of alternative (and competing) approaches to a subject. It is a commonplace that different communities—including different communities within the United States today—have sharply different ideas about marriage and family. We would not be surprised to hear different attitudes expressed in New York City’s Greenwich Village, suburban Minneapolis, and Provo, Utah. It would seem natural, if not inevitable, that the rules established for these different communities would be as distinctly different as the communities themselves.³⁶

Bix’s argument for local control is even more persuasive when the issue is expression and administration rather than substantive regulation. The argument against decentralized determinations, whether at the state or local level, is confusion—confusion about who is married to whom, which divorces will be recognized, which courts have jurisdiction of a given dispute.³⁷ Robert Nozick, the apostle of libertarianism, argued toward the end of his life that in a democratic society, voters want “expression of the values that concern us and bind us together.”³⁸ Nozick distinguished between the *symbolic* importance of official expression versus coercive state actions that require compliance.³⁹

The debate over same-sex marriage takes place in a context in which national consensus on the underlying values is impossible. Political scientists, though they disagree as to whether the public generally is more polarized politically than it was a generation ago,⁴⁰ agree that on certain hot button issues, most notably abortion and sexual morality, the public has become intensely polarized, and polarization on these issues has increased

36. Bix, *supra* note 5, at 337-38.

37. See, e.g., *Divorce*, *supra* note 14, at 385-89.

38. ROBERT NOZICK, *THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS* 286-87 (1989).

39. *Id.* at 286-87, 290.

40. For a summary of the extensive political science literature on these issues, see Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 *AM. J. SOC.* 408 (2008) (finding polarization on moral issues largely non-existent forty years ago, greater polarization today on moral issues among the better educated and more politically active, and polarization on moral issues increasing much more dramatically since the mid-eighties); Edward L. Glaeser & Bryce A. Ward, *Myths And Realities Of American Political Geography* (Harvard Inst. on Econ. Research, Discussion Paper No. 2100, Nov. 23, 2005) (concluding that American political divisions have reverted to their pre-New Deal form, and have become increasingly religious and cultural); see also John H. Evans, *Have Americans’ Attitudes Become More Polarized?—An Update*, 84 *SOC. SCI. Q.* 71 (2003); MORRIS P. FIORINA, ET AL., *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2004).

since the mid-eighties.⁴¹ Bill Bishop, in *The Big Sort*, argues further that migration has reinforced the split, producing more politically homogeneous residential groupings *within regions*.⁴² When people choose where to live based on an urban versus suburban ambiance, eclectic versus uniform architectural styles, individual versus family-centered activities, they are also choosing Democratic versus Republican neighborhoods,⁴³ and Bishop argues that more politically homogenous social groups reinforce political differences and push each pole farther away from the center.⁴⁴ Thus, fewer congressional districts remain closely divided, even in “purple” regions that are true battlegrounds at the state level.⁴⁵ Bishop argues that these results are independent of redistricting, and produce citizens who interact overwhelmingly with others who share their political beliefs.⁴⁶ Other journalists confirm that, particularly among mobile college grads, the selection of smaller cities over larger ones, suburbs over cities, and certain neighborhoods over others reflects, *inter alia*, attitudes toward family.⁴⁷

As a result, same-sex marriage is likely to remain a divisive issue. In the country as a whole, support for same-sex marriage is increasing.⁴⁸ The increase in support is particularly strong among the young, the well-educated, those in the Northeast and the West Coast, and in many urban areas.⁴⁹ Moreover, with the emergence of a new set of family values that emphasizes later marriage, deinstitutionalization of gender roles, cohabitation as an ordinary occurrence, and responsibility for children in a variety of settings, support for same-sex marriage becomes not only permissible but

41. See, e.g., Baldassarri et al., *supra* note 40, at 427-29 (documenting increase in polarization on moral issues); see also Evans, *supra* note 40.

42. BISHOP, *supra* note 33, at 41-57.

43. *Id.*

44. *Id.* at 43-47.

45. *Id.*

46. *Id.* at 235-36.

47. See, e.g., Steve Sailer, *Values Voters*, AM. CONSERVATIVE (Feb. 11, 2008), <http://www.amconmag.com/article/2008/feb/11/00016> (observing that couples seeking to have children often chose regions where housing is less expensive while single individuals and those without children are more attracted to cities). For a fuller treatment of these issues, see June Carbone & Naomi Cahn, *Judging Families*, 77 U. MO.-KAN. CITY L. REV. 267 (2008).

48. See, e.g., Brian Montopoli, *Poll: Support For Same Sex Marriage Grows*, CBS NEWS (Apr. 27, 2009, 6:30 PM), http://www.cbsnews.com/8301-503544_162-4972643-503544.html.

49. Lax & Phillips, *supra* note 34, at Figure 8. See also Mary Frances Hill, *B.C., Ontario More Supportive of Same Sex Unions*, NAT'L POST (Sept. 14, 2009, 1:23 PM), <http://network.nationalpost.com/np/blogs/posted/archive/2009/09/14/b-c-ontario-more-approving-of-same-sex-marriage-poll.aspx> (comparing attitudes in Canada, the U.S., and the UK and finding that younger people and those in urban areas were more likely to support same-sex marriage).

obligatory for those who embrace the new norms.⁵⁰ It is unsurprising that cities such as San Francisco have led in the recognition of same-sex couples, and more cities are likely to wish to do so.⁵¹ These developments raise new issues about the extent to which municipalities and other local governments can give expression to these sentiments without political support at the state level.

II. SAME-SEX MARRIAGE AND MUNICIPALITIES AS POLITICAL ACTORS

No state delegates the power to determine who shall marry to local governments.⁵² Brian Bix calls the allocation of responsibility to the state an “accident of history.”⁵³ Richard Schragger observes that the choice between state and local governments has been given relatively little thought.⁵⁴

The allocation of family law decision-making to the state, however, makes sense. It is the result of a compromise. On the other hand, the importance of certainty about family status makes uniformity valuable for reasons that have only increased with time. In describing the evolution of divorce jurisprudence, Ann Estin observes that by the middle of the twentieth century, increasing mobility “undermined the efforts of more restrictive states to extend their control. . . . Frequent moves made the concept of domicile more elusive and the tie between individuals and states more tentative.”⁵⁵ The conflict between different regimes often left individuals in limbo over their marital status. Estin concludes that:

50. See Jonathan Rauch, *Red Families, Blue Families, Gay Families, and the Search for a New Normal*, 28 *LAW & INEQ.* 333, 342 (2010) (arguing that for those who embrace the new model, “marriage is incomplete if it excludes gay couples! Excluding them sends all the wrong signals about family and responsibility. It would make a hypocritical nonsense of what it is that marriage is supposed to be all about”).

51. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 *J.L. & POL.* 147, 148-49 (2005) [hereinafter “Schragger, *Cities*”] (discussing the number of municipalities that have issued marriage licenses to same-sex couples in defiance of state law).

52. *Id.* at 155, observing that:

Marital status is governed by state statute in all states, however, and even in those states with robust constitutional or statutory grants of local home rule, domestic relations has fallen within what commentators and courts call the “private law exception” to home rule authority. The “private law exception” presumes that a whole range of regulatory activities are inappropriate for local determination, including such common law subjects as torts, contract, and property, as well as domestic relations law, including marital status. The rationale for this exception to home rule grants of authority appears to be efficiency.

53. Bix, *supra*, note 5, at 339.

54. Schragger, *supra* note 51, at 154. “Few inquire whether states are the appropriate units for determinations of this kind or whether some other unit of government would be equally as, or more, appropriate.” *Id.*

55. *Divorce*, *supra* note 14, at 420.

With no clear method for determining to which community a particular marriage or family belonged, domestic relations law became preoccupied with convoluted problems in the conflict of laws. In order to maintain the tradition of local authority over divorce, the [Supreme] Court was obliged to get deeply involved in drawing a complex series of lines demarcating state authority. Despite these efforts, marital status was frequently uncertain and unpredictable.⁵⁶

Further decentralization of determinations of family status would only compound the difficulties. While Richard Schragger argues that the costs would “not be prohibitive,” he acknowledges that they would involve “parental rights and child custody, tax filing status, property division on dissolution, and many other legal rights and obligations.”⁵⁷ These factors create increased interest in nationalizing more of domestic relations law, not in delegating more of it to municipalities.⁵⁸

At the same time, the compromise was struck at the state level because, as the last section established, family values have never been uniform enough to allow a national approach. The regional differences include not only substantive ones, such as the permissible terms for divorce, but differences between more religious and more secular perspectives, between Biblical fundamentalists, who treat the Bible as literally true, and Biblical minimalists, who treat religious teachings as more flexible, and between those who see family norms as rooted in moral terms to be enforced by the state and those who see them as a matter of individual choice.⁵⁹ These differences affect not just the legal terms that govern marriage and divorce, but also the ways in which decisions are justified and aspirations are expressed. In the context of child custody, for example, all states have modernized the role of non-marital cohabitation in custody decision-making. Yet, Arkansas courts continue to emphasize that “non-marital cohabitation will not be abided,” while Rhode Island courts may dismiss an objection to a parent’s overnight visitors as “frivolous.”⁶⁰

56. *Id.*

57. Schragger, *supra* note 51, at 157.

58. Indeed, Estin concludes that the result has been development of a number of methods encouraging greater nationalization including Supreme Court decisions addressing full faith and credit in the divorce context. *Divorce*, *supra* note 14, at 430.

59. See, e.g., Peter L. Francia, Jonathan S. Morris, Carmine P. Scavo & Jody Baumgartner, *America Divided? Re-Examining the “Myth” of the Polarized American Electorate* 11 (2005) (unpublished paper), available at http://convention2.allacademic.com/one/apsa/apsa05/index.php?click_key=1&PHPSESSID=63e5d52ae9fdda78e0b328c42916094a (observing that in those states voting Republican in 2004, almost half of the voters were Biblical fundamentalists compared to twenty-eight percent in states voting Democrat); David E. Campbell, *A House Divided? What Social Science has to Say About the Culture War*, 15 WM. & MARY BILL OF RTS. J. 59, 64-65 (2006) (arguing that it is traditionalism rather than denomination that determines party affiliation, and that traditionalists are less likely to see changes in moral values as appropriate or a matter of individual choice).

60. *Compare* Taylor v. Taylor, 110 S.W.3d 731, 737 (Ark. 2003) (stating that “a parent’s unmarried cohabitation with a romantic partner, or a parent’s promiscuous conduct

These differences have not blocked all movement toward greater uniformity. Congress, for example, has passed legislation prodding the states to streamline paternity establishment and facilitate child support awards.⁶¹ Moreover, after a century of conflict prompted in large part by religious opposition,⁶² all states adopted some form of no-fault divorce between 1969 and 1985, and the substantive changes made resolution of the jurisdictional conflicts easier.⁶³ Even during the long period of frustrated efforts to reform divorce, the states adopted a variety of stratagems to ease divorce restrictions. Lawrence Friedman writes, for example, that as early as 1870 the written law and the actual practices of divorce had begun to diverge significantly, with the number of divorces increasing and collusive or fraudulent divorces becoming more common.⁶⁴ The early efforts moved things along in part by avoiding a challenge to the prevailing ideology of marriage in the state and making changes in ways consonant with regional differences in sensibilities.⁶⁵ Managing jurisdictional differences was an important part of that effort.⁶⁶ With time, changes in societal attitudes and the hypocrisies and contradictions in the new procedures helped create the circumstances that made national reform possible.⁶⁷

A similar process is underway in the recognition of same-sex relationships. Sociologists Jeffrey Lax and Justin Phillips argue that legal changes largely track the changes in public opinion polls.⁶⁸ Gay-friendly states and cities have led reform efforts with adoption of anti-discrimination measures in employment and housing—the measures that command the most support.

or lifestyle, in the presence of a child cannot be abided), *with Logan v. Logan*, 763 A.2d 587, 590 (R.I. 2000) (dismissing the mother's request that father be prohibited from having overnight visitors when the children were present as "frivolous"). For a fuller account, see Carbone & Cahn, *supra* note 47, at 287-98.

61. See Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998).

62. Estin reports uniform laws were "the single most talked-about solution to the divorce problem," but they were impossible to achieve "because different religious groups with differing ideas on divorce dominated enough state legislatures to prevent the passage of model laws." *Divorce*, *supra* note 14, at 392 (quoting WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 252-53 (1967)).

63. *Divorce*, *supra* note 14, at 431 (commenting on the judicial role in managing jurisdictional disputes).

64. LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 35 (2004); see also *Divorce*, *supra* note 14, at 392-93.

65. See generally Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1511 (2000) (discussing "the gradual decay of the fault regime").

66. See Estin, *Divorce*, *supra* note 14, *passim*.

67. See, e.g., Friedman, *supra* note 65, at 1536 (arguing "the whole edifice was rotten to the core" and that when the system collapsed it appeared as a sudden giving way that in fact resembled the collapse of a bridge or a floor rotted away by termites).

68. See Lax & Phillips, *supra* note 34, at 367.

They have followed with adoption of a variety of partnership benefits. Same-sex marriage is the most controversial of the proposals to better the lives of same-sex couples, and the one with the least public support.⁶⁹ Even then, support for it has been steadily increasing, especially among Americans under thirty.⁷⁰

In effecting these changes, gay-friendly cities have often led the way, sometimes enacting measures later adopted at the state-level.⁷¹ Yet, in many states the resistance to city efforts has been intense because acceptance of homosexuality itself has been defined as a “Kulturkampf”: a culture war in which “two strongly and bitterly opposed views of culture have sought to win over whatever jurisdictions they can, establishing beachheads.”⁷² In a culture “war,” the fight is one to establish a dominant cultural viewpoint. As Marc Poirier explains, “To the cultural or moral universalist, the specifics of local place are irrelevant to the right way to do and to be.”⁷³ Both those who see same-sex marriage as a basic human right and those who see sexual morality as either divinely or naturally ordained reject the premises that celebrate local variation or experimentation.⁷⁴ Poirier argues that they, accordingly, interpret local events as “beachheads” in the fight to stamp out or encourage acceptance of same-sex couples.⁷⁵ These conflicts framed the litigation in *Romer v. Evans*,⁷⁶ which tested the constitutionality of a state proposition prohibiting municipal anti-discrimination bans.

The events that led up to *Romer* began after a number of Colorado municipalities passed anti-discrimination ordinances.⁷⁷ The cities of Aspen and Boulder and the city and county of Denver all enacted laws that banned discrimination on the basis of sexual orientation in activities including housing, employment, education, public accommodations, and health and welfare services.⁷⁸ Some of these ordinances had been in place for over twenty years⁷⁹ when a proposition was placed on the Colorado ballot that provided that:

69. *Id.*

70. *Id.*

71. See, e.g., Megan E. Callan, Comment, *The More, the Not Marry-er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 SAN DIEGO L. REV. 427, 436-37 (2003).

72. Poirier, *supra* note 7, at 387-88.

73. *Id.* at 391.

74. *Id.* at 400-01.

75. *Id.* at 388.

76. 517 U.S. 620 (1996).

77. *Id.* at 623-24.

78. *Id.* (citing DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-91 to -116 (1991); ASPEN, COLO., MUN. CODE § 13-98 (1977); BOULDER, COLO., REV. CODE §§ 12-1-1 to -11 (1987)).

79. Jay Michaelson, *On Listening to the Kulturkampf, or, How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 DUKE L.J. 1559, 1570 (2000).

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.⁸⁰

The Colorado Supreme Court ruled that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment of the U.S. Constitution “because it infringed the fundamental right of gays and lesbians to participate in the political process.”⁸¹ The U.S. Supreme Court affirmed the Colorado ruling six to three, but on different grounds.⁸² Justice Kennedy’s majority opinion applied a rational relationship test rather than strict scrutiny⁸³ and emphasized equal protection rather than access to the political process per se.⁸⁴ He observed, first, that: “A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁸⁵ Second, he called attention to the motive underlying the proposition and concluded that:

[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”⁸⁶

In deciding the case on equal protection grounds, Justice Kennedy did not address either the issue of access to the political process that concerned the Colorado Supreme Court, or the relationship between the state and the municipalities that enacted the ordinances.⁸⁷

80. *Romer*, 517 U.S. at 624 (quoting COLO. CONST. art. II, § 30b).

81. *Id.* at 625 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (*Evans I*)).

82. *Id.* at 626, 636.

83. *Id.* at 635 (citation omitted).

84. *Id.* at 633.

85. *Id.*

86. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

87. For discussion of this issue, see Lynn A. Baker, *The Missing Pages of the Majority Opinion in Romer v. Evans*, 68 U. COLO. L. REV. 387 (1997). Baker observes that it is “clearly the case” that the State of Colorado could “abolish the very cities of Aspen, Boulder, and Denver” and almost certainly has the power to “repeal any ordinances these cities may enact” and “to prohibit these cities from adopting any such ordinances in the future.” *Id.* at 399-401 (footnote omitted). Yet, she concludes that Amendment 2 goes too far, reasoning that:

There are . . . four characteristics that, taken together, render Amendment 2 both unique and unconstitutional. Amendment 2 would (1) deny to a single class of persons, (2) identified on the basis of a general status rather than specific conduct, (3) direct access to the political and judicial processes, (4) for the purpose of seek-

Justice Scalia dissented and, in an opinion in which Chief Justice Rehnquist and Justice Thomas joined, he also saw the issues as about gay and lesbian rights.⁸⁸ He began his dissent by observing that:

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. . . .

This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that “animosity” toward homosexuality is evil.⁸⁹

Indeed, Scalia made clear throughout the opinion that he thought the voters supporting Amendment 2 were entirely reasonable in their fear that favorable municipalities would create a “beachhead” effect that would lead to “not merely a grudging social toleration, but full social acceptance, of homosexuality.”⁹⁰ The dissent insisted that this problem “for those who wish to retain social disapprobation of homosexuality” arises because gays and lesbians “tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large.”⁹¹ Scalia accordingly found the factors others see as a justification for decentralized decision-making—different populations, with different values, more likely to congregate in urban versus rural areas—as grounds to uphold the decision of the majority to counter “the geographic concentration and the disproportionate political power of homosexuals.”⁹² Scalia, then and now, sees no basis

ing protection against discrimination on the basis of that general status. Understood in this way, Amendment 2 is readily distinguishable, not only from other exercises of the state’s near plenary power over its political subdivisions, but also from other state or federal constitutional provisions that require a particular group “to amend the constitution to obtain legislation it favors or believes it needs.”

Id. at 402-03 (footnotes omitted).

88. *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

89. *Id.* (first alteration in original) (citations omitted). Scalia further stated that: I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.

Id. at 644 (referring to *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), which upheld a criminal statute outlawing sodomy).

90. *Romer*, 517 U.S. at 646 (Scalia, J., dissenting) (citation omitted).

91. *Id.* at 645-46. (citations omitted).

92. *Id.* at 647. Indeed, Scalia further observed that:

It is also nothing short of preposterous to call “politically unpopular” a group which enjoys enormous influence in American media and politics, and which, as

for a truce in the culture war; he would continue to uphold draconian measures that include not only discrimination in employment and housing, but criminalization of same-sex conduct.⁹³

Those who support recognition for same-sex couples often advocate local initiatives in precisely the terms Scalia condemns; that is, they allow space for more visible gay and lesbian relationships, encouraging more tolerant attitudes in the public at large, and producing greater support for the principle that LGBT people are entitled to equality.⁹⁴ What Scalia characterizes as the “enormous influence” of a tiny minority,⁹⁵ Andrew Koppelman might describe as the growing commitment of the majority of the population to the principle that discrimination on the basis of sexual orientation is wrong.⁹⁶ Federalism in this context can facilitate a strategy to increase majority commitment to that principle.

Of course, federalism can also facilitate resistance.⁹⁷ Local districts in states such as Massachusetts, for example, may choose to express their disapproval of same-sex couples. Partly for this reason, important distinctions exist between cultural expression and access to state provided services and statuses. While LGBT couples may prefer to live in gay-friendly municipalities,⁹⁸ many may find it difficult to move to Boston from western Mas-

the trial court here noted, though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.

Id. at 652 (citation omitted).

93. See *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

94. See Poirier, *supra* note 7, at 405.

95. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

96. See *id.* at 405 n.98 (citing Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 11 (2004)) (describing Koppelman as “noting the persuasiveness of performances of same-sex couples and parents as the equivalent to that of their heterosexual counterparts”). Indeed, in the years since *Romer* was decided, support for protecting LGBT people from discrimination has grown dramatically and a substantial majority of the country as a whole supports the protections Colorado Amendment 2 would have prohibited. See Lax & Phillips, *supra* note 34.

97. This is particularly true since groups at the national level stand ready to promote and fund local initiatives. In Iowa, for example, the National Organization for Marriage and the American Family Association poured money into a campaign to oust three Iowa Supreme Court justices who supported same-sex marriage. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html>. The electorate voted to remove the justices, the first time in Iowa history that Supreme Court justices have ever been rejected by voters. *Id.*

98. A traditional argument for federalist approaches has been the value of experimentation that allows people with different preferences to choose among legal jurisdictions on the basis of such preferences. Richard Schragger notes that the principal objection to such competition is the creation of “races-to-the-bottom,” encouraging jurisdictions to adopt laxer standards, such as lower environmental regulations, in an effort to attract industries. Schragger, *Cities*, *supra* note 51, at 162. He maintains that marriage eligibility rules, however, seem “to be one of the few regulatory arenas in which there do not appear to be significant competitive pressures that need to be solved with centralized regulation.” *Id.* at 163.

sachusetts. Likewise, residents of western Massachusetts would be deeply offended if local officials could deny them a marriage license guaranteed as a matter of equal protection under state law.⁹⁹ On the other hand, affirmative expressions of values,¹⁰⁰ whether tied to the importance of marriage as a general matter or support for same-sex couples in states that refuse to recognize marriage rights, have long been part of local efforts.¹⁰¹ A federalist strategy that emphasizes visibility and affirmation, rather than municipal legal transformation, could reconcile the need for both predictability and change. The question then becomes what kind of measures municipalities should be able to pursue in the absence of state support—and to what extent individuals can choose among different legal regimes without moving.

III. MUNICIPAL SUPPORT FOR SAME-SEX MARRIAGE: A CATALOGUE OF OPTIONS

The ambit for municipal expression of support for same-sex marriage depends on the context supplied by the state. Most states at this point either provide for same-sex marriage or prohibit recognition.¹⁰² For the last sever-

Instead, the larger issue is the role of constitutional guarantees in precluding local variation. In a state such as Massachusetts that guarantees LGBT people access to same-sex marriage as a constitutional right, permitting localities to deny marriage licenses on the grounds of sexual orientation would clearly be illegal. In other states, mayors and other municipal officials have justified local action on the ground that the failure to authorize same-sex marriage should be recognized as unconstitutional. *See* *Lockyer v. City & County of S.F.*, 95 P.3d 459, 462 (Cal. 2004). Experimentation of the type Schragger describes, however, has historically flourished where there is at least a measure of openness to the different approaches; something that is not politically true in the case of same-sex marriage. *See supra* text accompanying note 72 (discussing the idea of Kulturkampf).

99. Legislation has been proposed in Iowa, for example, to permit county recorders to refuse to issue marriage licenses to same-sex couples in spite of a ruling that such licenses are mandated by equal protection principles. Jason Hancock, *GOP Pushes for Right to Refuse Same-Sex Marriage Licenses*, IOWA INDEP. (Apr. 14, 2009), <http://iowaindependent.com/13999/gop-pushes-for-right-to-refuse-same-sex-marriage-licenses>.

100. An important line to draw in these efforts is a distinction between affirmation of values such as marriage and denigration of individuals because of their sexual orientation. *See* NOZICK, *supra* note 38; *see also supra* text accompanying notes 38 & 39.

101. States, for example, have adopted various types of marriage promotion programs that allow couples to opt into state promoted efforts. In Florida, the state offers a fifty percent discount in marriage fees if couples agree to pre-marital counseling. In Louisiana, couples can relinquish their rights to a no-fault divorce by entering into a covenant marriage. This means that they have to wait two years instead of the usual six months to divorce if they do not allege fault. Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 290 (2009). These programs allow the state to express support for more traditional notions of marriage without infringing on individual freedom of choice.

102. For a summary of state laws, see *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/?TabId=16430> (last updated July 14, 2011) [hereinafter *Same-Sex*].

al years, New York has been one of few states to unequivocally permit recognition of out-of-state marriages even though the state will not issue licenses for same-sex marriages within the state. The New York legislature adopted full same-sex marriage legislation as this Article was about to go to press, but it remains a model for municipal efforts that might take place elsewhere.¹⁰³ Gay and lesbian-supportive cities can take each of the steps in the New York approach, absent an express prohibition at the state level, but the meaning of these actions will vary with the political context of the state.¹⁰⁴ In those states on the way to recognition of same-sex relationships, these measures increase the visibility of same-sex relationships, “normalize” marriage rituals, place the imprimatur of city hall on the couple’s desire to marry, and provide state assistance in reconciling the competing legal regimes that govern the couple’s life.¹⁰⁵ In the states well along in the transition to full marriage rights, the effect may be to speed the process; in states with powerful opponents to same-sex marriage, the same measures may be

103. *Id.*; N.Y. Marriage Equality Act, 2011 N.Y. Sess. Laws, Ch. 95, A. 8354 (McKinney’s); *see also* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?ref=nyregion>. In addition, attorneys general in Rhode Island, Maryland and New Mexico have issued opinions suggesting that those states may recognize out-of-state same-sex marriages as a matter of comity. In Rhode Island, the state attorney general opinion has led to the granting of family benefits on the basis of out-of-state marriages, but the state supreme court has refused to grant jurisdiction over divorce cases, declaring that the decision to recognize same-sex marriages is best left to the state house and the legislature. *See* Letter from Patrick C. Lynch, Att’y Gen., State of R.I., to Jack R. Warner, Comm’r, R.I. Bd. Of Gov’rs for Higher Educ. (Feb. 20, 2007), cited in *Legal Recognition of Same-Sex Couples’ Marriages*, LAMBDA LEGAL (NOV. 2008), http://data.lambdalegal.org/publications/downloads/fs_legal-recognition-same-sex%20couples.pdf, also available at http://ri.glad.org/News_Room/RIAttorneyGeneral_Statement.pdf (“[W]hether based on Full Faith and Credit or on principles of Comity, Rhode Island will recognize same sex marriages lawfully performed in Massachusetts as marriages in Rhode Island.”); *Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007); *see also* Letter from Patrick C. Lynch, Att’y Gen., State of R.I., to Paul J. Tavares, General Treasurer (Oct. 19, 2004), available at <http://www.oag.state.md.us/Opinions/2010/Tavares.pdf> (allowing benefits). In Maryland, the state attorney general has also issued an opinion indicating that the state may recognize same-sex marriages performed elsewhere. *See* Marriage—Whether Out-of-State Same-Sex Marriage that is Valid in the St. of Celebration May be Recognized in Maryland, 95 Md. Op. Att’y Gen. 3334 (2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>; *see also* N.M. Op. Att’y Gen. No. 11-01 (2011), available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131>.

104. The state of Washington has passed legislation recognizing out of state marriages for the purpose of establishing domestic partnership recognition. *See* Eric W. Dolan, *Washington Recognizes Out-of-State Same-Sex Marriages*, THE RAW STORY (April 6, 2011), <http://www.rawstory.com/rs/2011/04/06/washington-recognizes-out-of-state-same-sex-marriages/>. Compare *infra* Section III.A, with *infra* Section III.B.

105. *See, e.g., infra* Section III.A (description of actions in New York City to recognize same-sex couples).

seen as an affront—or an outright threat—triggering greater backlash rather than support. Accordingly, the possibilities for municipal embrace of E-marriages will vary.

This section will proceed from the most to the least supportive models for action. After New York, the article will consider states, such as New Jersey, that recognize domestic partnerships, but not same-sex marriages. While these states would not recognize E-marriages as marriages, they would recognize them as civil unions, giving the participants a measure of legal recognition. Third are those states that prohibit recognition of same-sex marriages, but leave open other forms of recognition such as designated beneficiaries. Fourth are states that provide no recognition at the state level, but allow municipalities to provide domestic partner registries. Fifth, and finally, are states such as Ohio and Michigan that prohibit all recognition of same-sex relationships.

A. New York: Recognition of Out-of-State Marriages

Choice of law rules generally provide that a marriage valid where performed is valid everywhere unless it violates the strong public policy of the state.¹⁰⁶ Unlike the majority of states, New York has never passed a proposition or legislation declaring that the State will not recognize out-of-state same-sex marriages.¹⁰⁷ In *Hernandez v. Robles*, the State's highest court has ruled that the legislature's failure to pass such legislation meets the rational relationship test necessary to pass constitutional muster.¹⁰⁸ Despite the *Hernandez* decision, however, intermediate appellate courts have held that Canadian and Massachusetts same-sex marriages do not violate the public policy of the state, and the Governor responded by ordering state agencies to recognize the validity of such marriages.¹⁰⁹

106. See Joanna Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 460-61 (2005); Andrew Koppelman, *Interstate Recognition of Same Sex Civil Unions After Lawrence v. Texas*, 65 OHIO ST. L.J. 1265, 1266 (2004).

107. For a review of New York law, see Arthur S. Leonard, *New York Recognition of a Legal Status for Same-Sex Couples: A Rapidly Developing Story*, 54 N.Y.L. SCH. L. REV. 479 (2009/2010).

108. *Hernandez v. Robles*, 7 N.Y.3d 338, 357 (2006) (holding New York Domestic Relations Law does not authorize issuance of licenses for marriages of same-sex partners, although statute does not, on its face, expressly forbid such marriages).

109. Leonard, *supra* note 107, at 489-90. See also *Godfrey v. Spano*, 13 N.Y.3d 358 (2009); *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008). In *Martinez*, the court held that established New York marriage-recognition principles dictate recognizing a same-sex marriage performed in Canada. *Martinez*, 850 N.Y.S.2d 740. *Godfrey* involved challenges to two different executive actions recognizing same-sex marriages performed outside the state. *Godfrey*, 13 N.Y.3d 358. In both cases, the Court of Appeals af-

The governor's actions generated less controversy than elsewhere in the country, in part because fifty-eight percent of New Yorkers now support same-sex marriage, the fourth highest percentage in the country.¹¹⁰ New York City has been particularly aggressive in recognizing same-sex couples, taking the following actions:

1. *Recognition of Out-of-State Marriages*

On April 6, 2005, Anthony W. Crowell, special counsel to the mayor, released a letter stating that:

[I]t is the policy of the City of New York to recognize equally all marriages, whether between same- or opposite-sex couples, and civil unions lawfully entered into in jurisdictions other than New York State, for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law.¹¹¹

Other municipalities followed suit, including Westchester County, Albany, Binghamton, Buffalo, Brighton, Ithaca, Chili, Rochester, and Nyack.¹¹² A major effect of municipal recognition has been the extension of spousal health insurance and other benefits to same-sex spouses of employees.¹¹³ Westchester County, for example, created a domestic partnership registry in 2002 to allow “unmarried couples in committed relationships and who share common households” to receive recognition that made them eligible for health benefits.¹¹⁴ The County subsequently acted to recognize out-of-state

firmed the rejection of the challenges on other grounds without deciding whether New York marriage-recognition principles would apply to these marriages. *Godfrey*, 13 N.Y.3d at 377.

110. *Support for Same-Sex Marriage, State-by-State*, N.Y. TIMES (Aug. 21, 2010), <http://www.nytimes.com/interactive/2010/08/22/weekinreview/22gay-chart.html?ref=weekinreview>. The states with the strongest support for same-sex marriage are Massachusetts (62%), Rhode Island (60%), Vermont (59%), and then New York (58%). *Id.*

111. *Marriage Recognition for Same Sex Couples in New York: Advances Outside of the Courtroom*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/new-york-marriage-recognition-outside-courtroom.html> (last visited Mar. 30, 2011). The N.Y. City Administrative Code § 3-245 also provides that:

Members of a marriage that is not recognized by the state of New York, a domestic partnership, or a civil union, lawfully entered into in another jurisdiction, shall be entitled to all the rights and benefits available to domestic partners registered pursuant to this subchapter. A certificate of such domestic partnership, civil union or marriage issued by another jurisdiction shall constitute sufficient proof of entitlement to such rights and benefits

112. LAMBDA LEGAL, *supra* note 111. Westchester County's actions were challenged in court and upheld in *Godfrey*, 13 N.Y.3d at 381.

113. *See, e.g.*, Memorandum from David Nocenti, Counsel to the Governor, N.Y. State, to All Agency Counsel, New York State (May 14, 2008), *available at* http://data.lambdalegal.org/in-court/downloads/exec_ny_20080514_martinez-decision-on-same-sex-marriages.pdf.

114. *See Godfrey*, 13 N.Y.3d at 368.

marriages on the same basis as New York marriages for the purpose of determining benefits eligibility, effectively eliminating the need for domestic partnership registration.¹¹⁵ E-marriages could similarly take the place of domestic partnership registries in municipalities that base benefits on such registries.¹¹⁶

2. Civil Ceremonies

In June 2010, the City Clerk of New York City began to offer civil ceremonies to domestic partners equivalent to the civil marriage ceremonies the City Clerk's office performs for heterosexual couples in New York.¹¹⁷ It would require only a small additional step to combine such ceremonies with E-marriages or proxy marriages in another state. The controlling measure of the validity of the marriage would be the law in the state issuing the license, with New York recognizing the marriage as a matter of comity.¹¹⁸ The City could accordingly provide the necessary equipment to permit the ceremony to occur simultaneously in the state issuing the marriage license with an officiant from that state participating over Skype and a civil ceremony in New York celebrating a domestic partnership. While recognition of the out-of-state marriage would eliminate the need for a New York official, having both occur within the same ceremony would place the imprimatur of the state on the relationship and carry symbolic value.

3. Counseling

In August 2010, New York City further amended its administrative code to require that the City inform those registering as domestic partners and post the following notice on the Internet and in its offices and marriage bureaus:

Lawfully married individuals, including individuals in same sex marriages, are entitled to more New York State rights and benefits than those registered as domestic partners here in New York City. If an individual lawfully enters into a same sex

115. *Id.* at 368-69.

116. A large number of municipalities have created domestic partnership registries even in states that prohibit recognition of same-sex marriage. *See Domestic Partnership Registries*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/marriage/domestic_partners/9133.htm (last visited March 25, 2011). These jurisdictions include Phoenix, AZ; Denver, CO; Atlanta, GA; Kansas City, MO; St. Louis, MO; Lawrence, KS; New Orleans, LA; Ann Arbor, MI; Carborro, NC; Cleveland, OH; Salt Lake City, UT; Travis County, TX; and many others. *Id.*

117. Frank Lombardi, *Gay Couple Among First to Become Domestic Partners with Marriage-Like Ceremony at City Hall*, N.Y. DAILY NEWS (June 5, 2010), http://articles.nydailynews.com/2010-06-05/local/27066221_1_domestic-partners-gay-couple-gay-rights-advocates.

118. *See Godfrey*, 892 N.Y.3d 358.

marriage in a jurisdiction outside New York, they are entitled to most of the New York State rights and benefits available to people lawfully married in New York. If you are considering entering into a marriage in one of the jurisdictions listed above, it is recommended that you contact that jurisdiction beforehand in order to learn about any applicable marriage requirements or restrictions.¹¹⁹

The provision also requires that the City provide a list of jurisdictions that perform same-sex marriages.¹²⁰

Other jurisdictions have adopted various types of pre-marital counseling classes to provide couples with more information before they marry; states could easily incorporate advice about E-marriage into existing domestic partnership programs.¹²¹ That advice should include information about dissolution and its potential impact on matters such as property titles in addition to information about legal recognition of the change in status.

Municipalities might also choose to add information about the use of contracts to complement out-of-state marriages or other formal statuses. Some scholars, for example, favor mandatory pre-marital agreements.¹²² Municipal counseling programs could offer advice about the effect of out-of-state marriages on property titles, parental status, liability to creditors, and support obligations and information about the use of contracts to clarify those issues within the state.¹²³

4. Conclusion

The purpose of the New York measures is to express municipal support for same-sex couples in a way that allows public celebration of the relationship, provides counseling to permit the couple to realize the full extent of relationship rights permitted under state law, and gives symbolic, in addition to practical support for the principle of equal access to marriage even if the principle has not yet won recognition at the state level.¹²⁴ These measures create a model that can be repeated elsewhere, even if the state does not permit full recognition of out-of-state marriages. As this Article was going to press, New York State adopted a Marriage Equality Act providing for same-sex marriage in the state.¹²⁵ The New York experience, however, con-

119. N.Y. COMP. CODES R. & REGS. tit. Marriage notification, § 3-207.1 (2010).

120. *Id.*

121. *See* Belluck, *supra* note 11.

122. *See, e.g.,* Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992).

123. Indeed, Colorado offers same-sex couples the option of registering as “designated beneficiaries” and choosing among a menu of options relating to inheritance, property transfers, health-care decision-making, standing to sue in tort, and other matters common to spouses. COLO. REV. STAT. ANN. § 15-22-106 (2009).

124. *See supra* notes 103, 106 and accompanying text.

125. *See supra* note 103.

tinues to provide a model for gay friendly municipalities in states that are willing to recognize out-of-state marriages.

B. New Jersey: Recognition of Out-of-State Marriages as Domestic Partnerships

A number of states that permit domestic partnership or civil unions recognize out-of-state marriages as the equivalent of the status recognized in the state.¹²⁶ In New Jersey, for the example, the State Supreme Court held that the state must provide either same-sex marriage or a status equivalent to marriage.¹²⁷ The legislature responded with an amended domestic partnership law that provided a status equivalent to marriage.¹²⁸ The State Attorney General subsequently ruled that the state would recognize out-of-state marriages as domestic partnerships.¹²⁹ The opinion explained:

Recognizing same-sex marriages established under Massachusetts law as civil unions in New Jersey both gives substantial effect to the Massachusetts relationships by providing all of the rights and obligations of marriage and comports with the intent of the New Jersey Legislature to provide those rights to same-sex couples through a civil union.¹³⁰

A state like New Jersey that provides some recognition to same-sex marriages from other states could adopt all of the measures taken in New York. Gay and lesbian-supportive municipalities could arrange directly for E-marriages with officiants in other states. In that way, the marriage and the civil unions could take place side-by-side, each with legal effect, and each conferring the rights of a civil union in the home jurisdiction.¹³¹ The

126. See generally Hillel Y. Levin, *Resolving Interstate Conflicts Over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47 (2011). California, however, passed separate legislation allowing the state to recognize same-sex marriages in other states only during the period in which same-sex marriage was also authorized in California, and it recognized the marriages only for the purpose of granting domestic partnership benefits, not marriage. See *California Bill to Recognize Some Same-Sex Marriages*, CNN.COM (Oct. 12, 2009), <http://www.cnn.com/2009/US/10/12/california.samesex.marriage/index.html>.

127. *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

128. N.J. STAT. ANN. § 37:1-28 (2006).

129. See N.J. Op. Att'y Gen. No. 3-2007 (2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

130. *Id.* at 7 n.1.

131. See *N.J. Vital Statistics: Frequently Asked Questions: Civil Union Records*, N.J. DEP'T OF HEALTH AND SENIOR SERVS., <http://www.state.nj.us/health/vital/faq.shtml#cur> (last visited Oct. 15, 2010). The website reads:

Am I required to enter into a civil union in New Jersey if I am already in a civil union or same-sex marriage in another state or country?

No. You are not required to enter into a civil union in New Jersey. If your civil union or same-sex marriage meets the requirements of the state or country in which you registered, then it is recognized by the State of New Jersey as a civil union.

result is a public ceremony in the home state with registration in a second state recognizing the civil union or domestic partnership. In addition, the second state can offer the type of counseling available in New York.

C. Colorado: Designated Beneficiary Registries

Colorado, unlike many of the states recognizing civil unions, has created a “Designated Beneficiary” status that is expressly designed not to be “like marriage.”¹³² Instead, it allows registering couples to choose from a menu of options including inheritance, property transfers, health-care decision-making, standing to sue in tort, and other matters common to spouses.¹³³ Scholars such as Nancy Polikoff, who advocates that the state should move away from marriage as the universal basis for the regulation of domestic relationships, celebrate such approaches because they make “marriage matter less” and can be individually tailored to meet a wide variety of needs.¹³⁴

The Colorado setting poses something of a dilemma for marriage equality advocates. The creation of these innovative alternatives to marriage tends to be motivated by state hostility toward recognizing same-sex relationships on their own terms.¹³⁵ Yet, David Meyer notes that it constitutes “a new high-water mark in family law’s decades-long trend toward private ordering,”¹³⁶ and some same-sex couples may be more comfortable with the approach precisely because it is not marriage.¹³⁷

A municipal jurisdiction supportive of same-sex marriage may not necessarily want to link E-marriage to a status deliberately created not to be “marriage-like.” Instead of parallel E-marriage and civil union rites in a single ceremony, the jurisdiction may wish to encourage entirely separate ceremonies, much like the separate civil and religious ceremonies in other

However, if you wish, you may also elect to enter into a civil union in New Jersey. In that case, you would file for a Reaffirmation of Civil Union License in New Jersey.

Id. At least until the validity of the E-marriage provision is established in both New Jersey and the state issuing the marriage license, it might be useful to continue to have the civil union also take place in order to ensure that at least one of the statuses will be recognized.

132. COLO. REV. STAT. ANN. § 15-22-106 (2009).

133. *Id.*

134. Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 RUTGERS L. REV. 529, 556-67 (2009); see also NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

135. See, e.g., David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 121-22 (2010).

136. *Id.* at 122.

137. See, e.g., Polikoff, *supra* note 134 (welcoming the innovations that come from same-sex marriage hostile states).

countries.¹³⁸ Those who advocate abolishing marriage altogether as a legal status, while continuing religious ceremonies for those who wish them, might prefer this type of arrangement as well.¹³⁹

E-marriage in a state like Colorado could function like civil commitment ceremonies did in the era before recognition of same-sex couples or like a religious ceremony in a country that views only the civil ceremony as legally binding. The jurisdiction could provide information about the legal impact of the state sanctioned status, the possible choices open to the couple, and an explanation of the differences between a marriage and a designated beneficiary status. The partners could then arrange for an E-marriage on their own. The ceremony associated with the E-marriage would serve to meet the partners' emotional needs to express their commitment to each other and to the group assembled for the ceremony.

The difficulty with this arrangement is that the marriage, which would presumably be valid in the state issuing the marriage license, would not be valid in the home state. This means that the emotional and the legal and practical aspects of the relationship exist in different realms. The legal consequences of the unions are whatever the couple can arrange through contract, adoption of any children in the family, and the menu of options provided by Colorado law.¹⁴⁰ The law provides for joint ownership, intestacy rights, hospital and nursing home visitation rights, medical decision making (*e.g.*, end-of-life), health and life insurance benefits (if the employer elects to provide dependent coverage for designated beneficiaries), appointment as guardian or conservator, organ and tissue donation decision making, burial or cremation decision making, and the ability to sue for wrongful death.¹⁴¹ However, the law cannot address issues such as parentage, federal tax treatment, creditors' rights, and a variety of other issues affected by marriage.¹⁴²

138. For a comparative discussion of the various combinations of religious and civil marriages, see Gidi Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855 (2009).

139. See, *e.g.*, Mary Lyndon Shanley & Linda McClain, *Should States Abolish Marriage?*, LEGAL AFFAIRS: DEBATE CLUB (May 16, 2005, 9:27AM), http://www.legalaffairs.org/webexclusive/debate-club_m0505.msp; Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 546 (2007) (summarizing arguments for and against marriage); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163-64 (2006).

140. Nicole C. Berg, Note, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. ILL. L. REV. 267, 280 (2011). For commentary on the law, see Nancy Polikoff, *The Extraordinary New Colorado Law*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Apr. 15, 2009, 7:38 PM), <http://beyondstraightandgaymarriage.blogspot.com/2009/04/extraordinary-new-colorado-law.html>.

141. COLO. REV. STAT. ANN. § 15-22-105 (2010).

142. A federal trial court has ruled, however, that the Defense of Marriage Act is unconstitutional to the extent that it precludes recognition of state sanctioned same-sex mar-

It therefore makes sense in the context of such a law to keep the effects of marriage and domestic beneficiary status distinct. Unlike domestic partnerships, the Colorado statute provides for form contracts, rather than a status with a uniform meaning or a set of rights and obligations.¹⁴³ In a state that authorizes domestic partnerships, particularly those equivalent to marriage, the two statuses parallel each other. The Colorado statute, in contrast, deliberately creates a very different mechanism with its own integrity.

On the other hand, Colorado cities, such as Denver or Aspen, could provide venues for non-binding E-marriages separate and apart from the state's domestic beneficiary provisions. The cities could also provide counseling and/or combine the ceremonies with municipal domestic partner registration.¹⁴⁴ If these cities were to do so, the effect would be to emphasize: (1) the distinctions between marriage and other statuses; (2) the support for a public celebration of the couples' commitment to each other; and (3) an implicit (or perhaps fairly explicit) critique of the state's failure to provide same-sex marriage. The next section considers some of the benefits and risks of such action.

D. Philadelphia: Cities Offering Domestic Partnership Registries

The majority of states ban both same-sex marriage and civil unions and refuse to recognize such relationships from out of state.¹⁴⁵ Even in these states, however, many cities offer domestic partnership registries. Philadelphia provides an example.¹⁴⁶ It offers a "life partnership registry," limited to same-sex couples who can show that they are financially independent.¹⁴⁷ In upholding the legislation, the Pennsylvania Supreme Court emphasized that the legislation did not create a new type of marital status—something that would have exceeded Philadelphia's legal authority. Instead, the court concluded that:

riage for federal purposes. See *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010). While the Colorado provisions do not involve marriage and do not purport to affect federal tax treatment, it is possible that an E-marriage valid in the state issuing the marriage license would be entitled to federal recognition for tax purposes.

143. COLO. REV. STAT. ANN. § 15-22-105 (2010).

144. The municipal domestic partner registries predate the state provisions. For further discussion of such municipal provisions and E-marriage, see *infra* Section III.D.

145. For a summary of state laws, see *Same-Sex*, *supra* note 102.

146. In Pennsylvania, the two largest cities in the state, Philadelphia and Pittsburgh, and the state capital, Harrisburg, all offer domestic partnership registries, though they vary from each other. For a comprehensive account, see Anthony C. Infanti, *Surveying the Legal Landscape for Pennsylvania Same-Sex Couples*, 71 U. PITT. L. REV. 187 (2009).

147. *Id.* at 192 (citing PHILA., PA. CODE § 9-1106(2)(a)(2008)). In contrast, Pittsburgh has a domestic partnership registry, open to both same-sex and different-sex couples. *Id.* (citing PITTSBURGH, PA CODE § 186.02(a)(5) (2008)).

Indeed, even though the Legislation affords Life Partners certain limited rights and benefits that spouses also enjoy, those rights and benefits are but a small fraction of what marriage affords to its participants. As the City emphasizes, Life Partners who separate cannot take advantage of the domestic relations laws that govern, among other things, divorce, alimony, child support, child custody, and equitable distribution. Likewise, Life Partnership under the current Legislation does not somehow extend to Life Partners numerous other spousal benefits, including: (1) the rights and protections that come with holding marital property in a tenancy of the entirety; (2) the marital exemption from paying any transfer tax on inheritance from a spouse; (3) a guaranteed share of an intestate spouse's estate; (4) the testimonial privilege between husband and wife; (5) the right to file joint tax returns; (6) the first right to receive workers' compensation when the spouse dies; (7) employment preferences afforded to the spouses of veterans; and (8) the right to bring a wrongful death action on behalf of one's deceased spouse.¹⁴⁸

The court concluded that "life partnership" status "is, in essence, merely a label that the City can use to identify individuals to whom it desires to confer certain limited local benefits."¹⁴⁹

A city such as Philadelphia that might like to provide greater recognition to same-sex couples could choose to inform couples registering as life partners of the possibilities of engaging in an E-marriage, and it might be willing to host such ceremonies. If it were to do so, it is likely to face challenges from those opposed to greater recognition for same-sex couples.¹⁵⁰ First, given the existence of a law prohibiting recognition of same-sex marriage or civil unions, such action would strengthen the claim that the city was promoting a new marital status.¹⁵¹ Of course, accurate information describing the authorization of E-marriages in other states and the lack of legal recognition in the home state would no more create a new marital status than a life partnership registry. Second, in choosing to encourage E-marriages, the city risks a backlash against its activities that might extend beyond E-marriage; for example, the state might attempt to eliminate the registries themselves.¹⁵² Third, city-provided information about, or sponsorship of, E-marriage risks could cause confusion about the status of such relationships. Municipal life partnership registries provide some, but not all, of the benefits of marriage. City-sponsored E-marriages might further blur the distinctions between such registries and marriage without in fact providing any greater legal protections than the registry alone.

148. *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1244 (Pa. 2004) (citations omitted).

149. *Id.*

150. In *Devlin*, for example, a group of Philadelphia citizens and taxpayers claimed that the city's life partnership registry "violates public policy favoring marriage, because it deems certain same-sex couples to be married," and that the city had no power to protect life partners from discrimination. *Id.* at 1238.

151. See *id.* (making this claim in the context of the city life partnership registry).

152. See discussion of such efforts in Michigan, *infra* Section III.E.

The most significant aspect of city-sponsored E-marriage, however, would be the ceremony. The ritual aspect of marriage is designed to reinforce the commitment of the couple to each other and to the community around them. In this sense, a municipality that chooses to sponsor E-marriages signals its support for the couple and their right to marry. In a state such as New York, where the majority of the population supports same-sex marriage, and where the state recognizes out-of-state marriages, city sponsored ceremonies increase the visibility of actions already authorized under New York law. The question in Philadelphia would be whether the greater visibility would in fact spur greater public acceptance or be the equivalent of Mayor Newsom's marrying couples on the steps of city hall in San Francisco. The latter result spurred both California Supreme Court action extending the right to marry to same-sex couples and also contributed to the narrow passage of a proposition amending the California Constitution to revoke that right.¹⁵³ The political meaning of E-marriage may accordingly be one of time, place, and context.¹⁵⁴

E. Michigan: The Role of E-marriage in Hostile States

Some states, of course, not only prohibit recognition of same-sex marriage, but also prohibit any marriage-like status. In Michigan, for example, the voters approved a proposition in 2004 that amended the State Constitution to provide that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or a similar union for any purpose."¹⁵⁵ The state attorney general interpreted the "plain meaning" of the words to prohibit state institutions, including universities, from offering

153. See, e.g., Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 363-64, 369 (2009) (discussing the impact of Mayor Newsom's actions).

154. The legal issue also depends on context. Given the state's ability to refuse to recognize out-of-state same-sex marriage as a violation of the public policy of the state, the state almost certainly has the authority to ban use of municipal facilities to promote E-marriage. The question is whether the state action is done in a way that violates other constitutional guarantees. If, for example, the city were to make facilities available for E-marriage as a general matter and the state were to prohibit the use of such facilities only for same-sex couples, would this run afoul of constitutional guarantees? In *Romer*, Justice Kennedy characterized the Colorado proposition as motivated by hostility toward gays and lesbians and otherwise lacking a rational basis. 517 U.S. at 620; see discussion *supra* notes 80-92 and accompanying text. The purpose of E-marriage, however, is to evade the state's restrictions on same-sex marriage, so the validity of the state's purpose would appear to go to the heart of the marriage issue.

155. LEGISLATIVE ANALYSIS: BALLOT PROPOSAL 04-02, HOUSE FISCAL AGENCY (Oct. 25, 2004), available at <http://house.michigan.gov/hfa/PDFs/ballot04-02.pdf> [hereinafter LEGISLATIVE ANALYSIS]. The proposition passed with 58.6% of the vote. Robyn Rontal, Comment, *Domestic Partnership Health Care Benefits After National Pride at Work*, 11 J.L. SOC'Y 138, 148 (2009/2010).

domestic partner benefits.¹⁵⁶ The subsequent litigation went to the Michigan Supreme Court, which concluded that domestic partnerships then in effect in Kalamazoo, Ann Arbor, East Lansing, and elsewhere in Michigan violated the amendment.¹⁵⁷ The court concluded:

[G]iven that the marriage amendment prohibits the recognition of unions similar to marriage “for any purpose,” the pertinent question is not whether these unions give rise to all of the same legal effects; rather, it is whether these unions are being recognized as unions similar to marriage “for any purpose.”¹⁵⁸

While the opinion addressed only the ability of public employers to provide health-insurance benefits to their employees’ same-sex domestic partners, the language of the decision was particularly sweeping in its insistence that it did not matter how similar domestic partnerships were to marriage, but rather whether they were intended to provide benefits otherwise unavailable to same-sex couples because of their inability to marry.¹⁵⁹

The proposition and the subsequent court decisions would appear to prevent a New York-style approach embracing municipally sanctioned E-marriages for same-sex couples. As I have argued above, New York City emphasizes the importance of marriage, the failure of domestic partnership statuses to deliver the same benefits, and the City’s support for the extension of marriage rights to same-sex couples. This is, of course, exactly what the Michigan proposition wishes to prevent.

The alternative approach—one arguably left open by *National Pride*—is to relegate marriage to the private sphere and focus public efforts on helping couples to draft the appropriate documents to govern their property (deeds), estates (wills and trusts), children (adoption, birth certificates and voluntary acknowledgments of paternity), health care powers of attorney, and various other matters that may be addressed through contracts.¹⁶⁰ Couples would be able to arrange religious rites, custom-drafted civil ceremonies, or anything else they wish, including E-marriage, but these ceremonies would be left to the private realm with religions free to imbue what-

156. *Id.* at 149.

157. *Nat’l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008). *Cf. State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (concluding that Ohio Constitution article 15, § 11, providing: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions,” did not prevent application of that state’s domestic violence provisions to gay and lesbian couples).

158. *Nat’l Pride*, 748 N.W.2d at 543.

159. *Id.* at 533-37, 536-38 nn.14 & 16 (emphasizing that the domestic partnership provisions are restricted to same-sex couples, require cohabitation, and are designed to provide some of the benefits available from marriage).

160. For a particularly creative examination of the issue, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1273-74 (2010) (advocating ability to use contract to govern family relationships).

ever meaning they wish to the events without consequence for the state.¹⁶¹ State regulation would assist couples in drafting the documents necessary to order their affairs. Supporters of Colorado's designated beneficiary provisions emphasize that a major effect of the law is to bypass the patchwork of contracts, wills, and powers of attorney available under existing law, but difficult to assemble without a lawyer's help.¹⁶²

A supportive municipality in Michigan could attempt something similar. It could offer counseling open to everyone in the jurisdiction, married, engaged, cohabitating, or single.¹⁶³ The counseling could include a package of forms designed to address the full range of issues that households, couples, and families encounter. The advice could be designed to tailor the agreements to the couple's various statuses and needs, and, in the process, it could include information about the consequences of various in-state and out-of-state statuses, including E-marriage.

Such efforts, of course, could not change existing state law nor could either couples or municipalities confer some of the benefits of marriage that depend on recognition by other entities (federal tax treatment, for example). It should be possible, however, to draft provisions that do not run afoul of the state constitution. First, the provisions should apply to everyone and not just same-sex couples.¹⁶⁴ Second, the nature of the counseling provided should be tailored to the parties' individual circumstances and should include a variety of matters, such as joint property ownership, that do not depend on marriage.¹⁶⁵ Finally, the counseling should extend to matters that have been upheld in other contexts such as cohabitation agreements or compulsory arbitration clauses. The latter, which could provide for the selection of arbitrators from a list of gay- or lesbian-friendly decision-makers, could

161. See, e.g., Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006).

162. Ernest Luning, *Supporters Applaud Ritter for Signing Designated Beneficiaries Agreement*, THE COLORADO INDEPENDENT (Apr. 9, 2009), <http://coloradoindependent.com/26266/supporters-applaud-ritter-for-signing-designated-beneficiary-agreement-act>.

163. In a time of budget cuts, cost would be an obvious factor, but the city could assemble a package of materials and encourage attorneys or students to volunteer to assist with individual questions.

164. Indeed, the Michigan Civil Service Commission, in an effort to circumvent *National Pride*, voted to extend benefits to a broader group of employees, including not only same-sex couples, but other unrelated individuals in the same household. See Paul Egan, *State Employees' Same-Sex Partners to Get Health Benefits*, THE DETROIT NEWS (Jan. 27, 2011), <http://www.detnews.com/article/20110126/METRO/101260402/1409/METRO/State-employees%E2%80%99-same-sex-partners-to-get-health-benefits>.

165. As with Colorado Designated Beneficiaries, many of the forms would involve matters available under existing law such as the possibility of holding land in joint tenancy. See Luning, *supra* note 162.

also serve to minimize the risk of setting hostile precedents and to reduce the difficulties of ending the relationship.¹⁶⁶

The result would be to place the imprimatur of the municipality on individual efforts to order domestic relationships, without conferring the label “marriage” on the results. Rather than extend marriage to same-sex couples, it would speed the disassociation of state regulation from the religious and traditional associations with marriage. In this context, E-marriage might become simply one more private form of commitment managed by the couple without the involvement of the domiciliary state.

A hostile state might respond by attacking not only the counseling efforts, but the validity of the underlying agreements. Cohabitation contracts arguably constitute an “agreement recognized as a marriage or a similar union” for a purpose similar to marriage.¹⁶⁷ Yet, such express agreements between cohabitating couples have been upheld in Michigan and other states so long as they are not passed on “meretricious” consideration.¹⁶⁸ They are often recognized to be similar to marriage,¹⁶⁹ but they may also involve an exchange of goods, services, and promises typical of business

166. See, e.g., Freshman, *supra* note 19.

167. LEGISLATIVE ANALYSIS, *supra* note 155.

168. See *Tyranski v. Piggins*, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973) (holding that “where there is an express agreement to accumulate or transfer property following a relationship of some permanence and an additional consideration in the form of either money or of services, the courts tend to find an independent consideration”); *accord* *Cook v. Cook*, 691 P.2d 664, 669 (Ariz. 1984) (en banc) (“If the agreement is independent, in the sense that it is made for a proper consideration, it is enforceable even though the parties are in a meretricious relationship. That relationship will not prevent enforcement of the agreement unless the relationship is the consideration for the agreement.”); *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976) (en banc) (“[A] contract between nonmarital partners will be enforced unless expressly and inseparably based upon an illicit consideration of sexual services”); *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980) (citation omitted) (“New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together, provided only that illicit sexual relations were not ‘part of the consideration of the contract.’”); *Suggs v. Norris*, 364 S.E.2d 159, 162 (N.C. Ct. App. 1988) (“[A]greements regarding the finances and property of an unmarried but cohabiting couple, whether express or implied, are enforceable as long as sexual services or promises thereof do not provide the consideration for such agreements.”); *Watts v. Watts*, 405 N.W.2d 303, 311 (Wis. 1987) (citation omitted) (“Courts have generally refused to enforce contracts for which the sole consideration is sexual relations, sometimes referred to as ‘meretricious’ relationships. Courts distinguish, however, between contracts that are explicitly and inseparably founded on sexual services and those that are not. This court, and numerous other courts, have concluded that ‘a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain.’”).

169. See, e.g., *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) (en banc) (“We are not validating an agreement in which the only or primary consideration is sexual intercourse. The agreement here contemplated all the burdens and amenities of married life.”).

arrangements. A couple building a house, for example, may both contribute and take title jointly in a manner that may resemble either marriage or a business venture.

The distinction in existing law between permissible and impermissible cohabitation contracts is compensation for sexual activity that constitutes a form of prostitution, not whether they involve same-sex versus different-sex couples.¹⁷⁰ If Michigan were to uphold such agreements for different-sex couples, but invalidate them for same-sex couples, the decision would almost certainly run afoul of the decisions in *Romer v. Evans* and *Lawrence v. Texas*.¹⁷¹ That is, the state may arguably refuse to recognize marriage-like contracts because of its desire to promote marriage, as Illinois chose to do in *Hewitt v Hewitt*.¹⁷² To object to such agreements for same-sex couples but not for heterosexual ones, however, would appear to serve no rational purpose, particularly to the extent that the contracts address prosaic matters such as joint ownership of a house to which both have contributed. Moreover, distinguishing between permissible contract terms (property ownership?) and impermissible terms (support? wills?) may be arbitrary and unsustainable. And to the extent that the state attempted to limit the enforceability of such contracts more generally, the result would be constitutionally suspect. While Michigan may be able to bar state entities from granting employee benefits on the basis of domestic partnerships, it is another matter to say that an unmarried couple cannot contract to own a house jointly or provide a power of attorney to each other.¹⁷³

The state would be on stronger grounds if it simply forbade municipalities from providing counseling at all or denied access to state funding for such purposes. The result, however, may be to encourage such efforts on a private basis. The question of which measures may combine with E-marriage to build an infrastructure of support for same-sex relationships is much like Mayor Newsom's act of authorizing same-sex marriage in San Francisco—the line between transformation and backlash is ever changing.

170. See *Tyranski*, 205 N.W.2d 595. Some jurisdictions, however, have invalidated such agreements because they do not want to authorize alternatives to marriage. See *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So.2d 316 (La. Ct. App. 1983).

171. See discussion *supra* Part II.

172. *Hewitt*, 394 N.E.2d at 1204.

173. For discussion of what such agreements might address, see Linda J. Radvin, *Marital Agreements*, 849 Tax Mgmt. (BNA) A-48-49 (2003). Indeed, such forms are widely available on the web; see, e.g., *Nonmarital Cohabitation/Living Together Agreement*, ILG.ORG, <http://www.ilrg.com/forms/cohab-agreement.html> (last visited June 6, 2011).

CONCLUSION

The idea of marriage itself is changing as marriage rates decline and the likelihood of being married varies by region, class, and race, and some celebrate while others decry the traditions associated with marriage as a centuries old institution.¹⁷⁴ In the midst of these divisions, couples pick and choose the terms of their relationships, whether they decide to participate in fully sanctioned legal institutions or to create their own. Indeed, in arenas as diverse as assisted reproduction or covenant marriage, families are creating alternative legal and practical networks that may coexist within the same communities, yet confer different meanings on family life.¹⁷⁵

E-marriage has the potential to speed these developments. It offers individuals greater opportunity to participate in laws and rituals that express their values even if their home jurisdictions do not recognize the same aspirations, and they offer a way for municipalities to express support for the relationships of their citizens in states unwilling to recognize same-sex marriage directly.

The ability and willingness of cities to embrace E-marriage will vary widely, and the methods available to municipalities and the meanings they confer on these methods will also vary. In states like New York, municipal efforts to encourage out-of-state marriages embrace the status of marriage that strengthens its role within the state. In a state like Colorado, however, which has embraced individually tailored agreements while splitting on the issue of same-sex rights, recognition of E-marriage would speed the privatization of individual relationships and perhaps the move away from marriage as a state-defined status.

In all these cases, E-marriage has the capacity to interact with other developments to change the nature of family. As we gain much greater ability to choose our relationships and the terms on which we create, maintain and dissolve them, we will inevitably need to create more realistic ways to match the law to the expectations of increasingly diverse families.

174. See, e.g., CAHN & CARBONE, *supra* note 29, 19-33 (on the differences across the country) and 117-39 (on the changing meaning of marriage for red and blue families).

175. See, e.g., *id.* at 125-26, 162-63 (covenant marriage); Naomi Cahn & June Carbone, *Embryo Fundamentalism*, 18 WM. & MARY BILL OF RTS. J. 1015, 1048-49 (2010) (on the coexistence of embryo adoption and other forms of ART).