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State of the Union: The States' Interest in the Marital Status of Their Citizens

BRIAN H. BIX*

INTRODUCTION

The legal regulation of marriage is usually uncontroversial and given little attention within family law. Higher-profile questions such as adoption,¹ custody,² palimony,³ surrogacy,⁴ in-vitro fertilization,⁵ and medical decision-making for children,⁶ usually overshadow it. Roughly once a generation, however, questions regarding the regulation of marriage and its dissolution briefly come to the attention of the general public and legal commentators. Two generations ago, the controversies

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1. *See, e.g., In re Clausen (DeBoer v. Schmidt)*, 502 N.W.2d 649 (Mich. 1993) (deciding the "Baby Jessica" adoption dispute).

2. *See, e.g., Allen v. Farrow*, 611 N.Y.S.2d 859 (N.Y. App. Div. 1994) (deciding the custody dispute between Woody Allen and Mia Farrow); *Guardianship of Simpson*, 79 Cal. Rptr. 2d 389 (Cal. Ct. App. 1998) (determining the custody fight between O.J. Simpson and his children's maternal grandparents).

3. *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (allowing recovery for breach of contract between non-married cohabitants).

4. *In re Baby M.*, 537 A.2d 1227, 1246-49 (N.J. Sup. Ct. 1988) (holding a surrogacy agreement to be unenforceable because contrary to public policy).

5. *See, e.g., Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (deciding a divorce "custody" dispute regarding the disposition of couple's frozen pre-embryos).

6. *See, e.g., Lundman v. McKown*, 530 N.W.2d 807 (Minn. Ct. App. 1995) *review denied*, 1995 Minn. LEXIS 489 (Minn. 1995), *cert. denied*, 516 U.S. 1099 (1996), *and cert. denied sub nom. Lundman v. First Church of Christ*, 516 U.S. 1092 (1996) (upholding a \$ 1.5 million dollar verdict based on a Christian Scientist prayer-treatment of a diabetic child, which led to the child's death).

came from anti-miscegenation laws⁷ and migratory divorces.⁸ A generation ago, the controversy centered around the transition from “fault divorce” to a no-fault system (or a mixed system of fault and no-fault).⁹ The marriage-related controversies of this generation may now finally be emerging. First, substantial attention has been given to the possibility of state recognition of same-sex marriages¹⁰ (the initial move towards state recognition led to the adoption of the federal Defense of Marriage Act (“DOMA”)).¹¹ Second, much attention has been given to proposed “covenant marriage” state statutes (and their subsequent enactment in two states) which allow couples to opt into a more binding marriage commitment in which unilateral no-fault divorce is not an option.¹² Both controversies are likely at an early stage. In the case of same-sex marriage, Hawaii has backed away from recognizing same-sex marriages.¹³ Vermont’s recognition via “civil unions” is too new for its consequences, both state and national, to be ascertained.¹⁴ In the case of

7. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding anti-miscegenation laws to be unconstitutional).

8. Migratory divorces involve a spouse going to another state to get a divorce. The issue was the treatment by the home state of such decrees. See *Williams v. North Carolina*, 317 U.S. 287, 301-04 (1942) (concluding that home states must give full faith and credit to ex parte divorce decrees from another state); *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (holding, additionally, that home states are allowed to determine for themselves whether the decree-granting state had jurisdiction to grant the decree in question).

9. See, e.g., STEVEN D. SUGARMAN & HERMAN HILL KAY, EDs., *DIVORCE REFORM AT THE CROSSROADS* (1990); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984).

10. The attention was originally focused on Hawaii. See *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993), *recons. granted in part*, 875 P.2d 225 (Haw. 1993) (concluding that the restriction of marriage to opposite-sex couples was subject to strict scrutiny under the state constitution’s equal protection clause). A subsequent referendum effectively removed the issue from the Hawaii courts. *Baehr v. Miiike*, 994 P.2d 566 (Haw. 1999). See *infra* note 37. The attention was then on Vermont, where that state’s supreme court came to a conclusion similar to that of *Baehr*. The Court held the exclusion of same-sex couples from that state’s marriage statute violates the Vermont state constitution, by depriving such couples of the legal benefits available to married couples. *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999). In response to that decision, the Vermont Legislature passed, and the Governor signed, a bill creating “civil unions.” 2000 Vt. Acts & Resolves 91. The law took effect on July 1, 2000. Pamela Ferdinand, *Same-Sex Couples Take Vows as Law Takes Effect*, WASH. POST, July 2, 2000, at A3.

11. Pub. L. No. 104-199, 110 Stat. 2419 (1996), (codified at 1 U.S.C.A. § 7 (West 1997), 28 U.S.C.A. § 1738C (West Supp. 2000)).

12. See ARIZ. REV. STAT. §§ 25-901 to 25-906 (2000); LA. REV. STAT. ANN. §§ 9:272 to 9:275.1 (West 2000). See also *infra* Part IVB. For contrary evaluations of reform efforts to make divorce more difficult, see, e.g., Lynn D. Wardle, *Divorce Reform at the Turn of the Millenium*, 33 FAM. L.Q. 783 (1999) (offering a sympathetic overview of proposed reforms); James Herbie DiFonzo, *Customized Marriage*, 75 INDIANA L.J. 875, 957-62 (2000) (criticizing the proposed reforms).

13. *Baehr v. Miiike*, 994 P.2d 566 (Haw. 1999) (declaring a state constitutional challenge to the exclusion of same-sex couples from marriage to be moot, based upon a referendum changing the state constitution); see also *infra* note 37.

14. Carey Goldberg, *Gays and Lesbians Head for Vermont to Make It Legal, but How Legal*

covenant marriage, the issue of how other states will react to those trying to obtain divorces contrary to the terms of their covenant marriages has not yet been faced.

Issues regarding the state regulation of marriage and divorce turn on how individual states can, and should, regulate entrance into and exit from marriage. These questions are complicated by our mobile society and our federalist structure. Both of these factors inevitably lead to states "competing" to regulate the same marriage. These questions are also complicated by the social and legal changes of recent decades, which modify or undermine some of the claims states have regarding their interests in regulating the marital status of their citizens.

While the rhetoric of the phrase, "the state's interest in the marital status of its citizens," refers to governmental interest in its citizens' marital status, as though this was an end in itself, it seems probable that any such interest is largely instrumental—a belief that having citizens married (or single or divorced) aids other goals.¹⁵ Thus, while one often comes across passing references to a state's "interest" in marriage-related judicial proceedings, this shorthand is better unpacked into the various interests state regulation of marriage attempts to serve, and the various ways such regulations are constrained by constitutional doctrines and federalist ideas.

This article seeks to clarify what is meant by a state's interest¹⁶—both in a general sense¹⁷ and in the special context of the U.S. federal

Is It?, N.Y. TIMES, July 23, 2000, at A12 (noting that a large portion of those obtaining "civil unions" in Vermont come from out of state, but pointing out the uncertainty regarding the legal effects of these civil unions outside of Vermont). *See supra* note 10.

15. In part, the conclusion that a state's interest in the marital status of its citizens is *instrumental* is just a reflection of the fact that most of our objectives are *instrumental*. Getting a job, buying a book, purchasing food, or structuring certain sorts of political institutions are not done for their own sake, but for the sake of other goods, valued for their own sake (e.g., health, knowledge, security, happiness). *Cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 59-99 (1980) (offering, and analyzing, one possible list of basic goods, goods valued for their own sake).

Marital status could be valued for its own sake, but it is not easy to do. Usually marriage is valued instrumentally, for the benefits it brings to the individuals, to the individuals' children, or to society generally, and not being married is valued for the freedom it offers the individuals concerned to do other things.

16. There is a general, preliminary problem that is beyond the scope of this article: the inherent problems of speaking of a government or legislature having interests or purposes. These problems derive from the general question of the extent to which the attributes of individuals (will, mental states, etc.) can be ascribed to institutions or groups. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 313-37 (1986) (summarizing some of the problems of discerning group intentions in the context of legislative intentions). There are the slightly less difficult problems that derive from the fact that governments act through multiple agents (e.g., through administrative agencies and police officers as well as legislatures), and that the different actors might be following different and inconsistent agendas. The problem of consistency and coherence will be raised briefly in Part V.

17. In light of the federalism issues, consider the distinction between "the State's interest" as

system¹⁸—to see what help it might give us as we face a new set of issues regarding marriage, divorce, and federalism. Part I considers briefly the problem of justifying government intervention in people's intimate affairs. Part II offers an overview of the direct and indirect interests states may have in the marital status of their citizens and the way in which states may work to protect or further those interests. Part III considers some of the federalism issues raised by the regulation of marriage and divorce, including the traditional division of roles between the federal and state governments and the federal constitutional constraints on state action. Part IV explores the problem of competing state claims, where more than one state might seem to have an interest in the same marriage or divorce. That Part also revisits the issues of covenant marriage and same-sex marriage. Finally, Part V considers a "coherence"-based critique, which argues that a state's claim of substantial interest in its citizens' marital status risks incoherence, given the various constraints on state action within the contemporary social and legal contexts. That argument is ultimately rejected but still merits serious consideration when evaluating state claims in this area.

I. GOVERNMENT REGULATION OF DOMESTIC AND INTIMATE MATTERS

An initial challenge to governmental regulation of marriage is the claim that governments should not be in the business of regulating the most intimate aspects of people's lives. Challenges of this sort are often put in terms of John Stuart Mill's "harm principle": the view that government regulation is only justified where government is protecting other parties from harm.¹⁹ Applying this notion of government abstention to the context of the regulation of marriage is not as strange as it

referring to the supreme government of whatever country one might be discussing and "the state's interest" as referring to one of the fifty states in the United States. The first analysis is just about the interest any government has concerning the marital status of its citizens. The second may touch on the relative interests of different states within the federal system.

18. This article is intended primarily to analyze the issues, not to advocate. The purpose is certainly not to make a case for or against government action generally on domestic matters, nor to make the case for giving priority either to the state governments or the federal government for these issues.

19. See JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND UTILITARIANISM 12 (Bantam 1993) (1859): "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."

This principle is usually invoked against government coercion of behavior through the use of the criminal law, but the same argument could be used to urge the State to stay out of self-regarding behavior completely, even when the State is only using the pressure of civil liability or promised legal benefits to encourage or discourage behavior. The argument that Mill's principle would apply as well to civil law regulation, and to social peer pressure, was pressed as a criticism by Mill's contemporary, James Fitzjames Stephen. JAMES FITZJAMES STEPHEN, *Liberty, Equality, Fraternity*, ch. 4, in LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS 135-78 (University of Chicago Press 1991) (1874).

might seem: for hundreds of years in medieval Europe, marriage was a private contract requiring neither church nor state approval.²⁰ Additionally, at least one prominent contemporary commentator, Martha Fineman, suggests that government should get out of the business of regulating marriage, in large part to avoid favoring one form of intimate association over another.²¹

There are at least three important responses to this purported application of Mill's "harm principle." First, one can say that even self-regarding acts are the proper business of the state. James Fitzjames Stephen wrote: "[H]ow can the State or the public be competent to determine any question whatever if it is not competent to decide that gross vice is a bad thing?"²² However, as will be noted, one need not address the difficult question of the proper role government as an enforcer of morality to justify state action in the modern regulation of marriage.²³

The second response would emphasize that marriage is not a private act between consenting adults, but a public act between consenting adults, who then share a public status. In most parts of the United States today, consenting adults can organize their intimate lives pretty much as they choose without significant threat of interference by the state (though this was by no means always the case, and, in fact, is a recent development). Only when they seek state sanction and state benefits for their union will people find distinctions being made between couples and polygamous groups or between opposite-sex and same-sex

20. See, e.g., LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987* 20-25 (1990) (discussing "contract marriage" in the 16th, 17th, and 18th centuries, which sometimes involved neither Church nor State); see also, E. J. GRAFF, *WHAT IS MARRIAGE FOR?* 193-209 (1999) (describing the move from private to public, state regulated, marriage); MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 64-75 (1985) (discussing "informal marriage" in Colonial America and in earlier times). There are strong indications that the intervention of church and state into marriage mostly reflected the interests of propertied families being able to control their wayward children. See STONE, *supra* at 51-58.

21. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 5 (1995). Fineman summarizes her view as follows:

I suggest that all relationships between adults be nonlegal and, therefore, nonprivileged — unsubsidized by the state. In this way, "equality" is achieved in regard to all choices of sexual relational affiliations. I suggest we destroy the marital model altogether and collapse all sexual relationships into the same category — private — not sanctioned, privileged, or preferred by law.

Id.; see also *id.* at 229 ("One benefit of abolishing marriage as a legal category . . . is that the state interest in bolstering the institution would dissolve. Adult, voluntary sexual interactions would be of no concern to the state since there would be no longer be a state-preferred model of family intimacy to protect and support.").

22. See STEPHEN, *supra* note 19, at 137.

23. On this topic, see, e.g., ROBERT P. GEORGE, ED., *NATURAL LAW, LIBERALISM AND MORALITY: CONTEMPORARY ESSAYS* (1996); GERALD DWORKIN, ED., *MORALITY, HARM AND THE LAW* (1994).

couples.²⁴ What people do in the privacy of their own home with other consenting adults may be their own business, but when couples seek a public status, a state sanction, or state benefits, the matter becomes one of social and government concern.

The third response is that while "marriage" (or some other form of cohabitation) may reflect an intimate set of choices by the parties involved, a time will come, whether upon sickness, separation or divorce, or death, when it will be important to know who can decide for whom, and who gets what, i.e., issues of medical decision-making, child custody, division of property, inheritance, pension benefits, and so on. Usually citizens allow government to establish the framework for those decisions. The government then provides officially-recognized partners with rights and responsibilities superior to everyone else's. Without an official way to designate a committed partner, the legal system would often be hard-pressed to distinguish a life-partner from an occasional, casual companion.²⁵ These three responses are likely sufficient to meet a challenge based on Mill's "harm principle."

II. DIRECT V. INDIRECT INTEREST

A. *Indirect Interest*

What does it mean to say that the states have an interest in the marital status of their citizens? Consider the situation in *McGee v. International Life Insurance Co.*,²⁶ where the Supreme Court held that states had a "manifest interest" in their citizens being able to enforce valid insurance agreements in their home-state courts against out-of-state defendants.²⁷ The Court concluded not that a state has a particular interest in insurance coverage, but rather that, since a citizen finds recovery on a policy important (and this perception is not idiosyncratic), a state finds it of value to help its citizens with such a recovery. This type of interest can be termed an indirect interest. Analysis of indirect interests is helpful to the discussion of issues related to marital status. Citizens of

24. Though those who would extend Mill's principle regarding state non-intervention beyond criminal law to social benefits, *see supra* note 19, would not see this argument as a sufficient response. Like Fineman, *see supra* note 21, they would argue that the state has no business favoring some over others on the basis of choices regarding intimate associations.

25. *Cf. GRAFF, supra* note 20, at 212-15 (offering a similar argument).

26. 355 U.S. 220 (1957).

27. *McGee* addressed the question of whether a California court could, consistent with the constitutional requirements of due process, enter judgment against a Texas insurance company, where a contract for an insurance policy had been delivered to California, premiums were paid from there, and the insured was a California resident at the time of his death. In upholding the jurisdiction of the California courts, the Supreme Court stated that "[i]t cannot be denied that California has a manifest interest in providing effective means of redress for its residents." *Id.* at 223.

a state are interested in having their marriages and divorces recognized in other states and in having marital and post-marital obligations settled and enforced. To the extent that marital status determinations, such as decisions regarding civil liability, are matters of subjective concern to citizens, states are interested in helping their citizens get what they want: their legal obligations effectively enforced. In fact, to justify the state court's personal jurisdiction over an out-of-state divorce in *Hines v. Clendenning*, the Oklahoma Supreme Court invoked the Supreme Court's language in *McGee*: "The 'manifest interest' of the State of Oklahoma in the marital status, and financial relief incident thereto, of its residents, is surely as great as the interest of California in providing effective redress for insurance policy beneficiaries residing within its borders."²⁸

There is no reason to deny that states have such indirect, derivative interests in their citizens' marital status and related obligations. However, such indirect interests do not seem to be of particular interest in the context of the larger inquiry of this article. Therefore, all further references to the states' interests will be to direct, rather than indirect, interests.

B. Direct Interest

In contrast to situations where a state's interests are indirect, as in *McGee* and *Hines*, there are situations in which a state is interested in a direct way. The state is interested in having people act one way rather than another, and not merely because of the Utilitarian justification that a state prefers having its citizens' preferences satisfied. This sort of state interest is exemplified in the way that states speak of a public interest or "public policy" when refusing to enforce certain types of contracts, because the state does not want to encourage, or be party to, particular forms of immorality or exploitation.²⁹

Similarly, arguing for a social interest in having citizens structure their intimate lives one way rather than another would not be strange.³⁰ For example, it is often asserted that encouraging a long-term commit-

28. *Hines v. Clendenning*, 465 P.2d 460, 463 (Okla. 1970) (citing *McGee*, 355 U.S. at 223). In other contexts, the indirect versus direct distinction may raise constitutional issues. For example, in *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), the Supreme Court held that the Eleventh Amendment prevented federal courts from granting jurisdiction to a state which was suing another state on behalf of a citizen of the first state. I am grateful to Ira Lupu for this point.

29. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 178 (1979) (discussing when a term is unenforceable on grounds of public policy).

30. According to the U.S. Census Bureau, in 1998, 56% of the adult population was married and living with their spouse. Terry A. Lugaila, *Marital Status and Living Arrangements: March 1998 (Update)*, available at <http://www.census.gov/prod/99pubs/p20-514.pdf>. A state or community might reasonably take the position that this number is too high or too low. See, e.g.,

ment between sexual intimates will create a better atmosphere for children raised within such domestic institutions.³¹ Some might argue that the state has an interest in the marital status of its citizens that goes beyond such instrumental concerns. Justice Powell wrote: "The 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."³²

However, separating the institution from the incentives and disincentives to participate in it would be a mistake. Whether so intended or not, the elements of the institution are the reasons for entering or not entering into it. When a state reduces the benefits that accrue from marriage (by either removing the benefits or making them available to non-married couples or individuals) or makes it easier to leave the institution of marriage, it is in effect expressing a reduced interest in people becoming and staying married, despite any contrary message conveyed through public rhetoric.

The means by which states express their interest in the organization of their citizens' intimate or domestic lives will be explored in the next section. For the moment, it is worth noting the obvious: expressions of interest, at least the kinds likely to have significant effects, require significant resources. Sometimes the struggle to enforce or promote a particular marital status is given up for lack of resources. For example, some western states, in particular Utah, have struggled against break-away Mormon sects which practice polygamy.³³ In the mid-1950s, children were removed from polygamous households on the basis that they were immoral households.³⁴ Shortly thereafter, however, the children were returned to those households, apparently because of the expense of

WILLIAM A. GALSTON, *LIBERAL PURPOSES* 284-85 (1991) (arguing for a general preference for two-parent families, while noting that this will not be the best option for everyone).

31. See, e.g., GALSTON, *supra* note 30, at 283-88 (arguing for the married, two-parent family on the basis of its benefits for children). The connection between concern for marriage and concern for children used to seem more direct and obvious than it may seem now. In 1949, a New York domestic relations court wrote:

The state and the community are interested in and concerned with the institution which marriage creates. Man enters a marital relationship to perpetuate the species. The family is the result of marital relationship. . . . It is the foundation upon which society rests and is the basis for the family and all of its benefits.

Lester v. Lester, 87 N.Y.S.2d 517, 519-20 (N.Y. Fam. Ct. 1949).

32. Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring in the judgment).

33. It is a struggle which continues to the present. See Timothy Egan, *The Persistence of Polygamy*, N.Y. TIMES, FEB. 28, 1999, § 6 (Magazine), at 51.

34. See, e.g., *In re State ex rel. Black*, 283 P.2d 887 (Utah 1955). There had been no objection to the households, or to the way that the children were raised, other than the polygamous relations of the adults.

caring for so many children.³⁵

C. *Ways of Expressing State Interest*

Governments create many rules and practices that have the effect, sometimes unintended, of favoring one marital status over another.³⁶ When the Hawaii Supreme Court initially considered a state constitutional law challenge to the restriction of marriage to opposite-sex couples, it noted a long list of state-law-based rights and benefits that accrue to married couples.³⁷ Those benefits included control over community property, rights of inheritance, the ability to bring wrongful death actions, and post-divorce determinations of child custody, child support, spousal support, and division of property.³⁸

Two general points need to be made here about the effect of governmental actions on marital status. First, as indicated above, sometimes the encouragement or discouragement of marriage is an entirely unintended effect. Often, the unforeseen consequences of policies affect quite different areas. The most notorious examples may be some of the

35. See Ralph Nader, *The Law v. Plural Marriages*, 31 HARV. L. RECORD 10 (1960), reprinted in JUDITH AREEN, *FAMILY LAW* 20-21 (4th ed., 1999). Later courts found a way to reject polygamous marriage as sole justification for modifying custody, let alone removing a children from their parents. See, e.g., *Sanderson v. Tryon*, 739 P.2d 623, 627 (Utah 1987). This is consistent with the modern nexus test approach to alleged parental immorality in child custody cases. The alleged improper behavior will be considered relevant only to the extent that it has been shown to affect the person's fitness as a parent. See, e.g., *Feldman v. Feldman*, 358 N.Y.S.2d 507, 510 (N.Y. App. Div. 1974) (stating that "swinging" practices of mother irrelevant if they have no effect on the children).

36. Thus, when Martha Fineman argues for the abolition of marriage as a legal category, she emphasizes that there are public and private subsidies for that form of sexual relations and domesticity over other forms. See FINEMAN, *supra* note 21, at 228-30.

On some occasions, the state has tried to use access to marriage as a means of achieving other goods. See, e.g., *Zablocki*, 434 U.S. at 402-03 (invalidating a statute that restricted or prohibited marriage by those with outstanding child support obligations); *id.* at 388-91 (noting the state's argument that the statute would encourage support of children, but concluding that the statute was not narrowly tailored to serve that interest).

37. *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (listing fourteen state-law-based rights and benefits), *reconsidered in part*, 875 P.2d 225 (Haw. 1993); see also *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (summarizing the tangible and intangible benefits of marriage, in the course of invalidating state restrictions on prisoner marriage); *Baker v. Vermont*, 744 A.2d 864, 870, 883-84 (Vt. 1999) (listing some of the "legal benefits and protections incident to the marital relation"); GRAFF, *supra* note 20, at 38 (citing a 1997 General Accounting Office report indicating that there were over 1,000 federal laws in which rights, privileges or benefits turn on marital status).

The Hawaii Supreme Court in *Baehr* eventually concluded that a significant question had been raised regarding whether the exclusion of same-sex couples from the state's marriage laws violated the state constitutional right to equal treatment. *Baehr*, 852 P.2d at 69-71. However, a referendum held in Hawaii in November 1998 changed the state constitution to authorize the state legislature to restrict marriage to opposite-sex couples. This referendum rendered *Baehr* moot. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

38. See *Baehr*, 852 P.2d at 59.

earlier federal welfare rules, which allegedly had the effect, though certainly not the purpose, of discouraging marriage.³⁹ Similarly, a state might try to attract workers by offering a series of benefits that are confined to, or most highly valued by, married couples (e.g., some health benefits, which by covering family members may have significantly greater value to married employees). These benefits would tend to encourage marriage even though this may not be their purpose.

Second, the interests of the partners, whether potentially married, in a stable marriage, or considering divorce, potentially conflict at a number of points. Certain rules and practices making marriage more attractive to one partner may make it less attractive to the other.

Finally, a point about mixed messages. When access to divorce was limited, state permission was granted only to an "innocent" party who could show fault by the other spouse,⁴⁰ and substantial social and legal sanctions existed for cohabitation outside of marriage and for illegitimate children, the states' "message" was arguably clearer and more consistent. Today, government actions and promulgations can be seen as giving a "mixed message" regarding marriage.⁴¹ The problem of "mixed messages" will be considered further in Section V.

A number of the rules and practices could be said to discourage marriage. For example, mandatory procedures, blood tests, license fees, minimum age requirements, and parental or judicial consent requirements for some age groups, make marriage difficult for some couples.⁴² Second, a refusal by most jurisdictions to recognize common-law mar-

39. See, e.g., Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 492-94 (1996) (summarizing that view).

40. One area in which the states' position came across clearly was the refusal to grant or recognize divorces where the fault grounds were established by the collusion of the parties. See, e.g., *Fuchs v. Fuchs*, 64 N.Y.S.2d 487, 488-89 (N.Y. 1976) (quoting 9 CARMODY, N.Y. PRAC., Sec. 160, p. 242) ("The strict rules relating to opening defaults [are] not applied to actions for divorce, because of the well known vigilance of the courts to prevent collusion, and because of the general interest of the people of the state in the preservation of the matrimonial status of its citizens."); see also *Rankin v. Rankin*, 124 A.2d 639, 644 (Pa. 1956) ("The fact that married people do not get along well together does not justify a divorce. Testimony which proves merely an unhappy union, the parties being high strung temperamentally and unsuited to each other . . . is insufficient to sustain a decree." (citations omitted)).

41. Milton Regan has recently argued that much of the state regulation of marriage today, as contrasted with comparable regulation of a few decades back, can be seen as being aimed not at the marriage, but rather at protecting the autonomy interests of the partners, or protecting identifiable individuals from harm. Milton Regan, Jr., *Marriage at the Millenium*, 33 FAM. L.Q. 647, 656 (1999).

42. See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623 (S.D. N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (upholding against constitutional challenge New York's minimum age requirement and parental consent requirement). While these barriers can discourage some marriages, their usual intended purpose is to discourage impulsive, unwise marriages. Thus, increasing the average longevity of the marriages entered into. Cf. MARY ANN GLENSON, *THE TRANSFORMATION OF FAMILY LAW* 59 (1989) (describing waiting times between obtaining marriage license and

riages may act as an obstacle.⁴³ Third, rules against incestuous, same-sex, and polygamous marriages prohibit marriage for some interested parties.⁴⁴ While some states have imposed statutory or judicially created limitations on recovery for such unions,⁴⁵ most jurisdictions allow for contractual and restitutionary recovery based on a non-marital relationship.⁴⁶ To the extent that such protections of economic interests are available outside of marriage, the effect is to reduce the incentive to marry.

Fourth, most states no longer allow causes of action for breach of promise to marry,⁴⁷ criminal conversation, or alienation of affection.⁴⁸ These civil actions arguably protected the marital relationship, or at least expressed support for it. Some jurisdictions still recognize those causes of action, and there have been some high-profile, successful suits recently.⁴⁹

marriage as "a supposed deterrent to hasty marriage"). On the problems that may result from making entry into marriage too easy (or too easy relative to the ease of exit), see *infra* note 130.

43. Many states will not recognize a common law marriage within their own jurisdiction, but will recognize a common law marriage if valid in a state where the couple had earlier resided. See, e.g., *In re Estate of Benjamin*, 311 N.E.2d 495 (N.Y. 1974). Such situations can be understood as an instantiation of the general principle that a marriage valid at the place of celebration is valid elsewhere. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

All of the restrictions listed in the text have justifications unrelated to the promotion or discouragement of marriage. Even if the purpose of the rules lies elsewhere, their actual or potential effect in discouraging marriage should be noted.

44. See, e.g., DEL. CODE ANN. Title 13, § 101(a) (West 1999) (prohibiting incestuous and same-sex marriages).

45. See, e.g., MINN. STAT. ANN. §§ 513.075, 513.076 (West 1990) (allowing the enforcement of agreements between unmarried sexually intimate cohabitants only where they are in writing and signed); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979). But see *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983) (construing the Minnesota statutes narrowly to prevent its application to a case to which they arguably applied).

46. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Watts v. Watts*, 405 N.W.2d 303 (Wisc. 1987).

47. See, e.g., *Gilbert v. Barks*, 987 S.W.2d 772 (Ky. 1999) (removing the cause of action of "breach of contract to marry," but noting that causes of action for breach of contract or intentional infliction of emotional distress might still be available).

48. See, e.g., *Thomas v. Siddiqui*, 869 S.W.2d 740 (Mo. 1994) (abolishing the tort of criminal conversation, but reaffirming the availability of a claim for alienation of affection); NEW YORK CIVIL RIGHTS LAW § 80-a (McKinney 1992 & Supp. 2000) (abolishing the causes of action for alienation of affection, criminal conversation, seduction, and breach of contract to marry).

49. See, e.g., *Bland v. Hill*, 735 So. 2d 414 (Miss. 1999) (declining an the invitation to abolish the tort of alienation of affections, but reversing a \$200,000 judgment on the basis of improper evidentiary rulings by the trial court); *Hutelmyer v. Cox*, 514 S.E.2d 554 (N.C. App. 1999) (affirming a million-dollar judgment for criminal conversation and alienation of affection); *Veeder v. Kennedy*, 589 N.W.2d 610 (S.D. 1999) (affirming a judgment of \$265,000 for alienation of affection).

Fifth, the traditional rules for permanent alimony⁵⁰ provided that the support obligation would end automatically on the recipient's remarriage. This rule discouraged marriage in some circumstances. In response, some states passed legislation that authorized courts to modify or terminate alimony for non-marital cohabitation.⁵¹ This does not entirely eliminate the penalty for remarriage, but it makes the choice starker for the recipient of alimony: avoid any (marriage-like) cohabitation, whether institutionally recognized or not, or risk losing the alimony benefit.

Certain rules and practices could be said to *promote* marriage. For example, the equitable division of property upon divorce makes marriage more attractive for individuals who are likely to make sacrifices in their wage-earning for the sake of the relationship.⁵² Under divorce rules, these sacrifices have a far better chance of being compensated, at least in part.⁵³ States that allow something approximating equitable division for non-married couples diminish this advantage of marriage.⁵⁴

Second, non-married parents have been subject to significantly greater intrusion by the courts and state legislation regarding duties toward children.⁵⁵ This category includes once-married, divorced par-

50. As contrasted with alimony for a definite term, often called "rehabilitative alimony." E.g., HOMER H. CLARK & ANN LAQUER ESTIN, *DOMESTIC RELATIONS* 802 (6th ed., 2000).

51. See, e.g., CONN. GEN. STAT. § 46b-86(b) (1995).

52. Community property might also be an incentive for marriage in the ten or so states that have that property regime.

53. Cf. *Meyer v. Meyer* 606 N.W.2d 184 (Wis. Ct. App. 1999) (holding that in awarding maintenance to a divorcing woman, the lower court erred in taking into account sacrifices she had made for her partner's education during an earlier period of non-marital cohabitation), *petition for review granted*, 609 N.W.2d 473 (Wis. 2000).

As noted earlier, almost every rule or practice that would create a positive incentive for one group will create a negative incentive for another group. This practice is a prime example. Many wealthy individuals either avoid marriage, or try to get around equitable division rules through a premarital agreement. They do not want a portion of their money split with their partners upon the ending of the relationship.

54. There is one jurisdiction, Washington, where equitable division of property comparable to divorce is available as a matter of course to non-marital cohabitants. See, e.g., *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (holding that property acquired during non-marital cohabitation is presumed to be owned by both parties).

55. A number of constitutional challenges have been brought against this differential treatment on equal protection grounds, but courts have generally been unreceptive. See, e.g., *LeClair v. LeClair*, 624 A.2d 1350 (N.H. 1993) (holding that statutes authorizing orders requiring a divorced parent to pay the adult child's college expenses do not violate the Equal Protection Clause). On one occasion, the challenge was successful. *Curtis v. Kline*, 666 A.2d 265, 270 (Pa. 1995) (holding as unconstitutional a statute which imposed a parental obligation to pay for post-secondary education for non-marital parents, but not for parents in an intact family). Grandparent visitation is another area where courts and legislatures have treated intact families differently from families that have undergone separation or divorce. Compare *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995) (upholding against constitutional challenge Wyoming's grandparent visitation statute, emphasizing that it applied only in situations of divorce, death, or extended residence with

ents, as well as never-married parents. Thus, this item also fits into the third category, rules which encourage married couples to stay married. Third, tax law,⁵⁶ bankruptcy law,⁵⁷ evidence,⁵⁸ tort law,⁵⁹ and other areas of law confer distinctive benefits (and also impose certain burdens) on married couples.⁶⁰

Fourth, though states are far more willing to enforce premarital and marital contracts than they once were, there are still substantial constraints on the ability of parties to contract within or around state laws regarding marital status and obligations.⁶¹ This residual "status" nature of marriage will attract those who want to bind their partners (and them-

a grandparent) *with* *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996) (holding unconstitutional under the Florida Constitution a grandparent visitation statute that allowed the grant of visitation over the objections of parents in an intact family). The recent Supreme Court decision on grandparent visitation, *Troxel v. Granville*, 120 S. Ct. 2054 (2000), did not speak to that distinction, because the Washington statute invalidated in that case was far too broad in a variety of ways, including the setting of no limits on when visitation could be sought. *See id.* at 2064-65 (plurality opinion); *id.* at 2066 (Souter, J., concurring in the judgment).

56. *See, e.g.*, EDWARD J. McCAFFERY, *TAXING WOMEN* (1997) (focusing on the effect of income taxes); Mary Moers Wenig, *Taxing Marriage*, 6 S. CAL. REV. L. & WOMEN'S STUD. 561 (1997) (focusing on the effect of estate taxes); David Stout, *House Upholds Veto of Marriage-Penalty Bill*, N.Y. TIMES, Sept. 14, 2000, at A18.

57. *See* A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 70-71 & nn.7-10 (1998) (summarizing the benefits to filers for bankruptcy who are married).

58. *See, e.g.*, *Trammel v. United States*, 445 U.S. 40 (1980) (holding that the witness spouse only has the option whether to testify or not; also mentioning the privilege for confidential communications between spouses, which either the witness or non-witness spouse may use).

59. In most jurisdictions, consortium claims are allowed for spouses but not for non-marital cohabitants. The courts that have refused to extend such claims to non-marital cohabitants have often based those decisions on the state's interest in marriage. For example, the Massachusetts Supreme Judicial Court stated:

[Marriage] is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized. Our recognition of a right of recovery for the loss of a spouse's consortium promotes that value. Conversely, that value would be subverted by our recognition of a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage.

Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987) (quoting *Frenzy v. McAnarney*, 290 Mass. 544, 546 (1935) (citation omitted)).

60. Sometimes the rewards are aimed not merely at marriage generally, but at a particular type or structure of marriage. *See generally* Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 446 (1999) (arguing that though a growing percentage of American households do not resemble the paradigm of the patriarchal nuclear family, "our benefits programs . . . are still pitched at paradigms. Social security, welfare, workfare, and other government assistance programs have dark sides — burdens — that either fall on nontraditional households or stigmatize and perpetuate them, in poverty and on the fringes.").

61. *See generally* STEPHEN W. SCHLISSEL, ET AL., *SEPARATION AGREEMENTS AND MARITAL CONTRACTS* (1997); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998); Eric Rasumussen & Jeffrey Evan Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998).

selves) to long-term duties.⁶² Obviously, it might have the opposite effect on those who prefer flexibility or the ability to shape relationships to the partners' idiosyncratic interests. Fifth, for biological fathers, formal marriage may be the only path that ensures them parental rights to their biological children (assuming, of course, that the mothers of those children consent to the marriage).⁶³ Sixth, discrimination on the basis of marital status (e.g., by landlords) is legal in most jurisdictions, though some cities and states have passed laws forbidding such discrimination.⁶⁴

One might also note the state practices meant to help keep married people married, including rules which make divorce difficult or expensive—everything from covenant marriage arrangements which allow couples to opt into fault-divorce-only regimes, to residency requirements for obtaining a divorce,⁶⁵ to rules about property division, spousal support and child support.⁶⁶ Additionally, mandatory or quasi-mandatory premarital or pre-divorce counseling also help encourage marriages to stay together.⁶⁷

62. See, e.g., Rasmusen & Stake, *supra* note 61, at 466-69 (discussing why people might want to enter a traditionally binding marriage).

63. In *Lehr v. Robertson*, 463 U.S. 248 (1983), a biological father had tried to maintain contact with his biological child but had been prevented from doing so by the biological mother. *Id.* at 268-69 (White, J., dissenting). The biological mother had remarried, and the stepfather sought and was allowed to adopt the child. The biological father's objections were held to be untimely and procedurally of the wrong sort. *Id.* at 250, 264-65 (majority opinion). The Court commented: "The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences." *Id.* at 263.

The *Lehr* Court emphasized that under the New York statute in question, the biological father would not have had to do much to gain the legal right of notice of any adoption proceeding. *Id.* at 250-52 & n.5, 263-64. The level of protection is less clear regarding the right to block the adoption. See, e.g. In the Matter of the Adoption of Child by G.P.B., Jr., 736 A.2d 1277, 1286 (N.J. 1999) (holding that under the revised New Jersey adoption statute, "[i]f the court finds that the objecting parent has failed in performing his or her parental functions, it 'shall' enter the judgment of adoption over the parent's objection").

64. See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.2d 1134 (9th Cir. 2000) (en banc) (dismissing on standing and ripeness grounds a challenge to Alaska's law prohibiting discrimination in housing based on marital status).

65. See *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding Iowa's one-year residency requirement for divorce), discussed *infra*. See also Linda D. Elrod, et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 715 (1999) (listing the divorce residency requirements for all fifty states and the District of Columbia).

66. See, e.g., Elrod, et al., *supra* note 65, at 712 (chart summarizing the factors considered in the various jurisdictions for spousal support); *id.* at 714 (chart summarizing factors relating to child support); *id.* at 716 (chart summarizing rules relating to property division).

67. On mandatory premarital counseling, see, e.g., CAL. FAM. CODE § 304 (West 1999) (court may order premarital counseling for minors seeking to marry); UTAH CODE ANN. 30-1-30 to -39 (West 1999) (encouraging premarital counseling for minors and for the previously divorced); Tamar Lewin, *Debate Over Marriage Education for High-School Students*, N.Y. TIMES, Oct. 14, 1998, at B9. Quasi-mandatory premarital and pre-divorce counseling is a reference to the

III. FEDERALISM CONCERNS

A. *Federal v. State*

In the U.S. federalist system, responsibilities are often divided between federal and state government, divisions which reflect a combination of constitutional imperative, history and relative institutional strengths. This section will offer a general overview of the division of responsibility between federal and state governments. The next section will consider express federal constitutional constraints on state action.

"From the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states."⁶⁸ The general understanding of U.S. domestic relations law as a matter of exclusively, or primarily, state concern has been regularly restated.⁶⁹ However, this view has been challenged recently by commentators, both as a description of how things were and as a prescription for how matters should be.⁷⁰

The Supreme Court declared in *Sosna v. Iowa*,⁷¹ an important case authorizing states to impose residency durational requirements for divorce, that the regulation of domestic relations is "an area that has long been regarded as a virtually exclusive province of the States."⁷² The regulation of the terms of marriage has been especially marked as a province of state control. "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."⁷³

In *Ohio ex rel. Popovici v. Agler*,⁷⁴ Justice Holmes relied on the "common understanding" that domestic relations matters belonged exclusively to the states to uphold the jurisdiction of a state court over a divorce suit brought against an ambassador. That ruling came despite

covenant marriage systems, discussed *infra*, which make premarital and pre-divorce counseling mandatory for those couples who have chosen to opt into the covenant marriage option. See also *New Year Brings New Laws*, NEW HAVEN REG., Jan. 1, 1999, at A6 (noting a Florida law under which "couples who don't agree to marriage-preparation counseling will have to wait three days to tie the knot and pay \$88.50 for a marriage license instead of \$56").

68. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995) (footnote omitted).

69. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

70. See, e.g., Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

71. 419 U.S. 393 (1975).

72. *Id.* at 404 (1975); see also *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring in the judgment) ("The 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.").

73. *Sosna*, 419 U.S. at 404 (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)) (ellipses in *Sosna*).

74. 280 U.S. 379 (1930).

apparently clear statutory and constitutional language placing suits against ambassadors within the exclusive jurisdiction of the federal courts.⁷⁵

Similar sentiment was expressed recently in *United States v. Morrison*,⁷⁶ where the Supreme Court held unconstitutional a provision of the federal Violence Against Women Act of 1994.⁷⁷ That portion of the Act was held to be beyond Congress' regulatory power under either the Commerce Clause or Section Five of the Fourteenth Amendment.⁷⁸ The Court rejected a broad reading of an effects-on-interstate-commerce test, because such a reading might lead to the unacceptable consequence of federal regulatory intrusion on family law matters. "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."⁷⁹

Congress's legislative power under the Commerce Clause⁸⁰ has traditionally been held to fall far short of core family law matters.⁸¹ There have been areas, however, where the interstate aspects of the issues in question were thought to be sufficiently clear to justify federal intervention.⁸² Federal power over domestic relations matters has also been seen to be severely restricted on the judicial side. The federal courts do not have jurisdiction to grant or modify orders of divorce, alimony, or child custody.⁸³ They do, however, have the power to enforce such orders

75. *See id.* at 383.

76. 120 S. Ct. 1740 (2000).

77. Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 (1995) (codified at 42 U.S.C.A. § 13981 (West 1995)).

78. The provision in question "provide[d] a federal civil remedy for the victims of gender-motivated violence." *Morrison*, 120 S. Ct. at 1745. In the lower court, Chief Judge Wilkinson focused on the traditional province of family law regulation: "Section 13981 scales the last redoubt of state government — the regulation of domestic relations." *Brzonkala*, 169 F.3d 820, 896 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd*, 120 S. Ct. 1740 (2000).

79. *Morrison*, 120 S. Ct. at 1753. (The reference to *Lopez* is to *United States v. Lopez*, 514 U.S. 549 (1995) (holding that a law making it a federal crime to knowingly possess a firearm in a school zone exceeded Congress' authority under the Commerce Clause)).

80. Congress's power "[t]o regulate commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

81. *See, e.g., Lopez*, 514 U.S. at 564-65; *see also id.* at 624 (Breyer, J., dissenting).

82. This was perhaps most salient with the problem of the "kidnapping" of children by parents in custody battles—unsatisfied with the ruling in one state, the parents would defy the ruling of that state, and take the children to another state, hoping for a more favorable ruling there. The federal response was the Parental Kidnapping Prevention Act, 28 U.S.C.A. § 1738A (West 1994 & Supp. 2000).

83. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

previously granted by state courts.⁸⁴

Despite limited federal power in the family law area, federal control has increased in recent years, mostly through Congress' spending powers. Congress has enacted legislation making the receipt of federal funds by states, state agencies, or private agencies contingent on their acting consistent with certain mandates. Through such legislation, Congress "persuaded" the states to enact child support guidelines,⁸⁵ and child placement agencies to remove race-matching as a justification for delaying or denying adoption or foster care placements.⁸⁶

Congress has also affected family law through a variety of tangential powers. For example, the Defense of Marriage Act⁸⁷ was proffered under Congress's power under the Full Faith and Credit Clause.⁸⁸ This power was also used to make child support orders enforceable in other states.⁸⁹ Additionally, the Indian Child Welfare Act⁹⁰ was grounded on the federal government's power over matters affecting Native American tribes.

A general theory of federalism could—and probably should—be

84. *Id.* at 702. The opinion affirms a long list of cases going back to *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226 (1859), but grounds the conclusion not in the Constitution but rather in Congress's statutory grant of jurisdiction to the federal courts. *Ankenbrandt*, 504 U.S. at 695-701. While *Ankenbrandt* discusses the problem of power and jurisdiction intricately, there is little discussion of the possible policy arguments behind the conclusion. See Hasday, *supra* note 70, at 1301. Additionally, some commentators are distinctly unpersuaded by the case. See, e.g., Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1088 (1994) ("the division of authority between the state and federal courts over domestic relations law exists with little persuasive explanation for its origin and little challenge to its validity.").

85. The Child Support Enforcement Act, 42 U.S.C.A. §§ 651-69 (West 1991 & Supp. 2000). "[S]ince Congress began to pay attention to the issues [involving enforcement of child support obligations] in 1975, Congress has passed at least nine separate statutes [on the issue.]" Robert J. Levy, *Trends in Legislative Regulation of Family Law Doctrine: Millennial Musings*, 33 FAM. L.Q. 543, 547 (1999) (footnote omitted).

86. 42 U.S.C.A. § 1996b (West Supp. 2000). As Theodora Ooms pointed out to me, Congress in the course of its 1996 welfare reform law made funds available to the states which could be used, to "promote marriage" and to "encourage the formation and maintenance of two-parent families." DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF FAMILY ASSISTANCE, HELPING FAMILIES ACHIEVE SELF-SUFFICIENCY: A GUIDE ON FUNDING SERVICES FOR CHILDREN AND FAMILIES THROUGH THE TANF PROGRAM 3, 9 (1999) available at <http://www.acf.dhhs.gov/programs/ofa/funds2.htm>. There is little indication that the states have so far used such funds for the purpose of encouraging or strengthening marriages.

87. See *supra* note 11.

88. See U.S. CONST. art. IV, sec. 1 ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."). As later noted, the Defense of Marriage Act also includes a default definition of "marriage" for the purpose of federal legislation. See *infra* note 120.

89. The Full Faith and Credit for Child Support Order Act, 28 U.S.C.A. § 1738B (West Supp. 2000).

90. 25 U.S.C. §§ 1901-63 (1983 & Supp. 2000).

developed regarding an appropriate division of roles in family matters. One possible approach is to offer a federalist theory about the varying substantive roles of different governments within the U.S. system. Anne Dailey offers a theory of this kind. She argues that within U.S. federalism it is the role of states to promote a shared vision of the good life. Family law, therefore, is properly and primarily a matter of state law. Under this analysis, therefore, the federal government has a distinct but limited role in protecting individual rights in the domestic sphere.⁹¹

A second approach views federalism as encouraging states to consider and develop a variety of responses rather than imposing a uniform federal response. The usual image portrays the states as laboratories.⁹² If different states or cities should be encouraged to develop diverse responses to the regulation of marriage, then there might be reason to support the interpretation of the Full Faith and Credit Clause that underlies DOMA. There is a certain free market ethos that encourages municipalities and states to enact laws showing their support for certain kinds of communities,⁹³ with some areas offering laws consistent with the views of most same-sex couples while other areas offer laws consistent with the views of most traditional or fundamentalist believers.⁹⁴ People who feel comfortable in San Francisco may not feel comfortable in some rural areas of Mississippi, and vice versa. In a democracy, as in a free market, the causation works in both directions. Like-minded people in

91. See Dailey, *supra* note 68, at 1825. From a descriptive and critical perspective, some aspects of federalism and family law arguably reflect a belief that family law is a less important type of legal problem. This belief is likely grounded in sexism. See Cahn, *supra* note 84, at 1094-115.

92. See *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

93. Some commentators have pushed further towards viewing laws as subject to free-market choice. For example, Erin O'Hara and Larry Ribstein argue for presumptive enforcement of choice of law provisions to allow parties to choose the legal regime that is most efficient for their purposes. Erin O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, U. CHI. L. REV. (forthcoming 2000). One could easily extend this argument to allow couples about to marry to choose, from among the states, the package of legal rules under which they would marry. This argument would be amenable to those who favor a purely private ordering to marriage, and those who see little direct state interest in marriage rules.

94. The economic literature on federalism argues that the competition among local governments permits public services to be dispersed more efficiently. See, e.g., Truman Bewley, *A Critique of Local Public Expenditures*, 49 *ECONOMETRICA* 713 (1981); Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).

One commentator has suggested that the responses of various communities might have as much to do with the communities' economic interests as with theories of the good. Cf. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 *S. CAL. L. REV.* 745 (1995) (describing the significant economic benefits that could accrue to the first jurisdiction to recognize same-sex unions).

the same area establish laws which reflect their own values, which then attracts others with similar values.

There are two obvious and related implications for the regulation of marriage under this vision of U.S. federalism. First, the Full Faith and Credit Clause⁹⁵ and the Fourteenth Amendment⁹⁶ in particular, and the Constitution in general, favor a view of national citizenship, in which there are no significant barriers to interstate travel. Thus, one does not gain or lose substantial rights, benefits, or status simply by moving from one state to another.⁹⁷ Second, the Full Faith and Credit Clause is usually read as restricting the powers of states and municipalities to refuse to recognize divorces and marriages from other states. Creating a system that simultaneously allows for local variation and experimentation, and allows substantial rights of national citizenship is difficult: one cannot promote significant local autonomy and diversity without causing people to lose rights and liberties when they move across state or municipal boundaries. For example, same-sex couples may congregate in San Francisco or Vermont, where they feel more welcome, but there inevitably will come a time when circumstances (e.g., business relocation or need to care for a family member) could require some couples to move elsewhere. The question is whether the new state should have the right to treat them differently, and give them different status, than they were accorded in San Francisco or Vermont. Questions of constitutional doctrine aside, choosing between the benefits of local experimentation and the benefits of national citizenship seems inevitable.

B. *Constitutional Constraints on the States*

In the U.S. context, a discussion of competing state claims is complicated by constitutional constraints on states' power. While states are conventionally considered to have plenary power in the area of domestic

95. "The strong unifying principle embodied in the Full Faith and Credit Clause look[s] toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states." *Hughes v. Fetter*, 341 U.S. 609, 612 (1951); see also Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 2006 (1997) ("[T]he Full Faith and Credit Clause is more than a strategy to minimize friction. It represents the very idea of what it means to be in a Union. States are required to recognize and respect each other's laws because that is what members of a federation do.").

96. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend XIV, § 1.

97. See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999) (holding California durational residency statute limiting new residents' welfare benefits violates the constitutional right to interstate travel and the Privileges and Immunities Clause of the Fourteenth Amendment).

relations,⁹⁸ (1) the constitutional right of interstate travel limits a state's ability to favor its own residents over the residents of other states or recent immigrants to the state;⁹⁹ (2) the Full Faith and Credit Clause constrains a state's power to refuse to recognize the laws and judgments of other state courts;¹⁰⁰ and (3) Congress has substantially federalized domestic relations law. The latter is accomplished, in large part, by tying law reform to the receipt of federal funds.¹⁰¹

As to the first point, one should note, but not overstate, the restrictions on state action created by the constitutional right to interstate travel. In *Sosna v. Iowa*,¹⁰² the Supreme Court held that Iowa's requirement of one-year's residency before a citizen could use the Iowa court system to obtain a divorce did not constitute an infringement on the constitutional right to interstate travel.¹⁰³

Other constitutional rights may limit states' freedom to reward or punish different marital status-decisions. In *Eisenstadt v. Baird*,¹⁰⁴ the Supreme Court decided that the Equal Protection Clause of the Fourteenth Amendment forbids states from distinguishing between married and unmarried couples regarding the legality of obtaining or using contraceptives.¹⁰⁵ John Noonan objected to this decision because it undermines the notion of marriage as a special status and takes away some traditional legal and social means of encouraging couples to marry.¹⁰⁶

IV. THE RELATIVE CLAIMS OF DIFFERENT STATES

The question about states' interests in marital status occasionally arises when trying to decide which state or states have the power to determine questions of marital status. There may be competing claims

98. See *supra* Part IIIA.

99. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (holding that states cannot deny welfare assistance to residents who have lived in a state less than a year because this limit would infringe upon the constitutional right to interstate travel); see also *Saenz v. Roe*, 526 U.S. at 502-04 (barring states from paying new residents lower welfare benefits than longtime residents, basing this decision on the constitutional right to interstate travel and the "privileges or immunities" clause of the Fourteenth Amendment). But see *Sosna v. Iowa*, 419 U.S. 393, 409 (1975) (upholding a one-year residency requirement for divorce, despite a claim that the requirement interfered with the right of interstate travel).

100. U.S. CONST. art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

101. Along with the statutes discussed in Part III, one might also mention the important ways that federal legislation involving bankruptcy, pensions, taxation, and welfare inevitably influence, often significantly, the effects of entering and exiting marriage.

102. 419 U.S. 393 (1975).

103. *Id.* at 409.

104. 405 U.S. 438 (1972).

105. *Id.* at 454-55.

106. See John Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 273 (1973).

by different states. More precisely, there will often be a party claiming that determinations of another state should have no legal effect.

A. Divorce

Before no-fault took over U.S. divorce laws, cases where parties went to jurisdictions with less demanding divorce laws, only to have those divorces later attacked collaterally in the home jurisdiction, were common.¹⁰⁷ The collateral attacks¹⁰⁸ questioned the jurisdiction over the *res* of the marriage. The policy arguments presented were sometimes justified by state interest in the marital status of the state's citizens. Occasionally, though, the state courts found the inquiry unpersuasive. In *Rosenstiel v. Rosenstiel*,¹⁰⁹ the New York Court of Appeals had to determine whether to recognize a bilateral Mexican divorce.¹¹⁰ The divorce in question involved the husband's residence in a Mexican jurisdiction for a matter of hours, and the wife submitting to the jurisdiction of the Mexican court. While the New York court noted that the fleeting trip to Mexico would not establish the husband's domicile in the Mexican jurisdiction under traditional principles, it did not see a difference in kind from the jurisdictional requirements set up by sister states, whose determinations would have binding force under the Full Faith and Credit Clause:

The duration of domicile in sister States providing by statute for a minimal time to acquire domicile as necessary to matrimonial action jurisdiction is in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register. The difference in time is not truly significant of a difference in intent or purpose or in effect.

The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere

107. *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (concluding that North Carolina had to give full faith and credit to an *ex parte* divorce entered in Nevada); *Williams v. North Carolina*, 325 U.S. 226, 239 (1945) (concluding in a case involving the same parties that North Carolina could determine for itself the jurisdictional facts upon which the divorce had been based, and that it could withhold full faith and credit if it was not satisfied that the plaintiff in the divorce had established domicile in the granting state).

108. "Research of cases from 1945 to 1960 located only 86 cases involving collateral attacks upon Nevada *ex parte* divorces, of which 33 occurred in New York. Collateral attack was successful in two out of three cases. But the cases were few, considering the fact that during this period Nevada was handing down 5,000 to 10,000 migratory divorces per year." (citation omitted). AREEN, *supra* note 35, at 451.

109. *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (1965) (deciding a case where a man claimed that his current wife's former Mexican divorce was invalid, and thus their current marriage must be annulled).

110. *Id.* at 710.

to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

Nevada gets no closer to the real public concern with the marriage than Chihuahua.¹¹¹

The leading Supreme Court case on divorce residency requirements presents a different perspective. In *Sosna v. Iowa*, the Supreme Court held that a state's interest "both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack" justified a one-year residency requirement for divorces.¹¹²

Sosna depicts states offering the "benefit" of divorce not to just anyone who momentarily forms the intention to stay in the state, but to only those who are sufficiently attached to the state by substantial residency. There is no notion of state interest in marital status beyond a sense of "better service for good customers." It has been noted that, in *Sosna*:

[t]he jurisdictional requirement of domicile, enforced by statutory periods of residence, was meant to protect the interest of the state in marriage. Similarly the requirement that parties to a marriage may not agree to its dissolution, but must comply with statutory grounds, was meant to protect the state's interest. Yet with the adoption of no-fault divorce, much of the state's control over marital status was surrendered to the parties and their lawyers. Although lingering conceptions of fault . . . show that this process is not yet complete, nonetheless it is evident that the state's interest in limiting divorce and remarriage is waning.¹¹³

B. *Covenant Marriage*

Louisiana and Arizona recently passed "covenant marriage" laws, which require couples marrying in those states to choose, at the time of marriage, whether to have to have a traditional marriage or a covenant marriage. Traditional marriages are subject to either fault or no-fault grounds for divorce, while covenant marriages are subject almost exclu-

111. *Id.* at 712.

112. *Sosna*, 419 U.S. at 407. Part of the state's interest is characterized later in *Sosna* as "the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State. . . ." *Id.* at 409.

Commentators have suggested that Iowa's one-year residency requirement may have been created because Iowa had been one of the earlier states to adopt no-fault divorce, and Iowa may therefore have been concerned about large numbers of people coming to the state to take advantage of its less stringent divorce laws. See WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW 986 (1994).

113. WEYRAUCH ET AL., *supra* note 112, at 986.

sively to fault grounds for divorce.¹¹⁴ Imagine a hypothetical case in which a couple obtains a covenant marriage in Louisiana, and later moves to another state. Years later, the couple decides to divorce and wants to take advantage of the no-fault divorce rules and procedures available in the second state. If both spouses agree that they want a no-fault divorce, and the second state has no objections, does Louisiana have a legitimate claim that the divorce should not be granted on no-fault grounds?¹¹⁵ Second, if the second state grants the no-fault divorce, would Louisiana be bound, by Full Faith and Credit or by principles of comity, to recognize it? These issues directly raise the question of whether the state has a direct and enforceable interest in the marital status of its citizens.¹¹⁶

The more important issue involves migratory divorce. One example would be a person who could not get a divorce in his or her home state going to Nevada. Later that divorce decree is collaterally challenged by the spouse in the home state's courts.¹¹⁷ If one spouse in a covenant marriage leaves the state and becomes domiciled in another

114. ARIZ. REV. STAT. §§ 25-901 to 906 (2000); LA. REV. STAT. ANN. §§ 9:272, 275.1 (West 2000). Covenant marriage also requires pre-marriage counseling and pre-divorce counseling. Couples who are already married can "convert" their marriage to a "covenant marriage," if they so choose. LA. REV. STAT. ANN. § 9:275. There is one significant difference between the statutes. The Arizona version, but not the Louisiana version, allows a covenant marriage couple to divorce by mutual agreement. ARIZ. REV. STAT. ANN. § 25-903; *see also* Wardle, *supra* note 12, at 788-89 (discussing this difference).

Recent data indicates that less than two percent of those marrying in Louisiana have opted for covenant marriage, though there is evidence that this might be because of a general lack of awareness that the option is present and what it entails. E-mail from Prof. Steven L. Nock to Prof. Brian Bix (Aug. 10, 1999, 10:29:59 EDT) (on file with author).

115. Louisiana alone is used in the example, because Arizona covenant marriages allow no-fault divorce by mutual consent. *See supra* note 114. Arizona covenant marriages could still lead to my second example, the migratory divorce, where one partner is seeking a divorce in another state that he or she could not obtain in his or her home state.

How or why a state might intervene in a divorce in another state is not easy to imagine. One way in which such a question might be raised is if one of the parties to the divorce later changed his or her mind and wanted the divorce declared a nullity. There is case-law, however, which indicates that divorce decisions, where both of the parties participated and the court thought it had jurisdiction, may be immune, on equitable grounds, from collateral attack. *See Johnson v. Muelberger*, 340 U.S. 581, 589 (1951) (rejecting collateral attack by children of the divorcing couple); *Sherrer v. Sherrer*, 334 U.S. 343, 356 (1948) (concluding that a spouse cannot collaterally attack).

116. The argument that the marriage-performing state has a continuing interest in the marital status of the couple, and the ease with which the couple should be allowed to dissolve the marital bond, has some echoes of the old "vested rights" approach to conflicts of law, developed by Joseph Beale, according to which the legal sovereign in a jurisdiction has the exclusive authority to determine the legal significance of events occurring in that jurisdiction. *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 18-20 (1991) (summarizing Beale's approach).

117. *See, e.g., Fink v. Fink*, 346 N.E.2d 415 (Ill. App. 1976) (refusing to give full faith and credit to the husband's Nevada divorce).

state, can that spouse obtain a no-fault divorce in the second state? If a no-fault divorce (contrary to the terms of the covenant marriage) is obtained in another state, is it subject to collateral challenge by the other spouse in the home state? The creator of the concept of covenant marriage, Katherine Spaht, believes that migratory divorces in a covenant marriage are not subject to collateral challenge, but that there is a contractual element to the covenant marriage which would survive the migratory divorce, and this would subject the migratory spouse to liability for breach of contract.¹¹⁸

C. *Same-Sex Marriage and the Defense of Marriage Act*

When it appeared as if Hawaii might allow same-sex couples to marry, those opposed to same-sex marriage convinced other states to pass laws declaring same-sex marriages to be contrary to public policy in their jurisdictions.¹¹⁹ These opponents also acted at the federal level, persuading Congress to pass, and the President to sign, the Defense of Marriage Act, which states, in pertinent part:

No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.¹²⁰

DOMA was purportedly authorized by the second sentence of the Full Faith and Credit Clause of the Constitution: "the Congress may by general Laws prescribe the Manner in which . . . Acts, Records and Proceedings shall be proved, and the Effect thereof."¹²¹ There are significant debates regarding whether Congress in fact has the power under the Full Faith and Credit Clause to authorize states *not* to recognize the valid legal acts and proceedings of other states.¹²² There is also a question of whether states may constitutionally refuse to recognize marriages

118. Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 105-07 (1998).

119. See, e.g., ARIZ. REV. STAT. ANN. § 25-101(C) (West 2000); CONN. GEN. STAT. ANN. § 46a-81r (West 1999); DEL. CODE ANN. Title 13, § 101(a) (West 1999); 750 ILL. COMP. STAT. ANN. 5/213.1 (West 1999); LA. CIV. CODE ANN. Article 96 (West 1999); S.C. CODE ANN. § 20-1-15 (Supp. 1999); UTAH CODE ANN. § 30-1-2 (West 1998), VA. CODE ANN. § 20-45.2 (West 1995).

120. 28 U.S.C.A. § 1738C (Supp. 2000). The Act also provided a definition of marriage for the purposes of federal legislation, a definition that confines marriage to opposite-sex couples. 1 U.S.C.A. § 7 (West 1996).

121. U.S. CONST. art. IV, § 1.

122. See, e.g., Arthur R. Landever, *The Constitutional Requirements For and Against the Defense of Marriage Act*, 11 AM. J. FAM. L. 23 (Spring 1997); AREEN, *supra* note 35, at 39-41 (reproducing portions of the House Committee Report connected with DOMA, which discusses this question); see also Kramer, *supra* note 95, at 2001 (in considering whether Congress had the

valid in other states, even without federal authorization, under a public policy exception.¹²³ Finally, there is significant controversy regarding whether marriages are covered by the Full Faith and Credit Clause. On one hand, marriages, unlike divorces, are not clearly “public Acts, Records, [or] judicial Proceedings.” On the other hand, the laws under which couples marry do seem to fall within the “the public Acts . . . of every other State” to which full faith and credit must be given.¹²⁴

The Supreme Court has recently made clear that although states have no power to use public policy as a justification for not giving full faith and credit to the judgment of another state,¹²⁵ a “court may be guided by the forum State’s ‘public policy’ in determining the law applicable to the controversy.”¹²⁶ The treatment of a divorce judgment from another jurisdiction might be quite different from the treatment of a marriage from that same jurisdiction (a legal action performed under the authority of that jurisdiction’s laws). The latter might still be due some deference however.

These issues of interstate recognition of marriages raise questions about the states’ interest regarding the marital status of their citizens. The matter can be raised in quite different factual circumstances, which illustrate the varying interests that different states may have. One example of varying interests might be two long-time residents of California who are a same-sex couple, go to Vermont for a vacation, where they get married (or obtained a “civil union”) before returning. Another example might be two long-time residents of Vermont who marry there and later move to California. This argument may be strengthened by assuming that the move was motivated by reasons not entirely within the couple’s control, e.g., a job transfer or an illness in the family. The couple in the second situation might have a stronger claim to having its

power to do what it attempted in DOMA, “[w]e are dealing with a completely open question, one never addressed by any court or analyzed in depth by any scholar” (footnote omitted)).

123. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971): “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” Cf. Kramer, *supra* note 95 (arguing that states may not selectively discriminate in choice of law matters based on the desirability of other states’ policies; and that Congress has no power to authorize this sort of discrimination); Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996) (reviewing court decisions regarding public policy exception to marriages arguably contrary to the forum state’s public policy).

124. U.S. CONST. art. IV, § 1. See Kramer, *supra* note 95, at 1976, 1999 (discussing marriage laws and divorce judgments).

125. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (stating the Court’s refusal to support a “roving ‘public policy exception’ to the full faith and credit due judgments.”) (citation omitted).

126. *Id.*

marriage recognized than does the first couple.¹²⁷ The comparison of these scenarios parallels the concerns about a collateral challenge to an out-of-state divorce (though divorce adds the complication of the adverse individual interests to the adverse state claims). In the first example, Vermont may have no interest, and California a substantial interest, in the marital status of long-term California citizens whose only connection to Vermont is a vacation. California's interest in the second example seems more tenuous, however, in long-term Vermont residents who move to California. The tensions of federalism are the strongest in such situations.

V. COHERENCE

Some have questioned the coherence of the current policy of most, if not all, states regarding their citizens' marital status.¹²⁸ The argument goes roughly as follows: how can a state reconcile a claim that it has a strong interest in its citizens' being married when it creates a relatively easy¹²⁹ exit¹³⁰ from marriage through no-fault divorce and creates no

127. Larry Kramer argues that public policy exceptions to choice of law rules should be considered unconstitutional when applied to the laws of other states. Kramer also suggests that states could constitutionally apply the "interest analysis" conventionally used for contract and tort cases to their marriage law for couples domiciled in the state who had gone to another state to marry and then returned. Kramer, *supra* note 95, at 1998-99. Kramer believes a different result should obtain for couples who have recently moved to the state, and who are asking for recognition of a marriage celebrated in another state where they were long-domiciled. *Id.* at 2000.

128. A related argument was put forward in *Baehr v. Miike*, 1996 W.L. 694235 (Hawaii Cir. Ct., 1st Cir. 1996), affirmed without opinion, 950 P.2d 1234 (Haw. 1997), rev'd *on mootness grounds*; *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999). (The circuit court decision is excerpted in AREEN, *supra* note 35, at 28-36). The circuit court decision was the remand of the initial Hawaiian Supreme Court decision in *Baehr v. Lewin*, *supra* note 10. On remand, the trial court concluded that the state could not show a compelling interest for not allowing same-sex couples to marry, given that single parents and same-sex couples were raising children competently, and that the state was allowing same-sex couples to adopt and to be foster parents.

129. Though divorce in most jurisdictions may be relatively easy and quick relative to earlier generations and earlier laws, one should not overstate matters. Divorce is in most places and for many couples a long, unpleasant, and often expensive process.

130. Marriage in most American jurisdictions is also an easy entrance, for those of age (the minimal marriage license fee, the blood test, and the other usual requirements are unlikely to exclude many). The easy entrance is not problematic if one assumes that most states want to encourage marriage for everyone. One commentator, John Witte, Jr., has focused on ease of entrance, as it relates to the rules of exit:

The Western tradition has learned, through centuries of experience, to balance the norms of marital formation, maintenance, and dissolution. There was something cruel in a medieval canon law that countenanced easy contracting of marriage but provided for no escape from a marriage once properly contracted. . . . The lesson . . . is that rules governing marriage formation and dissolution must be comparable in their . . . stringency. . . . Stern rules of marital dissolution require stern rules of marital formation. Loose formation rules demand loose dissolution rules, as we see today.

JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT 217-18 (1997).

significant disincentives for the “informal substitutes for marriage”¹³¹ such as extra-marital sex¹³² and non-marital children?¹³³ Stated differently,¹³⁴ while governments may do many things to express their *symbolic* support for marriage, the decreasing benefits of marriage and the relatively low cost of exiting marriage effectively undermine the appeal of marriage.¹³⁵

Questions about the coherence of state policies on marriage are also present in marriage-related court decisions. One important Wisconsin Supreme Court decision upheld the enforceability of express or implied agreements to share income between non-marital partners.¹³⁶ The court rejected, basically on coherence grounds, a public policy argument

131. Cf. Spaht, *supra* note 118, at 67-69 (summarizing the argument, and the social scientific findings, that where laws encouraging marriage and discouraging divorce are the weakest, non-marital cohabitation is the most widespread).

132. Other countries offer significant legal incentives to marry. According to a recent news story, “[u]nder Iranian law, sex outside marriage is punishable by flogging, but if the man is not Muslim, he faces the death penalty.” Associated Press, *German Held in Sex Case Has Hearing*, N.Y. TIMES on the Internet, Aug. 11, 1999, available at <www.nytimes.com>. In the case, a German businessman was originally sentenced to death for having an illicit relationship with an Iranian medical student; his defense was that he had converted to Islam before having sex with the woman. The conviction was overturned on appeal. A second trial led to a second conviction and a second appellate reversal. In the third trial, the businessman was acquitted for lack of evidence. Afshin Valinejab, *Iran Guard Says Hofer Freed on Bail*, ASSOCIATED PRESS, Dec. 23, 1999, available at <http://www.washingtonpost.com>.

133. Cf. Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 268-74 (F. H. Buckley ed., 1999) (describing the interaction of social norms, legal rules, and game-theoretic truths in the marriage context); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 186-87 (1996) [hereinafter, Posner, *Regulation*] (showing how rules that benefit families, but are withheld from non-marital couples and children, work to encourage the formation of (traditional) families).

The traditional perspective was well-summarized by James Fitzjames Stephen:

Take the case of illegitimate children. A bastard is *filius nullius* — he inherits nothing, he has no claim on his putative father. What is all this except the expression of the strongest possible determination on the part of the Legislature to recognize, maintain, and favor marriage in every possible manner as the foundation of civilized society? . . . It is a case in which a good object is promoted by an efficient and adequate means.

STEPHEN, *supra* note 19, at 156.

134. The analysis derives from Posner, *Regulation*, *supra* note 133.

135. Posner would go further and argue that all legal regulation of actions that occur within the family, where the state could have deferred to self-regulation by the family itself, works to undermine the solidarity of the family. “The trend in favor of such laws — including no-fault divorce laws, child abuse laws, and spousal abuse laws . . . may help account for the increase in divorce, illegitimacy, and other family-related problems over the last several decades.” Posner, *Regulation*, *supra* note 133, at 190 (footnote omitted). (The summary of Posner’s views in this note may oversimplify somewhat his analysis; at a minimum, it should be added that Posner advocates, not just in domestic regulation, but for all regulation of groups, government acting differently for “high-stakes opportunism” than for other forms of alleged misbehavior. See, e.g., *id.* at 189.)

136. *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987).

against allowing enforcement of such non-marital agreements that had persuaded an Illinois court. The Wisconsin court distinguished the Illinois decision on the basis that the latter had been decided in a statutory context of purely fault divorce and criminal sanctions for cohabitation, a context quite different from that in Wisconsin at the time of the decision—the state had no-fault divorce and had decriminalized cohabitation.¹³⁷ In other words, the court concluded that Wisconsin should not deprive a plaintiff of recovery, based on an alleged strong public policy in favor of marriage, since Wisconsin's other legal rules do not in fact support that policy.

As hard as it may be to imagine today, there was a time when the social and legal sanctions against non-marital cohabitation¹³⁸ and non-marital children were sufficiently strong that regulating access to marriage was considered sufficient to control, or at least strongly affect, population.¹³⁹ However, these days are long past. Even a generation ago, the Supreme Court brushed aside as absurd an attempt to justify a state statute regulating marriages as a way of preventing the birth of additional children.¹⁴⁰

One initial response to the charge of incoherence is that if by coherence one means consistency in principle, then consistency may be a laudable objective for government, it is virtually unobtainable, however, given the number of topics on which a government speaks and the number of ways through which the messages are transmitted (e.g., legislation, administrative regulation, court decision, executive action).¹⁴¹ As a result, government seems to be giving out mixed messages on nearly every topic, including marriage.

While a certain leeway regarding inconsistency/incoherence may

137. *Watts*, 405 N.W.2d at 310 (distinguishing *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979)).

138. While there are still some state laws prohibiting non-marital cohabitation, their enforcement is so rare that when it occurs it makes headlines. See, e.g., Jim Yardley, *Unmarried and Living Together, Till the Sheriff Do Us Part*, N.Y. TIMES, Mar. 25, 2000, at A9 (reporting unmarried couple receiving criminal summons for unlawful cohabitation under New Mexico law).

139. E.g., DANIEL J. BOORSTIN, *THE CREATORS: A HISTORY OF HEROES OF THE IMAGINATION* 674 (1992) ("Under the Austro-Hungarian laws designed to curb the Jewish population, only the eldest son in any Jewish family was allowed a marriage license.")

140. *Zablocki v. Redhail*, 434 U.S. 347, 374 (1978) (rejecting the argument that a statute preventing some people with existing child support obligations from marrying would help those people avoid further obligations, noting that "preventing the marriage may only result in the children being born out of wedlock, as in fact occurred in appellee's case").

141. Even as to individuals, the problem of coherence as a goal is that we hold so many different beliefs that some level of incoherence (i.e., inconsistency of principles) is inevitable. As to any particular belief, there is little reason to believe that changing that belief to its opposite is justified, even if doing so would make one's set of beliefs marginally more coherent. See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 268-70 (1994).

be sensible, this does not completely deflate the point. The criticism is not merely one of inconsistency, but that one set of policies will work to thoroughly undermine another set. If exiting marriage is easy and states remove almost every sanction against extramarital relationships, then anything else done to encourage marriage might possibly be for naught.

A second response is that the states' replies *are* coherent, and if they appear otherwise, it is only because social life is complex. States want people to marry, and encourage it by making entry easy and offering a number of benefits to being married. The states are no longer¹⁴² interested in keeping an unhappy couple together. Divorce has therefore been made relatively easy and cheap. A variety of values and impulses (e.g., for autonomy as well of stability, and to encourage commitment and protect the welfare of children, but not to hold people in situations which have become unbearable) make it difficult to improve on the "mixed messages" that states now give.¹⁴³

CONCLUSION

Modern regulation of marriage is the offering and withholding of state benefits relating to the public aspect of a private activity. Significant public benefits are available to certain couples and not to others (e.g., not generally to same-sex couples or polygamous groups). The policy of encouraging marriage in this way is substantially, though not entirely, undermined by the diminished presence of either social or legal sanctions for non-marital intimate relations and non-marital child-rearing.

The federal system complicates the regulation of marriage. States are simultaneously encouraged to go off in diverse directions and constrained from doing so. Part of the constraint comes from the constitutional doctrines that encourage national citizenship (e.g., the right to interstate travel), and part of the constraint comes from federal legislative intervention into what had once been the states' domain.

A number of states are now experimenting in ways to strengthen the marital commitment in order to protect the interests of children. Protecting the interests of children has become the default consensus of the purpose of marriage in the United States today. This replaces answers past generations might have given, such as property, business, or love.¹⁴⁴ These experiments are too new for their success to be determined.

142. Contrast the policy of the states during the period of fault divorce. *See supra* note 40.

143. This is basically the argument made by DiFonzo, *supra* note 12, in the course of criticizing current proposals for reforming marriage and divorce laws.

144. *Cf.* GRAFF, *supra* note 20 (considering the varying answers throughout history to the question, "What is marriage for?").

There is a temptation to say that these reforms are more symbol than substance, but as contemporary marriage can itself be seen as a kind of symbol—a public commitment to staying together, where it sometimes seems that there is little other than that commitment keeping the couple together—one should not underestimate the potential effects of these reforms.