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NOTE

The Right to Contract: Use of Domestic Partnership as a Strategic Alternative to the Right to Marry Same-Sex Partners

Dara E. Purvis*

ABSTRACT

Many legal scholars writing about same-sex marriage in recent years draw an analogy to constitutional analysis of historical bans on interracial marriage, arguing that prohibitions of same-sex marriage violate the Fourteenth Amendment’s Equal Protection Clause in the same manner, because such prohibitions classify on the basis of sex, and thus violate heightened scrutiny. There is another lesson, however, to be drawn from the history of constitutional protection of interracial marriage. Shortly after the Civil War, a series of cases unsuccessfully argued that the Civil Rights Act of 1866 gave black Americans the right to make contracts, including a marriage contract, with whomever they chose. While the cases were almost uniformly unsuccessful then, narrowing the focus today to domestic partnerships and other non-marriage, but legally recognized, relationships gives the argument renewed vigor. By focusing on the contractual elements of such relationships—the contractual components of marriage, but without the social, religious, and political freight of the institution—such an argument gives even rational basis review potential value, and offers a compelling strategy for future litigation.

I. INTRODUCTION

There are few topics as contentious in the current political atmosphere as gay marriage. The topic inflames the political arena to the extent that commentators have speculated that the controversy aroused by gay marriage allowed Republicans to harness the backlash of angry conservative voters turning out to the polls to support state measures banning same-sex marriage in service of every other Republican candidate and issue on the ballot.¹

Unusually, political arguments about same-sex marriage and constitutional arguments about the same topic have substantial similarities. Both sides agree that marriage is a fundamental right guaranteed by substantive due process of the Fourteenth Amendment.² The disagreement is over the definition of marriage: whether it is an intrinsically heterosexual insti-


tution and whether denial of it to same-sex couples is thus a violation of equal protection of the laws.³

A previous and similarly contentious dispute over marriage rights occurred over prohibitions of interracial marriage. While prohibitions of interracial marriage were struck down in 1967 in Loving v. Virginia, the first wave of litigation challenging such prohibitions was grounded in the Civil Rights Act of 1866, and its grant of an equal right to make and enforce contracts, rather than in the yet undetermined status of marriage as a fundamental right.⁴

While this first wave of litigation was unsuccessful, the focus on the contractual nature of the marriage relationship suggests a new and intermediate step in the modern debate about same-sex marriage. The contractual arguments, such as those advanced in the nineteenth century, apply with renewed vigor not to marriage, but to domestic partnerships that grant the contractual benefits of marriage without the attendant characteristics of what makes marriage so fundamental.⁵ Thus, a contractual argument can be advanced to argue that prohibitions of same-sex marriage that also prohibit domestic partnerships or recognition of any contractual arrangements between same-sex couples are unconstitutional even under more lenient constitutional scrutiny.

Arguments for same-sex marriage grounded in the Fourteenth Amendment’s Equal Protection Clause are almost always unsuccessful because a classification based on sexual orientation does not result in heightened scrutiny. This is why many lawyers have argued that describing same-sex marriage bans as classifications on the basis of gender is a stronger argument, as gender-based classifications trigger intermediate scrutiny.⁶ However, by combining an equal protection argument with a contractual focus, and focusing on domestic partnerships rather than marriage outright, rational basis review becomes a much more successful test.⁷

Part II of this note discusses the unsuccessful attempts to assert a right to enter into interracial marriage based upon the right to contract expressed in the Civil Rights Act of 1866. Part III traces the acceptance of marriage as a fundamental legal right. Part VI reviews the changes that have resulted in an increasingly contractual understanding of modern matrimony. Finally, Part V analyzes how a revitalized contract-based argument has renewed prospects in the service of same-sex partnership.

II. THE CONTRACTUAL ARGUMENT

From the beginning of American history, interracial marriage presented complex legal as well as social and political, problems. Sexual relationships between white men and black female slaves were relatively common and tacitly accepted, if not condoned, by a slave-owning society.⁸ Yet such interactions were viewed as part of the white man’s ownership of the black slave, not as two individuals choosing to enter into a romantic and sexual partnership.⁹ Interracial relationships in which the white partner wished he and his black partner were accepted, if not condoned, by society as a licit coupling, as opposed to society accepting the couple’s clandestine sexual interactions with willful semi-ignorance, were

³. Id. at 1425
⁷. See id.
⁹. See A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia, 77 Geo. L.J. 1967, 2000 (1989) ("[i]n the case of sexual relations between whites and their slaves, failure to punish the slave might have been a recognition that the slave had little choice in preventing the relationship, especially if the white were the owner").
viewed as severe transgressions. Even in states with laws against interracial fornication, for example, the laws were selectively enforced, primarily against couples whose relationships were displayed publicly.

As long as slavery was dogmatically established in a majority of the United States, there was little danger that the social norm of intolerance of interracial partnerships would change. Such an "exceptional relationship . . . could not realistically challenge the ruling public order of racial slavery." But as the abolitionist movement grew, so-called "antimiscegenation" statutes prohibiting interracial marriages grew both in number and severity. By 1860, twenty-three (of thirty-three total) states or territories instituted bans on interracial marriage or fornication, and from 1861-65, seven more states passed bans on interracial marriage. Overall, six southern states wrote bans of interracial marriage into their state Constitutions passed after the Civil War.

A. The Contractual Argument and Its Few Victories

Following the Civil War, the re-United States had to deal with the status of former slaves, and place them into the legal order of citizens for the first time. One of the major legislative attempts to spell out the new legal rights of former slaves was the Civil Rights Act of 1866, a statute so controversial that it had to be passed twice after President Andrew Johnson vetoed it. Intended as a tool to implement the Thirteenth Amendment's prohibition of slavery, and in response to the emerging Black Codes in the South, part of the Act stated that every person born in the United States had the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Emboldened by the stated right to "make and enforce contracts," a number of suits were brought challenging statutes prohibiting interracial marriage on the grounds that marriage should be treated as any other contract, which African-Americans had the right to enter, whether it was with a spouse of their own or a different race.

The vast majority of such attempts failed. Two cases temporarily succeeded among those cases asserting a conception of marriage as a purely civil contract, and were therefore subject to the rights spelled out in the 1866 Civil Rights Act.

11. See id. There was also a gendered aspect of such prosecutions: for example, between 1840 and 1860 in rural North Carolina, thirteen of seventeen prosecutions of interracial fornication were of couples in which the man was black. Id. The four exceptions were couples in which the white man presented his black partner to society as deserving of the same respect owed a white woman. Id.
12. Id. at 45.
13. See Emily Field Van Tassel, "Only the Law Would Rule Between Us": Antimiscegenation, the Moral Economy of Dependency, and the Debate Over Rights After the Civil War, 70 Chi.-Kent L. Rev. 873, 898-99 (1995). Blending misce, for "blend," and genus, for "race," the term "miscegenation" was created for a pamphlet purportedly advocating interracial marriage and procreation created by two journalists for the New York World. Id. After showing the pamphlet to prominent Republican politicians as a ruse in order to obtain favorable comments on the pamphlet's ideas from the politicians, the journalists forwarded the Republicans' statements to Democrat Samuel Sullivan Cox, who then argued that Democrats would protect American voters from such outrageous ideas. Id.
14. See David H. Fowler, Northern Attitudes Towards Interracial Marriage 143-47 (1987) ("From 1831 to 1865 the most portentous development in state legislative action on interracial marriage was the outbreak for the first time of substantial public controversy on the topic.").
15. Cott, supra note 10, at 40.
17. Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law—An American History 59 (2002). President Johnson specifically expressed concern that the Civil Rights Act of 1866, while not establishing the right to intermarry, indicated that Congress had the power to overrule all state laws prohibiting interracial marriage. Id.
18. See id. at 60.
1. **Alabama**

Under section 3602 of the Alabama Code of 1867, an interracial couple that lived together—married or not—was to be sentenced to between two and seven years in prison. Shortly after the statute went into effect, a black man named Thornton Ellis and a white woman named Susan Bishop who lived together were convicted of violating section 3602, but were sentenced only to a fine, as though they had been convicted of the lesser offense of cohabitating as an unmarried same-race couple. Ellis and Bishop appealed their convictions, however, and the Alabama Supreme Court noted that the strangely mild punishment was likely due to the lower court’s belief that the state law violated the Civil Rights Act of 1866. The court declared that this interpretation was mistaken, as the Civil Rights Act did not “prohibit the making of race and color a constituent of an offense, provided it does not lead to a discrimination in punishment.” In keeping with this understanding, the court not only affirmed the convictions of Ellis and Bishop, but remanded the case in order that the harsher prison sentence be imposed in lieu of the fines to which the pair were previously sentenced.

Shortly after Ellis was decided, elections for the Alabama Supreme Court were held. The elections led to a Republican dominated Supreme Court, and it was this court that heard Burns v. State, decided in 1872. The case was named after James Burns, a justice of the peace who was convicted of officiating at a marriage of an interracial couple. The newly Republican-controlled Alabama Supreme Court hearing his appeal directly reversed course and overturned Ellis.

The court’s reasoning in Burns flatly contradicted the previous holding that there was “no conflict” between the prohibition of interracial marriage and the Civil Rights Act of 1866. This time, the Burns court focused on marriage as a contract that the Civil Rights Act guaranteed former slaves the right to form. In fact, the court described marriage as purely a contractual relationship, stating that “[m]arriage is a civil contract, and in that character alone is dealt with by the municipal law.” As such, the Civil Rights Act established the right of freed blacks “to make and enforce contracts, amongst which is that of marriage . . . .” The understanding of marriage as a contractual right guaranteed by federal law did not last long. Political response was swift and decisive, reaffirming that interracial marriage was a crime in Alabama in section 4189 of the Alabama Code of 1876. The 1874 election resulted in three Democrats replacing the three Republicans sitting on the Alabama Supreme Court.

By 1877, the reversal was complete. That year, the Alabama Supreme Court decided Green v. State, affirming the conviction of an interracial couple convicted of violating section 4189 of the Alabama Code of 1876 by holding a marriage ceremony in July of 1876. The court’s opinion became a testament against the contractual nature of marriage cited frequently by later courts. The subject was addressed directly:

[i]s marriage, as the argument objected to assumes, nothing more than a civil contract? Is it, “in that character alone,” dealt with by the municipal law? Doubtless, it is by a contract—that is, by the agreement of the parties—that they enter into the state of marriage. But, as was said by the Supreme Court of Delaware, it is a contract “of a peculiar character and subject to peculiar principles.”

The court proceeded to then cite a number of authorities supporting its overall contention that marriage was “the most interesting and

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21. Wallenstein, supra note 17, at 71-72.
22. Id. at 72.
23. Id. at 72-73.
25. Id. at 527.
26. Wallenstein, supra note 17, at 73.
27. Id.
28. Id.; Burns v. State, 48 Ala. 195 (1872); Burns, 48 Ala. at 196, 199.
29. Id. at 197-98.
30. See id.
31. Id.
32. Id.
33. Id. at 198.
34. Wallenstein, supra note 17, at 75.
35. Id. at 71.
36. Green v. State, 58 Ala. 190 (1877)
37. Id. at 193.
important” institution of society, finishing, and “[w]ho can estimate the evil of introducing into their most intimate relations, elements so heterogeneous that they must naturally cause discord, shame, disruption of family circles and estrangement of kindred?” With the implicit reversal of Ellis, statutes prohibiting interracial marriage would remain undisturbed among Alabama’s laws for decades.

2. Louisiana

The second case which held that marriage was a civil contract and thus subject to the Civil Rights Act of 1866 was not a direct challenge to a prohibition of interracial marriage; rather, it arose from a dispute over inheritances. E.C. Hart lived with and fathered children by Cornelia Hart, a black woman. In 1867, E.C. and Cornelia were married in Shreveport, and E.C. Hart died eighteen months later. Both Cornelia, as widow and mother to his children, and Theodore Hart, representing several white relatives, claimed a right to inherit E.C. Hart’s estate.

The question of inheritance turned on whether the marriage between E.C. and Cornelia was legal. If it was a marriage recognized by the state of Louisiana, then Cornelia was clearly the next of kin and entitled to the estate. At the time of the ceremony between E.C. and Cornelia, however, Louisiana state law prohibited interracial marriage, which would have denied Cornelia rights as widow and her children rights as illegitimate heirs. Her attorneys argued that the Civil Rights Act invalidated the Louisiana law, while the representatives of Theodore Hart argued that the Louisiana state law was effectual and thus the “pretended marriage” between “a white person and a person of color” was “null as having been entered into in violation of a prohibitory law.”

Cornelia’s attorneys also argued that the Fourteenth Amendment trumped the Louisiana prohibition, but the Amendment was ratified in 1868, after the challenged marriage took place. Thus, who inherited E.C. Hart’s estate turned on whether the Civil Rights Act invalidated the Louisiana state law.

The Louisiana State Supreme Court held that it did. Judge Taliferro’s opinion for the court first held, finding against Theodore Hart’s argument, that there was “no reason to doubt the constitutionality” of the Civil Rights Act. The court then found that in Louisiana, “[o]ur law considers marriage in no other view than as a civil contract.” The opinion then established the right of E.C. and Cornelia’s children to inherit his estate, as their parents had married after their birth and E.C. had taken numerous public steps to recognize them as his children.

As in the case of Alabama, the decision interpreting marriage as a civil contract regulated by the Civil Rights Act was issued by a court dominated by Republicans. In Louisiana, however, the domination was more tenuous—the Hart decision was a slim majority of 3 to 2. And while the decision took longer to overturn than in Alabama, the Louisiana legislature did pass a renewed prohibition of interracial marriage in 1894 that was not successfully challenged in court.

B. Why the Contractual Argument Failed

The two examples of successful challenges to prohibitions of interracial marriage were determined by a court willing to regard marriage, or at least governmental regulation of marriage, as purely contractual. In contrast, the vastly greater number of examples in which challenges to interracial marriage bans based in the Civil Rights Act were unsuccessful focused on the
elements of marriage above and beyond mere contract: religious, societal, and public institutions.

1. Contracts as Concerning Property

Over a dozen suits making claims to the right to contract were unsuccessful, virtually all stressing the importance of marriage to society, emphasizing that such a fundamental relationship could not be governed as merely a contract. Many opinions quoted Dartmouth College v. Woodward, in which Chief Justice Marshall mentioned in dicta that article I, section 10 of the Constitution (declaring that “[n]o State shall [make] any “Law impairing the Obligation of Contracts”) was only understood to apply to contracts “which respect property, or some object of value . . . . It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces.” The less that a marriage contract seemed to deal with the mundane details of assets, community property, and legal rights against a spouse, therefore, the less likely that any mention of “contract” in a statute—such as the 1866 Civil Rights Act—was interpreted as including marriage.

2. Marriage as a Public Institution

Many spoke of marriage as a public institution—“more than a civil contract; it is a relation, an institution.” A Georgia case noted that while many thought of marriage “as a contract in the common meaning of the term,” and acknowledged that “it has, in a limited sense, properties which assimilate it to an ordinary contract,” marriage was nonetheless “some-thing more; it is an institution of public concernment, created and governed by the public will of the state or nation.” The Supreme Court of Arkansas also asserted that marriage was not “only a civil contract,” but was “a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state— the police power.” In addition, in Green v. Alabama, the Alabama Supreme Court approvingly cited a Kentucky case that held:

[a]s every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State . . . . Therefore, marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts.

These descriptions of marriage were in line with, and sometimes cited, a Supreme Court opinion issued in 1888. The case itself, Maynard v. Hill, did not deal with interracial marriage, but instead with a question of whether a divorce granted by the territorial legislature of Oregon was valid. The language used to explain why the legislative divorce was valid is very similar to the descriptions of marriage appearing in later interracial marriage cases. In Maynard, Justice Field’s majority opinion stated that marriage “is an institution, in the maintenance of which in its purity the public is deeply inter-
ested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.\textsuperscript{66} Marriage is described as "more than a contract . . . . It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."\textsuperscript{67}

Generally, cases discussing the significance of marriage as a public institution acknowledge the contractual elements of marriage, but dismiss them as superficial descriptions with no real force. In these cases, the significance of marriage is stressed repeatedly as a building block of society. The idea is thus reminiscent of religious or civic analogies of marriage as microcosms of the power relationship between God and man, or the State and its citizens. When read as a reproduction of the greater re-

3. Marriage as Religious

Other courts have stressed marriage as a component of civilization with an intensely moral dimension and effect upon society. The Supreme Court of Virginia argued that "[t]he right to regulate the institution of marriage . . . and to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality, and social order demand, has been exercised by all civilized governments in all ages of the world."\textsuperscript{68} Many courts also focused upon the religious foundation of marriage, stating that marriage "is a public institution established by God himself," and is "God-given, civilizing, and Christianizing."\textsuperscript{69} The Supreme Court of Tennessee declared that marriage "is an institution of God, and a very honorable state."\textsuperscript{70} and continued to make a Biblical argument against interracial marriage, quoting Genesis to illustrate that "[t]he discrimination as to race and

people, in this most important institution, has been observed, even from the days of the patriarchs."\textsuperscript{71}

Conceiving of marriage as a religious institution was doubly effective, because not only did the argument deny marriage as a purely contractual relation, but it also reinforced arguments for segregation based on religious grounds. For example, in\textit{Scott v. Georgia}, the State noted that

[b]efore the laws, the Code of Georgia makes all citizens equal, without regard to race or color. But it does not create, nor does any law of the State attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it.\textsuperscript{72}

In\textit{Lonas v. Tennessee}, the Supreme Court of Tennessee argued that bans of interracial marriage were "impos[ing] such restraints upon the relation as the laws of God" require.\textsuperscript{73} The court then cited Genesis as an illustration of the laws of God prohibiting interracial marriage.\textsuperscript{74}

C. Interracial Marriage Bans as Status Quo

The language in\textit{Maynard} is especially apposite to an understanding of marriage as a contract, because the only case which challenged a prohibition of interracial marriage to reach the United States Supreme Court did not raise the contractual argument.\textsuperscript{75}\textit{Pace v. Alabama}, decided five years before\textit{Maynard}, was an extremely short decision, challenging prohibitions grounded in the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{76} The Court held that because "[t]he punishment of each offending person, whether white or black, is the same," the law applied equally to both whites and blacks and thus could not be found to violate equal protection of the laws.\textsuperscript{77} The law also did

\begin{itemize}
  \item \textsuperscript{66} \textit{Maynard}, 125 U.S. at 211.
  \item \textsuperscript{67} \textit{Id.} at 213 (quoting Wade v. Kalbfeisch, 58 N.Y. 282, 284 (1874)).
  \item \textsuperscript{68} Kinney v. Commonwealth, 71 Va. 858, 862 (1878).
  \item \textsuperscript{69} State v. Gibson, 36 Ind. 389, 402-03 (1871).
  \item \textsuperscript{70} Lonas v. State, 50 Tenn. 287, 308 (1871).
  \item \textsuperscript{71} \textit{Id.} at 310.
  \item \textsuperscript{72} Pace v. Alabama, 106 U.S. 583 (1883).
  \item \textsuperscript{73} \textit{Id.} at 585 (focusing on equal protection argument).
  \item \textsuperscript{74} \textit{Id.} (citing Genesis 24:3-4 ("'[t]hou shalt not,' said Abraham, 'take a wife unto my son the daughters of the Canaanites, among whom I dwell; but thou shalt go unto my country, and to my kindred, and take a wife unto my son Isaac'')).
  \item \textsuperscript{75} See \textit{Pace v. Alabama}, 106 U.S. 583 (1883).
  \item \textsuperscript{76} \textit{Id.} at 585 (focusing on equal protection argument).
  \item \textsuperscript{77} \textit{Id.}
II. ALL CHALLENGES TO INTERRACIAL MARRIAGE CAST WITHIN A RACIAL WORLDVIEW

All challenges to interracial marriage, whether on contractual grounds or otherwise, were eventually rejected until the twentieth century. Even the infamous Plessy v. Ferguson decision referenced the contract argument only to dismiss it without analysis, finding that: "[l]aws forbidding the intermarriage of the two races, may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State." 80

III. HOW MARRIAGE BECAME FUNDAMENTAL

A. How Racism Helped Codify Marriage as Fundamental

In some respects, the resistance to interracial marriage and ideation of marriage as a fundamental moral component of a civilized society was a self-perpetuating cycle. As black Americans sought to become equal members of American society, many whites increasingly tried to codify lines between the races through prohibitions of interracial marriage. 81 As such laws were challenged, the rhetoric used to defend them increasingly emphasized the fundamental importance of marriage, both because such arguments seemingly refuted contractual legal arguments for allowing interracial marriage and because championing marriage as a fundamental right under attack by blacks was an extremely effective political argument. Given the still-overwhelmingly racist status quo, the more fundamental the status of marriage, the more of a threat to social order interracial marriage presented, and the more force describing the peril of interracial marriage had in political debate. Thus, the political currency helped develop an understanding of the marriage relationship as particularly fundamental and unique to American society.

In particular, the menace of black men marrying white women became the rallying cry of outraged white southerners. For example, in Bowlin v. Kentucky, the question of who could give testimony in court became a paean to the danger of interracial marriages. 82 The case was a challenge to a Kentucky statute that prohibited African-Americans from testifying as witnesses in trials of white people, although one African-American could testify against another African-American. 83 The Kentucky Court of Appeals held that the Civil Rights Act of 1866 could not be meant to overrule the Kentucky statute, because "on this theory ... the unqualified 'same power to make and enforce contracts' attempted to be given by that bill to black citizens would legalize intermarriages between the two races deteriorating to the Caucasian blood, and destructive of the social and legislative decorum of States." 84

Interracial marriage became the capstone of "social equality" between the races, which opponents of civil rights insisted was not and could not be mandated by law. In contrast to civil or political rights, which the Civil Rights Act and Civil War Amendments did fundamentally affect, social equality was seen as the refuge of private action. 85 Every possible incursion upon the superiority of white America was characterized by opponents as presenting men with "the degradation to our manhood" that mixed-race grandchildren born to their daughters would embody. 86 An admittedly extreme example of white superiority was the Georgia constitutional convention delegate who insisted that not including adequate debt protection for whites in the 1877 state constitution would "sooner or later lead" to "the amalgamation of

78. Id.
79. The first successful challenge was Perez v. Sharp, 198 P.2d 17 (Cal. 1948).
80. 163 U.S. 537, 545 (1896) (citing State v. Gibson, 36 Ind. 389 (1871)).
81. Van Tassel, supra note 13, at 896 ("Antimiscegenation rules, long a small part of the larger machinery of Southern slave and caste law (applying as they did to free people as well as slaves), were revived after the war, given new, independent emphasis, and put in service as a symbol of White resistance to 'social equality' with former slaves.").
82. 65 Ky. 5 (1867).
83. Id. at 6.
84. Id. at 9.
the races."\textsuperscript{87} Whether such fears were genuine or were voiced as a mere "political smokescreen,"\textsuperscript{88} the choice of a white person to marry a black person was understood as fundamentally upsetting the accepted social order rather than as a simple matter of contractual relationships.

B. The Modern Understanding of Marriage as a Legal Right

When prohibitions of interracial marriage were eventually struck down by the United States Supreme Court, the justification for the shift derived in an important sense from the previous instances in which the Court had acknowledged marriage as a fundamental right. Beginning in the 1870s, the Supreme Court began to interpret the Fourteenth Amendment's guarantee to due process as encompassing "substantive guarantees."\textsuperscript{89} Initially, the focus of such substantive rights was upon a liberty to contract, but in the early twentieth century, the conception expanded to include sexuality and marriage. In \textit{Meyer v. Nebraska}, the Court noted that "[w]hile this court has not attempted to define with exactness the liberty" guaranteed by the Fourteenth Amendment, "it denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry."\textsuperscript{90} Along similar lines, in \textit{Skinner v. Oklahoma}, when striking down a policy of sterilizing repeat criminal offenders, the Court declared, "[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."\textsuperscript{91}

In \textit{Loving v. Virginia}, the 1967 case that struck down the sixteen remaining state prohibitions of interracial marriage, the United States Supreme Court cited \textit{Meyer} and \textit{Skinner} to underscore the fact that Virginia's power to regulate marriages within the state was still circumscribed by the commands of the Fourteenth Amendment.\textsuperscript{92} The Court concluded that such prohibitions violated both the Equal Protection\textsuperscript{93} and Due Process\textsuperscript{94} Clauses of the Fourteenth Amendment. Subsequent Supreme Court cases speaking to marriage rights have varied in identifying marriage as a fundamental right rooted in equal protection or due process,\textsuperscript{95} which could potentially be relevant if a state were to ban marriages entirely. However, whether the primary identification is with equal protection or substantive due process, the courts clearly understood marriage to be much more than a mere contractual agreement.

C. The Significance of a Fundamental Right

This legal grounding of marriage as solely within the realm of substantive due process as a fundamental right was, at minimum, assisted by the social significance with which interracial marriage was freighted. Marriage was not thought of as a purely private contractual agreement in the nineteenth century, but the initial wave of challenges to prohibitions of interracial marriage that were grounded in the right to contract indicate that the contractual element was recognized even then.\textsuperscript{96} The social significance of allowing whites and blacks to marry, and the change in social status that such official relationships would signify, completely overwhelmed the more technical legal argument de-

87. Van Tassel, \textit{supra} note 13, at 905 (citations omitted).
90. 262 U.S. 390, 399 (1923).
92. \textit{Loving}, 388 U.S. at 1, 6-7.
93. \textit{Id.} at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").
94. \textit{Id.} ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").
95. Cass R. Sunstein, \textit{The Right to Marry}, 26 CARDOZO L. REV. 2081, 2089 (2005). The author stated that: [v]ery oddly, the Turner Court did not specify whether the right to marry is rooted in substantive due process (as Loving suggested) or in the fundamental rights branch of equal protection doctrine (the most sensible reading of Zablocki). It would be fair to read the Court as treating marriage as akin to other privacy rights, in a way that suggests that substantive due process is involved. But for purposes of reaching its conclusion, the Court did not have to choose between the two possible sources of its decision.
96. \textit{Gilbson}, 36 Ind. at 402 ("in this State marriage is treated as a civil contract, but it is more than a mere civil contract").
void of marriage’s status characteristics. Similarly, the controversy surrounding legalization of same-sex marriage today is due in large part to the social significance of allowing homosexuals to marry. Official recognition of homosexual relationships by the state is interpreted by both supporters and opponents as a signal that gay Americans would be accepted in the mainstream.

For this reason, it seems clear that the legal battle over allowing same-sex partners to marry must be argued within the framework of marriage as a fundamental right, grounded in the substance of the Fourteenth Amendment. The contractual argument advanced for striking down prohibitions of interracial marriage failed, because marriage is understood to be much more than simply a contract. Thus contractual arguments for marriage of same-sex partners will also fail.

Despite this understanding of marriage as a fundamental right, however, the contractual elements of marriage have become much more widely accepted and implemented over the last few decades. In the next section, I discuss how far marriage has moved towards the realm of contract rather than fundamental status.

IV. THE INCREASED ACCEPTANCE AND USE OF THE CONTRACTUAL ASPECTS OF THE MARRIAGE RELATIONSHIP

For hundreds of years, the Judeo-Christian concept of marriage was regarded as an irreversible bond. Marriage was not an agreement between two people; it was an institution created by God, regulated by the state, and entirely out of the hands of the two individuals choosing to join in it. As with most of family law, however, the provision of a “one size fits all” state-mandated form of marriage has steadily been eroded in favor of “private norm creation and private decision making.”

The first move towards a contractual conception of marriage was in the nineteenth century, possibly inspiring some of the litigation challenging prohibitions of interracial marriage. Seeds of a “contractarian model” of marriage have been described as the product of the Enlightenment, the general move to separate Church from state, and “post-Revolutionary America’s emphasis on individual rights.” An individualized negotiation of the marriage contract was also promoted by early feminists, such as Elizabeth Cady Stanton, as allowing women more freedom within a traditionally oppressive legal regime.

The twentieth century, however, has seen these seeds sprout into full flowers. The understanding both of marriage itself and of relationships resembling, but not becoming, marriage has changed drastically, thus contributing to a modern conception of marriage weighted much more towards the contractual side.

A. Diminished Role of Religion

One of the most striking changes in the understanding of marriage is the vastly diminished role of religion. For many if not most Americans, there is still a religious element to marriage, and certainly religious language is invoked frequently in discussions of what marriage is or should be. However, a Christian defense of marriage cannot be invoked in the courtrooms of secular, modern America. The more flexible understanding of marriage untethered from religious doctrines has been explicitly recognized as no longer necessarily prohibiting marriage “between any two partners.”

97. Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. LEGAL STUD. 869, 875 (1994) [hereinafter Brinig, Marriage].
98. Id.
100. Witte, supra note 5, at 196.
102. See Should Gay Marriage Be Legal?, U.S. NEWS & WORLD REPORT, June 3, 1996, at 31-32 (“Marriage as an institution is already threatened by divorce and by the erosion of religion and family values. If gay couples were allowed to marry, it would set a bad example for children and could spell the downfall of one of the cornerstones of our society”).
103. Id. (“Separation of Church and State is a fundamental democratic principle”).
104. Jennie Holman Blake, Book Note, The History and Evolution of Marriage From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition, 1999 B.Y.U. L. REV. 847, 857 (1999) (reviewing Witte, supra note 5); see also Witte, supra note 5, at 195 (“Today, a contractual view of marriage has come to dominate American law, lore, and life—largely unbuffed by complementary spiritual, social, or natural perspectives, and largely unreceptive to much of a role for the church, state, or broader community”).
B. Embrace of Additions to the Marriage Contract

In practical terms, marriage now allows for a significant degree of individualized negotiation between spouses to create a personalized version of the marriage agreement. Obviously the broad parameters of marriage are still set out by the state, but the flexibility afforded by contracts and agreements added on top of the traditional marriage contract is a significant departure from the older concept of marriage as a single rigid form mandated by religious precepts.

1. Prenuptial Agreements

One supra-contract added to marriage is a prenuptial agreement. Until the 1970s, prenuptial agreements were rarely accepted or enforced, as courts generally held them to be against public policy, both for promoting or encouraging divorce, and simply because prenuptial agreements changed the state-dictated terms of the marriage contract. Interestingly, some articulations as to why individualized agreements that changed the marriage contract were unenforceable still used the language of contractual analysis, holding that added agreements lacked consideration. The now-universal acceptance of prenuptial agreements indicates not only the changed attitudes towards divorce, but also an acceptance of marriage as allowing for individual customization.

2. Divorce

The toleration of divorce as a normal and licit occurrence, and the embrace of no-fault divorce, further indicates a move towards a contract-based understanding of marriage. Rather than an unbreakable vow, the relatively easy dissolution of marriage and the legal negotiation of alimony and child support agreements that often accompany such dissolutions resemble the negotiations surrounding termination of a generic long-term contract. This contract-like dissolution has become the target of critics suggesting that divorce has become too easy, and that because marriage can be dissolved at the whim of the partners without fault, blame, or attendant penalties, marriage vows have become unenforceable.

In the limited history of actual legal enforcement of the marriage vows, the enforcement was grounded in a contractual understanding. One way to understand causes of action for divorce is as analogous to a breach of contract – for example, a husband's failure to support his wife financially was once seen as not simply a moral failing of his status as provider, but a failure to fulfill the terms of his marriage contract. As such, nonsupport was codified in many states as grounds for the wife to seek divorce. Support as a duty applicable only to husbands is no longer recognized, as the feminist movement has worked to ensure that women have the right and ability to support themselves, but some interpretations of marriage contracts as legally binding documents continue to develop. For example, some courts have viewed components of religious contracts, such as the Jewish ketubah, as an agreement with legal obligations and consequences.

C. Expanding Legal Recognition of Partnerships Beyond the Marriage Vows

The growing entry of contractual analysis into the marriage relationship has been mirrored by an expansion of the relationships and legal rights of marriage into non-marital relationships. Benefits and, in some cases, obligations of marriage have been extended to apply to unmarried couples and families in a variety of contexts. Changing societal attitudes regarding premarital sexual activity and childbearing have had a significant effect on this process, as marriage is no longer "the only legitimate arena for intimacy, sex and procreation."
1. Nonmarital Partnership Obligations: Marvin v. Marvin

One of the most telling extensions of marital obligations to a nonmarital relationship occurred in the case Marvin v. Marvin. Michelle Marvin, formerly Triola, alleged that she and the actor Lee Marvin had orally agreed to live together, present themselves to others as husband and wife, that she would perform housework in lieu of her previous career, and that Lee Marvin would financially support her for the rest of her life—in short, that they would embody the stereotypical marriage relationship of breadwinning husband and domestic housewife without becoming legally married. After several years, the two ended their relationship and Mr. Marvin refused to support her, at which point she sued for the same property division and support rights that she would have received had they been married.

The California Supreme Court explicitly stated that it would not treat the two exactly as though they were married, but nevertheless treated the relationship as possessing legal obligations of some degree. The court took pains to emphasize the unique significance of marriage, “point[ing] out that the structure of society itself largely depends upon the institution of marriage,” but the decision was groundbreaking for nonmarital partners. The opinion minimizes the significance of its holding, stating that “[w]e need not treat nonmarital partners as putatively married persons . . . we need to treat them only as we do any other unmarried persons.” This seemingly innocuous statement, however, was a change from the previous legal rejection of nonmarital relationships. Agreements based on a consideration of “illicit cohabitation” between two unmarried partners of any kind had been considered void and unenforceable due to concerns of public policy. The sexual relationship between two unmarried persons, that is, meant that courts were unwilling to treat them as “any other unmarried persons.” The court in Marvin altered the legal landscape by holding that the relationship and agreements between nonmarital partners could be understood as “an implied contract, agreement of partnership or joint venture,” “some other tacit understanding between the parties,” or could have applied “the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts.” The only nod to the previous non-recognition of unmarried partners was a note that contracts or agreements that were “explicitly founded on the consideration of meretricious sexual services” would not be enforced by the courts. Not all states have followed California’s example, and the California court did not ultimately grant Michelle Marvin the full benefits she would have been entitled to had she and Lee Marvin been legally married. But Marvin v. Marvin ushered in a new level of legal recognition of non-marital partnerships.

D. The Limits of Contract

Obviously, marriage still occupies a special status not only in terms of societal significance, but also in the eyes of the law.


For example, in Michael H. v. Gerald D., a 1989 custody case, the United States Supreme Court held that a marital relationship could trump a biological father’s claim for visitation rights. According to California law, a child born to a married man and woman who are living together is presumed to be the child of the husband unless one of the spouses objects. This was challenged by Michael H., a man who had engaged in an adulterous affair with his neighbor Carole D., married to Gerald D. Michael and Carole’s affair produced a child, who the two confirmed was Michael’s daughter with a blood test when the child was six months

114. Id. at 110.
115. Id. at 110-11.
116. Id. at 122.
117. Id.
118. Marvin, 557 P.2d at 121.
120. Marvin, 557 P.2d at 121.
121. Id. at 109.
122. Id. at 110.
123. Id. at 122-23 (granting Michelle Marvin limited recovery).
126. Id. at 117-18.
127. Id. at 113.
When Michael and Carole’s affair ended, Michael filed suit in California asking for visitation rights. Despite paternity test results recognized and acknowledged by the courts showing that the child was Michael’s daughter, when the case was appealed to the Supreme Court, a majority of the Justices held that California’s law, which barred the biological father of a child from having any visitation rights with her, was perfectly acceptable. Justice Scalia’s opinion for the Court held that “our traditions have protected the marital family . . . against the sort of claim Michael asserts.”

2. The Situation Today: Marriage Is No Longer the Only Option

Marriage has therefore not lost all the special legal privileges concomitant with its historical status. It has, however, lost its monopoly as the only partnership recognized by the state. Sexual activity and procreation are now commonly accepted and given legal protection outside of the marriage vows, and the legal system recognizes limited aspects of non-marital partnerships.

V. APPLYING THE CONTRACTUAL ARGUMENT TO SAME-SEX PARTNERSHIPS

A. Why Divorce the Contractual Element?

A contract-based argument for the right to marry will likely fail today just as it failed in the early cases challenging prohibitions of interracial marriage. Marriage’s contractual elements are recognized, more now than ever in the nation’s legal history, but marriage is still conceived of as a “contract plus,” an agreement between two individuals that can be customized to a limited extent, but with the added freight of societal expectation, religious significance, and social history. If a relationship can be created, however, that is just the contractual elements, removing the plus from the equation, a legal argument rested purely in the right to contract would likely be much more successful. The possibility of an expansion of legal rights for nonmarital partnerships thus presents an interesting, if partial, potential solution to the question of same-sex marriage.

Focusing on the contractual characteristics of the marriage partnership without the added social significance that makes marriage a fundamental right has obvious flaws as an activist strategy. Concentrating on domestic partnerships rather than marriage per se does not address the most contentious elements of the marriage discussion head-on. Same-sex marriage is an issue of importance for advocates of homosexual rights, that is, because it is inseparable from related notions of status and societal acceptance. The very characteristics that suggest the viability of a contract-based argument for domestic partnerships, therefore, are for many the reason why same-sex marriage is important: more than the practical benefits of domestic partnerships, the status as societally-recognized, condoned, and celebrated partnerships is the true significance of same-sex marriage. To the extent that such acceptance is the goal of working towards same-sex marriage, therefore, the contract-based approach is inadequate.

There are two reasons, however, why targeting the intermediate step of domestic partnerships is useful to the ultimate goal of same-sex marriage.

1. Tangible Benefits

First, and most simply, there are numerous legal rights attendant to marriage that can also be achieved through domestic partnership. The most recent assessment by the United States General Accounting Office found that there are a total of 1,138 federal statutory provisions alone in which marriage is a factor—generally a determinative one—in eligibility. To the extent that marriage is desirable because of the legal

128. Id. at 113-14.
129. Id. at 131-32.
130. Id. at 124.
131. Michael H., 491 U.S. at 124
133. See, e.g., Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding that agreements between non-marital partners could be understood as an implied contract).
134. See id.
gal rights it confers upon spouses, therefore, domestic partnerships that confer some or all of the same rights are also desirable.

2. Creating a Spectrum

The second reason why domestic partnerships are pragmatically useful is more abstract and turns upon how society's understanding of marriage continues to change. One facet of the evolving understanding of marriage is the expansion of the legal recognition of partnerships, such as acknowledging unmarried partners under the law.\textsuperscript{136} This expanding recognition can also include establishing several versions of a marriage relationship, offering a spectrum of legal partnership options for couples intending to formalize their relationship under the law.

There are several possible forms that this further expansion could take. Some have proposed a move to a pure contract model, in which the state has no role in licensing or approving marital relationships apart from the general law of contracts.\textsuperscript{137} Such partnerships would be governed exclusively by private contracts negotiated by the individuals involved.\textsuperscript{138} Margaret Brinig conceptualizes marriage as a covenant; an “especially solemn type of contract” that is meant to be of “infinite duration.”\textsuperscript{139} Brinig's model includes the possibility of some individualized negotiation and modification to a universal base structure.\textsuperscript{140} In contrast, the “covenant marriages” now available in Arkansas, Arizona, and Louisiana give engaged couples the choice to enter into a marriage that cannot be terminated by a no-fault divorce.\textsuperscript{141} And a handful of states have made domestic partnerships available to same-sex partners.\textsuperscript{142}

William Eskridge, among others, has argued that allowing a menu of options as to the form a legal partnership takes is one step in a sedimentary progression towards allowing same-sex marriage.\textsuperscript{143} His focus is primarily on the social aspect of the progression, seeing legitimization of same-sex marriage as the ultimate action in a path that moved through decriminalization of sodomy and prohibiting discrimination against homosexuals.\textsuperscript{144}

Allowing domestic partnership as one choice among a spectrum of possible models – from partners living together but not entering into any formal arrangement to covenant marriages that cannot be terminated with no-fault divorce – advances the eventual goal of same-sex marriage as it normalizes untraditional relationships. If the path towards same-sex marriage is conceptualized as a series of small victories for the gay rights movement, starting with the decriminalization of sodomy, acceptance of domestic partnerships is thus one more incremental advance rather than a distraction from the ultimate goal.

B. How the Argument Changes by Focusing on Domestic Partnerships

The arguments for extending rights such as marriage to homosexuals are generally grounded in the Fourteenth Amendment. An asserted right can be found in either the Due Process Clause, arguing that a given right is fundamental and cannot be infringed without triggering strict scrutiny by the courts, or the Equal Protection Clause, claiming that homosexuals are being denied equal protection of the law. Each of these techniques has significant weaknesses, particularly in the context of the issue of marriage.

1. Due Process

One argument rooted in the Fourteenth Amendment turns on understanding marriage to be a fundamental right. If a state law affects a fundamental right, it is subject to more searching scrutiny than a challenge to a more innocuous regulation. The question in the context of same-sex marriage thus becomes whether marriage is fundamental.

\begin{itemize}
\item \textsuperscript{136} See generally Marvin, 557 P.2d 106 (discussing contract rights of unmarried partners).
\item \textsuperscript{137} Bix, supra note 105, at 167.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Brinig, Status, supra note 108, at 1596, 1598.
\item \textsuperscript{140} See id. at 1596 (noting that the “concept of covenant always misplaces a contract or law and economics analysis”).
\item \textsuperscript{142} See, e.g., Should Gay Marriage Be Legal?, supra note 102.
\item \textsuperscript{143} WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121, 124 (2001).
\item \textsuperscript{144} Id. at 115.
\end{itemize}
It would seem that this would be a relatively easy answer: the courts have found in previous cases reviewed supra that the right to marry is indeed a fundamental right. Yet questions of what rights are fundamental often become problems of definition: how a given judge or attorney characterizes the right at stake virtually decides whether it is fundamental or not. Same-sex marriage is not framed by its opponents as dealing with the right to marry. It is described as the right to marry someone of the same gender.

A similar problem was also seen in the example of the sexual conduct between two persons of the same gender. The shift in rights definition from Bowers v. Hardwick to Lawrence v. Texas, two Supreme Court cases upholding and then striking down state bans of sodomy, demonstrate the importance of how a right is characterized and how fluid that characterization can be. In Bowers, the 1986 case that upheld a law making sodomy a criminal offense, the right at issue was defined extremely narrowly and was specifically attendant to homosexuality.\(^{145}\) Justice White’s opinion for the Court described the case as turning upon “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”\(^{146}\) In contrast, Lawrence, the 2003 case that overturned Bowers, the issue was redrawn as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment . . .”\(^{147}\) Whether a due process-based argument for same-sex marriage is found to be persuasive, therefore, tends to turn on whether one conceives of the argument as a fundamental right to marriage in the abstract or a fundamental right for homosexuals to engage in marriage to a person of their same gender. This is particularly effective with regard to marriage, as one of the most common arguments advanced by those opposed to gay marriage is that marriage itself is intrinsically a union between one man and one woman.\(^{148}\) The battle over gay marriage therefore becomes a battle over the definition of marriage, and the history of marriage as a heterosexual institution is thus a significant obstacle to reform.

2. Equal Protection

The other possible argument from the Fourteenth Amendment rises out of the Equal Protection Clause, claiming that preventing gay couples from marrying denies them equal protection of the laws. The largest problem with this strategy is that because homosexuals are not recognized as a discrete and insular minority with the characteristics justifying characterization as a suspect class, a charge that a law does not treat homosexuals equally is subject only to rational basis review, the least rigorous standard of constitutional scrutiny.\(^{149}\)

There are two ways to deal with the lower scrutiny. One is to recast the issue as involving differential treatment under the law of a group that does trigger more rigorous scrutiny. One novel and influential argument utilizing this technique draws analogy from the interracial marriage debate: just as the Supreme Court recognized in Loving that prohibitions of interracial marriage were racial classifications despite applying to all races equally, the argument runs that courts should recognize that prohibiting people of the same gender from marrying each other is a classification based on sex, and thus deserving of intermediate judicial scrutiny.\(^{150}\)

3. Why Contractual Arguments Revitalize Rational Basis Review

Occasionally, however, rational basis review has resulted in the striking down of a law

146. Id. at 190.
147. Lawrence, 539 U.S. at 564.
148. See Press Release, White House Office of the Press Secretary, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), available at http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html. This press release stated: “[t]he union of a man and woman is the most enduring human institution, honoring – honored and encouraged in all cultures and by every religious faith. . . . Today I call upon the Congress to promptly pass, and to send to the states for ratification, an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife.
150. See, e.g., Koppelman, The Miscegenation Analogy, supra note 6.
that disadvantages homosexuals as a class. The most well known example is *Romer v. Evans*. In *Romer*, the United States Supreme Court struck down Amendment II, a Colorado state constitutional amendment prohibiting municipal or state anti-discrimination statutes prohibiting discrimination on the basis of sexual orientation on equal protection grounds. Despite reaffirming that homosexuals are not a discrete and insular minority that triggers heightened constitutional scrutiny under a suspect classification analysis, the Court held that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Furthermore, the amendment failed rational basis review because it "seen[ed] inexplicable by anything but animus toward the class it affect[ed]."

Some advocates of same-sex marriage have theorized that a rational basis review of laws prohibiting same-sex marriage could find that such laws violate the Equal Protection Clause, even under the most deferential examination. In the context of marriage, with all the social and religious freight that the concept still carries today, this argument is unlikely to be successful. A rational basis review of statutes or state constitutional amendments limiting marriage to one man and one woman under the Equal Protection Clause will almost certainly uphold the restriction, since the justification can be advanced that the government’s interest is not animus toward homosexuals but rather the protection of a traditional institution long “defined” as existing between a man and a woman.

Such review of a state constitutional amendment singling out homosexuals as not able to create domestic partnerships or reproduce any of the contractual elements of marriage, however, is similar to *Romer’s Amendment II in that it is difficult to explain such prohibitions except on the grounds of animus towards homosexuals.*

The key to the similarity to Amendment II is that most state constitutional amendments go beyond simply prohibiting same-sex marriage to also banning any legal recognition of same-sex relationships. For example, the Arkansas amendment bans “[l]egal status for unmarried persons which is identical or substantially similar to marital status.” Georgia’s amendment states that “[n]o union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage.”

A question on Kentucky’s ballot asked the voter whether he agreed “that a legal status identical to or similar to marriage for unmarried individuals shall not be valid or recognized.” And Utah’s amendment provides that “[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”

Such further restrictions have two far-reaching effects. First, again along the lines of Amendment II, such state constitutional amendments take away the ability of voters to pass statutes allowing unmarried partners any legal recognition. In some states, such as Georgia, the state amendment specifies same-sex partners only. In others, any unmarried partnership is disadvantaged, although some scholars have suggested that such amendments can be read narrowly to apply only to same-sex partners. The class, either of unmarried partners generally or same-sex partners specifically, is placed at a particular disadvantage, as such partners cannot be given legal rights with respect to each other through statute.

Second, many of the state amendments would prohibit even private contracts and agreements granting same-sex partners legal rights. Some of these contracts are private,
individualized agreements between the partners intended to reproduce some of the rights of marriage. Gay rights organizations publish guides to legal planning that detail how to establish as many of the marriage rights as possible. Other such recognitions are benefits extended by employers to same-sex partners, including benefits such as family sick leave, bereavement leave, and sometimes even life or health insurance. Extending health or life insurance to same-sex partners is particularly vulnerable to conflict with amendments banning legal recognition of same-sex partners that is similar to married partners, because such partners generally must establish their domestic partnership in some official way in order to qualify for the insurance. Finally, extensions of rights or programs to same-sex partners, such as granting a restraining order against a violent same-sex partner, may be curtailed.

Such extreme restrictions raise the same constitutional problems as Amendment II. Taking away the ability of same-sex partners to pass statutes or policies respecting any legal rights to one another, places same-sex partners at a particular disadvantage, based solely upon their status as homosexuals. As the Court stated in Romer, laws “singling out a certain class of citizens for disfavored legal status or general hardships are rare,” and is a literal “denial of equal protection of the laws.”

A recent New Jersey case serves as one example of how this argument may look in practice. In Lewis v. Harris, the New Jersey Supreme Court dealt with a same-sex marriage case holding that

\[\text{[a]t this point, we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples. Cast in that light, the issue is not about the transformation of the traditional definition of marriage, but about the unequal dispensation of benefits and privileges to one of two similarly situated classes of people.]

Evaluating the equality claim, the court then held that the extant New Jersey marriage statutes that denied the right to marry to same-sex couples violated the New Jersey State Constitution.

It is difficult to imagine a justification that does not rest upon animus towards homosexuals for such amendments that even prohibit employers from voluntarily giving their own employees bereavement if a same-sex partner passes away. In Romer, Amendment II was struck down by the Court as “a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.” State constitutional amendments banning domestic partnerships or any extension of legal rights to same-sex partners are strikingly similar and suffer from the same constitutional deficiency.

VI. CONCLUSION

Reviving the contractual argument significantly changes the framing of the debate concerning same-sex marriage, and offers different assessments of possible success. The fight for same-sex marriage can be roughly divided into three fronts. First, there is an affirmative battle working to achieve formal recognition of same-sex marriage under law, requiring an amended

\[\text{example, Lambda Legal's guide to advocating extending insurance benefits to same-sex partners at work directly promotes “[a] domestic partnership affidavit” as a means of assuring insurance companies that they will not be defrauded. Id.}

\[\text{Christopher Rizzo, Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska’s Initiative 416, 11 J.L. & Pol’y 1, 26 (2003).}

\[\text{Romer, 517 U.S. at 633.}

\[\text{Lewis v. Harris, 908 A.2d 196, 217 (N.J. 2006).}

\[\text{Id. at 220.}

\[\text{Romer, 571 U.S. at 635.}

\[\text{generally Ark. Const. of 1874, amend. 83; Ga. Const. art. I, § IV; Ky. Const. § 233.} \]
legal and cultural understanding of what marriage is. Second, there is an affirmative movement to create marriage-like relationships for unmarried partners through institutions such as domestic partnerships or civil unions. Finally, there is a defensive struggle either to prevent passage of legislation banning same-sex marriage, currently primarily fought in the context of state constitutional amendments, or to challenge extant bans in the courts.

A contractual argument for same-sex relationships will almost certainly have no success in arguing for the ability to marry outright. Marriage itself has been sufficiently recognized as a fundamental right that even with the increased acknowledgement of the contractual elements, a right to marry based solely in the right to contract on equal terms is unlikely. The viability of a contractual argument on the second and third fronts, however, is significantly better. As delineated above, an argument for domestic partnerships as contracts makes the challenge to bans of same-sex partnerships much more powerful even under rational basis review.

A contract-based argument against prohibitions of same-sex marriage that also encompasses domestic partnerships changes the framing of the debate in a way that accrues material advantages and disadvantages. The contractual argument focusing on domestic partnerships rather than marriage per se does not address the most contentious elements of the marriage discussion head-on. Same-sex marriage is an issue of importance for advocates of homosexual rights, that is, because it is so freighted with questions of status and societal acceptance. The very characteristics that suggest the viability of a contract-based argument for domestic partnerships, therefore, are for many the reason why same-sex marriage is important: more than the practical benefits of domestic partnerships, the status as recognized by society, condoned, and celebrated partnerships is the true significance of same-sex marriage. Therefore, to the extent that such acceptance is the goal of working towards same-sex marriage, the contract-based approach I have laid out is inadequate.

There is a strong argument, however, that a sedentary progression towards marriage will be more successful than fighting the highly contentious battle for marriage outright. In this sense, therefore, a less controversial argument that is not dependent on arguments explicitly advancing the equal rights of homosexuals to enter into as significant an institution as marriage nevertheless moves American society one step closer towards acceptance of same-sex marriage and equal rights in general.

The contract-based argument for domestic partnerships, therefore, does not present a solution to the question of how to secure the legal right for same-sex partners to marry. It does, however, offer a persuasive justification for taking one step further along a road that might one day lead to same-sex marriage—and for the time being, will result in a powerful weapon against particularly exclusionary same-sex marriage prohibitions and work towards greater equality in the form of privately formed legal relationships and domestic partnerships.