

The Contested Place of Religion in Family Law

Edited by

ROBIN FRETWELL WILSON

University of Illinois College of Law



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Divorcing Marriage and the State Post-*Obergefell*

Robin Fretwell Wilson

Roger and Stephany Joslin Professor of Law, University of Illinois College of Law

The United States Supreme Court's landmark decision extending the right to marry to same-sex couples, *Obergefell v. Hodges*, turned a simmering dispute into a "raging inferno."¹ Chief Justice John Roberts, reading portions of his twenty-nine-page dissent from the bench for the first time in a decade-long tenure,² accused the majority of "an act of will, not legal judgment."³ "People of faith," he said, "can take no comfort in the treatment they receive from the majority today."⁴

Collisions over same-sex marriage erupted almost immediately around the country – from Alabama, Indiana, and North Carolina, to Ohio, Louisiana, Oregon, and beyond.⁵ Perhaps most infamous, elected county clerk Kim

¹ Greg Bluestein, *White House Contenders Pledge in Georgia that Gay Marriage Fight Will Go on*, AJC (July 10, 2015), <http://politics.blog.ajc.com/2015/07/06/white-house-contenders-pledge-in-georgia-that-gay-marriage-fight-will-go-on/> (quoting then-candidate Texas Senator Ted Cruz).

As just two barometers, a Tennessee legislator proposed a law that "any court decision purporting to strike down natural marriage, including *Obergefell v. Hodges*, is unauthoritative, void, and of no effect"; two South Carolina lawmakers proposed banning taxpayer funds and government salaries for "licensing and support of same-sex marriage." *Tennessee Bill Would Nullify Supreme Court's Gay 'Marriage' Decision Statewide*, LIFE SITE (Sept. 18, 2015, 6:47 PM), www.lifesitenews.com/news/tennessee-bill-would-nullify-supreme-courts-gay-marriage-decision-statewide; 2015 South Carolina House Bill No. 3022. Such measures would have no legal effect.

² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–26 (2015); *Supreme Court Extends Gay Marriage Nationwide*, CHICAGO TRIBUNE (June 26, 2015), www.chicagotribune.com/news/nationworld/ct-supreme-court-gay-marriage-20150626-story.html.

³ *Obergefell*, 135 S. Ct. at 2612. ⁴ *Id.* at 2626.

⁵ See Victor Puente, *Casey County Clerk: Let People Buy Marriage Licenses Online*, WKYT (July 6, 2015), www.wkyt.com/home/headlines/Ky-Clerk-Let-people-buy-marriage-licenses-online-311820401.html; Nick Gass, *Same-Sex Marriages Still on Hold in Louisiana, Mississippi*, POLITICO (June 26, 2015), www.politico.com/story/2015/06/mississippi-gay-marriage-on-hold-supreme-court-ruling-119473; Rose Hackman, *Meet the Alabama Judges Who Refuse to Issue*

Davis shut down marriage to everyone in Rowan County, Kentucky, because issuing licenses to same-sex couples “would conflict with God’s definition of marriage” and “would violate [her] conscience.”⁶ Federal District Court Judge David Bunning broke the impasse, jailing Davis and instructing her deputies to issue licenses or go to jail, too.⁷

Like Davis, some faith leaders distanced themselves from the new public meaning of marriage. More than 700 religious figures signed a pledge “to disengage civil and Christian marriage,” saying they would “no longer serve as agents of the state in marriage.”⁸ In their view, “to continue with church practices that intertwine government marriage with Christian marriage will implicate the Church in a false definition of marriage.”⁹ The impulse to withdraw religious marriage from the public sphere is part of a larger movement by some believers to retreat from civil culture and develop instead intentional orthodox communities of believers.¹⁰

Faced with deep unease over the public meaning of marriage, commentators – and increasingly, legislators – have latched onto a seductively simple solution to the conflicts erupting around same-sex marriage: “[G]et the government out of the marriage business, altogether.”¹¹ US Senator Rand Paul said in *Time Magazine* that “the government should not prevent people from making contracts but that does not mean that the government must confer a special imprimatur upon a new definition of marriage. Perhaps the time has come to examine whether or not governmental recognition of marriage is a good idea.”¹²

Marriage Licenses – Gay or Straight, GUARDIAN (July 12, 2015), www.theguardian.com/us-news/2015/jul/12/alabama-judges-gay-marriage-licenses; *McCrory Vetoes NC Religious Objection Bill on Gay Marriage*, ABC 11 & ASSOCIATED PRESS (May 29, 2015), <http://abc11.com/politics/mccrory-vetoes-nc-religious-objection-bill-on-gay-marriage/746406/>.

⁶ Abby Ohlheiser, *Kentucky Clerk Kim Davis on Gay Marriage Licenses: ‘It is a Heaven or Hell Decision’*, WASH. POST (Sept. 1, 2015), www.washingtonpost.com/news/acts-of-faith/wp/2015/09/01/kentucky-clerk-kim-davis-on-gay-marriage-licenses-it-is-a-heaven-or-hell-decision/.

⁷ *Kentucky Clerk Kim Davis Ordered to Jail for Refusing Marriage Licenses to Gay Couples*, ABC7 (Sept. 3, 2015), www.abc-7.com/story/29944148/kentucky-clerk-gets-jail-time-for-failing-to-issue-same-sex-marriage-licenses.

⁸ Ephraim Radner & Christopher Seitz, *The Marriage Pledge*, FIRST THINGS, www.firstthings.com/marriage-pledge; see also Bryan Cones, *It’s Time to Separate Church and State Marriages*, US CATHOLIC, Feb. 2014, at 40–43.

⁹ Radner & Seitz, *supra* note 8.

¹⁰ See ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017).

¹¹ Keith Ablow, *When It Comes to Marriage, Government Should Divorce Itself*, FOX NEWS (Mar. 27, 2013), www.foxnews.com/opinion/2013/03/27/when-it-comes-to-marriage-government-should-divorce-itself.html.

¹² *Rand Paul: Government Should Get Out of the Marriage Business Altogether*, TIME (June 28, 2015), <http://time.com/3939374/rand-paul-gay-marriage-supreme-court/>.

Legislators, however, have advanced quite different conceptions of what it would mean to “end marriage.”¹³ Bills in Oklahoma, Michigan, and Utah would shift responsibility for issuing marriage licenses to “churches of any denomination, even a notary public,”¹⁴ in order to insulate religious objectors from having to “accept . . . marriage” in its current form or “reject [one’s] own beliefs regarding [marriage].”¹⁵ A Tennessee legislator argued that Tennessee should return to common law marriage, saying that marriage clerks “don’t answer to the Supreme Court.”¹⁶ Alabama and Indiana would eliminate marriage licenses altogether in favor of marriage contracts. Seeing marriage as “simply a contract between two people,” Indiana Representative Jim Lucas would require “a signed contract, witnessed by two other[s] . . . to legally wed.”¹⁷ A “big fan of simplicity,” Lucas believes that “[b]y taking state government out of marriage,” churches cannot “be forced to perform or recognize something that goes against their religious beliefs.”¹⁸ Lucas’s bill would also “eliminate[] a ‘Kim Davis’ situation.”¹⁹

Despite the possibility of muting the impact on religious dissenters with well-drawn statutory protections, the dangerous idea of radically transforming the state’s relationship to marriage has taken hold. This chapter examines these emerging attempts to solve clashes over same-sex marriage by divorcing marriage from the state. It critiques specific proposals to limit state-sponsored marriage. Section I briefly reviews notions for “ending marriage” cropping up in statehouses and public debate. Section II links these proposals to, ironically, older more left-leaning claims that society should “abolish marriage.” Section III arrays

¹³ Michael A. Lindenberger, *A Gay-Marriage Solution: End Marriage?* TIME (Mar. 16, 2009), <http://content.time.com/time/nation/article/0,8599,1885190,00.html?xid=rss-mostpopularemail.3>.

¹⁴ Chris Jones, *Utah Legislator Working on Bill to Get State Out of Marriage Business*, KUTV.COM (June 26, 2015), <http://kutv.com/news/local/utah-legislator-working-on-bill-to-get-state-out-of-marriage-business>.

¹⁵ Cheryl Wetzstein, *Oklahoma Bill Abolishes State Marriage Licenses: Couples Would Need Clergy or Notary to Process New Certificates*, WASH. TIMES (Mar. 11, 2015), www.washingtontimes.com/news/2015/mar/11/oklahoma-bill-abolishes-state-marriage-licenses/?page=all.

¹⁶ Tracy Kornet, *TN Legislator Wants State to Stop Issuing All Marriage Licenses*, WSMV.COM (Jan. 12, 2016, 9:51 PM), www.wsmv.com/story/30850413/tn-legislator-wants-state-to-stop-issuing-all-marriage-licenses.

¹⁷ H.B. 1163, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2017) (referred to Judiciary Committee); Stephanie Wang, *Lawmaker Proposes an End to Indiana Marriage Licenses*, INDY STAR (Jan. 7, 2016, 6:59 PM), www.indystar.com/story/news/politics/2016/01/07/lawmaker-get-government-out-marriage/78364598/ (discussing 2016 bill, H.B. 1041).

¹⁸ January Rutherford, *Seymour Lawmaker’s Bill Gets Government out of Marriage*, VINCENNES SUN-COMMERCIAL (INDIANA) (Jan. 19, 2016).

¹⁹ *Id.*

proposals to divorce marriage from the state on a continuum from weaker to stronger claims – from the idea that society should simply redub civil marriages as civil unions to the idea that the state should only enforce parties’ contractual agreements, rather than specifying rights and obligations that attach when a couple marries. A radical transformation of the state’s relationship to marriage, whatever form that may take, risks disturbing the delicate web of norms around marriage – norms of faithfulness, permanence, emotional and financial interdependence, and physical security. This section suggests that these norms are reinforced when religious couples participate in the institution now known as “marriage.”

After probing the general proposition that society should transform the state’s relationship to marriage, this chapter explores concerns raised by specific legislative proposals to back-walk the state’s regulation of marriage. It asks, what happens to the millions of Americans who have relied upon the state’s existing structure if proposals to divorce marriage from the state become law? It explores practical questions – will other states or the federal government recognize the “marriages” of couples who privately contract after the state backs away from marriage? Will couples in this newly privatized status qualify for the social benefits attached to marital status? If the new privatized marriages take the form of a contract, will couples have the foresight, discipline, and, most significantly, roughly equal bargaining power to arrive at fair agreements governing the financial and domestic aspects of their relationship? Can couples contract their way into the cocoon of protections for marriage that give it unique privacy and intimacy, such as the right not to testify against one another or share marital confidences?

Section IV ultimately concludes that society should be loath to unwind the religious and civil dimensions of marriage since the consequences may be so profound.

I A DANGEROUS IDEA TAKES HOLD

Every state in America “still comingles religious and civil marriage.”²⁰ As Professor Harry Krause notes, “The law requires a civil license but allows a (civil or) *religious* pronouncement to be the last word in formalizing the marriage.”²¹ In all fifty states, marriage by a religious figure brings into

²⁰ Harry Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex – Or Not at All?* 34 FAM. L.Q. 271, 283 (2001) (emphasis in original).

²¹ *Id.*

existence a civil marriage regulated by the state.²² It is a crime or regulatory violation for religious figures not to record a marriage they have solemnized.²³ So while it is possible to have a civil marriage without a religious ceremony, it is impossible to enter into a religious-only marriage in the United States.²⁴

As the “keystone of the Nation’s social order,” married couples are preferred in such matters as the following:

[T]axation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules.²⁵

Indeed, “1,138 [federal] benefits, rights and protections” flow to married couples.²⁶ States have also privileged married couples in “many facets of the [state’s] legal and social order.”²⁷ Marriage law does more than dictate rights and obligations between the two spouses – it creates rights against third parties, requiring others to respect a spouse’s “power to make medical decisions,” and entitling spouses “to public benefits, such as family leave or social security.”²⁸

In the months preceding *Obergefell* religious figures had begun to rethink the role religion plays in civil marriage. Latching onto an idea that has been around for decades, more than 700 pastors, imams, priests, and others pledged in *First Things* to “no longer serve as agents of the state in marriage.”²⁹ In order to separate “civil marriage from religious marriage,” pledge signers would instruct their parishioners “to seek civil marriage separately from their church-related vows and blessings.”³⁰ Not every religious figure believes it is necessary

²² See, e.g., S.B. 297, 61st Leg., Gen. Sess. (Utah 2015); S.B. 296, 61st Leg., Gen. Sess. (Utah 2015) (naming ministers, imams, and other religious figures as authorized celebrants of marriage).

²³ See TEX. FAM. CODE ANN. § 2.206 (West 2015) (misdemeanor not to file license). IND. CODE ANN. §§ 31-11-11-8, 34-28-5-4 (West 2015) (infraction punishable by fine).

²⁴ Couples may immigrate to the United States whose relationships would not be recognized as civil marriages if entered into here, such as those in polygamous marriages. See Witte, Chapter 17, this volume, and Strassberg, Chapter 18, this volume, for critiques of the norms around polygamy.

²⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

²⁶ *Federal Right and Protections Granted to Married Couples*, MASS EQUALITY, www.massequality.org/content/federal-rights-and-protections-granted-married-couples.

²⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

²⁸ Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 91 IND. L.J. 1261, 1265 (2015).

²⁹ Radner & Seitz, *supra* note 8 (last visited May 16, 2016). See Bryan Cones, *It’s Time to Separate Church and State Marriages*, US CATHOLIC, Feb. 2014, at 40-43.

³⁰ Radner & Seitz, *supra* note 8.

to take such a radical step, that “not officiating at unions that are not gospel-qualified” would suffice.³¹ Still, one in four pastors and one in three Americans think that a sharp break between religious marriage and state regulation is a good idea.³²

Earlier, George Weigel of the Ethics and Public Policy Center argued that the Catholic Church should “pre-emptively withdraw from the civil marriage business, its clergy declining to act as agents of government in witnessing marriages for purposes of state law.”³³ This fracturing would challenge “the state (and the culture) by underscoring that what the state means by ‘marriage’ and what Catholics mean by ‘marriage’ are radically different, and that what the state means by ‘marriage’ is wrong.”³⁴

Since *Obergefell*, the notion that the deep divide over marriage should be solved by getting the government out of marriage has gotten significant traction with legislators. Senator Paul argued, “[t]he 14th Amendment does not command the government endorsement . . . conveyed by the word ‘marriage,’” so society can reexamine the government’s role in marriage.³⁵ For Paul, government’s role should be limited to enforcing contracts that couples write to govern their own relations. A growing set of state legislators also believes “the best way to protect marriage is to divorce marriage from government.”³⁶ Texas State Representative David Simpson wants to “get [Texas] out of the business of licensing marriage”³⁷ because “the federal government usurp[ed] our authority here in Texas to regulate and respect this institution.”³⁸ Instead, “clergy members would issue marriage licenses.”³⁹

³¹ Ruth Moon, *Should Pastors Stop Signing Civil Marriage Certificates?* CHRISTIANITY TODAY (Jan. 26, 2015), www.christianitytoday.com/ct/2015/januaryfebruary/should-pastors-stop-signing-civil-marriage-certificates.html?share=ReueLRxknZy/6QU%20onpbIVAhWRRo%20pkv (quoting Russell Moore, president of the Ethics & Religious Liberty Commission of the Southern Baptist Convention).

³² *Id.* (reporting on Fall 2015 survey of 2000 Americans and 1000 senior Protestant pastors); Bob Smietana, *Religious Weddings Should Not Be Connected to the State’s Definition and Recognition of Marriage*, LIFEWAY RESEARCH (Dec. 2, 2014), www.lifewayresearch.com/2014/12/02/most-americans-say-the-state-should-not-define-marriage/.

³³ George Weigel, *The Crisis of a Second Obama Administration*, FIRST THINGS (Nov. 14, 2012), www.firstthings.com/web-exclusives/2012/11/the-crisis-of-a-second-obama-administration.

³⁴ *Id.*

³⁵ Carlos Santoscoy, *Rand Paul Reacts to Supreme Court Ruling: Let’s Do Away with Civil Marriage*, ON TOP (June 29, 2015), www.ontopmag.com/article.aspx?id=21134&MediaType=1&Category=26.

³⁶ Risa Morris, *East Texas Legislator Asks Governor for Special Session About Marriage*, CBS19-TV (June 29, 2015), www.cbs19.tv/story/29436201/east-texas-legislator-asks-governor-for-special-session-about-marriage.

³⁷ *Id.* ³⁸ *Id.* ³⁹ *Id.*

Sharing this view, lawmakers have begun to put pen to paper. Indiana Representative Lucas reintroduced his measure in Indiana. Missouri Republican Representative T.J. Berry filed a 336-page bill in the 2017 legislative session that would “treat[] everybody the exact same way . . . leaving space for people to believe what they believe outside of government.”⁴⁰ Under the proposal, Missouri would no longer recognize marriage but would recognize only domestic unions for straight and gay couples.⁴¹ Marriage would be an exclusively religious institution, with no legal effect. Berry’s proposal grandfathered existing marriages into domestic partnerships but going forward, this status becomes the exclusive province of the state; couples are free to have religious marriage ceremonies, or civil ones for that matter, but that proceeding “shall have no legal effect upon the validity of the contract of domestic union.”⁴² For Berry, this severing of the ties between religious marriage and the state’s regulation “would get back to government being in its role and religion being in its role . . . Marriage has been, through history going back thousands of years, a religious ceremony not a governmental ceremony.”⁴³

A number of commentators and scholars believe that Missouri’s approach is the right “fix”: the state should create a new status with a new label other than marriage that would unlock the benefits presently reserved for married couples.⁴⁴ Like Representative Berry’s bill, marriages would become a private matter, giving “religious organizations [the ability] to set their own rules regarding who could marry.”⁴⁵ Advocates contend that government recognition of civil unions or domestic partnerships would reduce “the unnecessary and sometimes ugly intensity of current public debate.”⁴⁶ As Section II shows, this post-*Obergefell* narrative taps into criticisms of marriage that previously garnered little mainstream attention.

II RECASTING A VINTAGE IDEA

Rattling around long before *Obergefell* have been criticisms of marriage as a dated, patriarchal institution that it is wildly unfair to use to confer benefits

⁴⁰ Summer Ballentine, *A Lawmaker’s Solution for Marriage Debate: Remove the State*, AP NEWS (Dec. 30, 2016), <https://apnews.com/efcd0917b4d04b2ba05126c7557d1bf2/lawmakers-solution-marriage-debate-remove-state>.

⁴¹ H.B. 62, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017).

⁴² *Id.* at 451.125.1(5). Out-of-state marriages would be treated as domestic partnerships. *Id.* at 451.125.1(7).

⁴³ Alisa Nelson, *Missouri Legislator Says His Bill Would Defuse Some Controversy in Gay Weddings Resolution*, MISSOURINET (Dec. 1, 2016), www.missourinet.com/2016/12/01/missouri-legislator-says-his-bill-would-diffuse-some-controversy-in-gay-weddings-resolution/.

⁴⁴ See Section III.B.3. ⁴⁵ Stephen Macedo, JUST MARRIED 121 (2015). ⁴⁶ *Id.* at 120.

upon families. As this section shows, critiques have long called for marriage to be abolished.

Professor Krause argues that the “close association of marriage and religion” in our country’s history is a thing of the past:

[O]nce upon a time not long ago, marriage was a near-mandatory institution. “Family” was the all but inevitable consequence of marriage, and the unacceptability of women in the marketplace limited women to family roles. Then it made sense to deal with marriage and family as one unitary concept – even if there was the occasional infertile couple, or the occasional female professional.⁴⁷

To successfully adapt “civil regulation of marriage and the family” to society’s current needs, Krause believes, “we must start by separating civil marriage from our continuing romance with religious images of ‘marriage’ as . . . a natural virtue.”⁴⁸ A state’s interest in adults’ relationships should be guided by a single consideration: “[W]hat does this or that union do for society, and what rights and rules should society provide in return?”⁴⁹ Part and parcel of this “pragmatic, rational approach” is for the state to extend “social benefits and privileges” to a given status, however triggered, leaving “sentiment, religion, love and romanticism . . . to the personal sphere.”⁵⁰ Elsewhere in this volume, Weiner (Chapter 11) argues that society should leave state-supported marriage in place but build up duties outside marriage to reflect the reality of non-marital co-parenting.

Those who would “abolish marriage” entirely advance three distinct reasons: “favoring marriage discriminates against cohabitants and single people,” the “state has no legitimate reason to define the terms of intimate relationships[,] and marriage law is an ineffective means to protect children and caregivers.”⁵¹ For instance, Professor Paula Ettelbrick laments the “cruel punishment of families in crisis who don’t fit the [marriage] mold.”⁵² She argues that “families are actually strengthened when we expand our view of ‘The Family’ because our policies have greater reach to support the value of families.”⁵³ In part, Ettelbrick’s claim rests on the notion that non-marital partners are “no less committed to seeing their loved one through an illness or financial crisis than

⁴⁷ Harry Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex – Or Not at All?* 34 FAM. L. Q. 271, 284 (2001).

⁴⁸ *Id.* at 283–84. ⁴⁹ *Id.* ⁵⁰ *Id.* at 276, 284.

⁵¹ Strauss, *supra* note 28, at 1263 (summarizing arguments).

⁵² Paula Ettelbrick, *Domestic Partnerships, Civil Unions, or Marriage; One Size Does Not Fit All*, 64 ALB. L. REV. 905, 909 (2001).

⁵³ *Id.* at 912.

spouses.”⁵⁴ Ettelbrick urges the state to “provide economic and legal supports to a wider range of families, and stop stigmatizing any family structure that is not packed neatly into the marriage or biological parent box.”⁵⁵ As appealing as the push for marriage equality was, it “incorporated the politics of preference for marriage as the centerpiece of family,”⁵⁶ threatening to wipe out substantial and important progress in recognizing a broader conception of what constitutes a family – and therefore what should be encouraged and supported by the state.⁵⁷

Although Ettelbrick appears to contemplate multiple institutions receiving state support, not just marriage alone, others, such as Professor Martha Fineman, contend that as long as marriage exists with any state support, “[i]t will continue to occupy a privileged status and be posited as the ideal, defining other intimate entities as deviant.”⁵⁸ Echoing Fineman, Professor Nancy Polikoff believes that the same-sex marriage “valorizes the current institution,” one she sees as “grossly hierarchical” and “gendered.”⁵⁹ By “mimic[king] the worst of mainstream society,” the same-sex marriage movement failed to reach for “a truly transformative model of family for all people.” For this group, support for marriage must be scuttled.

Some question the utility of marriage as “a bright line to identify those couples whose intimacy is presumed to be deserving of such protection.”⁶⁰ Professor Patricia Cain argues the state should seek to protect couples who “demonstrate personal commitment to a shared life” through private contracts, not public status.⁶¹ For Cain, marriage can be “abolished so long as intimacy, a negative liberty, is protected.”⁶² Of course, the current tax system would have to be changed to make benefits available on some basis other than marital status, as Cain acknowledges.⁶³ But in a world without marriage, couples could formalize their commitment to each other through private contracts, much as Indiana Representative Lucas would allow.

⁵⁴ *Id.* at 909. ⁵⁵ *Id.* at 912. ⁵⁶ *Id.* ⁵⁷ *Id.*

⁵⁸ Martha Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 234–35 (1995) (arguing the state should support the “mother-child dyad” as the core, legally privileged, family connection).

⁵⁹ Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”*, 79 VA. L. REV. 1535, 1536, 1541 (1993).

⁶⁰ Patricia Cain, *Imagine There’s No Marriage*, 16 QUINNIPAC L. REV. 27, 42 (1996).

⁶¹ *Id.* at 43. ⁶² *Id.* at 30.

⁶³ *Id.* at 49. Among other things, Professor Cain notes that tying benefits to marital status undercuts a couple’s right to privacy if they must prove the legitimacy of their relationship to receive the benefit. *Id.*

Thus, in Cain's conception, couples could contract as to property rights, support rights, children, or other items of concern to them, as Bix (Chapter 9, this volume) and Brinig (Chapter 10, this volume) both show couples do after divorce. Cain sees this as advantageous because "[n]ot all relationships are the same. Customized agreements that reflect the reasonable expectations of the parties make it easier for the couple to live up to those expectations."⁶⁴ Breach of contract would become the exclusive remedy, obviating the need for marriage and divorce law.⁶⁵

Social progressives are not the only ones to advocate for limiting the state's role in marriage before *Obergefell*. Religious leaders have long expressed concern about the melding of religious and civil marriage. In 1880, Pope Leo XIII issued an encyclical on "Christian marriage," warning that shared authority over marriage invades what is properly an ecclesiastical sphere.⁶⁶ Shared authority is troubling because "when the Church exercises any [power over marriage], [men] think that she acts either by favor of the civil authority or to its injury" when matrimony should be the "subject of the [Church's] jurisdiction."⁶⁷ Men, Pope Leo contended, will "endeavor to deprive [marriage] of all holiness, and so bring it within the contracted sphere of those rights which, having been instituted by man, are ruled and administered by the civil jurisprudence of the community."⁶⁸

Some modern scholars echo this view. Shortly after the country's first same-sex marriage decision, *Goodridge v. Department of Public Health*⁶⁹ in 2009, Professor Daniel Crane urged a return to religion of exclusive control over the social phenomenon known as marriage. Religious authorities should want this, he contended, because it would protect their autonomy from the state.⁷⁰ Crane believes religious communities should prepare standard-form religious agreements that believers can use to reflect their religious understandings of marriage, bounded only by "minimal norms of [a] liberal democratic society."⁷¹

Professor Edward Zelinsky advocates for a "multiplicity of contractual regimes" that couples can enter into instead of marriage, which will better

⁶⁴ Cain, *supra* note 60, at 43. ⁶⁵ *See id.*

⁶⁶ Letter from Pope Leo XIII to the Patriarchs, Primate, Archbishops, and Bishops of the Catholic World in Grace and Communion with the Apostolic See (Feb. 10, 1880), http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_10021880_arcanum.html.

⁶⁷ *Id.* ⁶⁸ *Id.* ⁶⁹ 798 N.E.2d 941 (Mass. 2003).

⁷⁰ Daniel A. Crane, A 'Judeo-Christian' Argument for Privatizing Marriage, 27 CARDOZO L. REV. 1221, 1250 (2006).

⁷¹ *Id.* at 1254.

“satisfy their most intimate consumer preferences.”⁷² The state can eliminate marriage as a status because “as a practical matter, rules . . . governing married couples [with respect to parentage, custody, immigration, inheritance, and other matters] increasingly apply outside of marriage.”⁷³ Further, marriage carries not just benefits but disadvantages that “penalize marriage.”⁷⁴ Because family law has long permitted spouses to privately order their affairs with prenuptial agreements, Zelinsky believes couples will be better served with tailor-made arrangements: “People will feel more committed to domestic arrangements that they have affirmatively chosen.”⁷⁵ Zelinsky would not invalidate agreements “except upon very compelling grounds,” for example, to protect minor children.⁷⁶

For everyday people, the notion that the government should get out of the marriage business holds commonsense appeal. It has become commonplace on blogs and social media to see sentiments such as these: “Marriage is truly [sic] a religious ceremony, o[f] no concern to the civil government.”⁷⁷

III WHAT IS WRONG WITH GETTING THE GOVERNMENT OUT OF MARRIAGE

Transforming the state’s relationship to marriage – whether by substituting a customized legally recognized contract for marriage’s off-the-rack benefits or by shifting the state’s largesse to something other than marriage – risks disturbing not only the complicated structure of benefits tied to marriage, with unintended consequences. It risks disturbing the web of healthy norms surrounding marriage.

A What Is Wrong with the Overarching Idea

As a society, we are in far too deep to unwind the civil and religious aspects of marriage. Radically transforming the state’s relationship to marriage would raise thorny questions about the benefits now accorded to married couples in Social Security, tax, immigration, employee benefits, healthcare, and many other dimensions.⁷⁸ Getting the government out of marriage is not as “simple

⁷² Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161, 1164, 1215 (2006).

⁷³ *Id.* at 1163. ⁷⁴ *Id.* at 1207-08. ⁷⁵ *Id.* at 1184, 1164. ⁷⁶ *Id.* at 1184.

⁷⁷ See generally Robin Fretwell Wilson, *Getting Government Out of Marriage*” Post Obergefell: *The Ill-Considered Consequences of Transforming the State’s Relationship to Marriage*, 2016(4) *ILL. L. REV.* 101 (2016).

⁷⁸ See *supra* note 26.

as waving a magic wand”: it would complicate “things like spousal privilege”; entail “remov[ing] probate courts and divorce courts . . . put[ting] them back in the hands of the church”; and require “completely reform[ing the] tax code and tax law” tied to “marital status” – in other words, countless changes because “[t]he state’s regulation of marriage is older and far more embedded than even the welfare state itself.”⁷⁹

Legislative proposals for back-walking the state’s regulation of marriage uniformly overlook the millions of Americans who have married or aspire to marry. In 2014, a total of 2,140,272 couples in America were married,⁸⁰ representing a slim majority, 44%, of all adults.⁸¹ Although younger Americans are delaying marriage and the fraction of never-married individuals has more than doubled since 1960,⁸² 85% of all Americans “will marry at least once.”⁸³ Of those marriages, 50% to 60% “will last until death.”⁸⁴ Thus, marriage remains the primary vehicle for protecting individuals against hardship and vulnerability within the family. Even if we collectively would not accord significant state support to marriage if deciding the question today, proposals to transform the state’s relationship to marriage have not explained whether or how the proposal would treat couples who married believing that “marriage” provided all of the needed protections.⁸⁵

Legislative proposals for divorcing the state from marriage also fail to consider whether other states, the federal government, and private parties would accord the same rights to contracts between parties or domestic partnerships as they do to marriage. An entire scaffolding of societal benefits rests on marital status, including entitlement to spousal benefits from employers; the ability to participate in Social Security as a result of a spouse’s work history, file

⁷⁹ Steve Deace, *Laissez Faire Marriage*, WESTERN JOURNALISM (March 21, 2013), www.westernjournalism.com/laissez-faire-marriage/?utm_source%3DTwitter%26utm_medium%3DPostSideSharingButtons%26utm_content%3D2016-12-29%26utm_campaign%3Dwebsitesharingbuttons.

⁸⁰ The marriage rate in 2014 of 6.9 marriages per 1000 people represents a decrease from 8.2 marriages per 1000 people in 2000. See *National Marriage and Divorce Rate Trends*, CDC (Nov. 23, 2015), www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.

⁸¹ Frank Newport & Joy Wilke, *Most in US Want Marriage, But Its Importance Has Declined*, GALLUP (Aug. 2, 2013), www.gallup.com/poll/163802/marriage-importance-dropped.aspx.

⁸² Wendy Want & Kim Parker, *Chapter 2: Trends in the Share of Never-Married Americans and a Look Forward*, PEW RESEARCH CENTER (Sept. 24, 2014), www.pewsocialtrends.org/2014/09/24/chapter-2-trends-in-the-share-of-never-married-americans-and-a-look-forward/.

⁸³ See Ron L. Deal, *Marriage, Family, & Stepfamily Statistics*, SMARTSTEPFAMILIES, www.smartstepfamilies.com/view/statistics (last visited Dec. 28, 2015).

⁸⁴ Strauss, *supra* note 28, at 1266.

⁸⁵ “Marriage,” when used in quotes, means the legal status regulated by the state, to which benefits and obligations attach.

taxes jointly, or hold property jointly; and thousands of sundry benefits attached to marriage.⁸⁶

Just as important, forcing couples to contract or enter domestic partnerships may put at risk the recognition of the relationship by other states. Many couples marry in one state and later move to another.⁸⁷ State laws address what a couple must do to avail themselves of the new state's marriage and divorce laws. But if a couple began in Missouri and Indiana and contracted or entered a domestic partnership, it is unclear whether a later state would have the jurisdiction to decide rights between the couple, or at death, or the desire to do so.

Equally problematic, many protections attached to marriage apply during the pendency of the relationship, shielding spouses, for example, generally from testifying against each other or sharing marital confidences.⁸⁸ Absent such protections, adults in an intimate relationship occupy more of an arm's length relationship and cannot freely and securely share their deepest concerns.

Proposals to substitute contract for status overlook the value of off-the-rack rules that couples assume with the simple act of marrying. "Intimate relationships involve rights and expectations that deserve legal protection" but are hard to enforce "without imposing status norms on couples. Marital status offers a way to manage this tension."⁸⁹ For this reason,

The state cannot simply get out of the marriage business. As long as intimates can bring legal claims against one another in tort, contract, or equity, the law must determine who has obligations, how those obligations arise, how they change, and what their default content will be – and these legal rules will be tailored to the nature of our relationships. If a state abolished intimate-relationship licenses, then private law would refashion ad hoc categories of intimate status.⁹⁰

Society has seen fundamental transformations in "marriage" before. More recently, "no fault divorce brought a huge change to the meaning of civil

⁸⁶ GAO-04-353R – Defense of Marriage Act: Update to Prior Report; Morgan Quinn, *What's Cheaper: Marriage or Domestic Partnership?* GOBANKINGRATES (Feb. 4, 2015) www.gobankingrates.com/personal-finance/whats-cheaper-marriage-domestic-partnership/#.VqAi5D94fhM.mailto.

⁸⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015); Tom Oldham, *Marital Property Rights of Mobile Spouses When They Divorce in the United States*, 42 FAM. L.Q. 263 (2008).

⁸⁸ See Walter Wadlington, Raymond C. O'Brien, & Robin Fretwell Wilson, DOMESTIC RELATIONS: CASES AND MATERIALS 189 (7th edn. 2013); *Trammel v. US*, 445 US 40 (1980).

⁸⁹ Strauss, *supra* note 28, at 1310. ⁹⁰ *Id.* at 1287–88.

marriage,” although not one as great as the elimination of coverture.⁹¹ A lively debate continues to rage about whether no-fault divorce made it more likely people would in fact divorce.⁹² Social conservatives seeking to alter the relationship between marriage and the state generally see no-fault divorce as wreaking havoc on the institution of marriage.⁹³ Whatever one thinks about cleaving apart gender and marriage⁹⁴ – as *Obergefell* does – proposals to get the government out of marriage would work a far greater change than eliminating gender from the legal meaning of marriage. Just as significantly, marriage carries with it a set of positive norms that may be disrupted by a radical restructuring of the state’s relationship to marriage.

1 Marriage Is Regulated by Norms as Well as Law

Two notable changes have occurred to marriage in the past century – both of which offer a caution to those urging the state to back away from marriage. At the end of the 19th century, Married Women Property Acts eradicated coverture, the system by which a woman’s legal identity melded into her husband’s upon marriage, meaning she could not contract, sue or be sued, or hold property.⁹⁵ Ending coverture helped to hasten a conception of marriage as a “relationship between two spouses with equal rights and equal duties.”⁹⁶ Although the change did not precipitate marriage’s demise, the social understanding of marriage changed.

Whatever one thinks about different genders as a prerequisite to legal marriage,⁹⁷ proposals to get the government out of marriage would arguably work a far greater change. Marriage encourages positive norms

⁹¹ Douglas Laycock, *The Campaign Against Religious Liberty*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 243 (Schwartzman et al. eds., 2016).

⁹² Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 *AM. ECON. REV.* 608–27 (1998); Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 *J. OF LAB. ECON.* 799, 799 (2004).

⁹³ Scott Keyes, *Conservatives Aren’t Just Fighting Same-Sex Marriage. They’re Also Trying to Stop Divorce*, *WASH. POST* (Apr. 11, 2014), www.washingtonpost.com/opinions/conservatives-arent-just-fighting-same-sex-marriage-theyre-also-trying-to-stop-divorce/2014/04/11/5f649bd6-bf48-11e3-bcec-b71ee10e9bc3_story.html?utm_term=.39f261c106d8.

⁹⁴ See, e.g., Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 *HOFSTRA L. REV.* 1155 (2006); Macedo, *supra* note 45; Robert P. George, Sherif Girgis & Ryan T. Anderson, *The Argument Against Gay Marriage: And Why it Doesn’t Fail*, *PUB. DISCOURSE* (Dec. 17, 2010), www.thepublicdiscourse.com/2010/12/2217/.

⁹⁵ Martha Ertman, *PRIVATE ORDERING UNDER THE ALI PRINCIPLES: AS NATURAL AS STATUS*, 284, 295 (2006).

⁹⁶ Laycock, *supra* note 91, at 243. ⁹⁷ See Kar, Chapter 15, this volume, for competing views.

that may be disrupted by a radical restructuring of the State's relationship to marriage.

Most Americans "think marriage should be monogamous and [they] want it to last for life."⁹⁸ Marriage signifies "an obligation to be faithful, to give and receive help in times of sickness, and to endure hardships . . . Society enforces these ideals both formally and informally."⁹⁹ The "tangle of overlapping moral norms" around marriage includes "sexual fidelity, emotional fidelity, economic support (including financial and domestic services), emotional support, and relationship maintenance."¹⁰⁰

Norms, or societal rules that govern and enforce "collective behaviors *outside of the law*,"¹⁰¹ "operate over and are somehow accepted within particular groups or communities."¹⁰² Group members treat norms as "general requirements,"¹⁰³ even though they are neither recorded nor static.¹⁰⁴

The law plays an important role in shaping and reinforcing norms, over and above the "effect created by its [formal] sanctions."¹⁰⁵ Laws can "provide unmistakable evidence of a consensus," unifying a group around a new idea.¹⁰⁶ But laws can also undercut social norms. Whether the law has an impact depends on how many people feel a certain way about the subject the

⁹⁸ Sara McDougall, Book Review (reviewing John Witte, *THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY*, at xvii, 531 (2015)).

⁹⁹ *MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES* 306 (H. Elizabeth Peters & Claire M. Kamp Dush, eds., 2009); see also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1289 (1998) ("[M]arriage is subject to many tangible social conventions that announce and reinforce the parties' commitment. Beyond this, behavior in marriage is subject to long-standing societal expectations that tend to constrain the parties' freedom and influence them toward trustworthiness, fidelity, honesty, and altruism.").

¹⁰⁰ Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 91 IND. L.J. 1261, 1301 (2015); see also Elizabeth S. Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1910 (2000) ("[M]arital norms encourage sexual fidelity, openness, emotional sharing, and altruism.").

¹⁰¹ Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1713 (1996).

¹⁰² *Id.* Classic examples of norms include the general expectation that one should keep a promise. Stephen R. Galoob & Adam Hill, *Norms, Attitudes, and Compliance*, 50 TULSA L. REV. 613, 614, 619 (2015) (reviewing GEOFFREY BRENNAN ET AL., *EXPLAINING NORMS* (2013)) (quotations omitted).

¹⁰³ Galoob & Hill, *supra* note 104, at 614.

¹⁰⁴ Or indeed, formally recordable at all. Posner, *supra* note 103, at 1699, 1713.

¹⁰⁵ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339 (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 391 (1997).

¹⁰⁶ McAdams, *Origin*, *supra* note 105, at 402.

law is regulating.¹⁰⁷ The risk here is that transforming the state's relationship to marriage will fray the tissue of norms surrounding marriage.

2 Marriage Benefits from the Participation of Religious Couples

Despite the withering criticisms of marriage described in Section II, married couples who self-identify as religious strengthen the norms around marriage. In one study of 4587 married couples, those who attended church regularly had “the lowest risk of divorce” even after controlling for other demographic factors.¹⁰⁸ This finding is not isolated. Reviewing ninety-four studies of religion and marital or parental functioning published in journals since 1980, and using meta-analytic techniques to summarize key quantitative findings across seventy-eight studies, Professor Annette Mahoney and colleagues found “greater religiousness appeared to decrease the risk of divorce” in multiple national surveys.¹⁰⁹ Additionally, “couples belonging to the same denomination or faith tradition” experienced a “better marital adjustment.”¹¹⁰

To be sure, religious believers may struggle with conflicting beliefs: a sense of duty to remain bound arrayed against the belief that God would also want believers to be “happy,” which may not be possible were they to remain married.¹¹¹ Further, religious observance is not an inoculant against

¹⁰⁷ Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 789 (1998) (discussing the “status quo equilibrium”).

¹⁰⁸ Vaughn R. A. Call & Tim B. Heaton, *Religious Influence on Marital Stability*, 36 J. SCI. STUDY RELIGION 383 (1997) (using panel data for 4587 married couples from the National Survey of Families and Households). Conversely, “differences in patterns of religious attendance between spouses create problems for a marriage that cannot be explained by the demographic composition of other aspects of the marriage included in this analysis.” *Id.* at 387–88. The reasons why church attendance exerts this positive effect may differ for men and women. Call and Heaton found that the wife's views of marital commitment and non-marital sex were more important to marital stability than the husband's. *Id.*

¹⁰⁹ Annette Mahoney et al., *Religion in the Home in the 1980s and 1990s: Meta-Analytic Review and Conceptual Analysis of Links Between Religion, Marriage, and Parenting*, 15 J. FAM. PSYCH. 559, 560 (2001); see also THE NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2012, at 72, www.stateofourunions.org/2012/SOOU2012.pdf; Ron L. Deal, *Marriage, Family, & Stepfamily Statistics*, SMARTSTEPFAMILIES, www.smartstepfamilies.com/view/statistics (last visited Dec. 28, 2015). Findings of increased marital stability may reflect delayed divorce. Luiza Y. W. Chan & Tim B. Heaton, *Demographic Determinants of Delayed Divorce*, 13 J. OF DIVORCE 97, 102 (1989).

¹¹⁰ Annette Mahoney et al., *Marriage and the Spiritual Realm: The Role of Proximal and Distal Religious Constructs in Marital Functioning*, 13 J. FAM. PSYCHOLOGY 321, 321 (1999).

¹¹¹ See Steven M. Harris, *How Faith Influences Divorce Decisions*, INSTITUTE FOR FAMILY STUDIES (March 13, 2017), <https://ifstudies.org/blog/how-faith-influences-divorce-decisions>.

divorce.¹¹² Still, these findings suggest that religious marriages contribute to marriage's overall stability.¹¹³

Religious couples are happier in their marriages, too.¹¹⁴ When marriage and religion are integrated, couples perceive greater benefits from being married, report less conflict, engage in more verbal collaboration with each other and less “verbal aggression and stalemate”; they have “greater global marital adjustment.”¹¹⁵ Married couples who pray together report better relationships.¹¹⁶

True, engaging in “more joint religious activities” may make couples more satisfied by virtue of time spent together.¹¹⁷ Shared expectations “for the marital relationship” because both have a “relationship with God” may foster intimacy in the marriage that explains these results.¹¹⁸ Couples say they “sojourn” together.¹¹⁹ Shared commitment appears to be explanatory, too.¹²⁰ Professor Samuel Perry found that religion influenced marital quality positively when the spouses share a commitment to religion, but negatively when one spouse is religious and the other is not.¹²¹ Across dozens of studies, “greater religiousness . . . facilitate[s] marital functioning,” although the effects are “small.”¹²² The benefits do not disappear among the most religious couples.¹²³

Children benefit, too. Individual studies find that “greater parental religiousness relates to more positive parenting and better child

¹¹² See Brinig, Chapter 10, this volume; Bix, Chapter 9, this volume.

¹¹³ In some religious groups, earlier and more frequent child bearing occurs, lowering income and increasing divorce risk. Jennifer Glass & Philip Levchak, *Red States, Blue States, and Divorce: Understanding the Impact of Conservative Protestantism on Regional Variation in Divorce Rates*, 119 AM. J. SOC. 1002, 1008–09 (2014).

¹¹⁴ Rachel Lile Colbert, Scale Development of the Religious Marital Factor Measure (Mar. 13, 2007) (unpublished Psy.D dissertation, Regent University), gradworks.umi.com/32/56/3256899.html (online questionnaire). Although positive for both genders, religiosity may influence men and women differently. See, e.g., Gary L. Hansen, *The Effect of Religiosity on Factors Predicting Marital Adjustment*, 50 SOC. PSYCHOL. Q. 264, 265 (1987).

¹¹⁵ Mahoney et al., *supra* note 110.

¹¹⁶ Christopher G. Ellison et al., *The Couple That Prays Together: Race and Ethnicity, Religion, and Relationship Quality Among Working-Age Adults*, 72 J. MARRIAGE FAM. 963, 963 (2010).

¹¹⁷ Mahoney et al., *supra* note 110, at 333. ¹¹⁸ Colbert, *supra* note 114. ¹¹⁹ *Id.*

¹²⁰ See generally Christopher G. Ellison & Kristin L. Anderson, *Religious Involvement and Domestic Violence Among US Couples*, 40 J. SCI. STUDY RELIGION 269, 273–74 (2001).

¹²¹ Samuel L. Perry, *A Match in Heaven? Religion-Based Marriage Decisions, Marital Quality, and the Moderating Effects of Spouse's Religious Commitment*, 123 SOC. INDICATORS RES. 203, 223 (2015).

¹²² Mahoney et al., *supra* note 110, at 560.

¹²³ See Margaret R. Wilson & Erik E. Filsinger, *Religiosity and Marital Adjustment: Multidimensional Interrelationships*, 48 J. MARRIAGE & FAM. 147 (1986).

adjustment.”¹²⁴ A review of the literature concluded that “[b]eing married and being involved in religious activities are generally associated with positive effects in several areas, including physical and mental health, economic outcomes, and the process of raising children.”¹²⁵

Religious couples experience less violence. This “inverse association between religious attendance and abuse persists” after controlling for the degree of social support and integration, substance and alcohol abuse, depression and low self-esteem.¹²⁶ The positive effect of church attendance “is stronger for African American men and women and for Hispanic men,” groups that otherwise “experience elevated risk.”¹²⁷ It is not surprising that married religious couples would experience “far-reaching, positive effects”: marriage and religion “influence similar domains of life” and act through pathways that share “important parallels.”¹²⁸

But religiosity is not a panacea against unhappiness or dysfunction.¹²⁹ Some studies report mixed results, for example, that “religiosity” improved marital satisfaction among “less neurotic husbands,” but not “more neurotic” ones.¹³⁰

Religiosity has its costs. It can increase marital dependency – that is, believing that one’s life would shatter or “be worse should the marriage end,” especially for more fundamentalist believers.¹³¹ It may discourage help seeking, isolating spouses in dysfunctional relationships.¹³²

Nonetheless, across large groups, those who are religiously married have marriages that function positively along a number of dimensions. They are, on

¹²⁴ Annette Mahoney et al., *Religion in the Home in the 1980s and 1990s: Meta-Analytic Review and Conceptual Analysis of Links Between Religion, Marriage, and Parenting*, 15 J. FAM. PSYCHOL. 559, 560 (2001).

¹²⁵ Linda J. Waite & Evelyn L. Lehrer, *The Benefits from Marriage and Religion in the United States: A Comparative Analysis*, 29 POPULATION DEV. REV. 255, 255–56 (2003).

¹²⁶ For men, the “protective effect” against domestic violence occurs only for those who attend church weekly, but not less frequently; for women, church attendance, however frequent, correlated with less violence. Christopher G. Ellison & Kristin L. Anderson, *Religious Involvement and Domestic Violence Among US Couples*, 40 J. SCI. STUDY RELIGION 269, 273–74 (2001).

¹²⁷ Christopher Ellison et al., *Race/Ethnicity, Religious Involvement, and Domestic Violence*, 13 VIOLENCE AGAINST WOMEN 1094, 1100 (2007).

¹²⁸ Waite & Lehrer, *supra* note 125, at 255–56.

¹²⁹ See Kieran T. Sullivan, *Understanding the Relationship Between Religiosity and Marriage: An Investigation of the Immediate and Longitudinal Effects of Religiosity on Newlywed Couples*, 15 J. FAM. PSYCHOL. 610 (2001). See also Offit, Chapter 12, this volume; Wilson and Sanders, Chapter 13, this volume.

¹³⁰ Sullivan, *supra* note 129.

¹³¹ John Wilson & Marc Musick, *Religion and Marital Dependency*, 35 J. SCI. STUDY RELIGION 30, 32, 39 (1996) (reporting more marital dependency among more conservative Protestant denominations).

¹³² Sullivan, *supra* note 129.

balance, happier than nonreligious married couples, less likely to divorce, more collaborative, and more faithful, and less likely to report domestic violence, even after controlling for other demographic factors. This empirical snapshot, although far from perfect,¹³³ illuminates precisely what is at stake if religious marriage somehow withdraws from the public sphere.

3 How Would Transforming the Government's Relationship to Marriage Disturb Marriage Norms?

Indiana Representative Lucas's contractual model, like Missouri Representative Berry's shift to domestic partnerships and academic proposals described later, would sever the relationship between religious marriage and the state-recognized union. In neither instance would religious marriage solemnization cause the state-recognized union to spring into existence. The religious marriage would now become separable from the state-supported union.

Cleaving apart what has always been intertwined aspects of marriage – civil and religious – carries the risk that the norms and understandings surrounding marriage become torn or frayed. How would this occur? It would not occur if people who enter the state-sponsored union, by contract or registration as a partnership, still understand it to be marriage – and if the same fraction of people continue to embrace that state-sponsored union, whatever it is called, *and* also religiously marry. There would then be no reason to worry about altering the norms and legal understandings around marriage. The title would change, and little else.

If, however, people entering the new state-sponsored union come over time to see it as something wholly distinct from marriage as we now understand it, then different norms governing that union may develop. Indeed, longtime marriage critics have argued for something other than “marriage” precisely to shed patriarchy and other negative norms they ascribe to marriage.¹³⁴ There is no assurance that the security, satisfaction, and safety many enjoy in their marriages will carry over to this new union. Moreover, if couples can contract for some but not all the protective features associated with marriage now, there is every reason to believe norms around the union would change.

¹³³ Donald H. Baucom, *Religion and the Science of Relationships: Is a Happy Marriage Possible?* 15 J. FAM. PSYCHOL. 652 (2001) (arguing for more specific hypothesis and study of mechanisms).

¹³⁴ See Fineman, *supra* note 58; Polikoff, *supra* note 59.

Religious marriage is shoring up the marriage culture through long-term, stable, monogamous relationships in which both parties are physically secure. As a part of the broader marriage culture, religious marriage increases the fraction of well-functioning marriages among all married couples, reinforcing the norms associated with the cultural status known as “marriage” for everyone.

Substituting a different substrate for state benefits changes the relative attractiveness of marriage to some couples and may affect the number of couples who ultimately marry. It is an article of faith that the benefits accorded to couples when they assume the mantle of marriage “channels” couples into that status.¹³⁵ By no longer privileging all marriages, including religious ones, society impoverishes the cluster of goods that motivates couples to marry. True, religious couples have independent reasons to continue to marry (such as the belief that God sanctifies the relationship or because they are pressured, or encouraged, by their religious community) – in which case, they may continue to share in norms around “marriage.” Less religious couples may not share those reasons, however, with fewer participating in the positive norms around marriage.

Unwinding the civil and religious aspects of marriage would harm not only the marriage culture but religious marriages, too. If religious adherents never take an additional step to ensure their marriages have civil effects, they would lose out on the valuable protections. While religiously married couples benefit from a religious experience of marriage, none of the studies previously mentioned show that religious marriages function well *only* because of religious commitments. The civil regulation of marriages likely reinforces religious norms of permanence and sharing. Civil exit rules increase the transaction cost of divorce and force sharing of marital property or one’s income through property division and alimony rules. This may encourage struggling religious couples to work on their relationships. In other words, the difficulty of civil exit strengthens marriage.¹³⁶

A retreat of religious marriage from the public sphere also risks affecting the social signal marriage sends. The *First Things* pledge to solemnize religious

¹³⁵ Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

¹³⁶ Cf. Sarah W. Whitton et al., *Attitudes Toward Divorce, Commitment, and Divorce Proneness in First Marriages and Remarriages*, J. MARRIAGE & FAMILY 276 (2013) (observing that the easier it is to exit a relationship, the more often people will do so, “making the marriage more fragile”). Religious communities may also lose an important entrance into the couple’s life – the religious wedding – which can help bind couples more strongly to a religious faith community.

marriages but refuse to assist with civil effects places a burden on those who religiously marry to take additional steps to enter the state-supported union, with its attendant benefits and protections.¹³⁷ And so, too, does Representative Berry's proposal to change Missouri's existing regulation of marriage. If couples religiously marry but never cement the state-recognized union, the subset of religious-only marriages, which empirically are stronger relationships, may diverge from, and be seen as distinct from, the set of civil relationships. Put another way, what was once conceived of as a single thing – marriage – will increasingly be seen as two distinct categories, which may or may not share a single set of norms.

Indeed, it would be quite remarkable if basic parameters of the new state-recognized union did not diverge from those associated now with marriage. Just as one cannot turn over a glass of ice water and expect only the water to come out, leaving the ice behind, severing the state-recognized union from religious marriage assumes the two aspects can be divorced without losing religion's positive influence on the civil relationship.

While it is true that some countries long ago stripped religious authorities of the power to bind couples with legal effect, leaving "marriage" entirely to civil authorities, political leaders such as Germany's Bismarck rationalized the state's monopoly over marriage as increasing its power over religion and individual citizens – outcomes that many would find problematic.¹³⁸ Moreover, in countries where civil authorities exercise exclusive control over marriage, a significantly smaller fraction of citizens conduct their intimate relationships within marriage.¹³⁹ Countless differences between these cultures and their legal systems may account for differences in how couples

¹³⁷ Some people marry for the romantic cache. See STATE OF OUR UNIONS, *supra* note 111. If marriage is divorced from the state, some couples may marry for the romantic meaning, if not the religious import despite available alternatives, but likely will gravitate to religious marriage, not the benefit-conferring civil status.

¹³⁸ See Heiner de Wall & Andreas Gestrich, *Constitutional Complexity and Confessional Diversity*, in THE DYNAMICS OF RELIGIOUS REFORM IN NORTHERN EUROPE, 1780–1920: POLITICAL AND LEGAL PERSPECTIVES 149, 174–80 (Keith Robbins ed., 2010).

¹³⁹ See Laurie DeRose et al., *Family Instability and Early Childhood Health in the Developing World*, WORLD FAMILY MAP 14–16 (2014), worldfamilymap.ifstudies.org/2014/articles/family-instability-and-early-childhood-health (reporting highest levels of cohabitation in Europe and Latin America); Omar G. Encarnación, *Why Latin American Courts Favor Gay Rights*, N.Y. TIMES (Jan. 29, 2014), www.nytimes.com/roomfordebate/2014/01/29/why-is-latin-america-so-progressive-on-gay-rights (describing Latin America's system of civil marriage only); Jonathan Luxmoore, *European Countries Distinguish Between Religious, Civil Marriages*, NAT'L CATHOLIC REP. (Apr. 15, 2015), www.ncronline.org/news/global/european-countries-distinguish-between-religious-civil-marriages (describing separation of civil and religious marriage in Europe).

structure, and the state regulates, intimate relationships – but the increasing irrelevancy of marriage in these countries should give current proponents pause.

The social cues signaling one is married may change, as well. Today, religious marriage and civil marriage are outwardly indistinguishable to the public because married couples, whether religious or not, usually signal their commitment by wearing wedding rings or otherwise informing the world of their status.¹⁴⁰ Indiana Representative Lucas's proposal to "get the government out of marriage" effectively erases the status now known as civil marriage, substituting a private contractual regime. Individuals who contract may or may not continue to outwardly declare themselves married. If they do not declare themselves as married, one would expect over time that different norms would develop around contractual, intimate relationships. Couples who previously may have married civilly increasingly may not share, or buy into, many norms now associated with marriage.

In short, whether one erases the civil status now known as "marriage" – or leaves the civil part to mere contract – there is the risk that fewer Americans will participate in relationships with the protective features of religious marriage. Overall, the religious marriage culture would suffer by becoming more isolated and less germane.

Society should care about this outcome if fewer children are raised in households that benefit from protective norms, including long-term stability, faithfulness, and less domestic violence.¹⁴¹ As with many things affecting the family, the gravest impact may fall on the most vulnerable Americans. Professor Helen Alvaré, an adviser to Pope Benedict XVI's Pontifical Council for the Laity, believes those who would suffer most from the change would be "the poor, new immigrants and racial minorities."¹⁴² Alvaré argues that "[t]he last thing [the vulnerable] need is for religious people, and religious institutions – who have and practice a thick form of marital commitment, with a long history of overlap with civil marriage – to abandon the public square by

¹⁴⁰ The wearing of rings by both sexes has changed with time, with 80% of men wearing wedding rings after World War II, versus 15% "at the end of the Great Depression." Eric V. Copage, *Without This Ring, I Thee Wed*, N.Y. TIMES, Apr. 15, 2011, at ST14. Some committed non-marital couples wear rings, including gay couples who were once locked out of marriage, to signal permanence and commitment. Stephanie Hallett, *Gay Engagement: Which Etiquette Rules Apply?* HUFFINGTON POST (Dec. 08, 2011), www.huffingtonpost.com/2011/12/08/gay-engagement-rules_n_1132852.html.

¹⁴¹ See Weiner, Chapter 11, this volume, for an empirical snapshot of parenting outside marriage.

¹⁴² Brian Fraga, *Separating Religious and Civil Marriage*, OUR SUNDAY VISITOR (June 6, 2012), www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/8611/Separating-religious-and-civil-marriage.aspx.

removing the witness of marriage which we solemnize and practice as faithful, permanent and oriented to children.”¹⁴³

B Critiquing Individual Proposals to Get the Government out of Marriage

Many of the notions for getting the government out of the marriage business are critically “short on substance.”¹⁴⁴ This section critiques the variants on this idea.

1 First Proposal: Retrenching Religious Marriage from Civil Solemnization

One conception of getting the government out of the marriage business is for religious adherents to withdraw their marriages from the public realm. For proponents, foisting back onto the government the sole authority for civil solemnization avoids complicity with same-sex marriage.¹⁴⁵ The *First Things* pledge would accomplish this separation by solemnizing religious marriages but refusing to memorialize the civil marriage with state officials; the couple would have to seek a civil marriage separately.¹⁴⁶ The primary risk: the couple religiously marries but never takes the second step of civilly marrying – missing out on the state’s legal protections.

Of course, religious believers could “be married first in a civil ceremony and then, if they so choose, have the marriage blessed by the Church in a religious ceremony.”¹⁴⁷ The risk here is that couples civilly marry but may never bother to marry religiously. Some religious communities may not perceive this as a loss if the couple was never likely to participate in the community of believers. Presumably, however, solemnizing a marriage religiously is an

¹⁴³ *Id.*

¹⁴⁴ Stella Morabito, 5 *Questions For Libertarians Who Support Privatizing Marriage*, FEDERALIST (July 28, 2015), thefederalist.com/2015/07/28/5-questions-for-libertarians-who-support-privatizing-marriage/.

¹⁴⁵ See Shikha Dalmia, *Privatizing Marriage is a Terrible Idea*, REASON.COM (July 21, 2015), reason.com/archives/2015/07/21/privatizing-marriage-is-a-terrible-idea; see also *supra* notes 8 and 11.

¹⁴⁶ Of course, religious believers could “be married first in a civil ceremony and then, if they so choose, have the marriage blessed by the Church in a religious ceremony.” George J. Marlin, *After Obergefell: What is to be Done?* CATHOLIC THING (Aug. 8, 2015), www.thecatholicthing.org/2015/08/08/after-obergefell-what-is-to-be-done/ (speculating that the government will strip religion “of its powers to represent the state in marriage” if religious figures “stand[] [their] ground” and refuse to solemnize same-sex marriage).

¹⁴⁷ *Id.*

important introduction to a faith community, opening the possibility the couple become more active in the faith.

Collapsing religious marriage with civil marriage is a good thing: society wants religious marriages to have civil effects. Without civil effects, religious adherents will be stranded in the position of mere cohabitants under the law, leaving them with inadequate remedies.¹⁴⁸ In such a scheme, traditionally vulnerable dependents, such as women and children, lose. Even if child support is adequate, children suffer when their custodial parent, usually the mother, experiences severe financial strain.

To see the cataclysmic effect that a failure to secure marriage's civil incidents could have for women, one need look no farther than the eighty-five Shari'a courts operating throughout Great Britain.¹⁴⁹ As members of insular communities, many women who appear before these courts have religious marriages, but not civilly recognized ones. Such a system leaves women with no recourse other than the Shari'a court for dissolution of the marriage.

Under the school of Islamic law most often applied, the *Hanafi* school, the norms governing property division, spousal maintenance, and custody sharply depart from what would happen under British law if these women civilly divorced, resulting in outcomes that in the US would be against public policy. For instance, fathers receive custody of male children older than age seven and female children older than age nine upon divorce, without consideration of the child's best interests.¹⁵⁰ Men are entitled to divorce by unilateral proclamation, but a woman must satisfy certain requirements to end her marriage – not least of which is that she must sometimes buy her way out by paying back the *mahr* – a payment received by her for marrying – or by forfeiting the right to any deferred *mahr* that would otherwise be due.¹⁵¹ Women do not receive an equitable share of property acquired during the marriage and titled in the man's name, and receive alimony only for several months following divorce, known as the "*iddat* period."¹⁵² Not surprisingly, under British law, these women would receive considerably more protection, including equitable

¹⁴⁸ See Weiner, Chapter 11, this volume. In states recognizing common law marriage, vulnerable parties may become married by virtue of co-residence, agreement to be bound, and holding out as married; in that case, they would receive full marriage remedies. See John DeWitt Gregory, Peter N. Swisher & Robin Fretwell Wilson, *UNDERSTANDING FAMILY LAW* 36–38 (4th edn. 2013).

¹⁴⁹ Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in *MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION* (Joel A. Nichols ed., 2011).

¹⁵⁰ Robin Fretwell Wilson, *Privatizing Family Law in the Name of Religion*, 18 *WM. & MARY BILL RTS. J.* 925, Fig. 1 (2010).

¹⁵¹ *Id.* at Fig. 2. (discussing procedural hurdles to divorce for women). ¹⁵² *Id.* at Fig. 2.

division of the couple's assets, and alimony if the wife is unable to provide for herself.¹⁵³ Although an extreme example, when religious marriages have no civil effects, vulnerable parties may be left destitute and without access to their children.

Equally unconscionable results can occur upon a spouse's death. This is so because civil marriage provides important protections after death. Consider one hypothetical: a couple has two sons and one daughter; after the husband passes away, his wife, children, and both of his parents survive him. If British law governed the outcome in this case, the woman would receive 100% of her husband's estate upon his death. In the absence of a civilly recognized marriage, the outcome under the *Hanafi* school of Islamic law is starkly different: the widow now receives a mere 12.5% of her husband's estate.¹⁵⁴ Compounding the woman's plight, many families in Great Britain ignore their duties under Islamic law to care for divorced or widowed relatives, foisting the widow onto the social safety net rather than caring for her themselves.¹⁵⁵ Outside of civilly recognized marriage, the state does not have many tools to fix such unacceptable outcomes.

Of course, not all religious understandings will be as harsh as those described here. Moreover, some religious believers may seek to do right by an ex-spouse or widow, although they may be defeated in doing so by religious norms – for example, by Islamic rules limiting who can be named in a will.¹⁵⁶

Educating religious adherents to civilly bind themselves before or after religiously marrying is a possibility. The insularity of some religious communities will pose a challenge to such efforts, as might countervailing advice from other community members or religious leaders themselves.¹⁵⁷ Indeed, many religious communities that now see civil marriage as tainted likely would advise congregants to avoid what they see as the “black stain” of civil marriage post *Obergefell*.

2 Second Proposal: Scrapping State Support for Marriage in Favor of Enforcing Contracts

US Senator Rand Paul and Indiana Representative Jim Lucas propose abolishing state-sponsored marriage, leaving couples to contract for rights and obligations in the relationship. Indiana House Bill 1163, now before the legislature for a second year, would eliminate the state's off-the-rack regulation

¹⁵³ *Id.* at 930. ¹⁵⁴ *Id.* at 945. ¹⁵⁵ *Id.* at 947. ¹⁵⁶ *See id.*

¹⁵⁷ *See* Offit, Chapter 12, this volume; Wilson & Sanders, Chapter 13, this volume (discussing role of faith leaders).

of marriage, relying instead on couples to memorialize their own agreements for the relationship under Indiana contract law.¹⁵⁸ Age limits and other constraints that now apply to marriage would govern the ability to contract, dissolution would “happen through the courts,” and contract terms that would now be void in marital agreements would still be void.¹⁵⁹ Couples could contract around duties of support after a marriage, but not during it; they could decide not to share property; but contract terms that would imperil a child’s support or welfare would not be allowed.¹⁶⁰ Lucas believes House Bill 1163 to be “an all-around win” and marriage “wouldn’t change.”¹⁶¹

It is simply implausible that a couple’s relationship left to contract would substantively arrive at agreements that approximate the status of being married. Couples are unlikely to bargain for all the duties between spouses under civil law, if for no other reasons than a lack of knowledge or power. Would they know enough to require confidentiality of communications, or certain property distribution upon death?¹⁶²

When the state sets the terms of the relationship, it makes the benefits and risks easier to assume; permitting couples to privately set the terms of their relationship eliminates this channelling function of marriage.¹⁶³ Arguably, there are “social benefits to the way the state has structured marriage – such as the benefits that might come from the guarantee of an equal, or near-equal, division of marital resources upon divorce – benefits that might be lost if parties are allowed to alter the state-supplied terms.”¹⁶⁴

Equally troubling, couples rarely sign contracts now to privately order their marital affairs.¹⁶⁵ Cohabitants also rarely enter into agreements, and when they do, the agreements “rarely meet traditional standards for enforceable contracts.”¹⁶⁶ While “all but two American jurisdictions will enforce express cohabitation contracts,” some “states limit enforcement to express or written contracts, out of the same pragmatic concerns that underlie statutes of frauds,

¹⁵⁸ Wang, *supra* note 17. ¹⁵⁹ *Id.*

¹⁶⁰ H.B. 1163, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2017). ¹⁶¹ Wang, *supra* note 17.

¹⁶² See *supra* note 150 (discussing protections upon death).

¹⁶³ Carl E. Schneider & Margaret F. Brinig, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 157 (1996).

¹⁶⁴ See Brian H. Bix, *The ALI Principles and Agreements: Seeking a Balance Between Status and Contract*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 380 (Robin Fretwell Wilson ed., 2006).

¹⁶⁵ 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 (1998). There is a dearth of empirical studies of whether couples enter agreements, however. Merle Weiner, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW 396–97 (2015).

¹⁶⁶ Strauss, *supra* note 28 at 1296.

such as the ease of false allegations, the lengthiness of court battles, and the difficulty of determining precise terms.”¹⁶⁷ Some things that couples may well value and would contract for, such as sexual access or fidelity, cannot form the basis for an enforceable agreement, jeopardizing enforcement of other bargained-for exchanges around property, duties of support, or financial interdependence.¹⁶⁸

A purely contractual regime raises concerns about the bargaining power and capability of the parties.¹⁶⁹ Bargaining for protections is fraught with pitfalls: “[I]t is hard to think clearly about the financial terms of the end of a romantic relationship when one is at an early period of the relationship.”¹⁷⁰ Overly optimistic soon-to-be newlyweds may view their relationship through “rose-colored glasses,” discounting the possibility that they will ever break up.¹⁷¹ Although slightly less than 50% of first marriages end in divorce, 100% of engaged couples say they will not.¹⁷² Any bargain reached is only valid if there is full disclosure.¹⁷³ Finally, most couples “slide into” cohabiting, and many slide from cohabiting into marriage; there is no opportunity to reach express agreements before entering the relationship.¹⁷⁴

Reducing the social understanding around marriage to whatever terms a couple can agree to skips an important step: solemnization of the relationship.¹⁷⁵ Whether by a civil authority or a religious figure, solemnization helps drive home the significance of marriage – something the state quite rightly wishes to reinforce.

¹⁶⁷ *Id.* at 1278.

¹⁶⁸ AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION CH. 1 (2000) (recommending non-enforcement of any term that would introduce fault); *In re Mehren*, 118 Cal. App. 4th 1167, 1171 (Cal. Ct. App. 2004); *Diosdado v. Diosdado*, 97 Cal. App. 4th 470, 496–97 (Cal. Ct. App. 2002); *Unif. Premarital and Marital Agreements Act*, NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS § 10(b)(3) (2012), www.uniformlaws.org/shared/docs/premarital%20and%20marital%20agreements/2012_pmaa_final.pdf (making unenforceable a term that purports to modify the grounds for a court-decreed separation or marital dissolution) [hereinafter UPMAA].

¹⁶⁹ Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1312 (2006).

¹⁷⁰ See Bix, *supra* note 166, at 379 (discussing “bounded rationality”).

¹⁷¹ *Social Indicators of Marital Health & Well-Being*, STATE OF OUR UNIONS (Aug. 27, 2016), www.stateofourunions.org/2011/social_indicators.php#divorce.

¹⁷² Sanger, *supra* note 169. ¹⁷³ See UPMAA § 9(d).

¹⁷⁴ Jeffrey H. Larson & Thomas B. Holman, *Premarital Predictors of Marital Quality and Stability*, 43 FAM. REL. 13, 13 (1994); W. Bradford Wilcox, *Men and Women Often Expect Different Things when They Move in Together*, ATLANTIC (July 8, 2013), www.theatlantic.com/saxes/archive/2013/07/men-and-women-often-expect-different-things-when-they-move-in-together/277571/.

¹⁷⁵ *Indiana Marriage Laws*, UNIVERSAL LIFE CHURCH MONASTERY, www.themonastery.org/wedding-laws/Indiana.

Couples may gloss over significant differences in how committed each person is to the relationship.¹⁷⁶ Even if they set pen to paper, offer and acceptance would be thoroughly unromantic:

Intimate partners would have to make offers regarding financial, homemaking, caretaking, and domestic services. They would need to place an economic value on their contributions to the relationship and bargain for services in return. Consider, first, what is required for intimate partners to enter binding contracts for economic services such as domestic or wage labor. The first hurdle is formation – offer, acceptance, and consideration. Where are the offer and the acceptance? Intimate partners rarely make explicit arrangements for dividing economic services, and even when they do, their arrangements fluctuate ... [Many] cohabitants may decide to move in together and make agreements about rent or bills, but they rarely negotiate chores.¹⁷⁷

Couples will inevitably overlook important questions because they simply do not know enough about the duties and obligations that marital states would impose or address to contract for similar terms. Consequently, the law will have to supply significant legal gap fillers.¹⁷⁸

Because couples likely will not write down their understandings, most litigated “agreements will be implied-in-fact contracts for which the court infers the parties’ promises from their conduct.”¹⁷⁹ Yet, implied-in-fact contracts may not provide more relief. A court may decide that the services were “rendered gratuitously,” warranting no compensation after-the-fact.¹⁸⁰ Few states are willing to force repayment by one partner for the domestic services of the other.¹⁸¹

In the absence of a contract, the weaker earning party will not have access to remedies, unless the background law that currently governs cohabitating relationships changes.¹⁸² Equitable remedies are unlikely to provide an adequate backstop. As Professor Gregg Strauss notes, cohabitants can seek

restitution for money or services contributed to the other’s property or business, but cohabitants typically fail to recover money or services that “can be characterized as part of the ordinary give-and-take of a shared life,” such as domestic chores or living expenses. Even if one cohabitant contributed more

¹⁷⁶ Michael Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment*, RAND (2013), www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1001/RAND_WR1001.pdf.

¹⁷⁷ Strauss, *supra* note 28 at 1294. ¹⁷⁸ Sanger, *supra* note 169.

¹⁷⁹ Strauss, *supra* note 28 at 1293. ¹⁸⁰ *Id.* at 1279. ¹⁸¹ *Id.* at 1279.

¹⁸² See Bix, Chapter 9, this volume.

to the couple's domestic life, courts assume that the couple received a mutual benefit and refuse (as in marriage) to balance their relationship ledgers.¹⁸³

Children may also "be harmed by the enforcement of certain ... agreements."¹⁸⁴ For example, an agreement between adults may adversely affect a child's right to support. Absent thick notions of state law public policy constraints on such terms,¹⁸⁵ a purely contractual regime may jeopardize the interests and well-being of children.

For religious couples in particular, a purely contractual regime is likely to be unsatisfactory. Contractual terms restricting divorce to "fault" grounds such as infidelity, or deciding dispositively who would receive custody of any children, would be against public policy and unenforceable.¹⁸⁶

A contractual regime may encourage tallying by each party, rather than norms of sharing that foster give and take: "Each [spouse] would have an incentive to keep track of who pays for dinner, cleans the dishes, or mows the lawn. They need an accurate tally, both because nonperformance can justify a future demand for compensation and because sufficient nonperformance can be a material breach that justifies ending the relationship and seeking damages."¹⁸⁷

Apart from the limits of contract, marriage as a status shields families from oversight.¹⁸⁸ "Abolishing state-recognized marriage would actually separate family members in the eyes of the law," erasing marital benefits like the presumption of paternity for married husbands or the family's "veil of privacy."¹⁸⁹ While scholars have been critical of family privacy since it can

¹⁸³ Strauss, *supra* note 28, at 1282–83. Moreover, before a court can decide whether it is unjust for the defendant to retain benefits from the relationship, the court must make judgments about the level and type of commitment in the relationship." *Id.* at 1297. Even if restitution became "generally available for intimate parties . . . restitution law openly relies on moral judgments about the nature of our relationships." *Id.* at 1296.

¹⁸⁴ See Bix, *supra* note 164, at 380 (describing how pre-marital agreements affect women and children).

¹⁸⁵ If courts police the agreement between cohabitants for substantive and procedural unfairness, the law will introduce "status norms on couples" at the back end, instead of at the front end when the couple decides to marry. Strauss, *supra* note 28, at 1310. Couples will necessarily have less notice of what those norms will be.

¹⁸⁶ Mehren, *supra* note 168.

¹⁸⁷ Strauss, *supra* note 28, at 1295. Moreover, when a partner "falls short, the other would have an incentive to insist on prompt performance; otherwise, a court might later interpret his acquiescence as a rescission of the original arrangement." *Id.*

¹⁸⁸ See McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1955) (refusing to intervene in dispute between spouses over financial support beyond "necessaries"). Refusing to police choices during intact relationships, of course, leaves the weaker spouse without remedies other than divorce.

¹⁸⁹ *Id.*

enable domestic violence, the state's noninterventionist stance does provide families the autonomy to structure their own relationships.¹⁹⁰ Privacy and autonomy from the state are two goods that libertarians including Rand should be especially loathe to disturb since doing away with the status of marriage may increase government involvement in people's personal lives.¹⁹¹

3 Third Proposal: Redubbing "Marriage" as "Domestic Partnership"

After Judge Vaughn Walker released his opinion in *Perry v. Schwarzenegger*,¹⁹² invalidating Proposition 8, a number of prominent voices called for the "end [of] marriage[]." *Time Magazine*, for example, proposed:

[G]ive gay and straight couples alike the same license, a certificate confirming them as a family, and call it a civil union – anything, really, other than marriage. For people who feel the word *marriage* is important, the next stop after the courthouse could be the church, where they could bless their union with all the religious ceremony they wanted. Religions would lose nothing of their role in sanctioning the kinds of unions that they find in keeping with their tenets. And for nonbelievers and those who find the word *marriage* less important, the civil-union license issued by the state would be all they needed to unlock [marriage's] benefits.¹⁹³

Professors Richard H. Thaler and Cass R. Sunstein have advocated a "freedom expanding" approach: substitute "civil union" for the word "marriage" across all laws. Civil unions would become the only "legally recognized domestic partnership";¹⁹⁴ marriages "would be strictly private matters, performed by religious and other private organizations [eliminating] the same one-size-fits all arrangement of state marriage."¹⁹⁵

¹⁹⁰ For a pair of competing views on the value of family autonomy, see LEE E. TEITELBAUM, *FAMILY HISTORY AND FAMILY LAW* (1985) and BRUCE C. HAFEN, *THE FAMILY AS ENTITY* (1989).

¹⁹¹ See Dalmia, *supra* note 145; Jason Kuznicki, *Marriage Against the State Toward a New View of Civil Marriage*, POLICY ANALYSIS, Jan. 12, 2011, <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA671.pdf>.

¹⁹² 704 F. Supp. 2d 921 (N.D. Cal. 2010), <http://documents.nytimes.com/us-district-court-decision-perry-v-schwarzenegger>.

¹⁹³ Lindenberger, *supra* note 13.

¹⁹⁴ Stephen Macedo, *JUST MARRIED* 120 (2015); Richard H. Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

¹⁹⁵ Macedo, *supra* note 194 (describing Richard H. Thaler & Cass R. Sunstein, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009)). Professor Robin West has advanced a related proposal that differs in a crucial respect: civil unions and marriages would exist "side by side." Robin West, *MARRIAGE, SEXUALITY, AND GENDER* 315 (2007). Entering into a civil union would entitle a couple "to the state's support, including those

The struggle over who owns marriage – religion or the state – has its genesis in the “enormous array of benefits”¹⁹⁶ the state uses to channel couples into marriage.¹⁹⁷ It is murky whether the federal government will continue to treat registered domestic partners as they do married spouses now that *Obergefell* has opened marriage to everyone, gay or straight, since equal treatment in taxes and other matters was driven by the patent unfairness of gay couples being married in some states and not others.¹⁹⁸ In any event, nothing compels a state to accord the benefits of marriage to couples who enter into other statuses elsewhere.¹⁹⁹

Concerned about eliminating the “dichotomy between single and married [that] does not do justice to what people might choose,” Thaler and Sunstein seek to “end the state monopoly on . . . marriage [because it] gives public authorities the sole power to confer official legitimacy, a stamp of approval of immense importance.”²⁰⁰ For them, it is far more preferable for “religious organizations to set their own rules regarding who could marry.”²⁰¹ In this scheme, only private institutions, not the state, would recognize something called “marriage.”²⁰²

First published in 2008, Thaler and Sunstein’s minimalist vision has taken on greater relevance since *Obergefell*.²⁰³ Politically, redubbing marriages as civil unions would likely be seen as “a form of leveling down.”²⁰⁴ To the extent that any redubbing reflects animus, it would be constitutionally suspect.²⁰⁵

Professor Steven Macedo wonders whether society can now “drop the term” marriage, as Missouri Representative Berry proposes, since the Supreme

supports states now bestow upon married couples.” Even though both statuses would coexist, civil unions “would be understood to be the ordinary, normal, accepted means by which the state involves itself in family life,” becoming “the norm *over time*.”

As Maryland debated its same-sex marriage legislation, one legislator introduced a measure to recognize civil unions, along with marriage, as a way to resolve the religious issues around marriage. 2008 Md. Laws HB112.

¹⁹⁶ Thaler & Sunstein, *supra* note 194.

¹⁹⁷ Carl E. Schneider & Margaret F. Brinig, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 157 (1996).

¹⁹⁸ Heidi L. Brady & Robin Fretwell Wilson, *The Precarious Status of Domestic Partnerships in a Post-Obergefell World*, 24 ELDER LAW JOURNAL 49 (2016).

¹⁹⁹ Steve Sanders, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 96 (2016).

²⁰⁰ Macedo, *supra* note 194; Thaler & Sunstein, *supra* note 194. ²⁰¹ *Id.* ²⁰² *Id.*

²⁰³ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). ²⁰⁴ Macedo, *supra* note 194.

²⁰⁵ Some read Justice Kennedy’s opinion in *Obergefell*, though at times “difficult to follow,” as saying a civil union granting the same set of rights and responsibilities to all married couples would not be constitutionally suspect – so long as the dropping of the term “marriage” was not based on animus toward same-sex couples. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 173–74 (2015)

Court decided the marriage question on due process grounds as a fundamental right.²⁰⁶ One reading of *Obergefell* may be that the state cannot withdraw the civil status known as marriage.²⁰⁷ A second is that if the state has a civil status known as marriage, it must be open to lesbian and gay couples, but governments need not give tangible benefits to marriages at all.²⁰⁸

Finally, to the extent that this renaming would remove the requirement that an authorized celebrant must solemnize the civil status, the significance of the choice to enter a civil union may be lost on the couple.²⁰⁹ And as noted earlier, renaming risks disturbing the web of understandings around marriage. Reacting to Representative Berry's proposal, Missouri Catholic Conference Executive Director Mike Hoey asked, "If you replace marriage with domestic union, will people still take [marriage] as seriously?"²¹⁰

IV CONCLUSION

In the firestorm ignited by *Obergefell*, some want to allay the concerns of religious objectors by distancing the state from the institution of marriage. Not only would a breach between the state and marriage fail to materially resolve the religious liberty tensions Senator Adams catalogues (Chapter 21, this volume), but it also threatens to diminish the institution of marriage for the religious and secular alike. Every predictive judgment is that divorcing marriage from the state would be self-defeating. An unwinding would likely mean that fewer people of faith would channel into state-recognized unions, shearing those couples of the powerful protections and benefits the state provides.

²⁰⁶ *Id.*

²⁰⁷ In concluding that "[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society," the Court noted that marriage "has long been "a great public institution, giving character to our whole civil polity," that it is a "keystone of the Nation's social order," and that "[s]tates have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order." *Obergefell*, 135 S. Ct. at 2590, 2601–02. Although "the state itself makes marriage all the more precious by the significance it attaches to it," it is unclear whether the state can withdraw the "respected status and material benefits [it bestows] on married couples." *Id.* at 2601–02; *id.* at 2613 (Roberts, C.J., dissenting).

²⁰⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In other passages, the Court's decision reads much more narrowly. "The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.* at 2607. Indeed, the Court explicitly acknowledged that states are "free to vary the benefits they confer on all married couples," which presumably would encompass extending no benefits at all. *Id.* at 2601.

²⁰⁹ *Indiana Marriage Laws*, UNIVERSAL LIFE CHURCH MONASTERY, www.themonastery.org/wedding-laws/indiana.

²¹⁰ Ballentine, *supra* note 40.

Further, the norms around marriage are delicate and complicated, creating the need to proceed with caution. An unwinding risks a disruption of those norms by altering the cultural fabric of the institution – potentially making *all* marriages, both civil and religious, less beneficial for participants. Ironically, the chorus of voices calling for the government to “get out of marriage” have latched onto a vintage idea long pursued by critics of marriage, who see it as patriarchal and oppressive. The idea had no takers then, and it should not now. A far more measured course would provide thick protections for people to live out their faith convictions about marriage, while ensuring that marriage as a civil institution remains as beneficial as it is now.²¹¹

²¹¹ See Adams, Chapter 21, this volume.