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STATE INTEREST AND MARRIAGE—THE THEORETICAL PERSPECTIVE

*Brian H. Bix**

Connie Post has seen an awful lot of dresses, wedding cakes and bouquet tosses. No big surprise: Post, wed 10 times, is apparently Ohio's most-married woman. "I do believe in marriage and I think the way I've lived my life proves it," she said.¹

By the conference description, we are to consider “the relationship of marriage and self-government.”² It is hard to analyze the relationship of these two, because they are “moving targets.” Everyone thinks they know what is meant by “marriage,” but as the debate ensues about the extension (e.g., to same-sex couples) and modification (e.g., for covenant marriage rules) of marriage, and our social norms about the roles of parents (married or not) and spouses change, one might wonder how much is certain and agreed upon and how much is fluid and up for review and revision.³

The difficulties are at least as great, and probably greater, in speaking of “self-government.” The conference organizer’s intention appears to be to refer to the democratic self-government of a nation. However, one could also speak of the ability of individual states or of communities to govern themselves, and, with only a slight extension, the self-government of a household, a (married) couple, or even an

* Frederick W. Thomas Professor of Law and Philosophy, University of Minnesota. Presented at “A Conference on Marriage, Democracy, and Families,” Hofstra University School of Law, March 2003. I am grateful for the comments and suggestions of Karen Helfand Bix, Robert J. Levy, Miranda Oshige McGowan, and the participants at the Hofstra conference.

1. Brad Hunter, *Weird But True*, N.Y. POST, Feb. 17, 2003, at O17.

2. BROCHURE FOR “A CONFERENCE ON MARRIAGE, DEMOCRACY, AND FAMILIES,” HOFSTRA UNIVERSITY SCHOOL OF LAW (March 2003) (on file with Hofstra Law Review).

3. I discuss some of these issues in Brian Bix, *Reflections on the Nature of Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE 21ST CENTURY 111-19 (Alan J. Hawkins, et al., eds. 2002) [hereinafter Bix, *Reflections*].

individual.⁴ On the individual level (and similarly for couples), the state can help or hamper a citizen's efforts to direct his or her life—making opportunities or legal powers available or placing costs, barriers, or prohibitions on certain choices. This point has obvious relevance to the question of state policy regarding marriage (for example, state laws regarding *who* can marry, such as laws prohibiting bigamy and polygamy, incest restrictions, and laws restricting marriage to opposite-sex couples),⁵ but, as will be discussed, states can affect the “self-government” of couples in more subtle ways as well. And the self-government of communities and states is at least partly in tension with the self-government of the nation—this is the issue of federalism.

Part I of this Article will discuss the general questions about the proper way to understand and characterize the government's interests in the marital status of its citizens. Part II will raise some of the complications created by the federal system in the United States. Part III will consider some additional issues regarding inclusion, exclusion, and social norms.

I. THE STATE INTEREST IN MARRIAGE—GENERAL CONSIDERATIONS

First, it should be noted that it is not necessary or inevitable that the state be involved in marriage at all. Here, one can look both to history and to recent theory. As to history, Lawrence Stone tells us that in England, until well into the sixteenth century, neither Church nor state regulated marriage in a systematic way.⁶ The lack of systematic or

4. A central element of Immanuel Kant's moral philosophy (and that of many thinkers since Kant) is the ability of individuals to govern themselves, a notion summarized by the concept of “autonomy.” See, e.g., Henry E. Allison, *Immanuel Kant*, in *THE OXFORD COMPANION TO PHILOSOPHY* 435, 437 (Ted Honderich, ed. 1995); J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 6 (1998).

5. See, e.g., JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW 2-76* (4th ed. 1999) (“Restrictions on Who May Marry”).

6. See LAWRENCE STONE, *UNCERTAIN UNIONS AND BROKEN LIVES* 15-35 (1995). Consider also the following, from Alan Macfarlane, who divides “the English wedding as it developed over the centuries” into two separate acts where the first, the “betrothal,” was the legally significant act (the second, “voluntary” act was the public celebration or announcement). ALAN MACFARLANE, *MARRIAGE AND LOVE IN ENGLAND: MODES OF REPRODUCTION 1300-1840* 309 (1986). Macfarlane adds:

An important feature of the [betrothal, the legally binding aspect of marriage,] was that it originally involved no religious or ritual element. It was a purely personal, private, civil contract, only to be entered into by the couple. There was no necessity for a clergyman to be present, or for any religious ceremony. A marriage was valid without banns or license, at any hour, in any building. This continued to be the case from Anglo-Saxon times to Hardwick's Marriage Act of 1753.

Id. at 310.

pervasive control by those institutions was exemplified by the practices of informal and clandestine marriage—such marriages may not have been common, but their presence and acceptance were nonetheless significant.⁷ Clandestine marriage had a theological grounding:

In the thirteenth century Pope Innocent III had decreed that the free consent of both spouses, not the formal solemnities by a priest or in a church, was the sole essence of marriage. Consequently a valid and binding marriage was created by a mere verbal contract, performed by an exchange of vows to this effect between a man and a woman over the age of consent (14 and 12), witnessed by two persons, and expressed in the present tense.⁸

The English civil law did not take regulatory control of marriage in any effective way until the Marriage Act of 1753, which forbade clandestine marriages.⁹ There is some indication that Church and state entered the regulation of marriage not entirely from high motives, but in large part to respond to the special interests of particular groups—the interest of the propertied classes in reducing the uncertainty regarding property that can arise from lack of clarity regarding a couple's marital status, and the desire of rich and noble families to prevent their children's secret marriages with "unworthy" partners.¹⁰

While history offers examples of the state not being fully or systematically involved in the regulation of marriage, some contemporary theorists have offered reasons why the state should stop regulating marriage. Most prominently, Martha Fineman has argued that the state should be neutral among intimate relationships, and be

7. See JULIA BRIGGS, *THIS STAGE-PLAY WORLD* 54 (2d ed., 1997) ("[I]n England the great majority of weddings were performed in church, preceded by the reading of banns, or, at short notice, the obtaining of a special license," but there were two other forms of marriage, including forms that allowed for clandestine marriages); J. A. SHARPE, *EARLY MODERN ENGLAND: A SOCIAL HISTORY 1550-1760* 62 (2d ed. 1997) ("The church was anxious that [the marriage] contract should be made in a formal and public service . . . Even so, an indeterminable number of unions, especially among the lower orders, took place without any formal church ceremony. . . . [C]landestine marriages . . . were a continual problem."); DAVID CRESSY, *BIRTH, MARRIAGE AND DEATH: RITUAL, RELIGION, AND THE LIFE-CYCLE IN TUDOR AND STUART ENGLAND* 316-35 (1997) ("Clandestine and Irregular Marriages").

8. STONE, *supra* note 6, at 20; cf. BRIGGS, *supra* note 7, at 54 ("Secret marriages were easier to effect at a time when marriage required witnesses, but was legally binding without the formal civil and religious sanctions it acquired after 1753."); KEITH WRIGHTSON, *ENGLISH SOCIETY 1580-1680* 67 (1982) (discussing how the church of England, unlike the churches of continental Europe, "continued to recognize as legally binding two other forms of valid, though irregular marriage" beyond formal union in a church).

9. See STONE, *supra* note 6, at 24-33.

10. See *id.* at 10-35.

concerned only with supporting the parent-child relationship.¹¹ Under this proposal, couples (or polygamous groups) would be free to go through private or religious marriage ceremonies, but these would not affect the participants' legal rights and obligations.¹² Intimate relations among adults would be regulated much as other relations between adults, by rules of contract and property (and, at the outer limit, criminal law).¹³ Professor Fineman's argument is grounded on criticism of the way that the traditional family (arguably) helps to foster sexual inequality, and the way that current state policies expressly and implicitly favor some forms of intimate relationship (for example, opposite-sex couples within traditional marriages) over other forms, without justification.¹⁴

However, the current situation is that the government (in the United States and in most other countries) *is* involved in the regulation of marriage, and there is no indication that the government is likely to withdraw from this area any time soon. There are rules for entry into marriage, legal rights and obligations the spouses have against one another based on their marital status, certain legal benefits and obligations the couple has against the government and other third parties based on marital status, and rules for exit from marriage (divorce, and its aftermath).¹⁵ In discussions of what rules to have, or which rules to change, officials and politicians often refer to government or societal interests regarding marriage.¹⁶ The coming subsections attempt to offer a brief (and far from comprehensive) overview of the types of interests that are at stake.

A. *Government Serving Citizens' Interests*

Given that the government is, and seems likely to stay, in the business of regulating marriage (and using marital status as a significant category in the assignment of rights, benefits, and obligations), one can

11. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 226-33 (1995).

12. See *id.* at 229.

13. See *id.*

14. See *id.* at 143-44, 228-30.

15. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989) (summarizing the changes in rules regarding entry into and exit out of marriage, the couple's legal benefits and obligations against the government and third parties, and the spouses' legal benefits and obligations against each other as a couple).

16. See, e.g., Neil A. Lewis, *From the Rose Garden: Same-Sex Marriage; Bush Backs Bid to Block Gays from Marrying*, N.Y. TIMES, July 31, 2003, at A1.

ask about what purposes the state can and should pursue. The government can serve the interests of its citizens either directly or indirectly.¹⁷ This subsection deals with serving citizens' interests directly. As regards marriage, the state could argue that if its citizens want to marry, the state should do what it can to provide that institution, educate the public about it, and make access to it easy. On the whole, this reflects the current state of things in the United States, where, with some prominent exceptions (for example, barriers for same-sex couples and polygamous marriages), the substantive and procedural barriers to marriage are relatively few and trivial.¹⁸ Similarly, if citizens want to divorce, the state could be seen as an agent making this "service" available to its citizens. (Of course, a pure service model becomes difficult when the spouses disagree about whether they want the marriage to continue, and one must also, of course, consider the effects on children, and the effects on society generally, of giving citizens what they want in this area, whether the spouses agree or not.)

B. Indirect Interests—Marriage Options and Marriage Contracts

There is also a more indirect way in which the state can serve its individual citizens—by empowering them through allowing them to make binding commitments. This point is relevant both to marriage/divorce/covenant marriage, and to the related ability of couples to enter premarital or marital contracts that modify the state's default rules of marriage and divorce.

Until the last few decades, couples in most states were not able to enter enforceable premarital or marital agreements that affected the financial rights and obligations arising from their marriage or from its dissolution.¹⁹ Under current law, every state now recognizes the enforceability of premarital agreements (the enforceability of marital agreements, which are agreements entered into during the marriage, may

17. So much could be common ground between a more conventional view of the state as a servant to its citizens, and a more cynical public choice view of the state as the locus of rent-seeking by various self-interested groups. (Public choice theory is the application of basic economic theory to political decisionmaking, portraying officials and lobbyists as cooperating and trading for mutual gain, not (primarily) in the service of the public good. For a discussion, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).)

18. See, e.g., GLENDON, *supra* note 15, at 35-84 (summarizing the legal regulation of marriage formation in the United States and Western Europe).

19. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998) [hereinafter Bix, *Bargaining*]; Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. L. 1, 11 (1992) [hereinafter Younger, *Update*].

be less certain), though many states impose significant requirements of substantive and procedural fairness.²⁰ However, there are significant limits on the scope of such agreements. Of greatest importance, they cannot bind the parties or the courts on issues regarding children (child custody, visitation, and child support),²¹ and the parties cannot enter premarital agreements that constrain their ability to seek a divorce.²²

As to the second limit, while the idea of private contracting out of parts of a state's divorce regime is structurally similar to covenant marriage statutory rules (which give couples an option, at the time of marriage or after marriage, of basically opting out of the no-fault alternative for divorce),²³ and while allowing such agreements to be enforceable has some support among commentators, to date no state has allowed this sort of provision in a premarital agreement to be enforceable (though there is little case law on the matter).²⁴

The argument in favor of allowing the partners to a marriage to affect the terms of their marriage is roughly similar to the argument for allowing parties to a commercial transaction to choose the terms of their agreement, and even which state's contract law will apply to the transaction.²⁵ In each case, parties are allowed to modify the terms of

20. For an overview of the enforceability of premarital agreements, see *Bargaining*, *supra* note 19, at 148-58; Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059 (1988); see Younger, *Update*, *supra* note 19, at 5, 7. For an overview on marital agreements, see, for example, LAURA W. MORGAN & BRETT R. TURNER, ATTACKING AND DEFENDING MARITAL AGREEMENTS 455 (2001) ("Most states have held that the standard of validity and enforceability of postnuptial agreements is the same as that governing antenuptial agreements.") (footnote omitted).

21. See, e.g., MORGAN & TURNER, *supra* note 20, at 390; UNIFORM PREMARITAL AGREEMENT ACT § 3(b), 9C U.L.A. 43 (2001 & Supp. 2003) (premarital agreements may not cover child support).

22. See, e.g., AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.08 cmt. a (2002).

23. For the covenant marriage rules in the three states that have passed such laws, see ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2000 & Supp. 2002); ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (Michie 2002); LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000 & Supp. 2003). The initial data indicates that the take-up rate for covenant marriage, at least in Louisiana, has been relatively low—five percent or lower. Laura Sanchez et al., *The Implementation of Covenant Marriage in Louisiana*, 9 VA. J. SOC. POL'Y & L. 192, 198 (2001) ("[O]nly 1.5% of all newly contracted marriages [in Louisiana] in 1998 were covenants."); Steven L. Nock et al., *Covenant Marriage Turns Five Years Old*, MICH. J. GENDER & L. (forthcoming, 2003) (manuscript at 10, on file with author) ("Currently, less than 2% of all newly contracted marriages in Louisiana are covenants.") (footnote omitted).

24. For a discussion of these issues in the context of the ALI proposals, see Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 231, 239-43 (2001).

25. See generally Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L.Q. 255 (2002) (discussing the value of choice of law rules for commercial and family agreements)

their arrangement in ways that best serve their joint interests.²⁶ There are, of course, limits to this argument: both ways in which even freedom of contract is limited for commercial agreements, as well as reasons for treating marital commitments differently from commercial connections.²⁷

On one hand, giving greater control over the terms of marriage to the parties may lead to marriages more suited to the individual needs and preferences of parties and (thus also) to more marriages. On the other hand, the terms of those “additional” marriages may be one-sided, such that they may fail to serve the interests either of the weaker party to the marriage or, depending on the further effects of having such marriages, the interests of society.²⁸ Additionally, while allowing parties to tailor their marriage terms to their relationship (or at least to choose from a “menu” of marriage options)²⁹ might allow parties to optimize terms and to create more precise “signals” to one another regarding their preferences for married life, there might be problems in the confused “signals” to the general public, who will not know which social norms to reinforce because they would likely not know or be able to quickly ascertain the terms of each couple’s marriage.³⁰

C. *Indirect Interests—Marital Sacrifices and Property Division Upon Divorce*

The state can also indirectly serve the interests of individuals by making sure that their sacrifices within marriage will have a substantial return. The change in property division rules (justifying equitable transfer of property based on work in the home and other sacrifices)³¹ and in alimony (with alimony being increasingly grounded on

[hereinafter Bix, *Proposal*]; see also Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 472-73 (1998) (arguing that agreements regarding marriage create net gains in trades away from the default position).

26. See Rasmusen & Stake, *supra* note 25, at 466.

27. Some of these limiting arguments and policies are considered in Bix, *Proposal*, *supra* note 25, at 263-64, 266-71.

28. This last point is based in part on discussions with Katharine Silbaugh.

29. On the idea of a “menu” of options, see Bix, *Bargaining*, *supra* note 19, at 177-79, n.124.

30. Compare Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 201-44 (F. H. Buckley, ed. 1999), with Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT at 256-74 (debating the advantages and disadvantages of contract marriage).

31. See generally Grace Granz Blumberg, *The Financial Incidents of Family Dissolution*, in CROSS CURRENTS 390-98 (Sanford N. Katz et al., eds. 2000).

“contribution” to the household, rather than by “status” or “need”³² are moves in this direction. A similar effect is obtained by a “partnership” theory of marriage, whether effected by a community marital property regime,³³ by a presumption of equal division upon divorce, or a combination of the two.³⁴

D. Encouraging Marriage

If we take it as a given, for the moment, that having a greater percentage of adults married is, on the whole, better for society generally, or better for the children being raised,³⁵ one question is the appropriate ways in which the state can encourage marriage.³⁶

Traditionally, the encouragement of marriage occurred through laws and social norms which both offered substantial benefits to couples living together within marriage,³⁷ and placed substantial penalties on couples living together outside of marriage. Among the legal penalties

32. See, e.g., AMERICAN LAW INSTITUTE, *supra* note 22, § 5.02 cmt. a (prescribing a focus for “alimony/spousal maintenance” on compensating for losses and sacrifices during the marriage, rather than on need).

33. One should be precise: community property regards the ownership and control of property *during the marriage*. Most community property states (like all common law property states) have equitable division rules upon divorce, so that the equal title to marital property during the marriage does not guarantee an equal split upon divorce (California is an exception, *requiring* an equal division upon divorce. CAL. FAM. CODE § 2550 (West 2003)). However, when one’s starting point is fifty-fifty, it is, psychologically speaking, much more likely that the final figure will be at or near fifty-fifty.

34. See, e.g., IDAHO CODE § 32-712(1)(a) (Michie 1996 & Supp. 2002) (establishing community property with a presumption of equal division of marital property upon divorce).

35. According to a White House press release:

There is an abundant body of research proving that children raised in households headed by continuously married parents fare, on average, better than children growing up in any other family structure. Children growing up without a married mother and father are more likely to experience school failure, to suffer from emotional disturbance or depression, and to abuse drugs.

Press Release, The White House, Working Toward Independence 19 (Feb. 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book.pdf> [hereinafter Working Toward Independence].

36. One important element of encouraging marriage that *will not* be discussed in detail here is the effort to remove those rules and benefits criteria not directly related to family policy but which have the unintended effect of discouraging marriage. This was often claimed to be the case with welfare rules. See, e.g., Nina Bernstein, *Strict Limits on Welfare Benefits Discourage Marriage*, *Studies Say*, N.Y. TIMES, June 3, 2002, at A1.

37. See, e.g., Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (summarizing some of the state law benefits available to married couples in Hawaii, in the context of a challenge to the exclusion of same-sex couples from marriage); see also WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 137-38 (2002) (discussing the 1049 federal rights and benefits available to married persons).

were a variety of legal discriminations against what we now call “non-marital children,”³⁸ and very little recourse for the economically weaker party (in an opposite-sex couple, usually the woman) to recover property not in her name—or anything even approximating alimony—once a non-marital relationship had ended.³⁹

In recent years, public officials and other policy advocates have again urged the strong public and governmental encouragement of marriage. In a February 2002 press release describing President Bush’s proposals for welfare reform, the President emphasized that one of the goals would be “to encourage the formation and maintenance of two parent married families and responsible fatherhood.”⁴⁰ It is interesting to note that arguments for encouraging marriage tend to come in three distinct types: (1) the effects of marital status on children (probably the most common in current debates);⁴¹ (2) the instrumental effects of marital status on the surface well-being of the adults involved;⁴² and

38. See, e.g., JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES-COMMENTS-QUESTIONS 1301-06 (9th ed. 2001) (summarizing the changing constitutional treatment of illegitimacy and related classifications); see also JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 156 (University of Chicago Press 1991) (1873):

Perhaps the most pointed of all illustrations of the moral character of civil law is to be found in the laws relating to marriage and inheritance. . . . Take the case of illegitimate children. A bastard is *filius nullius*—he inherits nothing, he has no claim on his putative father. What is all this except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favour marriage in every possible manner as the foundation of civilized society? It has been plausibly maintained that these laws bear hardly upon bastards, punishing them for the sins of their parents. It is not necessary to my purpose to go into this, though it appears to me that the law is right.

Id.

39. See Blumberg, *supra* note 31, at 401 (“the dissolution of . . . non-marital relationships . . . since the 1970s . . . ha[s] been regulated by contract law in most jurisdictions [but this has] not prove[n] satisfactory in theory or practice.”) (footnotes omitted).

40. See Working Towards Independence, *supra* note 35. As the White House press release indicated, the 1996 Welfare Reform law had a similar objective, but stated it in terms of “two-parent families,” while President Bush wanted to clarify that it is part of the objective to increase the number of *married* parents. See *id.*

41. See generally JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE (2000) (arguing that divorce has significant and long-lasting negative effects on children).

42. See generally LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000) (the book’s argument is summarized in its title). But see Richard E. Lucas et al., *Reexamining Adaptation and the Set Point Model of Happiness: Reactions to Changes in Marital Status*, 84 J. PERSONALITY & SOC. PSYCHOL. 527 (2003) (concluding that for most people, change in marital status will not result in a long-term change in level of happiness). One finds a somewhat more subtle variation of the instrumental value theme in some of the literature on the economics of marriage—for example, in the argument that a more traditional marriage allows the partners to maximize their utility through a division of labor. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 30-79 (enlarged ed. 1991) (discussing the division of labor within households).

(3) arguments within faith-based communities based on the teachings of the faith in question.⁴³ One piece of the argument that is usually missing,⁴⁴ one that fits between the instrumental arguments (for example, that marriage has good bottom-line effects on adult partners, and divorce has bad effects on children) and the faith-based arguments, is a moral one, grounded in claims about virtue and the good, without depending on the commands of some divine being, sacred book, or religious institution. A second, usually missing, piece is being filled in by the organizer of this conference, Linda McClain, and some of the conference's other participants—the possible value of marriage to society, beyond the (purported) instrumental value in making more healthy and mature adults and better-raised children. This view is often characterized in terms of the value of intermediate institutions (including marriage) to the health of civil society.⁴⁵

What is also worth noting is how little discussion there is within the media of the simple point that if marriage is good, either for the adult partners, for the children being raised within the household, or for society generally (whether because of the benefits to children and adults already mentioned, or because of some other causal link), then there are good reasons to extend this benefit to same-sex couples and/or polygamous groupings.⁴⁶

43. See generally JOHN WITTE, JR., *FROM SACRAMENT TO CONTRACT* (1997) (discussing how religion influenced Western marriage law).

44. There are exceptions. See generally, Scott Fitzgibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41 (2002) (discussing the benefits of marital obligation in terms of secular, primarily Aristotelean, philosophy).

45. See, e.g., John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1070 (2001) (addressing the “perennial Western ideal that stable marriages and families are essential to the survival, flourishing, and happiness of the greater commonwealths of church, state, and civil society”); cf. Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) (discussing other aspects of domestic relations policy, in particular, the promotion of care, in civic republican terms); see generally Philip Pettit, *Republicanism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at <http://plato.stanford.edu/entries/republicanism/> (Edward N. Zalta ed.) (last modified Jan. 10, 2003).

46. This point is made often enough by those advocating recognition of same-sex marriage. See, e.g., E. J. GRAFF, *WHAT IS MARRIAGE FOR?* 249-53 (1999) (arguing that all the reasons that make marriage valuable are reasons to extend the institution to same-sex couples); Bix, *Reflections*, *supra* note 3, at 115-16 (arguing that if the purpose of marriage is to help children, then the institution should be extended to same-sex couples). There is little discussion anywhere about polygamy—as those advocating same-sex marriage tend to want to distance their cause from a different unpopular domestic arrangement. See Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1594-96 (1997). By my comments, I do not mean to imply that there have not been past and present unpleasant associations with polygamous practices, including sexist assumptions or the exploitation of under-age women. See generally Michael Janofsky, *Young Brides Stir New Outcry on Utah Polygamy*, N.Y. TIMES, Feb. 28, 2003, at A1 (examining accusations related to the contemporary polygamous

E. Non-Marital Cohabitation

There are inevitable tensions between the desire of governments to encourage marriage and the need for governments to be fair to, and to respond to the interests of, those in long-term non-marital relationships.⁴⁷ In particular, there is a puzzle of how to be fair to people living in non-marital relationships without simultaneously undermining much of the incentive for marriage. The point is that every advantage given to non-marital couples is a reduction in the *relative* advantage to being married.⁴⁸ On the other hand, not recognizing claims based on non-marital cohabitation risks permitting significant injustices to go uncompensated.⁴⁹ Within the United States, only the state of Washington has formalized the right to bring equitable claims based on a long-term non-marital cohabitation;⁵⁰ other jurisdictions have allowed recovery based on common law claims, such as those based on contract or restitution.⁵¹

F. Government Interests and Legal Rights

There are certain paradoxes regarding government policy about marriage.

First, there are certain rights and obligations, some of them mere default rules (subject to being contracted around by a premarital or marital agreement that meets certain criteria), but many of them non-

practices of one community). However, such problems from past practices, or from the current practices of particular groups, falls far short of proof that polygamy is so inherently immoral that it should either be the subject of criminal penalties or at least should never receive state recognition. Conversely, tying the argument for same-sex marriage to polygamy was one of the main arguments used by opponents of same-sex marriage. See ESKRIDGE, *supra* note 37, at 131.

47. See Scott & Scott, *supra* note 30; see also Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1465 (2001) (arguing for treating cohabitation and marriage similarly in certain circumstances).

48. See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979) (offering this justification for refusing to enforce an alleged contract between non-marital cohabitants).

49. See, e.g., *Watts v. Watts*, 405 N.W.2d 303, 311-12 (Wis. 1987) (recognizing that “refusal to enforce contract and property rights” between non-marital couples may result in one partner retaining all accumulated assets).

50. See, e.g., *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001) (summarizing the doctrine in a case where the claim was brought by one partner of a same-sex couple).

51. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (the first important “palimony” case, recognizing claims arising from a long-term non-marital relationship); *Watts*, 405 N.W.2d at 313, 314 (allowing unmarried cohabitant to assert contract and unjust enrichment claims against the other party to the cohabitation).

waivable.⁵² At the same time, some of these same rights and obligations are considered unenforceable (under the doctrine of “family privacy”) if brought by parties still in an intact marriage.⁵³ Of course, one can understand some of the policy reasons behind non-enforcement. Courts might suspect that allowing spouses to bring court actions for insufficient support or insufficient care would lead to a flood of litigation that would overburden already overburdened family courts. Additionally, there is some question about whether the floodgates could ever be reduced by the usual means—such as by making the cases more predictable through the creation of relatively bright-line rules. Among other likely complications, the cases may turn on matters that are difficult to prove (or, where proof of violation is clear, there might still be doubt regarding when violations might be “justified” or “excused”). Additionally, family matters are notorious for being an area where angry parties will bring and maintain lawsuits even when the law is clearly against them.⁵⁴

At the same time, the refusal to enforce spousal duties *combined* with a refusal to allow some of them to be “contracted around” (that is, refusal to allow them to be modified or waived in enforceable contracts), leaves the parties relatively powerless, with exit from the marriage the only legal recourse.⁵⁵

Someone might respond that this is only to see part of the picture. When legal enforcement of standards is not available, this could be seen as a judgment that enforcement is better left to social forces.⁵⁶ However, this assumes that the forces of conventional morality are (still) responsive to the norms covering spousal obligations to one another even though there is growing evidence that social pressures (and legal pressures as well) are today far more focused on and responsive to

52. See *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18-19, 20 (Cal. App. 1993) (holding that an agreement by a husband to pay his wife for nursing services was unenforceable, as against public policy, in part because spouses have an existing statutory duty to care for one another).

53. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (dismissing a claim based on the husband’s statutory obligation of support on the basis that the parties were not living separate and apart, and because the level of non-support had not reached harmful levels).

54. See, e.g., Conference, *High-Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L.Q. 589, 590 (2001) (discussing the serious problem of high-conflict custody cases, in which the parties, among other things, show “a high level of anger and a willingness to engage in repetitive litigation”).

55. And, of course, the situation was much more problematic some decades ago, when exit from marriage was difficult, and almost none of the aspects of marriage could be contracted about between the parties. See Bix, *Bargaining*, *supra* note 19, at 150.

56. See generally Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

responsibilities of parents to children than they are to the responsibilities of spouses to one another.⁵⁷

II. FEDERALISM AND NATIONAL CITIZENSHIP

An ongoing problem with government policies regarding marriage and the family is the tension created by a combination of “our federalism” and the constitutional idea of national citizenship, as instantiated by the Fourteenth Amendment and the Full Faith and Credit Clause⁵⁸ (and the court cases construing those provisions).

On one hand, family law policy is generally left to the states.⁵⁹ However, it is important to note that, while lawmaking in this area has devolved to the states, it has not (with few exceptions) devolved further, to municipalities or other sub-state communities and institutions.⁶⁰

The tension comes when the rights of states to create different family and marriage policies for their residents conflicts with the interest in national citizenship—the value that people should have certain basic rights as United States citizens, wherever they might live, and that they should not lose significant rights by moving from one state to another (the right to interstate travel).⁶¹

On one hand, the combination of national citizenship (as enforced by the Full Faith and Credit Clause) and the usual rules of recognizing marriages validly celebrated in another state,⁶² meant that when it looked like Hawaii might recognize same-sex marriages, there was a fear (by some, a hope by others) that all other states would have to recognize

57. See generally JUNE CARBONE, *FROM PARTNERS TO PARENTS* (2000). While there may still be a general consensus on certain marital norms (e.g., that adultery is wrong), other norms (for example, the proper division of responsibility within a household or equality between the spouses) have become far more contested, and therefore less susceptible to social support and enforcement.

58. U.S. CONST. art. IV, § 1.

59. Though the federal government has become increasingly involved, primarily through tying compliance to suggested policies as the condition for significant federal subsidies, family law remains largely state-based. See Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 17 (2000) (summarizing recent congressional intrusions on state family law policy); see also Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789 (1995).

60. See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1198-99 (1992) (discussing how states have substantial control over municipalities' regulation of domestic law).

61. See *Saenz v. Roe*, 526 U.S. 489, 498 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969); cf. *Sosna v. Iowa*, 419 U.S. 393, 406 (1975) (holding that Iowa's one-year residency requirement for divorce does not violate the right to interstate travel).

62. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

same-sex unions celebrated in Hawaii.⁶³ This was the motivation behind the Defense of Marriage Act (“DOMA”).⁶⁴ The purpose of that Act was to give congressional authorization for states to refuse to recognize same-sex marriages from other jurisdictions, if they so chose.⁶⁵

It has been less clear what the cross-state consequences from a recognized legal relationship that fell short of marriage would be. With Vermont’s experience with “civil unions,” the problem has not been that other states have been forced to recognize that status; to the contrary, the problem has been that other states have felt no duty to give it any recognition at all (or have in fact felt bound *not* to recognize it). Vermont’s “civil union” statute allows same-sex partners to obtain within Vermont the same rights and obligations as opposite-sex partners can obtain (in any of the states) through marriage.⁶⁶ However, those who have obtained such a civil union have had great difficulty having that legal relationship recognized or respected in other jurisdictions as a “marriage” for the purpose of interpreting a consent decree visitation clause.⁶⁷

Similarly, while Louisiana, Arizona, and Arkansas have created “covenant marriage” options⁶⁸ that allow couples in those states to choose a more binding form of marriage for themselves, it has remained unclear whether other states are legally bound to respect that choice, if and when someone in a covenant marriage goes to the courts in one of those other states and asks for a no-fault divorce (contrary to the terms of the covenant marriage).⁶⁹

63. See Carl Iseli, Editorial, *The Meaning of Marriage in a State*, WASH. POST, Aug. 23, 2003, at A21.

64. The relevant portion of DOMA appears at 28 U.S.C. § 1738C (Supp. 2003). The Act also contains a definition of marriage for the purposes of federal legislation, confining marriage to opposite-sex couples. 1 U.S.C. § 7 (1997 & Supp. 2003).

65. See H.R. REP. NO. 104-664 (1996).

66. See VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002).

67. See *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002) (refusing to dissolve a Vermont civil union because of strong public policy against same-sex marriages); *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002) (refusing to view a civil union as a “marriage” for the purpose of interpreting a consent decree visitation clause); see generally Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, April 6, 2003, § 9, at 2 (reporting that a Texas court refused to grant a divorce to a Vermont civil union since the Vermont civil union statute requires those seeking the dissolution of a civil union within Vermont to have been resident in that state for one year). But see Elissa Gootman, *Judge Allows Suit in Death of Gay Mate*, N.Y. TIMES, April 16, 2003, at D8 (describing a Long Island, New York, case in which civil union partner was allowed to file a wrongful death lawsuit as a spouse).

68. See *supra*, note 23.

69. As far as I know there is no case law yet on this issue, but even Katherine Shaw Spaht, one of the original proponents of covenant marriage, believes that other states would be free to grant a no-fault divorce in those circumstances. See Katherine Shaw Spaht & Symeon C. Symeonides,

There is a general tension, of course, between a community's ability to enforce, or at least encourage, shared values on the one hand, and the national rights of citizenship and the right of interstate travel on the other. This tension exists regardless of where (below the federal level) one places the policy-making power regarding marriage. However, additional moral and policy complications arise by leaving the decision at the state level rather than at a more local level. Any decision to shape family life in one direction or another (for example, by encouraging traditional marriages or extending marriages to same-sex couples) makes an area more attractive to one group of people and less attractive to another. There is inevitably a balance between the benefits of allowing a community to define its own character and the costs that such self-definition might impose on individuals who do not fit into that self-definition. On the side of group or community self-government, we can speak of the ideals behind the right of association, and even the right of intimate association. At the same time, allowing *state* regulation of such association (making decisions about inclusion and exclusion, or about which lifestyles to support at the state level) potentially poses a significant threat to equal opportunity or the equal access to public establishments.⁷⁰ If the same sort of decision regarding regulation or support were to be made at a much more local level—if, say, an apartment complex or a small village declared itself strongly supportive of same-sex marriage or polygamy or traditional gender roles within marriage—the cost to third parties excluded or offended by these policies, and thus strongly encouraged to move elsewhere, would not be trivial, but they would be relatively modest. Compare this to a situation where the policy is statewide, and those tied to a particular region by work or family might not have a reasonable option of exit to a friendlier jurisdiction.

III. POLICY, DEMOCRACY, AND SOCIAL NORMS

It is only being slightly cynical (or slightly realistic) to point out that when we talk about “the state’s interest” in marriage or in certain

Covenant Marriage and the Law of Conflicts of Laws, 32 CREIGHTON L. REV. 1085, 1108-17 (1999). However, the authors of that article also think that if and when such a no-fault divorce is granted in a different state, the other spouse would have a right to damages for breach of the covenant. *See id.* at 1117-20.

70. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 623-25 (1984) (discussing when the constitutional freedom of association must yield to countervailing state interests). The text is primarily making a moral or policy point, and is not a claim about the current understanding of the constitutional freedom of association or how that understanding might or should be changed.

family law policies, we are referring to the judgment regarding the state's interest made by a majority of legislators along with the governor (or, at the federal level, Congress and the President). This in turn may reflect the judgment of a majority of voters—or at least a large portion of those pressure groups with the greatest influence. Not to turn this into either a civics lesson on the one hand, or an outline of public choice theory⁷¹ on the other, the point is simply that family law policy can and will change as the judgment or preferences of those with direct or indirect power to create family law and policy change.

There are some blatant examples from the early parental rights (and educational rights) decisions of *Meyer v. Nebraska*⁷² and *Pierce v. Society of Sisters*.⁷³ In those cases, legislative majorities tried to constrain the educational rights of minority populations within the state (in *Meyer*, the right of the children of German-speaking parents to learn German at school,⁷⁴ and, in *Pierce*, the right of Catholic families to send their children to private schools).⁷⁵ The efforts of the majority to define the common good and to try to mold the thinking within their communities succeeded at the state level, but was overridden by decisions of the United States Supreme Court, which held that the objectives sought were beyond the constitutional powers granted to the states (due to the limits on state power imposed by the Fourteenth Amendment to the Constitution).⁷⁶ There have been other occasions where the will of the majority regarding the regulation of marriage and families has been turned back on constitutional grounds,⁷⁷ though arguably only the anti-miscegenation laws have quite the same feel of a majority trying to regulate how a subjugated group lives.

Even the legislation invalidated in *Meyer* and *Pierce* can be read more charitably, and in line with other legislation regulating marriage and family, as reflecting the views of the majority (or at least of well-organized groups urging their views in the absence of well-organized opposition⁷⁸) regarding what is in the best interests of the community,

71. See *supra* note 17.

72. 262 U.S. 390 (1923).

73. 268 U.S. 510 (1925).

74. See *Meyer*, 262 U.S. at 396-98.

75. See *Pierce*, 268 U.S. at 518-19.

76. See *supra* note 62 and accompanying text.

77. See generally *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating a Virginia anti-miscegenation law); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a Wisconsin law which prohibited marriage to a class of poor Wisconsin citizens subject to court-ordered child support); *Troxel v. Granville*, 530 U.S. 57 (2000) (invalidating a Washington third-party visitation law).

78. This was arguably the situation for the grandparent visitation statutes, passed in all fifty states before some of them were invalidated by *Troxel*. See *Troxel*, 530 U.S. at 73 n.1.

specifically the *beliefs* and *perceptions* about the common good, where data and conclusive arguments will usually be in short supply.

The background of social norms is thus very important. Barring unquestionable evidence as to cause and effect, policies will necessarily turn on normative beliefs (with varying levels of support in statistical data, anecdote, moral theory, religious doctrine, etc.). It once made much more sense to most Americans than it does now to force an unhappy (and childless) married couple to stay married, as a matter of public policy (the question changes significantly, at least for some, when there is an argument for the couple's staying together for the sake of minor children). It was once the case that people would commonly speak about the state's interest in couples staying married, where this asserted interest was not (necessarily) related to any children born to the marriage.⁷⁹ Today we may see the individual spouses' failure to keep to their marital commitments or to work sufficiently hard to make the marriage work as moral or character failings, but we usually do not see them as matters justifying state intervention.

One might respond that it is not merely a matter of people's preferences (whether those people be citizens or officials), but rather the truth of the matter regarding what furthers the public good. The problem is that social scientists seem unable to give us "the truth of the matter," in a clear and uncontroversial way, on most issues. Even for many basic and oft-studied questions like the effect of divorce on children, and the effect of no-fault divorce laws on the divorce rate, no firm and final answer seems to have been agreed upon.

IV. CONCLUSION

Given the fact that our government regulates marriage, and will likely continue to do so into the indefinite future, we should try to think clearly about the different sorts of interests that are at stake in the regulation of marriage (and divorce), the way such interests are complicated by the conflicting ideals of federalism and national

79. See *Fuchs v. Fuchs*, 64 N.Y.S.2d 487, 488-89 (N.Y. 1946) ("The strict rules relating to opening defaults [are] not applied to actions for divorce, because of the well known vigilance of the courts to prevent collusion, and because of the general interest of the people of the state in the preservation of the matrimonial status of its citizens.") (quoting 9 CARMODY, N.Y. PRAC., § 160, at 242); *Rankin v. Rankin*, 124 A.2d 639, 644 (Pa. 1956) ("The fact that married people do not get along well together does not justify a divorce. . . . Testimony which proves merely an unhappy union, the parties being high strung temperamentally and unsuited to each other . . . is insufficient to sustain a decree.") (citations omitted).

citizenship, and the role of social norms in motivating, supplementing, or undermining legal regulation.

The promotion of marriage, and the promotion of *particular kinds* of marriages, as ways to strengthen civil society, is an important interest to consider, but such efforts must be evaluated in the context of more mundane objectives—using domestic relations laws to serve individual interests, directly and indirectly, and trying to find a workable middle ground between community (and state) self-government and the needs of national citizenship.