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**Toward a Political Sociology of Conjugal-Recognition Regimes:
Gendered Multiculturalism in South African Marriage Law**

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ABSTRACT

While conjugal-recognition policies are often a subject of political debate, scholars rarely attempt to explain the causal roots of such policies. When they do, their methods typically focus on discrete policies in isolation—same-sex marriage, no-fault divorce, etc.—with comparatively little investigation of potential connections *among* policies. This article begins to develop a more holistic approach focused on identifying and explaining what I call *conjugal-recognition regimes*. Adapting the concept from the existing literature on welfare regimes, I argue that conjugal-recognition regimes exist when an identifiable pattern or principle organizes an institution’s conjugal-recognition policies. Such regimes shape social relations at multiple levels, both between the individuals in conjugal relationships and among the multiple institutions (state, religious, and so on) that confer official conjugal recognition. I argue that these organizing patterns or principles emerge out of historically specific, institutionally situated, and discursively constructed political debates on specific conjugal issues and, to the extent a regime in fact exists, go on to shape subsequent conjugal-policy controversies. I demonstrate these ideas through an extended analysis of post-apartheid South African marriage law, which has recently incorporated numerous previously excluded conjugal formations but has also assigned each new form to its own statutory and administrative structure or, as I call it, “silo.” I argue that these silos entrench a principle of “gendered multiculturalism” that officially defines cultures in terms of their supposedly characteristic gender relations. This principle increasingly tends to embed religious and cultural elites’ understandings of their respective traditions into the state’s marriage laws.

Recent decades have transformed the laws governing conjugal recognition in many places around the world. Many of the most well-known changes have expanded individuals' autonomy to enter and leave conjugal relationships. Divorce laws have generally relaxed; marriage eligibility has expanded to interracial and, more recently and less pervasively, same-sex couples; and a growing number of jurisdictions offer conjugal recognition outside the framework of marriage. These changes have been most noticeable in western capitalist democracies but have appeared elsewhere as well (Goode 1993; Htun and Weldon 2011), and many scholars have heralded them as part of a broader, more-or-less global trend toward more individualist, voluntary, intimate, and gender-egalitarian modes of conjugality (Beck and Beck-Gernsheim 1995; Cherlin 2004; Coontz 2005; Giddens 1992).

Increasingly this individualist trend is complexly entangled with various multicultural claims concerning state conjugal recognition. Once most fully expressed in Asian, Middle Eastern, and African societies with a history of plural family laws under colonialism and after (Edelman 1994; Kabeberi-Macharia 1992; Sagade 1996; Shachar 2001), multicultural approaches to conjugal recognition are now more and more common in Europe, North America, and elsewhere. Multicultural family-law reform efforts cover a wide spectrum: Some call for inscribing the substantive commitments of particular religious and cultural communities into state law, while others instead advocate exempting such communities from state family law (Fishbayn Joffe 2013; McClain 2013). Specific controversies include clerical authority to perform state-recognized marriages, state recognition of religious family-law tribunals, state enforcement of religious marriage contracts, the decriminalization and/or recognition of polygamous marriages, and the autonomy of religiously adherent private business owners to refuse their services for same-sex weddings.

The co-existence of individualist and multicultural trends in conjugal recognition complicates simplistic accounts of a global shift towards more individualist family laws. More fundamentally, it undermines the assumption often lurking in many scholarly accounts that changing conjugal norms and behaviors on the ground have simply filtered up somehow into the law. A closer look reveals that conjugal-law reforms have appeared in diverse chronologies and combinations, and in ways that do not always neatly follow local practices (Dillon 1993; Eekelaar and Nhlapo 1998; Hartog 2000; Phillips 1988; Stacey 2011; Stacey and Meadow 2009). A new approach is necessary to comprehend this diversity and the more complex interplay between policy and practice that it implies. As a first step in such a project, this paper proposes framing conjugal-recognition policies as elements of broader *conjugal-recognition regimes*. I adapt the concept from the voluminous literature on welfare states, where the concept of “welfare regime” has given scholars a firmer grip on the various constellations of social-provision policy seen in different places and times around the world. At its heart the “regime” concept emphasizes relations, both among policies and among the individuals, institutions, and social groups who create and are governed by policy regimes. Such an emphasis is critical for understanding conjugal recognition, intertwined as it is not only with relations among individuals but also among institutions, especially the many state and religious institutions enjoying legitimate authority to recognize (and thereby to help constitute) conjugal relationships. Also helpful is welfare-state scholarship’s increasingly prominent emphasis on historical specificity, framing regimes as emerging out of particular political contests to temporarily solidify the matrix of power relations within which subsequent reform debates will be staged. This emphasis has increased the critical edge of welfare-regime scholarship, producing tools that can both grapple with complexities of particular cases and facilitate theory-building conversations between them.

To demonstrate and develop these ideas I travel to post-apartheid South Africa, a standard-bearer in both individualist and multicultural conjugal-recognition reform. Within the first twelve years of democracy, South African marriage law incorporated two family forms excluded under apartheid law: marriages under indigenous African¹ or, as it is known in legal parlance, “customary” law; and same-sex couples. This makes South Africa the world’s first jurisdiction to recognize both same-sex and (some) polygamous marriages (Stacey and Meadow 2009), an intriguing enough feature on its own. But my account will primarily focus on a less-noticed feature that, I argue, initially helped facilitate this expansiveness but now ties further expansions to an increasingly rigid template. So rigid has this template become that Muslim marriages remain largely unrecognized today, despite law-reform efforts that, as with their customary- and same-sex marriage counterparts, stretch back to the post-apartheid transition and beyond. The key feature of this increasingly rigid template is the recognition of newly incorporated conjugal forms within their own separate statutory and administrative structures or, as I call them, “silos.” Despite repeated arguments for folding each newly incorporated form into the existing Marriage Act, each has instead been assigned to, respectively, the Recognition of Customary Marriages Act (RCMA) of 1999, the gender-neutral Civil Unions Act² (CUA) of 2006, and the proposed Muslim Marriages Bill (MMB). The repeated application and decreasing controversy of the siloing technique marks it as an organizing feature of South Africa’s new conjugal-recognition regime. Moreover, I argue, it enacts a principle of *gendered multiculturalism* that officially defines “cultures” in terms of their supposedly characteristic gender relations: African culture by its polygynous heterosexuality, mainstream Western culture by its dyadic heterosexuality, and so on. Not only does this principle permit little space for those conjugal relationships that do not easily fit its typology, but it also has tended increasingly to

defer to cultural and religious elites' gendered definitions of their respective traditions.

How did this regime come about? Following the insights of welfare-regime scholars, my account emphasizes both institutional and discursive factors. The former forced conjugal-recognition issues onto the policy agenda, established the outer boundaries of possible policy responses, and carried policy solutions from one debate into the next. But they alone cannot explain the qualitative *content* of the new regime. On that question, I argue that the successive debates carved the new regime's principle of gendered multiculturalism out of a more general background understanding, shared among post-apartheid politico-legal elites, that marriage is *culturally universal*. While this shared understanding virtually guaranteed changes to the hegemonically Judeo-Christian conjugal-recognition regime of the apartheid state, it also positioned "culture" as a likely fault line distinguishing different stakeholders' substantive positions and rhetorical strategies in the specific debates to follow, thereby constituting the lines along which the new regime might vary. These lines were actively elaborated by activists in similar ways across the debates. In both cases gender-rights activists—namely feminists and lesbian, gay, bisexual, transgender, and intersex (LGBTI) advocates—argued for a unified marriage law by framing "cultures" as polyvalent and dynamic, while African and religious traditionalists generally used more autonomous and timeless representations of "culture" to argue for more distinguished laws. The silos established by the RCMA and the CUA were largely concessions to traditionalists, importing their more timeless and autonomous understandings of "culture" into the law, cloaking them in increasingly state-backed authority over marriages in their respective communities, and enabling a principle of gendered multiculturalism to take hold. Stakeholders in the Muslim marriage debate now simply presume any bill for that community will take a siloed form. Perhaps even more tellingly, the most conservative wing of Muslim

clerics has successfully delayed the bill's enactment over their concerns that authority within the silo it creates would lean too heavily toward the state and away from themselves, whom they see as the proper custodians of Muslim tradition.

Inter-institutional relations such as those between Muslim clerics and the state have important symbolic and material implications for relations among individuals on the ground, especially for hierarchies of gender, race, and sexuality. This is especially true for marriage, with all the circuits of property, resources, power, and respect that pass through it. That was of course a key motivation for those who have participated in the South African debates, as it is for those in analogous debates around the world. A key virtue of framing conjugal-recognition policies in terms of “regimes” is that it helps us get a handle on these interwoven layers of relations, from the inter-institutional to the interpersonal. Scholars' too-common assumption that conjugal practice simply filters up into conjugal policy misses these complicated dynamics, effectively naturalizing conjugal recognition rather than problematizing it as a socially produced and complexly institutionalized practice. I thus begin by considering why we need to focus on understanding conjugal recognition at all.

I. The Need to Study Conjugal-Recognition Policies

Married and cohabiting relationships are key building blocks of most every society, so the practices that constitute and define them shape many domains of social life. At the core of these practices lie acts of conjugal recognition. Conjugal couples are sustained through countless everyday acts of recognition affirming that the relationship exists and that this existence triggers a range of rights and responsibilities both between the partners themselves and between them and third parties (Berger and Kellner 1964). One of the key factors distinguishing marriage from

unmarried cohabitation is that these everyday acts of recognition are undergirded by more formalized processes.³ These often include a widely understood, ritualized ceremony transforming the partners into spouses (Hull 2006; Ingraham 1999; Lewin 1998)⁴ and the vesting of primary authority for conferring the status of “marriage” in concrete institutions such as religious organizations and states. When people distinguish the married from the unmarried in everyday life, these institutions are often their presumed reference points.⁵ And so the rules and policies governing religious and state institutions’ conjugal-recognition practices have far-reaching implications. By establishing what sorts of people and relationships may be officially recognized, what steps recognition requires, what rights and responsibilities it implies, and how recognized relationships may be dissolved, conjugal-recognition policies help shape the social meanings and desirability of marriage and of other formally recognized statuses such as “civil union.” Beyond that, the meanings and desirability of unmarried cohabitation, singlehood, and divorce are all also shaped by their relationship to marriage (Axinn and Thornton 2000; Bumpass, Sweet, and Cherlin 1991; Cherlin 2009; Clarkberg et al. 1995; Thornton, Axinn, and Xie 2007).

Enduring political concern with conjugal-recognition policies is further evidence of their import (Cott 2000). The best-known current example is the battle over same-sex couple recognition that has spread rapidly throughout the world in recent years. It follows a deep and wide range of contests concerned with such issues as marriage among religious, racial, and other minorities, and among colonized peoples; marriage across racial or other lines; polygamy; age of consent; definitions of incest; clerical authority to perform state-recognized marriages; women’s authority within and on behalf of their marriages; and access to divorce. While many of the highest-profile controversies have concerned states’ marriage laws, marriage-policy activists

have also targeted the doctrine of religious institutions, the practices of businesses and other employers (e.g., Raeburn 2004), and the less formal but often no less consequential norms of communities and social groups. Their motivations are both material and symbolic, at stake both access to concrete resources and to the respect access signifies. The recognition of a marriage is often simultaneously understood as affirming the personhood and citizenship of the spouses and the legitimacy of their identity groups. Conjugal-recognition policies thus often form a key stage for broader “politics of recognition” (Taylor 1994), a theme central to the South African case I take up below.

But despite all this, relatively little scholarly work has focused on understanding the causal roots of conjugal-recognition policies. A huge social-science literature exists on marriage and conjugal relationships, of course, but most of it has focused on explaining the roots and consequences of people’s actual conjugal behaviors. Those attempts at explaining conjugal policy that do exist usually focus on particular historical or regional cases and, even more narrowly, a specific, isolated conjugal-recognition policy, with few gestures to broader theory-building. Work in this vein rarely attends to any links that may exist between the policy in question and other conjugal policies, or between the society under study and other potentially related cases.⁶ The variation such studies attempt to explain is often implicitly framed as a particular policy’s presence or absence in a given setting, rather than more qualitative variations in the policy’s content; relatedly, these studies often limit the variables whose potential causal influence they explore to those attitudes and behaviors that directly relate to the specific phenomena the policy addresses.

To take the most recent and sustained example, scholars of same-sex couple recognition overwhelmingly emphasize pro-LGBT laws and attitudes as the factors that condition its

enactment. Most of this research claims jurisdictions follow an incremental, presumptively universal⁷ progression from sodomy decriminalization through anti-discrimination protections before arriving at couple recognition, first under a non-marital label such as “civil partnership” or “civil union” and only later as “marriage” (Eskridge 2002; Fellmeth 2008; Graycar and Millbank 2007; Waaldijk 2001). Some scholars also emphasize the impact of LGBT activist mobilization and strategy as well as increasing visibility of and improving attitudes toward LGBT people (Aloni 2010; Badgett 2005; Eskridge 2002). Factors related to other conjugal behaviors and attitudes are mentioned only in passing, however, as are questions about the character of the recognition extended to same-sex couples—for example, why the substantive rights conferred with recognition vary, often significantly, from one jurisdiction to the next, in ways that do not always neatly track the rights offered different-sex couples. The question is presumed simply to be: Are same-sex couples recognized or not? And the answer is presumed to relate exclusively to LGBT politics rather than also to broader conjugal issues.

II. A Better Approach: Conjugal-Recognition Regimes

Are conjugal-recognition policies really driven by such discrete dynamics? Or might they be more connected? Political actors, for their part, often presume the latter. The American same-sex marriage debate, for example, has featured frequent references to *Loving v. Virginia*, unmarried cohabitation, “rising” divorce rates, and polygamy. Rhetoric like this, by its very existence, embeds the same-sex marriage debate within broader marital and conjugal politics. And it highlights the plausible intuition that each of these issues is connected with the others by virtue of their shared entanglement with the institution of marriage.

Exploring this possibility requires a more holistic approach, a useful model for which can

be found in the voluminous and sophisticated literature on welfare “regimes.” Defined in one formulation as “patterns across a number of areas of policy” related to the common topic of, in this case, social provision (O’Connor, Orloff, and Shaver 1999:12), the regime concept has helped welfare-state scholars to describe and explain the “distinctive institutional arrangements” into which these social-policy patterns have “congealed” in different places and times (Adams and Padamsee 2001:3). These congealed arrangements shape both policies’ consequences on the ground and the possibilities for future reform, reflecting not simply a collection of policies but a “more organized mode of governance” (4) and a kind of pact among relevant stakeholders stabilizing, at least for a time, their power relations with each other. While scholars of conjugal recognition have occasionally used the term “regime” term in a broadly similar sense (e.g., Deere and León 2005; Rayside 2010), it has not been as systematically developed as in the welfare literature.

Doing so requires reframing the object of our explanatory attempts away from a discrete conjugal-recognition policy’s presence or absence and toward any pattern or principle that may cut across multiple elements of an institution’s conjugal-recognition policy. A case such as South Africa undoubtedly fits this approach unusually well, with its multiple marriage laws markedly similar in form and content, while most states and institutions have only one marriage statute. But even apparently unified conjugal-recognition policies comprise multiple policy decisions—eligibility for marriage, eligibility for divorce, recognition of marriages performed elsewhere, etc.—that may combine in instructive ways. Relatedly, one can ask not just binary questions about a policy’s mere presence or absence but instead more qualitative questions attentive to conjugal policies’ potentially significant details. Does a jurisdiction’s no-fault divorce regime imply certain kinds of post-divorce property arrangements (Fineman 1989)? Does same-sex

couple recognition occur under the label “marriage” or under another term? The matters regulated by conjugal-recognition policy range from the scope of eligibility (i.e., who?) to the steps and choices required to attain recognition (how?), and the benefits and responsibilities conferred (what?) by recognition. A regime approach puts all these on the table, searching for connections among them that may reveal a deeper organizing pattern or principle.

Welfare-regime scholars have identified such organizing patterns and principles using a wide range of methodologies, from quantitative analyses of policy inputs and outcomes (Esping-Andersen 1990) to ethnographic studies⁸ of policy administration (e.g., Fahey 2002; Haney 1996; Kingfisher and Goldsmith 2001; Korteweg 2006), all techniques that could also find uses in studying conjugal-recognition regimes. In this article I draw most from the strand of regime scholarship that investigates the concrete historical processes through which policies are produced and enacted (e.g., Esping-Andersen and Hicks 2005; Skocpol 1992; Steinmetz 1993). While different empirical cases will be most illuminated by different conceptual and methodological tools, and my discussion below emphasizes those tools on which I most heavily rely, there are general themes that must be central to any historicized analysis of conjugal policy formation. The first two of these are well developed in the welfare-state literature: the concrete institutions within which policy regimes are made, administered, reproduced, and reformed; and the structures and processes of meaning through which policy ideas and principles are elaborated, contested, and enacted. The third important theme has been mentioned by welfare-state scholars with as yet little development (e.g., Adams and Padamsee 2001), but is an absolutely central problem for regimes of conjugal-recognition: the side-by-side co-existence in one place and time of *multiple* regimes administered by multiple institutions, all of which govern the shared topic of conjugal recognition.

The central precept of historical institutionalist approaches to regime formation is that regimes emerge out of historically specific, institutionally situated political struggles among particular actors. The concrete characteristics of the lawmaking institutions where these struggles occur—legislatures, courts, agencies, and so on—play a key role in establishing the opportunities and challenges facing reform efforts. Lawmaking systems with multiple “veto points,” for example, make reform more difficult (Birchfield and Crepaz 1998; Immergut 1990; Tsebelis 2002). “Countermajoritarian” institutions such as independent courts and strong political parties, by contrast, can facilitate reform even in the face of public opposition, provided would-be reformers can convince institutional decision-makers of their case (Mishler and Sheehan 1993; Schmidt 1996). Scholars of same-sex couple recognition in Latin America have already emphasized such factors (Pierceson, Piatti-Crocker, and Schulenberg 2010), and both courts and strong parties played exactly this role in the South African case I discuss below. Institutions also help control the “policy agenda,” the list of topics that are mooted for debate with a meaningful chance of some sort of action (Kingdon 2003).

Beyond just lawmaking institutions, the institutional arrangements embedded in existing regimes themselves shape possibilities for regime reform. In very general terms, the institutions composing a regime often tend to reproduce that regime through various mechanisms, including administrators’ and recipients’ vested interests in the system’s maintenance, power relationships among relevant stakeholders that grant the greatest influence to those groups that benefit the most from the existing regime (Pierson 2000), and “policy feedback loops” that tend to frame reform processes in the terms of existing policy (Béland and Hacker 2004). The last of these will be especially important to the South African case, where the siloing technique’s repetition moved it from a point of central controversy in early debates to the taken-for-granted basis of later

reform efforts. It is important to emphasize that, despite institutions' general tendency toward stasis, constellating multiple institutions under a shared regime can produce dynamics that foster change. Different institutions often operate according to different, sometimes even irreconcilable logics reflecting their own particular histories, and the resulting tensions among them can persuade political actors that reform is needed (Lieberman 2002; Orren and Skowronek 1994). As I elaborate below, I see this dynamic as especially important and pervasive in the domain of conjugal recognition.

This important caveat aside, institutional factors tend to explain persistence more powerfully than change and, relatedly, are not very helpful in explaining policy *content*. Addressing this problem requires attention to discursive factors in both the background structures and foreground processes (Padamsee 2009) of policy formation. The former include policy actors' shared "cognitive paradigms" and "normative frameworks," i.e., implicit assumptions about the way the world does or should work that shape understandings of the problem and the perceived utility or legitimacy of alternative proposed solutions (Campbell 2002). Background discursive structures also often help constitute the identities of the social groups who will feel called to engage each other on the policy-reform field of play (Adams and Padamsee 2001). Foreground processes play out within this field of possibility, as political actors consciously develop and deploy specific policy proposals and "framing" strategies (Béland 2005) in order to articulate their perceived interests, attract supporters, establish discursive dominance, and enact their preferred policies. The configurations of meaning deployed in foreground processes are more "coherent" and "explicit" than the more implicit and diffuse background structures, entailing specific "ideas"—from philosophies to proposals to slogans—consciously understood by at least some who use and hear them. Although the scholarly literature on policy regimes does

not always explicitly state this point, the implication is that these foreground strategies are virtually always somehow perceivable as consistent with the more general background structures; otherwise, they would never be considered or even, in some cases, understood. Methodologically, this implies that closely examining the array and interplay of foreground framing strategies can help us begin to excavate shared background assumptions, a technique on which my own analysis below relies heavily. Beyond this, framing strategies also have the capacity, if their associated policy proposals are enacted, to embed their more specific meanings into the resultant regime as its central organizing principles.

The precise relationship between institutional and discursive factors will vary from case to case, but each will be somehow important in explaining all conjugal-recognition regimes. The final, critical factor is that, typically, multiple conjugal-recognition regimes co-exist in one time and place. In the domain of welfare, scholars have observed that a host of other institutions and social groups beyond just the state, from families and employers to charities and religious organizations, administer social provision according to what are, in effect, their own “welfare regimes” (Adams and Padamsee 2001). The same is not only true of conjugal recognition but utterly central to it, forming one of the key problems that any account of conjugal-recognition policies must confront.⁹ Not only is formal conjugal recognition conferred by many different institutions and actors—especially by states and religious organizations but also, as highlighted above, by social groups and individuals in everyday life—but in most societies there also circulates an implicit assumption that conjugal recognition will be *continuous* across all contexts and institutions. Put simply, we often presume that we all agree who is and who is not married.¹⁰

This expectation provokes some key implications for the study of conjugal-recognition policy. First, it means that one key provision to examine when searching for an organizing

pattern or principle underneath an institution's conjugal-recognition policies is how it articulates with the policies of co-present institutions. For example, will the state automatically recognize marriages performed by clerics? Some purely secular regimes such as France and Mexico simply ignore religious ceremonies, requiring civil ceremonies for state recognition. In other cases an official state religion has primary or even exclusive access to state conjugal recognition. In between these poles lies a range of other possibilities, including culturally and/or religiously pluralist regimes such as that of post-apartheid South Africa. One could also ask the converse question of non-state conjugal-recognition regimes, i.e., will a religious organization's own conjugal-recognition regime follow the guidelines set by the state or will it adopt some other—often but not always more restrictive—criteria? Is the state regime, backed as it is by the legitimate threat of force (Weber 1968), capable of forcing its way into non-state regimes (Merry 1988), or do the latter manage to retain some degree of autonomy? Such gaps can appear even among different arms of the state, especially in highly federated structures such as the United States. Laws of same-sex couple-recognition differ widely there from one state to the next and, until recently, between the states and the federal government (Koppelman 2006),¹¹ a situation that echoes similar historical complexities around interracial marriage, definitions of incest, and divorce.

Not only must such questions be included when *describing* an institution's conjugal-recognition regime, but even more importantly they may be important factors in *explaining* regime change. On the one hand, changes in one regime may help to legitimize a new principle that can then work its way into intersecting regimes, much as socially recognized same-sex commitment ceremonies, some of them formally performed in religious institutions, have helped to build greater public support for legally recognizing same-sex marriages (Hull 2006).

Conversely, differences between intersecting conjugal-recognition regimes can create tensions that build the case for reform, much as the apartheid state's non-recognition of customary marriages created pressures that vaulted the issue to the upper reaches of the post-apartheid policy agenda. These observations vis-à-vis conjugal recognition represent a specific iteration of the more general finding, already well-documented by welfare policy scholars, that the institutions articulated under a regime often operate according to different, sometimes irreconcilable principles. Regimes attempt to stabilize this diversity, usually with success, but in the long run these diverse principles can transform the regime itself.

In the next section I apply these ideas to the post-apartheid South African case. My primary material comprises the public statements made by relevant politico-legal elites (i.e., lawmakers, judges, government bureaucrats, and activist leaders) in the customary, same-sex, and Muslim marriage debates. These include court filings and judgments; oral and written submissions to Parliament and relevant government agencies; press releases, interviews, op-eds, and articles; speech transcripts; and other propaganda materials such as pamphlets, advertisements, and signs. This material was gathered through extensive archival and internet research and my own personal requests of those directly involved, and includes a substantial representation of material from each of the major normative positions represented in each debate. My argument also draws on my experiences working with a feminist and an LGBTI organization involved in the RCMA and CUA debates¹² and on several dozen interviews I conducted with relevant politico-legal elites to explore interpretive ambiguities in the primary source material and to help construct historical narratives of the reform processes.

III. The Institutionalization of Gendered Multiculturalism in Post-Apartheid South African Marriage Law

As mentioned before, I describe the regime produced by these processes as one of “gendered multiculturalism,” meaning that it officially defines “cultures” in terms of their supposedly characteristic gender relations. This principle increasingly organizes the ongoing development of the state’s own conjugal-recognition regime and, by extension, the ways the state regime articulates with its cultural and religious counterparts.

The regime’s silos are the key technique through which the gendered multicultural principle takes institutional form. At the level of the regime’s everyday, ongoing operation, conjugal relationships are requested to place themselves in one and only one category. Couples with multiple allegiances—for example, those who value both African tradition and Christianity, or whose spouses follow different religious traditions—can only access state recognition under one of those identities. This dilemma is especially acute for those who identify as both traditionally African and lesbian or gay, as state recognition for their conjugal relationships is available only under the latter identity (Bonthuys 2008; de Vos and Barnard 2007).¹³ Perhaps even more consequential are the ways siloing channels expectations for further expansion, as policy makers now expect currently excluded cultural and religious groups to reach consensus on gender relations before new silos will be constructed for them. Not only does this expectation frustrate the regime’s extension to new groups, but it also increasingly appears to empower religious and cultural elites to set the terms for state recognition of marriages performed in their respective traditions. To the extent these elites define their respective traditions in less gender-egalitarian terms, this tendency may tilt the gendered definitions of “cultures” recognized under South African marriage law in more patriarchal directions. Feminist scholars have made similar

arguments about culturally plural legal systems in other settings (e.g., McClain 2013), most notably “millet” systems where members of different religious and cultural communities are on most matters subjected to the jurisdiction of entirely separate judicial structures administered by cultural or religious authorities. The South African regime is not nearly as segregated as that, most separation focused on the point of entry to marriage more than life within it. (One bureaucrat described it to me as a house with many doors.) Its institutional segregation has increased slightly over time, however, and it looks possible that future expansions may continue this trend.

This section builds up to that claim by proceeding chronologically through the four key episodes that constructed the new regime. First, I briefly describe the hegemonically Judeo-Christian¹⁴ marital regime of the colonial and apartheid eras, along with the resistance to this hegemony that eventually displaced it with more culturally universal understandings of marriage. I then explore how the customary-marriage debate produced a siloed approach to managing cultural difference in marriage, even though many criticized such a move. Despite further debate on similar points the same-sex marriage debate produced yet another silo, thereby cementing the silo as the organizing technique of post-apartheid marriage law. So rigid is this expectation that debates about Muslim marriage, having evolved throughout this period, now take a siloed approach as the presumed basis for law reform, an assumption that seems to have empowered conservative Muslim elites relative to their more feminist counterparts.

A. The Hegemonically Judeo-Christian Regime of Colonialism and Apartheid

Throughout colonial and apartheid South African history, official state law was built around European understandings of marriage grounded primarily in different variations of

Protestant Christianity. While customary marriages were treated differently by each of the British colonies and Boer republics that eventually joined to form the Union of South Africa in 1910, each clearly disfavored them (Bennett 2004; Brookes 1924). Colonists' chief complaint was "polygamy,"¹⁵ which they saw as the root evil of African societies (Martens 2009; Welsh 1971). Many laws pushed Africans toward Christian, monogamous models of marriage, at least nominally theorizing that this would "civilize" Africans more broadly. The Native Administration Act of 1927 solidified the hierarchy, defining customary conjugal relationships out of the official category of marriage entirely: What Africans called "marriages," the newly unified state would call only "customary unions," and even that only for a scattershot collection of purposes (Bennett 2004).

Africans *could* access state recognition by marrying either in mainline churches or in government offices (Bennett 2004:57). State officials presumed, often inaccurately, that Africans who chose this approach intended to declare their general allegiance to Western cultural norms and its associated legal system; any existing customary union was thus automatically nullified in the state's eyes, and the marriage's particulars (e.g., property rights, inheritance, and so forth) were governed by common instead of customary law. Meanwhile, a series of court rulings refused state recognition to marriages sacralized by independent African churches, Indian religions, and Islam¹⁶—even though the text of the Marriage Act, enacted by the apartheid government in 1961, specifically authorized state recognition for the latter two of these. In all cases, the chief objection to these marital forms was once again their potential for polygamy. In these ways, the South African state built a white supremacist regime for recognizing conjugal relationships in which the sign of "marriage" was defined as intrinsically Judeo-Christian, Western, and monogamous.

South Africans did not all passively accept this regime, of course (Meintjes 1990; Posel 1995). Virtually all Africans, Muslims, and Hindus regarded marriages sacralized under their respective traditions *as* marriages. Among most Africans, rites such as the negotiation and payment of “lobola” (often over-simply translated as “bridewealth”)¹⁷ were usually the measure of a valid marriage, their salience grounded in their perceived traditional provenance and cosmological significance (Nhlapo 1994). For many customarily married spouses—especially wives—the state’s refusal to recognize their marriages had tragic material consequences (Mabandla 1990), leaving their property claims unenforceable against the greed of deserting spouses, deceased spouses’ extended family, or—perhaps most infamously—“paper wives” their migrant-worker husbands had married in town under the civil law (Walker 1990). All this unfolded in a broader context of apartheid violence against non-white families, split apart by migrant labor, racial classifications, and policing (Sachs 1990).

By apartheid’s end this regime was thoroughly delegitimized among those who would go on to wield post-apartheid influence. The non-recognition of African and other non-white marriages was seen as a key example of apartheid’s racist cultural politics, a local understanding strengthened further by the global rise of discourses celebrating family diversity and family rights (Nhlapo 1994). Scholars and political leaders began to debate how best to incorporate African, Muslim, and Hindu marriages; a smaller number also discussed same-sex relationships (Bekker 1991; Costa 1994; Sachs 1990). Much of this discussion focused on multiple excluded forms at once, framing it as a general and shared problem and, thus, individual reforms as elements of a broader, more expansive post-apartheid regime.

The interim and final constitutions¹⁸ made such proposals an actual possibility. At the broadest institutional level, of course, they opened many new pathways to the state for would-be

reformers, replacing the white supremacist, National Party monopoly on state power with non-racial elections and a justiciable bill of rights to be interpreted and defended by the newly established Constitutional Court. The constitutions also included substantive provisions specifically relevant to marriage-law expansion. Some clauses opened the door to pluralist approaches to recognition; these included provisions elevating customary law to a full co-equal basis of South Africa's legal system and explicitly permitting Parliament to recognize religious family laws. Cutting in a more universalist direction, other clauses subjected cultural-rights claims to equality guarantees around gender and sexual orientation—the latter the world's first in a national constitution. Taken together, these provisions began to fill in the outlines of the legal environment within which a new conjugal-recognition regime would emerge, yet they retained significant ambiguities still to be debated and resolved.

B. Silos' Emergence in the Recognition of Customary Marriages Act

Such debate was quickly initiated by the South African Law Commission, an independent and technocratic state agency responsible for research and public consultation in the service of law reform. The newly elected Mandela administration reorganized the apartheid-era Commission into a non-racial, democracy-promoting body that endeavored to find consensus across different interest groups and bring South Africa's statutory law in line with its new constitution. The agency quickly opened several research projects focused on different relationship forms excluded by the apartheid regime: African customary marriages¹⁷; Muslim marriages; Hindu marriages; and unmarried partnerships, both same- and different-sex. Among these, customary marriage struck Commission staff as the “natural” and “logical” first priority, both because it affected the largest number of people and because it was a central pivot for the broader question of customary law's post-apartheid status (Goldblatt and Mbatha 1999).

The Commission released an Issue Paper in August 1996 inviting public comment. This paper presumed that customary marriages deserved recognition and suggested that this should include polygynous marriages. It also obliquely hinted that the Commission foresaw some sort of pluralized approach as the likely way forward (South African Law Commission 1996). A much more detailed Discussion Paper followed one year later maintaining the Commission's support for recognizing both monogamous and polygynous customary marriages. Largely as a consequence of polygyny's proposed inclusion, the paper reluctantly favored a separate statute for customary marriage. While the Commission thought a unified system would be ideal, they also worried that civil marriage's default property rules were unsuited to customary marriages, especially when polygynous (South African Law Commission 1997). Their concerns on this front were bolstered by their comparative review of marriage law in other African countries. By the Commission's account, almost all African countries favored more unified family-law systems in the early post-colonial period only to find them unworkable, eventually opting for more pluralized approaches. More extensive consultation with women's groups and rural communities followed, and the Commission placed a final report and draft bill before Parliament in September 1998.²⁰ Two months later a final bill was enacted, bearing much the same outlines as the Commission's early suggestions: recognition for monogamous and polygynous customary marriages under a separate statute.²¹

The Commission and parliamentary processes were largely battles between gender-rights activists and traditional leaders. The most significant of the former were the Gender Research Project of the Centre for Applied Legal Studies (CALS), a human-rights law organization affiliated with Johannesburg's University of the Witwatersrand; and the Rural Women's Movement (RWM), a grassroots organization of rural women activists with whom CALS

partnered for research and joint advocacy efforts (Albertyn and Mbatha 2004; Goldblatt and Mbatha 1999). Other women's and feminist organizations also made written and oral submissions, but it was CALS who had the most sustained presence, acting on behalf both of themselves and, in separately written submissions, the RWM. Traditional leaders' contributions, for their part, took the form of individual and regional efforts rather than any coordinated national response.

Across their differences, gender-rights activists and traditional leaders all agreed with the Commission and virtually all other politico-legal elites that customary marriages deserved state recognition. This already reflected the culturally universal understanding of "marriage" that had developed largely in protest against the apartheid regime. This bedrock agreement virtually ensured that customary marriage would open a path to a new regime, but the contours of that regime remained undetermined.

Gender-rights activists' central rationale for supporting customary-marriage recognition was that its non-recognition materially disadvantaged women in rural communities by rendering their claims for property and support unenforceable. They favored a unified marriage law administered primarily by civil rather than customary legal institutions, saying the latter were usually hostile to rural women's interests. They advocated equal spousal rights and opposed recognizing polygyny—although CALS would crucially modify their position on this last point near the debate's end. Traditional leaders, meanwhile, were primarily concerned with their own power and, more generally, the status of "African culture" in the post-apartheid order. They preferred that customary marriages be recognized under a separate law administered almost exclusively by customary institutions (i.e., by themselves), opposed equalizing spouses' formal rights, and favored recognizing polygynous unions.

CALS and the RWM framed their arguments in the customary-marriage debate around a narrative portraying “culture” as intrinsically dynamic and polyvalent, adapting to changed historical circumstances and unfolding in a multicultural environment where many people simultaneously drew on multiple traditions. In contrast with other feminist narratives depicting “African culture” as necessarily hostile to gender equality,²² this dynamic narrative suggested a possibility that a reformed “African culture” could help shape a gender-egalitarian post-apartheid future. The dynamic narrative of culture led directly into CALS’s argument for one unitary marriage law “drawing on the positive elements of both [customary and civil] systems [and] creating a new...progressive system for all South African families” (Gender Research Project 1996:6).²³ In the views of CALS and the RWM, culturally specific laws would fossilize dynamic cultural practices into static rules; indeed, that was exactly what they argued had happened under the colonial and apartheid states. They wrote that what the government called “customary law” was “developed by certain elite groups within the indigenous population together with the colonial rulers and...[became] a relatively static body of codified law” (3), contrasting this with pre-colonial, un-codified “indigenous law,” whose more general principles were applied more flexibly and, as a result, tended to change over time. In the present context, they argued that it was better to leave most cultural practices as a private matter—where, it was implied, dynamism could flourish—and limit official state law’s role to “regulation and protection of the proprietary and other consequences of legal marriage” (6).

CALS and other gender-rights activists unanimously agreed that these legal consequences should be uniform across all marriage types. Spouses should hold marital property jointly in “community of property,” only deviating from this arrangement if there were a fairly negotiated pre-nuptial contract. All wives should enjoy equal rights with their husbands, including the

capacity to act on behalf of their marriages. And only monogamous marriages should be recognized.²⁴ Because they favored uniform legal consequences for all marriages, gender-rights activists saw no need for multiple marriage laws. Moreover, a more pluralized system risked extending apartheid racial divisions into the post-apartheid future. As the Women's Lobby, another gender-rights organization, put it, creating a separate law for customary marriage would suggest that "South Africa is still at the stage where we are unable to amalgamate under one unifying system....In our view [this] perpetuates racial divisions" (South African Law Commission 1998:4).

Traditional leaders, by contrast, welcomed greater statutory separation, framing their arguments around a narrative portraying "cultures" as ideally autonomous and timeless. Interestingly, their accounts echoed gender-rights activists' claim that colonial and apartheid governments had unduly intervened into customary law. But whereas gender-rights activists argued this history suggested the wisdom of one unified marriage law, codifying "culture" as little as possible, traditional leaders instead suggested that a unified law would simply repeat apartheid's illegitimate intrusion into customary law. Lying behind this argument was a conception of the civil-law system as intrinsically European. As Phathekile Holomisa, long-time president of the non-governmental Congress of Traditional Leaders (CONTRALESA), argued a couple years after the customary-marriage debate, "The settlers...put up their own laws and...oppress[ed] the natives with these systems....When the African finally freed himself from the white man's oppression, he simply devised ways of taking over the new system, as if the struggle for freedom was about substituting black for white" (Holomisa 2002). Better that customary law in general and customary marriage in particular be administered by traditional leaders themselves. After all, as the Eastern Cape House of Traditional Leaders, a state body, put

it, “[Our] courts have been trying cases of this nature and they continue doing so” (Eastern Cape House of Traditional Leaders 1998:2). They dismissed gender-rights activists’ concerns that these courts entrenched women’s disadvantage, arguing that true customary law was meant to provide for the vulnerable, including women. The “egotistic and arbitrary decisions of [male] heirs” who disappropriated widows, for example, were actually “against...custom” (4). With greater institutional autonomy for customary law, a “correct interpretation of indigenous laws and practices [could] develop” (Holomisa 2005). This institutional separation would require, at a minimum, a separate law for customary marriage.

As mentioned before, the final RCMA largely resembled the Law Commission’s initial proposal for a separate, polygyny-inclusive statute. This undoubtedly reflected the agency’s influence in establishing the initial terms of debate. But this outcome ultimately achieved greater legitimacy when CALS changed its position on polygyny, and consequently on statutory separation, toward the debate’s end. While attending a February 1998 RWM meeting, CALS staff observed that some women “sat down quietly” while the others voiced their opposition to polygyny with the chant, “One Man, One Woman.” It turned out the quietly sitting women were themselves polygynously married, wary of advocating their own marriages’ non-recognition (Albertyn and Mbatha 2004:54). Reasoning that polygyny was declining anyway, CALS decided they must represent these differences of opinion and advocate polygyny’s recognition.²⁵ Although the RWM and other gender-rights activists maintained their opposition, some even criticizing CALS for the shift, CALS’s special prominence in the RCMA proceedings made it that much easier for the Law Commission to write in its final report that “[t]here was surprisingly little divergence of opinion about the Commission’s reluctance to prohibit polygyny by law” (South African Law Commission 1998:5).²⁶

CALS's shift on polygyny triggered a similar shift on statutory separation. If polygynous unions were to be in community of property, a principle on which they and other gender-rights activists continued to insist, then some sort of mechanism would be necessary to protect the rights of co-wives with overlapping community-of-property claims. CALS settled on a mechanism with the perceived silver lining of making polygyny more onerous: Before they could marry a second or third wife, husbands would have to win certification from a civil court that their proposed property arrangements were fair.

And so the major parties achieved sufficient consensus that Parliament agreed to enact the first silo of what would go on to become the post-apartheid conjugal-recognition regime. Nonetheless, it should be emphasized that siloing remained controversial at this point. The Law Commission, officials in the ruling African National Congress (ANC) party, and gender-rights activists all continued to hope that a more comprehensive and unified marriage law might be possible someday. Indeed, at an institutional level the RCMA's silo was rather partial: Civil rather than customary courts would adjudicate applications both for polygynous marriage and for customary divorce, and couples were encouraged to register their customary marriages with the same Department of Home Affairs that administered the Marriage Act.²⁷ In other words, neither the siloed form nor the gendered multicultural ethic of the new regime emerged fully institutionalized from the RCMA battle. That would occur only with the CUA, in which a siloed form was once again heatedly debated and, ultimately, adopted—this time with even greater separation at the institutional level.

C. Silos' Extension in the Civil Unions Act

Compared to customary marriage, the same-sex marriage controversy was both more intense and more focused on the central question of whether the conjugal form under debate

deserved recognition at all. Despite a lengthy string of pro-gay court rulings and legislative enactments relying on the constitution's equality clause to extend immigration, pension, parenting, and other benefits to same-sex couples (Berger 2008), LGBTI activists worried that more comprehensive recognition, especially under the term "marriage," was still too controversial both for the courts and for the broader public. So deep was their concern that they actively dissuaded one of South Africa's most prominent lawyers from pursuing a marriage case on behalf of a lesbian couple in the late 1990s, but a different lesbian couple unconnected to LGBTI activism, Marié Adriaana Fourie and Cecilia Bonthuys, brought their own case a few years later. The country's leading LGBTI litigation group reluctantly filed their own parallel case to maximize chances of success, and, hearing the two cases together, the Constitutional Court unanimously held that excluding same-sex couples from marriage law violated the Constitution. They gave Parliament a year to find a solution, failing which the existing Marriage Act would become gender-neutral on December 1, 2006.²⁸

The court victories unleashed a ferocious political antipathy unseen during the previous years' quiet accumulation of pro-LGBTI law reforms, so the ruling African National Congress (ANC) government attempted to prevent the Marriage Act's automatic extension to same-sex couples by pursuing a similar "civil union" strategy to that which many global jurisdictions had adopted in preceding years. But the strategy was both almost certainly unconstitutional and, it eventually became clear, unpopular among some highly placed ANC officials. At the last minute a new compromise was brokered: The Civil Unions Bill would clearly confer the honorific of "marriage," as LGBTI activists wished, but it would also defer to traditionalist demands that it remain separate from both the mainstream Marriage Act and the RCMA. And so the Civil Unions Act became the third silo of the emerging regime.

While the same-sex marriage debate's higher profile and entanglement with the Constitutional Court infused it with different dynamics than those surrounding customary marriage, the two debates featured largely similar organizational and semiotic structures. Once again gender-rights activists counterposed a dynamic and polyvalent understanding of "culture" to traditionalists' more timeless and autonomous depictions. Substantively, the two central questions again concerned the recognition of a non-mainstream gendered configuration of marriage and the merits of siloing. These similarities reflected the enduring influence of the same background conditions that had shaped the RCMA process. More importantly, they also encouraged policy makers and activists to see the same-sex marriage debate as the next in an accumulating series of conjugal-recognition controversies, and thereby the resulting CUA as the next silo in the increasingly entrenched post-apartheid conjugal-recognition regime.

The lead gender-rights organization in the CUA process was the Joint Working Group (JWG), a recently formed nationwide network of local LGBTI organizations (Vilakazi 2008). They received significant support from the organized feminist community, including both CALS, who shared expertise they had gained through their involvement in the RCMA process and their ongoing cooperation with the Law Commission's several research projects on marriage and partnership rights, and the Women's Legal Centre, who had litigated several important customary-law cases and would go on to be a leading player in the Muslim-marriage debate. The traditionalist side of the debate once again included traditional leaders, acting both individually and through national groups such as CONTRALESA and the state's National House of Traditional Leaders (Reid 2008). It also included a large number of religious institutions, the most important being the Marriage Alliance, a coalition of 80 churches and Christian organizations formed during the court proceedings (Marriage Alliance of South Africa 2005a).

They filed an *amicus* brief in the Constitutional Court hearing (Marriage Alliance of South Africa 2005b) and organized public campaigns against same-sex marriage. Their efforts were joined by other religious organizations such as the anti-abortion group Doctors for Life, the Christian Lawyers Association, and the Muslim Judicial Council.

LGBTI advocates and their allies objected to the civil-unions proposal as an unnecessary and unwarranted segregation. They had two primary substantive objections: 1) the creation of a separate statutory category for same-sex (and *only* same-sex) couples, and 2) the refusal of the government to call couples joined under that statute “married.” While the proposal would permit the term “marriage” to be used during the actual ceremony, once the ceremony was completed the state would only use the term “civil partnership.” Gender-rights activists argued that this violated the Constitutional Court’s mandate that Parliament equalize the status afforded same- and different-sex couples. A key element of their argument was that the language of civil partnership and civil union lacked the deep cultural grounding enjoyed by marriage. As the JWG wrote to Parliament, “Civil partnerships...come with none of the reputation, experience, position, influence, standing in the community, traditions and prestige of marriage” (Members of the Joint Working Group 2006:12–13). Implicit in this argument was an emphasis on marriage’s cross-cultural legibility, a suggestion that marriage was in many respects culturally universal. Tactically, however, gender-rights activists also emphasized marriage’s grounding in *particular* traditions, with many LGBTI people speaking specifically as members of different cultural and religious traditions. Many of the JWG’s member organizations made their own oral and written submissions to Parliament, including Jewish OUTlook and The Inner Circle, an LGBTI-focused Muslim organization, and key JWG strategist Fikile Vilakazi handled much of the organization’s media relations to ensure their efforts had “an African face” (Vilakazi 2008:92). The JWG’s

written submission highlighted ethnographic and historical research documenting same-sex practices in African communities throughout the pre-colonial, colonial, and apartheid eras, from the Lovedu Rain Queen's tradition of taking multiple wives to marriages among male workers on apartheid mines. They also argued that the civil-unions approach violated the widely-known African value of "ubuntu," which they argued required extending equal respect to all persons. They further argued that the civil-unions approach violated LGBTI persons' right to religious freedom by refusing their religious marriages state recognition as such.

This emphasis on particular religious and cultural traditions repeatedly portrayed them as dynamic, anticipating traditionalist arguments (elaborated below) that homosexuality was inherently incompatible with those traditions. Their efforts on this front were supported by a few non-LGBTI-specific religious organizations, ranging from the South African Council of Churches,²⁹ a stalwart of the anti-apartheid struggle and a direct JWG ally (South African Council of Churches n.d.), to—surprisingly—the Dutch Reformed Church, the church most closely associated with the apartheid government (Gereformeerde Kerke in South Africa and Vorster 2006). Regarding African cultures, LGBTI advocates argued that the rejection of homosexuality now presumed inherent to African culture was in fact a product of colonialism, pointing out that the laws that previously criminalized homosexuality were of British, not African, provenance. As the JWG submission to the Home Affairs committee put it, "Homosexuality is African; Homophobia is un-African" (Members of the Joint Working Group 2006). Meanwhile, the Constitution that underlay the current controversy was itself portrayed as a profoundly and proudly local—and, therefore, African—creation, one that in fact led rather than followed the world in its expansive inclusion of sexual orientation in the Equality Clause. One of their key supporters in government, Minister of Defense Mosiuoa Lekota, rose to "remind

those who know, and inform those who do not know, that in the long and arduous struggle for democracy very many men and women of homosexual and lesbian orientation joined the ranks of the liberation and democratic forces,” clearly remembering his own time in an apartheid prison alongside legendary gay, anti-apartheid activist Simon Nkoli (National Assembly 2006:68).

To reiterate, this dynamic and polyvalent framing of African and religious cultures was intended to support a unified Marriage Act for both different- and same-sex couples. But it should be noted that the JWG did not argue for a completely unified marriage regime, as they delicately, and largely successfully, attempted to avoid engaging the RCMA. There were and are African-identified lesbian and gay people who would like to marry under the RCMA (Isaack 2008), but, as one JWG strategist told me during the process, advocates feared broaching the issue would prove too explosive. The JWG legal team (of which I was briefly a part) also anticipated the possibility that some might attempt to legitimize the creation of a separate statute for same-sex couples by pointing to the RCMA. They anticipated, in other words, the possibility that the CUA would come to be seen as another building block in an emerging, siloed regime, a prediction that would indeed come to pass at the debate’s end. At the debate’s height, however, traditionalist opponents were primarily concerned with preventing any recognition for same-sex couples whatsoever.

Both religious and African traditionalist arguments against same-sex couple recognition turned on notions of culture as similarly timeless as those advanced by traditional leaders in the RCMA debate. Religious traditionalists advanced this depiction first in the context of their own respective theologies, and then frequently moved to what they portrayed as the universal, cross-cultural and cross-faith condemnation of homosexuality. As the Marriage Alliance (2006:2) told Parliament, “This view of the family...is universally recognised by most people and religions as

divinely ordained, and as a key to the moral structure of a healthy society.” While religious opponents’ documents repeatedly referred to the “traditional” definition of marriage as between “a man and a woman,”³⁰ they rarely identified this with any *particular* tradition, instead portraying it as universal. That the world’s otherwise very different “peoples and religions”³¹ should be nearly unanimous on marriage’s inherent heterosexuality was represented as evidence of the connection’s natural and divine mandate.

African traditionalists echoed this theme. In their view, same-sex coupling was simply foreign to “African culture”—a term they always invoked in singular rather than plural form, suggesting pan-African unanimity at least on this point. Claiming that “[s]ame sex marriage is against...culture (all types of culture),” CONTRALESA’s submission to Parliament emphasized their view that African marriage joined two families rather than two individuals and was thus incompatible with the “oddity” of same-sex marriage (CONTRALESA 2006:10). As a committee report on one of the public hearings in the northeastern town of Polokwane put it, “When lobola or magadi is...paid for a man to get a women, [the spirits of deceased] ancestors are informed to join the two families together” (Portfolio Committee on Home Affairs 2006). But “ancestors would not bless same sex marriages,” since these could not produce children. The government’s proposal was thus represented as an attack on African tradition.

This emphasis on cross-cultural unanimity did represent something of a departure from the purely autonomous vision of culture advanced by traditional leaders in the RCMA debate. But at its core it remained an argument that religious and traditional authority should be autonomous from (if not superior to) the state, an autonomy both groups of traditionalists saw as threatened by the Civil Unions Bill. This concern was even more pronounced in their second substantive position: If same-sex unions were to be recognized even despite their objections,

such recognition must be maximally separated from the special symbol of “marriage.” The Marriage Alliance worried that the initial Civil Unions Bill’s references to “marriage” and “marriage officers” evinced confusion as to whether the bill meant to expand marriage or to create a separate institution. They also argued that under the initial bill, “minister[s] of religion [could] be compelled by court order to solemnise” a civil union, in part because they were defined under other laws as “marriage officers” (2006:3). Only by entirely removing the word “marriage” could religious autonomy be protected.

As with the RCMA, policy makers managed to work out a consensus, however uneasy, at the last minute. The stage for this consensus was set when the state’s own law advisors refused to certify the constitutionality of the Civil Unions Bill as written, citing much the same concerns raised by LGBTI advocates and their allies (Portfolio Committee on Home Affairs 2006). This strengthened the hand of those inside the ANC who supported full same-sex marriage rights, for it raised the specter that the Constitutional Court might intervene once more. Minister of Home Affairs Nosiviwe Mapisa-Nqakula called separate meetings with LGBTI leadership, the Marriage Alliance, and traditional leaders. By multiple accounts, the main purpose of these meetings was to learn what each interest group would be minimally willing to accept.³² The JWG insisted that same-sex couples not be confined to a wholly separate bill and that the government use the term “marriage” to recognize those same-sex couples who desired it. Key JWG strategist David Bilchitz told Minister Mapisa-Nqakula of his childhood desires to grow up and get married—not civilly unioned—in the rituals of his Jewish heritage, a desire he told me the Minister said she had shared with respect to her own Zulu traditions.³³ Religious and African traditionalists, for their part, each insisted that followers of their respective traditions not be forced to perform same-sex weddings, whether as clergy or as state officers. On the final day of

committee deliberations in the upper house of Parliament, the ANC government submitted a revised bill addressing each of these concerns. The new bill would now be available to both same- and different-sex couples and would offer all these couples recognition under the term “marriage” or “civil partnership,” as they wished. On the other hand, existing provisions permitting state officers and religious organizations to refuse to perform same-sex marriages were retained, with special provisions in the latter case to increase religious organizations’ authority over potential rogue clergy, and a provision was added clarifying that this bill did not apply in any way to the RCMA. In short, the bill was now clearly a marriage bill, but it was also somewhat more sharply siloed than was the original proposal. This bill, with minor revisions, became law on November 20, 2006.

D. Muslim Marriages: Assuming Silos from the Start

Even as the above two cases were being debated and decided, the pursuit of state recognition for Muslim marriages has continued to percolate without resolution. One particularly thorny challenge has been the tremendous diversity of South Africa’s Muslim communities, comprising multiple waves of immigration from several different regions over some four centuries and counting (Dangor 2003). It is not clear at this writing when a bill might be enacted, much less what the provisions of such an enactment might entail. It does seem clear, however, that the range of possibilities has narrowed over time. Issues that were controversial in the RCMA and CUA—most especially polygyny and siloing—now have presumed answers: Muslim marriages, including those that are polygynous, will be accommodated within their own, Muslim-specific bill. Before such a bill will be formally proposed, however, policy makers expect these diverse Muslim communities to follow the examples set in the RCMA and CUA debates and find a compromise, however uneasy, about the ways religious and state authorities

should fit together under the new law, a question understood by most involved to be both important in its own right and to have implications for broader gender relations in Muslim families (Patel 2011).

The most recent active legislative proposal has its roots in the same Law Commission that shaped the early stages of the RCMA and CUA processes. After their usual public consultation process, the Commission produced a draft bill in 2003 quite similar in most major respects to the recently enacted RCMA. This bill would construct a separate statutory silo for Muslim marriages and permit the recognition of polygynous marriages, provided a civil court had certified that proposed financial arrangements satisfied the Holy *Qur'an's* mandate of equal support for all spouses (South African Law Commission 2003:110-33). The proposal would obviously have extended the regime established by the RCMA, but it languished for several years until the Women's Legal Centre brought a case in 2009 asking the Constitutional Court to force Parliament to take up the question (South African Press Association 2009). While this case was unsuccessful, the Department of Justice and Constitutional Development released a proposal in late 2010 based on the Law Commission's 2003 bill and embarked on another round of public consultation (Department of Justice 2010).

Before turning to that consultation and the fierce controversy it provoked, it is worthwhile to pause and note that the siloed model first created with the RCMA and extended with the CUA, each time after fierce debate, is now completely uncontroversial as a basis for Muslim marriages' state recognition. This is notable because in this case, unlike with either customary or same-sex marriage, there actually exist two ready-made, unsiloed alternatives. The first is simply to enforce the original 1961 text of the Marriage Act, section 3(1) of which explicitly authorizes the recognition of "Mohammedan" marriages. As mentioned above,

apartheid-era courts overruled this provision because of Muslim marriages' potential for polygyny, but post-apartheid legal developments—including the RCMA—have likely rendered this case law moot. The most logistically straightforward option would thus be simply to reaffirm that the Marriage Act is available to marriages performed by Muslim clerics.³⁴ At least one legal scholar has even implied that no such reaffirmation is necessary, saying Muslim clerics can currently register as marriage officers under the Marriage Act if they so wish (Amien 2010). And indeed, while this article was in press the Department of Home Affairs, during a period when its top two officials happened to be Muslim women, for the first time trained and deputized several dozen Muslim imams as marriage officers under the Marriage Act. How far this will continue remains uncertain, a cabinet reshuffling after the May 2014 elections having moved these officials into different departments. And most stakeholders continue to desire a solution outside the Marriage Act—in part because most everyone agrees that polygynous unions should be recognized. The second readily available and less siloed option is a Recognition of Religious Marriages Bill released by the state's Commission on Gender Equality in 2005. This bill would have provided for any religious organization to perform state-recognized marriages, including, where applicable, polygynous marriages. However, it has no discernible political support.

So the current debate continues to proceed on the assumption of a siloed, polygyny-inclusive statute. What has proved elusive even within that framework is consensus about the relationship between state and religious authorities when it comes to administering Muslim marriage law. Opponents of the most recent bill argue, often fiercely, that it subordinates Islamic law to the state (e.g., Smith 2011). Much as traditional leaders did in the customary-marriage debate, some Muslim clerics object to the bill's insistence that civil rather than religious courts handle divorces and adjudicate the fairness of proposed property arrangements before permitting

a husband to take a second wife. A more broadly-held objection, advanced by a wider range of clerics and by the Muslim Lawyers Association, criticizes the bill's "opt-out" structure, which presumes the Muslim-specific bill will govern all marriages contracted by Muslims unless the spouses affirmatively opt-out in favor of other provisions. This, too, is seen as inserting the state above Islamic law. Gender-rights activists and their allies, most themselves identifying as Muslim, generally favor these provisions as necessary to protect Muslim women (Recognition of Muslim Marriages Forum 2011; Women's Legal Centre 2011). Echoing their own counterparts in the customary-marriage debate, they suggest that many religious courts apply unduly ossified and patriarchal visions of Islam. Moreover, they argue, these courts' enforcement power is limited, grounded only in social legitimacy and easily ignored by abusive and neglectful husbands. Only the state has the capacity to enforce women's rights.

At this writing, these conflicting positions are at an impasse. The Justice Department claims it is redrafting the bill to produce a revised proposal at some indefinite date in the future. Whether such a proposal will in fact appear, much less run the gauntlet required for legislative enactment, remains unknown. There is, at the very least, cause for doubt. For the purposes of this paper, it is important to emphasize that this doubt is directly grounded in the challenges Muslim communities have had fitting into the framework established by the RCMA and extended through the CUA. This is especially striking because no one disagrees that Muslim marriages *deserve* state recognition, not even those more conservative Muslim clerics wary of such recognition's implications for their own authority. But, under the new regime, consensus around a conjugal form's legitimacy is by itself insufficient to ensure state recognition. What is required is consensus about a cultural or religious group's relations of power, between the genders and between the groups' elite authorities and the state.

V. Conclusion

Starting with a background assumption that marriage is culturally universal, the debates recounted above have carved out a gendered multicultural principle and a siloed statutory architecture that increasingly shape the new regime's capacities for expansion and, by extension, help construct hierarchies of authority within and among those communities included under the regime's ambit. The new regime's obvious strength is that it is far more expansive than the heterosexist and white supremacist regime that preceded it. Its expansion occurs on specific terms, however, as the delays in recognizing Muslim marriages reveal. A look back over the reforms attempted and enacted so far suggests that these terms increasingly tend to entrench traditionalists' concrete authority over their respective cultures' and religions' own conjugal-recognition regimes and, at a more general symbolic level, to favor traditionalists' more timeless and autonomous understandings of "culture."

The direct empowerment of religious and cultural elites can be seen in Muslim clerics' success thus far in delaying the enactment of a Muslim-marriage framework that they believe would elevate the state's authority over their own, and in the CUA's establishment of a process that prevents individual clergy from performing state-recognized same-sex marriages unless their respective religious organizations have already agreed to include same-sex couples in their own conjugal-recognition regimes. Customary marriage is the only real exception to this tendency, as the RCMA's provisions largely sidelined traditional leaders in favor of the state's own institutions. Perhaps this apparent increasing tendency to favor religious and cultural elites is a consequence of the regime's increasing entrenchment, an interpretation that would be consistent with traditional leaders' disappointments with the RCMA but later success in excluding same-

sex couples from the RCMA's ambit during the CUA process. The outcome of the ongoing Muslim-marriage process will be important to watch in this respect. At the very least, those existing provisions of the state regime that already empower cultural and religious elites seem likely to frustrate non-state regimes' capacities for dynamic evolution.

This likelihood is magnified by the regime's more general tilt in favor of the timeless and autonomous representations of "culture" advanced by traditionalists in each debate. This association, in my view, reflects both the siloed architecture's intrinsic tendencies and a constellation of meanings that congealed onto the form through the successive debates. Regarding the first point, it is difficult to imagine how the state could maintain cultural autonomy without administratively distinguishing one group from another. While such distinctions could simply unfold at the level, say, of everyday judicial and official decision-making, more thoroughly inscribing them into legal texts and institutions through techniques such as siloing seems likely to promote this autonomy even more thoroughly. This is undoubtedly the intuition that led gender-rights activists generally to favor greater legal integration and traditionalists generally to favor greater separation in each debate. But the debates themselves elaborated this association into an even richer chain of connotations, as traditionalists framed their claims not as appeals to autonomy in the abstract but, more specifically, as necessary steps for restoring their traditions to pre-colonial luster. When traditionalists won the silos they desired in the RCMA and CUA, the silos also largely imported this logic of cultural timelessness into the law itself. This can be seen not only in the direct empowerment of cultural elites mentioned above, but also in the fact that each silo defines its gender relations in largely traditionalist terms—polygyny in African customary and Muslim marriages, and exclusive heterosexuality in all those religious traditions that do not explicitly opt

in to the CUA. While some clerics and traditional leaders do interpret their traditions in more gender-egalitarian ways, they are the minority. The tilt in favor of traditionalist authority will probably tend to frustrate the development of gender-egalitarian expressions of those cultural traditions, at least insofar as they are recognized by the law. Future empirical research within different cultural and religious communities will be necessary to adjudicate this prediction.

This trend towards greater cultural and religious separation in marriage law is echoed by similar trends in other domains. Of particular note are evolving proposals for a bill concerning “traditional” (i.e., customary) courts. An earlier draft would have limited these courts’ jurisdiction to smaller matters and created “community courts” in neighborhoods not governed by customary law that would similarly handle small, local disputes. The general thrust of this proposal was less to empower traditional elites and more to strengthen the local accessibility that many saw as traditional courts’ chief virtue, replicating that in another non-traditional form throughout the country. The proposal, one could say, emphasized the “courts” more than the “traditional.” The current draft, by contrast, is much more sharply siloed. It drops the community court proposal, increases rather than limits traditional leaders’ authority in their own communities, and mandates that residents of traditional communities handle almost all disputes in their communities’ traditional courts rather than in civil courts. Gender-rights activists are once again the leading critics of this proposal, arguing it will entrench elite patriarchal authority within traditional communities; traditional leaders, unsurprisingly, are among the current draft’s strongest supporters. All this unfolds against a broader backdrop in which conservative and patriarchal understandings of African tradition appear politically ascendant. Current president Jacob Zuma, for example, has framed his public image in terms far more African traditionalist and, with intermittent exceptions, patriarchal than his main post-apartheid predecessors, Nelson

Mandela and Thabo Mbeki (Hassim 2009; Hunter 2010; Robins 2006, 2008; Tallie 2013). Not coincidentally, he is currently married to four wives.

All of this said, few regimes in any domain of policy ever achieve total coherence, and South Africa's new conjugal-recognition regime does contain some divergent elements that may, in the long run, pave the way to a different regime in the future. Many of these are contained within the CUA, which fits a bit less snugly than the other silos with the regime's overarching logic. Unlike its counterparts, the CUA was drawn not around a culture³⁵ per se but around a particular mode of conjugal gender relations, namely dyadic gender-neutrality, that could at least hypothetically be realized in a range of traditions. Buddhist and pagan clerics are already performing state-recognized marriages under this authority. Even some Jewish and Christian organizations have been touched by the CUA despite their existing access to the Marriage Act, as LGBTI congregants have been emboldened by the CUA to argue for religious recognition of their same-sex marriages. In one particularly creative arrangement, an independent, LGBTI-focused Metropolitan Community Church (MCC) congregation in Cape Town has deputized a Methodist preacher to perform state-recognized same-sex marriages under the MCC's organizational authority even though his home denomination has not yet changed its own policy.³⁶ What is more, this preacher insists that all couples he marries, whether same- or different-sex, register their marriages under the Civil Union Act.

At present these instances of dynamic development remain few and scattered—all mainline Christian denominations, for example, still refuse to perform same-sex marriages—so it remains unknown whether the CUA's idiosyncrasies will in fact result in the current regime's transcendence. Fully understanding the regime's operation and its capacities for change will of course require attention not just to the circumstances of its creation but also to institutional and

individual responses on the ground. In the larger project of which this article is a part, I take on such questions through comparative ethnographic research among LGBTI-identified South Africans on the one hand and a traditional community in the province of KwaZulu-Natal on the other (Yarbrough 2013). While this project is still ongoing, at this stage it seems most of my participants do not regard the statutory marital silos as very symbolically meaningful, perceiving more similarity than difference among different marital forms. That said, the one major exception does concern the different gender relations inscribed into the various silos: Virtually all of the young traditional community residents I interviewed, both male and female, prefer the Marriage Act to the RCMA because they do not wish to marry polygynously. This exception does reveal how the material differences between the silos can shape individuals' marital behaviors, but it does not mean that the gendered multicultural logic of the siloed architecture has influenced these young people's conceptions of marriage. To the contrary, most of these participants explicitly rejected the notion that polygyny was essential to their African (and more specifically Zulu) identities, many suggesting that times have changed and that Zulu culture should also change. Indeed, contradicting many claims of the kind canvassed earlier in this article, a significant minority of my traditional community participants also supported same-sex marriage rights. The dynamics at play are complex, and they undoubtedly play out differently in different communities. But even these limited findings suggest that a state's conjugal-recognition regime does not always completely impose its logic on those it governs, and that some of the gaps that do exist derive from the agency of the governed themselves. On the other hand, it also suggests that this interpretive agency may founder at the point it runs aground of the regime's material constraints. This further underlines the need to watch the Muslim Marriage Bill and the Traditional Courts Bill should their more thoroughly siloed institutional structures be enacted.

Findings such as these are already a hallmark of regime analyses in the domain of social welfare. A major strength of welfare-regime scholarship has been its capacity to enable a range of methodological approaches, from macro-level comparative analyses between nation-states to fine-grained ethnographic analyses of behavior within particular regimes, all within a conceptual vocabulary that renders this vast body of work more inter-intelligible than is currently true of studies of conjugal recognition. Like social provision, conjugal recognition is a key node in broader constellations of power at levels that range from the interpersonal to the inter-institutional. In the South African case, the new regime represents a particular pact between gender-rights activists and traditionalists at the level of policy that has produced uneven consequences among individuals on the ground. Similar observations are implicit in the voluminous literature on conjugal behavior around the world and explicit in the smaller, but growing, literature explaining conjugal-recognition policy. What is needed is a set of tools capable of connecting these levels of conjugal life, a need that the concept of conjugal-recognition regimes is well-suited to help fill.

NOTES

¹ In this paper I use the term “African” to refer to those whose genealogy or phenotype potentially could have subjected them to colonial- and apartheid-era customary law, either through their own self-identification, the state’s classifications, or both.

² Despite its title, the CUA does permit same-sex couples to be recognized as “marriages.” I say more on this below.

³ The relative informality of unmarried cohabitation can be seen in the difficulty cohabitants often have identifying a specific start or end date to their relationship (Manning and Smock 2005).

⁴ A wedding is the classic example of a performative act that, by virtue of being completed, creates the reality it describes (Austin 1975). Note that not all societies configure marriage around such clearly identifiable ceremonies or even regard marriage itself as an unambiguous, binary status; for example, see the discussion of southern African Tshidi in Comaroff 1980.

⁵ This is not always the case. For example, as I discuss below, the apartheid state’s non-recognition of African customary marriages did not lead Africans to regard their own marriages as invalid. Understanding when institutions’ conjugal policies command such authority and when they do not would be a question potentially illuminated by the regime approach I advocate in this article.

⁶ There is a body of scholarly literature that takes a broader view of conjugal-recognition policies by comparing similar policies in different societies (e.g., Fishbayn Joffe and Neil 2013; Nichols 2012; Shachar 2001). This scholarship makes important contributions to the project I advocate here, and I draw on much of it in this article. Most of this work is done by political philosophers and legal scholars, however, and so focuses on the policies’ *consequences* and normative

implications rather than the *causes* that explain them as social outcomes, which are my concern in this paper.

⁷ There are echoes here of the broader individualist narrative about family policy with which I opened this article.

⁸ Many ethnographic studies also uncover departures from or frictions between organizing patterns, which point both to the limits of regimes and possible sources of policy change.

⁹ This can be seen as a specific instance of the broader phenomenon of what law-and-society scholars call “legal pluralism,” in which multiple regulatory systems overlap (Berman 2009; Griffiths 1986).

¹⁰ There are of course instances where this is not true in practice. My point here is that it usually assumed that it *should* be true, with profound consequences for the politics of conjugal recognition.

¹¹ The June 2013 Supreme Court decision in *Windsor v. United States* largely removed this disjuncture as it pertains to same-sex marriage. The federal U.S. government must now recognize those same-sex marriages that are valid under state law. It remains somewhat ambiguous whether the relevant law is that of the place where the marriage was solemnized or that of the place where the couple lives. Different standards apply for different matters (i.e., tax, immigration, Social Security benefits, etc.), but most federal laws look to the place of solemnization.

¹² I worked for three months with the Gender Research Project of the Centre for Applied Legal Studies in 2005, several years after the enactment of the RCMA, and for three months with OUT LGBT Well-being in 2006. In the latter case I helped organize LGBT contributions for a short time in the early stages of the same-sex marriage debate.

¹³ The same dilemma affects some who identify as both traditionally African and bisexual or

transgender, when their conjugal relationships are with someone who shares the same legally recognized gender. Such a dilemma does *not* necessarily appear with respect to religion, as the CUA is the only existing marriage law potentially available to all religions. I discuss this at greater length below.

¹⁴ I characterize the apartheid regime as “Judeo-Christian” because that was how apartheid lawmakers themselves understood it. I do not mean this to imply that there are no important differences between or within Jewish and Christian traditions on marriage, nor that the apartheid state’s understandings of Jewish and Christian theologies match all understandings of those traditions around the globe. Most particularly, of course, polygynous marriage has existed in some Jewish and Christian communities. In other words, the “Judeo-Christian” traditions inscribed into apartheid law were historically specific versions thereof.

¹⁵ I use the term “polygamy” here and elsewhere because the actors themselves used it, but it is important to keep in mind that the practice in question is specifically polygynous.

¹⁶ *Ismail v Ismail* 1983; *Seedat’s Executors v. The Master* 1917.

¹⁷ “Lobola” is derived from the isiZulu word *ilobolo*, and has become the lingua franca term throughout the region. Other local terms for broadly similar practices include “*bogadi*, *bohali*, *munywalo* and *ikhazi*” (South African Law Commission 1998:49).

¹⁸ An interim constitution was negotiated by the apartheid government, political parties, traditional leaders, and civil-society organizations, and followed by a final constitution negotiated by the newly elected Parliament that, after two attempts, was certified by the newly established Constitutional Court as having satisfied the interim constitution’s “constitutional principles.” For more on this process, see Klug 1996.

¹⁹ The apartheid-era Commission had actually begun its own research project into recognizing

African customary marriages, but their research was frustrated by many Africans' distrust of apartheid bodies, as well as by the tangle of complications presented by the diverse treatments of marriage law in the nominally independent ethnic "bantustans." The new Commission opted to start the project afresh rather than extend the apartheid-era Commission's research.

²⁰ The ruling African National Congress (ANC) party initiated special parliamentary procedures to streamline passage. CALS staff has claimed the ANC hoped to deliver something for women ahead of the country's second democratic elections in 1999 (Goldblatt and Mbatha 1999). But the Commission's project committee chair, legal academic Thandabantu Nhlapo, denied any political pressure, saying the Commission was simply ready to proceed. Personal interview with Thandabantu Nhlapo, August 31, 2010.

²¹ The major difference in the final bill concerned the default property regime for customary marriages; I discuss this below.

²² For example, consider the words of the new state agency, the Commission on Gender Equality: "In general, customary practices are patriarchal and consequently discriminatory as they keep women in a status of perpetual minority. Customary law has rarely, if ever, afforded women equal decision making powers within the marriage relationship" (Commission on Gender Equality 1998:2).

²³ As this indicates, CALS saw the customary-marriage debate as part of a more comprehensive reform of South African marriage law, which they argued "should also include an investigation into all forms of family arrangements such as religious unions (particularly Muslim and Hindu unions), same sex unions, and cohabitation arrangements" (Gender Research Project 1996:6).

They would go on to play an important role in the processes that produced the CUA.

²⁴ Most gender-rights groups did favor some legal protections for women and children in existing

polygynous marriages, but only as a transitional provision rather than as a comprehensively recognized status.

²⁵ Notably, this substantive shift was driven by much the same dynamic narrative of culture CALS had used to frame their arguments throughout the debate, for it emphasized both the multiplicity of opinion that already existed among rural African women and the prospect that practices would change over time.

²⁶ No gender-rights organizations ever advocated polygyny's *prohibition*, so this phrase was technically accurate. But it also may have been artfully drawn to portray greater consensus than was actually the case. Indeed, CALS's own submission carefully distinguished its initial opposition to recognition from a pro-prohibition stance.

²⁷ Technically the RCMA required such registration, but it also provided that failure to register would not nullify the marriage's legal validity.

²⁸ The case's lone partial dissent, by Justice Kate O'Regan, held that this change in the Marriage Act should take immediate effect.

²⁹ The SACC's decision to support same-sex marriage rights was controversial with many of its member churches. Personal interviews with Keith Vermeulen, September 1, 2010; and Moss Nthla, December 6, 2010.

³⁰ This formulation was proposed as a constitutional amendment by Steve Swart, an African Christian Democratic Party Member of Parliament and Marriage Alliance ally. Interestingly, while it most readily suggests an anti-polygamy view, it could also be read to permit a polygynous collection of marriages each of which is between a man and *a* (different) woman. Indeed, while most of the religious same-sex marriage opponents I interviewed indicated their opposition to polygamy, there were exceptions, and I was not able to document any organized

religious opposition to the RCMA specifically.

³¹ Personal interview with Erroll Naidoo, August 31, 2010.

³² Personal interviews with Jonathan Berger, September 20, 2010; David Bilchitz, September 15, 2010; and Reverend Moss Ntlha, December 6, 2010.

³³ Personal interview with David Bilchitz, September 15, 2010.

³⁴ Monogamous Muslim-identified couples, like all adult different-sex couples, can marry under the Marriage Act via a civil ceremony, and as this article was in press the first imams were appointed as marriage officers under the Marriage Act. Such couples could also marry under the Civil Unions Act if any Muslim organizations were to apply for authority to perform state-recognized marriages under this Act, although to date none have done so.

³⁵ One could argue that the CUA treats LGBTI people as themselves a relatively coherent cultural group. Because LGBTI people were never as *explicitly* characterized as a cultural group as were Christians, traditional Africans, Muslims, and so forth, I prefer to leave that a suggestion rather than a full-fledged assertion. Moreover, given the reasons I canvas in the text, I do not think such an understanding is necessary for the CUA to have contributed to the gendered multicultural principle of the overall regime. To the extent that this regime influences everyday understandings of marriage and culture, perhaps it will cultivate a sense among South Africans that LGBTI people constitute a distinct cultural group going forward.

³⁶ Personal interview with Sharon Cox Ludwig, August 24, 2010.

APPENDIX

Most legal documents referenced in this article appear below. All written submissions to judicial and legislative proceedings by both individual and institutional authors are listed in the bibliography under the authors' names.

Bills and Statutes

Civil Union Act. No. 17 of 2006. Republic of South Africa.

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Muslim Marriages Bill. 2010. Pretoria: Department of Justice and Constitutional Development.

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