

# The Louisiana DOMA as an Improper Impediment to the Evolution of Public Policy Toward Cohabitants

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# The Louisiana DOMA as an Improper Impediment to the Evolution of Public Policy Toward Cohabitants

## I. INTRODUCTION

Some people just do not want to get married. In fact, more and more Americans are choosing not to do so, opting instead to live together without walking down the aisle.<sup>1</sup> As of the 2000 Census, there were nearly 5.5 million households in the United States headed by an unmarried partner.<sup>2</sup> Of those households, more than 4.8 million were headed by an opposite-sex unmarried partner.<sup>3</sup>

Social acceptance of unmarried couples in long-term relationships has increased in the last 20 years.<sup>4</sup> Public attitudes toward celebrity lifestyles are often indicative of a broader approval or disapproval of the lifestyle in general. Some famous couples have chosen not to marry yet have remained devoted to one another for decades and raised families together. Kurt Russell and Goldie Hawn, for instance, are both successful actors who have been together for more than 25 years without getting married.<sup>5</sup> The two have a son, along with other children from previous marriages.<sup>6</sup> When asked why she and Russell never married, Hawn replied, "Because we have done just perfectly without marrying . . . . I already feel devoted and isn't that what marriage is supposed to do? So as long as my emotional state is in a state of devotion, honesty, caring and loving, then we're fine."<sup>7</sup> Although there is some debate

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1. T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 59 (2004) (citing Larry L. Bumpass & James A. Sweet, *Cohabitation, Marriage and Union Stability: Preliminary Findings from NSFH2* at tbl. 2 (Nat'l Survey of Families and Households, Working Paper No. 65, May 1995)).

2. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000, CENSUS 2000 SPECIAL REPORT 4 tbl. 2 (Feb. 2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

3. *Id.*

4. Gallanis, *supra* note 1, at 58.

5. *Goldie Hawn and Kurt Russell prove their 25-year romance is still going strong on holiday in Croatia*, THE DAILY MAIL ONLINE, (June 17, 2010, 8:22 PM), <http://www.dailymail.co.uk/tvshowbiz/article-1287435/Goldie-Hawn-Kurt-Russell-prove-25-year-romance-going-strong-holiday-Croatia.html#ixzz11huplXgn>.

6. See *Goldie Hawn Biography*, BIOGRAPHY.COM, <http://www.biography.com/articles/Goldie-Hawn-9331873> (last visited Nov. 9, 2010).

7. Anythinghollywood, *Hollywood's Golden Couple, Goldie Hawn and Kurt Russell*, ZIMBIO.COM (Mar. 8, 2009, 4:33 AM), <http://www.zimbio.com/Goldie+>

about whether living together outside of marriage is an acceptable social practice, such relationships have undeniably become more common. As Letitia Baldrige noted over 30 years ago, “It used to be called living in sin . . . but it has become, by weight of sheer statistics, a way of life. We must therefore cope with it as such.”<sup>8</sup>

Americans choose not to marry for various reasons. The American Law Institute articulated a few such reasons in its “Principles of the Law on Family Dissolution”:

Among other [reasons], some [couples] have been unhappy in prior marriages and therefore wish to avoid the form of marriage even as they enjoy its substance. . . . Some begin a casual relationship that develops slowly into a durable union, by which time a formal marriage ceremony may seem awkward . . . . Failure to marry may reflect group mores; some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others. Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner’s preference for marriage. . . . In all these cases, the absence of formal marriage may have little or no bearing on the character of the parties’ domestic relationship . . . .<sup>9</sup>

No matter what reason a couple chooses not to marry, society now recognizes such relationships and the law should do so as well. Scholars have long debated the legal rights and protections that should be afforded to couples choosing not to enter into the marital relationship.<sup>10</sup> Any rights and protections that exist for such couples, which vary from state to state, were threatened in the aftermath of

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Hawn/articles/69/Hollywood+Golden+Couple+Goldie+Hawn+Kurt+Russell (last visited February 22, 2012).

8. THE AMY VANDERBILT COMPLETE BOOK OF ETIQUETTE 128 (L. Baldrige ed., 1978).

9. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 6.02 cmt. a (2002).

10. See generally Gallanis, *supra* note 1, at 59; Kathryn Venturatos Lorio, *Concubinage and its Alternatives: A Proposal for a More Perfect Union*, 26 LOY. L. REV. 1 (1980).

the Massachusetts Supreme Court's 2003 decision in *Goodridge v. Department of Public Health*.<sup>11</sup> In *Goodridge*, the court held that denying a same-sex couple's right to marriage violated the Massachusetts Constitution.<sup>12</sup> In response, 30 states have adopted a "Defense of Marriage Amendment" ("DOMA") to amend their constitutions and prevent a similar decision granting same-sex couples the right to marry.<sup>13</sup>

Many of these DOMAs also affect the rights of opposite-sex couples. Fifteen DOMAs, including Louisiana's, prohibit a legal status "identical or substantially similar" to marriage for all unmarried persons, including opposite-sex couples as well as same-sex partners.<sup>14</sup> In several of these states, legal authorities analyzed the amendment and determined its effect upon unmarried opposite-sex couples ("cohabitants").<sup>15</sup> Although in 2004 the Louisiana legislature debated the effect its DOMA would have, the issue remains unresolved.<sup>16</sup>

Compounding the uncertainty as to the application of DOMA to cohabitants in Louisiana is the State's history of legislative

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11. 798 N.E.2d 941 (Mass. 2003).

12. *Id.*

13. See ALA. CONST. art. I, § 36.03; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; CO. CONST. art. 2, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, ¶ I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

14. These fifteen DOMAs are those of: Arkansas, ARK. CONST. art. I, § 25; Florida, FLA. CONST. art. I, § 27; Kansas, KAN. CONST. art. XV, § 16; Kentucky, KY. CONST. § 233A; Louisiana, LA. CONST. art. XII, § 15; Michigan, MICH. CONST. art. I, § 25; North Dakota, N.D. CONST. art. XI, § 28; Ohio, OHIO CONST. art. XV, § 11; Oklahoma, OK. CONST. art. II, § 35; South Carolina, S.C. CONST. art. XVIII, § 15; South Dakota, S.D. CONST. art. XXI, § 9; Texas, TEX. CONST. art. I, § 32; Utah, UTAH. CONST. art. I, § 29; Virginia, VA. CONST. art. I, § 15-A; Wisconsin, WIS. CONST. art. XIII, § 13.

15. See *National Pride at Work, Inc. v. Gov. of Michigan*, 748 N.W.2d 524 (Mich. 2008); *Ross v. Goldstein*, 203 S.W.3d 508 (Tex. App. 2006); Va. Att'y Gen. Op. No. 006-003, 2006 WL 4286442 (2006); Kan. Att'y Gen. Op. No. 2007-29, 2007 WL 2689931 (2007); Mich. Att'y Gen. Op. No. 2005-7171, 2005 WL 639112 (2005).

16. The Louisiana DOMA was passed on September 18, 2004 as Act number 926. 2004 La. Acts 2878.

restrictions upon private contracts between such couples.<sup>17</sup> Those contractual restrictions were repealed over 20 years ago, revealing a movement toward a more liberal public policy concerning the rights of cohabitants, consistent with changing social attitudes about such relationships.<sup>18</sup> The Louisiana DOMA, adopted primarily in an effort to strengthen the ban on same-sex marriage in the state, impedes this movement with a blanket restriction on the contractual rights of cohabitants. Consequently, legal experts are questioning the direction of the state's current policy toward cohabitants.<sup>19</sup> This Comment answers those questions and others by providing much-needed clarity concerning the scope of the Louisiana DOMA.

This Comment will proceed in four parts. Part I profiles state DOMAs nationwide and offers a glimpse of several states' determinations of the effect of those laws on the rights of cohabitants. Part II discusses the liberalization of the public policy toward cohabitants in Louisiana. Part III shows how the Louisiana DOMA is an improper impediment to the development of this policy. Part IV concludes with a recommendation that the legislature change the Louisiana DOMA to address only same-sex marriage. This change is necessary because the Louisiana DOMA's restrictions are inconsistent with the direction of state public policy, ineffective as a tool to promote marriage, and, as part of the state constitution, far too burdensome to change in order to maintain consistency with contemporary social norms.

#### I. THE FIGHT FOR ANSWERS ACROSS THE COUNTRY: DETERMINING THE EFFECT OF STATE DOMAS UPON COHABITANTS

Called to action by state supreme courts that viewed legislative bans of same-sex marriage as violative of their state constitutions, many state legislatures adopted constitutional amendments declaring same-sex marriage unconstitutional.<sup>20</sup> Although the amendments were created to prevent a state supreme court from granting same-sex couples the right to marry, many of the amendments also

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17. KATHERINE S. SPAHT & RICHARD D. MORENO, *MATRIMONIAL REGIMES*, § 8.3 in 15 *LOUISIANA CIVIL LAW TREATISE* 771 (3d ed. 2010).

18. See generally Catherine Augusta Mills, Comment, *Implications of the Repeal of Louisiana Civil Code Article 1481*, 48 LA. L. REV. 1201, 1215 (1988).

19. SPAHT & MORENO, *supra* note 17, at 771.

20. See *supra* note 13.

address the rights of opposite-sex couples. In many of these states, the public grew concerned over whether the language of these amendments could potentially affect private contracts.

*A. State Supreme Court Decisions Nullifying Legislative Prohibitions of Same-Sex Marriage*

Most states prevent same-sex couples from contracting to marry.<sup>21</sup> For example, Louisiana's legislative protections of marriage are found in the Civil Code. Louisiana Civil Code article 86 defines marriage as "a legal relationship between a man and a woman that is created by civil contract."<sup>22</sup> The first part of article 89 prohibits persons of the same sex from contracting marriage with each other.<sup>23</sup> The second part of that article implements article 3520 to govern same-sex marriages contracted in other states:<sup>24</sup> "A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose . . ." <sup>25</sup> Any marriage contracted in violation of an impediment, such as the impediment of same sex, is considered absolutely null under Louisiana law, voiding any legal effect of the marriage from the moment of its creation.<sup>26</sup> Furthermore, "a purported marriage between parties of the same sex does not produce any civil effects."<sup>27</sup>

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21. See, e.g., ALA. CODE § 30-1-19 (Westlaw 2011); FLA. STAT. ANN. § 741.212 (Westlaw 2011); IND. CODE § 31-11-1-1 (Westlaw 2011); MINN. STAT. ANN. § 517.01 (Westlaw 2011); MISS. CODE ANN. § 93-1-1 (West 2007); MO. ANN. STAT. § 451.022 (Westlaw 2011); N.C. GEN. STAT. ANN. § 51-1.2 (Westlaw 2011); OKLA. STAT. ANN. tit. 43 § 3.1 (Westlaw 2011); TEX. FAM. CODE ANN. § 6.204 (West 2006).

22. LA. CIV. CODE art. 86 (2010).

23. LA. CIV. CODE art. 89 (2010).

24. LA. CIV. CODE art. 89 (2010) ("Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code.").

25. LA. CIV. CODE art. 3520 (2010).

26. LA. CIV. CODE art. 94 (2010) ("A marriage is absolutely null when contracted without a marriage ceremony, by procuration, or in violation of an impediment . . ."); *id.* cmt. b.

27. LA. CIV. CODE art. 96 (2010). The article allows for civil effects to remain in the following situations: a) "in favor of a party who contracted for the marriage in good faith for as long as that party remain in good faith;" b) "[w]hen

State courts, however, found that these kinds of limitations on same-sex marriage violated state constitutions.<sup>28</sup> In 1993, the Hawaii Supreme Court held in *Baehr v. Lewin* that there was no fundamental right to same-sex marriage in Hawaii, but that a claim for sex discrimination arising out of the denial of marriage rights was subject to strict scrutiny.<sup>29</sup> The court remanded the case, and in 1996, the Hawaii Supreme Court held the state had not met its burden of showing a compelling interest for the discrimination and therefore found that the Hawaii statute limiting marriage to opposite-sex couples violated the Hawaii Constitution.<sup>30</sup>

Similarly, in 1999, the Vermont Supreme Court held in *Baker v. State* that the Vermont Constitution required the benefits of marriage be extended to same-sex couples.<sup>31</sup> In that case, same-sex couples claimed the legislation that denied them marriage licenses violated the state constitution.<sup>32</sup> The court allowed the existing legislation to remain in effect while the legislature drafted new laws in accordance with the order.<sup>33</sup> In response to the court's ruling, the Vermont Legislature created a new legal relationship—the civil union for same-sex partners, carrying with it all the legal incidents and benefits of marriage.<sup>34</sup> Commentators on both ends of the marriage debate described the unions as “‘same-sex marriage by another name,’ or ‘marriage lite’ . . . .”<sup>35</sup> Thus, they argued that “the

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the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the [other party] remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage;” and c) “a marriage contracted by a party in good faith produces civil effects in favor of a child of the parties.”

28. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

29. *Baehr*, 852 P.2d 44.

30. *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), *aff'd*, *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997). In 1998, Hawaii passed a constitutional amendment, article I § 23, granting the legislature the right to reserve marriage for opposite-sex couples.

31. *Baker*, 744 A.2d 864.

32. *Id.* at 867–68.

33. *Id.* at 887.

34. VT. STAT. ANN. tit. 15, § 1201 (Westlaw 2011).

35. Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 229 (2004–2005).

[Vermont legislature] maintained a nominal distinction between civil unions and marriage.”<sup>36</sup>

Four years later, the Massachusetts Supreme Court went a step further than *Baker* in *Goodridge v. Department of Public Health*.<sup>37</sup> Partially relying on the Supreme Court’s decision in *Lawrence v. Texas*,<sup>38</sup> and expanding on the decision of the Vermont Supreme Court in *Baker*, the court re-wrote the Massachusetts definition of marriage as “the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>39</sup> The court later issued an opinion to the state senate which said that drafting a statute establishing civil unions similar to those in Vermont while still denying marriage rights to same-sex couples would “maintain[] an unconstitutional, inferior and discriminatory status for same-sex couples.”<sup>40</sup>

Many state legislatures became wary of cases like *Goodridge* and *Baker* and took measures to prevent such decisions from occurring in their respective states. To combat what they feared would be a growing trend in state courts, the legislatures proposed amendments to their state constitutions that would ban same-sex marriage. The general electorate subsequently adopted these amendments.

### *B. State DOMAs Make Same-Sex Marriage Unconstitutional*

In 2000, Nebraska spearheaded the movement against the judicial expansion of marriage rights by becoming the first state to amend its constitution to recognize marriage as the union of only one man and one woman.<sup>41</sup> The amendment also went beyond marriage, declaring invalid “[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship.”<sup>42</sup> Supporters of the amendment called it “a response to

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36. *Id.*

37. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003).

38. 539 U.S. 558 (2003).

39. Richard Cook, *Kansas’s Defense of Marriage Amendment: The Problematic Consequences of a Blanket Nonrecognition Rule on Kansas Law*, 54 U. KAN. L. REV. 1165, 1170 (2006) (quoting *Goodridge*, 798 N.E.2d. at 969).

40. Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of Lawrence v. Texas*, 14 KAN. J.L. & PUB. POL’Y 687, 696 (2005) (citing Opinion of the Justices to the Senate, 440 Mass. 1201, 1206–07 (2004)).

41. NEB. CONST. art. I, § 29 (Westlaw 2011).

42. *Id.*

a court decision last year in Vermont [*Baker*] that stopped short of legalizing gay marriage but held that gay couples were entitled to the same benefits as heterosexual ones.”<sup>43</sup> Opponents attacked the amendment on many grounds, including the potential for unintended, even harmful, restrictions on certain private agreements between same-sex couples.<sup>44</sup> Having withstood a constitutional challenge that proceeded all the way to the Eighth Circuit Court of Appeals, the amendment still stands today.<sup>45</sup>

Other states were hesitant to follow Nebraska’s response to *Baker*,<sup>46</sup> but they quickly reacted to the Massachusetts Supreme Court’s official recognition of same-sex marriage rights in *Goodridge*.<sup>47</sup> To date, 30 states have amended their constitutions to prohibit same-sex marriage.<sup>48</sup> Twenty-three of these amendments were passed in the election cycle immediately following the *Goodridge* decision, and three more were passed in 2008.<sup>49</sup>

Some of these states found it necessary not only to prohibit same-sex marriage but also to preclude any couple from creating a legal relationship with each other intended to replicate marriage. Fifteen state DOMAs, including Louisiana’s, not only prohibit same-sex marriage, but also limit the rights of cohabitants.<sup>50</sup>

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43. Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, October 21, 2000, at A9. In her article, Belluck quotes Dan Parsons, the spokesman for the Nebraska Coalition for the Protection of Marriage, as saying, “Because of the action in Vermont, we really feel we’ve been forced to adopt this language to close this loophole.” *Id.*

44. *Id.* M.J. McBride, a campaign coordinator for Nebraskans Against 416, said, “My binding contracts, my power of attorney, wills and medical directives will be viewed as contracts or partnerships between two people of the same sex and no longer be recognized or valid in the state of Nebraska.” *Id.*

45. *Citizens for Equal Prot., Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev’d*, 455 F.3d 859 (8th Cir. 2006).

46. Only Nevada joined Nebraska in passing a constitutional amendment prior to *Goodridge*. Proposed in 2000, Article I, section 21 of the Nevada Constitution passed in 2002 because of a state law requiring voters to approve the amendment in two consecutive general elections. The amendment reads, “Only a marriage between a male and female person shall be recognized and given effect in this state.” NEV. CONST. art. I, § 21 (Westlaw 2011).

47. Because *Goodridge* recognized same-sex couples’ right to marriage, and not their right to a marriage alternative like *Baker*, states were quicker to respond to what they perceived to be a direct attack on the institution of marriage itself.

48. *See supra* note 13 (listing state DOMAs).

49. In 2004, 13 amendments were passed. In 2005, two were passed. In 2006, eight were passed.

50. *See supra* note 15 (listing state DOMAs that address opposite sex couples).

Although the bulk of the national debate surrounding state DOMAs has focused on the ban of same-sex marriage, the language of this particular group of DOMAs raises important questions regarding the rights of cohabitants. A lack of clarity arises, specifically, through “legal status” clauses such as the Louisiana DOMA clause, which states, “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”<sup>51</sup> In several of these states, state courts or attorneys general have been compelled to offer analyses of whether the state DOMAs affect private contracts.

### *C. Determining the Effects of State DOMAs*

Each of the states to address the effect of the state DOMA on the rights of cohabitants has come to a similar result. However, the opinions from the state courts and attorneys general vary as to both the reasoning and directness.

#### *1. Clear Interpretations of the State DOMA*

Virginia, Kansas, and Texas have provided a clear and direct analysis of their state DOMA through opinions from state courts or attorneys general.<sup>52</sup> All such opinions held that the effects of the state DOMA were limited to state action.

##### *a. Virginia’s Clear-Cut Decision: There is No Effect*

The Virginia DOMA prohibits the creation of a legal status with effects similar to marriage regardless of any romantic relationship between the parties. The amendment says, in pertinent part, “[Virginia] and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage.”<sup>53</sup> Prior to the passage of the amendment, the Virginia Attorney General issued an opinion stating, without

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51. LA. CONST. art. XII, § 15 (Supp. 2011).

52. See *Ross v. Goldstein*, 203 S.W.3d 508 (Tex. App. 14th Dis. 2006); Va. Att’y Gen. Op. No. 06-003, 2006 WL 4286442 (2006); Kan. Att’y Gen. Op. 2007-29, 2007 WL 2689931 (2007).

53. VA. CONST. art. I, § 15-A (Westlaw 2011).

equivocation, that the amendment would not affect private contracts.<sup>54</sup> In particular, the opinion states that the amendment would not affect the legal rights of unmarried persons involving various types of private contracts and agreements. Nor would it “alter any other rights that do not ‘approximate the design, qualities, significance, or effects of marriage’” or create the rights or effects of marriage.<sup>55</sup> The attorney general noted further that these rights do not arise from marriage and are therefore unaffected by the enactment of the marriage amendment.<sup>56</sup> The attorney general then issued a sweeping statement designed to inspire certainty regarding the private contractual rights of persons in Virginia following the passage of the marriage amendment: “Any Virginian, subject to any other existing legal limitations, may enter into any lawful contract, dispose of property to any person of his choosing by will or deed, or appoint any person to act on his behalf pursuant to a power of attorney or advance medical directive.”<sup>57</sup> Following the attorney general’s clear and strong opinion, no litigation or other legal challenges concerning the Virginia DOMA have arisen.

*b. Kansas Relies on Legislative Intent to Declare No Effect*

The relevant part of the Kansas DOMA, subsection (b), reads as follows: “No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”<sup>58</sup> Although the amendment does not employ language referring specifically to legal status, the Kansas Attorney General was asked to address whether the amendment affected private insurance contracts.<sup>59</sup> In his opinion, the Kansas Attorney General looked to the legislature’s intent when it drafted the amendment and determined there was no such effect.<sup>60</sup> State Representative Jan Pauls said private employers could voluntarily offer insurance benefits to “non-marital couples.”<sup>61</sup> Representative Pauls also

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54. Va. Att’y Gen. Op. No. 06-003, 2006 WL 4286442.

55. *Id.* at 1.

56. *Id.* at 4.

57. *Id.* at 3.

58. KAN. CONST. art. XV, § 16 (Westlaw 2011).

59. Kan. Att’y Gen. Op. No. 2007-29, 2007 WL 2689931 (2007).

60. *Id.* at 2.

61. *Id.*

insisted the amendment would not “remove any rights that a Kansas citizen currently holds.”<sup>62</sup> The attorney general’s opinion also includes the testimony of Professor Kris Kobach,<sup>63</sup> who said that subsection (b) of the amendment applied only to rights and incidents of marriage given by the state and did not limit contractual or legal agreements between private parties.<sup>64</sup> Professor Kobach then explained his view in further detail:

In other words, private contracts that offer benefits similar to those offered to married couples are in no way prohibited by [the Marriage Amendment]. . . . When such a private contract is made, it does not constitute “recognition by the state.” The state has not acted in any way. [A] right or incident of marriage is something that is automatically triggered when a marriage exists. It is something that has been positively identified by statute or court decision . . . contractual or private legal arrangements are not “rights or incidents of marriage,” because they do not come into existence automatically under state law as soon as a marriage exists.<sup>65</sup>

*c. Texas Court’s Alternative Approach*

The Texas DOMA reads in relevant part, “This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”<sup>66</sup> In *Ross v. Goldstein*, a Texas appellate court addressed an issue arising out of the intestate succession of John David Green.<sup>67</sup> The court rejected a claim by Ross, Green’s same-sex partner, for recognition of a “marriage-like relationship” between the two men that would entitle Ross to a portion of Green’s property in the succession.<sup>68</sup> The court reasoned that Texas’s DOMA mandated a denial of the claim because public policy was “unambiguous, clear, and controlling on the question of

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62. *Id.* (It is only logical to assume that when Rep. Pauls refers to “any right,” she is including the freedom to privately contract and order one’s affairs.)

63. Prof. Kris Kobach is the Daniel L. Brenner/UMKC Scholar and Professor of Law at the University of Missouri-Kansas City School of Law. He has taught at UMKC since 1996.

64. Kan. Att’y Gen. Op. No. 2007-29, 2007 WL 2689931, 3.

65. *Id.*

66. TEX. CONST. art. I, § 32 (Westlaw 2011).

67. *Ross v. Goldstein*, 203 S.W.3d 508 (Tex. App. 2006).

68. *Id.* at 514.

creating a new equitable remedy akin to marriage: [a court] may not create such a remedy.”<sup>69</sup> The court stated further, “Texas has determined that same-sex couples must address their particular desires through other legal vehicles such as contracts or testamentary transfers.”<sup>70</sup> Through this statement, the court thus recognized a freedom for private parties to contractually arrange their affairs.

The court’s less-direct analysis has more to do with the issue brought before it than its interpretation of the amendment. Because the appellant argued only the issue of whether the court could establish a “marriage-like relationship” for same-sex couples,<sup>71</sup> the court addressed only this issue. The court was not required to give the type of clear and definite statement given in both Kansas and Virginia as to the precise limits of the state DOMA. Although the court in *Ross* did not expressly address any potential effects on private contracts, it assumes there are none through its determination that same-sex couples can always address their concerns through private contracts.<sup>72</sup> If same-sex couples in Texas can turn to contracts instead of a “marriage-like relationship” to order their affairs, it follows that opposite-sex couples can do the same.

*d. Michigan’s Application of General Constitutional Principles*

Unlike Virginia, Kansas, and Texas, legal authorities in Michigan used general principles of the Michigan Constitution, rather than a specific interpretation of the state DOMA itself, to find that Michigan’s DOMA did not affect private contracts.

The Michigan DOMA reads in pertinent part, “[T]he union of one man and one woman in marriage shall be the only agreement

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69. *Id.*

70. *Id.* The court parenthetically refers to a Texas House of Representatives Joint Resolution, which says:

This state recognizes that through the designation of guardians, the appointment of agents, and the use of private contracts, persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to proceeds of life insurance policies without the existence of any legal status identical or similar to marriage.

*Id.* (quoting Tex. H.R.J. Res. 6, § 2, 79th Leg., R.S. (2005)).

71. *Ross*, 203 S.W.3d at 512.

72. *Id.* at 514.

recognized as a marriage or similar union for any purpose.”<sup>73</sup> This amendment uses the broadest language of all in prohibiting relationships similar to marriage under law.<sup>74</sup> The amendment lacks any reference to same-sex or opposite-sex couples and bans any recognition of a marriage-like relationship “for any purpose.”<sup>75</sup>

In *National Pride at Work, Inc. v. Governor of Michigan*, the Michigan Supreme Court addressed the issue of whether the state DOMA prevented public employers from providing their employees with health insurance benefits for their domestic partners.<sup>76</sup> The court held public employers could not provide such benefits since domestic partnerships were similar to marriage “because [they] are the only relationships in Michigan defined in terms of both gender and lack of a close blood connection.”<sup>77</sup> Because public employers were an arm of the state and domestic partnerships were a relationship similar to marriage, the court concluded that the recognition of such benefits, and therefore the domestic partnership status, violated Michigan’s DOMA.<sup>78</sup> In a footnote, the court specifically declined to address “whether private employers can provide health-insurance benefits to their employees’ same-sex domestic partners.”<sup>79</sup>

Twenty years prior to *National Pride*, the court in *Woodland v. Michigan Citizens Lobby* provided a clear interpretation of the Michigan Constitution—specifically whether the relevant provisions applied to private conduct.<sup>80</sup> In *Woodland*, the court held that the Declaration of Rights of the Michigan Constitution<sup>81</sup> had “never been interpreted as extending to purely private conduct; these provisions have consistently been interpreted as limited to protection against state action.”<sup>82</sup> In a 2005 interpretation of the state’s DOMA, the Michigan Attorney General used the court’s opinion in

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73. MICH. CONST. art. I, § 25 (Westlaw 2011).

74. *Id.*

75. *Id.*

76. 748 N.W.2d 524 (Mich. 2008).

77. *Id.* at 536. Note that in this case, domestic partnerships only involved persons of the same gender. *Id.* at 531.

78. *Id.*

79. *Id.* at 544 n.1.

80. 378 N.W.2d 337 (Mich. 1985).

81. The Declaration of Rights is Article I of the Michigan Constitution and contains the Michigan DOMA at section 25.

82. *Woodland*, 378 N.W.2d at 344.

*Woodland* to find that the amendment operates “as a limitation on government conduct and therefore applies to state and local government entities.”<sup>83</sup>

Unlike Texas, Kansas, and Virginia, the interpretations of the Michigan DOMA do not expressly address the amendments application to private contracts. Rather, through a clear interpretation of the general principles of the Michigan Constitution, one can infer that the amendment would not apply to any private conduct whatsoever.

The aforementioned state interpretations of DOMAs around the nation show that state DOMAs are strong indicia of state policy toward the rights of cohabitants. Based on a variety of reasons, each interpretation found the state DOMA does not affect private contracts. The legal history of Louisiana provides a different scenario from the above mentioned states, and interpretation of the Louisiana DOMA could therefore be decidedly different.

#### *D. Shifting the Focus Back Home: The Adoption of the Louisiana DOMA*

Legal authorities in Louisiana face an issue that none of the aforementioned states had to resolve when deciphering the intent of the drafters of the state DOMA and determining the law’s effects: Louisiana’s history of legislative restrictions upon contracts between cohabitants. The Louisiana DOMA, adopted in September 2004, states:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. *A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.* No official or court of the state of Louisiana shall recognize any marriage

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83. Mich. Att’y Gen. Op. No. 005-7171, 2005 WL 639112, 4 (2005).

contracted in any other jurisdiction which is not the union of one man and one woman.<sup>84</sup>

Prior to its passage, the state legislature debated several key issues arising from the language of the amendment.<sup>85</sup> One major area of controversy was the proposed amendment's potential impact on private contracts, including domestic agreements between cohabitants and domestic partner benefits private companies offer in contracts with their employees.<sup>86</sup> Legal analysts were split on the potential impact of the amendment on these contracts.<sup>87</sup> Specifically, the opposing sides disagreed as to what effect, if any, the Louisiana DOMA would have upon private contracts between cohabitants.<sup>88</sup> As the Public Affairs Research Council of Louisiana noted in materials disseminated to voters in advance of the DOMA vote,

Some legal scholars believe the amendment will not disturb private contracts . . . . Other legal experts think private contracts closely paralleling marital rights may be nullified such as alimony and health-care benefits. Others think the amendment would invalidate all agreements between same-sex and unmarried opposite-sex partners, even those that are not marital in nature, such as medical directives.<sup>89</sup>

Although Louisiana courts came close to resolving the dispute among the legislators, no answer has been provided yet, and the issue remains unresolved.<sup>90</sup>

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84. LA. CONST. art. XII, § 15 (emphasis added).

85. *Guide to the Constitutional Amendment on the Defense of Marriage Act*, STUD. & REP. BY DATE (Pub. Affairs Research Council of La.), Aug. 2004, at 3, available at <http://www.la-par.org/studrepdate.cfm>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 4. The amendment also withstood a judicial challenge prior to its adoption in *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005), on the grounds that it contained more than one object, violating the single-object rule of the Louisiana Constitution contained in Article XIII, section 1 (B). See *Forum for Equality PAC*, 893 So. 2d at 729, for an explanation of the single-object rule. The Louisiana Supreme Court eventually found that the DOMA had as its sole object "the defense and protection of our civil tradition of marriage." *Forum for Equality PAC*, 893 So. 2d at 734.

90. After its adoption, the Louisiana DOMA was an issue in only one case, *Ralph v. City of New Orleans*, 4 So. 3d 146 (La. App. Ct. 4th 2009). The case involved a taxpayer suit seeking a declaration that the city of New Orleans and the City Council had acted beyond their powers when they provided for the registry of

### III. THE EVOLUTION OF PUBLIC POLICY TOWARD COHABITANTS IN LOUISIANA

Louisiana law governing the rights of cohabitants has undergone a gradual change coinciding with the contemporary cultural practices and attitudes of Louisiana citizens. The evolution of these laws is evident in the changes made to the Civil Code and the Revised Statutes. An examination of the changes to the Code articles and criminal statutes governing the rights of cohabitants exposes how the Louisiana DOMA undermines social policy.

#### *A. The Era of Louisiana Civil Code Article 1481 and its Restrictions on the Rights of Cohabitants*

Only Louisiana and South Carolina have passed a statute restricting “donations between persons living in concubinage, or otherwise sustaining immoral relations.”<sup>91</sup> The restrictions under the Louisiana Civil Code were much broader than those in South Carolina, limiting donations between anyone living in “open concubinage.”<sup>92</sup> None of the versions of the Civil Code defined “open concubinage.” According to the Louisiana Supreme Court, concubinage can be defined as “the act or practice of cohabiting without legal marriage.”<sup>93</sup> In other words, concubinage is a

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domestic partnerships, and then used the registry as the basis for extending health insurance coverage and benefits to the unmarried “domestic partners” of city employees. *Ralph*, 4 So. 3d at 148. One of the issues brought to the court rings a familiar tune—whether the health insurance benefits for domestic partners violated the Louisiana DOMA’s prohibition of “[a] legal status identical or substantially similar to that of marriage for unmarried individuals . . .” *Id.* at 158. The court, however, dismissed any consideration of this issue on procedural grounds, holding that the claim was not before it because it was not raised in the pleadings. *Id.*

91. Annotation, *Validity and Construction of Statutes Discountenancing Donations, Testamentary or Otherwise, Between Persons Living in Concubinage or Otherwise Sustaining Immoral Relations*, 62 A.L.R. 286 (2010). The South Carolina statute, passed in the Act of 1795 and later incorporated into the general statutes, limited only a lawfully married man from giving more than one-fourth of the value of his estate to a woman with whom he lived in adultery. The statute is almost entirely obsolete, however, and has not been litigated since 1899. See *Beaty v. Richardson*, 34 S.E. 73 (S.C. 1899).

92. See LA. CIV. CODE art. 1481 (1870).

93. *Succession of Jahraus*, 38 So. 417, 459 (La. 1905).

relatively stable relationship that requires living together as man and wife without being married.<sup>94</sup> Concubinage is open when the relationship is not “disguised, concealed or made secret by the parties.”<sup>95</sup> In *Succession of Bacot*, the court defined a concubine as “one who occupies the position, performs the duties, and assumes the responsibilities of a wife, without the title and privileges flowing from a legal marriage.”<sup>96</sup> A paramour is simply a man with whom a concubine lives.<sup>97</sup>

Prior to its repeal, Louisiana Civil Code Article 1481 provided the foundation for contractual restrictions upon those living in open concubinage in Louisiana.<sup>98</sup> At first, the article completely prohibited donations of immovables and donations of movables in excess of certain pecuniary limitations.<sup>99</sup>

The history and eventual repeal of article 1481 and its restrictions upon donations between persons living in open concubinage reveals a gradual change to a more liberal and open public policy toward cohabitants in Louisiana.<sup>100</sup> During the Roman Empire, concubinage was widely recognized as an inferior or secondary status to marriage and was afforded only certain types of legal recognition.<sup>101</sup> The Roman concubine never acquired the social or legal status of her male partner.<sup>102</sup> Under early French law, concubines and paramours were completely prohibited from making

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94. Lorio, *supra* note 10, at 13 (quoting *Succession of Jahraus*, 114 La. 456, 458 (1905)).

95. *Succession of Green v. Mears*, 499 So. 2d 637, 638 (La. Ct. App. 3d 1986).

96. 502 So. 2d 1118, 1127 (La. 1987) (quoting *Purvis v. Purvis*, 162 So. 2d 239, 240 (La. Ct. App. 1935)).

97. *Schwegmann v. Schwegmann*, 441 So. 2d 316, 323 (La. Ct. App. 1983).

98. The article was repealed by the Louisiana legislature in Act 468 of 1987. Act. No. 468, 1987 La. Acts 1149.

99. LA. CIV. CODE art. 1481 (1870):

Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

Those who afterwards marry are excepted from this rule.

100. Mills, *supra* note 18, at 1215.

101. *Bacot*, 502 So. 2d at 1127–28.

102. *Bacot*, 502 So. 2d at 1128 (citing Lorio, *supra* note 10, at 5).

donations to each other.<sup>103</sup> The versions of article 1481 in the early Louisiana Civil Codes also forbade all donations between those living in open concubinage, but in 1825 the article was amended to read as follows until it was repealed in 1987:<sup>104</sup>

Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate.

Those who afterwards marry are excepted from this rule.<sup>105</sup>

The jurisprudence that interpreted article 1481 reveals the evolution of Louisiana's public policy toward cohabitants.<sup>106</sup>

The first version of the article forbade all donations between concubine and paramour. In 1825 the article was modified to allow a donation of ten percent of one's estate, and the legislature made an exception for couples that later married.<sup>107</sup> The 1825 version of article 1481 lasted nearly 50 years, when the reasons for its application began to change.<sup>108</sup> Originally, the article was used to discourage illicit liaisons, especially between white men and their slaves.<sup>109</sup> Over time, article 1481 was used to condemn concubinage as immoral and to show that such relationships were unacceptable to society.<sup>110</sup> As more people began living together outside of wedlock, article 1481 morphed into a vehicle to promote the institution of marriage and discourage concubinage.<sup>111</sup> This is especially evident in light of the fact that, if two people living in open concubinage were to later marry one another, they would be completely exempt from any of the limitations of article 1481, both before and after marriage.<sup>112</sup> However, one scholar pointed out that "penalizing

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103. Lorio, *supra* note 10, at 12 n.61 (quoting the ancient French law which prohibited all donations between concubines in Royal Ordinance, Code Michaud de janvier 1629, art. 12).

104. Mills, *supra* note 18, at 1215.

105. LA. CIV. CODE. art. 1481 (1870).

106. Mills, *supra* note 18, at 1216.

107. *Id.*

108. *Id.*

109. *Id.* Mills offers an interesting perspective on the use of concubinage in the Civil War era to protect legitimate forced heirs from losing their inheritance rights to slaves and to prevent an increase in the free black population in the South. *See Id.* at 1216 n.78.

110. *Id.* at 1216.

111. *Id.* at 1216–17.

112. Lorio, *supra* note 10, at 20; *see also* Mills, *supra* note 18, at 1206.

those who [chose] concubinage over marriage [did] not significantly [promote] the latter institution at the expense of the former.”<sup>113</sup> An examination of how article 1481 has applied to insurance policies provides a more in-depth view of the changes in the law over the last century.

### 1. Article 1481 and Insurance Policies

In 1905, the Louisiana Supreme Court in *New York Life Insurance Co. v. Neal* allowed a concubine, as a named beneficiary on a life insurance policy, to recover only one-tenth of the total proceeds of the policy.<sup>114</sup> The court classified the proceeds of the policy as a donation of a movable subject to reduction under article 1481.<sup>115</sup> In 1930, the Supreme Court overruled *Neal* in *Sizeler v. Sizeler* and declared article 1481 inapplicable to life insurance proceeds, allowing the concubine to recover the whole amount of the proceeds.<sup>116</sup> Although the Court in *Sizeler* found that life insurance policies were not governed by rules applicable to donations, such as article 1481, it also set a precedent for the supremacy of freedom of contract when it allowed a paramour living in open concubinage to enter into a particular type of contract for the benefit of the concubine.<sup>117</sup>

More than 50 years later, in *Woodmen of the World Life Insurance Society v. Leblanc*, a Louisiana circuit court held a man could change the named beneficiary on his private life insurance policy from his wife and their two minor children to his concubine.<sup>118</sup> The court held, “It was not for the trial judge then, nor is it for us now, to pass judgment on the decedent for his decision to change beneficiaries.”<sup>119</sup> As one commenter noted, “With respect to Louisiana’s law on concubinage, this statement succinctly acknowledges the trend away from imposing upon individuals, through assertions of public policy, a sense of morality that is not shared by all.”<sup>120</sup>

### 2. The Repeal of Article 1481 and its Implications

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113. Lorio, *supra* note 10, at 23.

114. *New York Life Ins. Co. v. Neal*, 38 So. 485, 485 (La. 1905).

115. *Id.* at 486.

116. *Sizeler v. Sizeler*, 127 So. 388, 389 (La. 1930).

117. Mills, *supra* note 18, at 1207–08.

118. Mills, *supra* note 18, at 1208 (citing *Woodmen of the World Life Insurance Society v. LeBlanc*, 417 So. 2d 886 (La. Ct. App. 1982)).

119. *Woodmen of the World*, 417 So. 2d at 888.

120. Mills, *supra* note 18, at 1208.

The 1987 repeal of article 1481 marked the culmination of a gradual trend away from the imposition of a non-universal morality upon individuals living in open concubinage in Louisiana. The repeal also showed, at least prior to the passage of the Louisiana DOMA, that donations between cohabitants no longer violated public policy.

When it repealed article 1481, the legislature also rejected a proposed article 101, which read as follows: “[a]n otherwise valid contract is not rendered unenforceable solely because the parties, neither of whom was married, were cohabitants at the time of contracting, but such a contract must be in writing.”<sup>121</sup> This concurrent repeal and rejection are strong indicia of state policy towards cohabitants in the late 1980s.

The repeal of 1481 indicated that donations between cohabitants were no longer against public policy.<sup>122</sup> However, the rejection of article 101 shows the legislature was not ready to allow all contracts between cohabitants.<sup>123</sup> These dual legislative acts show a desire to loosen the restrictions on the ability of cohabitants to privately contract with one another while concomitantly ensuring that such freedoms are not absolute. More importantly, the acts show how Louisiana law has evolved in tandem with societal norms; as the number of unwed cohabitants increased and social acceptance grew, the law changed to offer cohabitants greater freedom to order their affairs.

### *3. Looking at What’s Left—The Status of Concubinage Under Current Louisiana Law*

Since the repeal of article 1481, Louisiana law continues to recognize concubinage as a legal status. In the Louisiana Code of Evidence, a concubinage relationship is used as a prerequisite for certain exceptions to the inadmissibility of character evidence.<sup>124</sup>

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121. H.B. 1139, § 1, art. 101, 1987 La. Reg. Sess.

122. Mills, *supra* note 18, at 1228.

123. *Id.* As Mills notes in her comment, there is still room for those contracts that are otherwise enforceable so long as they do not violate public policy. Article 1968 of the Louisiana Civil Code declares any contracts that violate public policy absolutely null for an unlawful cause. The article says, “The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.” LA. CIV. CODE art. 1968.

124. LA. CODE EVIDENCE art. 404 (2009). Article 404 (A)(2) says:

(2) Character of victim. (a) Except as provided in Article 412, evidence of a pertinent trait of character, such as a moral quality, of the victim of the crime offered by an accused, or by the prosecution to rebut the character evidence; provided that in the absence of evidence of a hostile demonstration or an overt act on the part of the victim at the time of the

Under Louisiana Revised Statute 9:344 (B), grandparents of a minor child can obtain visitation rights if the parent has died or is incarcerated and lived in concubinage with the other parent.<sup>125</sup> Thus, while concubinage is not relevant to contractual freedom as it was during the era of article 1481, the legal status of concubinage still exists in modern Louisiana law.<sup>126</sup> Concubinage (or cohabitation) was, at one time, evidence of a crime in Louisiana, as well.

### *B. Cohabitation as Evidence of a Crime in Louisiana*

Unmarried cohabitants were once subject to criminal prosecution in Louisiana.<sup>127</sup> From 1960 to 1975, entering into a common law marriage in Louisiana was a crime, punishable by a fine of up to \$1,000, one-year imprisonment (with or without hard labor), or both.<sup>128</sup> The statute outlawing common-law marriage provided: “The living together openly by a man and woman as man and wife shall be considered as prima facie evidence that a common law marriage has been entered into by them.”<sup>129</sup> The statute was repealed in 1975 in Act No. 638 of the Louisiana Legislature. The purpose of that act clearly evinces legislative intent to maintain consistency with cultural norms. Its goal was to

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offense charged, evidence of his dangerous character is not admissible; provided further that when the accused pleads self-defense and there is a history of assaultive behavior between the victim and the accused and the accused lived in a familial or intimate relationship such as, but not limited to, the husband-wife, parent-child, or *concubinage relationship*, it shall not be necessary to first show a hostile demonstration or overt act on the part of the victim in order to introduce evidence of the dangerous character of the victim, including specific instances of conduct and domestic violence; and further provided that an expert’s opinion as to the effects of the prior assaultive acts on the accused’s state of mind is admissible . . . .

LA. CODE EVIDENCE art. 404(a)(2) (2009) (emphasis added).

125. LA. REV. STAT. ANN. § 9:344 (2009).

126. Following divorce, if a former spouse began living in open concubinage with another person, it was grounds for terminating alimony or reducing the amount of spousal support under former Louisiana Civil Code Article 112. That provision was repealed in 2006, but some former spouses are still alleging that living in open concubinage is grounds for terminating spousal support following the dissolution of a marriage. *See e.g.*, *Greenland v. Greenland*, 29 So. 3d 647 (La. Ct. App. 2009); *Ray v. Ray*, 960 So. 2d 174 (La. Ct. App. 2007).

127. *Mills*, *supra* note 18, at 1213.

128. *Id.* (citing LA. REV. STAT. ANN. § 14:79.1 (1961), enacted by Act No. 73, § 1, 1960 La. Acts 240, 240–41, and repealed by Act No. 638, § 3, 1975 La. Acts 1395).

129. LA. REV. STAT. ANN. § 14:79.1 (1961), repealed by Act No. 638, § 3, 1975 La. Acts 1395.

provide that it is the public policy of the state of Louisiana to accord equal protection under the law of the state to all citizens without regard to race, creed, color, or national origin; *to repeal laws inconsistent with this policy* and to permit the gathering of statistics on such bases provided they are not used in contravention of this policy.<sup>130</sup>

This repeal reflects the evolution that began in 1930 with the life insurance cases toward a more liberal public policy with respect to cohabitants in Louisiana.<sup>131</sup> As the repealing act shows, the “religious overtones inherent in previous public policy were giving way to more important concerns.”<sup>132</sup>

#### IV. THE LOUISIANA DOMA: AN IMPEDIMENT TO THE EVOLUTION OF PUBLIC POLICY

The liberalization of the state’s public policy on the rights of cohabitants and the new restrictions placed upon those rights by the Louisiana DOMA are at odds. Some scholars have argued that the policy espoused in the Louisiana DOMA marks a return to traditional family values through the constitutional promotion of marriage in the state.<sup>133</sup> However, a stronger argument can be made that the DOMA is not only inconsistent with the trending policy toward cohabitants but is also an ineffective tool to promote marriage and an overly burdensome restriction on the rights of cohabitants.

##### *A. The Louisiana DOMA is Inconsistent with the Trend in Public Policy on the Rights of Cohabitants*

Until the passage of the Louisiana DOMA, there was a clear trend toward a more liberal policy with respect to cohabitants in Louisiana.<sup>134</sup> This trend accurately reflects society and everyday life in Louisiana: more people are choosing not to marry, and more people have begun to think of cohabitation as an acceptable way of life.<sup>135</sup> Both the legislation and jurisprudence in Louisiana have

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130. Act No. 638, § 3, 1975 La. Acts 1395 (emphasis added).

131. Mills, *supra* note 18, at 1213.

132. *Id.*

133. See SPAHT & MORENO, *supra* note 17, at 771.

134. See generally Mills, *supra* note 18; Lorio, *supra* note 11; see also text accompanying notes 102–145.

135. See Gallanis, *supra* note 1, at 58; Larry L. Bumpass & James A. Sweet, *Cohabitation, Marriage and Union Stability: Preliminary Findings from NSFH2* 7 at tbl. 2 (Nat’l Survey of Families and Households, Working Paper No. 65, May 1995).

evolved to a point where at least one commenter notes the “trend away from imposing upon individuals, through assertions of public policy, a sense of morality that is not shared by all.”<sup>136</sup> Yet the Louisiana DOMA may directly contradict this trend by placing a blanket constitutional restriction upon the rights of cohabitants.<sup>137</sup> This restriction, the effects of which remain uncertain, is a harbinger of a possible return to imposing a non-universal morality upon cohabitants. The language of the Louisiana DOMA restricting the rights of cohabitants is therefore inconsistent with the evolution of both the law and society in the state. Furthermore, the DOMA is an inaccurate reflection of the contemporary public policy toward cohabitants.

*B. The Louisiana DOMA is an Ineffective Tool to Promote Marriage*

The primary purpose of the Louisiana DOMA is to strengthen the ban on same-sex marriage in Louisiana. Yet its drafters decided to expand the statute’s scope beyond that goal, enveloping both same- and opposite-sex couples with the language of the amendment. The reason for doing so is a familiar one. The Louisiana DOMA shows the drafters’ intent to focus on the state’s interest in promoting marriage. And some have claimed that the limitations placed on cohabitants “can be seen not so much as punishing them for some kind of immorality, but a withholding of benefits so as to encourage them toward a relationship that ostensibly would be more stable.”<sup>138</sup> This approach mirrors the one courts used when applying article 1481 prior to its repeal.<sup>139</sup> That approach is problematic because promoting marriage by discouraging cohabitation has not had the desired effect.<sup>140</sup> With cohabitation becoming a more acceptable cultural practice, it is hard to see how any intended effect would be achieved through the Louisiana DOMA and its similar approach to promoting marriage.

*C. The Louisiana DOMA is too Procedurally Burdensome*

Unlike Louisiana Civil Code article 1481 or Louisiana Revised Statutes section 14:79.1 (criminalizing common law marriage), the

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136. Mills, *supra* note 18, at 1208.

137. LA. CONST. art. XII, § 15.

138. SPAHT & MORENO, *supra* note 17, at 771.

139. See Mills, *supra* note 18, at 1216–17.

140. Lorio, *supra* note 11, at 23.

Louisiana DOMA is a constitutional amendment, which makes it a far more permanent and stable statement of law and policy. This is an overly burdensome method to declare a shift in public policy toward cohabitants. Civil Code articles and revised statutes require only the work of the legislature to change them, providing for a more streamlined system that is better able to accurately reflect contemporary social views.<sup>141</sup> A constitutional amendment is intended to reflect bedrock principles of state law, and the process required to change the constitution is complex and difficult.<sup>142</sup> In order to pass a bill changing the Civil Code or the Revised Statutes, a majority vote of both legislative houses is required.<sup>143</sup> In order to amend the Louisiana Constitution, a two-thirds vote of both houses is required to bring the amendment to a vote by the general electorate.<sup>144</sup> A majority vote of the electorate is then required to adopt the amendment.<sup>145</sup> The difference in the number of legislative bills passed compared to the number of constitutional amendments adopted each year reflects the differences in procedure and, ultimately, that constitutional principles hold a more permanent spot in state law.<sup>146</sup>

Furthermore, the Louisiana DOMA incorporates a blanket restriction upon the rights of cohabitants into the “fundamental law upon which the structure of [Louisiana] government is founded.”<sup>147</sup> An attempt by a court to rule contrary to the principles laid down in the Louisiana DOMA would pierce directly to “the very heart of the stability of constitutional government.”<sup>148</sup> Given the drastic changes in state policy toward cohabitants that have occurred throughout the history of Louisiana, the reason for creating such a permanent, inconsistent policy toward the rights of cohabitants is dubious. The proper place to create such a policy, if one exists at all, is through legislation, which more accurately reflects current trends in state law.

## V. CONCLUSION

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141. LA. CONST. art. III, § 15.

142. See LA. CONST. art. XIII, § 1.

143. LA. CONST. art. III, § 15.

144. LA. CONST. art. XIII, § 1.

145. LA. CONST. art. XIII, § 1.

146. In 2010 alone, 12 constitutional amendments were proposed in Louisiana (ten of which passed) as compared to hundreds of legislative bills. See *Voters Approve Majority of Constitutional Measures*, ASSOCIATED PRESS, Nov. 2, 2010.

147. *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 176 So. 2d 425, 447 (La. 1965) (Summers, J., dissenting).

148. *Id.*

If the Louisiana DOMA is necessary, it should focus upon strengthening the state's ban on same-sex marriage. Venturing beyond that purpose and restricting the rights of opposite-sex couples is at odds with the public policy toward cohabitants in Louisiana. The amendment should therefore be changed to eliminate any reference to opposite-sex couples, and should instead focus solely on the prohibition of same-sex marriage or a legal status similar to marriage for persons of the same sex. Issues surrounding the state's ban on same-sex marriage are outside the scope of this Comment, except to note the ban has been a legal constant in Louisiana and the public policy behind it has not yet wavered. The argument over whether prohibitions like this one should be placed in a constitution is a passionate one. And it is rooted in the debate over whether the right to same-sex marriage is provided for in the U.S. Constitution. What is not debatable, however, is that Louisiana's policy toward cohabitants has changed drastically over time.

Louisiana is a unique state because of its signature blend of history, culture, and people. Its civil law tradition sets it apart as well. Uniqueness, however, does not warrant laws that are held years behind the development of society. People across the country and in Louisiana respect a couple's choice to stay together without marrying. Allowing the law to reflect this respect is the proper course.

*Randy J. Marse, Jr.\**

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