OUTSIDE EQUAL PROTECTION: THE EVOLUTION OF STATE LAWS AS PRECEDENT FOR LIFTING GEORGIA'S SAME-SEX MARRIAGE BAN

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INTRODUCTION

"Marriage is encouraged by the law."[1] Georgia encourages marriage as a state policy, but what exactly is "marriage"? With seminal cases moving through federal courts—the April 2014 filing of a civil rights class action challenging Georgia's constitutional ban on same-sex marriage[2] and the Supreme Court's June 2015 confirmation of same-sex marriage rights nationwide[3]—the country appears poised to finally conceive the constitutionally protected marriage institution without gendered restrictions. Regardless of any constitutional protection on either the state or federal level, the evolution of marriage laws in Georgia reveals a strong policy of amending "tradition." Georgia's statutory ban on same-sex marriage contradicts these amendments and the state's otherwise liberalized and egalitarian legal framework for the marriage contract.

The conceptualization of how Americans define marriage and same-sex couples' right thereof has remained at the forefront of social, political and even judicial platforms for the greater part of the twenty-first century. The pro-same-sex marriage organization Freedom to Marry reports that a "supermajority"—or 63% of the country—now supports same-sex marriage compared to "the 70% of Americans who *opposed* interracial marriage in 1967."[4] Georgia stands with the rest of the country facing an unprecedented era in the social, political, and legal history of marriage.

Georgia's concept of marriage, both historically and presently, is far from static. From a legal perspective, marriage is based on English Common Law conceptions of a civil contract formed between two competent parties.[5] These contracts stand on three basic criteria: the parties must be able to contract; they must enter into an actual contract; and the contract must be

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[1] GA. CODE ANN. § 19-3-6 (2010).
[2] Inniss et al. v. Aderhold et al., No. 1:14-cv-01180-WSD (N.D. Ga. Apr. 22, 2014).
[3] Obergefell v. Hodges, 576 U.S. (2015) (No. 14-556), http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.
[4] *Roadmap to Victory*, FREEDOM TO MARRY (Sept. 14, 2015), http://www.freedomtomarry.org/pages/roadmap-to-victory/.
[5] *See infra* Part II.B.

legally consummated.[6] The marriage contract lacks any heterosexual confines: legal consummation of a valid marriage contract requires no sexual intercourse and marriage contracts are valid in Georgia regardless of procreation. Georgia also maintains a strong public policy promoting the freedom of contract. In the context of marriage, Georgia permits and enforces antenuptial agreements. Georgia also repealed common law marriage in 1997, effectively preventing default marriage and emphasizing the state's desire that parties seeking to marry adhere to the contractual nature of the institution.

Although Georgia's marriage contract is not left solely to the freedom of the contracting parties, the state has consecutively lifted many constraints that historically restricted the availability of this contract. First, Georgia removed any statutory distinction between Christian and non-Christian religions for the purpose of authorizing officials to perform marriages, despite the traditionalist argument that often ties opposition to same-sex marriage with religious convictions. Second, after increasing the severity of its anti-miscegenation laws seventy years *after* the Civil War and emancipation, the state repealed all racial restrictions on marriage contracts. Third, women are no longer subordinate to their husbands following the removal of coverture laws. Finally, Georgia broadened and liberalized divorce laws through the inclusion of statutory no-fault divorce grounds.

This Article does not suggest that the marriage institution lacks continued relevance or benefit to society. Indeed, it speaks to the contrary. In contrast to the suggestions of some scholars,[7] the institution of marriage and the legal benefits bestowed upon married couples retain contemporary social relevance. Georgia has slowly deregulated marriage laws in reaction to evolving social norms—albeit much later than many other states—aligning the institution with societal realities over time.

This Article proceeds in three parts: Part I examines marriage broadly, recognizing the arguments for and against its continued relevance in contemporary American society. Part II analyzes the history of the marriage contract under Georgia law in light of the state's expansive public policies encouraging freedom of contract. Part III diagrams the legal evolution of the marriage institution throughout Georgia's history, recognizing the progressive removal of the State's nineteenth and twentieth-century restrictions on marriage that has gradually yielded increasing social relevance for the marriage contract.

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[6] GA. CODE ANN. § 19-3-1 (2010).

[7] *See infra* Part I.B.

I. THE INSTITUTION OF MARRIAGE

Contemporary conceptions of marriage, both socially and legally, are in flux.[8] Western society has challenged the so-called traditional, hetero-normative idea of marriage that ties the institution to religion and confines the commitment to one man and one woman.[9] Initial challenges to hetero-normative marriage definitions emerged in the mid-twentieth century, but the last decade has witnessed significant progress toward aligning the marriage institution with contemporary notions of the monogamous adult relationship.[10]

A. *MARRIAGE RATES NATIONALLY AND IN GEORGIA*

While the prominence of the marriage debate gains traction, national marriage rates declined in the first eleven years of the twenty-first century.[11] The number of couples married in 2011 fell 1.4 per 1,000 total population compared to just eleven years prior.[12] In contrast to this national statistic, Georgia's annual marriage rate decreased from 10.3 per 1,000 total population in 1990 to 6.6 per 1,000 total population in 2011.[13]

Georgia's marriage rates are directly inverse to the presence and perception of same-sex relationships in the state. In 2010, the Williams Institute reported 5.9 same-sex couples per 1,000 total population living in Georgia.[14] This statistic reflects 21,318 Georgia same-sex couples.[15] Georgia

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[8] *See* Stephanie Coontz, *Why America Changed Its Mind on Gay Marriage*, CNN OPINION (Oct. 13, 2014), http://www.cnn.com/2014/10/13/opinion/coontz-same-sex-marriage/index.html?iref=allsearch.
[9] *Id*.
[10] *Id*.
[11] *National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 14, 2015), http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.
[12] *Id*.
[13] *Id*.
[14] The Williams Institute, *Georgia Census Snapshot 2010*, UCLA SCHOOL OF LAW (Sept. 14, 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Georgia_v2.pdf.
[15] *Id*. at 1.

voter support for same-sex marriage increased by five percent in 2013,[16] with 56 percent of Georgia voters under thirty supporting same-sex marriage.[17]

B. Debating the Traditional Hetero-Normative Definition of Marriage

Scholars have reexamined hetero-normative definitions of marriage and conceptualized amendments to this definition within the context of twenty-first century social realities. The hetero-normative definition of marriage is defended by a common justification: "respect for tradition."[18] Proponents of hetero-normative marriage warn that "the very foundation of society" is at stake.[19] From the traditionalist perspective, "opposite-sex marriage . . . represent[s] . . . time tested-wisdom and cultural identity."[20] Professor Kim Forde-Mazrui argues that a "[s]tate's interest in preserving tradition—including the tradition of opposite-sex marriage—is probably legally sufficient to survive the most deferential standard of rational basis review under the Equal Protection Clause."[21] The United States Court of Appeals for the Sixth Circuit, the first federal court to uphold same-sex marriage bans, founded its decision on just this rational basis.[22] Writing for the majority, Justice Sutton recognized that the panels' task was "to decide whether the law has some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side."[23] In a tremendous setback for the traditionalist ideology, the Supreme Court's decision in *Obergefell v. Hodges* disagreed with the Sixth Circuit, refusing to uphold state bans on same-sex marriage..[24]

Many traditionalists found their support for opposite-sex marriage definitions on the argument that social orders, which have long viewed marriage as a union between one man and one woman, are stronger than the laws affirming them. William C. Duncan, Executive Director for the

[16] *Georgia Miscellany*, PUBLIC POLICY POLLING (Aug. 8, 2013), http://www.publicpolicypolling.com/main/2013/08/georgia-miscellany.html.
[17] *Id*.
[18] Kim Forde-Mazrui, *Tradition As Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 282 (2011).
[19] *Id*. at 285.
[20] *Id*. at 284-5.
[21] *Id*. at 281.
[22] DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).
[23] *Id*. at 13.
[24] *Id*.

Marriage Law Foundation, explained that the tradition of opposite-sex marriage affirms opposite sex laws:

> [t]he laws related to marriage, like other '[l]aws arise out of a social order; they are the general rules which make possible the tolerable functioning of an order. Nevertheless an order is bigger than its laws, and many aspects of any social order are determined by beliefs and customs, rather than being governed by positive laws.'[25]

Thus, according to traditionalists, marriage is and should only be between opposite sexes. If marriage laws define the institution as an opposite-sex institution through social orders, then the foundation of the traditionalist position actually supports the converse argument that opposite-sex marriage laws fail to align with contemporary social realities.

Many scholars have argued that these social norms governing the social order and society's perspective on marriage change over time and that marriage laws should therefore change accordingly. These arguments fall in two primary categories: (1) numerical challenges questioning not only the permissible gender restrictions on marriage, but also the two-party exclusivity of the institution; and (2) functional approaches that more broadly reconsider the applicability of restrictive, traditional marriage to contemporary society.

1. Scholars Question Whether Marriages Should Be Limited to Two Parties.

Permitting same-sex marriage challenges the gender confines of marriage. Some question whether marriage should be limited to a relationship between only two persons regardless of gender. Two primary models of non-traditional relationships challenge this two-party norm of the marriage institution: polygamous marriages and polyamorous relationships.

Opponents of same sex-marriage have often-argued that an expansion of marriage would force states to legalize polygamy and extend marriage beyond the two-person model.[26]Hema Chatlani's student article

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[25] William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 267 (2007) *quoting* Russell Kirk, THE ROOTS OF AMERICAN ORDER 5 (1974) (Russell Kirk explained that the social influence on marriage laws purporting the opposite-sex tradition affirms opposite-sex marriage laws.).

[26] *See* Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down A Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J.L. 101, 128 (2006) (*citing* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47 ("[i]f same-sex marriage must be legalized to accommodate the subjective,

counters this position, distinguishing between the two institutions and recognizing the "number of social ills historically prevalent in polygamy that are not present in same-sex marriages. 'Incest, statutory rape, physical, sexual[,] and emotional abuse, deprivation of education, and forced marriages of young girls are endemic to all of the polygamist communities,' but not to [same-sex] unions."[27] With legalized same-sex marriage in forty-eight U.S. states,[28] there has yet to be a decision using this precedent to simultaneously approve polygamy.

Polyamory presents an alternative mode of adult relationships that is broadly defined as a non-monogamous commitment between multiple parties.[29] Professor Elizabeth Emens understands polyamory "to encompass five main principles: self-knowledge, radical honesty, consent, self-possession, and privileging love and sex over other emotions and activities such as jealousy."[30] Elizabeth Cannon Lesher's student comment envisions three routes for progress towards acceptance of polyamorous relationships and plural marriages: first, confronting prohibitions against plural marriage with litigation; second, moving to define polyamory as a legally and socially recognized sexual orientation; and third, considering polyamory and religious polygamy as institutions worthy of substantive due process rights.[31] Plural marriage thus endows this multiparty commitment with marriage rights otherwise held only by two-person unions. The polyamorous challenge, much like polygamy, faces resistance in a society where monogamy and coupled versions of marriage are the steadfast norm.

As Professor Emens explains, the country's focus on the same-sex marriage debate simultaneously reveals its disregard for the political relevance of multi-party relationships. While same-sex marriage challenges the traditional bi-gendered nature of marriage, it largely retains all other

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identity-defining sexual-intimacy preferences of gays and lesbians, it would be very difficult to refuse to recognize consanguineous marriage, polygamy, and other prohibited marriages on a principled basis")).

[27] *Id.* (*citing* Catherine Blake, *The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages Versus Internet Sex Predators*, 7 J. L. & FAM. STUD. 289, 289-90 (2005)).

[28] *See supra* note 4.

[29] Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 283 (2004) ("Contrary to the common view of multiparty relationships as either oppressive or sexual free-for-alls, at least some set of individuals--polyamorists, or 'polys' for short--seems to be practicing nonmonogamy as part of an ethical practice that shares some of its aspirations with more mainstream models of intimate relationships.")).

[30] *Id.*

[31] Elizabeth Cannon Lesher, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 TUL. J.L. & SEXUALITY 127, 130 (2013).

aspects of the institution. Legal recognition of polygamy and polyamorous relationships would allow the confines of marriage to expand exponentially, both by the number of parties involved and by entirely reevaluating the social conceptions of the institution. Same-sex marriage challenges only the gender confines of marriage, otherwise maintaining the institution's position and purpose in society without change.

2. Scholars Question the Function of State-Governed Marriage in 2014.

The function of marriage and its purpose in light of contemporary religious, social, and economic realities have been debated for decades. Multiple positions exist on how to best retain monogamous, coupled marriage regimes that also serve a functional relevance in twenty-first century society.

On the extreme, some scholars champion a complete elimination of the legal marriage relationship on the grounds that it lacks any continued purpose. This view rejects restricting marriage to hetero-normative, opposite-sex couples and goes beyond either extending marriage to same-sex couples or adopting laws to recognize same-sex relationships as domestic partnerships distinct from marriage.[32] Instead, this total deregulation of marriage is based in two diverging arguments: (1) the libertarian perspective that advocates privatization of the institution thus facilitating parties' freedom in structuring their own committed relationships; and (2) the more controversial replacement of marriage with legal relationships based on uniting children and their caretakers, not the sexual intimacy of adults.[33]

The libertarian approach to the deregulation and privatization of marriage finds its root in the "realities of modern America," where some scholars argue the committed monogamous relationship is best served by private regulation.[34] These libertarian perspectives are largely pro-marriage and advocate retention of the institution, but without state influence or restriction.[35] Professor Edward Zelinsky argues that "[m]arriage--the structured, publicly-proclaimed, communally-supported relationship of mutual commitment--should become solely a religious and cultural institution with no legal definition or status."[36] He believes the abolition of "civil marriage will strengthen marriage by encouraging competition among

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[32] Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1162 (2006).
[33] *Id*. at 1163 *and* Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).
[34] Zelinsky, *supra* note 48, at 1169-70.
[35] *See* Zelinsky, *supra* note 48.
[36] Zelinsky, *supra* note 48, at 1163.

alternative versions of marriage"; particularly amongst private religious institutions.[37] Under this proposal, marriage continues to exist, but void of any legal benefit and instead based in private, religious or contractual agreements.

Recent inclusion of same-sex couples within an otherwise unchanged marriage institution by states and private organizations stands as a stepping-stone toward this full deregulation and privatization.[38] Inclusion effectively eliminates the unique advantage of opposite-sex marriage by extending its rights beyond the traditional parameters of the institution. Professor Zelinsky highlighted such a potential effect from an American Law Institute proposal that sought to equalize the legal remedies for terminating a marriage or a domestic partnership.[39] As a result, the "proposal would consolidate under a single set of rules the parallel regimes that today exist for married and unmarried couples, thereby codifying and simplifying the law."[40]

Similarly, private organizations have ignored any remaining restriction of marriage rights to opposite-sex couples by contracting around marriage laws. Professor Zelinsky offers "the now common practice of employer-provided fringe benefits for employees' domestic partners" as a prime example.[41] Marriage survives, but without an opposite-sex monopoly on legal rights. For Zelinsky, the competitive result of his marriage abolition suggestion is already at work in this context because companies are encouraged to—and clearly have—created benefit schemes to attract the best employees.

Professor Martha Albertson Fineman takes the opposite view on the issue, championing the elimination of legal marriage not as a means of privatizing the institution, but as a necessary means to create an entirely new legal construct that benefits caregivers of children instead.[42] Under Professor Fineman's argument, "we should view the parent-child relationship as the quintessential or core family connection, and focus on how policy can strengthen this tie."[43] She inverts the traditionalist argument that marriage is necessary for the support of heterosexual relationships that produce and protect children.[44] Legal protection for caregivers is far more advantageous,

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[37] *Id*. at 1173.
[38] *See* Zelinsky, *supra* note 48.
[39] *Id*. at 1169-70.
[40] *Id*. at 1170.
[41] *Id*.
[42] Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).
[43] *Id*. at 245-46.
[44] *Id*.

she argues, because "one could have a marriage [or other long-term sexual affiliations] without necessarily constituting a "family" entitled to special protection and benefits under law. Correspondingly, one might have dependents, thereby creating a family and gaining protection and benefits, without having a marriage."[45]

The libertarian argument for privatizing the institution advocates for a regime governed by social orders accepting or championing the extension of rights to same-sex couples. Alternatively, the elimination of marriage to create legal caregiver relationships serves not as a means of privatizing marriage, but constructing legal benefits for the "modern families" that exist outside the bounds of a two-parent, hetero-normative category. In stark contrast to many traditionalist approaches that fear any redefinition of marriage because it is the institution protecting family, Professor Fineman proposes eliminating marriage in order to better protect families. The pro-opposite sex marriage institution, Alliance Defending Freedom, argues that "marriage policy is rooted in the reality that children need a mother and a father."[46] The Alliance position reflects a traditionalist conception of marriage that Professor Fineman challenges with her approach. For her, "family as a social category should not be dependent on having marriage as its core relationship. Nor is family synonymous with marriage. Although both of these original conceptions of family might have held true in the past, things have changed substantially in recent decades."[47] She finds the current legal confines of marriage incapable of addressing the needs for figuratively paternalistic resources and maternalistic care for all "dependents," children and the elderly, "in today's society with its emerging norm of single-parent households."[48] Professor Fineman's approach deconstructs and entirely contradicts the continued relevance of the often-proffered traditionalist conception of one man, one woman marriage.

3. Support Continues Growing for Permitting Same-Sex Marriage.

Extending, not eliminating, the current legal and social benefits of civil marriage to same-sex couples has received the widest and most resounding support in the redefinition of marriage debate.[49] As the majority

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[45] *Id.*

[46] *Cf. Marriage and Family*, ALLIANCE DEFENDING FREEDOM, (Oct. 6, 2014), http://www.alliancedefendingfreedom.org/issues/marriage-and-family *and* Fineman, *supra* note 58.

[47] Fineman, *supra* note 58, at 245.

[48] *Id.* at 271.

[49] Adam Liptak, *Supreme Court Delivers Tacit Win to Gay Marriage*, N.Y. TIMES (Nov. 10, 2014), http://www.nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html?_r=0.

of federal decisions leading to *Obergefell v. Hodges* reveal,[50] there is tremendous impetus for including same-sex couples within the current marriage institution.

Prior to June 2015, same-sex couples in states without the freedom to marry continued turning to the alternative of out-of-state marriage. Professors Adam Candeub and Mae Kuykendall took the out-of-state marriage practice one step further and suggested that "states offer marriages to those outside their borders through technology."[51] Their rationale for reforming out-of-state marriage procedures is two-fold: "(i) nearly every state requires the physical presence of a couple within its territory in order to authorize the couple's marriage; and, (ii) couples value the status and ceremony of marriage even if it lacks legal force in their home state."[52] Authorizing out-of-state marriages through video conference or even by telephone provides access to marriage for Americans residing anywhere in the United States and even encourages the benefits of inter-state competition, similarly championed in an alternate context by Professor Zelinsky's libertarian privatization theory.[53] States with the most favorable distance-marriage policies would presumably receive a greater market share of the economic stimulus that these marriages could create.

Scholars have dutifully responded to the marriage debate with challenges and alternatives for decades. Expansion of existing marriage laws to include both opposite and same-sex couples rather than any elimination thereof, whether for privatization or in order to create an alternative legal relationship, has by far been the most successful and most widely accepted challenge to traditional marriage.

II. MARRIAGE IS A CIVIL CONTRACT UNDER GEORGIA LAW

Since at least the adoption of English Common Law,[54] Georgia has defined marriage as a contractual relationship. The marriage contract has

[50] Lawrence Hurley, *Update 1-U.S. Top Court Takes No Immediate Action on Gay Marriage Cases*, REUTERS (Nov. 10, 2014), http://www.reuters.com/article/2014/10/02/usa-court-gaymarriage-idUSL2N0RX0YA20141002.
[51] Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 735 (2011).
[52] *Id.* at 736-7.
[53] *Id. See* Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1173 (2006).
[54] Georgia officially adopted the English Common Law in 1784. Act of Feb. 25, 1784, Vol. I, 404.

only three essential requirements: "(1) Parties able to contract; (2) An actual contract; and (3) Consummation according to law."[55] Georgia also enforces antenuptial contracts on commercial grounds and has never required procreation to result from the marriage contract. The simplistic nature of the marriage contract and its liberal enforcement lays the foundation for expanding marital contract freedom to same-sex couples.

A. FREEDOM OF CONTRACT PUBLIC POLICY IN GEORGIA

Georgia jurisprudence is rich on the state's policies favoring broad freedom of private contract. As stated by the Supreme Court of Georgia in 1950, Georgia "courts should always guard with jealous care the rights of private contract, and give to them full effect when it is possible to do so."[56] Georgia liberally encourages this individual freedom in both Georgia and in out-of-state contracts: "a contract should not be held unenforceable as being in contravention of public policy except in cases free from substantial doubt where the prejudice to the public interest clearly appears. Enforcement of a contract or a contract provision which is valid by the law governing the contract will not be denied on the ground of public policy, unless a 'strong case' for such action is presented."[57]

Within Georgia's statutory same-sex marriage ban, it is specifically "the public policy of th[e] state to recognize the union only of man and woman."[58] A same-sex marriage contract, regardless of the parties' liberal freedom in contracting such an agreement, is just the type of case "free from substantial doubt" that the Georgia courts contemplated.[59] The tremendous breadth granted to parties' individual contract freedoms stands in contrast to the same-sex marriage ban and provides valuable precedent for aligning the state's marriage laws with its generally broader and arguably libertarian perspective on contracts.

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[55] T.R.R. COBB ET AL., THE CODE OF THE STATE OF GEORGIA 331, § 1653 (1863). The same requirements listed in § 1653 of the 1863 Code reappear in each subsequent publication: R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 392, § 1698 (1873), R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 392, § 1698 (1882), JOHN L. HOPKINS ET AL., THE CODE OF THE STATE OF GEORGIA 221, § 2411 (1895), JOHN L. HOPKINS, THE CODE OF THE STATE OF GEORGIA 785, § 2930 (1910), ORVILLE A. PARK ET AL., THE CODE OF GEORGIA 1405, § 53-101 (1933).
[56] Rose City Foods v. Bank of Thomas Cnty., 62 S.E.2d 145, 148 (Ga. 1950).
[57] Am. Mgmt. Servs. E., Inc. v. Fort Benning Family Communities, LLC, 734 S.E.2d 833, 839 (Ga. Ct. App. 2012) (*citing Nationwide General Ins. Co. v. Parnham,* 357 S.E.2d 139 (Ga. Ct. App. 1987)).
[58] GA. CODE ANN. § 19-3-3.1(a).
[59] Fort Benning Family Communities, *supra* note 74, at 839.

B. ORIGIN OF MARRIAGE CONTRACTS IN GEORGIA

Marriage laws in Georgia are the product of centuries-old regulations under English Common Law that define marriage as a contractual relationship. For much of modern history, marriages were unregulated in England.[60] Marriage was largely a private agreement and "until well into the sixteenth century, neither Church nor state regulated marriage in a systematic way."[61] In explanation of historical marriage laws, the United Kingdom Parliament reports that "[u]ntil the middle of the 18th century marriages could take place anywhere provided they were conducted before an ordained clergyman of the Church of England."[62]

The regularity of informal marriages promoted a lack of institutional control over marriage agreements.[63] In the thirteenth century, the Catholic Church decreed support for clandestine marriages and confirmed the contractual nature of the marriage agreement:

> Pope Innocent III . . . decreed that the free consent of both spouses, not the formal solemnities by a priest or in a church, was the sole essence of marriage. Consequently a valid and binding marriage was created by a mere verbal contract, performed by an exchange of vows to this effect between a man and a woman over the age of consent (14 and 12), witnessed by two persons, and expressed in the present tense.[64]

Informal, contractual marriage prevailed under English law for the centuries preceding the establishment of the Georgia colony in 1732.[65]

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[60] *See generally* Brian H. Bix, *Conference on Marriage, Families, and Democracy: State Interest and Marriage – The Theoretical Perspective*, 32 HOFSTRA L. REV. 93 (2003).
[61] *Id*. at 94 (*citing* LAWRENCE STONE, UNCERTAIN UNIONS AND BROKEN LIVES 15-35 (1995)).
[62] *The Law of Marriage*, UK PARLIAMENT (Aug. 28, 2014), http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/lawofmarriage-/.
[63] Bix, *supra* note 77, at 94-95 ("The lack of systematic or pervasive control by those institutions was exemplified by the practices of informal and clandestine marriages – such marriages may not have been common, but their presence and acceptance were nonetheless significant.").
[64] *Id*. at 95 (*citing* LAWRENCE STONE, UNCERTAIN UNIONS AND BROKEN LIVES 20 (1995)).
[65] *See Georgia*, HISTORY (Aug. 28, 2014), http://www.history.com/topics/us-states/georgia.

Over two decades after the founding of the Georgia colony, Lord Hardwicke's Marriage Act of 1753 increased England's legal regulation of marriage and "declared that all marriage ceremonies must be conducted by a minister in a parish church or chapel of the Church of England to be legally binding."[66] Despite this additional requirement, English Common Law maintained that the marriage agreement was to be founded in a simple civil contract executed by the marrying couple.[67]

Under both English Common Law and the state statutes since enacted in Georgia,[68] marriage laws have remained based in the common law conception of marriage as a contractual agreement. Marriage and divorce in Georgia before the turn of the nineteenth century remained "relatively informal affairs" and "common law marriage in the seventeenth and eighteenth centuries might be entered into by private contract."[69] Georgia officially adopted English Common Law in 1784 and "the several acts, clauses, and parts of acts, that were in force and binding on the inhabitants of said province, on the 14th day of May, A.D. 1776 . . . ."[70] Georgia followed the common law "so far as [it was] not contrary to the constitution, laws, and form of government [then] established in [Georgia]."[71] Professor Henry H. Foster also explains that in the early stages of American history, "[t]he premise of matrimonial law was derived from England and ecclesiastical authority."[72] Georgia marriage law is founded upon these English notions of the marital agreement. With the 1784 adoption of he common law, Georgia officially assimilated to England's foundational principle that "marriage was . . . a civil contract by the law and that it might be dissolved by death or legislative or judicial divorce."[73]

The Georgia legislature found all marriages prior to 1785 that "ha[d] been heretofore contracted by any person or persons . . . ratified, confirmed, and allowed as valid in law."[74] Georgia codified the practice of issuing marriage licenses in 1789.[75] Georgia granted these marriage licenses to

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[66] *The Law of Marriage*, *supra* note 79.
[67] *See* Henry H. Foster, *Indian and Common Law Marriages*, 3 AM. INDIAN L. REV. 83, 86-87 (1975).
[68] *See* GA. CODE ANN. §§ 19-3-1–68.
[69] Foster, *supra* note 84, at 87, 85.
[70] Act of Feb. 25, 1784, Vol. I, 404.
[71] *Id*.
[72] Foster, *supra* note 84, at 86-87.
[73] *Id*.
[74] GEORGE WATKINS & ROBERT WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 314 (1800).
[75] "[T]he register of probates in each county shall grant marriage licenses to any minister of the gospel or justice of the peace to join persons of lawful age, and authorized by the levitical degrees, to be joined together in the holy state of matrimony." GEORGE WATKINS & ROBERT WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 415 (1800) (Act of 1789, No. 419 § 6).

persons actually "intending to marry": parties who had the requisite intent to enter a marriage *contract*.[76]

Recognition of Georgia's contract-based marriage institution continued in the nineteenth century before the adoption of the state's first legal code.[77] Howell Cobb's 1846 analysis of Georgia statutes explains that "[Georgia] law considers marriage in no other light than as a civil contract . . . [T]aking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and lastly, actually did contract."[78] In 1860, the Supreme Court of Georgia reaffirmed this "willingness" or intention requirement and found that "[m]arriage being a contract, is of course consensual, for it is of the essence of all contracts to be constituted by the consent of both parties."[79]

T.R.R. Cobb's Code of 1863 codified the tri-partite marriage contract conditions already enforced under Georgia law. Since 1863, Georgia has statutorily permitted the solemnization of valid marriages upon these same three requirements: "(1) Parties able to contract; (2) An actual contract; and (3) Consummation according to law."[80] Today, marriage remains a contractual agreement with these identical requirements.[81] The marital contract as the cornerstone of marriage in Georgia is arguably the institution's strongest legal tradition, enduring through 2015 with little to no change since its common law origins in England.

C. Elimination of Common Law Marriage in Georgia

[76] *Id*. ("where such persons, intending to marry, shall have the bans of marriage published three times in some public place of worship, it shall be lawful for such minister or justice to marry the persons of published aforesaid").

[77] *See* T.R.R. Cobb, *supra* note 55.

[78] Howell Cobb, Analysis of the Statutes of Georgia in Use With the Forms and Precedents Necessary to Their Operation and an Appendix 283 (1846) (*citing* 1 *Blac. Com*. 433).

[79] Askew v. Dupree, 30 Ga. 173, 178 (1860).

[80] T.R.R. Cobb, *supra* note 55, at 331, § 1653. The same requirements listed in § 1653 of the 1863 Code reappear in each subsequent version of the Georgia Code: Code 1873, § 1698; Code 1882, § 1698; Civil Code 1895, § 2411; Civil Code 1910, § 2930; Civil Code 1914, § 1930; Civil Code 1933, § 53-101; Ga. Code Ann. § 19-3-1 (2014).

[81] Ga. Code Ann. § 19-3-1.

Georgia's refusal to recognize common law marriage since 1997[82] supports the state's implied policy that the contract-based marriage institution is properly limited to parties who actually *contract* and do not default into such a marriage. Common law marriage, although required in Georgia to have been the result of an actual agreement, was the circumstantial implication of marital status, not marriage based on a civil contract executed before the state.

Pro-freedom of contract policies are evident in Georgia's common law marriage jurisprudence. For nearly two centuries, Georgia based common law marriage on the parties' inherent ability to enter their own private agreement for marriage. Howell Cobb's 1846 statutory analysis explained the state's earliest codification of common law marriage:

> [i]f a man cohabits with a woman, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessities he will become liable, although the creditor be acquainted with her real situation; for her a like assent will be implied as in the case of husband and wife.[83]

By the subsequent rule of the 1860 Supreme Court of Georgia, "'[a]ny mutual agreement between the parties to be husband and wife in presenti, especially where followed by cohabitation, constitute[d] a valid and binding marriage . . . .'"[84] The Court subsequently held that a valid common law marriage could exist despite the lack of a marriage license in Georgia.[85]

In 1939, the Supreme Court of Georgia reiterated the state's allowance of this private agreement and found "that if a man and woman, competent to do so, voluntarily and in good faith consented to be man and wife, actually . . . contracting to then assume the status of man and wife, they were thereupon considered by the common law as married, and are accordingly so considered in this State."[86] The Supreme Court of Georgia continued basing common law marriage on virtually identical conditions well into the twentieth century.[87]

The eventual removal of common law marriage serves two broad purposes: (1) it eliminates the unusual resemblance between permissible common law marriage and criminal fornication; and (2) it prevents any common law recognition of a valid same-sex marriage between a same-sex

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[82] GA. CODE ANN. § 19-3-1.1.
[83] HOWELL COBB, *supra* note 78, at 285 (*citing* Sel. N. P. 296).
[84] Askew v. Dupree, 30 Ga. 173, 178 (1860) (*citing* Rose v. Clark, 8 Paige Ch. 574 (N.Y. Ch. 1841).
[85] *Id*. at 190.
[86] Lefkoff v. Sicro, 189 Ga. 554, 562-63 (Ga. 1939)
[87] *See Lefkoff*, *supra* note 102.

couple meeting the requirements. As is evident in pre-1997 Georgia court holdings, common law marriage functionally provided access to a couple's otherwise unlawful concurrent fornication and cohabitation outside of marriage. A couple's simultaneous fornication and cohabitation—without a private agreement to marry—became punishable under Georgia law in 1817.[88] This punishment, however, was avoidable through solemnization of a legal marriage before the state.[89] Today, the Georgia Code retains a statute punishing voluntary fornication, which is certainly unconstitutional under *Lawrence v. Texas*,[90] but with no reference to cohabitation or the avoidance of punishment through marriage.[91] Georgia historically drew a very thin line between behavior sufficient to establish a valid common law marriage and behavior resulting in criminal liability—all seemingly in furtherance of the state's policy encouraging marriage that remains today.[92]

The common law marriage repeal, however, came only a year after the state's statutory ban on same-sex marriages. Today, many same-sex couples in Georgia actually satisfy the now-repealed requirements for valid common law marriages. Before *Obergefell v. Hodges*, same-sex couples were left without access to legal common law marriage and otherwise banned from the post-1997 alternative of legal marriage offered to opposite-sex couples.

Just as Lord Hardwicke's Marriage Act of 1753 removed the informalities of marriage agreements and required an actual ceremony for a legal marriage before the government, Georgia's statutory provisions defining the parameters for a marriage contract and the subsequent ban on default, common law marriages 150 years later only further bolster Georgia's preference for actual marital contracts at the time of marriage.

D. Enforcement of Antenuptial Contracts in Georgia

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[88] 1817 Ga. L. 126, § 4. "Any man and woman who shall live together in an open state of adultery, fornication, or adultery and fornication, which will be sufficiently established by any circumstances which raise the presumption of cohabitation and unlawful intimacy, or who shall otherwise commit adultery, fornication, or adultery and fornication, shall be severally indicted, and on conviction, such man and woman shall be severally sentenced to pay a fine not exceeding five hundred dollars, and on conviction a section time, a fine of one thousand dollars, and for every repetition of the offence, a fine in the same proportion; and moreover, may be imprisoned in the common jail."

[89] *Id*. "But it shall at any time be in the power of the parties to prevent or suspend the prosecution by marriage, if such marriage can be legally solemnized."

[90] 539 U.S. 558 (2003).

[91] GA. CODE ANN. § 16-6-18.

[92] GA. CODE ANN. § 19-6-3.

Georgia's enforcement of antenuptial contracts aligns the marital agreement with many standards of review utilized in examining commercial contracts.[93] In the last 30 years, "Georgia has evolved from abject rejection of prenuptial contracts as contrary to public policy to limited, but sporadic, prenuptial agreement enforcement to a minimalist standard of review which favors enforcement."[94] Georgia largely follows the general U.S. trend from previously enforcing antenuptial contracts based solely on "marital public policy considerations . . . toward procedural and substantive standards accorded ordinary contracts."[95] This policy is reflective of Georgia's preference for protecting parties' freedom of contract—in commercial *and* marital agreements.

The 1982 Supreme Court of Georgia found that public policy did not invalidate antenuptial contracts[96] and outlined a three-prong test for determining the enforceability of such agreements.[97] Originally, Georgia trial courts followed three basic criteria:

> (1) Was the agreement obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts?
>
> (2) Is the agreement unconscionable?
>
> (3) Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?[98]

As to the entirety of the agreement, the Supreme Court has "repeatedly . . . impose[d] an affirmative duty of full and fair disclosure of all material facts on parties entering into an antenuptial agreement."[99] The establishment of the test diverged markedly from Georgia's prior adherence to the invalidation of antenuptial agreements as a matter of public policy.[100]

In 2005, the Supreme Court's application of the three-prong test revealed another notable evolution of Georgia law: "one that now favors the enforcement of prenuptial agreements, focusing on procedural safeguards

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[93] *See* John C. Mayoue & Margaret G. Gorji, *Georgia's Evolving View on the Enforceability of Prenuptial Agreements*, 12 GA. BAR J. 18 (2007).
[94] *Id.*
[95] Mayoue, *supra* note 109.
[96] Scherer v. Scherer, 292 S.E.2d 662, 666 (1982) (holding "that antenuptial agreements in contemplation of divorce are not absolutely void as against public policy").
[97] *Id.*
[98] *Id.*
[99] Blige v. Blige, 656 S.E.2d 822, 826 (Ga. 2008) (citations omitted).
[100] *See* Mayoue, *supra* note 109.

alone."[101] The Court applied commercial contract principles to the divorcing couple's agreement and circumstances.[102] While material facts must be disclosed,[103] "parties to prenuptial agreements in Georgia are not by virtue of their planned marriage in a confidential relationship" that would impose heightened duties of disclosure.[104] Antenuptial contracts apply a commercial definition of unconscionable, "where one of the parties takes a fraudulent advantage of another, an agreement that no sane person not acting under a delusion would make and [of which] no honest person would take advantage."[105] The Supreme Court of Georgia not only enforces antenuptial contracts between couples, it also analyzes the agreement as though executed under commercial circumstances where full freedom of contract exists.

The recognition of antenuptial contracts in Georgia and the commercial evolution of the laws that govern the enforceability of these contracts present a key extension of the freedom of contract into the marital realm.

E. Georgia Marriage Contracts Are Valid Without Procreation

The United States Supreme Court found procreation and marriage to be fundamental rights,[106] but Georgia courts never defined procreation as a fundamental or required component of the marriage contract. Valid marriages exist in Georgia through a contractual agreement with no legal requirement that the parties ever procreate.[107] While impotency remains a valid ground for divorce,[108] Georgia courts have not clearly defined the term and multiple Supreme Court of Georgia decisions indicate that impotency is an inability to engage in sexual relations, not procreation. With no legal prerequisites for procreation under the marital contract, Georgia's laws

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[101] *Id*.
[102] Mallen v. Mallen, 622 S.E.2d 812 (Ga. 2005).
[103] Blige, *supra* note 115 (citations omitted).
[104] Mallen, *supra* note 118, at 816.
[105] *Id*. at 816-17.
[106] Motes v. Hall County Dep't of Family & Children Services, 306 S.E.2d 260, 362 (Ga. 1983) (citing *Skinner v. Oklahoma*, 316 U. S. 535, 541 (1942)). "Marriage and procreation are fundamental to the very existence and survival of the race."
[107] *See* GA. CODE ANN. § 19-3-1.
[108] GA. CODE ANN. § 19-5-3(3).

defining marriage have long contradicted the traditionalist justifications for maintaining an exclusively hetero-normative institution.

1. Procreation Was Historically the Goal of Marriage, But It Was Never Required Under Georgia Law

Georgia historically viewed procreation as a goal of marriage, but a valid marriage does not require that the couple procreate or even have the ability to do so. In 1847, the Supreme Court of Georgia found "the procreation of children [to be] one of the prime *objects* of the marriage contract."[109] Though consistent with nineteenth century social expectations, the Court's discussion clearly defines procreation as a goal, but not a requirement of marriage.

While a valid marriage still requires consummation of the contract,[110] multiple decisions by the state's Supreme Court also hold that "[s]exual intercourse is not essential to the consummation of a valid marriage" contract.[111] In 1860, the Court explained that the contract and the parties' mutual consent thereof constitutes a marriage, not sexual intercourse or procreation:

> [c]onsensus, non concubitas, faciat matrimonium, the maxim of the Roman civil law, is, in truth, the maxim of all law upon the subject; for the concubitas may take place for the mere gratification of present appetite, without a view to anything further, but a marriage must be something more; it must be an agreement of the parties . . . .[112]

In 1890, the Court further explained that the statute "meant consummation under license."[113] Parties enter into the marriage contract not by engaging in sexual relations or procreating, but by obtaining a license with the intention to be married and actually contracting such an agreement.

Marriage laws discussing impotency are the only restrictions with any correlation to a married couple's ability to procreate. Under Georgia's

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[109] Head v. Head, 2 Ga. 191, 205 (Ga. 1847) (emphasis added) (holding that the husband was unable to seek a divorce on grounds that his wife abandoned him, which was not a permissible divorce ground under the common law in effect at time).

[110] GA. CODE ANN. § 19-3-1.

[111] Long v. Long, 13 S.E.2d 349, 350 (Ga. 1941). *See* S. v. S., 86 S.E.2d 103, 104 (Ga. 1955) (*citing Askew v. Dupree*, 30 Ga. at 173); Nelms v. State, 10 S.E. 1087 (1889); Lefkoff, *supra* note 102.

[112] Askew v. Dupree, 30 Ga. 173, 178 (Ga. 1860).

[113] Smith v. Smith, 11 S.E. 496, 497 (Ga. 1890).

1863 Cobb Code, the state deemed a marriage invalid when one party was shown to have been impotent at the time of that marriage.[114] This restriction was repealed in 1965 and a marriage is valid today regardless of a party's impotence at the time of the contract.[115] Georgia, however, retains a provision that allows parties to divorce on the grounds of "[i]mpotency at the time of marriage."[116] Under English Common Law, "corporeal infirmity," which was defined as "impotence," was a ground for total divorce.[117] Georgia first included "[i]mpotency at the time of marriage" as a statutory ground for divorce in 1850.[118]

Georgia retention of the impotency ground[119] could imply that marriages require procreation if impotency is defined as synonymous with an inability to procreate. Nevertheless, impotency is not listed as a reason for invalidating a marriage.[120] The inclusion of impotency as a divorce ground is likely irrelevant to a procreation-requirement or lack thereof because the Supreme Court of Georgia's discussion of impotency implies that since at least the mid-twentieth century, the intended definition has nothing to do with an ability to procreate and instead refers to "the complete act of sexual intercourse."[121]

The 1847 Supreme Court found that "natural impotency" constituted a ground for divorce because "the pro-creation of children is one of the prime objects of the marriage contract."[122] After nearly one hundred years, the Court adopted an alternative definition from the American Jurist that "[i]mpotency denotes a state of permanent inability on the part of one of the parties to perform the complete act of sexual intercourse."[123] Fourteen years later in 1955, the Court reiterated the American Jurist definition and looked to the holdings of other jurisdictions, including the Minnesota Supreme Court's finding that "impotency was defined as being substantially the 'want of potentia copulandi, and not merely incapacity for procreation.'"[124] Unfortunately, the Court's decision failed to clarify the bounds of the

[114] T.R.R. COBB, *supra* note 553, at 331, § 1653.
[115] 1965 Ga. L. 500, § 1.
[116] GA. CODE ANN. § 19-5-3(3).
[117] Head, *supra* note 125.
[118] 1850 Ga. L. 151.
[119] GA. CODE ANN. § 19-5-3(3).
[120] GA. CODE ANN. § 19-4-1.
[121] Long, *supra* note 127.
[122] Head, *supra* note 125.
[123] Long, *supra* note 127 (*citing* 17 Am. Jur. 223, § 141).
[124] S. v. S., *supra* note 127 (*citing Payne v. Payne*, 49 N.W. 230 (Minn. 1981)) (rejecting the husband's argument that his wife's paralysis and inability to experience an orgasm constituted impotency).

complete sexual act as only an inability to physically engage in intercourse or to also achieve satisfaction from it.[125]

Georgia courts have not provided further clarity beyond the adopted American Jurist definition, but subsequent rulings demonstrate an evident transition from the early correlation between impotency and the goal of marital procreation to a definition more closely aligned with the ability to perform some type of sexual activity in general. The definition of impotency remains somewhat unclear, but Georgia seems to follow a contemporary definition unrelated to procreation. This conclusion is bolstered by the Georgia General Assembly's 1965 decision to remove impotency as grounds for invalidating a marriage.

Notably, none of the Supreme Court of Georgia rulings related to impotency restrict the activity to heterosexual relations. Such a heterosexual limitation, however, could arguably be implied from the notion that only a man and a woman are capable of procreation or because Georgia defines marriage as an agreement between one man and one woman. It is alternatively arguable that there is no sexuality restriction implied because a valid marriage is consummated by mutual agreement to the contract, not sexual intercourse, and marriages exist today regardless of whether or not the parties procreate. If procreation is unnecessary, a heterosexual restriction is also not required.

Georgia courts' discussion of the term implies that impotency is synonymous with an ability to engage in sexual relations, not an inability to procreate. The 1860 Supreme Court of Georgia reiterated that sexual intercourse does not constitute consummation, "yet it is so far one of the essential duties for which the parties stipulate, that the incapacity of either party to satisfy that duty nullifies the contract."[126] It appears that even in 1860 when impotency could invalidate a marriage, the term meant the incapacity to engage in sexual relations, not an inability to procreate.[127] Impotency is a divorce ground, but no longer nullifies the marriage contract entirely and thus, no provision of the Georgia Code requires sexual intercourse or procreation between a couple in order for the effectuation of a valid marriage contract.

Parties to a marriage contract consummate the agreement without sexual intercourse or procreation. A valid marriage similarly remains, despite a couple's inability to procreate or disinterest in the same. Therefore, the marriage contract is not confined to fertile, heterosexual couples who otherwise hold the exclusive biological capacity to procreate.

[125] S. v. S., *supra* note 127, at 105.
[126] Askew, *supra* note 128, at 178.
[127] *Id*.

2. Procreation or A Lack Thereof Is Not Grounds For An Annulment Under Georgia Law

An annulment in Georgia is granted when a marriage is void as a matter of law, unless children were born into that marriage. In the latter case, Georgia law will not allow an annulment in order to prevent wives from being denied alimony and their children from effectively being bastardized.[128] A marriage into which children were born cannot be annulled, but this by no means imposes a legal duty upon married couples to procreate.

Married parties in Georgia could previously avoid alimony and support payments for children if the marriage in dispute was deemed void.[129] In 1945, the Supreme Court of Georgia applied this rule and reversed a judgment requiring alimony payments by a husband, even though he and his wife had a child, because the marriage was void.[130] The Supreme Court eliminated this rule in 1965, explaining that the Georgia "legislature sought . . . to protect the children of marriages previously considered void . . . by prohibiting annulment and thus guaranteeing their legitimacy.[131] Consistent with this purpose, the legislature provided that "such marriages could be dissolved only by divorce."[132] Georgia's annulment laws prevent an annulment if the couple has children, but this does not correlate to any requirement that the couple ever procreate. Couples with children are simply prohibited from seeking an annulment in order to better protect the children of divorced parents.

The legal history of Georgia's marriage contract displays a marriage institution firmly grounded in civil contract. While this contract was not open to same-sex couples until June 2015, Georgia broadly embraced an otherwise libertarian contract public policy that protected parties' freedom in formulating these agreements. In the last thirty years, the state revolutionized its stance on antenuptial contracts, which were once void as a matter of public policy and today are not only enforceable, but also interpreted under commercial contract principles. With this strong precedent for extending the marital contract to same-sex couples, Georgia also places no requirement of sexual intercourse to consummate marriages, nor any obligation of procreation under the marriage contract. In light of these largely libertarian

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[128] *See* Wallace v. Wallace, 145 S.E.2d 546 (Ga. 1965).
[129] Eskew v. Eskew, 34 S.E.2d 697 (Ga. 1945).
[130] *Id*.
[131] Wallace, *supra* note 144.
[132] Wallace, *supra* note 144, at 548.

contract ideals and the lack of any procreation requirement, Georgia jurisprudence retains no restriction that otherwise confines the marriage contract to a heterosexual relationship in the wake of *Obergefell v. Hodges*.

III. DEREGULATION OF GEORGIA MARRIAGE LAWS

Marriage in Georgia has not been static. Georgia Courts and the Georgia Legislature have altered and amended the definition of marriage in the broader context throughout the last two centuries. Georgia rejected many of the restrictions or discriminatory practices codified during the nineteenth and twentieth centuries in four major arenas: (1) disconnecting religious classifications from civil marriage; (2) repealing anti-miscegenation laws; (3) eliminating gender-biased coverture laws; and (4) implementing no-fault divorce.

A. Treatment of Religious Groups Under Georgia Marriage Laws

Georgia largely removed the statutory categorization and separation of approved religious groups' involvement in granting marriages. Beginning in 1849, Georgia created a separate and distinct—albeit seemingly equal—category for "any Jewish minister" performing marriages.[133] The 1863 Cobb Code adopted this same separatist approach to religious involvement in marriage licenses, broadening the rule to include religions beyond Judaism.[134] Accordingly, "the Ordinary [could] direct the marriage license to any Jewish minister, or other person of any religious society or sect, authorized by the rules of such society, to perform the marriage ceremony, who shall make return thereon as required."[135] All subsequent versions of the Georgia's Code retained this provision through 1933.[136]

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[133] 1849 Ga. L. 69, § 1. "Be it enacted by the Senate and House of Representatives of the State of Georgia in the General Assembly met, and it is hereby enacted by the authority of the same, That the Clerks of the Courts of the Ordinary shall upon application being made, grant and direct marriage licenses to any Jewish minister or other person authorized to perform the marriage ceremony between Jews, and that such person so performing the marriage ceremony shall make a return on the license in manner and form as is now required by law."

[134] T.R.R. COBB, *supra* note 55, at 332, § 1663.

[135] T.R.R. COBB, *supra* note 55, at 332, § 1663.

[136] *See* R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 296, § 1707 (1873), R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 393, § 1707 (1882), JOHN L. HOPKINS ET AL., THE CODE OF THE STATE OF GEORGIA 224, § 2421 (1895), JOHN L. HOPKINS, THE CODE OF THE STATE

Today, Georgia makes no distinction between religious groups, or otherwise impliedly identifies groups as categorically non-Christian.[137] Any "minister, or other person of any religious society or sect authorized by the rules of such society to perform the marriage ceremony" may grant Georgia marriage licenses.[138] In this sense, Georgia law transitioned away from confining marriage licenses based on normative-religious traditions centered on Christianity.

B. Georgia Anti-Miscegenation Laws

Before and after the abolition of slavery, Georgia law vehemently restricted and prohibited interracial marriages until the latter part of the twentieth century.

Common law marriage and the legal marriage status it provided was never available to slaves in Georgia.[139] The legislature's simultaneous 1866 repeal of slavery laws and allowance of marriages between colored persons granted the right to marry for the first time, but not without restrictions.[140] The 1866 Act stated "[t]hat persons of color, now living together as husband and wife, are hereby declared to sustain that legal relation to each other . . . ."[141] The Supreme Court of Georgia explained that prior to the Act and "[d]uring the existence of slavery in [Georgia], slave marriages were not binding, and their offspring was not legitimate."[142] Prior to 1866, Georgia law appears consistent to that of many southern slaveholding states where "the marriage of slaves was utterly null and void; because of the paramount ownership in them as property, their incapacity to make a contract, and the incompatibility of the duties and obligations of husband and wife with the relation of slavery . . . ."[143]

Just three years before the abolition of slavery and extension of marriage rights, Georgia's Cobb Code of 1863 included provisions

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OF GEORGIA 787, § 2940 (1910), ORVILLE A. PARK ET AL., THE CODE OF GEORGIA 1409, § 53-211 (1933).

[137] GA. CODE ANN. § 19-3-30.

[138] GA. CODE ANN. § 19-3-30(c).

[139] *See infra* notes 155-56.

[140] 1866 Ga. Law 239, §§ 2, 5.

[141] 1866 Ga. Law 239, § 5.

[142] Price v. Brown, 85 S.E. 870, 872 (Ga. 1915) (considering the validity of the plaintiff's parent's marriage and his status as a legitimate child because they had both been slaves).

[143] Andrews v. Paige, 50 Tenn. 653, 660 (1871).

restricting marriages due to race.[144] Despite the gains of 1866, a version of Georgia's anti-miscegenation statutes remained in effect until 1979.[145] The original Cobb Code prohibited "[m]arriages between white persons and negroes, or mulattoes . . . ."[146] In 1865, the Georgia Constitution amended the anti-miscegenation provision and tightened the prohibition to only "marriage relation[s] between white persons and persons of African descent . . . ."[147] This language remained in the Georgia Code for the next fifty-two years.[148]

The laws of Native Americans residing within Georgia at the beginning of the nineteenth century mirrored the state's later anti-miscegenation statutes. Professor Fay Yarbrough explains that "whereas American society defined its members in terms that distinguished between those who were white and everyone else, the Cherokees chose to focus on similarities among all non-black peoples, making the distinction between those who were black and everyone else."[149] She states further that "[a]n 1824 [Cherokee] law declared that 'intermarriages between negro slaves and Indians, or whites, shall not be lawful.'"[150] In her opinion, "the Cherokee Nation passed their own anti-miscegenation law to distinguish themselves racially from blacks while identifying as social equals with whites."[151]

An 1868 amendment to Georgia's Declaration of Fundamental Rights brought into question the constitutionality of the state's anti-miscegenation laws which had been reaffirmed just three years prior in the state's constitution. Under the amendment, Georgia extended fundamental rights so that "[t]he social status of the citizen shall never be the subject of legislation."[152] The 1869 Supreme Court of Georgia considered the unconstitutionality of the state's anti-miscegenation laws under this fundamental right.[153] In upholding the racial restrictions, the Court found "the section of the Code which forbid[ ] intermarriages between the races [wa]s neither inconsistent with, nor [wa]s it repealed by, the section of the

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[144] T.R.R. COBB, *supra* note 55, at 333, §§ 1664-66 (§ 1664. "Marriages between white persons and negroes, or mulattoes, as defined in this Code, are prohibited."; § 1665: "Marriages between free persons of color may be made without license, or publication of bans."; § 1666: "The contubernial relation among slaves shall be recognized in public sales whenever possible, and in criminal trials where it becomes important to the advancement of justice.").
[145] 1979 Ga. L. 948, 949.
[146] T.R.R. COBB, *supra* note 55, at 333, § 1664.
[147] G.A. CONST. of 1865 art. V., § 1, para. 9.
[148] *See* CLARK, *supra* note 55, 296, § 1708 (1882); HOPKINS, *supra* note 55, at 787, § 2941.
[149] Fay Yarbrough, *Legislating Women's Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 J. SOC. HIS. 385, 389 (2004).
[150] *Id*.
[151] *Id*. at 390.
[152] G.A. CONST. art. I, § 11.
[153] Scott v. State, 39 Ga. 321 (Ga. 1869) (examining the legality of intermarriage between white persons and persons of color).

Constitution . . . under consideration."[154] In the Court's view, "[t]he amalgamation of the races [wa]s not only unnatural, but [wa]s always productive of deplorable results."[155]

The Georgia Legislature expanded the constitutional anti-miscegenation laws in 1927, passing a statute under which it became "unlawful for a white person to marry anyone except a white person."[156] The 1927 Act further added criminal punishment for "any person, white or otherwise, who shall marry or go through a marriage ceremony in violation of this provision."[157] It was also "the duty of the Attorney-General to institute criminal proceedings against the parents of . . . a child" born to a white and a colored parent.[158] Prior to 1927, the anti-miscegenation laws in force since 1865 prevented only the intermarriage of white persons and "persons of African descent."[159] Georgia expanded the racial constraints on marriage exponentially in 1927,[160] preventing white persons from marrying *any* other race.

In a state that had not seen slavery since 1866, Georgia courts deemed the strict statutory prohibitions against interracial marriage as not only constitutional, but a preventative measure against "unnatural" unions.[161] Georgia did not repeal the sweeping 1927 anti-miscegenation law, which actually expanded marital discrimination based on race beyond any post-slavery statute, until 1979.[162] Through this Act, Georgia also removed all laws under Chapter 53 of the code relating to race and discrimination.[163] Despite an arguable lag, Georgia aligned its marriage laws with the 1979 social reality that slavery had been abolished more than 100 years prior and racial discrimination within marriages ceased to be acceptable. With a similar evolution in Georgia jurisprudence, same-sex marriage rights and their existence in Georgia since June 2015 present an analogous alignment of social reality and the law.

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[154] *Id*. at 327.
[155] *Id*. at 323.
[156] 1927 Ga. L. 277, § 15.
[157] 1927 Ga. L. 277, § 15.
[158] 1927 Ga. L. 278, § 20.
[159] G.A. CONST. of 1865 art. V., § 1, para. 9.
[160] *See supra* notes 172-74.
[161] Scott, *supra* note 169.
[162] 1979 Ga. L. 948, 949.
[163] 1979 Ga. L. 948.

C. Georgia Coverture Laws

Georgia marriage law has moved toward gender equality and no longer defines husbands as the head of household or married woman under coverture laws as their husbands' property. At common law, "the union of man and wife was a junction of persons and fortune – 'no more twain, but one flesh.'"[164] The common law rule inhibited married women from entering contracts in their own capacity.[165] The 1854 Supreme Court of Georgia found that a married woman's "general disability to enter into any contract, under the Common Law," was due to the fact that "during the marriage, her very being or legal existence, [wa]s suspended; or at least [wa]s incorporated or consolidated into that of her husband."[166]

The common law subordination of women contrasts the apparently more progressive perspective of the Cherokee Nation, which inhabited parts of Georgia since before European settlement. The Cherokees' "matrilineally determined clan affiliations" were seen as "vital to legitimate membership in the [Cherokee] Nation . . . ."[167] Intermarriage with non-Cherokees complicated this system. Professor Fay Yarbrough explained that "[a]n 1819 act stipulated that Cherokee women retained their property rights upon marrying white men and that a white man could not dispose of his Cherokee wife's property without her consent."[168] Unlike Cherokee laws restricting interracial marriage, gender-based marriage laws opposed the position taken by English settlers and later, Georgia state law.

Georgia Courts and the Georgia Legislature began amending common law coverture laws in the mid-nineteenth century. The Georgia Supreme Court stated in 1851 that "[w]hatever may have been the Common Law rule . . ., it is now settled, so far as authority can settle any point, that, with respect to her separate property, a married woman is to be regarded, in Equity, as a feme sole."[169] The Georgia legislature expanded upon this and codified the autonomy of married individuals in regards to property in 1866; "all the property of the wife at the time of her marriage . . . shall be and

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[164] Wylly v. S.Z. Collins & Co., 9 Ga. 223, 237 (1851).
[165] *See* Waters v. Bean, 15 Ga. 358 (1854).
[166] *Id*. at 360 (finding a contract void because of the coverture and the wife's legal inability to contract).
[167] Yarbrough, *supra* note 165, at 386.
[168] *Id*. at 387.
[169] Wylly, *supra* note 180 (considering whether a married woman could individually recover trust income and recognized "husband and wife as distinct persons, with distinct property and distinct powers over it").

remain the separate property of the wife."[170] This followed the legislature's promulgation of a statute ten years prior in 1856 that made a husband not liable for his wife's debts and prevented any of his wife's property from being obligated to any debt of her husband that predated their marriage.[171]

Georgia's 1863 Cobb Code amended the 1856 Act to define coverture under the following parameters: "the husband is the head of the family, and the wife is subject to him; her legal existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order."[172] The Supreme Court of Georgia confirmed this transition away from the common law rule and established the male head of household principle:

> [T]he common law rule upon this subject, no longer prevails in this State. And every married woman entering into the matrimonial relation, since the abrogation of the common law rule, remains, as to her property, a feme sole, without the necessity even of a trustee to protect it, with power to purchase, hold, and convey property, contract and be contracted with, sue and be sued, as a feme sole.[173]

In all subsequent versions of the Georgia Code through 1983, Georgia has retained the statutory subordination of wives under the power of their husbands as heads of the family.[174]

Although Georgia no longer followed strict common law coverture after 1863, women remained subordinate to their male counterparts under the head of family statute through much of the twentieth century. The 1980 Supreme Court of Georgia upheld the statute and found that husbands, as head of their families, are the presumed legal owners of a family house and all its effects.[175] The Court found that this presumption was rebuttable, but

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[170] 1866 Ga. L. 146.

[171] 1856 Ga. L. 229.

[172] T.R.R. COBB, *supra* note 55, at 338, § 1700. Can't find original citation "T.R.R. Cobb"—original citation found at note 55.

[173] Huff v. Wright, 39 Ga. 41, 43 (1869).

[174] R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 303, § 1753 (1873), R.H. CLARK ET AL., THE CODE OF THE STATE OF GEORGIA 402-03, § 1753 (1882), JOHN L. HOPKINS ET AL., THE CODE OF THE STATE OF GEORGIA 238, § 2473 (1895), JOHN L. HOPKINS, THE CODE OF THE STATE OF GEORGIA 795, § 2992 (1910), ORVILLE A. PARK ET AL., THE CODE OF GEORGIA 1416, § 53-501 (1933). Not sure if this is referring to GA. Code or GA. CIV. Code

[175] Cleveland v. State, 270 S.E.2d 687 (Ga. Ct. App. 1980) (permitting the jury to infer that drugs found in the home owned by the defendant's wife were constructively also in the defendant's possession because he was the head of the family).

the decision nonetheless reflects the lack of legal autonomy for women that persisted despite Georgia's abandonment the common law rule of coverture over a century earlier.[176]

Women remained legally subordinate to their husbands until a 1983 amendment to the head of family statute effectively repealed all remaining conceptions of coverture in Georgia.[177] Just three years prior, the Supreme Court recognized that "[a]lthough there ha[d] been many changes regarding the husband-wife relationship, [the head of family statute] remain[ed] unamended and inviolate."[178] Subsequent versions of the Georgia Codes contain the remnants of the head of family statute, but provide only for "[i]nterspousal tort immunity, as it existed prior to July 1, 1983," the date Georgia repealed the remainder of the section.[179]

Women, much like non-Caucasian citizens, endured statutory restriction and subordination throughout much of Georgia's history. Georgia's elimination of common law coverture served only partial effect when the state retained and enforced a statutory provision specifically subordinating women to their husbands, the proverbial heads of the family, until 1983. The amendment served to align Georgia's treatment of married women with the social realities that even the Supreme Court of Georgia recognized had long-since changed.[180]

D. Georgia No-Fault Divorce

Georgia has greatly expanded the latitude of permissible divorce grounds over its history. Prior to the recognition of no-fault divorce grounds in 1973, Georgia law permitted divorce solely on fault grounds. For the last forty years, no-fault divorce has liberalized the marriage contract by extending an individual's ability to autonomously dissolve the contract if he or she simply believes the "marriage is irretrievably broken."[181]

Under the common law, Georgia granted "a total divorce, . . . pre-contract, [for] consanguinity or relation by blood, affinity or relation by marriage, and corporeal infirmity."[182] Partial divorce under common law was allowed for only two reasons: "adultery and cruel treatment."[183] In 1850, the Georgia legislature codified eight fault grounds for divorce:

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[176] *Id.* at 689.
[177] 1983 Ga. L. 1309, § 1.
[178] Cleveland, *supra* note 191, at 689.
[179] GA. CODE ANN. § 19-3-8.
[180] *See supra* note 193.
[181] GA. CODE ANN. § 19-5-3.
[182] Head, *supra* note 125.
[183] *Id.* at 206.

> (1) intermarriage within the levitical degrees of consanguinity;
> (2) mental incapacity at the time of marriage;
> (3) impotency at the time of marriage;
> (4) force, menaces, or duress in obtaining the marriage;
> (5) pregnancy of the wife at the time of marriage, without the knowledge of the husband;
> (6) adultery in either of the parties after the marriage;
> (7) willful and continued desertion by either party for the term of three years;
> (8) conviction of either party of an offence involving moral turpitude.[184]

Between 1946 and 1971, the Georgia Legislature amended and supplemented these original eight grounds and today provides twelve fault grounds for divorce.[185] The additions included habitual intoxication,[186] cruel treatment,[187] incurable insanity,[188] and drug addiction to narcotics, depressants, or stimulant drugs.[189]

Georgia treats heterosexual and homosexual relations as equally sufficient to constitute adultery,[190] which was a partial divorce ground under the common law and a fault ground since 1850.[191] The Supreme Court of Georgia held in 1981 that "[a] person commits adultery when he or she has sexual intercourse with a 'person' other than his or her spouse. Therefore, both extramarital homosexual, as well as heterosexual, relations constitute adultery."[192] This equal treatment makes the sexuality distinction irrelevant in the context of divorce—Georgia courts grant divorce on grounds of adultery regardless of whether the guilty party had relations with a member of the opposite or same sex.

The 1973 addition of no-fault divorce significantly broadened parties' access to marriage contract dissolution. No-fault divorce does not

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[184] 1850 Ga. L. 151, § 1.
[185] *See* 1946 Ga. L. 90, § 2; 1951 Ga. L. 744, § 1; 1962 Ga. L. 600, § 1; 1963 Ga. L. 288, § 1; 1971 Ga. L. 361, § 1.
[186] 1946 Ga. L. 90, § 2.
[187] *Id*. (under the common law, cruel treatment was a ground for partial divorce).
[188] 1951 Ga. L. 744, § 1.
[189] 1971 Ga. L. 361, § 1.
[190] *See* Owens v. Owens, 274 S.E.2d 484, 485-86 (1981).
[191] GA. CODE ANN. § 19-5-3. *See* Harwell v. Harwell, 209 S.E.2d 625, 627 (1974).
[192] Owens, *supra* note 190 (citations omitted) (holding that regardless of the nature of the extramarital relations, neither party is competent to testify as to the occurrence of the adultery).

require any statutorily defined wrongdoing by either party. The requesting spouse need only state that "[t]he marriage is irretrievably broken," meaning that either one or both parties are unable or refuse to cohabit, and there are no prospects for a reconciliation.[193] In 1974, the Supreme Court of Georgia found that "[p]roof of fault is not required to show a marriage is 'irretrievably broken.' The parties do not specifically complain of the other's conduct. They merely state that their marital differences are insoluble and request a change of status."[194]

In no-fault proceedings, the court only examines the potential fault of either spouse in the determination of appropriate alimony awards after the divorce is granted.[195] The Supreme Court reaffirmed that fault accusations, or "'[t]he factual cause of the parties' separation [i]s made relevant to both the issues of entitlement and amount of alimony, regardless of the grounds on which the divorce is granted.'"[196]

Divorce and the legal dissolution of marriage under Georgia law stands in contrast to the procedural restrictions placed on entering the institution. Georgia's divorce laws, both on fault grounds that treat heterosexual and homosexual relations equally, and the state's acceptance of no-fault divorce, reflect a broader policy of liberalization and increased access to divorce.

Marriage is thus organic—Georgia law no longer categorizes marriage licenses against a Christian norm, prohibits interracial marriages, enforces coverture principles of gender inequality, or confines divorce to fault grounds. Collectively, the amendments and additions to marriage laws in Georgia have served to align an institution rooted in the foundation of the state's legal history with contemporary social realities. The marriage institution draws much from tradition, but its relevance in the twentieth century demands changes such as those cited above.

CONCLUSION

Georgia encourages the institution of marriage—an institution grounded in civil contract that the state has repeatedly augmented and updated in consideration of both social realities and equal treatment. While marriage rates decline nationally and in Georgia, the debate over the definition of marriage continues to gain prominence. Many challenge the

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[193] GA. CODE ANN. § 19-5-3.
[194] Harwell, *supra* note 191 (affirming the grant of alimony for the wife on procedural grounds).
[195] *See* Davidson v. Davidson, 257 S.E.2d 269, 270 (1979) (affirming the lower court's holding that no evidence was necessary to grant a divorce on no-fault grounds, but the no evidence rule applies only to the divorce, not a later discussion of alimony between parties).
[196] *Id.* (*citing Bryan v. Bryan*, 242 Ga. 826 (1979)).

relevance of the state-encouraged marriage institution, but as the appellate decisions across the country and the Supreme Court's holding in *Obergefell v. Hodges* make clear, marriage remains a relevant institution to American society—one that has been and will continue to be amended in accordance with social reality. Georgia's marriage laws reveal a consistent precedent that recognizes an impetus for aligning marriage with these social realities, regardless of any constitutional protections, or lack thereof, on state and national levels. Georgia removed many restrictions throughout the late twentieth century—ignoring non-Christian categorizations for marriage ceremonies, repealing racial restrictions and anti-miscegenation laws, overturning coverture confines that legalized gender inequality, and liberalizing access to divorce through no-fault grounds—and today stands with strong precedent in support of the state's extension of same-sex marriage rights. Georgia's civil marriage contract, which represents a relatively unwavering legal institution without requirements of procreation, and Georgia's broad freedom of contract policies, which has bled into the marriage realm through the enforcement and interpretation of antenuptial agreements, join this precedent in supporting society's growing acceptance of same-sex marriage.