

COMMENT

REDEFINING MARRIAGE: HOW THE INSTITUTION OF MARRIAGE HAS CHANGED TO MAKE ROOM FOR SAME- SEX COUPLES

Amber Bailey

INTRODUCTION.....	306
I. HISTORY OF SAME-SEX MARRIAGE CASES AND THE “TRADITIONAL MARRIAGE” ARGUMENT	308
II. MARRIAGE AS A “GENDERED” INSTITUTION	310
A. History of Coverture In England and the United States	311
B. Effects of Coverture on the Rights of Married Women	312
III. CHANGES TO MARRIAGE LAWS IN THE UNITED STATES	314
A. Married Women’s Property Acts	315
B. Divorce	316
C. Child Custody	317
D. Spousal Support	318
E. Marital Rape Exemptions.....	320
F. Griswold and Expectations about Marriage and Reproduction	321
G. Implications for the Traditional Marriage Argument	322
IV. LEGAL CHANGES IN JURISDICTIONS THAT RECOGNIZE SAME-SEX MARRIAGE	322
A. Jurisdictions that Legalized Same-Sex Marriage via the Legislature	323
i. Vermont	323
ii. Connecticut	324
iii. New Hampshire	326
iv. District of Columbia	327
v. New York.....	328
B. States that Legalized Same-Sex Marriage via the Courts	329
i. Massachusetts	329
ii. Iowa	330
C. Implications for the Traditional Marriage Argument.....	331
CONCLUSION	332

INTRODUCTION

Same-sex marriage has received significant political and legal attention in the United States over the past decade.¹ The topic has been the subject of heated political debate, several court cases, and a number of state constitutional amendments.² Those opposed to allowing same-sex couples to wed have argued that doing so would fundamentally alter the institution of marriage as it has historically been practiced in the United States.³ However, this “traditional marriage” argument does not appear to recognize the number of changes that have been made to marriage laws, especially regarding gender.⁴ Marriage laws in the United States have undergone significant changes over time.⁵ As a result, the institution of marriage can accommodate same-sex couples without fundamentally changing marriage laws as they exist today.

A review of the changes already made to US marriage laws, as well as the process used to legalize same-sex marriage in the jurisdictions that have chosen to do so, show that the concerns raised by the traditional marriage argument are unfounded.⁶ The traditional marriage argument seems to be based on the assumptions that marriage laws have been largely static over the course of United States history and that current marriage laws are incompatible with recognition of same-sex marriage.⁷ Given that these assumptions are not supported by the historical changes marriage has undergone or by the ease with

1. See David Masci, *A Contentious Debate: Same-Sex Marriage in the U.S.*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (July 9, 2009), <http://pewforum.org/Gay-Marriage-and-Homosexuality/A-Contentious-Debate-Same-Sex-Marriage-in-the-US.aspx>.

2. Twenty-nine states have banned same-sex marriage via constitutional amendment. *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN, [http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009\(1\).pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_2009(1).pdf) (last updated January 13, 2010). The majority of these bans were passed between 2004 and 2008 (Alaska’s constitutional amendment was passed in 1998, Nebraska’s in 2000, and Nevada’s in 2002). *Id.*

3. See Transcript of Interview by John King with Rick Santorum, 2012 Republican presidential candidate, CNN (June 8, 2011, 7:00 PM), <http://transcripts.cnn.com/TRANSCRIPTS/1106/08/jkusa.01.html> (“[C]hanging the laws of the country [is] going to have a profound impact on society . . . don’t try to fundamentally change how society functions by changing that definition [of marriage].”)

4. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 447 (Cal. 2008) (noting that “throughout this state’s history the legislature . . . has effected numerous fundamental changes in the institution of marriage, dramatically altering its nature from how it existed at common law.”).

5. See *infra* Part III.

6. See discussion *infra* Parts III-IV.

7. See *supra* note 3 and associated text for a definition and example of the “traditional marriage” argument. See also cases cited *infra* Part I for examples of “tradition” argued by parties against allowing same-sex marriage. This argument suggests that both marriage in its current form is substantially similar to marriage as it has been practiced throughout United States history, and allowing same-sex marriage now would require a more significant change than any marriage has previously undergone. It also suggests that allowing same-sex marriage now would require a more significant change than any that marriage has previously undergone.

which modern US jurisdictions have legalized same-sex marriage,⁸ the traditional marriage argument should be rejected.

As compared to today, marriage in the early United States was highly “gendered.” The rights and responsibilities of the parties to a marriage were significantly different for a husband than for a wife. The doctrine of coverture ensured that being a wife created a different set of legal expectations, rights, and responsibilities than being a husband.⁹ Under the law of coverture, a married woman was treated differently than both married men and single women.¹⁰ It could be argued that such a highly gendered institution of marriage is incompatible with same-sex marriage because it would require one of the wives or husbands to take on the legal role of the “other” gender.

However, marriage laws in the United States have changed since the strict gender categories of coverture were enforced. Those changes began in the mid-19th century with the adoption of Married Women’s Property Acts.¹¹ As a result of this period of change, the doctrine of coverture has been largely eliminated, child custody and spousal support laws have all been changed, marital rape exemptions have been eliminated, and the Supreme Court has found a fundamental privacy right for the use of contraception within marriage.¹² The result of these changes is that marriage as it is practiced today is much more gender-neutral than it was earlier in United States history. A gender-neutral system of marriage can more easily accommodate same-sex couples. This is illustrated by the fact that states with gender-neutral systems have had to make very few changes to their laws in order to legalize same-sex marriage.¹³

Part I of this article outlines the recent history of same-sex marriage cases. The traditional marriage argument appears frequently in case law concerning same-sex marriage. The use of the argument in both federal and state court shows that questions of tradition and history are important considerations in the debate over whether or not to legalize same-sex marriage.

Part II of this article focuses on marriage in early United States history. Early marriage laws were heavily based on the English doctrine of coverture in which a woman’s legal identity was covered or subsumed into her husband’s upon marriage. This resulted in an institution of marriage that was gendered - the rights and responsibilities of the parties differed based on gender.

Part III of this article details some of the changes that have made marriage more gender-neutral. Many of the gender differences present in marriage laws under the coverture system have been erased or lessened, including in the areas

8. See discussion *infra* Parts III-IV of changes to marriage laws and the process used to legalize same-sex marriage in US jurisdictions.

9. Amy D. Ronner, *Husband and Wife Are One – Him: Bennis v. Michigan as the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 132 (1996).

10. Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN’S L.J. 179, 181-82 (1998).

11. Richard Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1414 (1983).

12. *Griswold v. Connecticut*, 381 U.S. 479, 480-86 (1965).

13. See *infra* Part IV.

of married women's property rights, child custody, spousal support and marital rape. These changes to laws concerning marriage contradict the traditional marriage view of a fixed institution with roots in early United States history.

Part IV of this article examines how marriage laws changed in the District of Columbia and six states (New York, Connecticut, New Hampshire, Vermont, Iowa and Massachusetts) after the legalization of same-sex marriage. In the jurisdictions that legalized same-sex marriage through the legislature, substantial changes to the law beyond clarifying gender-specific language were not necessary. The jurisdictions that legalized same-sex marriage through the courts did not have make any legislative changes to comply with those judicial decisions mandating legal same-sex marriage. The fact that so few changes were required shows that marriage laws do not need to be fundamentally altered to allow same-sex marriage.

I. HISTORY OF SAME-SEX MARRIAGE CASES AND THE "TRADITIONAL MARRIAGE" ARGUMENT

One frequently recurring argument from opponents of same-sex marriage is that recognizing same-sex marriage would represent a break from, or even cause harm to, traditional marriage.¹⁴ Several different courts, both state and federal,¹⁵ have considered this argument. Some courts have found it persuasive,¹⁶ while other courts have ruled that a state's interest in maintaining traditional marriage cannot justify denying same-sex couples the right to marry.¹⁷ The frequency with which the traditional marriage argument appears in these court cases illustrates how important the history of marriage laws in the United States is to the debate over legalizing same-sex marriage.

While the debate over same-sex marriage has been most visible in the past decade, there were several cases beginning in the 1970s through the 1990s where various courts refused to recognize a right to same-sex marriage.¹⁸ Courts were generally quick to dismiss same-sex marriage in these cases and did not always address the traditional marriage argument.¹⁹

In 1993, the Hawaii Supreme Court addressed same-sex marriage in *Baehr v. Lewin*.²⁰ The defendants argued that marriage by definition and usage

14. Patrick Busch, *Is Same-Sex Marriage a Threat to Traditional Marriage?: How Courts Struggle with the Question*, 10 WASH. U. GLOBAL STUD. L. REV. 143, 144 (2011).

15. See *supra* notes 13-14.

16. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived . . . that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational . . .").

17. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 447 (Cal. 2008).

18. See *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307, 310 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *DeSanto v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984); *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974).

19. Busch, *supra* note 14, at 151.

20. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

meant a “special relationship between a man and a woman.”²¹ The majority remanded the case to determine whether denying marriage to same-sex couples constituted sex discrimination under a strict scrutiny standard.²² However, the dissent argued that the state interest in upholding traditional marriage would satisfy rational basis review and there was thus no violation of the Hawaii Constitution.²³ The dissent also stated that the plaintiffs could receive benefits given to married couples without “rooting out the very essence of legal marriage” by recognizing same-sex marriage.²⁴

The Massachusetts Supreme Judicial Court was the first to address the traditional marriage argument and find a right to same-sex marriage.²⁵ The court stated that it was refining the definition of marriage by recognizing same-sex marriage in Massachusetts,²⁶ and disagreed with the state’s argument that such a change would “trivialize or destroy the institution of marriage as it [had] historically been fashioned.”²⁷ However, in 2006, another state court found the traditional marriage argument to be more persuasive.²⁸ The New York Court of Appeals found that “the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.”²⁹

The California Supreme Court found a right to same-sex marriage in the California Constitution in 2008.³⁰ The court noted that many people believe that “it is vitally important to preserve the long-standing and traditional definition of marriage as a union between a man and a woman”³¹ However, the court also acknowledged that the statutory definition of marriage has changed over time even though the definition of marriage as a relationship between members of the opposite-sex has stayed the same.³²

The Iowa Supreme Court rejected the traditional marriage argument with little analysis in 2009.³³ The defendants explicitly invoked traditional marriage by arguing that the state had an interest in “promoting the concept and integrity of the traditional notion of marriage.”³⁴ The court dismissed that argument,

21. *Id.* at 61.

22. *Id.* at 68.

23. *Id.* at 74 (Heen, J., dissenting).

24. *Id.*

25. *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2006).

26. *Id.* at 969.

27. *Id.* at 965.

28. *See* Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006) (holding that prohibiting same-sex marriage was supported by rational basis and did not violate the New York constitution).

29. *Id.* at 8.

30. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

31. *Id.* at 399.

32. *Id.* at 407-08 (“Although the California statutes governing marriage and family relations have undergone very significant changes in a host of areas since the late 19th century, the statutory designation of marriage as a relationship between a man and a woman had remained unchanged.”)

33. Varnum v. Brien, 763 N.W.2d 862, 898-99 (Iowa 2009).

34. *Id.* at 873.

stating that “a specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes . . . when the tradition is nothing more than the historical classification currently expressed in the statute being challenged.”³⁵

The Supreme Court briefly addressed the traditional marriage argument in 2003 when it struck down state sodomy laws in *Lawrence v. Texas*.³⁶ Justice Scalia, in dissent, argued that recognizing a privacy right to engage in sodomy would eventually lead to the Court finding a right to same-sex marriage.³⁷ However, Justice O’Connor stated in her concurrence that “preserving the traditional institution of marriage” is a legitimate state interest, and therefore the Court’s decision would not lead to same-sex marriage.³⁸

The Federal District Court for Northern California dismissed the traditional marriage argument in 2010.³⁹ Both the plaintiffs and defendants in the case provided expert testimony on the history and meaning of marriage.⁴⁰ The court found the plaintiff’s testimony more compelling, and made a finding of fact that “California ha[d] eliminated marital obligations based on the gender of the spouse. . . [and that] partners share the same obligations to one another and to their dependents [regardless of sex].”⁴¹ The court held that California’s ban on same-sex marriage failed even rational basis review, and thus violated the United States Constitution.⁴²

Arguments about the tradition and history of marriage have appeared in a variety of cases in recent years with different courts reaching different conclusions on the issue. Because of these arguments, the history of marriage in the United States is an important factor in the debate over whether same-sex marriage should be legalized. The validity of the traditional marriage argument (that same-sex marriage would represent a break with longstanding marriage practices in the United States)⁴³ should be determined in light of the actual history of marriage in the United States.

II. MARRIAGE AS A “GENDERED” INSTITUTION

The legal consequences of marriage today are not identical to the legal consequences of marriage as it was originally practiced in the United States.⁴⁴ Marriage in the United States used to be a gendered institution – the rights and

35. *Id.* at 898 (holding that a classification cannot be maintained simply for its own sake).

36. *Lawrence v. Texas*, 539 U.S. 558 (2003).

37. *Id.* at 600 (Scalia, J., dissenting).

38. *Id.* at 585 (O’Connor, J., concurring).

39. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

40. *Id.* at 993.

41. *Id.* at 932.

42. *Id.* at 997.

43. See discussion *supra* p. 1 for “traditional marriage” argument.

44. See *infra* Part III.

responsibilities of the parties to a marriage differed based on gender.⁴⁵ Under that system, the law treated married women differently than single women.⁴⁶ These differences can be seen in the doctrine of coverture, which results in limitations on married women's ability to own and control property and make contracts, and places additional restrictions on married women in criminal law and other areas.⁴⁷

A. History of Coverture In England and the United States

The doctrine of coverture illustrates the ways in which married women were treated differently than both married men and single women under the law. The United States inherited the doctrine of coverture from English common law.⁴⁸ Blackstone, in his *Commentaries on English Law*, described coverture as suspending “the very being or legal existence of the woman” and incorporating it into her husband's legal existence.⁴⁹ A wife was literally “covered” by her husband and performed everything “under his protection.”⁵⁰ In marked contrast with the status of married women today, a married woman under the doctrine of coverture did not have a legal identity separate from her husband.⁵¹

Coverture was influenced by societal views towards women and their proper place in the world. The doctrine was influenced by, and sought to uphold, the Victorian ideal of “separate spheres.”⁵² According to the separate spheres ideal, women had control over the domestic sphere (the home and child-raising) while men worked and provided for the family in the public sphere (anything outside the home).⁵³ Although women were considered to be suited to the domestic sphere of the household, husbands still retained control over their wives even in matters concerning the home.⁵⁴ While the ideal of separate spheres was never universally practiced in reality, it was influential in England and America.⁵⁵ The doctrine of coverture upheld the separate spheres ideal by ensuring that wives did not have legal power in the public world.⁵⁶ In

45. See discussion *infra* Part II.A-B for a description of the practice of coverture in the United States and the way coverture limited married women's rights.

46. Yvette Joy Liebesman, *No Guarantees: Lessons From the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 *WOMEN'S RTS. L. REP.* 181, 183 (2006).

47. See *infra* Part II.B.

48. Liebesman, *supra* note 46, at 182.

49. 1 *WILLIAM BLACKSTONE, COMMENTARIES* *430.

50. *Id.*

51. Ronner, *supra* note 9, at 132.

52. Danaya C. Wright, “*Well-Behaved Women Don't Make History*”: *Rethinking English Family, Law, and History*, 19 *WIS. WOMEN'S L.J.* 211, 236-37 (2004).

53. *Id.*

54. See *id.*

55. *Id.* at 236.

56. See Liebesman, *supra* note 46, at 185-86.

turn, the doctrine supported coverture by making power and authority outside of the home seem wholly unnecessary for wives.⁵⁷

Colonial America adopted these highly gendered ideas about marriage that were bound up in the English doctrine of coverture.⁵⁸ Coverture remained firmly entrenched in the Eastern portion of the United States (the former colonies) into the 19th century even though some Western states adopted fewer traditional restrictions on married women's rights.⁵⁹ There is some evidence that coverture restrictions were looser when the colonies were first founded (in terms of granting land to women – possibly to encourage people to move to the colonies) but became more strict with time as English law gained more influence in the Colonies.⁶⁰

B. Effects of Coverture on the Rights of Married Women

Coverture affected married women's rights in several different areas of law. For example, a husband had rights to his wife's earnings and to pursue debts owed to her.⁶¹ A wife could not sue or be sued unless her husband joined in the suit.⁶² One could not steal from the other, because a husband and wife were considered to be one legal entity.⁶³ The husband also controlled custody of the couple's children.⁶⁴ A husband had the right to punish his wife for disobeying him as long as no permanent injury was done.⁶⁵ If a wife committed adultery, her husband could bring a suit against the other man under the theory that he had taken the husband's property.⁶⁶

In criminal law, the doctrine of coverture created a presumption that any criminal act committed by a wife in the presence of her husband was done under his command or coercion.⁶⁷ However, this presumption could be rebutted by "slight" evidence.⁶⁸ Also, the presumption did not exist if a wife committed the crime outside of the presence of her husband or if the crime was murder or treason.⁶⁹ Additionally, a husband and wife could not conspire to commit a crime together because they were considered to be the same legal entity.⁷⁰ This

57. *See id.*

58. *Id.* at 182.

59. *Id.*

60. Chused, *supra* note 11, at 1389-90.

61. Turano, *supra* note 10, at 180-81.

62. Ronner, *supra* note 9, at 133.

63. *Id.*

64. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 77 (2003).

65. Courtney G. Joslin, *The Evolution of the American Family*, HUM. RTS., Summer 2009, at 2, 2.

66. *Id.*

67. *Commonwealth v. Eagan*, 103 Mass. 71, 71 (1869); Turano, *supra* note 10, at 186.

68. *Morton v. State*, 141 Tenn. 357, 359 (1918).

69. *Id.*

70. Ronner, *supra* note 9, at 133.

theory that a husband and wife were one legal entity also prevented them from testifying either for or against each other in court.⁷¹

One of the major impacts of coverture on the rights of married women was on their ability to own and use property. A husband controlled all property in a marriage and if a wife owned any real property it became her husband's after the couple married.⁷² A wife could not sell or give away any property after marriage.⁷³ Property that belonged to a wife before marriage was subject to be taken by her husband's creditors.⁷⁴ Husbands had the right to any money gained by renting out their wife's property.⁷⁵ Married women also lost the right to control their own personal property; wives could dispose of personal property only with their husband's consent.⁷⁶

Coverture also significantly limited a married woman's ability to make contracts. At common law, a husband and wife could not enter into a contract with each other because it would be as if he had a contract with himself.⁷⁷ A wife also had no ability to make contracts independently without the permission of her husband.⁷⁸ A wife's contractual obligation created prior to marriage passed on to her husband after marriage.⁷⁹ However, third parties could not enforce contracts made solely with a wife against her husband, and furthermore if a wife died before the obligation was paid, her husband would be relieved of the obligation.⁸⁰ Conversely, if a husband died before his wife's obligation was paid, it would revert to her as if she had never married.⁸¹

Coverture restricted married women differently than it did single women.⁸² Although single women (whether never-married or widowed) did not have all of the rights afforded to men in the 18th and 19th centuries, they did have many rights that married women were denied.⁸³ For example, a single woman could own property, enter into contracts, work and keep her own money, and sue and be sued in her own name.⁸⁴

Marriage in the 18th and first half of the 19th century created two very different legal statuses dependent on gender. Married women had fewer rights than their husbands.⁸⁵ This illustrates the fact that marriage as an institution was

71. *Id.*

72. Turano, *supra* note 10, at 181.

73. *Id.*

74. *Id.* at 181-82.

75. *Id.* at 182.

76. Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213, 2215-16.

77. Ronner, *supra* note 9, at 132.

78. 5 Williston on Contracts § 11:2 (4th ed.).

79. *Id.*

80. *Id.*

81. *Id.*

82. Liebesman, *supra* note 46, at 183.

83. *Id.*

84. *Id.* at 183; Ronner, *supra* note 9, at 132.

85. See discussion *supra* Part II.B on restrictions on married women's rights to own property and enter into contracts.

gendered: entering into a marriage had a different impact on a woman's legal status than it did on a man's. Married women also had fewer rights in certain areas of the law than single women.⁸⁶ Single women enjoyed rights that were not available to married women. The restrictions placed on married women did not fully apply to single women, showing that marriage itself was specifically a gendered institution.⁸⁷

Recognizing marriage for a same-sex couple would have been difficult to imagine under the doctrine of coverture. A marriage in which the parties receive different rights and have different expectations based on gender is ill suited to accommodate two men or two women. An argument could be made that legalizing same-sex marriage under that system would have required fundamental legal changes and even the alteration of how society viewed gender. However, the traditional marriage argument,⁸⁸ in drawing an unbroken line between marriage as it was practiced at the founding of the United States until today ignores or dismisses significant changes that have been made to marriage laws over time.

III. CHANGES TO MARRIAGE LAWS IN THE UNITED STATES

In contradiction to the traditional marriage argument, marriage laws have been changed substantially since the period when strict gender categories were imposed by the doctrine of coverture. Beginning with the adoption of the Married Women's Property Acts in the mid-19th century, marriage laws have changed with regard to property, divorce, child custody, and alimony/spousal support.⁸⁹ These changes have eliminated many of the differences in rights and responsibilities between husband and wife that were present under the doctrine of coverture.⁹⁰ These changes have also made marriage into an institution that can recognize same-sex couples; a system of marriage that offers the same legal rights to each party regardless of gender is one that can be applied to same-sex couples.⁹¹

86. Liebesman, *supra* note 46, at 183; Ronner, *supra* note 9, at 132; *See also* notes 82-84 and accompanying text.

87. *See* note 84 and accompanying text.

88. *See* discussion *supra* p. 1 on "traditional marriage" argument.

89. *See* discussion *infra* Part III.A-E.

90. *See* discussion *infra* Part III.A on the Married Women's Property Acts allowing women to retain rights to property (which was not allowed under the doctrine of coverture); *See* discussion *infra* Part III.B on the introduction of "no-fault" divorce (and how this is at odds with the doctrine of coverture); *See infra* Part III.C for changes to child custody laws (which have been changed from having an automatic preference for fathers as was the case under the doctrine of coverture); *See infra* Part III.D for changes in spousal support laws (including allowing both husbands and wives to claim alimony); *See infra* Part III.E for changes to marital rape exemptions (which drew from the doctrine of coverture but have largely been eliminated).

91. *See infra* Part IV for examples of how our modern system of marriage can easily be applied to same-sex couples without fundamental changes to the law.

A. Married Women's Property Acts

Changes in US society in the 18th and 19th centuries changed women's role in the public sphere and led to the adoption of laws allowing married women to have control over their own property. In the late 18th and early 19th centuries women became more involved in public life through religious and social activities and became more literate.⁹² In addition, economic developments gave women more opportunity to work outside the home.⁹³ The elimination of some of the strict restrictions on married women's property rights under the doctrine of coverture reflects these changes in women's lives.⁹⁴

In the later years of the 18th century there were increasing numbers of religious and service societies for women; most dealt with "domestic" or religious concerns but led to women becoming increasingly involved in "public" life.⁹⁵ Women's opportunities for education also increased after the Revolutionary War. During the public education movement of that time, women's academies were created and literacy rates increased so much that by 1850, women and men had similar literacy rates.⁹⁶ At the turn of the 19th century women's magazines and fiction and religious books became more popular.⁹⁷

Several states passed Married Women's Property Acts in the mid-19th century.⁹⁸ Most of the acts passed in the 1840s aimed to protect married women's property from their husband's debts.⁹⁹ Most of these statutes protected both real and personal property from being taken for the debts of their husbands.¹⁰⁰ Some of the statutes had provisions allowing married women to hold property apart from her husband.¹⁰¹ However, courts generally read those provisions narrowly.¹⁰² A second group of Married Women's Property Acts were passed from the 1840s until around 1860.¹⁰³ These statutes began establishing separate estates for wives.¹⁰⁴ Married women were given more ability to own property in their own right.¹⁰⁵ A third group of Acts, most passed after 1860, began protecting married women's earnings from being controlled by their husbands.¹⁰⁶

92. Chused, *supra* note 11, at 1414-16.

93. *Id.* at 1414.

94. *Id.*

95. *Id.* at 1415.

96. *Id.* at 1416.

97. *Id.* at 1416-1417.

98. *Id.* at 1398.

99. *Id.* at 1398-99.

100. *Id.* at 1399.

101. *Id.* at 1399-1400.

102. *Id.* at 1400.

103. *Id.* at 1398.

104. *Id.*

105. Chused, *supra* note 76, at 2222.

106. Chused, *supra* note 11, at 1398.

New York's Married Women's Property Act was passed in 1848 and served as a model for other states.¹⁰⁷ The New York Act allowed married women to own their own real and personal property and gave them the right to any rent derived from those properties.¹⁰⁸ This ownership was not subject to the control of her husband.¹⁰⁹ The Act also made it legal for married women to receive property as gifts and devises, and allowed all contracts made by women before marriage to remain in effect after marriage.¹¹⁰

The Married Women's Property Acts weakened the doctrine of coverture and led to fewer restrictions on married women's rights. These changes created a more gender-neutral system of marriage because they eliminated some of the differences in the treatment of married men and women. Allowing married women to retain rights to property, as married men were allowed to do, is one example of a change in marriage laws that ended explicitly unequal treatment based on gender.

B. Divorce

Divorce laws in the United States have changed significantly over time. Divorce laws in the United States used to be based on a "fault" system, where one spouse would have to assert some type of mistreatment by the other spouse in order to obtain a divorce.¹¹¹ The acceptable grounds for divorce included acts such as adultery, abandonment or desertion, impotence, and bigamy.¹¹² Over time, states began expanding the grounds for divorce to include acts such as non-support, insanity, voluntary separation, and incompatibility.¹¹³

In the mid-20th century, states, led by California in 1969,¹¹⁴ began enacting "no-fault" divorce laws, which allowed either spouse to file for divorce without asserting that the other spouse had committed some wrong or mistreated them in some way.¹¹⁵ The emergence of "no-fault" divorce laws represented a quick and sweeping change. Prior to the late 1960s the "fault" system was used in every state, but by 1985 every state in the United States had some form of "no-fault" divorce.¹¹⁶

In addition to representing one way in which marriage laws today differ from "traditional" United States marriage laws, these changes to divorce laws

107. See New York's Married Women's Property Act, ch. 200, 1848 N.Y. Laws 307 (1848).

108. See *id.* at § 2.

109. *Id.*

110. See *id.* at §§ 3-4.

111. Shaakirrah R. Sanders, *The Cyclical nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 421.

112. *Id.*

113. *Id.* at 422.

114. *Id.* at 429-30.

115. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2050, 2053-2054.

116. Sanders, *supra* note 111, at 430 n. 147.

have a specific relevance to making marriage more gender-neutral. Under the doctrine of coverture, a woman's legal identity was subsumed into that of her husband.¹¹⁷ Allowing for divorce, even under the "fault" system, challenged the notion that husband and wife were one legal entity.¹¹⁸ "No-fault" divorce represents an even starker break from the way marriage was conceptualized under coverture. The system of "no-fault" divorce gives wives a legal avenue to unilaterally end a marriage without justifying this desire by showing some sort of mistreatment by her husband.¹¹⁹ This is a far cry from a system of marriage where one spouse (the wife) had her legal identity essentially covered by the other (her husband). Allowing a wife to end her marriage on her own terms seems antithetical to a system of marriage where a wife's legal identity is not just fused with but controlled by her husband.

C. Child Custody

Child custody laws have progressed over time from favoring either husbands/fathers or wives/mothers to becoming gender-neutral. Under coverture, a husband/father had control over child custody.¹²⁰ This system is sometimes referred to as "paternal preference rule."¹²¹ Generally, custody of children would automatically be given to the father in a divorce unless the mother could show that he was not fit to be a parent.¹²²

In the 19th century, the paternal preference system came to be replaced in the United States by including a "Tender Years" presumption,¹²³ sometimes called "maternal presumption."¹²⁴ Under the Tender Years presumption, young children would be placed with their mothers even though the husband and father retained control of custody.¹²⁵ While the Tender Years presumption represents a break with the law under the coverture system, it still represents a gendered system, both for the obvious fact that it favors mothers over fathers in the placement of a child but also by reinforcing the presumption that mothers are the more nurturing parent and responsible for childcare.¹²⁶

In the late 19th and 20th century, the Tender Years presumption came under increasing criticism and in its place, the "Best Interests of the Child"

117. See *supra* Part II.

118. Kay, *supra* note 115, at 2032 (quoting Norma Basch in *Framing American Divorce* that "[t]he old common law fiction that husband and wife were one and the husband was the one could no longer hold quite the same authority once divorce challenged the male-dominated corporatism of marriage.>").

119. See Kay, *supra* note 115, at 2053-54.

120. Davis, *supra* note 64, at 78.

121. Alexandra Selfridge, *Challenges for Negotiation and Drafting an Antenuptial Agreement for the Religious Upbringing of Future Children*, 16 J. CONTEMP. LEG. ISSUES, 165 n. 2.

122. *Id.* at 166.

123. Davis, *supra* note 64, at 78.

124. Selfridge, *supra* note 121, at 166 n. 3.

125. Davis, *supra* note 64, at 78.

126. Selfridge, *supra* note 121, at 166 n. 4.

standard began to be used.¹²⁷ The Best Interests standard de-centered the rights of the parents and held that a parent's interest in custody of his or her child could be defeated if the safety or interest of the child required it.¹²⁸ By the 1970s, the Best Interests standard was commonly used throughout the United States.¹²⁹

Currently, there is some recognition from the courts that federal and state equal protection clauses require the use of gender-neutral standards and applications in awarding custody of a child.¹³⁰ Gender preferences in custody laws have been struck down as violating Constitutional rights to equal treatment based on gender.¹³¹ State legislatures have also moved from gendered presumptions in child custody laws to more gender-neutral systems and encourage joint custody.¹³²

The movement from a child custody system that heavily favored either husbands/fathers over wives/mothers or vice versa is an example of the elimination of the gendered coverture system over time. The switch from the Tender Years Presumption, which favored mothers over fathers in certain circumstances, to the Best Interests standard represents a move toward more gender-neutral marriage and family laws. The use of the Best Interests standard and movement away from gender preferences removes gender-based presumptions and creates a more gender-neutral system.¹³³

D. Spousal Support

Spousal support (alimony) laws in the United States were traditionally rooted in English common law and the doctrine of coverture. Under the doctrine of coverture, a husband had a legal duty to support his wife financially.¹³⁴ This duty was in some ways seen as the "price" or "cost" of a woman subsuming her identity into his and his gaining control of her earnings and property.¹³⁵ However, the passage of the Married Women's Property Acts weakened the basis for this notion of alimony where support from a husband represented the price of a wife subsuming her identity to his.¹³⁶ The idea began

127. *See id.* at 166 n. 3.

128. Thomas L. Fowler and Ilene B. Nelson, *Navigating Custody Waters Without a Polar Star: Third Party Custody Proceedings After Peterson v. Rogers and Price v. Howard*, 76 N.C. L. REV. 2145, 2154 n. 32.

129. Davis, *supra* note 64, at 78. *See also* discussion Selfridge *supra* note 121, at 175-76 (author stating that some states kept some version of "maternal preference" past the 1970s).

130. Selfridge, *supra* note 121, at 168.

131. *Id.*

132. *Id.* at 169.

133. However, note that some criticize the best interests standard as not being gender neutral in practice as courts continue to use gender-biased presumptions in making actual custody decisions. *See* Selfridge, *supra* note 121, at 171 n. 25.

134. Liebesman, *supra* note 46, at 185.

135. Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U. L. REV. 501, 503.

136. *Id.* at 505.

to emerge that a wife was able to keep and control her own property during a marriage, and her husband should also be relieved of his duty to support her if the marriage ends.¹³⁷ While alimony has not been eliminated completely, it has been changed to become more gender-neutral. For example, either an ex-husband or an ex-wife can now receive spousal support after a divorce.¹³⁸

The earliest type of alimony was permanent alimony where the support given was based on the needs of the receiving spouse and the ability of the other spouse to pay.¹³⁹ This type of alimony was generally awarded to wives who had been housewives and homemakers in a long-term marriage.¹⁴⁰ However, this system placed a significant burden on men tasked with paying alimony to their ex-wives indefinitely.¹⁴¹ This system of alimony became rarer after “no-fault” divorce laws began appearing in the 1970s.¹⁴²

Newer systems include the “reimbursive” system.¹⁴³ In this system, one spouse is awarded compensation for the services he or she performed during marriage.¹⁴⁴ However, this system is still based on a gendered notion of marriage where one spouse works outside the home and the other tends to household matters.¹⁴⁵ The more recent trend is towards a “rehabilitative system,” which is based on a notion that one spouse should not leave the other in financial trouble after a divorce.¹⁴⁶ Under this system, support is awarded in order to give an individual a chance to pursue educational or career opportunities that were given up in favor of focusing on family or household work.¹⁴⁷ The goal of this type of support is that the temporary payments will allow the individual to support him or herself at which point the spousal support payments can end.¹⁴⁸

Spousal support laws have changed to become more gender-neutral. Under the system of coverture, alimony was a payment awarded to a wife by a husband. More recent systems allow spousal support to either an ex-husband or an ex-wife. Systems of awarding spousal support have also shifted to rely less on gendered notions of compensation for a wife who has been a homemaker to one in which temporary compensation is given based on the reality the spouse faces after the divorce.

137. *Id.*

138. *Id.* n. 42.

139. *Id.* at 506-07.

140. *Id.* at 506.

141. *Id.* at 507.

142. *Id.*

143. *Id.* at 508.

144. *Id.*

145. *Id.*

146. *Id.* at 511.

147. *Id.*

148. *Id.*

E. Marital Rape Exemptions

Marital rape exemptions were one aspect of the doctrine of coverture that lasted well after the passage of the Marital Property Acts in the mid-19th century. Significant opposition to marital rape exemptions in the late 1970s and 1980s resulted in many states altering or repealing the exemptions.¹⁴⁹ As a result, no state currently has an “absolute exemption” (where a husband cannot be prosecuted for rape of his wife if they are legally married).¹⁵⁰ The repeal of absolute marital rape exemptions represents another way in which marriage has evolved in the United States.

Under the doctrine of coverture, a man could not legally rape his wife.¹⁵¹ The courts considered a wife as giving consent to sexual intercourse through the act of marrying her husband.¹⁵² The 1857 Massachusetts case of *Commonwealth v. Fogerty*, illustrates the recognition of marriage as defense to accusations of rape.¹⁵³ In that case, the court noted “[o]f course, it would always be competent for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.”¹⁵⁴

Marital rape exemptions began to be abolished beginning in the mid-to-late-1970s when Nebraska’s legislature abolished their marital rape exemption.¹⁵⁵ Marital rape exemptions were also abolished by the courts.¹⁵⁶ For example, in 1984, New York’s Court of Appeals ruled that its state’s marital rape exemption was unconstitutional.¹⁵⁷ The court found no rational basis for the marital rape exemption and quoted Supreme Court Justice Oliver Wendell Holmes in noting that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”¹⁵⁸

While the absolute marital exemption for forcible rape has been eliminated by all states,¹⁵⁹ some states still grant some form of spousal

149. Jaye Sitton, *Old Wine in New Bottles: The Marital Rape Allowance*, 72 N.C. L. REV. 261, 277.

150. Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction*, 43 CLEV. ST. L. REV. 351, 367.

151. *Id.* at 352.

152. *Id.* at 354.

153. *Commonwealth v. Fogerty*, 74 Mass. 489 (1857). See also discussion Morgan Lee Woolley, *Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues*, 18 HASTINGS WOMEN’S L.J. 269, 278-79 of this case.

154. *Fogerty*, 74 Mass. at 491.

155. Woolley, *supra* note 153, at 279.

156. See *infra* note 158 for a list of cases.

157. *People v. Liberta*, 474 N.E.2d 567, 575 (N.Y. 1984); See also Woolley, *supra* note 153, at 279-280, for discussion of this case.

158. *Liberta*, 474 N.E.2d at 575. The New York court also noted that several other courts have struck down marital rape exemptions, including Massachusetts in *Commonwealth v. Chretien*, 383 Mass. 123 (1980), New Jersey in *State v. Smith*, 85 N.J. 193 (1980), and Virginia in *Weishaupt v. Commonwealth*, 227 Va. 389 (1984).

159. Siegel, *supra* note 150, at 367.

immunity for sexual assault charges.¹⁶⁰ However, even though these lesser forms of marital rape exemptions remain, most states have revised their laws to be gender-neutral so that rape or sexual assault is not defined as a crime that can only be committed against a woman.¹⁶¹ Again, the New York Court of Appeals in *People v. Liberta* considered the gender inequity of their rape laws and found that “exempt[ing] females from criminal liability for forcible rape” violated the Equal Protection clause.¹⁶²

The elimination of absolute marital rape exemptions in the 20th century shows a more recent change in the evolving system of marriage laws in the United States. While not all forms of spousal immunity have been removed, the absolute immunity from prosecution for a husband raping his wife under coverture has been eliminated. Marriage laws have continued to shift away from the gendered coverture system (in this case through eliminating the notion of marriage as a contract where husbands had an implicit right to have sex with their wives).¹⁶³

F. Griswold and Expectations about Marriage and Reproduction

In addition to the direct changes to marriage law, there is a backdrop of the Supreme Court recognizing individual rights to privacy in areas of marriage and the family.¹⁶⁴ The Supreme Court’s decision in *Griswold v. Connecticut* represents a decoupling of reproduction and marriage.¹⁶⁵ One argument against same-sex marriage is that marriage needs to be restricted to opposite sex couples for the purpose of reproduction.¹⁶⁶ However, the Court in *Griswold* held that banning married couples from using contraception violated their Constitutional right to privacy.¹⁶⁷ If opposite-sex couples have a right to marriage even when reproduction is consciously avoided, the argument that the primary function of marriage in the modern world is to facilitate child rearing is undercut.

In *Griswold*, the Court concluded that a Connecticut statute criminalizing the use of contraceptives was unconstitutional.¹⁶⁸ The Court described marriage as “a coming together for better or for worse, hopefully enduring, and intimate

160. Woolley, *supra* note 153, at 280-82.

161. *Id.* at 280.

162. *Liberta*, 474 N.E. 2d at 575-76.

163. Jill Elane Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1398, 1402.

164. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

165. *Id.* at 485-86.

166. See, e.g., *Hernandez v. Robles*, 855 N.E. 2d 1, 1-3 (N.Y. 2006), (holding that a legislature could rationally restrict marriage to opposite sex couples because “heterosexual intercourse has a natural tendency to lead to the birth of children.”)

167. *Griswold*, 381 U.S. at 485-86.

168. *Id.* at 480-486. The statute in question was Connecticut Statute Section 53-32 which stated that “any person who uses any drug, medicinal article or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined or imprisoned.” *Id.* at 480.

to the degree of being sacred.”¹⁶⁹ The Court also noted that the idea of authorities prying into the “marital bedroom” was intrusive to the point of being repulsive.¹⁷⁰

The Court was willing to find a privacy right for married couples who purposefully avoid having children. This acknowledges that married couples have a right to determine when or if they will have children. If the state cannot enforce laws to ensure opposite-sex couples can reproduce, an argument can be made that a state does not have a rational interest in banning same-sex couples from marrying based on the assumption that they will not have children.

G. Implications for the Traditional Marriage Argument

One of the assumptions underpinning the traditional marriage argument¹⁷¹ is that any change to current marriage laws threatens to upset an institution that has remained relatively unchanged since the founding of our country.¹⁷² However, this assumption is simply unsupported by the history of marriage in the United States. Marriage laws in the United States have undergone significant changes over time.¹⁷³ The traditional marriage argument cautions that any change to marriage laws threatens to weaken marriage as an institution and our society as a result.¹⁷⁴

However, this warning holds much less weight given that the institution of marriage in the United States has already weathered many changes without any resulting collapse of society or of the institution itself. Marriage as it was practiced under coverture afforded husbands significant legal control over their wives and children.¹⁷⁵ Today, marriage is a much more gender-neutral institution where husbands and wives have the same legal responsibilities and rights toward each other and their children. Given the United States’ history of changing marriage laws, recognition of the right for same-sex couples to wed seems less like an unprecedented change and more in line with previous alterations to marriage.

IV. LEGAL CHANGES IN JURISDICTIONS THAT RECOGNIZE SAME-SEX MARRIAGE

If same-sex marriage truly represented an unprecedented change to the institution of marriage, one would expect that current marriage laws would have to undergo significant alterations to legalize same-sex marriage. However, a review of legal changes in United States jurisdictions that have recently

169. *Id.* at 486.

170. *Id.* at 485-86.

171. The traditional marriage argument holds that recognition of same-sex marriage would fundamentally alter the institution of marriage as it is practiced today.

172. See discussion *supra* note 7 and accompanying text of how the traditional marriage argument as it has been formulated seems to necessitate this assumption.

173. See *supra* Parts III.A-E.

174. See *supra* note 3.

175. See *supra* Part II.

legalized same-sex marriage contradicts that expectation. Six states and the District of Columbia have legalized same-sex marriage since 2003.¹⁷⁶ A review of the legal changes in those jurisdictions shows that it was not necessary to dramatically change the substantive marriage laws in order to implement same-sex marriage. Same-sex marriage was legalized without altering the underlying purpose and effect of the law or changing the rights and responsibilities granted to married couples.

A. Jurisdictions that Legalized Same-Sex Marriage via the Legislature

In the states where the legislature voted to legalize same-sex marriage there are three common types of provisions that were added to state statutes. First, revisions of statutory language concerning eligibility requirements to make gender-specific language more gender-neutral.¹⁷⁷ Second, provisions to protect members of the clergy and religious organizations from legal action for refusing to perform or recognize same-sex marriage based on their religious convictions.¹⁷⁸ Third, provisions dealing with previously existing civil union or domestic partnership law aimed at clarifying how those legal partnerships will be recognized under the law after same-sex marriage is legalized.¹⁷⁹ None of these types of revisions changed the underlying legal status of married couples in those jurisdictions.

i. Vermont

Vermont's legislature voted to legalize same-sex marriage on April 6, 2009 with Senate Bill 115.¹⁸⁰ In Bill 115, Vermont's legislature revised portions of their statutes as they were then written to use gender-neutral language. Through Bill 115, the Vermont legislature also added provisions to the statutes protecting religious individuals and organizations from legal action for refusing to perform or accommodate same-sex marriages.¹⁸¹ Vermont's legislature did not find it necessary to change the law in any other way in order to legalize same-sex marriage.

The Vermont legislature explicitly changed the language of the Vermont statutes in two areas. Section 3 of Bill 115 added gender-neutral consanguinity

176. Massachusetts (2003) and Iowa (2009) legalized same-sex marriage through court decisions. New York (2011), Connecticut (2009), New Hampshire (2009), Vermont (2009) and Washington D.C. (2009) legalized same-sex marriage via legislation.

177. See S.B. 115 §§ 3, 5, 7, 2009 Gen. Assemb. (Vt. 2009) (discussed *infra* at pp. 26-28); S.B. 899 §§ 4, 6, 2009 Gen. Assemb. (Conn 2009) (discussed *infra* at pp. 28-30); H.B. 436 § 59:1, 2009 Gen. Ct. (N.H. 2009) (discussed *infra* at pp. 30-32).

178. See S.B. 115 §§ 9-11 (discussed *infra* at pp. 26-28); S.B. 899 §§ 7, 17-19 (discussed *infra* at pp. 28-30); H.B. 436 §§ 59:3-4 (discussed *infra* at pp. 30-32); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 No. 1 D.C. Reg. 27, § 2 (§ 1283, 31 Stat. 1391) 27-28 (January 1, 2010) (discussed *infra* at pp. 34-35).

179. See S.B. 899 §§ 10-13 (discussed *infra* at pp. 28-30); H.B. 436 § 59:5-9 (discussed *infra* at pp. 30-32).

180. S.B. 115 §§ 1-2.

181. See *id.* § 9-11.

prohibitions¹⁸² to the Vermont Statutes.¹⁸³ Section 7 of the Bill changed the terms used in marriage licenses so that applicants can choose a gender appropriate term (each party can designate themselves as a bride, groom or spouse).¹⁸⁴ Beyond those two specific sections of the statutes, the Vermont legislature only found it necessary to include a general broad-reaching provision to ensure that the state's marriage laws would apply equally to same-sex couples. Section 8 of the Bill revised the statutory definition of marriage and added the following language to the statutes: "Terms relating to the marital relationship or familial relationships shall be construed consistently with this section [defining marriage as 'the legally recognized union of two people'] for all purposes throughout the law"¹⁸⁵

The changes made in Sections 3 and 7 of Bill 115 show that the gender-specific language of a marriage statute can be made gender-neutral without altering the underlying purpose and effect of the law. Section 8 illustrates that including same-sex couples within the definition of marriage does not fundamentally alter marriage. The Vermont legislature included same-sex couples within *every statute* related to marriage simply by stating that when the term "marriage" appears in the Vermont statutes, it now includes same-sex couples.¹⁸⁶ If recognizing same-sex marriage required massive changes to the law, such a general, sweeping provision would not have been effective.

Sections 9, 10, and 11 of the Vermont Bill included exemptions for religious objectors to same-sex marriage.¹⁸⁷ Including exemptions for religious organizations and clergy members who do not wish to participate in or solemnize a same-sex marriage does not represent a substantial change to Vermont's marriage law. Ensuring that religious organizations cannot be forced to perform rites for same-sex couples does not alter how a state recognizes or implements marriage. The conscience provision also does not change what rights and responsibilities marriage confers on individuals who receive a marriage license from the state nor does it change how marriage laws affect married opposite-sex couples. In this way, the exemptions added by the Vermont legislature did not change the effect of Vermont's marriage law; they only ensured that religious organizations did not face legal liability for refusing to perform same-sex marriages.

ii. Connecticut

The Connecticut legislature legalized same-sex marriage on April 23, 2009 with Senate Bill 899.¹⁸⁸ Connecticut's legislature was also able to legalize

182. Consanguinity prohibitions make it illegal for individuals who are too closely related from marrying.

183. *Id.* § 3.

184. *Id.* § 7.

185. *Id.* § 5.

186. *Id.*

187. *Id.* §§ 9-11.

188. S.B. 899 § 1.

same-sex marriage without making major revisions to their marriage law. The changes made by Senate Bill No. 899 included clarifications to portions of the existing law that had gender-specific language, “conscience” provisions for members of religious groups opposed to same-sex marriage, and sections meant to integrate Connecticut’s already existing system of civil unions into the new law.

Like Vermont, the Connecticut legislature chose to explicitly alter the language of the statutes in only a few areas, and then relied on a general provision to ensure that the rest of the statutes would be read in a gender-neutral fashion. Section 4 of Bill 899 added a new eligibility section with gender-neutral language (“A person is eligible to marry if such person is . . .”).¹⁸⁹ Section 6 repealed the previous gender-specific consanguinity prohibitions and replaced them with a version using gender-neutral language.¹⁹⁰ Then, Section 8 created a new gender-neutral provision in the statutes: “Wherever in the general statutes or the public acts the term ‘husband’, ‘wife’, ‘groom’, ‘bride’, ‘widower’, or ‘widow’ is used, such term shall be deemed to include one party to a marriage between two persons of the same sex.”¹⁹¹ Again, such a sweeping provision would be entirely ineffective if recognizing a marriage between two brides or two grooms necessitated changing the underlying effect of those laws. These changes only highlight how little the Connecticut legislature needed to change the statutes in order to legalize same-sex marriage.

The Connecticut legislature did find it necessary to create two “new” provisions in the law. Through Sections 1 and 2 of Senate Bill 899, the Connecticut legislature dealt with recognizing marriages from other states and jurisdictions.¹⁹² Section 1 stated that, moving forward, Connecticut will recognize as valid substantially similar marriages from other states not barred elsewhere in Connecticut’s laws.¹⁹³ Section 2 stated that valid Connecticut marriages can be recognized in other states as a marriage.¹⁹⁴ While these sections were additions to Connecticut’s marriage laws, neither was necessary for the legal recognition of same-sex marriage within the state. Both provisions deal with the recognition of out-of-state marriages in a climate where some states have chosen to legalize same-sex marriages while others have not. Neither provision changed the rights or responsibilities Connecticut confers upon married couples.

Sections 7, 17, 18, and 19 of Bill 899 introduced “conscience” provisions allowing members of clergy and religious organizations to refuse to officiate same-sex marriages, decline to provide services or accommodations to same-sex marriages and to deny adoption services to same-sex couples due to their

189. *Id.* § 4.

190. *Id.* § 6.

191. *Id.* § 8.

192. *Id.* §§ 1-2.

193. *Id.* § 1.

194. *Id.* § 2.

religious beliefs.¹⁹⁵ Sections 10 through 13 integrated Connecticut's civil unions into the new marriage laws.¹⁹⁶ Again, as in Vermont, these sections did not alter the underlying effect of Connecticut's marriage laws. "Conscience" provisions do not change the rights of married couples, they merely codify explicitly that religious organizations cannot face legal penalties for refusing to recognize marriages contrary to their religious philosophy.

iii. New Hampshire

The New Hampshire legislature legalized same-sex marriage through the passage of House Bill 436 on June 3, 2009.¹⁹⁷ Again, the legislature did not have to significantly alter its marriage laws to legalize same-sex marriage. Similar to the other jurisdictions that legalized same-sex marriage through the legislature, New Hampshire's House Bill 436 revised gender-specific language in the New Hampshire statutes, created conscience protections for clergy and religious organizations, and enacted provisions so that same-sex couples with civil unions could obtain a civil marriage if they so wished.¹⁹⁸

House Bill 436 Section 59:1 repealed, reenacted, and revised portions of New Hampshire Statute Sections 457:1-3.¹⁹⁹ Sections 457:1 and 1-a were repealed and reenacted to explicitly define the purpose and eligibility requirements for marriage in gender-neutral terms: "[a]ny person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender."²⁰⁰ Section 457:2 was revised to use gender-neutral language for New Hampshire's consanguinity prohibitions.²⁰¹ Section 457:3 stated that New Hampshire would recognize all out of state marriages meeting New Hampshire's eligibility requirements.²⁰² These changes revised the language of New Hampshire's marriage law to include same-sex couples without changing the underlying rights and responsibilities granted to couples entering into a New Hampshire marriage.

However, Section 59:2 of House Bill 436 did retain one gender-based difference in New Hampshire's marriage law and create a different eligibility requirement for same-sex couples than for opposite sex couples.²⁰³ Prior to House Bill 436, New Hampshire Statute Section 457:4 stated that "no male below the age of 14 years and no female below the age of 13 years shall be capable of contracting a valid marriage."²⁰⁴ House Bill 436 retained this

195. *Id.* §§ 7, 17-19.

196. *Id.* §§ 10-13.

197. H.B. 436 § 59.

198. *Id.* § 59:1

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* § 59:2.

204. *Id.*

gender-based difference and revised the statute to require that parties to a same-sex marriage must be over the age of eighteen.²⁰⁵

The differing age requirements represent an area where New Hampshire's marriage law is not entirely gender-neutral. However, this discrepancy does not affect the rights and responsibilities of the parties to a marriage. New Hampshire's marriage law was not entirely gender-neutral prior to the implementation of same-sex marriage in that males had a higher age requirement than females.²⁰⁶ In legalizing same-sex marriage, New Hampshire's legislature chose to require a higher age requirement for same-sex couples than for opposite-sex couples.²⁰⁷ However, New Hampshire could have adopted a lower age requirement for same-sex marriage without changing the underlying effect of the law – the differing age requirements do not change the rights and responsibilities conferred by marriage.

Sections 59:3 and 59:4 of House Bill 436 created exceptions for clergy and religious organizations that do not wish to solemnize, officiate or accommodate same-sex marriages due to religious convictions.²⁰⁸ Sections 59:5-9 address New Hampshire's civil unions and create mechanisms for couples to convert a civil union to a marriage.²⁰⁹ Again, as with other jurisdictions, none of these revisions and additions to New Hampshire's laws affects the rights and responsibilities of parties to a marriage or change the purpose or effect of New Hampshire's marriage laws in terms of how the state recognizes marriage.

iv. District of Columbia

The District of Columbia legalized same-sex marriage on March 3, 2010 via the Religious Freedom and Civil Marriage Equality Amendment Act of 2009 ("the Act").²¹⁰ As in other jurisdictions, the District of Columbia revised the language of the D.C. Code to make it more gender-neutral and also added conscience provisions to protect religious organizations. Neither of these changes altered the rights and responsibilities of marriage or changed the operation or implementation of D.C.'s marriage laws for opposite-sex couples.

Section 2 of the Act added a new section to the D.C. Code defining marriage as "the legally recognized union of 2 persons" and specifying that "[w]here necessary to implement the rights and responsibilities [of marriage] gender-specific terms shall be construed to be gender-neutral for all purposes throughout the law."²¹¹ Again, this type of addition to the D.C. Code shows that any gender-specific provisions of the law can be read as gender-neutral without

205. *Id.* (Meaning that the age requirement for opposite-sex couples is lower than for same-sex couples).

206. *See supra* note 203 and accompanying text.

207. H.B. 436 § 59:2.

208. *Id.* §§ 59:3-4.

209. *Id.* §§ 59:5-9.

210. D.C. Law 18-110, 57 D.C. Reg. 1833 (D.C. 2010).

211. D.C. Law 18-248, 57 D.C. Reg. 27 (D.C. 2009).

altering the underlying meaning. A sweeping provision requiring a gender-neutral interpretation of D.C.'s already enacted marriage laws would not be possible if legalizing same-sex marriage required significant substantive changes to the law.

Section 2 of the Act added the same types of "conscience" provisions that other jurisdictions have with regard to religious objections to same-sex marriage.²¹² Section 3 of the Act added provisions to integrate the District of Columbia's domestic partnership laws into the new marriage system.²¹³ These changes do not represent any difference in the substantive law. They do not alter the rights and responsibilities marriage confers on individuals in D.C., nor do they change how marriage is implemented for opposite-sex couples.

v. New York

The New York legislature voted on July 24, 2011 to legalize same-sex marriage.²¹⁴ The Marriage Equality Act's legislative intent section provided that "marriages of same-sex and different-sex couples be treated equally in all respects under the law."²¹⁵ The legislative intent section concludes with:

The legislature intends that all provisions of the law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.²¹⁶

As with other states, any provisions of the law with gender-specific language can be read in a gender-neutral way without altering the underlying effect of the law on married couples.

The rest of the Marriage Equality Act included minor changes to the existing law in New York. New York's Domestic Relations law was amended by the addition of two new sections, 10-a and 10-b.²¹⁷ Section 10-a provided that a marriage is valid regardless of whether the parties are of the same or different sex, that all sources of law shall treat opposite-sex and same-sex marriages equally, and that all gender-specific language or terms in the statutes shall be read in a gender-neutral manner.²¹⁸ Again, this provision highlights how marriage laws were already gender-neutral in effect if not in language. If legalizing same-sex marriage required significant changes to how marriage in New York was recognized, implemented and practiced, this type of sweeping provision would be ineffective.

Section 10-b provided exemptions for religious groups.²¹⁹ Section 10-b(1) stated that religious organizations do not have to recognize, or provide

212. *Id.*

213. *Id.* § 3.

214. Marriage Equality Act, 2011 N.Y. Sess. Laws 749 (McKinney).

215. *Id.*

216. *Id.* § 2.

217. *Id.* § 3.

218. *Id.*

219. *Id.*

accommodations for any marriage.²²⁰ Section 10-b(2) prohibited bringing a civil cause of action against religious organizations that refuse to provide accommodations for a same-sex marriage.²²¹ Section 10-b(3) allowed religious institutions and organizations to limit to or give preference to members of the same religion or denomination in employment, sales or rental of housing.²²² This revision did not change the underlying marriage law in New York, but instead ensured that religious groups cannot be punished for refusing to recognize same-sex marriages. Section 10-b did not create new rights and responsibilities for married individuals or alter how the state of New York recognizes or implements its marriage laws.

B. States that Legalized Same-Sex Marriage via the Courts

Massachusetts and Iowa legalized same-sex marriage through decisions by their respective state supreme courts.²²³ After the highest court in the state mandated that same-sex couples be allowed to marry, the Massachusetts and Iowa state legislatures did not have to revise, repeal or amend sections of their marriage statutes to implement those judicial decisions. If same-sex marriage required significant changes to substantive marriage laws, one would expect that the state legislatures would have to change the state's laws in order to recognize same-sex couples. That this did not occur illustrates how the marriage laws of these states were already gender-neutral enough in practice to allow for same-sex marriage without substantial revisions to the law.

i. Massachusetts

The Massachusetts Supreme Court legalized same-sex marriage in 2003 with its decision in *Goodridge v. Department of Public Health*.²²⁴ The *Goodridge* decision did not invalidate any portion of Massachusetts's marriage statute (Massachusetts' General Laws Chapter 207) because the statute did not explicitly bar same-sex couples from marrying at the time of the decision.²²⁵ After the *Goodridge* ruling, the Massachusetts legislature amended Chapter 207 three times to repeal various portions of the law (sections 11-13, 28A and 50).²²⁶ However, none of these revisions were aimed at altering Massachusetts's marriage law in order to facilitate same-sex marriage.

One of the revisions was to repeal Section 28A of the Massachusetts statutes, which required a medical test prior to a marriage certificate being

220. *Id.*

221. *Id.*

222. *Id.*

223. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969, 973-74 (Mass. 2003); see *Varnum v. Brien*, 763 N.W.2d 863, 872, 906-07 (Iowa 2009).

224. *Goodridge*, 798 N.E.2d 941.

225. *Id.* at 952-53.

226. Compare MASS. GEN. LAWS ANN. ch. 207 (West 2003) (stating the 2003 version of sections 11-13, 28A, and 50 of Chapter 207), with MASS. GEN. LAWS ANN. ch. 207 (West 2011) (stating sections 11-13, 28A, and 50 of Chapter 207 have been repealed).

issued.²²⁷ The Massachusetts legislature repealed that test with a 2004 act.²²⁸ The medical test requirement was repealed for both opposite and same-sex couples alike. Repealing the medical test requirement did not alter the rights and responsibilities conferred by marriage in Massachusetts and was not necessary to legally recognize same-sex marriages in the state.

Additionally, Massachusetts repealed Sections 11-13 and Section 50 of the statutes in a 2008 Act.²²⁹ Sections 11-13 prohibited out-of-state residents from marrying in Massachusetts if their marriage would be contrary to the laws of their home state.²³⁰ Section 50 penalized officials who issued marriage licenses contrary to Section 11 of the statutes (forbidding marriages between out of state couples who would be prohibited from marrying in their home state).²³¹ Same-sex marriage was recognized in Massachusetts from 2003 to 2008 prior to those sections being repealed. Changing the Massachusetts statutes by repealing those sections was not a change necessitated by the Massachusetts Supreme Court's ruling in *Goodridge*. None of these amendments to marriage laws after the *Goodridge* decision was issued were passed in order to implement same-sex marriage.

ii. Iowa

The Iowa Supreme Court's 2009 ruling in *Varnum v. Brien* legalized same-sex marriage in the state.²³² As a direct result of that decision, Iowa Code section 595.2(1) was invalidated.²³³ Section 595.2(1) read: "only a marriage between a male and a female is valid."²³⁴ The Iowa Supreme Court in *Varnum* specifically ordered that the remaining statutory language should be interpreted and applied to allow same-sex couples "full access to the institution of civil marriage."²³⁵ Chapter 595 of the Iowa Code has not been amended since same-sex marriage was legalized in 2009 in order to comply with the court's ruling.²³⁶ Same-sex marriage in Iowa was legalized without invalidating or amending substantial portions of the existing law. That Iowa could begin recognizing same-sex marriages without any changes to their existing marriage laws contradicts the proposition that legalizing same-sex marriage represents an unprecedented and significant change to current marriage laws.

Members of the Iowa legislature have proposed bills to change the Iowa statutes in the wake of the *Varnum* decision. However, these proposed bills are

227. MASS. GEN. LAWS ANN. ch. 207, § 28A (West 2003).

228. 2004 Mass. Acts 1344.

229. 2008 Mass. Acts 1014.

230. MASS. GEN. LAWS ANN. ch. 207, §§ 11-13 (West 2003).

231. *Id.* § 50.

232. *Varnum*, 763 N.W.2d at 862.

233. IOWA CODE § 595.2 (2011).

234. *Id.* § 595.2 (1).

235. *Varnum*, 763 N.W.2d at 906-07.

236. Compare IOWA CODE ANN. § 595.2 (West 2009) (stating only marriage between a male and female is valid), with IOWA CODE § 595.2 (2011) (still stating marriage is between a male and female only).

attempts to halt same-sex marriages or “conscience” provisions meant to protect individuals and organizations that oppose same-sex marriage on religious grounds.²³⁷ For example, in February 2011, a bill was introduced that would add a subsection to Iowa Code Section 595.3 barring the county registrar from issuing marriage licenses to same-sex couples until an amendment to the Iowa Constitution that would ban same-sex marriage is submitted to the electorate.²³⁸ That same bill would also strip the Iowa Supreme Court’s jurisdiction to take cases relating to granting marriage licenses.²³⁹ A bill was also introduced in January 2010 to allow religious exemptions to solemnizing or recognizing the validity of a marriage.²⁴⁰ While these bills were proposed in response to the *Varnum* ruling, none of them were proposed to alter the existing marriage laws in order to comply with the ruling.

C. Implications for the Traditional Marriage Argument

The traditional marriage argument assumes that marriage laws would need to undergo significant changes to allow for legal same-sex marriage.²⁴¹ This assumption is not supported by the process United States jurisdictions have used to legalize same-sex marriage. Jurisdictions have had to implement essentially no changes to their substantive marriage law – that is, they have not had to change the underlying effect of their marriage laws – in order to recognize same-sex marriage. None of the changes implemented by jurisdictions that now recognize same-sex marriage have changed the rights and responsibilities of married individuals, or how those jurisdictions recognize marriage for opposite-sex couples.

The examples of jurisdictions legalizing same-sex marriage show that marriage as an institution is already gender-neutral enough in effect to accommodate same-sex couples. Jurisdictions that legalized same-sex marriage via the legislature revised gender-specific language and/or included a new section of the statutes to require other laws concerning marriage to be read as gender-neutral. The legislatures did not have to alter the rights and responsibilities granted by marriage or change the purpose and effect of the marriage laws in order to legalize same-sex marriage.

The two states in which same-sex marriage was legalized via the courts did not have to amend their marriage statutes in order to comply with the decisions. This also shows that state marriage laws do not need to be fundamentally changed to apply to same-sex couples. The same Massachusetts and Iowa marriage statutes which used to be restricted to opposite-sex couples were successfully applied to same-sex couples without any changes.

237. See H.F. 330, 2011 Gen. Assemb. (Iowa 2011); S.F. 2052, 2010 Gen. Assemb. (Iowa 2010).

238. H.F. 330 §§ 1-2.

239. *Id.*

240. S.F. 2052 § 1.

241. See discussion *supra* note 7 of why the traditional marriage argument seems to require this assumption.

CONCLUSION

Opponents of same-sex marriage often appeal to notions of traditional marriage in order to caution against granting marriage rights to same-sex couples.²⁴² This argument has been made by prominent politicians,²⁴³ as well as by parties opposing the implementation of same-sex marriage in lawsuits.²⁴⁴ The traditional marriage argument implies that marriage as an institution has been relatively static over time and that current marriage laws cannot accommodate same-sex couples without significant changes. However, the traditional marriage argument is undermined by the changes that have already been made to marriage laws in the United States and by the relative ease with which states that have chosen to recognize same-sex marriage have been able to accomplish that goal.

Marriage laws in the United States have undergone changes that have made the institution less gendered.²⁴⁵ Marriage in early United States history still adhered to the rules of coverture inherited from England,²⁴⁶ but marriage laws have since been changed so that the rights and responsibilities of marriage do not differ based on gender.²⁴⁷ Changes have been made to laws concerning married women's right to own and control property, divorce, child custody, spousal support, marital rape and the right to use contraception.²⁴⁸ These changes have removed many of the legal differences that once existed between "husband" and "wife." In light of these significant changes, the argument that recognizing same-sex marriages threatens to destabilize the institution as a whole is much less persuasive.

A review of the processes used to implement same-sex marriage in United States jurisdictions also contradicts the traditional marriage argument. In jurisdictions that have legalized same-sex marriage through the legislature, substantial legal changes were not necessary to do so.²⁴⁹ Jurisdictions were largely able to legalize same-sex marriage by inserting language into the statutes requiring marriage laws to be read as if they were gender-neutral.²⁵⁰ That these types of sweeping provisions are effective shows that legalizing same-sex marriage is possible without drastic changes to the marriage laws as

242. *See supra* page 1, the traditional marriage argument holds that recognition of same-sex marriage would fundamentally alter the institution of marriage as it has historically been practiced in the United States.

243. *See supra* note 3 (citing an interview with former Republican Senator and Presidential Candidate Rick Santorum.)

244. *See supra* notes 30 and 31 and accompanying text.

245. *See supra* Part II.

246. *See supra* Part II.A.

247. *See supra* Part III.

248. *See supra* Part III.A-F.

249. *See supra* Part IV.

250. As of the writing of this paper, Vermont, Connecticut, New Hampshire, New York and the District of Columbia have legalized same-sex marriage via the legislature. *See discussion supra* Part IV.A of the bills which legalized same-sex marriage in those jurisdictions.

they are currently written. This undermines the notion that recognizing same-sex marriage would require significantly altering marriage as it is practiced today.

The traditional marriage argument is also unsupported by a review of states that have legalized same-sex marriage via the courts.²⁵¹ A review of the Massachusetts and Iowa statutes today, post legalization of same-sex marriage, reveals that neither state had to make changes to their marriage laws in order to comply with the rulings by their respective state supreme courts.²⁵² This again shows that legalizing same-sex marriage does not require significantly altering marriage laws as they are currently written.

Overall, legislatures and courts that are faced with the question of whether to legalize same-sex marriage will likely have to consider the traditional marriage argument. In doing so, it is important to note that the institution of marriage has already undergone significant changes. Given the history of marriage in the United States, legal recognition of same-sex marriage is not an unprecedented and abrupt change. The changes that have already been made to marriage laws in the United States have created a largely gender-neutral institution that can accommodate same-sex couples in its current form.

251. As of the writing of this paper, Massachusetts and Iowa have legalized same-sex marriage via the courts. *See* discussion *supra* Part IV.B of those cases.

252. *See supra* Part IV.B.