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HAIL MARRIAGE AND FAREWELL

*Ethan J. Leib**

It was elating to see the long-awaited victory for same-sex marriage pop up on my screen at 10:01 a.m. on June 26, 2015. It felt like a victory for rights, for open-mindedness, for love, and for the future. It was gratifying to see something I wasn't sure I would get to see in my lifetime. I felt for a moment that I was living in a modern liberal state, where the state doesn't get in the business of making moral judgments about people's intimate choices in how they choose to organize their romantic and sexual lives.

But it didn't take long reading the opinion to see something many in the LGBT community warned people about along the way to marriage equality: that the price of admission to marriage for same-sex couples was the further reinforcement of a very traditional understanding of marriage and its role in society.¹ Justice Kennedy's decision for the majority in *Obergefell v. Hodges*² is nothing if not a paean to a very traditional picture of marriage and its centrality in the social order.³ That may have been the cost of his vote: to get a conservative to sign onto same-sex marriage, perhaps we needed a conservative vision of romantic and sexual life in marriage. And maybe it was worth it, too; indeed, the two unmarried and one widowed women on the Court signed onto the opinion with nary a concurring or cautionary note. Costs aside, if we are going to have marriage at all, we can't have marriage that excludes same-sex couples.

Still, there is an important question that likely remains open after *Obergefell*. Although no one can doubt that same-sex couples now have a fundamental right to marry if and when the state offers marriage at all, one

* Professor of Law, Fordham University School of Law. Thanks to Mary Anne Case, Clare Huntington, Joseph Landau, Juliet Lapidus, Evan Lee, Tom Lee, Michael Serota, Jed Shugerman, Steve Thel, Ben Zipursky, Catherine Powell, and participants in a summer Supreme Court workshop at Fordham University School of Law for conversations about this piece. I first explored the ideas presented here in an op-ed, Ethan J. Leib, Opinion, *Down with Marriage*, L.A. TIMES, June 17, 2015, at A23, and have sought to make a similar argument here in a longer format. Thank you to Lea Yoon for help with research and substance. Thank you to Sarah Jaramillo for help with sources.

1. See *infra* note 5 and accompanying text.

2. 135 S. Ct. 2584 (2015).

3. See *id.* at 2593–94 (“From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. . . . Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.”); *id.* at 2608 (“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.”).

might wonder whether Justice Kennedy actually created not just a right to marry, but also a right to marriage itself.⁴ To wit, is it an outgrowth of the Court's opinion that there is a constitutional *requirement* that states provide marriage and issue licenses? May states look for ways to pull themselves away from endorsing marriage at all?

My conclusion in what follows is that, notwithstanding much rhetoric in the opinion, states have some room to rethink marriage in light of marriage equality. And with some intellectual jujitsu, this opening to rethink the state's place in relational ordering gives marriage-skeptics another bite at the apple to get something they wanted all along: to decenter the largely religious, gendered, and bourgeois institution of marriage.⁵ Justice Kennedy's opinion has the unfortunate result of reaffirming marriage at the top of a relational hierarchy, yet there are surely other ways we can have civil rights and equality for gay people without marriage at all. A little bit of resistance by several states might allow for movement toward an even more progressive vision of a life in love. That vision either proliferates the menu of options available to people—gay or straight—or makes a meaningful effort to secularize the primary modality of recognizing and legitimating the private choices people make about ordering their romantic and sexual lives. Ultimately, this kind of disestablishment is not some newfangled idea: the state actually was quite a latecomer into the marriage business and it is only contingently in its current role.⁶

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Justice Kennedy certainly skates very close to establishing a right to marriage, not merely a right of access for same-sex couples to marry where and when marriage exists. Indeed, he had a lot to work with, using the Court's own precedent. A recent count by the American Foundation for Equal Rights—the organization that fought California's Proposition 8 in the courts, leading to the 2013 *Hollingsworth v. Perry*⁷ decision⁸—found at

4. Some commentators saw that the slippage between the right to marry and the right to marriage long before *Obergefell* provided reason to revisit the question. *See, e.g.*, Martha C. Nussbaum, *A Right to Marry*, 98 CALIF. L. REV. 667, 685–89 (2010); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096–97 (2005).

5. *See, e.g.*, TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 1–18 (2010); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 32–33 (2008); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008) (“[E]fforts to secure marriage equality for same-sex couples must be undertaken, at a minimum, in a way that is compatible with efforts to dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire. Resisting the normative and epistemic frame that values nonmarital forms of life in direct proportion to their similarity to marriage, we must unseat marriage as the measure of all things.”).

6. *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1766 (2005) (citing GEORGE ELLIOT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS (1904)); *id.* at 1794–95 (contrasting Puritan New England's late entry into marriage licensure to the long Anglo-American history of conflation “between religious and civil marriage”).

7. 133 S. Ct. 2652 (2013).

least fourteen Supreme Court cases since 1888 that advert to or support the general idea of marriage as a fundamental right.⁹ Those cases provided building blocks for the portion of the *Obergefell* decision that relies on the Due Process Clause to reinforce why states may not ban same-sex marriage.¹⁰ Although a Court decision based solely on the Equal Protection Clause was possible, the decision Justice Kennedy actually wrote was a mixture of equality-talk rooted in equal protection jurisprudence and fundamental rights-talk rooted in the Due Process Clause.¹¹ Still, as I read it, the Court ultimately comes shy of establishing that states *have a constitutional obligation to provide some package of relational privileges and burdens called marriage*, which is another way to understand what it would really mean for each individual to have a fundamental right to marriage.

Consider this hypothetical. Imagine the federal government and all of the states decide all at once on a creative solution to the culture war surrounding same-sex marriage that is likely to continue for a few months or years after *Obergefell*. The *détente* is an agreement that marriage in America will be left wholly to the private sphere and that only “civil unions” will be made available to all couples—opposite- or same-sex. Under this plan, civil unions would be the only domestic arrangement the state would recognize to disburse benefits to families, to exact taxes upon families, and to administer its family law.

True enough, this “solution” doesn’t wholly dignify the claims of single people who think the state should not be setting up systems to encourage coupling with the effect of denigrating the perfectly dignified lives of those who live as singles,¹² nor does it address those who might seek legal recognition for polyamorous unions.¹³ But it disestablishes marriage in a way that could be useful to both sides in the culture wars: those who want

8. *Id.* at 2668 (overturning the Proposition 8 ballot initiative banning same-sex marriage in California).

9. *14 Supreme Court Cases: Marriage Is a Fundamental Right*, AM. FOUND. FOR EQUAL RIGHTS (July 19, 2012), <http://www.afer.org/blog/14-supreme-court-cases-marriage-is-a-fundamental-right/> (citing *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977); *Moore v. E. Cleveland*, 431 U.S. 494, 499 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 376, 383 (1971); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888)) [<http://perma.cc/3LWS-CJH2>].

10. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

11. For some discussion of why it might have been better for the Court to stick with a more pure equal protection analysis, see Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23 (2015).

12. See BELLA DEPAULO, *SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER* 2–5 (2006); Michael Cobb, *The Supreme Court’s Lonely Hearts Club*, *N.Y. TIMES* (June 30, 2015), http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html?ref=opinion&_r=0 [<http://perma.cc/NSX3-F67Z>].

13. See generally RONALD C. DEN OTTER, *IN DEFENSE OF PLURAL MARRIAGE* (2015).

to associate with a church that has some exclusive definition of marriage can have their way (a church that will not marry gays or a synagogue that will not marry Jews to non-Jews) and those who want the state to treat all-comers equally in their requests for state recognition of partnership could have their way too. The “solution” also helps the state unload the millennia of baggage associated with marriage. Many feminists are right to highlight that marriage has been a source of women’s oppression; many secularists are right to highlight marriage’s religious character and the way the state unduly and unnecessarily entangles itself in religious practice by licensing marriages; and many sensitive to the way marriage stratifies society are right to emphasize that marriage is a bourgeois institution that is both out of reach for many poor people and that reinforces a certain kind of consumer capitalism that is distasteful.¹⁴ It is better for the state to opt out and distribute benefits and taxes in a more neutral way in the public sphere.

Would this possible world offend the U.S. Constitution? Surely, Justice Kennedy’s opinion provides an odd quotation here and there to support that position.¹⁵ But it is exceedingly difficult to see how that could be true, and not only for reasons Justice Thomas alludes to in his dissent: that most of our constitutional rights are negative rather than positive rights.¹⁶ It is hard to believe there is one bundle of privileges and burdens, itself given only one name—marriage—that states must provide. Indeed, there is plenty of diversity among states in what they actually do provide, and there is no corpus of constitutional law indicating the constitutional metes and bounds of what the marital minimum for states is. We know the state can’t set up “separate but equal” institutions—giving same-sex couples civil unions and opposite-sex couples the thing called marriage—but that doesn’t give us any clarity on the question at hand. It is true that a cleaner equal protection analysis in *Obergefell* would probably have done more to foreclose the argument that states must provide marriage, so this remains a real question. But the best answer seems to be that if all states decided all at once to get rid of marriage tomorrow in favor of civil unions for all, there is no constitutional injury that is likely to follow.¹⁷

* * *

But let’s move from the hypothetical world back to the almost-real world. Imagine that this “civil union for all” solution is tried not nationwide, but is started first in a state called Alahoma or Oklatucky.

14. See generally sources cited *supra* note 5.

15. E.g., *Obergefell*, 135 S. Ct at 2599 (“Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”).

16. *Id.* at 2635–39 (Thomas, J., dissenting).

17. I follow Martha Nussbaum here: “Nowhere . . . has the Court held that a state must offer the expressive benefits of marriage. There appears to be no constitutional barrier to a decision of a state to get out of the expressive game altogether, going over to a regime of civil unions” Nussbaum, *supra* note 4, at 688. Although she was writing before *Obergefell*, *Obergefell* is not a game-changer here.

Senator Rand Paul of Kentucky seems to be urging that his state get out of the marriage business.¹⁸ And Alabama and Oklahoma each got bills through one of their legislative houses in the run up to *Obergefell* that at least started the process of reconsidering the state's entanglement with marriage.¹⁹ If just one or two states try this mode of détente, is there a constitutional injury that could be contemplated by same-sex or opposite-sex couples?

Although I have suggested that there is no general right to have marriage recognition from “the state” if such recognition is offered to no one, if a state like Alabama embraces this détente not to quell the culture war but to stoke it, perhaps the intent of such legislation is so clearly meant to denigrate same-sex couples that some theory of constitutional injury is plausible for such couples. However, that would be a strange way of thinking about the constitutional law of marriage: a facially neutral policy of disestablishment that has the same impact on all members of the polity equally would be unconstitutional as applied to same-sex couples because of an invidious intent, but not as applied to opposite-sex couples, who cannot claim that the policy was adopted to discriminate against them. Even if it were possible for same-sex couples to challenge a state's effort to get out of the marriage business (leaving only same-sex couples with a remedy of marriage, not opposite-sex couples), it would not be easy to show that such a state is doing so for constitutionally suspect reasons.

There are many reasons why a state—even if acting alone—would consider getting out of the marriage business. Some of those reasons are not just “benign” in the sense that they are not driven by malice or animus,²⁰ but they are affirmatively rights-protecting. States may be getting out of the marriage business (1) to promote religious associational rights in the private sphere where some wish to maintain traditional forms of marriage out of genuine religious beliefs; (2) to promote rights of gender equality in light of marriage's long history of reinforcing gender roles; or (3) to promote a more contractarian and less religiously inflected coupling institution for the secular state. Not only do none of these state purposes seem invidious, they all have serious constitutional dimensions of their own that could be seen in certain lights as vindicating underenforced constitutional norms.

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18. See Rand Paul, *Government Should Get Out of the Marriage Business Altogether*, TIME (June 28, 2015), <http://time.com/3939374/rand-paul-gay-marriage-supreme-court/> [<http://perma.cc/4URY-ASCC>].

19. See S.B. 377, 2015, Reg. Sess. (Ala. 2015), <https://legiscan.com/AL/text/SB377/2015> [<http://perma.cc/CC3J-JN33>]; H.R. 1125, 2015, Reg. Sess. (Okla. 2015), <https://legiscan.com/OK/text/HB1125/2015> [<http://perma.cc/DAX3-3G3K>]. Neither bill was passed into law.

20. Of course, “animus” can undermine state laws even under rational basis review under the Equal Protection Clause according to the logic of *Romer v. Evans*, 517 U.S. 620, 633–34 (1996), an earlier Justice Kennedy opinion vindicating the civil rights of gay people.

Yet I confess the constitutional analysis here belies the atmospherics. Moving from the almost-real world to the actual world, what we saw happening in Oklahoma and Alabama right before *Obergefell* was not a careful debate about marriage's future in light of what the Supreme Court was about to do. There was fear and anxiety about the integration of the institution and a casting about for some way to resist what was about to happen. Indeed, Oklahoma State Representative Republican Ted Russ, the author of the Oklahoma bill, acknowledged he was responding to the marriage equality movement and explained, "The point of my legislation is to take the state out of the process and leave marriage in the hands of the clergy."²¹

Although the most rash of approaches to détente offered by Oklahoma and Alabama did not come to pass, a plausible analogy could be made to the Southern states that thought it better to get rid of public pools and public schools altogether than to integrate them racially, as the federal government was requiring. This "Massive Resistance" movement sought to stem the tide of civil rights being granted to blacks.²² A similar movement seemed to be bubbling up in some Southern states as the federal government was about to create a right to same-sex marriage: better to have no marriage than to sully the institution by integrating it. That analogy does not cast the right-wing proposals for getting out of the marriage business in a very favorable light, and history has judged Southern resistance to integration during the Civil Rights Revolution harshly—and deservedly so. Should we judge pockets of resistance to integrating marriage with same-sex couples as harshly?

* * *

To be fair, neither Oklahoma nor Alabama passed their laws in anticipation of the ruling, and in the few weeks after the ruling there has been widespread compliance with the Court's decision, even in states that looked like they were interested in resistance.²³ But it would be premature

21. See Randy Ellis, *House Passes Bill to Abolish Oklahoma Marriage Licenses*, OKLAHOMAN (Mar. 10, 2015), <http://newsok.com/house-passes-bill-to-abolish-oklahoma-marriage-licenses/article/5400240> [<http://perma.cc/SXA2-LTZY>].

22. For historical background on Massive Resistance, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S* (1969); MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 175–88 (2007); GEORGE LEWIS, *MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT* 1–26 (2006); *MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION* 21–38 (Clive Webb ed., 2005).

23. E.g., Associated Press, *All Alabama Counties Complying with Gay Marriage Ruling, LGBT Groups Report*, AL.COM (July 2, 2015), http://www.al.com/news/index.ssf/2015/07/all_alabama_counties_complying.html [<http://perma.cc/7SSS-GRG9>]. Some counties in Alabama, however, are not issuing any marriage licenses, claiming state law gives them discretion to issue no licenses—even though there is widespread understanding that if judges issue licenses to opposite-sex couples, they must issue them to same-sex couples as well. See Associated Press, *Alabama Judges Must Issue Gay Marriage Licenses if They Issue Straight Marriage Licenses, Court Rules*, AL.COM (July 2, 2015),

to condemn a state's possible withdrawal from the marriage business, especially if that withdrawal were preceded by a meaningful deliberative process about the best way forward after the Court's imposition of marriage equality.

Ultimately, I am doubtful that this potential form of resistance to the *Obergefell* decision would be on the wrong side of history. To go a bit further, LGBT advocates fresh from their recent victory might do well to join with those on the Right looking to get their states to recede from the marriage business. Now that the stain of indignity and inequality has been removed in this domain, it may be time to think more progressively about the future of marriage.

What some marriage-skeptics within the LGBT community wanted to achieve even before the gay rights movement double-downed on the quest toward marriage equality was a true separation of church and state, in which the government would only recognize secular unions, free of gender scripts and the normativity of bourgeois domesticity.²⁴ For this group of thinkers, although marriage equality was a no-brainer if the state was going to have marriage at all, there was real suspicion even of an ultimately integrated version of the institution. To "queer" family life, the plan requires more than domesticating same-sex couples into the religious, gendered, and bourgeois institution. Even if the inclusion of queer families into the traditional institution would serve to mix things up helpfully, the left wing of the LGBT community understood that it was plausible to hope for less normativity from the state about how to order family life.²⁵

Several different strategies could move us closer to that outcome: (1) disestablishing all marriage and opting only for the "civil unions for all" solution as a public law matter;²⁶ (2) including a wider array of state options for familial organization without privileging one over another, so that couples could sign registries or contracts or unions or marriages and all get the same default treatment, whatever they choose; or (3) even more radically rethinking all family law to get the state to further recede from the bedroom and the home. Because option (3) has the most potential to leave vulnerable persons subject to predation in the private sphere, probably implicates gender equality itself because it leaves the state impotent to intervene when necessary, and is the hardest to envision how to implement,

http://www.al.com/news/index.ssf/2015/07/alabama_judges_must_issue_gay.html [<http://perma.cc/6J46-AMMV>]. More recently, Kentucky county clerk Kim Davis declined to issue a marriage license despite the Court's rejection of her request for a delay. See Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Defies Justices on Marriage*, N.Y. TIMES, Sept. 2, 2015, at A1.

24. See, e.g., sources cited *supra* note 5.

25. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 7–9 (2000).

26. One might include in this option the various proposals for a singular "intimate caregiver" status and a "friend registry" as well. See sources cited *supra* note 5. For more on distributing the benefits and burdens of family status based on care-giving relationships rather than the traditional marital or biological family, see DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* (2009).

options (1) and (2) seem more attractive and achievable in the medium term. In an ironic turn, the states that see themselves as interested in resisting marriage equality are at least opening a pathway toward option (1)—and it may be valuable for the marriage-skeptics in the LGBT community and elsewhere to work with legislators in Alabama and Oklahoma to bring them closer to their goals, whether by refining option (1) or helping those legislatures understand option (2). Marriage-skeptics didn't quite foresee that it might just take the marriage equality win to start working with the other side to disestablish marriage.

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It is worth taking a slightly closer look at what Alabama and Oklahoma proposed before *Obergefell* to help identify just how these plans could be tweaked to make both the religious objectors to same-sex marriage and the left wing LGBT community work together for a mutually advantageous outcome.

Alabama's proposal is the somewhat more progressive approach. Four Republicans and one Democrat sponsored the bill; three other Democrats ultimately voted in its favor.²⁷ Although Senate Bill 377 did not actually purport to get rid of the status of marriage, it did secularize it by prospectively recognizing only "contracts of marriage"²⁸ that could be entered into by any two persons "who are otherwise legally authorized to be married."²⁹ After *Obergefell*, that would have included same-sex contractors in Alabama. Ultimately, very little about Alabama's family law was going to change: there were going to be couples "recorded" as "married" in Alabama's law. But Alabama was going to make small changes, none of which were obviously retrogressive; they might even be thought to be on a progressive path.

Most importantly, Alabama was no longer going to be in the business of issuing marriage licenses, preferring instead for couples simply to present a contract signed by witnesses to a probate court to be considered married under law. The contract was going to serve as the record of the marriage, and the state requirement of a license to marry was going to be abolished. Although largely a change in nomenclature rather than a thorough and substantive revisiting of the state's entanglement in marriage, even as an expressive shift in emphasis, there is much to recommend the approach. By distancing the state from endorsing the sacredness of the marriage bond and emphasizing its civil nature, Alabama was planning to open the door to a

27. S.B. 377, 2015, Reg. Sess. (Ala. 2015), <https://legiscan.com/AL/rollcall/SB377/id/447983> [<http://perma.cc/H8B3-AW9B>].

28. Alabama's formulation is neither really contractualist nor fully status-oriented. For that reason, it is both creative and hard to know what to make of it. For some criticism of moving more in the contractualist direction, see Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in JUST MARRIAGE 3, 5–6 (Joshua Cohen & Deborah Chasman eds., 2004).

29. Ala. S.B. 377 § 1(a).

version of the institution that may have been closer to France's treatment of marriage at the state level, which keeps the name "marriage" but in a wholly secularized form.³⁰

This might not go far enough for some progressives who would prefer a greater disestablishment, of course.³¹ But to the extent that the state was merely looking to withdraw from sanctifying marriages itself, allowing parties to contract in a civil process for state recognition, the proposed Alabama regime was at least a step toward disentanglement without any explicit power delegated to the private religious sphere. Implicitly, the new regime would permit religious institutions to exclude same-sex couples from their version of marriage. But the civil marriage category would be open to all couples wishing to sign a civil contract.

Yet even for those who wish for greater disestablishment nationwide, Alabama's proposed approach might be better than a full withdrawal from marriage altogether. To wit, if Alabama "withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering [only] civil unions to both same- and opposite-sex couples,"³² it would leave all Alabama couples in a purgatory from the standpoint of federal law, which relies on "marriage" as the relevant status for the conferral of federal benefits. So from the standpoint of continuity and coherence with the federal regime, Alabama's approach is a decent interim position in a direction that provides advantages for both religious and progressive communities that want the state to be in a different relationship with marriage.

Perhaps progressives could even convince Alabama's legislative houses to provide for *both* contracts of marriage and contracts of civil unions or domestic partnership (available to both same-sex and opposite-sex couples), deeming both contracts to have identical benefits and burdens statewide. Whether the state could deem a civil union within the state to get the marital package at the federal level is trickier—and it may take federal legislative action to accomplish that objective of putting a wider menu of relational arrangements on equal footing. But at the least giving couples more choices about what to call their coupling to the state—whether same-sex or opposite-sex—is something that should be acceptable to both

30. See Andrew C. Stevens, *By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage*, 63 EMORY L.J. 979, 1016 (2014) ("For example, France requires a ceremony celebrated by a civil authority; a religious ceremony may or may not be held afterwards." (citing Code Civil [C. CIV.][CIVIL CODE] art. 165 (Fr.))).

31. See, e.g., Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIANS, GAY MEN AND THE LAW 721, 725 (William B. Rubenstein ed., 2d ed. 1997); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Tamara Metz, *The Liberal Case for Disestablishing Marriage*, 6 CONTEMP. POL. THEORY 196, 199 (2007); Alice Ristroph & Melissa Murray, Feature, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1165 (2006).

32. Nussbaum, *supra* note 4, at 672.

campus.³³ Such an approach could also provide the benefit of not effectively *compelling* people to get married;³⁴ after marriage equality, many companies and insurers are shedding benefits for “significant others” when that other is not a spouse, and that is shoving private ordering into a compulsory marriage regime.³⁵ This is a troubling development just at the time the state may be able to distance itself from moralistic marriage.

Oklahoma’s efforts were more troubling than Alabama’s. On the surface, Oklahoma’s House Bill 1125³⁶ also proposed to do away with marriage licenses issued by the state—without quite disbanding the status of marriage. The state was proposing to “record” marriages without sanctifying or solemnizing them itself. But its regime did not go as far toward secularizing marriage as Alabama’s Senate proposed. Although the bill referred to marriages being “contracted” in disparate provisions, the Oklahoma bill is substantially less contractarian than Alabama’s.

To be sure, the Oklahoma House proposed to strike from its family law—before *Obergefell*—the rules limiting marriage to “person[s] of the opposite sex.”³⁷ But in the list of people that may perform or solemnize marriages,

33. When the Dutch government decided to offer “registered partnerships” along with marriage to both opposite- and same-sex couples, many opposite-sex couples wanted the marriage-like institution “devoid of the symbolism attached to marriage.” Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX MARRIAGE: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 457–58 (Robert Wintemute & Mads Andenaes eds., 2001) (ebook). As most states in the United States that have created “civil unions” or “domestic partnerships” before marriage equality offered the option mostly to same-sex couples (and only to opposite-sex couples rarely or on a restricted basis), *see generally* Case, *supra* note 6, at 1774–76, it has not been easy to tell what the demand for such an option might be more generally.

34. Consider Katherine Franke’s video reflection on *Obergefell*. *See* Catrin Einhorn, *How We Changed Our Thinking on Gay Marriage*, N.Y. TIMES (June 26, 2015), <http://www.nytimes.com/interactive/2015/06/26/us/changed-thinking-on-gay-marriage.html> (explaining that all the gay couples in Franke’s social circle who were once critical of marriage are now marrying because their lawyers and accountants are telling them they are crazy not to) [<http://perma.cc/7UCF-UYDG>]. Although Janet Halley already in 2006 highlighted the way we are all compelled to “[c]arry[] a [b]rief for” marriage, JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 17 (2006), Justice Kennedy’s majority opinion in *Obergefell* is a very clear version of that brief, now announced as the supreme law of the United States.

35. *See, e.g.*, Tara Siegel Bernard, *Fate of Domestic Partner Benefits in Question After Marriage Ruling*, N.Y. TIMES (June 29, 2015), <http://www.nytimes.com/2015/06/29/your-money/fate-of-domestic-partner-benefits-in-question-after-marriage-ruling.html> [<http://perma.cc/X3SL-PZLR>]; Laura Lorenzetti, *Looking to Stay on Your Partner’s Insurance? It May Be Time to Get Married*, TIME (June 26, 2015), <http://time.com/3938225/same-sex-benefits-marriage/> [<http://perma.cc/9UMA-XHWW>].

36. H.R. 1125, 2015, Reg. Sess. (Okla. 2015), <https://legiscan.com/OK/text/HB1125/2015> [<http://perma.cc/DAX3-3G3K>].

37. The red-lined proposed changes to Oklahoma’s family law are available online. *See id.* Same-sex marriage has been available in Oklahoma since 2014, *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), so the small change here in state legislation was already effectively required by the federal courts. But it was still a recognition that state laws on the books should change through legislation, not just through decrees of federal courts. James Brudney and I are starting to develop an account of when it makes sense for legislatures to undertake “legislative underwrites” when they want to adopt, through the democratic process, ends that have already been won through the judicial process.

Oklahoma purported to include not only “at least two adult, competent persons as witnesses” and “a judge or retired judge of any court” in Oklahoma, but also “an ordained or authorized preacher or minister of the Gospel, priest or other ecclesiastical dignitary of any denomination who has been duly ordained or authorized by the church to which he or she belongs to preach the Gospel, or a rabbi.”³⁸ In a way, this privatizes marriage, enabling parties to get married by friends, a judicial official, or a religious institution. But the approach does not cleanly secularize marriage, and puts religious (exclusionary) marriage on the same footing as judicial (equal access) marriages: they all get recorded as legitimate marriages by the state. Unlike Germany and France, where the state is clear that civil marriage is the only legally relevant category (and religious marriages have no public legal validity),³⁹ Oklahoma’s regime elevates the religious marriage and records it as legitimate within the state on par with a marriage before a judge. More, Oklahoma’s proposed regime would continue to require a ceremony, reinforcing the bourgeois nature of the institution.⁴⁰

In short, although Oklahoma’s modest effort to privatize marriage by ceasing to issue “licenses” was a “baby step” toward disestablishment (if it can even be called that), there is little in the rough draft of the bill as it stands to garner much support from the marriage-skeptics in the LGBT community. Oklahoma’s approach would tend to reinforce the religious and bourgeois character of the institution. Yet it may be possible to convince the State House and/or Senate in the future to craft a better regime that protects both the freedom of religion and the freedom from marriage, especially a too-religious and bourgeois version of it. Some evidence that these issues are not purely partisan and that common ground might be found can be gleaned by studying the roll call votes in Oklahoma on House Bill 1125: Republicans and Democrats do not seem to have settled on a clear position about the way forward in this area.⁴¹ Deliberation may continue and actually produce progress for all.

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Marriage-skeptics largely failed to predict that a successful marriage equality movement, culminating in a favorable decision from the Supreme Court, could get them somewhat closer to their goals by hitching a ride with some of the resisters to integrating the institution of marriage. Even Justice Kennedy’s over-the-top preaching about the virtues of marriage comes shy of actually compelling states to offer marriage from a constitutional

38. Okla. H.R. 1125 § 7(A).

39. See Case, *supra* note 6, at 1793–94 (citing FAMILY LAW IN EUROPE 297 (Carolyn Hammond & Alison Perry eds., 2d ed. 2002)); Stevens, *supra* note 30, at 1016 (citing Code Civil [C. CIV.][CIVIL CODE] art. 165 (Fr.)).

40. The Oklahoma bill had an exception for common law marriages, which would be valid without a ceremony—as long as the parties were otherwise eligible to be married and signed a notarized affidavit. See Okla. H.R. 1125 § 5(E).

41. See Okla. H.R. 1125.

perspective. But from a social perspective, marriage equality's success might make marriage seem almost compulsory for couples—and the LGBT marriage-skeptics were probably right that this can serve to denigrate people who do not couple in the one way the state recognizes in the United States. Ultimately, those marriage-skeptics may have to hold their noses when they see who it is that can help them disestablish marriage from the state. But in the marriage debate as elsewhere, politics makes strange bedfellows. There is work to be done, and the Right and the Left might be able to coordinate and collaborate on the future of marriage, now that there is no question about the equal public rights of same-sex couples to marriage if the state offers it.