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Domestic Partnerships: What the United States Should Learn from France's Experience

Christina Davis*

I. Introduction

Domestic partnerships¹ have been recognized by a number of governments to afford gay and lesbian couples certain rights enjoyed by married heterosexual couples.² However, jurisdictions differ in terms of the couples whom they permit to enter domestic partnerships. Many governments, such as Denmark³ and Hawaii,⁴ allow only same-sex couples to register as domestic partners. Other jurisdictions, such as

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1. Many labels have been used to indicate the legal recognition of unmarried relationships. These terms vary by jurisdiction and include "registered domestic partnerships," "registered partnerships," "domestic partnerships," "declared partnerships," "life partnerships," "stable relationships," "civil unions," and "reciprocal beneficiaries." See Nicole LaViolette, *Registered Partnerships: A Model for Relationship Recognition* (Aug. 2001), available at <http://www.lcc.gc.ca/pdf/LaViolette.pdf> (last visited Nov. 7, 2005).

However, distinctions between the various names for recognition of non-traditional relationships can be made. See, e.g., WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 84 (2002). Eskridge suggests a hierarchy of benefits conferred and/or commitments recognized through "domestic partnership," "cohabitation," "reciprocal beneficiaries," "civil unions," and "registered partnerships" (from least to greatest). *Id.*

In this Comment, for the sake of simplicity, "domestic partnership" is used to describe any state recognition of a relationship that affords certain rights and/or obligations.

2. See Robert Wintemute, *Conclusion in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 759, 764 (Robert Wintemute & Mads Andenaes eds., 2001). European countries recognizing same-sex couples through domestic partnerships include Denmark, Sweden, Norway, and Iceland. *Id.*

3. See Ingrid Lund-Anderson, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 417, 425 (Robert Wintemute & Mads Andenaes eds., 2001).

4. See HAW. REV. STAT. ANN. § 572C (LexisNexis 2001).

France⁵ and Maine,⁶ allow both same-sex and opposite-sex couples to register.

Although discussion of domestic partnerships often focuses on their viability as a legal framework for the recognition of same-sex relationships, this Comment does not. Rather, this Comment focuses on the impact of allowing heterosexual domestic partnerships. This Comment proposes that jurisdictions should not permit heterosexuals to register as domestic partners because it may degrade the institution of marriage and hurt society at large.

Because France's domestic partnership law, the Civil Solidarity Pact (PACS),⁷ has allowed heterosexual domestic partnership for several years, this Comment examines France's experience after PACS went into effect. In the first two years that French couples were permitted to register domestic partnerships, approximately 67,000 couples registered,⁸ and estimates suggest that forty percent of the couples who registered were heterosexual.⁹ PACS has affected the progression of many heterosexual relationships in France: prior to PACS, heterosexuals married to enjoy marriage's benefits, now they gain many benefits by becoming domestic partners.¹⁰

The nature of heterosexual relationships in France following the passage of PACS is relevant to all jurisdictions that are debating whether, and how to, recognize same-sex relationships. Many jurisdictions in the United States, for example, are still grappling with how to treat same-sex couples.¹¹ Before recognizing any domestic partnerships, the United States should consider the impact that heterosexual domestic partnerships would have on marriage.

Allowing domestic partnerships for heterosexuals jeopardizes marriage. Because of the benefits marriage confers on couples and their children,¹² it is a valuable institution that should be respected. Maine's

5. See LAW No. 99-944 of November 15, 1999 Relating to the Civil Solidarity Pact, 39 I.L.M. 224 (2000) [hereinafter PACS].

6. See 2003 Me. Laws 672 (2004).

7. See PACS, *supra* note 5. The PACS was enacted in November of 1999, and it became effective in 2000. *Id.*

8. Sarah Lyall, *In Europe, Lovers Now Propose: Marry Me, a Little*, N.Y. TIMES, Feb. 15, 2004, at 3.

9. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 141 (2002).

10. See Suzanne Daley, *French Couples Say: 'I Do'—Somewhat*, PLAIN DEALER (Cleveland, Ohio), Apr. 18, 2000, at 1A.

11. See, e.g., *Gay and Lesbian Political Action and Support Groups: Working for Liberty and Justice for All*, available at <http://www.gaypasg.org/GayPASG/Legal%20Joinings/Legal%20joinings%20and%20recognition%20of%20same-sex%20couples.htm> (last visited Nov. 7, 2005) (comparing the variety of ways in which some states have chosen to legally recognize same-sex relationships).

12. See WAYNE WEITEN & MARGARET A. LLOYD, *Marriage and Intimate*

recognition of domestic partnership for both same-sex and opposite-sex couples, enacted into law on April 28, 2004,¹³ is one example of a system that threatens to undermine marriage. Such frameworks should not be adopted in the United States.

This Comment examines the effect of allowing heterosexual domestic partnerships. Part II of this Comment outlines the methods by which same-sex relationships have been recognized in contemporary societies. It focuses on jurisdictions that have allowed domestic partnerships for both heterosexual and homosexual couples. Part III considers the negative implications of allowing domestic partnerships for heterosexual couples; specifically, France's PACS¹⁴ and its effects¹⁵ are considered. Part III also analyzes whether domestic partnerships for only same-sex couples would pass constitutional muster. Finally, Part IV discusses this Comment's conclusion, namely that heterosexual domestic partnerships should not be permitted because they may hurt heterosexual couples, their children, and society at large.

II. Recognition of Same-Sex Relationships in Contemporary Societies

Following the de-criminalization of homosexual acts in much of Europe and the United States,¹⁶ gay and lesbian couples began to seek legal recognition of their relationships in the 1980's and early 1990's.¹⁷ Government response to these efforts has varied over jurisdiction and time. The trend is toward greater rights for gay and lesbian couples, and this trend is most apparent in Europe.¹⁸ In contrast, jurisdictions in the United States have been more cautious about recognizing same-sex relationships¹⁹ because of the impact that recognition may have on marriage.

Relationships, in PSYCHOLOGY APPLIED TO MODERN LIFE: ADJUSTMENT AT THE TURN OF THE CENTURY 246, 247-48 (2000) for discussion of the health and happiness advantages that married people enjoy. See also Blaine Harden, *2-Parent Families Rise After Change in Welfare Laws*, N.Y. TIMES, Aug. 12, 2001, at 1 (suggesting that stability, often associated with low-conflict marriages, is critical for child development).

13. See 2003 Me. Laws 672 (2004).

14. See PACS, *supra* note 5.

15. Daley, *supra* note 10.

16. Efforts to decriminalize homosexual behavior continue today, as indicated by the recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that a state statute that made "consensual deviate sexual intercourse" with another adult illegal was unconstitutional. *Id.* at 578.

17. Robert Wintemute, *Introduction in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 1, 2 (Robert Wintemute & Mads Andenaes eds., 2001).

18. Lyall, *supra* note 8.

19. *Id.*

A. *Same-Sex Relationship Recognition in the United States*

Within the United States, legal recognition of gay and lesbian relationships varies significantly.²⁰ Because it is a federalist system, the United States recognizes federal protections as the minimum safeguards guaranteed to citizens.²¹ Thus, if the federal government does not recognize same-sex relationships, without a constitutional amendment, the states still can.²²

1. Non-Recognition at the Federal Level

The federal government has expressly prohibited same-sex relationships.²³ Although President George W. Bush's first attempt to amend the Constitution to define marriage as "between a man and a woman" failed,²⁴ proponents of the proposed amendment have promised to try again.²⁵ If such an amendment passed, critics of the amendment speculate that it would prevent not only federal recognition of same-sex marriage, but also *any* state recognition of these relationships.²⁶

20. *Compare* Defense of Marriage Act, Pub. L. No. 104-199, § 1, 110 Stat. 2419 (1996) (stating that the federal government has prohibited same-sex marriage) *with* *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (denying same-sex couples the right to marry violated the Massachusetts Constitution).

21. *See* U.S. CONST. amend. XIV, § 1 (prohibiting the states from abridging rights of U.S. citizens that are guaranteed by the federal government). *See also* U.S. CONST. amend. X (providing states all powers that are not prohibited by or delegated to the federal government by the Constitution).

22. States often afford their citizens more rights than the federal government recognizes. *See, e.g.,* *Commonwealth v. Triplett*, 341 A.2d 62 (Pa. 1975). In *Triplett*, the Pennsylvania Supreme Court decided that statements admissible under the United States Constitution, as held in *New York v. Harris*, 401 U.S. 222 (1971), were inadmissible under the Pennsylvania Constitution. *Triplett*, 341 A.2d at 64.

23. *See* Defense of Marriage Act § 1.

24. *See* Helen Dewar, *House Rejects Same-Sex Marriage Ban*, WASH. POST, Oct. 1, 2004, at A27, available at <http://www.washingtonpost.com/wp-dyn/articles/A63122-2004Sep30.html> (last visited Nov. 7, 2005).

25. *See* Craig Broffman & Ed Henry, *Same-Sex Marriage Senate Battle Over, War is Not*, CNN, July 15, 2004, <http://www.cnn.com/2004/ALLPOLITICS/07/14/samesex.marriage> (last visited Nov. 7, 2005). The text of the proposed Amendment reads as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Id.

26. *See* Dewar, *supra* note 24. For example, critics of the amendment fear that "it could jeopardize civil unions. . . ." *Id.*

2. Recognition in States other than Maine

State protections afforded to same-sex couples, and the requirements to receive those protections, vary significantly.²⁷ On one end of the same-sex relationship recognition continuum, Massachusetts has given same-sex couples the right to marry;²⁸ conversely, many states have expressly denied same-sex couples the ability to marry.²⁹

In the 2004 elections, propositions to ban same-sex marriage were on the ballot in eleven states.³⁰ All eleven propositions passed.³¹ Those states joined the six that had already prohibited same-sex marriage by constitutional amendment.³²

Thus, domestic partnership has become an important avenue for same-sex relationship recognition. States recognizing domestic partnership include California,³³ Vermont,³⁴ Hawaii,³⁵ New Jersey,³⁶ and Maine.³⁷ The rights that same-sex couples enjoy as a result of domestic partnership vary among these states, but often involve inheritance rights and next-of-kin status.

The requisites for entry into domestic partnerships in California, Vermont, Hawaii, New Jersey, and Maine differ. Vermont and Hawaii restrict domestic partnerships to same-sex couples.³⁸ California³⁹ and

27. *Compare* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (giving same-sex couples the right to marry) *with* HAW. REV. STAT. ANN. § 572C (LexisNexis 2001) (affording same-sex domestic partners only a few rights).

28. *See* Goodridge, 798 N.E.2d 941.

29. *See, e.g.*, 23 PA. CONS. STAT. § 1102 (2004) (defining marriage in Pennsylvania as "a civil contract by which one man and one woman take each other for husband and wife.").

30. *Election Results: Ballot Measures*, CNN, Nov. 11, 2004, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures> (last visited Nov. 7, 2005). The eleven states putting propositions to ban same-sex marriage on the ballot were Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. *Id.*

31. *Id.* Many of the states' propositions passed with three-quarters of voters' support, including Arkansas, Georgia, Kentucky, North Dakota, and Oklahoma. In Mississippi, the proposition was endorsed by eighty-six percent of voters. The slimmest margin by which the propositions passed was by fifty-seven percent of Oregon voters. *Id.*

32. The six states that already prohibited same-sex marriage are Alaska, Hawaii, Louisiana, Missouri, Nebraska, and Nevada. *Lambda Legal Issues Analysis/Advisory on Antigay Amendments to State Constitutions Passed by Voters*, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1552> (last visited Nov. 7, 2005).

33. CAL. FAM. CODE § 297 (2004).

34. 15 VT. STAT. ANN. § 1201 (2000). Vermont's "civil unions" provide essentially all of the benefits of marriage. *Id.*

35. HAW. REV. STAT. ANN. § 572C (LexisNexis 2001).

36. Domestic Partnership Act, 2003 N.J. Laws 246 (2004).

37. *See* 2003 Me. Laws 672 (2004).

38. *Compare* 15 VT. STAT. ANN. § 1201 *with* HAW. REV. STAT. ANN. § 572C

New Jersey⁴⁰ restrict domestic partnerships to all same-sex couples and any couple in which at least one of the partners is over the age of sixty-two.⁴¹

3. Domestic Partnership in Maine

On April 24, 2004, Maine enacted legislation allowing same-sex and opposite-sex couples to register as domestic partners.⁴² Although domestic partners are not afforded all of the rights of married couples, domestic partners gain certain rights,⁴³ providing an impetus for couples to register. Given that almost 3,400 Maine couples identified themselves as same-sex domestic partners in the last census⁴⁴ and that heterosexual partners are permitted register as well,⁴⁵ the impact of Maine's law may be significant. Domestic partnership benefits and ease-of-termination may make it an attractive alternative to marriage for many heterosexual couples.

Although domestic partners in Maine do not have rights equal to those of married couples, they enjoy rights sufficient to encourage domestic partnership registration. First, domestic partners enjoy the same rights of inheritance under intestacy law as do married spouses.⁴⁶ Second, partners are each other's next-of-kin,⁴⁷ giving them the right to make medical decisions for one another.⁴⁸ Third, they have the right to dispose of their deceased partner's remains.⁴⁹

To register as domestic partners in Maine, the partners must be "two unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible

(LexisNexis 2001) (Vermont's "civil unions" afford same-sex couples marriage in all respects but name, whereas the benefits same-sex couples enjoy under Hawaii's Reciprocal Beneficiary Act are more limited).

39. See CAL. FAM. CODE § 297 (2004).

40. 2003 N.J. Laws 246 (2004).

41. See *Holguin v. Flores*, 122 Cal. App. 4th 428 (2004). California's domestic partnership statute allows opposite-sex couples in which at least one person is over sixty-two and eligible for Social Security or Supplemental Security Income benefits to register as domestic partners because the reduction or elimination of benefits upon marriage may practically prevent marriage. *Id.* at 433.

42. See 2003 Me. Laws 672 (2004).

43. *Id.*

44. Josie Huang, *Partner Registry, First Day: No Protesters, Just Cheers; Surviving Partners Now Have Inheritance Rights and Next-of-Kin Status*, PORTLAND PRESS HERALD (Maine) July 31, 2004, at A1.

45. See 2003 Me. Laws 672 (2004).

46. *Id.* at § 7.

47. *Id.* at § 19.

48. Huang, *supra* note 44.

49. 2003 Me. Laws 672 (2004), § 18.

indefinitely for each other's welfare."⁵⁰ Furthermore, both partners must meet certain requirements: being "mentally competent" adults, "not being impaired or related in a fashion that would prohibit marriage," and being "legally domiciled together" in Maine for at least twelve months prior to the filing.⁵¹ Moreover, neither partner may be married nor already a domestic partner and each partner must be the sole domestic partner of the other and expect "to remain so."⁵²

Significantly, heterosexual couples are permitted to register as domestic partners. Although the statute does not explicitly include both same-sex and opposite-sex couples, the inference can be made that heterosexual partnerships are permitted because the requirements for domestic partnership do not include the partners being same-sex and the statute does not exclude opposite-sex partners.⁵³ The inference is confirmed by a state website which posts that heterosexual couples may register for domestic partnerships.⁵⁴

Couples who satisfy the eligibility requirements jointly file a completed-and-signed "Declaration of Domestic Partnership."⁵⁵ The state's declaration form requires identity information (name, residence, date and place of birth) for both of the partners and includes an oath confirming that both partners meet the eligibility requirements.⁵⁶ The declaration also includes warnings that registration may affect property and inheritance rights and that registration is not a substitute for wills, deeds, or partnership agreements and will be superceded by these documents.⁵⁷ Finally, the declaration explains how a domestic partnership may be terminated.⁵⁸

Domestic partnerships in Maine can be terminated by the partners in one of two ways;⁵⁹ both partners may sign a notice under oath that they consent to the termination⁶⁰ or one partner may unilaterally terminate.⁶¹ Unilateral termination becomes effective sixty days after the terminating partner serves the non-terminating partner in hand or by other approved

50. *Id.* at § 2.

51. *Id.* at § 17.

52. *Id.*

53. *Id.*

54. See *Instruction and Information for the Domestic Partner Registry in Maine*, available at <http://mainegov-images.informe.org/dhhs/bohodr/domstcpartnrshpbrchr.pdf> (last visited Nov. 7, 2005).

55. See *Declaration of Domestic Partnership*, available at [http://www.maine.gov/dhhs/bohodr/declrdomesprtnr\[1\].doc](http://www.maine.gov/dhhs/bohodr/declrdomesprtnr[1].doc) (last visited Nov. 7, 2005). The "Declaration of Domestic Partnership" is available at several state offices and on Maine's website. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See 2003 Me. Laws 672 (2004), § 17.

60. *Id.*

61. *Id.*

methods of service.⁶² Thus, termination of domestic partnerships is far less time-consuming and difficult than divorce.⁶³

B. Same-Sex Relationship Recognition in Europe

1. Recognition in Countries other than France.

Government recognition of same-sex relationships in Europe also varies between countries. In Italy,⁶⁴ same-sex relationships have not been recognized, at least partially because of the Vatican's influence.⁶⁵ Similarly, Spain has refused to recognize same-sex marriage on a national level.⁶⁶ Conversely, the Netherlands has granted same-sex couples the right to marry.⁶⁷ Between the two extremes are those jurisdictions recognizing same-sex relationships through domestic partnership. These countries include Denmark,⁶⁸ Sweden,⁶⁹ and France.⁷⁰

2. Domestic Partnership in France.

France allows both same-sex and opposite-sex couples to register as domestic partners.⁷¹ As a result, early estimates suggest that nearly forty percent of the couples who register as domestic partners are heterosexual.⁷² Furthermore, the number of people registering is significant. According to the French Justice Department, approximately 133,890 people had registered a domestic partnership by the end of 2002.⁷³

62. *Id.*

63. See Daley, *supra* note 10.

64. See Gioia Scappucci, *Italy Walking a Tightrope Between Stockhold and the Vatican: Will Legal Recognition of Same-Sex Partnership Ever Occur?* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 519, 529 (Robert Wintemute & Mads Andenaes eds., 2001).

65. *Id.*

66. See Nicolas Perez Canovas, *Spain: The Heterosexual State Refuses to Disappear* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 493, 493 (Robert Wintemute & Mads Andenaes eds., 2001).

67. See Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 437, 437 (Robert Wintemute & Mads Andenaes eds., 2001).

68. See Lund-Andersen, *supra* note 3, at 417.

69. See Hans Ytterberg, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, 427 (Robert Wintemute & Mads Andenaes eds., 2001).

70. See PACS, *supra* note 5.

71. *Id.*

72. Daley, *supra* note 10. However, privacy provisions prohibit compiling statistics on who has registered. See also Merin, *supra* note 9.

73. Lyall, *supra* note 8.

The numerous benefits offered by PACS encourage same-sex and opposite-sex couples to register. However, these couples register for different reasons. For same-sex couples, domestic partnership is an opportunity for legal recognition.⁷⁴ For opposite-sex couples, domestic partnership is a way to enjoy some of marriage's advantages without risking the lengthy and difficult divorce process.⁷⁵

Although not equivalent to the rights associated with marriage, several rights are granted after registering a domestic partnership. First, parties have the opportunity to contract for disposition of their property upon dissolution of the partnership.⁷⁶ If the partners do not explicitly dispose of their property via the partnership contract, upon termination, the government presumes that any property acquired during the partnership is owned jointly by halves.⁷⁷

The French government confers a wide variety of additional rights in the domestic partnership context. Two years after a partnership is registered, couples receive a 375,000 franc exception to testamentary and *inter vivos* gifts taxation.⁷⁸ On the third anniversary of the partnership, couples receive the same income tax break given to married couples.⁷⁹ Furthermore, a partner can enjoy the other partner's social security benefits if the partner is not entitled to social security benefits in any other capacity.⁸⁰ In the employment setting, non-transferred partners who work in civil service can request re-location if the other is transferred;⁸¹ partners at the same company can vacation at the same time;⁸² and partners receive two days bereavement leave upon a partner's death.⁸³ Finally, partners can continue or transfer their residential lease if the leasing partner dies.⁸⁴

The PACS allows couples to register "a contract concluded by two physically adult persons, of different sexes or of the same sex, for organizing their common life."⁸⁵ In an effort to prevent domestic partnerships of convenience,⁸⁶ the *Conseil Constitutionnel*⁸⁷ has

74. See Daley, *supra* note 10.

75. *Id.*

76. PACS, *supra* note 5, at art. 515-5.

77. *Id.*

78. PACS, *supra* note 5, at art. 5. See also Daniel Borrillo, *The "Pacte Civil de Solidarite" in France: Midway Between Marriage and Cohabitation in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 475, 485 (Robert Wintemute & Mads Andenaes eds., 2001).

79. PACS, *supra* note 5, at art. 4. See also Borrillo, *supra* note 78.

80. PACS, *supra* note 5, at art. 7. See also Borrillo, *supra* note 78, at 486.

81. PACS, *supra* note 5, at art. 13.

82. Borrillo, *supra* note 78, at 485.

83. *Id.* at 486.

84. PACS, *supra* note 5, at art. 14.

85. PACS, *supra* note 5, at art. 515-1.

86. See Borrillo, *supra* note 78.

interpreted “for organizing their common life” to require that the couple share a common residence.⁸⁸ Other entry requirements include that partners not share certain familial relationships⁸⁹ and not already be married or in a domestic partnership.⁹⁰

Entry into a domestic partnership is relatively simple. Qualifying couples form a partnership by taking two original copies of their signed partnership contract, as well as documents to prove where they were born and that they are not already in a partnership, to the Tribunal d’Instance in the jurisdiction where the couple resides.⁹¹ Once the appropriate documentation has been produced, the clerk enters the declaration in the registry, signs and dates the two original contracts, and returns a contract to each partner.⁹² Partners may modify their partnership contract at any time by filing a joint written declaration at the Tribunal d’Instance where they filed the original contract.⁹³

Termination of a domestic partnership is also straightforward, and it may be accomplished in four different ways.⁹⁴ Three methods of termination are immediate: death of a partner, marriage of a partner, and joint written declaration at the Tribunal d’Instance.⁹⁵ The fourth method, unilateral termination via written declaration, is effective three months after the date on which the terminating partner notified the non-terminating partner, provided the Tribunal d’Instance has also been notified.⁹⁶

III. The Implications of Allowing Domestic Partnership for Heterosexual Couples

A. *Support for Domestic Partnership Recognition*

Support for domestic partnerships first arose among same-sex couples in response to the “negative political feedback and uniform lack of success in the courts” that followed their initial attempts to have same-

87. See Merin, *supra* note 9. See also Borillo, *supra* note 78, at 484. Although not France’s Supreme Court, the *Conseil Constitutionnel* has the power to issue interpretations binding on all courts and public authorities in France. *Id.*

88. See Merin, *supra* note 9.

89. Partners may not be related by direct family line, in-laws in a direct family line, or collaterals within the third degree. PACS, *supra* note 5, at art. 515-2.

90. *Id.*

91. PACS, *supra* note 5, at art. 515-3.

92. *Id.*

93. *Id.*

94. PACS, *supra* note 5, at art. 515-7.

95. *Id.*

96. *Id.*

sex marriage recognized.⁹⁷ Domestic partnership was viewed as a viable avenue to gain some of the rights and protections of married couples.⁹⁸ In fact, in Hawaii, the Reciprocal Beneficiaries Act⁹⁹ was passed largely because Democrats wanted to accommodate loyal homosexual voters without alienating the voting public.¹⁰⁰

Same-sex couples initially sought domestic partnerships because “it recognized the existence and worth of nontraditional families, eased some of the legal discrimination between married and cohabiting couples, and was generally a step toward a liberal, free-choice regime for family law.”¹⁰¹ Today, many same-sex couples no longer view domestic partnership as a satisfactory solution.¹⁰² However, given the current state of law¹⁰³ and public opinion¹⁰⁴ in the United States, same-sex marriage is not likely to emerge on a national or widespread state scale any time soon. Therefore, if domestic partnerships are recognized, their frameworks must be evaluated carefully. Recognition of heterosexual domestic partnerships should not be an option because it could forever alter the progression of heterosexual relationships in the United States.

Kogan, a Professor of Law and Associate Dean for Academic Affairs at the S.J. Quinney College of Law, University of Utah,¹⁰⁵ has labeled supporting both same-sex and opposite-sex domestic partnerships as the “Equality Position.”¹⁰⁶ This euphemism veils the threat that opposite-sex domestic partnerships pose to marriage. Proponents of this ideology believe that “couples should have the freedom to determine how best to structure their own relationships, including the freedom to determine whether or not to marry.”¹⁰⁷ Although proponents of this view recognize that fewer people live in traditional nuclear families, they argue that non-traditional families meet the “emotional, social, and financial needs of the couple and their children.”¹⁰⁸

97. See ESKRIDGE, *supra* note 1, at 12.

98. See *id.*

99. HAW. REV. STAT. ANN. § 572C (LexisNexis 2001).

100. ESKRIDGE, *supra* note 1, at 23.

101. *Id.* at 15.

102. *Id.* Rather, now many same-sex couples will not be satisfied until they can marry. *Id.*

103. See Defense of Marriage Act, Pub. L. No. 104-199, § 1, 110 Stat. 2419 (1996). See also Broffman & Henry, *supra* note 25 (outlining President Bush’s attempts to amend the Constitution to prohibit same-sex marriage).

104. See *id.*

105. Kogan discusses the various views of domestic partners in a paper that was presented at and published by the Brigham Young University. Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 B.Y.U. L. REV. 1023, 1032.

106. *Id.*

107. *Id.*

108. *Id.* at 1033.

Although non-traditional families can meet children's needs, Kogan's "Equality Position"¹⁰⁹ ignores some social scientists' belief in the importance of the traditional family unit.¹¹⁰ "[A] growing body of social research" suggests that "the most supportive household is one with two biological parents in a low-conflict marriage."¹¹¹ Stability is critical to child development.¹¹²

Given the status of same-sex couples in the United States, it is understandable that several states have recognized same-sex domestic partnerships. However, the weak arguments supporting domestic partnerships for opposite-sex couples,¹¹³ as well as the countervailing evidence that children benefit from stable households with two biological parents,¹¹⁴ demand that heterosexual domestic partnerships not be permitted in the United States.

B. Comparing Domestic Partnership in France and Maine

Domestic partnerships for both same-sex and opposite-sex couples are already available in Maine.¹¹⁵ Maine's domestic partnership requirements¹¹⁶ are similar to those in France.¹¹⁷ For a couple to qualify, the partners need only to live together and plan for their lives together.¹¹⁸ Maine requires "domicil[e] together under long-term arrangements" and a "commitment to remain responsible indefinitely" for one another.¹¹⁹ However, the vague requirements enable Maine's couples who have lived together for twelve months to register as easily as French couples do.

In addition, domestic partnerships are terminated similarly in Maine and France.¹²⁰ Both schemes enable partners to contract in their declaration for the partnership's termination.¹²¹ Although Maine requires that instructions for termination be included,¹²² France does not.¹²³

109. *Id.*

110. See Harden, *supra* note 12. Kristin Moore, a psychologist and president of a nonpartisan research group, Child Trends, argues that "[f]or poor children, growing up in a household with cohabiting—but unmarried—adults is probably not an improvement over growing up in a single-parent family." *Id.*

111. *Id.*

112. *Id.*

113. See Kogan, *supra* note 105, at 1032-33.

114. See Harden, *supra* note 12.

115. See 2003 Me. Laws 672 (2004).

116. See *id.* § 17.

117. PACS, *supra* note 5.

118. 2003 Me. Laws 672 (2004). Maine requires twelve months of cohabitation. *Id.*

119. *Id.*

120. Compare 2003 Me. Laws 672 (2004) with PACS, *supra* note 5.

121. Compare 2003 Me. Laws 672 (2004) with PACS, *supra* note 5.

122. 2003 Me. Laws 672 (2004), at § 17.

However, in France, if the couple does not include instructions, the property will be distributed equally.¹²⁴ Thus, France has provided domestic partners a strong incentive to provide instructions.

Finally, and most important, both frameworks allow either bilateral or unilateral termination.¹²⁵ Bilateral declarations are effective on the date filed, while unilateral declarations become effective a certain period of time after notice is given to the non-terminating party.¹²⁶ This ease of termination is one reason that domestic partnerships should not be available to heterosexual couples.

Both Maine and France afford domestic partners benefits that unmarried, non-domestic partner couples do not have. Although France accords its domestic partners more benefits than does Maine,¹²⁷ the rights that Maine provides its citizens¹²⁸ could be sufficient to encourage heterosexual couples to register, particularly given the ease of termination.

C. *The Effects of Heterosexual Domestic Partnerships in France*

The similarities between domestic partnership in France and Maine make it important for the United States to consider the effect of domestic partnerships on heterosexual couples in France. The large number of heterosexual domestic partnerships in France has had a significant impact on heterosexual relationships.

Only ten months after the French statute took effect, nearly 23,000 couples had registered their domestic partnerships.¹²⁹ Although French law prohibits keeping statistics on who has registered a domestic partnership,¹³⁰ estimates suggest that about forty percent of the couples who have registered are heterosexual.¹³¹ Considering that by the end of

123. PACS, *supra* note 5.

124. *Id.*

125. Compare 2003 Me. Laws 672 (2004) with PACS, *supra* note 5.

126. Compare 2003 Me. Laws 672 (2004) with PACS, *supra* note 5.

127. PACS, *supra* note 5. The PACS entitles domestic partners to contract for disposition of their property upon termination of the domestic partnership (if no disposition is made, the property will be divided equally), to an income tax break similar to that of married couples upon the partners' third anniversary, to an testamentary/*inter vivos* taxation exception on upon the partners' second anniversary, to social security benefits if they are not available from any other source, to civil service transfers for both members of the couple, to vacation at the same time if working for same employer, and to bereavement leave and lease continuance or transfer upon the death of one partner. *Id.*

128. 2003 Me. Laws 672 (2004). Maine's domestic partners are provided inheritance rights under intestacy law, next-of-kin status, the power to dispose of their partner's remains following their death, and the ability to contract for instructions on termination of the partnership. *Id.*

129. Merin, *supra* note 9, at 141.

130. Daley, *supra* note 10.

131. Merin, *supra* note 9.

2002, about 133,890 people had signed such pacts (almost 67,000 couples),¹³² and that people continue to register,¹³³ domestic partnership has altered the institution of marriage in France.

Because of France's domestic partnership registry, both opposite-sex and same-sex couples' relationship progression has changed. Same-sex couples, who cannot marry, celebrate domestic partner registration just as many heterosexual couples traditionally celebrate marriage.¹³⁴ "The couples dress up, take pictures and have parties to mark the event."¹³⁵

On the other hand, heterosexual couples see domestic partnership completely differently—it is not considered a significant event. Some heterosexual couples in France see domestic partnership as a step toward marriage, without the perceived baggage.¹³⁶ Other heterosexual couples, who are not sure they want to marry, view it as an avenue to obtain some rights of marriage without the lifelong commitment.¹³⁷

One woman in a heterosexual domestic partnership articulates the latter view, "at first, when we PACS'ed, we thought we would be de-PACS'ed after three years, but we changed our minds."¹³⁸ Another woman who has a child with her boyfriend, but has neither married nor registered for domestic partnership, also expresses this view, saying, "I think there will probably be one day when it will be convenient for both of us to have this situation be legalized and all the financial and property aspects to be organized between us."¹³⁹ These women, unwilling to make a permanent commitment to their relationships, nevertheless have registered, or anticipate registering, a domestic partnership because of the conveniences it offers.

Heterosexuals registering their relationships see domestic partnership as a way to acknowledge a loving relationship, without the risk of repeating their parents' matrimonial mistakes.¹⁴⁰ The ease and speed of domestic partnership dissolution make it less intimidating to gain legal recognition and enjoy the additional benefits. For some

132. Lyall, *supra* note 8.

133. *See id.*

134. Daley, *supra* note 10.

135. *Id.*

136. *Id.* Daley introduces readers to a heterosexual couple in which both members are children of divorce and see marriage as "a burdensome institution, weighed down with religious connotations, likely to end badly and at an enormous expense." *Id.*

137. Lyall, *supra* note 8. Lyall tells the story of another heterosexual couple who had been together six years when they decided to register for domestic partnership. Two years after registration, the man has not told his parents about the registration, and they still call one another boyfriend and girlfriend. *Id.*

138. *Id.*

139. *Id.*

140. Daley, *supra* note 10.

heterosexual couples, the benefits afforded and the ease of dissolution make domestic partnership an attractive intermediary step or alternative to marriage. Therefore, the detrimental effects of allowing heterosexual domestic partnership must be considered.

D. The Potential Effects of Heterosexual Domestic Partnerships in the United States

Because only a handful of states have enacted domestic partnership legislation thus far,¹⁴¹ the types and effects of domestic partnerships must be considered if and when other states enact similar legislation. The effects of heterosexual domestic partnerships on France foreshadow the impact that such partnerships would have on the United States. Heterosexual domestic partnerships should not be available to heterosexual couples because they enable couples to enjoy some marital benefits¹⁴² without the parties making a substantial commitment to the relationship.

President Bush's proposal to invest \$1.5 billion to promote marriage in the United States¹⁴³ will not preserve the institution of marriage if heterosexual domestic partnerships are allowed in the United States. Recognition of heterosexual domestic partnerships would "downgrade" and "dilute"¹⁴⁴ marriage and make it easier to abandon, or perhaps make it "an elite category because of the specific, unique and complete legal protections it offers. . . ."¹⁴⁵

The effects of domestic partnership for heterosexual couples can already be felt in the United States, even in states where such partnerships are unrecognized.¹⁴⁶ Heterosexual couples register as domestic partners in cities and counties where it is made available so that same-sex couples can gain legal recognition and benefits.¹⁴⁷ As marriage rates decline, domestic partnerships grow increasingly attractive to heterosexuals.¹⁴⁸ Two graduate students in New York City registered as domestic partners to qualify for couples' housing, viewing their decision

141. See *Gay and Lesbian Political Action and Support Groups: Working for Liberty and Justice for All*, available at <http://www.gaypasg.org/GayPASG/Legal%20Joinings/Legal%20joinings%20and%20recognition%20of%20same-sex%20couples.htm> (last visited Nov. 7, 2005).

142. Compare 2003 Me. Laws 672 (2004) with PACS, *supra* note 5.

143. Lyall, *supra* note 8.

144. See Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J. L. FAM. STUD. 105, 106.

145. See *id.*

146. Martha Irvine, *Some Straight Couples Opt Against Marriage*, SEATTLE POST-INTELLIGENCER, Apr. 26, 2004, available at <http://www.contemporaryfamilies.org/media/news%2058.htm> (last visited Nov. 7, 2005).

147. *Id.*

148. *Id.*

as "a good, first, small step."¹⁴⁹

Other heterosexual couples register for domestic partnerships as a political statement.¹⁵⁰ They are protesting the proposed constitutional amendment to limit marriage to heterosexuals,¹⁵¹ and some have even called for a "marriage boycott."¹⁵² David Popenoe, a sociologist who is the co-director of the National Marriage Project at Rutgers University, calls such a campaign "idiotic," arguing that society's goal should be to foster committed relationships so children are raised in stable environments and maintaining that domestic partners are not as committed as spouses.¹⁵³ Even a sociologist, who argues that domestic partners can be as committed as married couples, acknowledges that domestic partners rarely plan for the future,¹⁵⁴ possibly evidencing a lack of commitment to the relationship.

In a society where marriage is already threatened,¹⁵⁵ legal recognition of heterosexual domestic partnerships would only further harm the institution because these domestic partnerships recognize and encourage heterosexual cohabitation. Although some psychologists have come to view heterosexual cohabitation as a new stage of courtship,¹⁵⁶ it should be entered into only after careful thought.

"[C]ohabitants report that they are less satisfied with their relationships than married couples, and cohabitating relationships are notably less stable than marital relationships."¹⁵⁷ Furthermore, although cohabitants may think they are improving their chances of marital success, several studies have shown that cohabiting before marriage actually correlates with higher divorce rates.¹⁵⁸ Although the nature of cohabitants' relationships, rather than cohabitation itself, may explain why subsequent marriages are more likely to fail,¹⁵⁹ any act that increases the risk of divorce must be carefully considered. Because domestic partnerships recognize and reward cohabitation, they too must

149. *Id.*

150. *Id.*

151. See Broffman & Henry, *supra* note 25.

152. See Irvine, *supra* note 146.

153. *Id.*

154. *Id.*

155. WAYNE & LLOYD, *supra* note 12. Psychologists identify at least six trends in our society challenging marriage: 1) "increased acceptance of singlehood," 2) "increased acceptance of cohabitation," 3) "reduced premium on permanence," 4) "transitions in gender roles," 5) "increased voluntary childlessness," and 6) "decline of the traditional nuclear family." *Id.*

156. "Three-quarters of cohabitants expect to marry their current partner." *Id.* at 268. This discussion of the nature of cohabitant relationships considers only heterosexual relationships.

157. *Id.* (citations omitted).

158. *Id.* However, correlation does not prove causation.

159. *Id.*

be carefully considered.

Marriage should be promoted and encouraged because it benefits each individual in the couple.¹⁶⁰ Married people enjoy better mental and physical health than single people.¹⁶¹ These health benefits may result because emotional support buffers stress, spouses discourage unhealthy habits, and married people enjoy higher incomes.¹⁶² Married individuals also rate themselves as happier than single people,¹⁶³ probably due to the above advantages that married people enjoy.¹⁶⁴

Being raised by married parents, particularly those who share a tranquil marriage,¹⁶⁵ also benefits children. According to a 2002 report released by thirteen family researchers in the United States, "children who live with their own married parents enjoy better physical health, on average, than children in other types of families."¹⁶⁶ Popenoe, a

160. See Tony Perkins, *Only Marriage Deserves Benefits*, BALT. SUN TIMES, June 15, 2004, at 13A. In his editorial, Mr. Perkins, president of the Family Research Council in Washington, D.C., bolsters his arguments for traditional marriage by discussing the benefits of marriage for each member of the married couple, such as better physical and emotional health and longer lives. He also highlights the benefits of being raised by married parents for children—these children have better chances of becoming "happy, healthy, responsible, morally upright citizens." *Id.*

161. WEITEN & LLOYD, *supra* note 12, at 267. See also Valerie Gibson, *Married & Loving It: A Long List of Benefits over the Single Life*, TORONTO SUN, Aug. 28, 2005, at 48 (noting that "[m]arried people live longer, have better health, earn more money and accumulate more wealth, feel more fulfilled in their lives, enjoy more satisfying sexual relationships and have happier and more successful children than those who remain single, cohabit or get divorced") (quoting LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000)); Gayle White, *Weighing the Pros & Cons of Marriage*, ATLANTA J.-CONST., Mar. 29, 2003, at 1B (stating that "[m]arried people have better health and lower rates of injury, illness and disability than singles.").

Clearly, satisfying marriages are more likely to benefit spouses than unsatisfying marriages. See, e.g., William Hathaway, *Strong Marriage Improves Health*, HARTFORD COURANT (Conn.), Sept. 16, 2003, at D3 (noting that "researchers at San Diego State University and the University of Pittsburgh said marriage may confer many intangible health benefits, such as spousal support of health behavior, more social engagement and financial security. However, the researchers said poor marriages may offset some of those advantages, leading to increased risk of heart disease and stroke and other ailments.").

162. WEITEN & LLOYD, *supra* note 12, at 267.

163. *Id.*

164. *Id.*

165. DAVID R. SHAFFER, *The Family*, in *DEVELOPMENTAL PSYCHOLOGY: CHILDHOOD & ADOLESCENCE* 557, 579 (1999). On the other hand, children in homes where marital conflict is prevalent suffer extreme distress and may act aggressively toward siblings and peers. Repeated exposure to marital discord contributes to adjustment problems such as anxiety, depression, and externalizing conduct disorders. *Id.*

166. See Alan Baker, *Marriage is Really Made in Heaven*, COURIER MAIL (Queensland, Australia), July 11, 2003, at 19 (discussing the report released by thirteen family researchers in the United States in 2002).

sociologist at Rutgers University,¹⁶⁷ summarizes the desirability of married parents raising children, explaining, “there is widespread agreement that living with two biological married parents is the gold standard for the well-being of children.”¹⁶⁸

Proponents of domestic partnerships may argue that domestic partners provide both each other and their children similar benefits, but the transitory nature¹⁶⁹ of cohabitation probably prevents these benefits from being realized.¹⁷⁰ In fact, the temporary nature of many cohabiting relationships may negatively impact both the couple and any children. Further, “[a] University of Chicago study from 2002 found that ‘cohabitating couples spend a larger share of their total (dollars) on alcohol and tobacco than do either married-parent families or single parents . . . and less on health care and education than do married parents.’”¹⁷¹ These spending habits may account for some of the trends seen among cohabitants.

Couples and their children rarely benefit from cohabitation. Cohabiting couples suffer higher rates of depression, domestic violence, and infidelity than married couples.¹⁷² Furthermore, children raised in cohabiting households are “more likely to have emotional and behavioral problems, . . . to do poorly academically, and to live in poverty.”¹⁷³

E. Does Limiting Domestic Partnerships to Same-Sex Couples Violate Heterosexual Couples’ Rights to Equal Protection?

Given the threat that heterosexual domestic partnerships poses to marriage and the implications of that threat for our society, jurisdictions should only consider domestic partnerships if limiting them to same-sex couples withstands equal protection challenges. Case law suggests that

167. See Irvine, *supra* note 146.

168. See Susan Reimer, *Grow up, Men: We Need You in the Family*, BALT. SUN, June 29, 2003, at 1N.

169. See Jill Kirby, *Children Pay the Price when Their Parents Don’t Marry: Marriage Is a Dirty Word to the Government, but the Costs of Having Single Parents are Terrible*, DAILY TELEGRAPH (London), Mar. 13, 2002, at 26. In England, five years after a child’s birth, fifty-two percent of cohabiting parents have broken up, whereas only eight percent of married parents have. *Id.*

170. See Perkins, *supra* note 160.

171. Cosmo Macero, Jr., *Gay Marriage for Richer, for Poorer*, BOSTON HERALD, Feb. 13, 2004, at 39. See also White, *supra* note 161 (stating that “[m]arried men and women consume less alcohol than singles. . .”). However, potential explanations for these spending habits are infinite. For example, married people may have more children than cohabitants, resulting in additional education and health care costs.

172. See Perkins, *supra* note 160.

173. *Id.* See also White, *supra* note 161 (indicating that children from unmarried or divorced parents are at a greater risk of living in poverty and “have lower grades, are more likely to be held back, and are more likely to drop out of high school. . .” In contrast, “children whose parents stay married have lower rates of substance abuse.”).

they can.¹⁷⁴ Equal protection challenges would prompt application of the “rational basis” test.¹⁷⁵ Because states and employers restricting domestic partnerships to same-sex couples have rational bases, prohibiting heterosexual domestic partnerships is constitutional.

1. The Supreme Court’s Interpretation of Equal Protection Requirements

When interpreting the Fourteenth Amendment’s guarantee that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws,”¹⁷⁶ the Supreme Court has acknowledged that the Fourteenth Amendment’s promise of equal protection must “coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”¹⁷⁷ Provided that a law does not burden a fundamental right¹⁷⁸ or target a suspect class,¹⁷⁹ a legislative classification will pass constitutional muster as long as it is rationally related to a legitimate government interest.¹⁸⁰

Same-sex couples, subject to more restrictions than heterosexual couples, are not a suspect class.¹⁸¹ *A fortiori*, unmarried heterosexual couples should not be considered a suspect class. Consequently, when evaluating the statutes, ordinances, or policies that allow only same-sex domestic partnerships, the rational basis test should be applied.

2. Cases Evaluating Whether Limiting Domestic Partnerships to Same-Sex Couples Violates Heterosexual Couples’ Rights to Equal Protection.

Although the Supreme Court has not considered an equal protection challenge to domestic partnerships for same-sex couples only, other courts have.¹⁸² These courts have concluded that challenges to such

174. See *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604 (7th Cir. 2001). See also *Holguin v. Flores*, 122 Cal. App. 4th 428 (2004).

175. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

176. U.S. CONST. amend. XIV, § 1.

177. *Romer*, 517 U.S. at 631.

178. Fundamental rights include those expressly granted by the Constitution, as well as those rights that have been implied based on the language of the Constitution. Rights that have been expressly granted include all of the rights listed in the first eight Amendments and the right to due process of law before being deprived of life, liberty, or property. See U.S. CONST. amends. I-VIII. See also U.S. CONST. amend. XIV. Rights that have been implied include, *inter alia*, the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right to an abortion, *Roe v. Wade*, 410 U.S. 113 (1973).

179. One suspect classification is race. See *Loving*, 388 U.S. at 1.

180. *Romer*, 517 U.S. at 631.

181. *Id.*

182. See *Irizarry*, 251 F.3d 604 (7th Cir. 2001). See also *Holguin*, 122 Cal. App. 4th 428 (2004).

domestic partnership schemes must satisfy the rational basis test.¹⁸³ The rational basis test is appropriate because “only when the plaintiff in an equal protection case is complaining of a form of discrimination that is suspect because historically it was irrational or invidious is there a heavier burden of justifying a difference in treatment than merely showing that it was rational.”¹⁸⁴ Unmarried, cohabiting heterosexuals are not a suspect class.¹⁸⁵ Furthermore, limiting domestic partnership to same-sex couples passes the rational basis test because doing so bears a rational basis to a legitimate end.¹⁸⁶

In *Irizarry v. Board of Education of Chicago*, Irizarry, a member of an unmarried heterosexual couple, challenged state laws permitting only same-sex couples to enter domestic partnerships.¹⁸⁷ Specifically, she challenged the policy of her employer because it afforded same-sex domestic partners benefits that she did not have access to in an unmarried, heterosexual relationship.¹⁸⁸ The Seventh Circuit affirmed the lower court’s dismissal of Irizarry’s action because the employer had a rational basis for its policy.¹⁸⁹ The court considered both the employer’s reasons for treating the couples differently and its own justifications when it decided that a rational basis existed.¹⁹⁰

The court first considered the employer’s arguments for treating opposite-sex and same-sex couples differently. The school district argued that it had recognized same-sex domestic partnerships for two reasons: 1) unlike heterosexual couples, same-sex couples do not have the option of marrying,¹⁹¹ and 2) the school wanted to attract homosexual teachers who could provide support for homosexual students.¹⁹² Although the policy may not have been effective,¹⁹³ it was not

183. See *Irizarry*, 251 F.3d at 604. See also *Holguin*, 122 Cal. App. 4th at 428.

184. *Irizarry*, 251 F.3d at 610.

185. *Id.*

186. *Id.* at 606. *Holguin*, 122 Cal. App. 4th 428.

187. See *Irizarry*, 251 F.3d at 606.

188. *Id.* Irizarry had been living with her domestic partner for more than two decades. During that time, they raised two children. When the Chicago Board of Education extended health benefits to same-sex domestic partners, Irizarry raised an equal protection challenge. She claimed that her domestic partnership met all of the domestic partnership requirements except being a homosexual relationship, and that limiting the benefits of domestic partnership to same-sex couples denied her equal protection. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. See *Nebbia v. New York*, 291 U.S. 502, 537-38 (1934) (noting that when applying the rational basis test, whether the law accomplishes its purported purpose is inconsequential). The Court explained:

Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with

constitutionally irrational.¹⁹⁴ Furthermore, cost, which could have been tremendous if unmarried opposite-sex couples gained benefits, can be a rational basis for treating non-suspect classes differently.¹⁹⁵

The Seventh Circuit also determined that there were two legitimate ends furthered by refusing to extend domestic partnership benefits to heterosexual couples.¹⁹⁶ Restricting domestic partnership to same-sex couples both encourages marriage and extends spousal fringe benefits to homosexuals.¹⁹⁷ The court recognized that the cost of extending benefits to all unmarried heterosexual couples might reduce or eliminate benefits to same-sex couples.¹⁹⁸

Further, the court reasoned that promoting marriage is important because it benefits the couple and any children of the couple.¹⁹⁹ Unlike cohabitation, which tends to distance people from other social institutions such as organized religion, marriage links couples to social institutions.²⁰⁰ The court also noted, "cohabitants are much less likely than married couples to pool financial resources, more likely to assume that each partner is responsible for supporting himself or herself financially, more likely to spend free time separate, and less likely to agree on the future of the relationship."²⁰¹ Finally, the court found that the characteristics of cohabitation "makes both investment in the relationship and specialization with this particular partner much riskier than in marriage, and so reduces them."²⁰²

Recently, a California statute extending the right to sue for wrongful death to domestic partners was challenged because the state allows all same-sex couples, but only opposite-sex couples in which one is over the age of sixty-two and eligible for social security benefits, to register as domestic partners.²⁰³ When the defendants to a wrongful death suit demurred, alleging the plaintiff lacked standing, the plaintiff argued that

the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id.

194. *Irizarry*, 251 F.3d 604, 610 (7th Cir. 2001).

195. *Id.* at 611.

196. *Id.* at 608.

197. *See id.*

198. *See id.* at 609.

199. *See* WEITEN & LLOYD, *supra* note 12. *See also* Blaine Harden, *supra* note 12.

200. *See Irizarry*, 251 F.3d 604, 608 (7th Cir. 2001).

201. *Id.*

202. *Id.*

203. *Holguin*, 122 Cal. App. 4th 428 (2004). In *Holguin*, the plaintiff was a male who had lived with his female partner for three years. She was killed in a traffic accident after a tractor trailer sideswiped her car, causing her to lose control and go under the truck's back tires. *Id.* at 431. *Holguin* sued the truck driver and the truck owner. They demurred, arguing that he did not have standing because the wrongful death statute did not extend to unmarried, cohabiting heterosexual couples. *Id.* at 432.

extending the right to sue for wrongful death to some unmarried couples, but not to others, was a violation of equal protection.²⁰⁴ The court denied the equal protection claim, holding that the state had rational bases for the law.²⁰⁵

The court identified at least two rational bases for extending the right to sue only to domestic partners: 1) domestic partners are “legally or practically²⁰⁶ prevented from marrying”²⁰⁷ and 2) married couples and domestic partners have publicly registered their relationship. Furthermore, the plaintiff was not denied equal protection because he and his partner were entitled to marry.²⁰⁸ Upon marriage, he and his wife would have received all of marriage’s benefits, which exceed those of domestic partnerships. The court stated it aptly, “[n]o case we know of has held the plaintiff was denied equal protection because he was a member of a class granted *more* advantages than the comparison class.”²⁰⁹

IV. Conclusion

In the continuing debate over the legal recognition that should or should not be afforded same-sex relationships, the United States must evaluate the implications of any legal changes on individuals, their communities, and society at large. While the trend has been toward giving same-sex couples more rights, many in the United States are opposed to same-sex marriage.²¹⁰ Therefore, the recognition of domestic partnerships is potentially significant, as evidenced by the increasing number of states permitting such partnerships.²¹¹

States that recognize domestic partners must proceed carefully. This Comment has proposed that heterosexual domestic partnerships should not be permitted because allowing domestic partnership for

204. *Id.*

205. *Id.* at 431.

206. *Id.* at 433. The statute enables opposite-sex couples in which at least one of the members is over sixty-two and eligible for Social Security or Supplemental Security Income benefits to register because these couples may be practically prevented from marrying. They are prevented from marrying because their benefits may be reduced or eliminated if they married. *Id.*

207. *Id.* at 432.

208. See *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (recognizing the right to marry as a fundamental right rooted in substantive due process).

209. *Holguin*, 122 Cal. App. 4th 428, 439 (2004) (emphasis in original).

210. See *Election Results: Ballots Measures*, *supra* note 30.

211. The National Center for Lesbian Rights, *Marriage, Domestic Partnerships, and Civil Unions: An Overview of Relationship Recognition for Same-Sex Couples in the United States*, http://www.nclrights.org/publications/marriage_equality0905.htm (last visited Nov. 7, 2005). California, New Jersey, Hawaii, and Maine are among those states that have enacted legislation to recognize and benefit domestic partners. *Id.*

opposite-sex couples in France has irreversibly changed the progression of heterosexual relationships there. Rather than seeing marriage as their goal, many heterosexual couples opt for domestic partnership because of its benefits and easy termination. Even couples who want to marry often see domestic partnership as an intermediate step toward substantial commitment.

Historically, marriage has been a celebrated social institution. It links married couples to other important social institutions, such as churches.²¹² Marriage also helps spouses “live longer, [be] healthier, earn more, have lower rates of substance abuse and mental illness, [be] less likely to commit suicide, and report higher levels of happiness.”²¹³ In fact, some argue that being raised by two married biological parents is the “gold standard” for raising children.²¹⁴

Marriage should be encouraged. If domestic partnerships are recognized and provide same-sex couples more rights, they should be limited to same-sex couples because heterosexual couples can enjoy the benefits of marriage by marrying. Enabling heterosexuals to obtain some marital benefits without making a lifelong commitment may further jeopardize the institution of marriage and result in far-reaching implications for the vulnerable members of society: our children. Given that restricting domestic partnership to same-sex partners should not violate equal protection,²¹⁵ the United States should not allow heterosexual domestic partnerships.²¹⁶

212. *Irizarry v. Bd. of Educ. of Chi.*, 251 F.3d 604, 609 (7th Cir. 2001).

213. *Id.* at 607.

214. *See* Reimer, *supra* note 168.

215. *Irizarry*, 251 F.3d at 606. *Holguin v. Flores*, 122 Cal. App. 4th 428, 439 (2004).

216. The only instances in which heterosexual domestic partnerships should be permitted are those in which at least one member of the partnership is over age sixty-two, because of the diminished Social Security benefits these people suffer if they marry. *See Holguin*, 122 Cal. App. 4th at 433.

