

1-1-2001

# Save the Marriage Before (Not After) the Ceremony: The Marriage Preparation Act - Can We Have a Public Response to a Private Problem?

Lundy Langston

Follow this and additional works at: <http://repository.law.miami.edu/umicl>

 Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

Lundy Langston, *Save the Marriage Before (Not After) the Ceremony: The Marriage Preparation Act - Can We Have a Public Response to a Private Problem?*, 9 U. Miami Int'l & Comp. L. Rev. 141 (2001)

Available at: <http://repository.law.miami.edu/umicl/vol9/iss1/10>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

**Save The Marriage Before (Not After) The Ceremony:  
The Marriage Preparation Act – Can We Have A Public Response To A Private  
Problem?**

Lundy R. Langston \*

I.	Introduction .....	144
II.	The State’s Interference via a Marital Preparation Act.....	150
III.	The International Arena.....	160
IV.	Conclusion.....	162

Two individuals meet, engage in an intimate, not necessarily sexual, relationship and marry. The two join in a union with the promise to spend the remainder of their natural lives together. But forever is not forever. On a national level, over 50 percent of marriages end in divorce.<sup>1</sup> Perhaps marriage vows should include a statement about the inevitability of divorce. States’ divorce laws vary, from fault-based, to no-fault, to a statutory period of separation.<sup>2</sup> Some states recently made it easier for individuals to be granted a divorce.<sup>3</sup> Reasons for making it easier to end

---

\* Professor of Law, Shepard Broad Law Center, Nova Southeastern University. The author wishes to thank research assistants Kerline Altidor, Ileana Ruiz, and Kimberlyn Salmon for their assistance.

<sup>1</sup> More than one-half of marriages in the United States fail in less than seven years. Connie Marshner, *Marry in Haste, Repent at Leisure – Marriage Savers: Hope for the Divorce Culture* June 1998, <http://www.capitalresearch.org/pcs/pcs-0698.html>; See also Dateline (NBC) Cindy Kerper, *Women’s Financial Information Program*, March 26, 1996 (Fifty percent of marriages end in divorce.); Weekly Bulletin Issue No. 38 (1997) Population Statistics-Divorces and Separations, 1996 (One in five marriages ends within 10 years; the divorce figures for 1996 indicate that 44 percent of the younger marriages will end in divorce; based on divorce patterns in 1996, it is calculated that one in 10 marriages is dissolved within five years of marriage). Massachusetts and Connecticut rank first and second, respectively, for having the lowest divorce rates in the nation. See National Center for Health Statistics, Monthly Vital Statistics Vol. 43, No. 13, pg. 4 (Oct. 23, 1995). Nevada had the highest divorce rate in the country. *Id.* Florida was ranked 8th. *Id.* In 1994, the divorce rate per 1,000 population for the entire United States was 4.6 percent. See *id.* Generally, rates were lower in the Northeast and Midwest and higher in the West and Southeast. *Id.*

<sup>2</sup> Louisiana recently enacted a Covenant Marriage Act that allows couples to select either a covenant marriage license, or the standard marriage license. See LA. REV. STAT. ANN. §9:272-75 (West, 1998) and 1997 LA. SESS. LAW SERV. ACT 1380 (H.B. 756) (West). See also Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66FORDHAM L. REV. 2471, 2472 (1998). It became the first state to implement covenant marriages. *Id.* Unlike a standard marriage, a couple seeking a covenant marriage must receive counseling prior to the wedding, must agree to pursue additional counseling if the marriage encounters difficulty, and cannot obtain a no-fault divorce absent a lengthy separation. *Id.* The standard marriage license permits no-fault divorce and does not require a showing of wrongdoing. The Covenant Marriage Act permits couples to divorce only in cases of abandonment, adultery or abuse, or if a spouse is convicted of a felony. The intended purpose of the Covenant Marriage Act is to reduce the high rate of divorce and was enacted out of concern for the permanence and stability of marriage as crucial for children and a healthy society. *Louisiana Bishops Respond To Covenant Marriage Act*, CATHOLIC COMMENTATOR, Nov. 5, 1997 (the official newspaper of the Diocese of Baton Rouge).

<sup>3</sup> Florida is one of those states. Florida moved from a fault based jurisdiction to a no-fault jurisdiction. *Frumkes v. Frumkes*, 349 So.2d 823, 824 (1977) (In 1971, Florida adopted a no-fault

marriages could have been related to the increased incidences of domestic violence.<sup>4</sup> Or the reasons could simply be related to a change of times. By making it easier to get a divorce, states may have simply played piper to individuals wanting to end their marriages without being forced to prolong the inevitable. Rather than prolong an unwanted marriage, the move to no-fault divorce was to serve as an out of a failing marriage. Such a move could have created an environment where rather than try to resolve differences individuals simply divorced their married partner.<sup>5</sup> The divorce rate has reached an all time high and it would not be a stretch to assume that there is a correlation between the high divorce rate and the move to a no-fault system.<sup>6</sup> The break down of the family structure resulting from the high divorce rate is also of concern to states.

In an attempt to prepare individuals for marital conflicts and resolves, Florida enacted the Marital Preparation and Preservation Act. The purpose of the act, I presume, is to educate individuals about the marital union before the marriage ceremony. Education prior to the union would presumably prepare couples for conflicts that may arise during the union and would therefore have the affect of saving the marriage. The Marital Preparation and Preservation Act provides that individuals are to enroll in classes prior to entering into a marriage union.<sup>7</sup> The Act does not make it

---

divorce, Fla. Stat. §61.052: Dissolution of Marriage). Fifteen states and the District of Columbia grant divorces solely on no-fault grounds. See Linda D. Elrod, Robert G. Spector, and Jeff Atkinson, *A Review of the Year in Family Law: Children's Issues Dominate*, 32FAM. L.Q. 661, Chart 4-Grounds for Divorce and Residency Requirements, Winter 1999. Thirtyfour states added no-fault to the already traditional grounds for obtaining a divorce. See *id.* Nevada is the sole state that uses neither. See *id.*

<sup>4</sup> Reasons for changing from fault to no-fault could be associated with an individual alleging fraudulent facts in order to get a divorce. *Carroll v. Carroll*, 322 So.2d 53, 55 (Fla. 1st DCA 1975). Cruelty was the fraudulent ground used that enabled parties to show grounds. *Id.* As a result of the fraudulent use of cruelty, the judge often knows nothing of what really caused the marriage break up. *Id.* See also Laura Bradford, *The Counter Revolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 630 (1997) (The same fear found in abused women who find themselves with an unwanted pregnancy is found in an abused woman who wants a divorce. Requiring a spouse to prove fault is unnecessarily intrusive and substantially limits his or her ability to make choices about the marriage.

<sup>5</sup> But see Herbert Jacobs, *Silent Revolution: The Transformation Of Divorce Law In The United States* 162 (1988) ("Every study of the impact of these laws on divorce rates concluded that no relationship existed between the introduction of no-fault and the rise in divorce.") A more recent study may bear some relationship between the continued rise in divorce and no-fault systems. At the time of Jacobs' notations no-fault had not been part of the divorce system in the number of jurisdictions it is today and even if it did exist, it was at an early stage. Almost ten years after his notation, I'm not so sure that the data would demonstrate that there is no correlation between no-fault and the rise in divorce. Although I have not conducted any studies, discussions from various individuals indicate to me that there may be a relationship between no-fault and the rise in divorce rates.

<sup>6</sup> But a return to a fault based divorce is not the answer. M.A. Stapleton, *Poll: Return To Fault-Based Divorce Not the Answer* CHI. DAILY L. BULL., Oct. 23, 1996, at 1. ("Rescinding no-fault divorce laws would not improve the divorce process, nor are the laws to blame for the increase in the divorce rate, according to the lawyers polled by the American Bar Association.") See also Herman F. Haase, *Divorce Law Needs Revision To Address Reality: Justice Haase*, CHI. DAILY L. BULL., Apr. 10, 1992, at 6. (Although 50 percent of marriages end in divorce, "the requirement for grounds saves very few, if any, marriages.")

<sup>7</sup> See Florida's Marriage Preparation and Preservation Act, 1998 Fla. Sess. Law Serv. ch. 98-403 (H.B. 1019).

mandatory for individuals to enroll in such classes but it does provide for a reduction in the marriage license fee for individuals who choose to enroll.<sup>8</sup> The Act does, however mandate a three-day waiting period for individuals who do not enroll in such classes.<sup>9</sup> Why would a state such as Florida enact such a statute when Florida made it easier to divorce? Florida is now a no-fault state, which means married individuals meeting residency requirements simply file for divorce once they believe the marriage is irretrievably broken.<sup>10</sup> What are the states' expectations for enacting such a statute?<sup>11</sup> To preserve marriages, to prepare individuals for the union of marriage or to prepare individuals on how to care for children who are brought into the union? Or could it be to set the standard for the norms, values, and morals of the state? If the states' interests are in preserving marriages then why not simply require fault on a party prior to granting a divorce? If the state's interest is in preparing individuals for the union or preparing individuals for children who may be brought into the union then is the state overstepping it's bounds with such a statute because of the privacy nature of child rearing? If the state's interest is in setting the norms, values and morals, then is it overstepping it's bounds by commingling the church with the state and/or also interfering with a family's private family values?<sup>12</sup>

<sup>8</sup> *Id.* See also *Editorial, Premarital Course A Political Ploy*, SUN-SENTINEL, Dec. 8, 1998, at 18A, available at 1998 WL 23472183. ("Marriage counseling prior to tying the knot would be a good idea for a lot of people. But four hours of state-sanctioned counseling, and a \$32.50 discount on a marriage license? It's highly suspect whether this will have any effect on producing more stable marriages. The legislation has the high-sounding name of the Marriage Preparation and Preservation Act. It plays well for politicians who want to let their constituents know they support 'family values.' Like state-sanctioned prayer, however, marriage counseling sanctioned and coerced by the state is an intrusion in an area of personal choice where government does not belong.")

<sup>9</sup> Marriage and Preparation and Preservation Act, Fla. Stat. § 741.04 (1998). An automatic waiting period is required to marry because the parties have to enroll in a class prior to marrying. The length of the classes can range from one day to six weeks.

<sup>10</sup> See *Kaylor v. Kaylor*, 466 So.2d 1253 (Fla. 2d DCA 1985); *Weinschel v. Weinschel*, 368 So.2d 386 (Fla. 3d DCA 1979); *Florida Bar v. Brownbaugh*, 355 So.2d 1186 (1978); *Williamson v. Williamson*, 353 So.2d 880 (Fla. 1st DCA 1977).

<sup>11</sup> Expectations vary from lowering the divorce rate, reducing school absenteeism and medical costs, to help couples get to know each other better. See David Nitkin, *Ready for Marriage? State Vows To Help; New Law Aims to Slow Divorce by Teaching Prospective Partners*, SUN SENTINEL, Dec. 7, 1998, at 1A, available at 1998 WL 23471966. ("We want to make sure prospective brides and bridegrooms throughout Florida know ... there will be different expectations of them, said Rep. Elaine Bloom [one of the sponsors of the bill], D-Miami Beach . . . Supporters say the law was designed to reduce divorce rates by nudging couples toward premarriage counseling. Cindy Wingerter, the marriage license manager with the Orange County clerk's office, predicted that the new law would help many couples get to know each other better . . ."). See also *Editorial, Premarital Course A Political Ploy*, supra note 8, at 18A (The Marriage Preparation and Preservation Act "plays well for politicians who want to let their constituents know they support family values.")

<sup>12</sup> See Stacey Singer, *Class Would Groom Couples for Marriage*, SUN-SENTINEL, May 10, 1998, at 1A, available at 1998 WL 3264121 ("If you're going to get divorced, you're going to get divorced . . . There are some things that government should leave alone.") (Statements from Muhammad and Schmidt a couple who took advantage of the no wait period. The husband had to return to his job in Baltimore two days after the ceremony. "A waiting period or course requirement would have mucked up their plans."). See also *Editorial, Premarital Course A Political Ploy*, supra note 8, at 18A ("Like state-sanctioned prayer . . . marriage counseling sanctioned and coerced by the state is an intrusion in an area of personal choice where government does not belong.")

How will the state dictate who instructs the courses? Can an instructor be a divorcee? On what basis will the state determine the content of the material? What role will religion play? If religion has any role is there a church and state conflict? Could such a course cause a conflict to arise if individuals do not share the same religion or have no religion at all? Can state government enter into a contract with individuals pre-marriage for a lifetime commitment post-marriage-- a contract that two free engaging individuals are, purportedly, failing to uphold at alarming rates? Should the government engage in this type of bargaining? If not a contract, is it an unconstitutional imposition? What are other countries doing with regard to maintaining marriages? Are other countries' divorce rates as high as the United States'? Is it a jurisdictional problem, an international one, or is it simply a matter for concern in the United States? Who will prepare the individuals for this lifetime commitment? Will we require the educators to be married? Will we prohibit the educators from divorcing? How will such an Act impact the fundamental right to marry which includes a right not to, and to end it? These are some of the questions I probe as I consider whether marriage preparation and preservation acts are constitutionally sound.

### I. Introduction

Generally marriage is a union between two individuals who have decided to spend the remainder of their lives together as husband and wife. This union means that the parties decide their various obligations and responsibilities. Although the two individuals made the decision to unite as one they can't decide completely on their rights and obligations. Although marriage is a union, sometimes referred to as a contract, between two individuals, it is a contract between three entities, i.e. the two individuals, man and woman, and the state.<sup>13</sup> Most states require that the union must be between one man and one woman.<sup>14</sup> Although technically the union of marriage is

<sup>13</sup> See *Baxter v. Baxter*, 720 So.2d 624 (Fla. 5th DCA 1998) (When you get married, you enter into a marital contract.); *Mulhern v. Mulhern*, 446 So.2d 1124 (Fla. 4th DCA 1984) (The State remains a party in the marriage during the continuance of the legal relationship of Husband and Wife.); *Ryan v. Ryan*, 277 So.2d 336, 338 (Fla. 1973) (Marital contract is a proper subject of the state's police power.) See also Maureen I. Strassberg, *The Distinction of Form or Substance Monogamy, Polygamy and Same Sex Marriage*, 75 N.C. L. REV. 1501, 1561 (1997) (Constitution's prohibition on laws impairing the obligation of contract was a source of marriage rights that could limit state control over marriage. However, the Court ultimately held that marriage is not a contract does not vest certain, definite, fixed private rights of property. As a result, marriage was frequently described by courts as a privilege established by state law . . . In distinguishing marriage from the right of contract, the Court was prepared to reduce at least some of the traditional incidents of marriage, including 'till death do you part' to nothing more than statutory privileges. It would be a mistake, however, to view these decisions as suggesting that marriage itself should be viewed as merely a statutory privilege, which could be freely abolished by state law.")

<sup>14</sup> Todd Gillett, *The Absolution of Reynolds: The Constitutionality of Religious Polygamy*, 8 WILLIAM & MARY BILL OF RTS. J. 497 (2000). See *Baehr v. Miiike*, 1996 WL 694235 (Haw. Cir. Ct. 1996); see also *Poisk v. Layton*, 695 So.2d 759, 761 (Fla. 5th DCA 1997) (state has prohibited same sex marriages); and *Defense of Marriage Act*, Pub. L. No. 104-199, 110 Stat. 2419 (1996). Congress enacted a statute defining marriage as, "a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." Although Congress can not dictate that states recognize marriage unions by sister states some commentators, for example noted constitutional scholar Lawrence Tribe, believe that Congress did not have the authority to enact such a statute and therefore the statute is unconstitutional. Although Congress could not and did

between two individuals, the state is an interested party because it defines the responsibilities and obligations of the parties.<sup>15</sup> The two individuals dedicate their lives to each other, agree to support the marital union, for life, and then oftentimes something happens. The relationship breaks down and the marriage is dissolved. Once the marriage breaks down the state becomes actively involved in deciding the obligations and responsibilities of the individuals. After the marriage ceremony the state plays an indirect role by determining if in fact the parties can dissolve the union and the obligations of the parties once the union is dissolved.

Why do people marry? What role does marriage play in the development of society? Can states impose restrictions on marrying?

#### A. Why Do People Marry?

People marry for as varied reasons as people divorce. There are however general notions of why people marry. People marry because they are in love with each other; because one person is in love with the other; because one individual may feel it is the right thing to do; because the woman (and sometimes girl) is pregnant; because the marriage was prearranged; in order to receive various state and or federal benefits, such as taxes<sup>16</sup>; or for companionship. Marriage is an expression of emotional support and public commitment.<sup>17</sup> As noted by Justice O'Connor in *Turner v. Safley*, "the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication in particular since many religions recognize marriage as having spiritual significance."<sup>18</sup>

There is a trend for couples to live together rather than marry.<sup>19</sup> Even though "more than half of first marriages are preceded by cohabitation ... living together is not marriage friendly."<sup>20</sup> A recent study produced data that suggests that "living together is not a good way to prepare for marriage or to avoid divorce."<sup>21</sup> The research from the

not mandate that states follow the Defense of Marriage Act, Tribe believes the statute should be deemed unconstitutional.

<sup>15</sup> Today state laws permit individuals to alter the state imposed obligations and responsibilities of the parties by recognizing pre-marital agreements between the parties. Such agreements may define responsibilities and obligations that are in opposite to those of the state. These agreements are recognized on various standards depending on the jurisdiction. The agreements typically fall into categories that either permit acceptance of such agreements given there was full financial disclosure or if the agreement was fair. *See also* *Lindsay v. Lindsay*, 163 So.2d 336, 338 (Fla. 3<sup>rd</sup> DCA 1964) (The State imposes a duty on the Husband to support his Wife and family, not merely to keep them out of the poor house, but to support them in accordance with his station and position in life.)

<sup>16</sup> *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("marital status often is a precondition to the receipt of government benefits [e.g., Social Security benefits, property rights] [e.g., tenancy by the entirety, inheritance rights], and other, less tangible benefits" [e.g., legitimation of children born out of wedlock].)

<sup>17</sup> *See* *Turner*, 482 U.S. at 95.

<sup>18</sup> *Id.* at 96.

<sup>19</sup> *Living Together Doesn't Increase Chances of Having A Good Marriage*, JET MAGAZINE, February 22, 1999, at 49. (The Census Bureau indicates that the number of unmarried couples living together in the United States increased from 439,000 in 1960 to 4,236,000 by 1998.)

<sup>20</sup> JET MAGAZINE, at 49.

<sup>21</sup> JET MAGAZINE, at 49. "The study indicated that living together increases the risk of domestic violence for women and the risk of physical and sexual abuse of children . . . [T]hey have lower levels of happiness. [C]ouples "show a lot of symptoms of depression. Their relationships are not

study indicated that "cohabitants tend not to be as committed as married couples to the continuation of the relationship and are more oriented toward autonomy."<sup>22</sup> The study indicated, however that couples who live together with the intention of marrying do well.<sup>23</sup>

### B. Restrictions On Marrying.

The United States Supreme Court held that states can impose restrictions on marrying if it is a "reasonable regulation that [does] not significantly interfere with decisions to enter into the marital relationship."<sup>24</sup> The Court held that such regulations "may legitimately be imposed."<sup>25</sup> Recognizing that there is a fundamental right to marry,<sup>26</sup> the Court in *Zablocki* held that although the fundamental character of marrying exists "state regulations which relate[] in any way to the incidents of or prerequisites for marriage [do not have to be] subjected to rigorous scrutiny."<sup>27</sup> Only reasonable regulations that do not significantly interfere with decisions to marry will be upheld.<sup>28</sup>

Various state restrictions have been imposed on marrying. The United States Supreme Court has deemed unconstitutional restrictions based on race.<sup>29</sup> In *Loving v. Virginia*, the Court applied the highest level of scrutiny for race-based restrictions. The Court in *Zablocki* noted that race based prohibitions are held to the highest level of scrutiny but other restrictions, even those imposed on the fundamental right to marry, do not necessarily rise to the highest level of scrutiny.<sup>30</sup> Justice Powell's view in *Zablocki* on whether restrictions on marrying should be upheld stated the analysis, "must start from the recognition of domestic relations as an area that has long been regarded as a virtually exclusive province of the States."<sup>31</sup> Justice Powell's view, was in a concurrence and not a part of Justice Marshall's majority opinion. Justice Powell also noted that the "marriage relation traditionally has been subject to regulation, initially by the ecclesiastical authorities, and later by the secular state."<sup>32</sup> Powell, however agreed with Marshall's opinion that a compelling state interest should not be imposed on all

stable, especially if they have children." See also Steven Andersen, *Eleanor Rigby Effectively Minimized Legal Exposure*, ILL. LEGAL TIMES 3, Oct. 1998, at col. 2. ("Everybody knows half of all marriages end in divorce, but just living together can cause bigger legal headaches." The author offers a bit of non-lawyerly advice to persons who cohabit, in particular in a jurisdiction that does not recognize common law marriages, to rent, not own; maintain separate checkbooks; don't have kids; avoid mutual debts. Andersen suggests that a "cornucopia of common-law conundrums can crop up" when cohabitants split up. *Id.* Basing his estimates on the census bureau's report that four million individuals are living together, Andersen states that amounts to the potential of eight million litigants. *Id.*)

<sup>22</sup> *Living Together Doesn't Increase Chances of Having A Good Marriage*, *supra* note 19.

<sup>23</sup> *Id.*

<sup>24</sup> *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* (The Court reaffirmed the fundamental character of the right to marry.) See also *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965). (The Court held that the right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause.)

<sup>27</sup> *Zablocki*, 434 U.S. at 386.

<sup>28</sup> *Id.*

<sup>29</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed [upon] by the Stat.")

<sup>30</sup> See *Zablocki*, 434 U.S. at 398.

<sup>31</sup> *Id.* at 398 (Powell, J., concurring).

<sup>32</sup> *Id.*

regulations<sup>33</sup> What is extremely important about Justice Powell's view is his recognition of the State and its relation to the church. Justice Powell noted that as early as 1878 the Court recognized a "state's absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . ." <sup>34</sup> Powell stated, "[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."<sup>35</sup> It would appear that Powell would certainly support the publicization of private family issues for the good of the community. We all know and appreciate that moral aspirations and people's values are generally intertwined with peoples' religions. Therefore, the state is aware of the connections and the potential for church and state conflicts.

Although the Court held that restrictions can be imposed if they are reasonable and do not significantly interfere with the decision to marry, it has deemed that restrictions to marry based on age are reasonable even though individuals within certain age groups are prohibited from marrying.<sup>36</sup> The Court recognized that minors are always under the care of someone and the extra protection is warranted.<sup>37</sup> It is also recognized that minors are not significantly mature to make decisions for themselves.<sup>38</sup>

Other restrictions on marrying that have been deemed reasonable include the prohibition of marrying within a certain degree of familial relations.<sup>39</sup> Reasons for justifying such a prohibition are necessary to protect children from incestuous relations and to provide a safe environment for them.<sup>40</sup> Prohibitions restricting individuals to

---

<sup>33</sup> Although Justice Powell notes that the standard of review for a fundamental right is a showing of a compelling state purpose, the majority failed to make clear the level of scrutiny could be compelling. Although the Court recognized that marriage is a fundamental right, the Court held a restriction imposed on a fundamental right "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." See *Zablocki*, 434 U.S. at 388. In the concurring opinions the Justices used the compelling interest test but the majority appeared to devise a different standard, i.e. sufficiently import and narrowlytailored. Although the Justices in their concurring opinions accepted the majority's language to be indicative of the compelling standard, the generally accepted language for a compelling state interest uses the word compelling as opposed to important. Notwithstanding my notation, it has been accepted that the standard is compelling regardless of the language of the Court in *Zablocki*.

<sup>34</sup> See Powell's concurring opinion in *Zablocki*, 434 U.S. at 389, discussing *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *Zablocki*, 434 U.S. at 386.

<sup>38</sup> See *Pierce v. Society of Sisters*, 269 U.S. 510 (1925). Notwithstanding the need to be under someone's care, the divorce rate for teenage marriages is much higher than for other marriages. To combat the high divorce rate in young marriages, California and Utah require premarital counseling in certain situations. CAL. CIV. CODE § 304 (authorizes the courts to order counseling for all couples in which one of the parties is under 18); UTAH CODE ANN. 30-1-30 to 39 (authorizes the county commissioners to require such counseling for couples in which one partner is either under 19 or divorced).

<sup>39</sup> See *Pennsylvania v. Casey*, 505 U.S. 833 (1992); see also *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>40</sup> *State of Missouri Ex. Rel. Meisner v. Geile*, 747 S.W.2d 757 (Mo.Ct.App. 1988).

<sup>41</sup> *Id.* at 757.



marry one individual have also been upheld.<sup>41</sup> The prohibition against polygamous marriages, the number of people one can marry, is associated with the morals of the community.<sup>42</sup> Although the Mormon Church has outlawed polygamy, there are a substantial number of Mormons who practice polygamy. Their continuance to practice polygamy certainly raises separation of church and state issues even the practice has been outlawed.

Prohibitions on marrying between individuals of the same sex have reappeared and this time with some support for individuals seeking such a marriage. As early as 1973, one state prohibited such a marriage even though there was no law against it. In *Jones v. Hallahan*, the Court of Appeals of Kentucky upheld the Jefferson Circuit Court's ruling that prohibited two women from receiving a license to marry.<sup>43</sup> The court held that although there was no law on the books that would prohibit such a union it was the custom of the state as well as within the records maintained by the church that such a union was to be between a man and woman.<sup>44</sup> Recently such unions came under fire again and at least one state, the state of Hawaii has noted that there is no stated reason for prohibiting such unions.<sup>45</sup> Other states have taken the opposite side of the coin and

---

<sup>41</sup> See *Reynolds v. United States*, 98 U.S. 145 (1878). ("Polygamy has always been odious among the northern and western nations of Europe . . . At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society. By the statute of 1 James I. (c. 11), the offence, if committed in England or Wales, was made punishable in the civil courts and the penalty was death). The court observes that the Legislature of Virginia in 1788 enacted the Statute of James I, death penalty included. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal "

<sup>42</sup> *Sanderson v. Tryon*, 739 P.2d 623 (Utah 1987). See also *Barlow v. Blackburn*, 798 P.2d 1360 (Ariz. Ct App. 1990); *Oliverson v. West Valley City*, 875 F.Supp. 1465 (D.Utah 1995) Although there are prohibitions against polygamous marriages and even though raids occurred in the 1950s to break up polygamous marriages, polygamists continue to flourish in some western states. It has been reported that over 50,000 polygamists live in the Rocky Mountains. But see Dirk Johnson, *Polygamists Emerge from Secrecy Seeking Not Just Peace But Respect*, N.Y. TIMES, April 9, 1991, at A22; See also James Brooke, *Utah Struggles With A Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998, at A12. (In May 1998, a 16-year old girl stumbled into a remote gas station in northern Utah. She reported that she was escaping her father, John Daniel Kingston, who had arranged a marriage between the girl and her uncle. The girl would be the man's 15<sup>th</sup> wife. The girl's father is a leader of a wealthy, but secretive polygamous group in a suburb of Salt Lake City. Her father was charged with felonious child abuse and the uncle with sexual abuse of a minor.) Because polygamy continues to flourish and is believed to be on the rise perhaps states have to resort to what Ralph Nader's suggested in the Sixties. In his article, *The Law v Plural Marriages*, 32 HARV. L. RECORD 10 (1960) he wrote "the solution of the problem of polygamy may require more than legal control or enforcement . . . These but inspire greater furtiveness and vigilance by the sects. A more sophisticated use of informal social approaches may succeed where attempts at enforcement have failed."

<sup>43</sup> *Jones v. Hallahan*, 501 S.W.2d 588 (1973).

<sup>44</sup> See *id.*

<sup>45</sup> See *Baehr v. Miiike*, 1996 WL 694235 (Haw.Cir. 1996). The court held that the state had

enacted statutes prohibiting such marriages<sup>46</sup> and specifically stated that same sex marriages sanctioned in sister states will not be recognized.<sup>47</sup> There was such fervor over the possibility of other states having to recognize valid marriages performed in Hawaii that Congress enacted the Defense of Marriage Act.<sup>48</sup> This enactment is an effort by Congress to alert states that they do not have to recognize same sex marriages even the marriage was valid in a sister state. Although a majority of states have enacted legislation that would prohibit same sex marriages, at least fifty-eight city-county jurisdictions have taken steps toward recognizing same-sex unions by extending some employment related benefits to same-sex couples in domestic partnerships.<sup>49</sup> As states continue addressing issues about gay/lesbian marriages, resolving the issues can become even more problematic because of the different voices within the gay/lesbian communities. Some advocate for marriage while others believe that the desire to marry in this particular community is "an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."<sup>50</sup>

It is true that the United States Supreme Court has recognized marriage as a fundamental right. It is also true that the Court has recognized that states' abilities to impose restrictions on marrying. This interference by the state and it's ability to impose restrictions on marrying, we now can presume that marriage is a status entered into by contract between three parties, i.e. man, woman, and the state. The individuals enter

---

failed to show a compelling state interest in denying same-sex couples the right marry. The court found the prohibiting statute unconstitutional and enjoined the director of the Department of Health for the State of Hawaii from denying marriage licenses "solely because the applicants are of the same sex." The court found that gays and lesbian adults can and do provide adequate parenting, and that many children being raised by single gay adults would be better off if their parents were allowed to marry a gay partner.

<sup>46</sup> Although in the Alaska case, *Brause v. Bureau of Vital Statistics*, the court ruled that the privacy provision of the Alaska Constitution protects as a fundamental right the right of two persons of the same sex to marry. The court ruled that the denial of marriage licenses to same-sex couples constitutes sex discrimination and that denial of same-sex marriage may only be upheld if it is justified under the very strict compelling state interest test. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super.Ct. 1998). The legislation has since passed a proposed constitutional amendment, which if ratified, will constitutionally define marriage as the union of one man and one woman. Cite *In Baker v. State*, the court concluded that limiting the protection of Vermont's marriage laws to the legal union of one man and one woman is reasonably related to the State's interest in furthering the link between procreation and child-rearing. *See Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>47</sup> *See* ARK. CODE ANN. § 9-11-109 (Statute was created to specifically state that marriage is only available to a man and a woman.); ARK. CODE ANN. § 9-11-107 (Clarified that same-sex marriages, even those created in other jurisdictions, are not recognized as valid in Arkansas.). Thirty states have enacted state legislation declaring that they will not recognize same-sex marriages.

<sup>48</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). In Section Three of the Act, marriage is defined as "a legal union between one man and one woman as husband and wife, and the word 'spouse' refers to a person of the opposite sex who is a husband or a wife." *Id.*

<sup>49</sup> *See* Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 237 (1995). Fort Lauderdale recently enacted an ordinance that would recognize health benefits to individuals in domestic partnerships, but that ordinance has been challenged.

<sup>50</sup> *See* Nancy Polikoff, *Will We Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage?",* 79VA. L. REV. 1535, 1536 (1993).

into the contract and the states define the rights and obligations that are due to each party. Why does the state play such a significant role when the individuals have decided to come together and the coming together of the individuals has nothing to do with fostering some positive notion toward the state? The union is a private acknowledgment to join, but the private union apparently is a public union of private parties. How does the union become public? The state defines the rights and obligations of the private union.

### C. Does Marriage Play A Role In The Development Of Society And Therefore Is Private But Public?

The "derivitization" of the "publicization" of a marriage union may be based in part on the notion that the institution of marriage is deemed the foundation of family and family the foundation upon which society rests.<sup>51</sup> "The state and the community have some interest in and concern with the institution created by marriage."<sup>52</sup> "[Some couples] enter a marital relationship to perpetuate the species. The family is the result of marital relationship. It is the institution which determines in a large measure the environmental influences, cultural backgrounds, and even economic status of its members. It is the foundation upon which society rests and is the basis for the family and all of its benefits."<sup>53</sup> Because of the view that the institution of family substantially impacts society, some would prohibit individuals from marrying if they deem the union to impose a negative impact on society.

In Chief Justice Rehnquist's dissenting opinion in *Zablocki*, he would have upheld, on a rational basis test, a provision prohibiting individuals who owed child support from marrying.<sup>54</sup> Rehnquist would view such a prohibition as a "permissible exercise of the State's power to regulate family life and to assure the support of minor children."<sup>55</sup> Even though Chief Justice Rehnquist conceded that the provision in the statute would make it legally impossible for individuals to marry for financial reasons, he stated that such a ruling would be no different than the Court's ruling in *Jobst* which, "in a similar number of cases, the Social Security Act makes the proposed marriage practically impossible for the same reasons."<sup>56</sup> The varied views of the Justices sitting on the Supreme Court today alerts us to the private and public conflicts of the marriage and family domains and of the varied views on the ability of the state to control the family. Family is a private arena that is best left to state's control, a phrase often used by federal judges who have no desire and apparent power to delve into this arena. One question that frequents is how a private arena became under the control of the state? The answer- marriage is the foundation of family and family is the foundation of society, therefore, the private is public.

### II. The State's Interference Via A Marital Preparation Act

Although marriage has been deemed a fundamental right by the US Supreme

<sup>51</sup> See Florida's Marriage Preparation and Preservation Act, ch. 98-403, § 2(2).

<sup>52</sup> See *Lester v. Lester*, 87 N.Y.S.2d 417 (1949). See also *Hoffman v. Boyd*, 698 So.2d 346 (Fla. 4th DCA, 1997).

<sup>53</sup> *Lester*, 87 N.Y.S.2d at 517.

<sup>54</sup> *Zablocki*, 434 U.S. at 407 (1978).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (Rehnquist, J., dissenting opinion).

Court, states are permitted to impose restrictions on marrying and states are not necessarily held to the highest level of scrutiny when they impose such restrictions. How far can or should a state intervene in placing restrictions on marrying? It has been noted by Professor Mary Ann Glendon that "the preliminaries required by a legal system before marriage can take place are revealing indications of the degree to which the State is actively regulating marriage formation, as opposed to contenting itself with promulgating rules that describe ideal behavior but have no real sanctions."<sup>57</sup> Professor Glendon notes that "[c]ompulsory premarital procedures provide a clue to the nature of the relation of the State to the family in another way as well. Marriage provides a convenient occasion for society to enforce certain social policies by making whatever event the legislature has deemed important a precondition to the celebration of marriage."<sup>58</sup>

The United States Supreme Court has addressed compulsory measures placed on marrying and in *Zablocki v. Redhail*, the Court presented a type of measuring rod<sup>59</sup> to determine when states have gone too far. The Court in *Zablocki* provided that a compulsory measure that directly and substantially interferes with the fundamental right to marry will not be upheld.<sup>60</sup> In *Zablocki*, the state of Wisconsin made it mandatory that prior to marrying (within the state of Wisconsin or elsewhere) parents, who were residents of Wisconsin and the non-custodial parent of a minor child[ren] had to provide proof of compliance with child support obligations and to demonstrate that their minor(s) were not and would not become public charges. The compulsory measure in *Zablocki* prevented residents within the stated class from marrying without a court order.<sup>61</sup> The Court was concerned that some non-custodial parents could quite possibly never marry if they did not have the financial means to meet their support obligations.<sup>62</sup>

A state measure that would prohibit an individual from ever marrying was clearly an infringement upon the individual's right to marry. Unlike Wisconsin, Florida's precondition does not prevent an individual from marrying. On its face the infringement imposed by the Florida statute, a three day delay from receiving a marriage license that would enable an individual to participate in a marriage ceremony.<sup>63</sup> Clearly on its face Florida's Act does not directly and substantially interfere with an individual's fundamental right to marry because it only provides for a three day delay which is a standard delay period in jurisdictions that do not have such a precondition.<sup>64</sup> Unlike Wisconsin's statute, Florida's Act does not prevent individuals

<sup>57</sup> Mary Ann Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 677 (1976).

<sup>58</sup> *Id.* at 677.

<sup>59</sup> *Zablocki*, 434 U.S. at 374.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Zablocki*, 434 U.S. at 404.

<sup>63</sup> See 1998 FLA. SESS. LAW SERV. Ch. 98-403 (H.B. 1019), Fla. Stat. § 741.04(3). "If a couple has not submitted to the clerk valid certificates of completion of a premarital preparation course, the effective date of the marriage license shall be delayed three days from the date of application." The statute provides for exceptions to the course requirement for non Florida residents and for individuals asserting hardship. *Id.*

<sup>64</sup> Other states that provide for a three-day delay include Iowa, Alaska, Delaware, and the District of Columbia. See IOWA CODE ANN. § 595.4 (West 1998); ALASKA STAT. § 25.05.091 (Michie

from ever marrying.<sup>65</sup> Justice Powell, noted however, in his concurring opinion on the Wisconsin prohibition, the acknowledgment by the United States Supreme Court of the importance of the marriage relationship to the maintenance of values essential to organized society.<sup>66</sup> This acknowledgment by the Court is a sure indication of states' powers to impact married units.

#### A. Is the Prohibition A Violation Of Church And State Notions?

Although Florida may be within compliance of *Zablocki* the Act may be an infringement upon the separation of church and state doctrine. The First Amendment of the United States Constitution prohibits the making of laws respecting the establishment of religion.<sup>67</sup> The basic rule dictated by the Establishment Clause of the United States Constitution is that government is to maintain a neutral position with respect to religion. States are prohibited from aiding any religion.<sup>68</sup> A relevant question, however is when does a state aid a religion such that it violates the establishment clause? In *Reynolds v. United States*, the high Court ruled that the establishment clause in effect erects a wall of separation between a church and a state.<sup>69</sup> But the Court later stated in *Lynch v. Donnelly*, that the "wall" is "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."<sup>70</sup> The Court in *Donnelly* stated that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility towards any [religion]."<sup>71</sup> Based on these assertions by the Court there would appear to be no violation of the Establishment Clause because Florida's Marriage Preparation and Preservation Act merely offers religious counseling as one of several choices for an individual to choose prior to receiving a marriage license. Pursuant to the Act, participation in a premarital preparation course provides individuals with a choice between instructors licensed by the state, i.e. a licensed psychologist, a licensed clinical social worker, a licensed marriage and family therapist, a licensed mental health counselor, a provider designated

---

1998); DEL. CODE ANN. tit. 13, §107 (1998); D.C. CODE ANN. §30.19 (1998).

<sup>65</sup> After *Zablocki*, states have proceeded with extreme caution when legislating compulsory measures for marriage, since the United States Supreme Court held that if a compulsory measure directly and substantially interferes with the fundamental right to marry it will not be upheld. *Id.* No resident of the state of Wisconsin, within the stated class, could marry.

<sup>66</sup> *Zablocki*, 434 U.S. at 397.

<sup>67</sup> U.S. CONST. amend. I.

<sup>68</sup> See *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>69</sup> *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>70</sup> *Lynch v. Donnelly*, 465 U.S. 668 (1984) or 525 F.Supp.1150 (1981); *cert. granted* 460 U.S. 1080 (1983), *reh'g denied* 466 U.S. 994 (1984). In *Donnelly*, the Court had to determine whether the use of a Christmas display as part of the observance of Christmas was a violation of the Establishment Clause when the City owned all components of the display. The Court ruled that it was not a violation of the Establishment Clause because it deemed that "whatever benefit to one faith or religion or to all religions, the use of a Christian symbol was indirect, remote and incidental. The Court stated that the utilization of the symbol (the nativity scene) during the Christmas holidays may advance religion in a sense, but "on occasion some advancement of religion will result from governmental action" but any "notion that these symbols pose a real danger of establishment of a state church is far-fetched." In her concurring opinion, Justice O'Connor stated that in order to determine whether or not a state has endorsed religion, one has to consider the purpose and effect prongs of the Lemon Test.

<sup>71</sup> *Donnelly* at 668. Pursuant to *Donnelly*, at best there is a guarantee that government will not coerce anyone to support or participate in religion or its exercise.

by a judicial circuit, certified school counselors, or a religious instructor, who also is sanctioned by the state, i.e. an official representative of a religious institution which is recognized by the state.<sup>72</sup> Any fee charged for the premarital course is to be paid for by the applicant.<sup>73</sup> The statute does not provide for a stated fee nor does it suggest a fee for the cost of the course. Rather it provides that each "judicial circuit may establish a roster of area course providers, including those who offer the course on a sliding fee scale or for free."<sup>74</sup> At first glance it does not appear that the statute conflicts with *Everson* and *Donnelly*. Pursuant to the Act an individual has several choices, one of which is religious. Although religion is mentioned in the statute, it is arguable that religion is not aided, which is in line with the Courts' opinions in *Everson* and *Donnelly*. Nor is there a favoring of one religion over another.

At second glance however, charging a fee for the course alerts us that more often than not the individual will seek guidance from the church because generally churches do not charge a fee for family related services. Understanding that a fee will be charged for the course, the State is on notice, if it did not originally have the intent, that the Act could in fact have the effect of requiring religious counseling prior to marrying. As previously stated, a marriage is a civil contract entered into by a woman, a man, and the state.<sup>75</sup> The state defines the obligations and responsibilities of the parties and by enacting the Marital Preparation Act, the state in effect has a strong influence from the church in fulfilling the state's part of the contract. Such a requirement fulfills the state's role in the marriage contract, which appears to be the intermingling with the church in order to set the norms for values and morals for individuals who desire to marry, for families, and for society. Such intermingling is problematic for separation of church and state issues.

An analysis of the establishment clause would not be complete without a discussion of the ever so criticized Lemon Test. Pursuant to the Lemon Test, a three part test must be satisfied in order to withstand an Establishment Clause challenge: (1) the law must have a secular legislative purpose; (2) the principal or primary effect of the law must neither advance nor inhibit religion; and (3) the law must not foster an excessive government entanglement with religion.<sup>76</sup> Applying the Lemon Test to the Marriage Preparation Act, under the first prong it could be argued that the state has a secular purpose for the Act. Pursuant to the Act, the state claims that since family is the foundation of society and the marital relationship is the foundation of the family, the goal of strengthening marriages via the Act can only lead to stronger families, children,

<sup>72</sup> FLA. STAT. § 741.0305(3)(a)(1-6) (1998).

<sup>73</sup> FLA. STAT. § 741.0305(3)(b) (1998).

<sup>74</sup> FLA. STAT. § 741.0305(3)(b) (1998).

<sup>75</sup> Maura I. Strassberg, *The Distinction of Form or Substance Monogamy, Polygamy and Same Sex Marriage*, 75 N.C.L. REV. 1501 (1997) (The "Constitution's prohibition on laws impairing the obligation of contract was a source of marriage rights that could limit state control over marriage. However, the Court ultimately held that marriage is not a contract within the meaning of the prohibition because a marriage contract does not vest certain, definite, fixed private rights of property. As a result marriage was frequently described by courts as a privilege established by state law.") *Id.* at 1560.

<sup>76</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *but see Helms v. Picard*, 151 F.3d 347 (1998).

and communities.<sup>77</sup> It is also stated in the Act that the "state has a compelling interest in educating its citizens with regard to marriage."<sup>78</sup> It is arguable that strengthening families and educating citizens on marriage with an invite for education from the church is not solely secular.

Under the second prong of the Lemon Test it is easy for the state to assert that the primary purpose of the Act is not to advance nor inhibit religion, it is also to strengthen families. Strengthening families is not necessarily an indication that the state is attempting to advance religion but it is no mere coincidence that strengthening families is also a goal of the church.

Under the third prong of the Lemon Test, it is certainly arguable that having at its core the same primary concern as the church, that there is some entanglement of the church and the state. When the state suggests that individuals could seek religious instruction and the probability of that occurring when a fee is charged for the counseling and probability that the church will most likely not charge such a fee. The legislation found that under instruction from a premarital course that "relationship skills can be learned [and] [o]nce learned [such skills] can facilitate communication between parties to a marriage and assist couples in avoiding conflict [which are then] generalized to parenting, the workplace, schools, neighborhoods, and civic relationships."<sup>79</sup> Again, suggesting that individuals could go to the church, the state is clearly on notice that relationship skills that will be taught will be those fundamental to the core of the church which will greatly impact on the morals of society. The state understands that the church could play a significant role in educating individuals on morals, thereby strengthening families on the morals of the church that will then become a substantial part of the morals of society. The state knows this will happen, in particular because more than likely the church's course will be free and any state offered course will probably require a fee. Therefore, individuals will select religion over state fee charged courses. By placing religion as one of the choices, the state knew that enacting such an Act that religion could play a significant role in determining the morals of society, something the state could not do under the Establishment Clause. By including state sanctioned religions as a choice, the state operates in a way to get around the Establishment Clause. By sanctioning religions approved by the state, the state is not only aiding religion, but aiding it in a way that permits religion to sets the mores of society.

Having asserted that the Act would be in violation of the three prong Lemon Test, I must revert back to my earlier statement that the Test has been substantially criticized. In post Lemon decisions the Court has in some instances departed from the test. For example, in *Marsh v. Chambers*, the Court in upholding prayers opening legislative sessions, emphasized the historical acceptance of the challenged practice, such history making it a part of the fabric of our society.<sup>80</sup>

Justice O'Connor was clear in her concurring opinion in *Donnelly*, that a more

<sup>77</sup> 1998 FLA. LAWS ch. 98-403, § 2(1)(2).

<sup>78</sup> 1998 FLA. LAWS ch. 98-403, § 2(1)(9).

<sup>79</sup> 1998 FLA. LAWS ch. 98-403, § 2(1)(4), 2(1)(5), 2(1)(6).

<sup>80</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

appropriate test is whether a law constitutes an endorsement of religion.<sup>81</sup> Pursuant to O'Connor, the purpose prong asks whether government's actual purpose is to endorse (or disapprove) religion; the effect prong asks whether, irrespective of government's actual purpose, the practice under review, in fact conveys a message of endorsement (or disapproval).<sup>82</sup> Under purpose, even if there is some secular purpose but dominated by religious purposes, the inquiry is whether the government intends to convey a message of endorsement (or disapproval) of religion.<sup>83</sup> Under the effect prong, it is crucial that the government does not have the effect of communicating a message of government endorsement (or disapproval) of religion.<sup>84</sup> O'Connor deemed the use of the Christian symbol during the celebration of a public holiday as an endorsement of religion.<sup>85</sup> She deemed it no more an endorsement than the use of the term "In God We Trust" which is displayed on coins.<sup>86</sup>

Writing for the dissent, Justice Brennan stated that the primary effect of the use of the nativity scene was the City's displayed approval of a particular religion.<sup>87</sup> Those believing in the message of the nativity receive a unique and exclusive benefit of public recognition and approval of their views, the effect on other religious groups is the message that their views are not similarly worthy of public recognition nor entitled to public support.<sup>88</sup> Notwithstanding the impact of religion on society, the display was held to be constitutional and not an infringement on separation and church issues.

What would be the result with respect to Florida's Act? Pursuant to the majority in *Donnelly*, the mere suggestion that one seek instruction from religion is not an endorsement of religion even though the purpose of the instruction has a secular purpose and the primary effect is an endorsement of religious participation; even though there is some advancement of religion, there is no real danger of establishing a state church. Or, by inserting religion as a choice for an individual seeking to marry, the State in effect, sends the message of the state's approval of religion in decision making and moral building characters for strengthening families, which in effect strengthens society. Using O'Connor's purpose and effect tests, it is arguable that Florida's Act does not have the purpose for endorsing religion but one can certainly argue that it can have the effect of endorsing religion. On the other hand omitting religion as a choice could imply the state's disapproval of religion in family strengthening and society building aspirations. Such disapproval could be a violation of the Establishment Clause if it inhibited religion.

#### **B. Going To Church Via The Marriage Preparation And Preservation Act**

The State of Florida has apparently determined that the increased number of failing marriages, noted in the findings of the legislature that "the divorce rate has been

---

<sup>81</sup> Lynch v. Donnelly, 465 U.S. 668 (1984).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Lynch, 465 U.S. at 668.

<sup>87</sup> *Id.* (Brennan, J., dissenting opinion)

<sup>88</sup> *Id.*



accelerating"<sup>89</sup> denotes that failing marriages are no longer just a problem with the private parties it is also a serious problem for the state. It is a serious problem for the state because according to legislation the family is the foundation of society and the marital relationship is the foundation of the family.<sup>90</sup> The legislature found that if the state strengthens marriages, this leads to stronger families and communities.<sup>91</sup> How do we go about strengthening families via the Act? Pursuant to the Act, "the premarital preparation course may include instruction regarding conflict management, communication skills, financial responsibilities, children and parenting responsibilities and may include data from available information relating to problems reported by married couples who seek marital or individual counseling."<sup>92</sup>

As early as 1872, the Supreme Court has noted the link between family and the church. In *Bradwell v. United States*, the Court stated that the "constitution of the family organization" is founded in the divine ordinance,<sup>93</sup> and marriage, according to the Court in *Reynolds v. United States*, said by its very nature is a sacred obligation.<sup>94</sup> Marriage, being sacred and family founded in divine ordinance sounds like intermingling of church and state and recognition by the United States Supreme Court of such an alliance. Circumventing, or least attempting to circumvent, the problems of marriage is not new to the church. In January 1986, the first Community Marriage Policy went into effect.<sup>95</sup> It was a community religion marriage policy signed by one rabbi and 95 priests and pastors from 19 denominations. Each agreed to require a minimum four-month preparation for couples, within their perspective religions, that are engaged.<sup>96</sup>

The State therefore has actual knowledge that the Church plays a significant role in fashioning out families and setting the groundwork for morals and the

<sup>89</sup> 1998 Fla. Laws ch. 98-403, § 2(1).

<sup>90</sup> *See id.* 1998 Fla. Laws ch. 98-403, § 2(2). *But see* Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 906 (1996) [(citing Martha A. Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995)). "In [her] book, Fineman proposes alternative ways to conceptualize relationships of dependence. Fineman argues that caregiving relationships (such as mother/child) rather than sexual relationships (such as husband/wife) should be the center of the conceptual frameworks we use to determine legal rights and construct legal institutions. The idea is that if mothers are weak and dependent, it is the network of social/political and economic systems that make them so. Fineman's proposal presupposes that strong and independent mothers are a good thing, a social objective well worth the radical social, political, and economic reconstruction it would entail."]] This would mean that focusing the foundation of family on marriage is flawed because coding the relation in this way permits a focus on the husband, rather than a focus on the children.

<sup>91</sup> *See id.* 1998 Fla. Laws ch. 98-403, § 2(1)(2).

<sup>92</sup> Fla. Stat. §741.0305(2) (1998).

<sup>93</sup> *Bradwell v. United States*, 388 F.2d 619 (2nd Cir. 1968) cert. denied 393 U.S. 867 (1968).

<sup>94</sup> *Reynolds v. United States*, 92 U.S. 145 (1878).

<sup>95</sup> *See* Marshner, *supra* note 1.

<sup>96</sup> *See id.* Florida's Act requires four hours, as a minimum. In 1986 there were 1,178,000 divorces in the United States, in 1995 there were 1,169,000. *See* Marshner, *supra* note 1. A drop of 9,000 divorces nationwide. *Id.* In Modesto, the location of the Community Marriage Policy agreement, there were 1,066 fewer divorces reported which is suggested by this author that the One Community Marriage Policy, in one city, accounted for a drop in 1/10th of the national reduction in divorce due to its churches' instructions on marriage. *Id.*

foundations of society.<sup>97</sup> How does the Church counsel on the material suggested by the State?<sup>98</sup> In the Act, the State listed the stated instruction as what "may" occur during the instruction, which means it is leaving what is actually instructed up to the instructor. Religious differences have been noted as a high risk factor for divorce.<sup>99</sup> What happens if during the course of the instruction, one of the parties' religious differences becomes a factor? For example, a problem could arise if both individuals are of two different religious affiliations and they both originally agree to be instructed by one of the religious leaders and it turns out that there are conflicts between the two religious groups and their instruction on marriage. As a result one party decides not to marry because of what took place in the instruction. What remedies are available? Since a breach of a promise to marry is not recognized in a significant number of states, including Florida,<sup>100</sup> does the individual have recourse against the state if after instruction under the pre-marriage course the union dissolves prior to the marriage? The state statute requires individuals to receive instruction but the statute does not speak to what happens if during the instruction the parties decide not to marry or one party decides not to marry? The statute does not speak to the negligence or recklessness of an instructor, nor does it speak of an instructor imparting personal views in the instruction. If the religious leader decides not to marry the parties because of responses given by the individuals during the course of the instruction then the party has an out because he/she may seek another religious leader. The statute does not per se impose on religious leaders obligations to marry the parties once the instruction is completed. I do not think that a church would allow such interference by the state even if the individual's interaction with the church may have been at the direction of the state. If

---

<sup>97</sup> Ira M. Ellman, *Divorce Rates, Marriage Rates and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000).

<sup>98</sup> The Premarital and Remarriage Seminar at Christ Church (Interview by Ileana Ruiz with Lourdes Grandal, marriage counselor for the Mother of Christ Catholic Church, Miami, Florida, June, 1999.) ("covers such key ingredients of marriage as: the biblical foundation of marriage, understanding your family of origin, communication skills, conflict resolution, intimacy and sexuality.") The biblical foundation of marriage would certainly appear to be a conflict with church and state, i.e. religious training which includes the biblical foundation of marriage as opposed to the state's notion, when the state is recommending such training.

<sup>99</sup> See Ann Doss Helms, *Love Isn't Enough, Growing Movement Teaches Marriage-Building Skills*, July 11, 1998 available at <http://www.charlotte.com/observer/family/bestread/marryskills.htm>, visited December 15, 2000.

<sup>100</sup> Twenty-six states and the District of Columbia abolished the action of breach of a promise to marry. See ALA. CODE §6-5-330; WEST'S CAL. CIV. CODE §43.5; COLO. REV. STAT. §§ 13-20-202 and 13-20-203; CONN. GEN. STAT. ANN. § 52-572b; DEL. CODE ANN. tit. 10 §3924; FLA. STAT. ANN. §§ 771.01 and 771.04; BURNS' IND. CODE ANN. §§ 34-4-4-1 and 34-4-4-2; ME. REV. STAT. ANN. tit. 14, §854; MASS. GEN. LAWS ANN. ch. 207, §47A; MICH. COMP. LAWS ANN. §§ 551.301 and 600.2901; MINN. STAT. ANN. §§ 553.02 and 533.03; MONT. CODE ANN. § 27-1-602; NEV. REV. STAT. §§ 41-370 and 41-380; N.H. REV. STAT. § 508.11; N.J. STAT. ANN. §§ 23-1; MCKINNEY'S N.Y. CIV. RTS. LAW § 80-a; N.D. CENT. CODE § 14-02-06; BALDWIN'S OHIO REV. CODE ANN. § 2305.29; PURDON'S 23 PA. CONST. STAT. ANN. § 1103; VT. STAT. ANN. tit. 15, § 1001; VA. CODE ANN. § 8.01220; W. VA. CODE § 56-3-2a; WIS. STAT. ANN. § 768.01; WYO. STAT. ANN. § 1-23-101; D.C. CODE ANN. § 16-923. Maryland has abolished the action except in cases involving pregnancy. MD. CODE ANN. FAM. LAW § 3-102. Utah abolished the action through a judicial ruling in *Jackson v. Brown*, 904 P.2d 685 (1995).

the instruction leads the individuals to a parting of the ways based on the instruction or conflicts that arose during the instruction that did not exist previously then perhaps the state should compensate the individuals in some way. The compensation presently given by the state is a reduction in the marriage license fee once the couple completes the instruction.<sup>101</sup> But what remedy to the parties if during the course of the instruction the couple decides not to marry? In particular what if the decision is based on information/material the couple was informed of during the course of the instruction? What if the instructor, a religious leader used this as an opportunity to direct the couple's morals which was in apposite to the couple's views on morals and this direction caused the couple to end the relationship? Since the state is directing couples to be instructed on conflict management, communication skills, financial responsibilities, and children and parenting responsibilities, does the state then sanction that the instruction is proper and that the couples should follow the instruction? What if the couple marries and follows all of the instructions given during the course and the parties subsequently divorce after marrying, do they now have a cause of action against the state? Does the state present any guarantees for couples if they follow the letter of the premarital preparation course during the course of their marriage? Should it?

So many questions are raised because of the impact that such a state imposed statute could have on private decisions in an effort to promote society. One should keep in mind that a significant reason for imposing such a statute was to influence the family, which the state believes impacts society. How will the state's public world image impact the private domain of individuals? Can the private domain impact the public? Should it? "The public world of politics is marked by the values of rationalism, competition, judgment of value by merit, objectivity, formal social bonds, uniforms and rituals that mask the person, universalism, and a secular morality divorced from the 'merciful God' and characterized at its height by real politik . . . [T]he private world of the family [in contrast] is marked by the values of sentiment, irrationalism, nurturance, loyalty, intimacy, love, subjectivity, sacrifice, particularism, harmony, and moralism."<sup>102</sup>

How does one instruct on subjectivity vs. objectivity? A religious leader will most assuredly resolve such a conflict within the religious state. How will instructors discuss the public/private dichotomous roles women face? "Women's private roles represent the seizure of sexual power by individual men in a particular mode of masculinity [while their] public roles represent means or resources by which the state manipulates and asserts power over individual men . . . The operation of public power anchors women's public identities theoretically – identities otherwise submerged in feminist accounts of women's privatization. Further, a state's use of women's public identities creates a distinction between 'male power' and 'state power' without forfeiting the gender entailments of either."<sup>103</sup> What happens or what could happen in the event that conflict arises between the parties who are being instructed on marrying-- the state

---

<sup>101</sup> Fla. Stat. § 741.01(5)(1998) (The fee charged for each marriage license issued in the state shall be reduced by a sum of \$32.50 for all couples who present valid certificates of completion of a premarital preparation course from a qualified course provider.)

<sup>102</sup> Margaret A. Baldwin, *Public Women and The Feminist State*, 20 HARV. WOMEN'S L.J. 47, 59 (1997).

<sup>103</sup> *Id.* at 161.

sanctioned instructor could impose public value norms on an individual's private sphere. What should happen, in particular with women in the event of conflict, the instructor should explore their public lives that would enrich the overall resolve of the public/private dichotomy.<sup>104</sup> As Suzanna Sherry points out in her critique of Professor Novak's article the view that "the rights of the individual simply cannot be separated from the rights of the citizen, and hence of the polity" she posits and I agree, that in addition to an enjoinder with the history of civic virtue there was also a history of natural rights.<sup>105</sup> Natural rights played a role in fashioning out laws, i.e. judges used such things as "natural justice, common right and reason, and the dictates of moral sense,"<sup>106</sup> an indication of the significant relevance of individualized subjectivity in our citizenship.<sup>107</sup> The state's move to replace subjectivity with the objectivity of state licensed instructors and/or state recognized religious leaders surely is an indication that marriages become public in order to maintain the public order of the community.<sup>108</sup>

In the cultural arena the "suggested" or "coercive" imposition of the statute could have an even greater impact. Culture plays an even more significant role in deciding issues of family and marriage. I will begin with the statement by Gerald P. Lopez, "To really matter, Latinos must be recognized . . . [a]nd . . . understood too."<sup>109</sup> Lopez continues "[a]fter all, basic recognition, some understanding, and occasional influence would seem elemental to membership in the national community."<sup>110</sup> One thing for certain the state of Florida is knowledgeable about the growing numbers of Latinos in the state and the influence that the Catholic church has on this particular group.<sup>111</sup> I'm sure that the state of Florida realization that "[k]nowledge about Latinos

<sup>104</sup> See *id.* at 162.

<sup>105</sup> See Suzanna Sherry, *Public Values and Private Virtue*, 45 HASTINGS L.J. 1099, 1101 (1994). Although I have much disagreement about Sherry's views on many aspects of our laws, I seem to somehow share her view of the need to include the historical heritage of both civic virtue as well as the notion of the natural rights.

<sup>106</sup> See Sherry at 1101.

<sup>107</sup> *Id.*

<sup>108</sup> But see Robert D. Segal, *Partnership Law Edging Into Realm of Divorce Cases*, CHI. DAILY L. BULL. 6, August 25, 1997) ("The Illinois ... pronounced that a marriage in this state is a shared enterprise, a partnership; between spouses. [T]he marriage relation of husband and wife is one of special confidence and trust, requiring the utmost to the end that injustice and oppression may not result.... A husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relationships with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse... This confidential relationship is a fiduciary relationship subject to the same rights and duties of non-marital business partners.") In effect the marriage is a completely objective enterprise under this notion. The values then are the norms of society and not the personal, private views of the parties. Perhaps this is the theory behind enacting such an act as the Marriage Preparation and Preservation Act.

<sup>109</sup> Gerald P. Lopez, *Learning About Latinos*, 19 CHICANO-LATINO L.REV. 363 (1998).

<sup>110</sup> *Id.*

<sup>111</sup> See Tania Jiyong Cho, *The Double Moral: Compliance of International Legal Obligations of Reproductive Rights vs. Allegiance To The Catholic Church*, 55 W.J.L. & TRADE AM. 421, 431 (1998) (90 percent of Latin America's population is of the Catholic faith.). See also N.J. Demerath III, *Excepting Exceptionalism: American Religion in Comparative Relief*, 55 ANNALS AM. ACAD. POL. & SOC. SCI. 28, 31 (1998) ("Virtually every Latin American country has a dominant Catholic legacy, albeit one in increasing competition with surging conservative Protestant movements and resurgent indigenous religion, such as Afro-spiritualism in Brazil and Mayan practices in Guatemala."). But see Laura M.

may in the near future be as profound as it is sweeping"<sup>112</sup> in particular because of the growing numbers played a role in the imposition of religion on marrying or at least legislators knew the impact that religion already has on this particular group and how that influence could substantially increase with the imposition of such a statute.<sup>113</sup> The Act could have the impact of socially constructing marrying values via notions of individuals licensed by the state or religious entities recognized by the state. Constructing society's values in such a way would not work within the Latino community. "Latinos are constructed by multiple influences – racism, sexism, the dominant culture's binary racial framework and minority language discrimination."<sup>114</sup> The social construction of race is even more problematic for those in the Latino community because it presumes a disconnection to Spanish/Hispanic origin. Even the connection to Spanish/Hispanic origin is also problematic if the connection disconnects the cultural aspects of the individual.<sup>115</sup>

If you find my cultural, ethnic discussion utilizing Latinos and Hispanics as disjointed, bear in mind as an American of African descent I may not be in a position to have accurate observations of the personal nature of marriage and family within this/these groups. I recognize the value of culture, of ethnicity, and heritage and understand that there are bonding elements that I may be unfamiliar with. Even if I share Christianity that is the religion of a substantial number of Latinos and Hispanics, am I in a position to observe and state the values in an appreciable manner? What of instructors, even if licensed by the State, even if of a religion recognized by the State when instruction is given is the instructor required to include in the guides/suggestions ethnic or cultural views? If so, and I believe ethnicity and culture are extremely important in the private realm of marriage, then are instructors being instructed on these valuable components?

### III. The International Arena

There appears to be an international, as national, on concerns of saving

---

Padilla, *Single-Parent Latinas On The Margin: Seeking A Room With A View, Meals, And Built-in Community*, 13 WIS. WOMEN'S L.J. 179, fn. 133 (1998) (The assumption that all Latinos are Catholic is one example of one of the common misperceptions used to justify homogenization under a common ethnic label.). It would not be unusual to have a large population of Latinos as Catholic since Catholicism is the largest single denomination in the United States. See Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998). Catholicism has a long history in the Latino community. It has been in Puerto Rico since 1511, longer there than anywhere else in the hemisphere. See Anthony M. Stevens-Arroyo, *The Latino Religious Resurgence*, 558 ANNALS AM. ACAD. POL. & SOC. SCI., 163, 165 (1998). Religion provided a space for Latino consciousness that was not readily available in education, law or politics.

<sup>112</sup> *Id.*

<sup>113</sup> American Catholicism has been shaped as clearly by local pressures as other denominations. [At one point] some conservatives in Rome the Church had fallen into the heresy of Americanism when American Catholics conform[ed] to the pattern of American churchstate relations. In the years since the 2<sup>nd</sup> World War, the growth and increasing self-confidence among Latino Catholics has generated an additional localizing pressure because of conflicts between the Latino laity and the largely European American hierarchy of the American church." See Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998).

<sup>114</sup> Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity*, 19 CHICANO-LATINO L.REV. 69, 140 (1998).

<sup>115</sup> See *id.* at 129-130.

marriages. In 1992, Spain passed three laws that would recognize the legal effects of Protestant, Jewish, and Islamic marriages.<sup>116</sup> Prior to the law, "spouses of Protestant, Jewish or Islamic faiths had to go through a double ceremony of marriage... [when] in contrast, the religious ceremony for Catholics itself was enough to produce the full effects of marriage."<sup>117</sup> By enacting such laws, the state undertook to give a special status to the named faiths' places of worship and to their ministers.<sup>118</sup> Under the laws, Spain recognized the civil effects of marriages conducted before a minister of the Evangelical, Jewish or Muslim faiths.<sup>119</sup> The parties were required to carry out the formalities before the officer of the Civil Status Register prior to marriage and the officer would issue a certificate of the capacity of the parties to enter into marriage.<sup>120</sup> In order to receive civil validity, the spouses are required to consent before the minister of the respective religious group and at least two other witnesses of full age.<sup>121</sup> The historic importance of the three laws is significance that it is the first time that Spanish law allowed "Spanish citizens to have the right to marry in a non-Catholic religious form, with civil effects."<sup>122</sup>

A very interesting development within European countries is whether within the concepts of the New Europe will provide citizens of European nations will also be citizens of Europe.<sup>123</sup> One of the issues clearly centered around whether within the European citizenship could the European community regulate both public and private spheres. It would seem that to enact a European community of rules that impact on the private sphere of individuals could conflict with the private sphere within a particular country. For example marriage laws enacted for the "New Europe," the European Union, could have serious conflicts with countries such as Spain which has a majority of citizens who are of the Catholic religion and France which has social morals which may be in direct conflict with Catholicism.

A National Marriage Act was passed in 1974 in Indonesia.<sup>124</sup> Indonesia is the

<sup>116</sup> Gabriel Garcia Cantero, *Spain: Some Problems of Cultural Pluralism*, 32U. LOUISVILLE J. FAM. L. 455 (1993-1994). (The Ministry of Justice prepared three accords, the Federated Evangelical (Protestant) Churches in Spain, the Federation of Jewish Communities in Spain the Spanish Islamic Commission separately, but in a similar fashion.) *Id.* at 455-56.

<sup>117</sup> Cantero at 455.

<sup>118</sup> *Id.* at 456.

<sup>119</sup> *Id.* (To give full effect, the marriages were required to be recorded in the Civil Status Register.)

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* The law covering Muslim marriages expressly states that such a marriage is to have legal effect only if the spouses satisfy the civil law conditions relating to the capacity to intermarry, which would in effect exclude the Muslim religion that permits polygamous marriages and replace it with the requirement of monogamy which is the public order in Spanish law.

<sup>122</sup> *Id.* at 457. It is not the first time Spanish law gave civil effect to non-Catholic marriages; Spanish law gave recognition to marriages conducted in accordance with the spouses' personal law. Author references a case regarding the former Spanish Protectorate in Morocco and the former African Colonies.

<sup>123</sup> Conversations with various law professors of the Universidad de Malaga, Spain. I had the honored opportunity of engaging with law professors who are very much involved in developing criteria for European citizenship at The Spanish Legal System and LatCrit Theory: A Dialogue held at The Universidad de Malaga on June 30, 1999.

<sup>124</sup> Mark Cammack, Lawrence A. Young, and Tim Heaton, *Legislating Social Change In An*

worlds most populace Islamic country.<sup>125</sup> Prior to the enactment of the National Marriage Act, marriage and divorce was "governed exclusively by the unamended rules of Islamic law."<sup>126</sup> A main goal of the law was to impact social reform and reduce the frequency of child marriages.<sup>127</sup> Although the Act failed to prevent underage marriage it impacted society in the areas of marriage regarding parental authority and female autonomy.<sup>128</sup> Impacting and changing social values and norms is a goal shared by legislatures enacting domestic marriage preparation acts.

Thousands of undocumented immigrants were barred from legally marrying when Florida enacted a statute that required a Social Security number or some form of immigration identification in order for applicants to receive a marriage license.<sup>129</sup> The goal of the statute was to provide a new tool for identifying and pursuing deadbeat parents.<sup>130</sup> Not only are immigrants forced to live together in a state that does not recognize common law marriages but it also interferes with religious practices. For example, without a marriage license, the Catholic church cannot perform a wedding.<sup>131</sup> The law can also have the effect of closing off the only avenue many illegal immigrants have for obtaining legal status.<sup>132</sup> At a time when the state is presenting legislation to strengthen marriages, this group is denied the right of marriage.

#### IV. Conclusion

I am not convinced that the Marriage Preparation and Preservation, as written, will not manipulate individuals to conform to certain stated value norms of the state.<sup>133</sup> Although it is clear that the state cannot manipulate individuals via religion and by making the statute non-mandatory at least facially one assumes that is not the goal of the state. I am not equally convinced that it was not the goal of the state to manipulate individuals on marriage norms and indirectly impose certain values. Because of the constitutional mandate on separation of church and state, the state could not mandatorily sanction the church in dictating the value norms of society. Neither could the state mandatorily impose an unreasonable regulation on the fundamental privacy right of

---

*Islamic Society- Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ("The sacred law contains detailed rules regarding marriage and divorce which are believed to reflect an objective expansion of God's revealed will and therefore cannot be changed or perfected through human intervention.")

<sup>127</sup> *Id.* at 46.

<sup>128</sup> *Id.* at 72.

<sup>129</sup> Andres Viglucci, *New Marriage Rule Blocks Undocumented Immigrants*, MIAMI HERALD, January 10, 1998, at 1B.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> I presented this discussion at a colloquy with my peers. During the discussion two Latina colleagues responded with completely opposite personal views about the impact of the Act. Both were Catholic. One responded that a priest would never advise a couple not to marry. The other responded that their priest informed them to delay their marriage vows, because of some of their personal views. The second respondent subsequently went to a Lutheran priest who immediately performed the ceremony for a fee. The second respondent stated that, but for her educational background, she probably would have followed her Catholic upbringing and adhered to the priest's statement advising them not to marry. The two responses clearly demonstrate potential problems when the church and the state unite.

marrying. Facially, with the Marriage Preparation and Preservation Act Florida did neither. But indirectly the state of Florida has either imposed religious views on individuals who plan to marry or state political views on such individuals. The imposition of state political views is indirectly imposed because the state dictates who is qualified to instruct individuals on marrying. The state of Florida has taken the private, personal lives of individuals who plan to marry and has imposed public views on the future of individual couples' families. The state has done this without any repercussion on the state in the event the parties ultimately divorce or there is no divorce but nonetheless there is a breakdown of the unit, for example via domestic violence.

It seems to me that a non-coercive could have been equally effective. Such a statute would permit couples to define their family unit within their private sphere and therefore impact the values of society via their subjective views. As written the statute permits the state to define the private sphere as public when it dictates who can instruct parties on marrying. By stating who qualifies as an instructor for instructing on marriage, i.e. individuals who are either licensed by the state or religious leaders recognized by the state, the state makes the private family sphere one with public values. A non-coercive instruction would be one which allows the couple to select instructors from whatever domain, i.e. a friend, a neighbor, a coworker, a family therapist who is not necessarily licensed by the state. Since the state incurs no liability if the instruction does not prevent a breakdown of the unit or divorce then why should it matter to the state if the individual has at least a four-hour discussion with a friend about marrying? If the state's objective is to fashion out moral values, societal values and norms by sending couples to state licensed individuals or state approved religious leaders then it should dictate such individuals as proper instructors? If this is the case then impose some liability on the part of the state if such instruction does not work, otherwise the state should not have such an impact on family norms and values without giving guarantees. What role should the state play in fashioning our family norms and values? What role is the state of Florida playing when it is known that religious differences has been noted as a high risk factor for divorce? Why impose on individuals the responsibility of having the union sanctioned by religion prior to joining as a married couple when the state "knows" the conflict between religion can cause a divorce-- is the state suggesting that the conflict should prevent a marriage and thereby prevent a divorce or is the state's interest to save the marriage by having the conflict resolved at the outset? If the latter is the case then where are the checks and balances to determine if the courses in fact meet that goal?

Based on the role and direction of the state in Florida's Marriage Preparation and Preservation Act, the state should add a section in the statute that provides, "Since family is the foundation of society and the marital relationship is the foundation of the family, consequently the state's interest in societal values permits it to define the norms and values of marital relationships." As far fetched as it may seem to hold the state responsible for the failing of marriages when individuals follow the letter of the Act, at a minimum the state should have some measuring gauge to determine the benefits of such an Act. Florida has commissioned the "Florida State University Center for Marriage and Family to develop a questionnaire and create a curriculum based on data



collected by its researchers."<sup>134</sup> At the time of this writing no such questionnaire has been presented even though this particular section of the statute became effective January 1, 1999.<sup>135</sup> Even though the Act is being administered, there is no collection of data because the questionnaire, a primary source for collecting the data, is not yet available.

It was suggested by one of the student participants at the conference, i.e. The Spanish Legal System and LatCrit Theory: A Dialogue, held at Universidad de Malaga, Spain, that if the state were genuinely concerned in saving marriages that the state would recommend instruction on how newly weds can purchase their first home; money management and other such skills rather than instructing on morals. It was the participants' belief that money management problems played a more significant role in the breakup of marriages than morals.

---

<sup>134</sup> Fla. Stat. § 741.03055 (3) (1998).

<sup>135</sup> *Id.*