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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.


683
France and Maine 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), 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, and estimates suggest that forty percent of the couples who registered were heterosexual. 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.

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. 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, it is a valuable institution that should be respected. Maine's

7. See PACS, supra note 5. The PACS was enacted in November of 1999, and it became effective in 2000. Id.
10. See Suzanne Daley, French Couples Say: 'I Do'—Somewhat, PLAIN DEALER (Cleveland, Ohio), Apr. 18, 2000, at 1A.
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, 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 PACS and its effects 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, gay and lesbian couples began to seek legal recognition of their relationships in the 1980’s and early 1990’s. 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. In contrast, jurisdictions in the United States have been more cautious about recognizing same-sex relationships because of the impact that recognition may have on marriage.

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2. See PACS, supra note 5.
4. 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.
7. Id.
A. Same-Sex Relationship Recognition in the United States

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

1. Non-Recognition at the Federal Level

The federal government has expressly prohibited same-sex relationships. Although President George W. Bush's first attempt to amend the Constitution to define marriage as "between a man and a woman" failed, proponents of the proposed amendment have promised to try again. 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.


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.


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. On one end of the same-sex relationship recognition continuum, Massachusetts has given same-sex couples the right to marry; conversely, many states have expressly denied same-sex couples the ability to marry.

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

Thus, domestic partnership has become an important avenue for same-sex relationship recognition. States recognizing domestic partnership include California, Vermont, Hawaii, New Jersey, and Maine. 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. California and...
New Jersey 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.

3. Domestic Partnership in Maine

On April 24, 2004, Maine enacted legislation allowing same-sex and opposite-sex couples to register as domestic partners. Although domestic partners are not afforded all of the rights of married couples, domestic partners gain certain rights, providing an impetus for couples to register. Given that almost 3,400 Maine couples identified themselves as same-sex domestic partners in the last census and that heterosexual partners are permitted register as well, 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. Second, partners are each other’s next-of-kin, giving them the right to make medical decisions for one another. Third, they have the right to dispose of their deceased partner’s remains.

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
DOMESTIC PARTNERSHIPS

indefinitely for each other's welfare." 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. 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."

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. The inference is confirmed by a state website which posts that heterosexual couples may register for domestic partnerships.

Couples who satisfy the eligibility requirements jointly file a completed-and-signed "Declaration of Domestic Partnership." 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. 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 superseded by these documents. Finally, the declaration explains how a domestic partnership may be terminated.

Domestic partnerships in Maine can be terminated by the partners in one of two ways; both partners may sign a notice under oath that they consent to the termination or one partner may unilaterally terminate. 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.
56. Id.
57. Id.
58. Id.
60. Id.
61. Id.
methods of service. Thus, termination of domestic partnerships is far less time-consuming and difficult than divorce.

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, same-sex relationships have not been recognized, at least partially because of the Vatican’s influence. Similarly, Spain has refused to recognize same-sex marriage on a national level. Conversely, the Netherlands has granted same-sex couples the right to marry. Between the two extremes are those jurisdictions recognizing same-sex relationships through domestic partnership. These countries include Denmark, Sweden, and France.

2. Domestic Partnership in France.

France allows both same-sex and opposite-sex couples to register as domestic partners. As a result, early estimates suggest that nearly forty percent of the couples who register as domestic partners are heterosexual. 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.

62. Id.
63. See Daley, supra note 10.
65. Id.
68. See Lund-Andersen, supra note 3, at 417.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textit{ inter vivos} gifts taxation.\textsuperscript{78} On the third anniversary of the partnership, couples receive the same income tax break given to married couples.\textsuperscript{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.\textsuperscript{80} In the employment setting, non-transferred partners who work in civil service can request re-location if the other is transferred;\textsuperscript{81} partners at the same company can vacation at the same time;\textsuperscript{82} and partners receive two days bereavement leave upon a partner's death.\textsuperscript{83} Finally, partners can continue or transfer their residential lease if the leasing partner dies.\textsuperscript{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."\textsuperscript{85} In an effort to prevent domestic partnerships of convenience,\textsuperscript{86} the\textit{ Conseil Constitutionnel}\textsuperscript{87} has

\begin{itemize}
  \item \textsuperscript{74} See Daley,\textit{ supra} note 10.
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} PACS,\textit{ supra} note 5, at art. 515-5.
  \item \textsuperscript{77} Id.
  \item \textsuperscript{78} PACS,\textit{ supra} note 5, at art. 5.\textit{ See also} Daniel Borrillo,\textit{ 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).
  \item \textsuperscript{79} PACS,\textit{ supra} note 5, at art. 4.\textit{ See also} Borrillo,\textit{ supra} note 78.
  \item \textsuperscript{80} PACS,\textit{ supra} note 5, at art. 7.\textit{ See also} Borrillo,\textit{ supra} note 78, at 486.
  \item \textsuperscript{81} PACS,\textit{ supra} note 5, at art. 13.
  \item \textsuperscript{82} Borrillo,\textit{ supra} note 78, at 485.
  \item \textsuperscript{83} Id. at 486.
  \item \textsuperscript{84} PACS,\textit{ supra} note 5, at art. 14.
  \item \textsuperscript{85} PACS,\textit{ supra} note 5, at art. 515-1.
  \item \textsuperscript{86} See Borrillo,\textit{ supra} note 78.
\end{itemize}
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 relationships 89 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-

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

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." Today, many same-sex couples no longer view domestic partnership as a satisfactory solution. However, given the current state of law and public opinion 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, has labeled supporting both same-sex and opposite-sex domestic partnerships as the "Equality Position." 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." 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."

97. See ESKRIDGE, supra note 1, at 12.
98. See id.
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.
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”\textsuperscript{109} ignores some social scientists’ belief in the importance of the traditional family unit.\textsuperscript{110} “[A] growing body of social research” suggests that “the most supportive household is one with two biological parents in a low-conflict marriage.”\textsuperscript{111} Stability is critical to child development.\textsuperscript{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,\textsuperscript{113} as well as the countervailing evidence that children benefit from stable households with two biological parents,\textsuperscript{114} demand that heterosexual domestic partnerships not be permitted in the United States.

\textbf{B. Comparing Domestic Partnership in France and Maine}

Domestic partnerships for both same-sex and opposite-sex couples are already available in Maine.\textsuperscript{115} Maine’s domestic partnership requirements\textsuperscript{116} are similar to those in France.\textsuperscript{117} For a couple to qualify, the partners need only to live together and plan for their lives together.\textsuperscript{118} Maine requires “domicil[e] together under long-term arrangements” and a “commitment to remain responsible indefinitely” for one another.\textsuperscript{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.\textsuperscript{120} Both schemes enable partners to contract in their declaration for the partnership’s termination.\textsuperscript{121} Although Maine requires that instructions for termination be included,\textsuperscript{122} France does not.\textsuperscript{123}

\begin{itemize}
  \item 109. Id.
  \item 110. See Harden, \textsuperscript{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.” \textit{Id.}
  \item 111. \textit{Id.}
  \item 112. \textit{Id.}
  \item 113. See Kogan, \textit{supra} note 105, at 1032-33.
  \item 114. See Harden, \textit{supra} note 12.
  \item 115. See 2003 Me. Laws 672 (2004).
  \item 116. See \textit{id.} § 17.
  \item 117. PACS, \textit{supra} note 5.
  \item 118. 2003 Me. Laws 672 (2004). Maine requires twelve months of cohabitation. \textit{Id.}
  \item 119. \textit{Id.}
  \item 120. Compare 2003 Me. Laws 672 (2004) with PACS, \textit{supra} note 5.
  \item 121. Compare 2003 Me. Laws 672 (2004) with PACS, \textit{supra} note 5.
  \item 122. 2003 Me. Laws 672 (2004), at § 17.
\end{itemize}
However, in France, if the couple does not include instructions, the property will be distributed equally. Thus, France has provided domestic partners a strong incentive to provide instructions.

Finally, and most important, both frameworks allow either bilateral or unilateral termination. 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. 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, the rights that Maine provides its citizens 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. Although French law prohibits keeping statistics on who has registered a domestic partnership, estimates suggest that about forty percent of the couples who have registered are heterosexual. Considering that by the end of

123. PACS, supra note 5.
124. Id.
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.
131. Merin, supra note 9.
2002, about 133,890 people had signed such pacts (almost 67,000 couples), and that people continue to register, 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. “The couples dress up, take pictures and have parties to mark the event.”

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. 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.

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.” 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.” 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. 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.
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.
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, 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 benefits 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 States 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” 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. . . .”

The effects of domestic partnership for heterosexual couples can already be felt in the United States, even in states where such partnerships are unrecognized. 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. As marriage rates decline, domestic partnerships grow increasingly attractive to heterosexuals. Two graduate students in New York City registered as domestic partners to qualify for couples’ housing, viewing their decision

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.
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. Married people enjoy better mental and physical health than single people. These health benefits may result because emotional support buffers stress, spouses discourage unhealthy habits, and married people enjoy higher incomes. Married individuals also rate themselves as happier than single people, probably due to the above advantages that married people enjoy.

Being raised by married parents, particularly those who share a tranquil marriage, 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.”

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.”).

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.”).

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, 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." He argues that cohabitation may lack the stability and commitment of marriage, leading to higher rates of depression, domestic violence, and infidelity. Furthermore, children raised in cohabiting households are more likely to have emotional and behavioral problems, and are less likely to do well academically and to live in poverty.

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...
they can.\textsuperscript{174} Equal protection challenges would prompt application of the "rational basis" test.\textsuperscript{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,"\textsuperscript{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."\textsuperscript{177} Provided that a law does not burden a fundamental right\textsuperscript{178} or target a suspect class,\textsuperscript{179} a legislative classification will pass constitutional muster as long as it is rationally related to a legitimate government interest.\textsuperscript{180}

Same-sex couples, subject to more restrictions than heterosexual couples, are not a suspect class.\textsuperscript{181} \textit{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.\textsuperscript{182} These courts have concluded that challenges to such

\textsuperscript{176} U.S. CONST. amend. XIV, § 1.
\textsuperscript{177} Romer, 517 U.S. at 631.
\textsuperscript{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. amend. I-VIII. See also U.S. CONST. amend. XIV. Rights that have been implied include, \textit{inter alia}, the right to marry, \textit{Loving v. Virginia}, 388 U.S. 1 (1967), and the right to an abortion, \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\textsuperscript{179} One suspect classification is race. See \textit{Loving}, 388 U.S. at 1.
\textsuperscript{180} Romer, 517 U.S. at 631.
\textsuperscript{181} Id.
\textsuperscript{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. 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." Unmarried, cohabiting heterosexuals are not a suspect class. Furthermore, limiting domestic partnership to same-sex couples passes the rational basis test because doing so bears a rational basis to a legitimate end.

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. 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. The Seventh Circuit affirmed the lower court's dismissal of Irizarry's action because the employer had a rational basis for its policy. 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.

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, and 2) the school wanted to attract homosexual teachers who could provide support for homosexual students. Although the policy may not have been effective, it was not

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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 requires 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
DOMESTIC PARTNERSHIPS

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.

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

Further, the court reasoned that promoting marriage is important because it benefits the couple and any children of the couple. Unlike cohabitation, which tends to distance people from other social institutions such as organized religion, marriage links couples to social institutions. 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.”

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.”

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. When the defendants to a wrongful death suit demurred, alleging the plaintiff lacked standing, the plaintiff argued that

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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.\textsuperscript{204} The court denied the equal protection claim, holding that the state had rational bases for the law.\textsuperscript{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 practically"\textsuperscript{206} prevented from marrying\textsuperscript{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.\textsuperscript{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 \textit{more} advantages than the comparison class."\textsuperscript{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.\textsuperscript{210} Therefore, the recognition of domestic partnerships is potentially significant, as evidenced by the increasing number of states permitting such partnerships.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{204} Id.
  \item \textsuperscript{205} Id. at 431.
  \item \textsuperscript{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. \textit{Id.}
  \item \textsuperscript{207} Id. at 432.
  \item \textsuperscript{208} See \textit{Loving v. Virginia}, 388 U.S. 1, 1 (1967) (recognizing the right to marry as a fundamental right rooted in substantive due process).
  \item \textsuperscript{210} \textit{See Election Results: Ballots Measures, supra} note 30.
  \item \textsuperscript{211} The National Center for Lesbian Rights, \textit{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. \textit{Id.}
\end{itemize}
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. 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.” In fact, some argue that being raised by two married biological parents is the “gold standard” for raising children.

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, the United States should not allow heterosexual domestic partnerships.

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.
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.