

**CONTRACTING OUT OF THE CULTURE WARS:
HOW THE LAW SHOULD ENFORCE AND
COMMUNITIES OF FAITH SHOULD ENCOURAGE
MORE ENDURING MARITAL COMMITMENTS**

JAMIE ALAN AYCOCK*

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* Associate, Wiley Rein & Fielding LLP in Washington, D.C.; J.D., Harvard Law School; B.A., Cornell University; Briefing Attorney to Justice Nathan L. Hecht of the Texas Supreme Court. I am grateful for Professor Martha Minow's helpful suggestions early on in my research, and I would like to thank Professors Elizabeth Bartholet and Janet Halley, as well as my wife Amira, for their advice and encouragement. Also, many thanks are due to the staff of the *Harvard Journal of Law & Public Policy* for their helpful suggestions and editing.

INTRODUCTION

The culture wars that have been raging since at least the 1960s show no signs of cooling off. In fact, commentary on the red state, blue state dichotomy seems only to have heated up in recent years. Although the underlying issues of the culture wars are at play in many areas of the law (as seen in the politicization of judicial confirmations), the most intense battleground may be the area of family law because the heart of the ongoing fight is over competing visions of the family. Many writers have enlisted with one side or another, staked out a particular position, and attempted to articulate a compelling vision for America. But because each battle is seen as a zero-sum game, few authors have attempted to develop practical solutions that bridge the divergent perspectives on the family. Since no side appears anywhere close to “winning,” it is imperative to develop family law solutions that bridge some of the differences.

This Article proposes that the law should enable individuals to make choices that further their particular vision of the family, without imposing that vision upon the whole of society, thus allowing pluralism in marriage law. One set of culture-warriors argues that the requirements for entering marriage should be heightened and that the duties and rights in marriage should be increased to achieve greater stability in what they consider *the* fundamental social institution. Another set of culture-warriors argues that individuals should be allowed to easily enter and exit marriage and that society should be especially concerned with the ongoing effects of patriarchal roles associated with this historically unjust social institution. This Article takes an approach that cuts across the divide by arguing, as others have,¹

1. See Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 542 (2004); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 921 (1987–88); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 90 (1990); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1232 (1998); Barbara Stark, *Marriage Proposals: From One-Size Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1482 (2001); Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & RELIGION 67, 68 (2000–01); Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 37. *But see* Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 318 (2004); James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 882 (2000).

that the role of contract in marriage should be extended for those who choose to agree to additional terms. In a sense, this approach transcends the culture wars by drawing on liberal values, such as individualism and neutrality, to allow individuals to emphasize more traditional or communitarian values, such as interdependence and attachment, if they so choose. This Article takes the argument a step further by recommending that communities of faith play an active, positive role in a marriage regime of expanded contract. Specifically, communities of faith should not only be allowed but should also be encouraged to define the types of commitments they wish to bless as marriage.

This Article first outlines some of the background for understanding changes in marriage and divorce in America, including changes in views on what marriage is and should be, as well as developments in society's conception of morality and law. After laying out the shifts that have taken place in the last half-century, the Article presents some of the major legal and non-legal attempts that have been made to fix marriage. Then, the Article provides a brief overview of what others have written on how expanding the role of contract might be used to strengthen marriage. Building on successful, non-legal approaches communities of faith have taken to strengthen marital commitments, the Article introduces a somewhat controversial idea: communities of faith should be involved in strengthening marriage by participating in developing marriage contracts. The rest of the Article defends this proposition by explaining why communities of faith might desire to be involved in such a project, exploring what their participation might look like, and attempting to answer potential critics. In addressing likely criticism, the Article responds broadly to several of the major anticipated concerns.

I. BACKGROUND

It is widely recognized that marriage as an institution is in decline in the United States. Though divorce rates have leveled off to some extent in recent years, they have remained at historically high levels. The divorce rate, calculated as the number of divorces per year per 1,000 married women age 15 and older, rose from 9.2 in 1960 to 22.6 in 1980, and then decreased

slightly to 19.5 in 1996.² As marriages have become increasingly likely to end, people have become less likely to marry in the first place. The marriage rate, calculated as the number of marriages per year per 1,000 unmarried women age 15 and older, has continued to decline from a historical high of 90.2 in 1950 to 49.7 in 1996.³ This decline in the marriage rate may partially account for the leveling off of divorce rates in the 1980s and 1990s. At least part of the explanation for lower marriage rates is the increasing prevalence of cohabiting unmarried adults. The number of couples cohabiting has steadily increased from approximately 440,000 in 1960⁴ to 2.85 million in 1990 and 4.9 million in 2000.⁵ This represents a growth “[a]s a percentage of the total households in the United States . . . from 0.8% in 1960 to 2% in 1980 to 4.5% in 2000.”⁶

Although a number of factors have contributed to the high divorce rate, at least some of the blame rightly has been placed on the advent of the now nearly universal “no-fault” divorce regime. As its name implies, no-fault divorce allows either party in a marriage to unilaterally terminate the marriage for any reason. Although it seems obvious that the ease of divorce in some sense encourages and destigmatizes divorce, for the most part the passage of no-fault divorce laws simply allowed the law to catch up with society regarding its changing attitudes toward marriage and divorce.⁷ The impact of these laws facilitating and destigmatizing divorce should not be understated, yet it is also important to recognize that critics of no-

2. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 111 tbl.156; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1985, at 80 tbl.120; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1970, at 60 tbl.75.

3. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, at 111 tbl.156; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1970, at 60 tbl.75.

4. Sean E. Brotherson & William C. Duncan, *Rebinding the Ties that Bind: Government Efforts to Preserve and Promote Marriage*, 53 FAM. REL. 459, 460 (2004) (citing Lynne M. Casper et al., *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation* (U.S. Census Bureau, Population Div. Working Paper No. 36, 1999)).

5. *Id.* (citing TAVIA SIMMONS & GRACE O'NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000 (2001)).

6. *Id.* at 460 (citing JASON FIELDS & LYNNE M. CASPER, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS, CENSUS BUREAU CURRENT POPULATION REPORTS P20-537 (2001)).

7. See JAMES Q. WILSON, THE MARRIAGE PROBLEM 162-66 (2002) (discussing the causes and consequences of no-fault divorce).

fault divorce often over-emphasize the extent to which changes in divorce law itself wrought change.⁸

Some praise these developments insofar as they hail the demise of what they perceive as an inherently exclusive and patriarchal institution that should have no place in a progressive society.⁹ The Scandinavian countries, and Sweden in particular, often are held up as a model for actively seeking to end all forms of gender discrimination.¹⁰ In its quest, Sweden has attempted to eliminate any legal or social pressures to marry as well as any economic consequences of divorce¹¹ through, for example, state allowances.¹² The fruit of such policies is clear: it is now as common for children to be born out of wedlock as it is for children to be born to married parents in Sweden.¹³ Further, there is little, if any, social pressure in Sweden for a couple with children to marry or to stay married.¹⁴

Despite the trends toward cohabitation and divorce, polling data indicate that the vast majority of Americans still regard the institution of marriage as very important to them.¹⁵ Consistent majorities view the high divorce rate as a "Very Serious Problem."¹⁶ In one survey, 62% of respondents said that divorce in this country should be harder to obtain than it is

8. See, e.g., BRIDGET MAHER, DETERRING DIVORCE 3 (2004), available at <http://www.frc.org/get.cfm?i=BC04D02> (claiming that "[m]uch of the rise in divorce rates can be attributed to no-fault divorce laws.").

9. See James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 37–38 n.33 (2003) (collecting sources criticizing the institution of marriage).

10. See ALLAN C. CARLSON, FAMILY QUESTIONS: REFLECTIONS ON THE AMERICAN SOCIAL CRISIS 20–25 (1991) (recounting a brief history of the move to eliminate gender discrimination and gender-role differentiation in Sweden).

11. See *id.* at 118 (discussing changes in Swedish tax law that removed incentives for marriage).

12. See *id.* at 69, 118 (noting the increase in child allowances and the marriage-neutral tax policy offered by Sweden).

13. See *id.* at 71 (noting that by 1986 nearly 50% of all children born in Sweden were illegitimate); Noelle Knox, *Nordic Family Ties Don't Mean Tying the Knot*, USA TODAY, Dec. 16, 2004, at 15A–16A, available at http://www.usatoday.com/news/world/2004-12-15-marriage_x.htm (noting that half of all children in Scandinavia are born to unmarried mothers).

14. See, e.g., Knox, *supra* note 13, at 15A (discussing the lack of social stigma attached to out-of-wedlock births in Scandinavia).

15. In one poll, 92% of respondents said having a successful marriage was "Very Important" to them. Ropes Center, *Thinking About Values*, PUB. PERSP. Feb.–Mar. 1998, at 12, 17 (Feb./Mar. 1998) (citing results of an Aug. 1996 poll by Wirthin Worldwide).

16. NBC/WALL ST. J. JUNE QUARTERLY SURVEY, June 16–19, 1999, <http://online.wsj.com/documents/poll1990624.html>.

now.¹⁷ Another survey found that 61% of respondents believed it should be harder for married couples with young children to get a divorce.¹⁸ Surveys show that people support measures that would make it more difficult for couples to divorce. For example, 78% of respondents in one poll agreed with a specific proposal that would require all married couples with children to go to counseling before a divorce is granted.¹⁹

Similarly, a high percentage of Americans sees marriage as especially significant for raising children. These opinions exist despite the fact that a majority of people no longer finds cohabitation by unmarried partners morally troubling.²⁰ In fact, among high school seniors, most "Agree" or "Mostly Agree" with the statement: "It is usually a good idea for a couple to live together before getting married in order to find out whether they really get along."²¹

At the same time, a significant majority of people believes it is best for children to grow up in two-parent families.²² Not only do Americans think it is best when children are raised by two parents, but surveys also show that a strong majority of Americans believes that it is better for children to be raised in a household with a married mother and father.²³ These results are especially significant given the division among Americans concerning the morality of unmarried cohabitation. A significant proportion of those who do not find unmarried cohabitation morally troubling believe that it is not the ideal family situation for raising children. Thus, disapproval of the high di-

17. WASH. POST/HENRY J. KAISER FAMILY FOUNDATION/HARVARD UNIV. VALUE STUDY, Oct. 4, 1998, <http://www.washingtonpost.com/wp-srv/politics/polls/vault/stories/data100498.htm>

18. Walter Kirn, *The Ties That Bind: Should Breaking Up Be Harder to Do? The Debate Over Easy Divorce Rages On*, TIME, Aug. 18, 1997, at 49 (citing a poll by Time/CNN, May 7-8, 1997).

19. Wirthlin Worldwide, Wirthlin Quorum Poll, July 7-10, 2000.

20. The Gallup Org., Gallup/CNN/USA Today Poll, May 18-20, 2001.

21. JERALD G. BACHMAN ET AL., MONITORING THE FUTURE: QUESTIONNAIRE RESPONSES FROM THE NATION'S HIGH SCHOOL SENIORS 2000, at 167 (2001).

22. When asked whether "[i]t is generally best for children to grow up in two-parent homes," 72% of respondents, defined as parents of children under 18, said they "Agree Strongly" and another 15% said they "Agree Somewhat." STEVE FARKAS ET AL., PUBLIC AGENDA, NECESSARY COMPROMISES: HOW PARENTS, EMPLOYERS, AND CHILDREN'S ADVOCATES VIEW CHILD CARE TODAY 42 (2000).

23. A 1996 *Los Angeles Times* poll found that 71% of respondents agreed that "[i]t's always best for children to be raised in a home where a married man and woman are living together as father and mother." Ropes Center, *supra* note 15, at 20.

orce rate and of cohabiting couples raising children outside of marriage does not appear to be limited to the small segment of the population labeled the “religious right.”

In fact, voices on the political left raised concerns about the implications of rising divorce rates as early as the 1960s. Then serving as Assistant Secretary of Labor, Daniel Patrick Moynihan issued his provocative report in 1965, *The Negro Family: The Case for National Action*.²⁴ In that report, he outlined how poverty among African Americans was linked, at least in part, to a breakdown in family structure.²⁵ Although his report received criticism as “blaming the victim” when it was originally published,²⁶ his analysis emphasizing the significance of family breakdown earned respect over time by those on the right as well as the left as his predictions have come to pass.²⁷

A. *Changing Conceptions of Morality and the Proper Role of Law*

The question how to deal with rising divorce rates and increasing cohabitation among adults raising children cannot be dealt with adequately, however, without first acknowledging broader recent developments in society, law, and society’s view of the role of the law. In relation to marriage, divorce, and cohabitation, two trends are especially significant: (1) the liberalization of moral values (or rise of moral relativism); and (2) the shift in family law toward focusing on individuals rather than groups. Both of these trends have been widely studied and generally are accepted as accurate descriptions of developments in the United States over the last half-century. Accordingly, this paper merely outlines these developments and then focuses on their implications for the current topic.

24. See OFFICE OF POLICY PLANNING AND RESEARCH, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

25. See *id.*

26. See WILLIAM RYAN, *BLAMING THE VICTIM* 63–64 (2d ed. 1976).

27. By the 1980s, Moynihan’s central argument came to be accepted in mainstream media. In 1986, it was the focus of a television documentary by Bill Moyers, *The Vanishing Black Family—Crisis in Black America*. See Bryce Christensen, *Time for a New ‘Moynihan Report’? Confronting the National Family Crisis*, *THE FAM. IN AM.*, Oct. 2004, at 1–2, available at http://www.profam.org/pub/fia/fia_1810.htm; see also *Hearing on Welfare Reform Reauthorization Proposals Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Robert Rector, Sr. Research Fellow, Heritage Foundation).

The liberalization in moral attitudes regarding family and sexuality, recognized as the “sexual revolution,” has wrought profound changes in society in terms of attitudes and actions. For example, in the short four-year period between 1969 and 1973, the percentage of Americans who said they believe “it is wrong for people to have sex relations before marriage” decreased from 68% to 48%.²⁸ The dramatic changes wrought in sexual behavior are illustrated vividly by a 1992 survey showing the percentages of women in various age groups who said they had not had premarital sex: 30.2% of women age 18–29, 27.4% of women age 30–39, 33.8% of women age 40–49, and 55.1% of women age 50–59.²⁹ The sharp change in sexual behavior occurred between the women who came of age in the 1970s and those who came of age in the decade before.

Not surprisingly, despite the increased availability and use of birth control and abortion, the increase in sexual behavior outside of marriage led to rapid increases in conception and births of children outside marriage. During 1960–64, 74% of first births among women age 15–29 were conceived after marriage, compared to 47% during 1990–94.³⁰ The changes are further seen in the increased percentage of births to unwed mothers, which rose only a relatively small amount from 3.8% in 1940 to 5.3% in 1960, but continued to rise steadily thereafter through the late 1990s, when births to unwed mothers constituted almost one-third of all births.³¹ Furthermore, changing morés of sexual behavior made it more socially acceptable for women to bear and raise children out of wedlock.

In direct response to this waning of traditional moral values, particularly those related to the Judeo-Christian tradition, the law has dropped statements of moral aspiration.³² In the family law context, the law largely “has deserted its function of pre-

28. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1843–44 (1985) (citing E. SHORTER, *THE MAKING OF THE MODERN FAMILY* 114 (1975)).

29. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 214 (1994).

30. AMARA BACHU, U.S. CENSUS BUREAU, *TRENDS IN PREMARITAL CHILDBEARING 1930 TO 1994*, CURRENT POPULATION REPORTS P23-197, at 5 tbl.2 (1999).

31. STEPHANIE J. VENTURA & CHRISTINE A. BACHRACH, NATIONAL VITAL STATISTICS SYSTEM, *NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940–99*, at 17 tbl.1 (2000); JOYCE A. MARTIN ET AL., NATIONAL VITAL STATISTICS SYSTEM, *BIRTHS: FINAL DATA FOR 2000*, at 9 tbl.D (2002).

32. Schneider, *supra* note 28, at 1845.

scribing and describing norms of conduct whose purpose is to maintain families as places for interdependent, collective living and the nurture of children."³³ But the law has not simply traded one set of moral ideals for another to dictate what should govern family life; instead, the law has "'relinquish[ed] most of its overt attempts to promote any particular set of ideas about family life,' reflecting instead modern legal values of pragmatism, antiformalism, and neutrality."³⁴

As people have come to accept alternative lifestyles as legitimate and undeserving of moral condemnation, they have become less likely to believe that the law should enforce or even encourage particular lifestyles. There are, of course, counterexamples to this trend away from moral discourse in the law, as evidenced by the abortion issue. On this particular issue, Americans remain divided, and both sides make strident moral appeals. Because the abortion debate stands in such stark contrast to other legal debates, however, this counterexample only highlights the extent to which moral discourse has been eliminated from the law.

As postmodern morality has taken hold, family law has moved away from its traditional emphasis on group values such as interdependence and attachment, in favor of individual values such as equality and individuality.³⁵ In her widely cited comparative work *The Transformation of Family Law*, Mary Ann Glendon details how this shift has taken place in the United States and Western Europe. As Glendon observes, the family and the institution of marriage once were but now no longer are "the essential determinants of an individual's economic security and social standing."³⁶ As a result, the law now protects the family because it serves individual fulfillment rather than because it serves society.³⁷

Furthermore, despite the fact that moral relativism has resulted in family laws that no longer explicitly promote a particular ideal family life, this veil of moral neutrality "masks a

33. Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 247 (1990) (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989)).

34. *Id.* at 264 (quoting GLENDON, *supra* note 33, at 297).

35. *See id.* at 246.

36. GLENDON, *supra* note 33, at 292.

37. *Id.* at 292–93.

bias favoring the values of equality, individual freedom, and tolerance."³⁸ As many scholars have recognized, emphasizing individual rights in family law may in some sense set the individual free, but at the same time this emphasis "invites us to value individual interest above family and societal stability."³⁹ This individual-centeredness may "paradoxically work[] to the detriment of individuals as well as families, for individuals are born into and must suffer the fates of families."⁴⁰

Debates on family law present a false dichotomy when they are reduced to the question of whether the law should set a goal to be lived up to or should simply reflect the state of people's lives.⁴¹ This approach fails to recognize that a family law regime that does not present a norm toward which people should strive in fact embodies a value system that says there is no norm. Solutions to problems in family law must therefore recognize that the American family law system will no longer propagate explicit norms for family life and that the system implicitly favors the values of "equality, individual freedom, and tolerance."⁴² As a result, reformers seeking to strengthen marriage must at the same time discover ways to emphasize and serve these favored values.

B. Attempts to Fix Marriage

Wide-ranging concerns about the high divorce rate and declining marriage rates have led to a multitude of proposals for strengthening the institution of marriage. Proposals involving legal means have focused on placing burdens on either the decision to marry or the decision to divorce. Attempts to produce wiser decisions upon entering marriage have included waiting

38. Woodhouse, *supra* note 33, at 264.

39. *Id.* at 255 (citing Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 893-94; David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805 (1985); Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015 (1985); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985); Michael S. Wald, *Introduction to the Family, the State and the Law*, 18 U. MICH. J.L. REFORM 799 (1985)).

40. *Id.*

41. See, e.g., Ezra Hasson, *Setting a Standard or Reflecting Reality? The 'Role' of Divorce Law, and the Case of the Family Law Act 1996*, 17 INT'L J.L. POL'Y & FAM. 338 (2003).

42. Woodhouse, *supra* note 33, at 264.

periods and premarital counseling.⁴³ Attempts to cause more careful reflection upon divorce similarly have included waiting periods, counseling, and mediation.⁴⁴ Other proposals have gone so far as to call for a return to a fault-based divorce regime.⁴⁵

Beyond the legal means that have been proposed, there is a growing network of individuals and organizations that emphasize non-legal means for strengthening commitments in marriage. Some of these efforts to strengthen marriage, such as Marriage Encounter, which was imported to the United States by Catholics from Spain, began as early as the 1970s.⁴⁶ What has been called the “marriage movement,” however, began in earnest in the mid-1990s with groups such as Marriage Savers and Smart Marriages.⁴⁷ Such efforts do not see social problems such as divorce and children being raised out of wedlock as matters to be solved by the state, coercing people to stay or get married. Instead these non-legal approaches tend to see social problems of this nature as matters to be dealt with by individuals, through greater personal commitments, and by social institutions such as churches, through raising social expectations.

1. Legal Efforts to Strengthen Marriage

In an innovative legal effort to strengthen marriage, three states have adopted, and several more have considered, some form of what is called “Covenant Marriage.”⁴⁸ When a couple marries under this new regime, they select whether to opt into standard or

43. For example, Florida and Utah have passed legislation to fund premarital preparation. Similarly, the federal government provided for Temporary Assistance for Needy Families (TANF) grants to states for marriage education efforts. See, e.g., Brotherson & Duncan, *supra* note 4, at 461–62.

44. For example, the Michigan Mediation Project refers couples considering divorce to mediation before they enter legal proceedings. See *id.*

45. See *id.* at 465 (“In recent legislative sessions in various states, other types of bills have been introduced to deal with the issues related to divorce. These included prohibitions on no-fault divorce actions when the divorce was contested by one of the parties or included children (Georgia, Massachusetts, Montana), a requirement of marriage counseling or marriage education before a divorce is granted (Arizona), and allowance for a court to refer a divorcing couple for counseling or mediation (Washington).”).

46. See William J. Doherty and Jared R. Anderson, *Community Marriage Initiatives*, 53 FAM. REL. 425 (2004).

47. *Id.* at 426.

48. For the text of the legislation passed in Louisiana, see LA. REV. STAT. ANN. §§ 9:272–275.1, 307–309 (2004). For detailed analysis, see Katherine S. Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998).

covenant marriage. Under standard marriage, there are no additional entrance requirements. Covenant marriage, in contrast, imposes additional entrance requirements, including the requirement that the couple go through some form of premarital counseling and that they have explained to them the additional exit requirements imposed on those opting for covenant marriage.⁴⁹

Under covenant marriage statutes, it is more difficult to exit covenant marriages than it is for standard marriages. Although the states vary in terms of the acceptable grounds for divorce, each requires that divorce only be granted in cases where some enumerated fault-based ground is established or where the divorcing spouse complies with a waiting requirement that allows divorce only after a specified period of time,⁵⁰ presumably to prevent hasty divorces.

It remains too early to assess thoroughly the impact of covenant marriage laws; however, early findings “show that covenant marriage was associated with lower marital disruption in the first 5 years of marriage and lower perceived chance of separation among wives.”⁵¹ As time passes and further data become available, it will be necessary to assess the extent of selection effects, particularly since it is known that couples selecting covenant marriage are more “religiously active, serious about premarital preparation, and committed to the marital ideal.”⁵²

2. *Non-legal Efforts to Strengthen Marriage*

Efforts to strengthen marriage have also included a variety of non-legal means. For example, groups have sprung up to encourage wise decisions upon entering marriage, to equip couples to more effectively deal with conflict, and to divert couples whose marriages might be salvaged to counseling or mediation

49. See, e.g., LA. REV. STAT. ANN. § 9:272 (2004).

50. For example, the Louisiana statute sets out various periods of separation that qualify a spouse in a covenant marriage to file for divorce depending on the circumstances of the marriage and of the separation itself. LA. REV. STAT. ANN. § 307 (2004).

51. Brotherson & Duncan, *supra* note 4, at 464 (citing Laura A. Sanchez et al., Can Covenant Marriage Foster Marital Stability Among Low-income Fragile Newlyweds?, paper presented at the National Poverty Conference on Marriage and Family Formation Among Low-Income Couples: What Do We Know From Research? (2003)).

52. *Id.*

before proceeding to divorce.⁵³ Among the most noteworthy and possibly effective non-legal means that have been used recently to combat divorce are “community marriage policies.”⁵⁴

Although they vary depending on the locality in which a policy is adopted, the basic idea behind community marriage policies is for stakeholders in a community, led by church leaders, to meet to design and commit to a plan intended to strengthen marriage.⁵⁵ Community marriage policies often involve clergy committing not to marry couples unless the couples first undergo premarital counseling or take part in a “premarital inventory.”⁵⁶ Community marriage policies were first implemented in 1986 when Mike and Harriet McManus worked with leaders in the city of Modesto, California.⁵⁷ The couple began traveling around the country promoting the implementation of similar policies.⁵⁸ In 1996, they formed the organization Marriage Savers, which holds itself out as “a ministry that equips local communities, principally through local congregations, to help men and women to: prepare for life-long marriages, strengthen existing marriages, and restore troubled marriages.”⁵⁹

Marriage Savers has developed an intense program relying on grassroots activity to mentor new couples as well as those who are married and experiencing problems. Marriage Savers considers the development of mentor couples who will work with engaged and newlywed couples as one of its principal goals.⁶⁰ Local pastors select couples they perceive as having vital, long-term marriages to participate in twelve hours of training over two days.⁶¹ This training prepares the mentor couples to administer and discuss a premarital inventory and to lead mentored couples through exercises related to commu-

53. For an extended discussion of such groups, see Doherty & Anderson, *supra* note 46.

54. MICHAEL J. MCMANUS, MARRIAGE SAVERS: HELPING YOUR FRIENDS AND FAMILY AVOID DIVORCE 301 (rev. ed. 1995).

55. *See id.* at 293–318.

56. *See id.* at 297–98.

57. *See* Doherty & Anderson, *supra* note 46, at 427.

58. *See id.*

59. *See* Marriage Savers, <http://www.marriagesavers.org> (last visited Oct. 3, 2006).

60. *See* Doherty & Anderson, *supra* note 46, at 427.

61. *See id.*

nication and conflict resolution.⁶² For troubled marriages, mentor couples are trained to lead mentored couples through seventeen “marriage ministry action steps” similar to twelve-step programs geared toward ending addiction.⁶³

Marriage Savers claims that community marriage policies have reduced divorce rates substantially where they have been implemented.⁶⁴ For example, the group claims that as a result of the community marriage policy implemented in Modesto, California in 1986, the divorce rate declined by 47.6% by 2001, even though the marriage rate increased by 12.3% as of 1999 (based on the last available data).⁶⁵ To combat the skepticism with which the group’s claims of dramatic results were greeted, Marriage Savers commissioned a study by the independent Institute for Research and Evaluation to assess the extent of the effect, if any, of implementing a community marriage policy on a community’s divorce rate.⁶⁶ The study found a statistically significant impact on divorce rates where a community marriage policy has been implemented.⁶⁷ The study matched counties with similar underlying trends in divorce rates to evaluate the differences attributable to the community marriage policies themselves.⁶⁸ The study estimated reduction in divorce rate of 2% more per year in counties that implemented community marriage policies.⁶⁹ Accordingly, counties with a community marriage policy had an 8.6% decline in the divorce rate over four years, while comparison counties had a 5.6% decline.⁷⁰ Although the declines in divorce rate attributed to the community marriage policies were relatively small, the results of the study are important in that they show a grassroots effort can actually make an impact on divorce rates.⁷¹

62. *See id.*

63. *See id.*

64. *See Welfare and Marriage Issues: Hearing Before the Subcomm. on Human Res. of the H. Comm. On Ways and Means*, 107th Cong. 28 (2001) (statement of Michael J. and Harriet McManus).

65. *Id.*

66. Doherty & Anderson, *supra* note 46, at 427 (citing Marriage Savers 2002 annual report).

67. Paul James Birch, Stan E. Weed & Joseph Olsen, *Assessing the Impact of Community Marriage Policies on County Divorce Rates*, 53 FAM. REL. 500 (2004).

68. *Id.*

69. *Id.* at 502.

70. *Id.* at 500.

71. *Id.*

These results are impressive, particularly given that nothing in the Marriage Savers approach to community marriage policies is legally binding on any of those involved. The program seems to derive its success from creating social costs to divorce by building relationships with mentoring couples with an interest in averting marital breakdown.

C. Using Contract to Strengthen Marriage

Some commentators and academics have advocated avoiding direct state action by simply allowing individuals to structure the terms of their marriages, just as we allow businesses to structure their financial relationships.⁷² In the last year, the call for customized contractual marriage has begun to expand beyond the scholarly realm, and has been discussed in the left-leaning *San Francisco Chronicle*⁷³ as well as in a small wave of blogs.⁷⁴

In the commercial context, contracts are an indispensable means for securing commitments. Parties agree in advance to the terms for their relationship and often set out the consequences, if any, should either of the parties fail to live up to the agreement. Though parties to a contract give up some of their autonomy in binding themselves, the parties agree to the contract precisely because they believe that, despite giving up some autonomy, they are in fact furthering their own self-interest.

Although commercial relationships differ from intimate relationships, there is reason to believe a similar logic applies. Elizabeth Scott has outlined how it can be rational for individuals to use precommitment strategies when they seek to pursue long-term goals but fear making future choices based on inconsistent short-term preferences.⁷⁵ Her analysis fits well in the marriage context, where individuals may have the long-

72. See Estin, *supra* note 1; Haas, *supra* note 1; Scott, *supra* note 1; Scott & Scott, *supra* note 1; Stark, *supra* note 1; Qaisi, *supra* note 1; Wolfe, *supra* note 1. *But see* Bix, *supra* note 1; DiFonzo, *supra* note 1.

73. Colin P.A. Jones, *Marriage Proposal: Why Not Privatize? Partnerships Could Be Tailored to Fit*, S.F. CHRON., Jan. 22, 2006, at D1, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/01/22/ING6FGOLVA1.DTL>.

74. See, e.g., Married to the Company in the 21st Century (Jan. 25, 2006) http://japery.newpantagruel.com/2006/01/25/married_to_the_company_in_the_21st_century.php (last visited Nov. 15, 2006); Daniel Larison, Corporate Millets (Jan. 25, 2006), <http://larison.org/archives/000559.php> (last visited Nov. 15, 2006).

75. See Scott, *supra* note 1, at 13.

term goal of a lifelong marriage, yet absent additional pre-commitment, short-term difficulties in the relationship or other fleeting preferences might undermine the long-term goal. Elizabeth and Robert Scott use this analysis as a basis for conceiving of marriage as a relational contract.⁷⁶

Critics who argue against the idea of extending contract principles to marriage include scholars from a range of legal, political, and sociological perspectives. Communitarians express concern that contract produces a limited conception of marriage as a relationship based merely on individual fulfillment, thus harming the interests of women and children while undermining societal welfare and stability.⁷⁷ At the same time, some critics say contract principles are simply inappropriate for intimate relationships because individuals are less likely to be motivated by their own self-interest since such relationships are frequently characterized by altruism or coercion.⁷⁸ Feminists have argued that this approach constitutes a thinly veiled effort to reinvigorate traditional gender roles.⁷⁹ Social conservatives fear that extending contract in marriage will undermine the state role in marriage altogether, ushering in complete private ordering in intimate relationships, thus paving the way for developments such as gay marriage and polygamy.⁸⁰ Others have appealed to a conception of a constantly changing human nature to criticize a marriage regime in which "earlier selves" could unfairly bind "later selves."⁸¹

Allowing individuals to bind themselves to one another in more enduring ways would further the liberal values of neutrality, individualism, equality, and tolerance, respecting individuals enough to allow them to set the terms of their relationships, rather than leaving such important matters in the hands

76. See Scott & Scott, *supra* note 1, at 1231.

77. See e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (1991); Minow *supra* note 39; Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605 (1993).

78. See Michael J. Trebilock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 45-85 (Peter Benson ed., 2001).

79. See e.g., DiFonzo, *supra* note 1, at 936.

80. Heather K. McShain, *For Better or For Worse? A Closer Look at Two Implications of Covenant Marriage*, 32 FAM. L.Q. 629 (1998).

81. See DiFonzo, *supra* note 1, at 940-44.

of the paternalistic state. At the same time, furthering individualism through a more contractual marriage regime actually would give those individuals the tools to strengthen family and societal stability by allowing them the freedom to make choices more explicitly that value interdependence and attachment. Using contract rather than other legal means, such as a return to a fault-based system, to strengthen marriage would avoid employing a coercive state in requiring stronger terms for all marriages. Thus, using contract would allow the state to maintain a more neutral stance toward marriage terms because a contract-style legal regime would not require the state to advocate any particular normative vision of marriage or the family. This proposed marital regime is, therefore, consistent with both liberal values, such as neutrality and tolerance, as well as now widely-accepted relative moral values.

Measures such as covenant marriage are similar to advancing contract in the marriage context in that both approaches allow couples to decide whether to opt into a more stringent legal regime. Advancing contract, as opposed to covenant marriage, however, provides additional advantages. Under covenant marriage, couples may choose one of only two possible legal regimes to which their marriage will be subject, and the state maintains a relatively significant role by continuing to set all the terms of both of the two legal regimes. In contrast, advancing contract in marriage reduces the role of the state to only (1) setting the minimum requirements for entering marriage, (2) setting the minimum responsibilities spouses must assume toward one another, and (3) enforcing any additional terms agreed to by couples. This is significant because covenant marriage has drawn criticism from those who argue that it advances a particular normative vision of the family by adopting a form of fault-based divorce. Advancing contract is not likely to draw the same political fire because it avoids enlisting state support for a particular normative vision. Instead, advancing contract principles amounts only to legal enforcement of the terms to which a couple agrees apart from any state influence or endorsement. This approach avoids controversy because it is neutral on its face and because it directly advances liberal values, including individualism, pluralism, and diversity. Under this approach, couples could design terms to further different types of relationship goals, whether they desire something more

akin to traditional marriage with distinct gender roles or something more egalitarian in nature that works to eliminate gender stereotypes.⁸²

II. INVOLVING COMMUNITIES OF FAITH IN EXTENDING CONTRACT IN MARRIAGE

As others have advocated, the use of contract in marriage should be expanded and legally enforced. In particular, though the state should continue to set the minimum requirements for entering marriage, as well as the minimum responsibilities spouses must assume toward one another, individuals should be allowed to strengthen their marriages through the creation of additional terms. Individuals might rationally agree to the following kinds of terms: (1) restrictions on the available grounds for divorce, (2) additional burdens placed on a party seeking divorce, (3) requirements of arbitration or mediation in the event either or both spouses seek a divorce, or (4) procedures for determining custody and visitation for any children born or adopted during the marriage. In most circumstances, enforcing such provisions would further liberal values, such as individualism and pluralism, while providing the opportunity for individuals to choose to emphasize traditional or communitarian values such as interdependence and attachment.

This Article takes this line of argument a step further by suggesting that communities of faith should play an active, positive role in a marriage regime of expanded contract. The law should not only allow but also encourage communities of faith to define what types of commitments they will bless as marriage. Congregations that have adopted community marriage policies have already imposed restrictions on the civil marriages they will bless. These efforts should be expanded to allow communities of faith not only to require couples they marry to take certain actions before they are married (such as premarital counseling) but also to require certain legally enforceable premarital commitments (such as restrictions and burdens on the availability of divorce). This proposal calls for a shift in the current understanding of the role of communities of faith in performing weddings. Currently, communities of faith

82. See Stark, *supra* note 1, at 1528–42 (outlining three possible forms of marriage under a postmodern conception of marriage terms, including the “gender equity,” “relational,” and “customized” models).

may only limit who they will marry based on what the couples say or do before marriage. Under the proposed marriage regime, communities of faith would have an increased role as marital gatekeepers since the requirements they impose on couples before marriage potentially could exercise legally enforceable sway throughout the life of the marriage.

This proposed marriage regime could result in a spectrum of possibilities. At one extreme, this proposal could lead to marriages with a wide variety of terms, varying depending on the particular community of faith involved with each wedding. There might be significant differences among the required terms for marriage both on an interfaith as well as an intrafaith basis. It is not clear whether interfaith differences would be as significant as intrafaith differences. For example, the differences between the various branches of Judaism could be more significant than those between Islam and Christianity. If the proposed marriage regime produced such variety, there would be a marriage term "market" with competition among congregations or faiths for would-be married couples. Such a result likely would assuage concerns some might raise about potential opportunities for coercion by communities of faith, because communities of faith would have to compete in this market.

At the other extreme, the proposed marriage regime could lead communities of faith to band together, like those that have already worked together to adopt community marriage policies in some cities. Banding together would allow communities of faith to raise the level of commitment required for entering religious marriage of any kind. For this kind of cooperation to work, the level of commitment could only be raised to the level of the least stringent obligations to which all of the cooperating communities of faith could agree. As a result, the additional commitment required would probably be small. Even if such cooperative action ensued, however, the proposed regime would continue to allow civil ceremonies administered by public officials for couples who need meet only the minimum state entry requirements and the minimum level of commitment required by the state. Because people would retain the option of civil marriage with no additional requirements, this resulting marriage regime hardly could be seen as coercive.

Thus, there would be no significant legal coercion regardless of whether the proposal were to result in great diversity among the contract terms required by various communities of faith, co-

operation among communities of faith to require more stringent terms for any religious marriage, or something in between these extremes. Instead, steps toward this kind of marriage regime should be seen as affording individuals both (1) greater contractual freedom in their ability to set the terms for marriage, and (2) increased associational freedom by allowing individuals to associate with a community of faith that defines marriage as the individual sees fit and can act to uphold that definition.

Similarly, the proposed marriage regime would expand associational freedom for groups. Allowing groups to define the terms of their members' marriages would expand their ability to define themselves. This marriage regime would allow groups to define and uphold a more rigorous understanding of marriage relationships, rather than forcing groups to accept the currently universal and less demanding form of marriage. Furthermore, respecting this form of group associational freedom advances the liberal values of pluralism and diversity by allowing variety and group expression of identity.

It may be helpful to consider what this proposed marriage regime might look like in practice. Even if communities of faith band together to create common marriage term requirements, just as they already have developed premarital requirements such as community marriage policies in some cities, the practical impact of this proposed regime would be felt only at the margins. The effect might initially be indistinguishable in practice from a covenant marriage regime, such as that in Louisiana. The covenant marriage regime in Louisiana, however, leaves the decision whether to enter into a covenant or standard marriage completely in the hands of the couple that marries. This proposed marriage regime would leave the ultimate decision about which marriage terms to adopt to the couple, but would recognize and affirm a role for communities of faith. Although this might seem insignificant initially, the impact of this shift may be considerable in the long-term by creating local mechanisms for social approbation of marriage terms.

Should communities of faith develop across-the-board requirements for entering a "religious" marriage, this may raise concerns of undue coercion. But as already discussed, the additional across-the-board requirements are unlikely to be very great, and couples could always obtain a civil marriage with no additional requirements. Thus, the so-called coercive effect under such a regime would necessarily be limited to those whose

desire for a religious marriage of some sort outweighs their aversion to the additional marriage terms required by communities of faith.

Should communities of faith go it alone under this proposed marriage regime, it is difficult to predict both how stringent additional required marriage terms would be as well as the extent to which communities of faith would even opt-in to the regime and actually require additional marriage terms. The stringency of any additional required terms would likely vary from simply “feel good” additional terms to terms stringent enough to be unconscionable or unconstitutional. Terms at either of these extremes are likely to have no practical effect since neither would have any teeth: “feel good” terms would have no substance, while unconscionable or unconstitutional terms would be unenforceable.

Evangelical Protestants and Roman Catholics constitute roughly 30% and 25% of the American population, respectively.⁸³ Thus, their response to the proposed marriage regime would be crucial. It could have ripple effects in society, significantly affecting whether a critical mass of communities of faith could agree to across-the-board additional marriage terms for “religious” marriages. How might these two groups respond?

Due to the hierarchical nature of the Roman Catholic Church, Catholic parishes might develop a uniform approach under the proposed marriage regime. Such a uniform response could be imposed through discipline by the U.S. Conference of Catholic Bishops (“USCCB”). Or it could be imposed on a diocesan basis by particular bishops in each diocese. Though the Roman Catholic Church’s official stance is that marriage is an indissoluble union, along with the liberalization of divorce laws it appears to have liberalized the availability of once rare annulments.⁸⁴ As such, it seems likely that any additional marriage terms promulgated by the USCCB would amount only to “feel good” statements about the theological understanding of oneness in marriage. At the same time, those bishops more predis-

83. PEW RESEARCH CENTER, *EVENLY DIVIDED AND INCREASINGLY POLARIZED: 2004 POLITICAL LANDSCAPE* 66 (2003), available at <http://people-press.org/reports/display.php3?PageID=757> (survey data showing religious denomination affiliation in 2002–03).

84. See Edward N. Peters, *Annulments in America: Keeping Bad News in Context*, *HOMILETIC AND PASTORAL REV.*, Nov. 1996, at 58, available at http://www.canonlaw.info/a_annulments.htm.

posed to take controversial stands consistent with orthodox Catholicism might develop more stringent additional legally binding marriage terms for couples in their dioceses.

In contrast, evangelical Protestants are not beholden to the same kinds of structures and authorities as are Roman Catholics.⁸⁵ But as literal believers of the Bible, they also tend to hold relatively conservative theological views of marriage. As such, the proposed marriage regime may initially have its greatest impact in evangelical Protestant congregations. Implementation of the proposed marriage regime would likely spark debate in such congregations about the extent to which the church community should be involved in the lives of its members. Just as in other areas of life, some of these churches would likely conclude in the spirit of the Protestant Reformation that such matters of biblical interpretation should be determined by individuals as they are individually directed by God, and others which see the biblical terms of marriage as having only one possible interpretation would be more likely to embrace the opportunity to make use of the legal system to enforce such terms. This internal dialogue would allow communities of faith to make decisions explicitly about the trade-offs between having more stringent additional legal marriage requirements (and possibly scaring off members) and requiring only a watered-down version of marriage under the law though trying to hold onto a more stringent theological understanding of marriage.

Thus, a cursory look at these two large religious groups makes clear that the practical impact of the proposed marriage regime would probably be at the margins. Either communities of faith would band together to require slightly more stringent additional marriage terms for all those choosing a “religious” marriage rather than simply a civil marriage, or there would be a “market” for marriage terms, with only those already com-

85. See Mark A. Noll, Lecture Before the Ethics and Public Policy Center: Understanding American Evangelicals (Dec. 8, 2003), available at http://www.eppc.org/publications/pubid.1943/pub_detail.asp (explaining the rise of the term “evangelical” as associated with particular Protestant groups and noting the “four key ingredients of evangelicalism” identified by David Ebbington as “conversion, or ‘the belief that lives need to be changed’; the Bible, or the ‘belief that all spiritual truth is to be found in its pages’; activism, or the dedication of all believers, including laypeople, to lives of service for God, especially as manifest in evangelism (spreading the good news) and mission (taking the gospel to other societies); [and] crucicentrism, or the conviction that Christ’s death was the crucial matter in providing reconciliation between a holy God and sinful humans”).

mitted to a more commitment-oriented form of marriage choosing to make such terms legally binding. This proposal could be significant nonetheless by allowing social pressure in communities of faith to play a role, albeit a role limited by couples' ability to choose a non-religious marriage by civil authorities. By granting an explicit role for communities of faith that so choose, this proposal may help to account for some of the externalities of divorce. Whereas individuals deciding whether to divorce or stay married may rationally only consider the impact of such a decision on themselves, communities of faith are in a position to require their members to consider the broader effects of a divorce culture. Just as a couple may opt to buy a home where there is a stringent homeowner's association that they know will restrict their freedoms in some ways, they might rationally expect the benefits of being in a community of couples with higher-commitment marriages to outweigh the costs of giving up the freedom to opt for a low-commitment marriage.

The basic proposal of this Article is thus two-fold. First, the enforcement of contractual provisions in marriage should be expanded. Just as in the commercial context, individuals could further their long-term self-interest by choosing to contractually limit some aspects of their freedom.⁸⁶ Second, communities of faith should be encouraged to expand their role in calling for greater commitment from the couples for whom they perform marriage ceremonies through particular contractual provisions, similar to the way some already have instituted community marriage policies. Communities of faith would then be able to require that those couples they marry agree to specific contractual provisions that further bind them to one another through legally enforceable means.

Many proposals have been offered for particular marriage terms under a marriage regime involving greater private ordering, including calls for the enforcement of arbitration agreements and terms dealing with how to award child custody and visitation in the event of divorce. This Article focuses on contractual restrictions and burdens placed on the availability of divorce because these contractual innovations may be the most

86. See generally Scott, *supra* note 1.

significant for stemming the tide of divorce.⁸⁷ In addition, people with very different normative goals could embrace such terms. Contractual restrictions and burdens on the availability of divorce may also serve as an example solution for other seemingly intractable problems in family law by using broadly shared liberal values to empower individuals to choose more traditional or communitarian values in their own lives. In particular, couples should be allowed to restrict the grounds under which they will be allowed to seek divorce, and they should be allowed to adopt legally binding consequences in their premarital agreements for a spouse who seeks divorce. For example, couples should be able to opt to return to a fault-based regime should they wish.

There are a variety of potential objections to this proposed marriage regime. This Article addresses philosophical, results-minded, constitutional, and contract law concerns. Furthermore, the Article argues that there is no reason to believe that advancing contract in marriage necessarily undermines the state's ability to set the floor for entrance into and the responsibilities required by the institution of marriage. Just as contract and constitutional law provide the ceiling for the enforceability of marriage terms, public policy provides the floor for the minimum requirements. Nothing about this proposal would undo the state's ongoing interest in promoting marital stability. This proposal simply would allow for private ordering along a greater range of marriage terms, the outer bounds of which would be set by public policy on the one hand and contract and constitutional law on the other. Therefore, this proposal could only improve the state of marriage in America.

III. LIMITING DIVORCE THROUGH RESTRICTED GROUNDS AND ADDED CONSEQUENCES

This Part focuses on how couples might use contract to strengthen their marriages by either restricting the grounds available to them for divorce, agreeing in advance to particular

87. The possibility of reducing divorce seems especially important because of recent social science research which shows that divorce causes greater repercussions in the lives of children and ex-spouses than was previously known. See, e.g., LINDA J. WAITE ET AL., DOES DIVORCE MAKE PEOPLE HAPPY?: FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES (2002), available at <http://www.americanvalues.org/UnhappyMarriages.pdf>; JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE (2000).

consequences for the spouse that seeks divorce, or both. This Part begins by explaining, using precommitment theory, how it could be rational for individuals to opt into a more restrictive marriage regime. This Article also contributes to precommitment theory in the marriage context by explaining why communities of faith might decide to only marry couples that agree to additional terms that comport with the particular community's definition of marriage.

After detailing the theory and the proposal, this Article responds to the arguments of critics who might say such a regime is deficient on theoretical as well as policy grounds and is subject to challenges under constitutional and contract law doctrines. This Article emphasizes how this proposal's added dimension of involvement by communities of faith does not increase the force of these objections. This Part illustrates the general proposition that increased contractual freedom in marriage can further liberal as well as traditional and communitarian values: allowing individuals to choose restrictive terms in a marriage contract furthers liberal values, such as individualism and pluralism, while allowing willing individuals to increase their commitment to traditional or communitarian values, such as interdependence and attachment.

A. *Precommitment as Rational for Individuals
and Communities of Faith*

The most extreme version of this kind of proposal would allow individuals to "choose freely to enter into an indissoluble marriage."⁸⁸ In arguing for such a proposal somewhat tongue in cheek, Christopher Wolfe attempts to show that the current marriage regime, in fact, forces people to be free.⁸⁹ He argues that the current marriage regime is a version of "liberal paternalism" in that it says, "Those who would seriously commit themselves to an indissoluble marriage — indissoluble in a binding and legally enforceable way, not just as a personal ideal or goal — are making a mistake. They must be protected from the consequences of their own improvidence."⁹⁰ Wolfe contrasts this perspective with that of traditional communities, such as Roman Catholics, who, though they "deny the absolute

88. Wolfe, *supra* note 1, at 37.

89. *Id.* at 39.

90. *Id.* at 41.

value of the autonomous life," are "not permitted to make legally enforceable contracts that bind themselves to abide by what they take to be the moral law."⁹¹

The decision to restrict the available grounds for divorce or to choose penalties should a spouse seek a divorce could be based either on communitarian virtue or enlightened self-interest.⁹² The communitarian approach might say either that "the community authoritatively commands a restrictive divorce regime" or even if it does not that "the community is better off if the individuals in it bind themselves to a restrictive marital regime."⁹³ The communitarian approach conceives of the law less in terms of rights and more in terms of duties, and intends for the law to promote the good of the community.⁹⁴ Although this approach provides a rational explanation for why one might opt for a restrictive marital regime, this Article emphasizes approaches that appeal to enlightened self-interest to illustrate the broader argument that allowing individuals greater contractual freedom, even if they use that freedom to restrict their options, is consistent with liberal values, particularly individualism.

Marriage in the United States has been imbued with the value of individualistic utilitarianism; that is, individuals now largely see themselves as having a duty to maximize their own happiness.⁹⁵ Furthermore, marriage laws currently embody this

91. *Id.* at 39.

92. Haas, *supra* note 1, at 882–83.

93. *Id.*

94. See *id.* at 883 nn.21–22 (citing *Evans v. Evans*, 161 Eng. Rep. 466, 467 (1790) ("[T]hough in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good."); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (holding that legislative control of marriage was justified by the importance of marriage to "the morals and civilization of a people"); Pope Pius XI, *Encyclical Casti Connubii* (Dec. 1930), in OFFICIAL CATHOLIC TEACHINGS: LOVE AND SEXUALITY 23, 25 (O. Liebard ed., 1978) ("[T]he nature of matrimony is entirely independent of the free will of man, so that if one has once contracted matrimony he is thereby subject to its divinely made laws and its essential properties.")).

95. See Haas, *supra* note 1, at 883–84 n.25 (citing ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985)); J. RICHARD UDRY, *THE SOCIAL CONTEXT OF MARRIAGE* 474 (3d ed. 1974) ("In the past hundred years, Americans have redefined the nature of marriage . . . as an arrangement of mutual gratification.").

assumption in that no-fault, easy-dissolution divorce laws are rooted in the idea that individuals should remain free to maximize individual utility.⁹⁶ Even assuming such strong values of individualism, individuals might rationally choose a more restrictive marital regime. Proposals have been as restrictive as Christopher Wolfe's "indissoluble marriage" or as modest as short waiting periods from the time a divorce is sought until the divorce may be granted.

Proponents of precommitment in marriage often draw an analogy to Ulysses and the Sirens to illustrate how precommitment might be a rational strategy in marriage.⁹⁷ Ulysses wanted to hear the beautiful voices of the Sirens, but having heard the stories of seafarers and their ships being dashed against the rocks in pursuit of the voices, he knew he would not be able to resist once he heard the sound. To protect himself and his crew, he put wax in the ears of his crewmembers and had them bind him to the mast of the ship and told them not to release him (despite his pleas to be set free) until they were well out of earshot of the Sirens. As Elizabeth Scott has argued, such pre-commitment strategies "are useful in situations in which an individual has a long-term preference or goal that she anticipates will conflict on some occasions with temporarily dominant short-term preferences."⁹⁸ A person may use precommitments to "reinforce long-term goals, thereby mitigating the problem of inconsistent choices," similar to the way Ulysses had himself physically bound to avoid his short-term preference to chase after the Sirens.⁹⁹

Theodore Haas uses a game theoretic approach to imagine the utilitarian calculus in marriage in terms of cooperative or selfish behavior.¹⁰⁰ In his prisoner's dilemma-style conception of marriage, each partner chooses to act either cooperatively or selfishly, cooperation being defined as acting to maximize group welfare and selfishness being defined as seeking to maximize one's own welfare without concern for one's

96. See Haas, *supra* note 1, at 883–84.

97. See Scott, *supra* note 1, at 40–44. *But see* DiFonzo, *supra* note 1, at 942–43 (arguing that the Ulysses analogy to precommitment in marriage is problematic in that it fails to address the "unpredictability of human development").

98. Scott, *supra* note 98, at 40.

99. *Id.*

100. See Haas, *supra* note 1, at 884–90.

spouse.¹⁰¹ The decision matrix below¹⁰² represents a rough sketch of the spouses' choices and their resulting payoff rankings using a simple utilitarian calculus:

Figure 1

		Wife	
		Selfish	Cooperative
Husband	Selfish	(3, 3)	(1, 4)
	Cooperative	(4, 1)	(2, 2)

The matrix illustrates that if both spouses are cooperative (lower right cell), each spouse has a higher ranked payoff than if they both act selfishly (top left cell)—both achieve their second-best outcome instead of their third-best outcome. It is important to recognize that each spouse's behavior provides the context for the other's behavior. Accordingly, neither one can achieve the first-best outcome in which one acts selfishly while one's spouse acts cooperatively. This is because when one acts selfishly, one's spouse has an incentive to switch to selfish behavior.

Haas explains, however, that because loving couples are likely to "desire to enhance the welfare of the other rather than simply . . . use the other as an instrument to enhance their own welfare," a different matrix of outcomes is likely to be more realistic.¹⁰³ In this more realistic (and more attractive) version, each person derives utility not only from his or her own welfare, but also from the welfare of the other.¹⁰⁴ The following decision matrix¹⁰⁵ sketches choices and payoffs under this second rubric:

101. *See id.* at 884–85

102. *See id.* at 885.

103. *Id.* at 886.

104. *See id.*

105. Haas, *supra* note 1, at 886.

Figure 2

		Wife	
		Selfish	Cooperative
Husband	Selfish	(2, 2)	(3 or 4, 3 or 4)
	Cooperative	(3 or 4, 3 or 4)	(1, 1)

This matrix imagines a world in which mutual cooperation is the best outcome and mutual selfishness is a distant second-best outcome. Haas reasons that this conception of self-interest would cause the spouses to prefer mutual selfishness to one spouse taking advantage of the other.¹⁰⁶

Haas argues that spouses or prospective spouses confront not one, but both of these matrices.¹⁰⁷ Though an individual may view the second matrix as a “vision of the happy life,” a rational individual will incorporate the first matrix into decision-making because he or she is aware that human nature is not entirely altruistic.¹⁰⁸ Because current divorce law does not protect the decision to cooperate (that is, either spouse may decide to unilaterally terminate the marriage without any legal consequences), the spouses may end up in the top right or bottom left cells of the first matrix—yielding the worst possible outcome for one of the spouses.¹⁰⁹ Accordingly, spouses may rationally eliminate this risk by entering into a legally enforceable agreement that protects the decision to cooperate, either by restricting the grounds for divorce or by penalizing the divorcing spouse.¹¹⁰

Elizabeth Scott argues that precommitment devices, such as opting for more restrictions on the availability of divorce, could promote marital stability by:

- Directly adding to the cost of seeking a divorce;
- Indirectly promoting cooperative behavior and reducing conflict during marriage by reducing the likelihood that divorce will be considered; and

106. *See id.*

107. *See id.*

108. *Id.* at 887.

109. *Id.* at 888.

110. *See id.*

- Fostering careful decision-making about marriage, which would discourage impulsive marriages and encourage decisions consistent with an individual's long-term preferences.¹¹¹

In Scott's formulation, direct burdens on the decision to divorce are intended to "operate only as safeguards against overvaluation of the alternatives or exaggeration of the costs of marital dissatisfaction."¹¹² Consequently, short-term preferences are given less immediate weight in the decision calculus since, over time, these preferences will be less significant in the long-term cost-benefit analysis.¹¹³ Scott recognizes that precommitment theory presumes that, although short-term preferences will change from time to time, long-term preferences remain relatively stable.¹¹⁴ Though it is possible that long-term preferences will change, feedback effects make it even less likely that this will occur once spouses enter a marriage with precommitment devices because, as in other long-term contractual relationships, "[k]nowledge that the defection will be sanctioned reduces the temptation to defect and reinforces cooperative patterns of behavior."¹¹⁵

Together, the game theoretic and precommitment models make a strong case for the possibility that rational individuals desiring to maximize their self-interest might decide to opt into a more restrictive marital regime. Furthermore, the communitarian critique suggests that society would be better off if individuals were to enter into such commitments.

B. *Why Communities of Faith Should Encourage Precommitments*

Not only could individuals rationally choose a more restrictive form of marriage, but communities of faith could also rationally encourage such choices. In fact, communities of faith could play an important role in strengthening the institution of marriage by requiring couples to adopt more restrictive mar-

111. Scott, *supra* note 1, at 44, 46.

112. *Id.* at 49.

113. *Id.*

114. *See id.*

115. *Id.* at 51–52 (citing Robert Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CAL. L. REV. 2005, 2042–49 (1987) (describing experimental research in game theory that demonstrates that conditional cooperation—"tit for tat"—is the best strategy to maintain a cooperative equilibrium in a long-term strategic game relationship)).

riage terms. Even though the proposed regime would not require or even overtly encourage action by communities of faith, particular communities of faith might rationally require that such terms be adopted for two major reasons. First, a community might see itself as having a social responsibility to cultivate more enduring marriages so that the communitarian vision of benefits to the broader society is more fully realized. Second, the community might desire that its members' civil marriages more accurately reflect the community's more binding religious understanding of marriage.

Although some, or even many, communities might decide not to require additional marriage terms, others might prefer a more pronounced role in marriage than they currently play. They would no longer simply facilitate marriages. Instead, communities would have the option of actually shaping ongoing marriage relationships. Although this would enhance the role these communities play, their role would be limited by the extent to which couples are willing to accede to demands by the community.

Although communities would have some opportunity to shape the terms of marriages, couples could always look to the marriage terms market to check this power. If requirements imposed by a particular community of faith became too onerous, a couple could seek out another religious body to perform their wedding. Even if communities of faith worked together to set minimum additional marriage terms for all religious marriages, couples could always turn to the civil authorities, which would validate marriages without adding terms to the "floor" set by the state. Whether or not particular couples decide to adopt or reject a community's required terms, communities could play a potentially important role because they would gain social power to approve or disapprove of particular marriage terms. Although this proposal would have an effect only at the margins, it would be significant in approving religious communities' role for social approval of marriages.

C. *Overcoming Challenges to Allowing
a More Restrictive Marriage Regime*

A number of objections have been voiced to a proposed regime in which couples are allowed to opt for more restrictive marriage terms. These objections would likely intensify if communities of faith were encouraged to only marry couples

who agree to their additional legally enforceable marriage terms. Broadly, these objections can be grouped as: (1) challenges to the philosophical approach of the proposed regime; (2) concerns about the proposed regime's predicted effects; (3) constitutional problems related to the establishment and free exercise clauses; and (4) contract law objections.

This Article addresses the philosophical challenges by arguing that the proposed regime is more consistent with liberal values, such as individualism and pluralism, than is the current marriage regime. Second, this Article makes clear that concerns about the predicted negative effects of the proposed regime are either not likely to occur or should not be considered problematic. Furthermore, even if some of the predicted negative effects were to materialize, the benefits of the proposed regime would outweigh the costs. Third, this Article explains how enforcement of contractual restrictions and burdens on divorce, even when a community of faith is involved, does not raise significant Establishment Clause concerns because such obligations neither necessarily entangle the state in church affairs nor churches in state affairs. In addition, significant free exercise problems are not implicated because such self-imposed obligations are not necessarily religious in nature. Fourth, this Article argues that additional marriage terms would not necessarily violate contract law or legal rules against contracts in violation of public policy. Although additional marriage terms should not be rejected out of hand, this Article does argue that courts should continue to invalidate particular unenforceable terms under contract law or on public policy grounds, similar to the way courts approach commercial contracts.

1. Philosophical Challenges

Although each of the existing philosophical challenges to the proposed marriage regime will likely intensify in response to the role I have outlined for communities of faith, this Article is unlikely to generate opposition that is different in kind from already existing concerns. Possibly the most significant philosophical objection to the proposed marriage regime comes from communitarians. Though communitarians share the ultimate goals that underlie this proposal, including fostering interdependence and attachment as well as empowering mediating institutions such as communities of faith, communitarians might object to the means advocated in this proposal. Some

have argued that proposals to encourage private ordering, albeit with the ultimate goal of furthering more traditional values, take the wrong approach by emphasizing the maximization of individual utility.¹¹⁶ This approach maintains that private ordering as a means “fail[s] to respect the strong and legitimate interest that society as a whole has in the regulation of marriage.”¹¹⁷ Turning to private precommitment strategies constitutes “giving up” on this shared public commitment to marriage.¹¹⁸ Communitarians contend that this public commitment should be preserved because of the significance of marriage for children and because marriage continues to be the “primary foundation of the family, which is the foundational unit of our society’s structure.”¹¹⁹

Though this Article proposes a practical approach for dealing with the impasse the culture wars have wrought on the institution of marriage, support for the proposal would not preclude belief that marriage constitutes more than simply a privately ordered contract by autonomous individuals, as communitarians and others would contend. Still, the communitarian contention that increased private ordering constitutes “giving up” on a shared public commitment to marriage is partly correct. This Article’s proposal acknowledges that there now exists a widely shared public commitment to the liberal values of individualism and pluralism and that there is no longer a clear consensus on moral values. Rather than cling to the notion that all of society must live out communitarian values, this proposal is more modest in simply allowing room for those who do wish to live out these values. The proposal, however, does not surrender the shared public commitment to marriage because it would not eliminate or undermine the current role of the government in setting the floor for marriage entry and the minimum obligations spouses must assume toward one another. In addition, under the proposed regime the government also would continue to promote the shared value and public policy of marital stability. The proposal

116. See, e.g., Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 *IND. L.J.* 503, 508–10 (1998) (criticizing a private ordering proposal which had the goal of empowering individuals to restrict the terms of their marriage).

117. *Id.* at 509.

118. *Id.*

119. *Id.*

would simply allow those who so choose to raise the bar in marriage.

Other critics argue that a more restrictive marriage regime allowing the use of precommitment mechanisms is paternalistic in that it only allows individuals to limit (and not expand) their future options.¹²⁰ If current marriage and divorce laws significantly restricted future individual choice, this argument would be more plausible. In light of pervasive no-fault divorce laws and the wide-ranging enforcement of prenuptial agreements that protect individuals' assets upon entering marriage, however, it is difficult to see how individuals' future options might be further expanded. Under current law, marriage only limits future options to a very small degree. Accordingly, there is little room, let alone need, to allow individuals to expand future options. Yet there is room, and an expressed need, for expanding individuals' ability to limit future options.

Similarly, it has been argued that a marriage regime that increasingly looks to contract would take away a couple's freedom not to contract, thereby coercing couples to make a choice. Some view such a regime as just as paternalistic as one which makes the choice for the couple.¹²¹ Some advocates for the extension of contract principles in marriage have gone so far as to suggest "compelling marrying parties to determine the economic consequences of their own divorce,"¹²² but the proposal outlined in this Article does not go so far. Whereas requiring parties to specify in this way what they expect out of marriage would constitute forcing a choice, the proposal here should not be seen as impinging on couples' ability not to contract because it still would allow couples to marry without any additional marriage terms. Some would argue, however, that even the availability of the option to contract constitutes taking away the freedom not to contract because the parties must in a sense negotiate their agreement not to contract. Such an extreme view seems to be a strained understanding of paternalism.

Finally, critics have argued that a marriage regime relying on precommitment mechanisms does not adequately deal with the

120. See, e.g., DiFonzo, *supra* note 1, at 941.

121. See *id.* at 959 (citing Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEATTLE U. L. REV. 31 (1998); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983)).

122. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 399 (1992).

unpredictability of human development.¹²³ Such critics see precommitment as inherently problematic in that earlier “selves” are empowered to constrain the freedom of later “selves.”¹²⁴ Furthermore, it is argued that earlier “selves” are unlikely to make rational choices in this context because any restrictions they impose on themselves are “premised on the overly sunny assumptions about future identities made by the optimistic selves about to be wedded.”¹²⁵ Scott addresses the concern that long-term preferences will change by reasoning that the precommitment devices themselves are likely to promote cooperative behavior, resulting in “compatible rather than alienated later selves.”¹²⁶ Although changes in long-term preferences may in fact be rare, she fails to address directly how precommitment theory can deal with truly changed long-term preferences.

A more direct response to this criticism takes these three steps:

1) Individuals should be allowed to assess whether they are likely to gain or lose from binding themselves. In addition, allowing precommitment assumes that individuals do a better job of determining risks in their intimate relationships than does the state.

2) Allowing individuals to self-impose restrictions will change the way they think about marriage and, unlike the current marriage regime, will encourage them to adopt marriage terms that account for the possibility of changes in long-term preferences.

3) That some individuals’ long-term preferences will not be protected does not undermine the soundness of the proposed marriage regime. Critics of proposals involving precommitments fail to recognize that the current marriage regime does not protect those whose long-term preferences would be protected by enforcing precommitments. The proposed marriage regime would simply shift the law from favoring those whose long-term interests are served by non-enforcement of precommitments to favoring those whose long-term interests are

123. See DiFonzo, *supra* note 1, at 943.

124. *Id.* at 942–45 (expressing concern that precommitment seriously restricts personal autonomy by not allowing an “escape hatch” in the event of changed long-term preferences). *But see* Scott, *supra* note 1, at 58–62 (attempting to address the philosophical problem of earlier “selves” binding later “selves”).

125. DiFonzo, *supra* note 1, at 944.

126. Scott, *supra* note 1, at 62.

served by enforcement. This shift makes sense given that more individuals may have long-term interests in enforcement of precommitments than in non-enforcement,¹²⁷ and, that society is likely to derive positive externalities from more stable marriages.

2. *Negative Effects*

Beyond the philosophical concerns that have been voiced against proposals to expand the use of contract in marriage, critics have voiced concern that extending contract will have a disparate negative impact on women. This Article's proposal, however, is likely to increase women's bargaining position at the outset of marriage. Some feminists have attacked the use of premarital agreements generally because they tend to "protect the wealth and earnings of an economically superior spouse from being shared with an economically inferior spouse" and because they "undermine the precarious socioeconomic status of women and sharpen gender inequality in the distribution of wealth."¹²⁸ These arguments may have some merit with regard to the types of prenuptial agreements that are currently enforced. In contrast, allowing marrying parties to restrict the grounds available for divorce or to penalize the party seeking divorce is likely to further the interests of the economically weaker party, usually the woman.

Allowing parties to opt into a more restrictive divorce regime increases the bargaining position of the economically disadvantaged party by protecting marriage-specific investments like child-rearing or housekeeping. Under the current no-fault divorce regime, the party (usually the woman) who invests in marriage-specific skills rather than market-valued skills is left in a precarious position because the value of that party's investment can be eliminated by her spouse's filing for unilateral no-fault divorce.¹²⁹ Thus, there is a disincentive for either spouse to invest in marriage-specific skills. Parties can prevent

127. This proposition rests partly on the ideas elaborated previously regarding the rationality of choosing precommitment devices in the first place. In addition, the precommitment model may overcome some of the social psychology problems that lead to sub-optimal marriage and divorce decisions. For an extended discussion, see Scott, *supra* note 1, at 62-69.

128. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 234, 240 (1994).

129. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 466-69 (1998).

this disincentive by designing terms that protect the economically weaker spouse, thus allowing her to invest in marriage-specific skills if she so chooses. Though not all couples will adopt such terms, a regime that allows these kinds of choices would be better even for those economically weaker spouses who do not adopt such terms in their marriages because they would have specific notice about whether their investment in marriage-specific skills will be protected and could plan accordingly.

This line of argument leads directly to the other major concern of feminists with regard to contract in marriage: the “reinvigoration of traditional gender roles.”¹³⁰ Feminists have voiced concern that some proponents of expanding the use of contract in marriage intend, among other things, to enable couples with a preference for a division of labor along traditional gender lines to do so by protecting the spouse who does not develop market-valued skills.¹³¹ Advocates for contractual autonomy have been called “new paternalists” for seeking to purchase marriage stability “at a cost which is unacceptable, unnecessary, and unknowable.”¹³² The feminist concern is that freedom of contract in marriage “seeks to burden both sexes with outdated role assumptions,” and this cost is considered unnecessary because “our shift into a culture of divorce has ebbed; the lessons of harm to children and the punctured illusion of freedom in serial marriages have had their sizable impact.”¹³³

First, it remains to be seen to what degree couples would choose a division of labor according to traditional gender roles if they were given increased freedom of contract in designing their marriage terms. Second, assuming some couples agree to a division of labor in which husbands are in the labor force and wives are focused on domestic work, it is blatantly paternalistic to argue that because the proposed regime would allow this choice to be made, the regime itself would be sexist per se and discriminatory toward women. The feminist critique misses the mark by calling those in favor of individual freedom and a system that enhances the bargaining position of economically disadvantaged spouses “new paternalists” who merely make

130. DiFonzo, *supra* note 1, at 960.

131. *See id.* at 935, 960–61; Linda J. Lacey, *Mandatory Marriage “For the Sake of the Children”: A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1448 (1992).

132. DiFonzo, *supra* note 1, at 961.

133. *Id.*

“obedience to nonsexist linguistic norms.”¹³⁴ Instead, such feminists should be seen as paternalistic elites who seek to impose their values by coercing couples to “choose” androgynous roles and a marriage in which both spouses work in the marketplace.

Feminists, however, are not the only group to voice concerns about the ultimate impact of treating marriage more like a contract. Some social conservatives have speculated that a greater pluralism in marriage will actually further undermine the institution of marriage by paving the way for the likes of lower-commitment marriage, gay marriage,¹³⁵ and polygamy. A move toward contract in marriage might lead to unpredictable consequences, including even some of those consequences predicted by this concerned subset of social conservatives. As the argument goes, allowing couples to bind themselves to one another according to more enduring terms as they see fit makes it more difficult to fend off the argument that other couples should be able to bind themselves to one another as they see fit.¹³⁶

The state of marital commitments in America, however, as outlined above, has reached a point where (1) people are less likely to marry; (2) trends suggest that those who do marry are likely to divorce; and (3) marriage could hardly be less restrictive. Thus, even if these forms of marriage were to spring up as a result of the proposed innovation,¹³⁷ on balance the institution of marriage would still be strengthened through enforcement of a subset of more binding marriages. A significant proportion of people may choose more binding forms of marriage if given the option. Although there may be a small minority that would opt for a less exacting marriage relationship, it is difficult to imagine that many people would choose an explicitly “second class” kind of relationship.¹³⁸ Some would say this reinforces the notion that extending contract principles would prevent people from pursuing their “true” preferences. Instead, it

134. *Id.*

135. See McShain, *supra* note 80 (suggesting that “covenant marriages” may open the door to same-sex marriages).

136. See *id.* at 637–39.

137. This statement assumes, for the sake of argument, that the possible forms of marriage that social conservatives oppose would in fact negatively impact the institution of marriage or society at large.

138. See Wolfe, *supra* note 1, at 37–41.

seems more likely that the “true” preference of most people is for a lifelong committed relationship. Because most individuals begin marriage hoping for it to last and believing that it will last, extending contract principles gives individuals the tools to actually accomplish their lofty goals.

3. *Constitutionality Under the Establishment and Free Exercise Clauses*

The proposed marriage regime could raise constitutional concerns. It might be argued that the proposal raises Establishment Clause concerns by involving the state in essentially religious activities, that is, religious marriage agreements. At the same time, it might be argued that the proposal creates Free Exercise Clause problems because enforcement of some contractual provisions could amount to forcing individuals to perform religious acts.

The particular marriage terms focused on in this paper—restrictions and burdens imposed on the availability of divorce—do not appear to implicate such church-state concerns seriously, but other possible marriage terms might raise more serious questions. For example, enforcing arbitration clauses that defer authority to a religious body could entail greater state entanglement with religious affairs. In addition, arbitration clauses that call for resolution of claims based on religious doctrine could cause the state to enforce performance of actions that are more religious in nature. Discussion of these concerns already has developed in the context of the Jewish ketubah, a marriage contract of sorts that may call for the involvement of a Jewish tribunal, a Bet Din, acting in accord with rabbinical tradition.¹³⁹

139. See *Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. 1983) (holding enforceable the secular terms of parties’ binding prenuptial agreement to arbitrate any postmarital religious obligations before a rabbinical tribunal); *In re Marriage of Goldman*, 554 N.E.2d 1016 (Ill. App. Ct. 1990) (holding that the ketubah that parties signed prior to their marriage ceremony was intended to be a contract requiring that the status and validity of their marriage would be governed by Orthodox Jewish law, and that a court order requiring the husband to obtain Jewish “get,” which would allow his wife to remarry in the Jewish tradition, did not violate the husband’s First Amendment rights); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781 (1998) (comparing and contrasting the constitutionality of kosher laws with enforcement of ketubahs); Jodi M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493, 506–511 (1996) (discussing establishment and free exercise concerns related to enforcement of a ketubah).

The Establishment Clause essentially requires that the state be neutral and detached from religious activities.¹⁴⁰ The proposed marriage regime satisfies each of the three prongs set out by the U.S. Supreme Court in *Lemon v. Kurtzman*¹⁴¹ for violations of the Establishment Clause:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not “foster an excessive government entanglement with religion.”¹⁴²

First, this Article’s proposal encompasses multiple secular purposes: it furthers individuals’ freedom of association and contract and also advances the long-established public policy of promoting marital stability. Second, although the proposed regime would empower communities of faith to exercise sway over marriage terms for couples who seek a congregation’s blessing, the primary effect of the proposed regime would not be to further religion per se. Instead, the primary effect would be neutral with respect to religion, as it would simply grant greater autonomy to individuals. As such, the proposal would neither further nor inhibit religion. Third, with respect to restrictions and burdens placed on the availability of divorce, there is not likely to be any entanglement between government and religion. The regime would not sign over a blank check of power to religious bodies. The proposed regime would allow religious bodies to serve only as gatekeepers for the kinds of marriages they bless. Although religious doctrine might inform the kinds of restrictions or burdens on divorce that a couple might adopt, there would be no entanglement because such terms are not likely to be expressly religious in nature.¹⁴³

The Free Exercise Clause of the U.S. Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”¹⁴⁴ Violations of the Free Exercise Clause can occur when government action inter-

140. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

141. 403 U.S. 602 (1971).

142. *Id.* at 612–13 (citation omitted).

143. See *Jones v. Wolf*, 443 U.S. 595 (1979) (adopting a “neutral principles” approach, allowing courts to examine all but expressly religious doctrine).

144. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

feres with a sincere religious belief.¹⁴⁵ Government action constitutes a violation of free exercise rights where it imposes a significant burden upon a person's free exercise of religion and this imposition is not overcome by a compelling state interest.¹⁴⁶ Burdens on the free exercise of religion include: (1) forcing a person to do something forbidden by his religion, (2) preventing a person from doing what is required by his religion, (3) making religious observance more difficult or expensive, and (4) forcing someone to do something "religious" that the person does not wish to do, though such an objection may not be based on the person's religious beliefs.¹⁴⁷

Restrictions and burdens on the availability of divorce are likely to be challenged under the Free Exercise Clause where an individual either changes his religion or decides to no longer observe a religion. Although it is possible that an individual might agree only to particular marriage terms based on affiliation (or non-affiliation) with a particular religion, enforcement of a restriction or burden on divorce does not necessarily force an act that is religious in nature. Courts reviewing Jewish religious divorce cases have adopted this view, determining that requiring a divorcing spouse to undergo a "get" procedure before a Jewish tribunal, which frees the religious spouse to remarry under the dictates of Orthodox Judaism, does not impinge on the non-religious spouse's free exercise rights.¹⁴⁸ Even if a court were to find a significant burden imposed on an individual's free exercise rights, the court could find several compelling secular state interests that would justify the imposition, including freedom of contract, the promotion of marital stability, or the advancement of children's well-being. In the case of the "get" procedure, one court held that requiring the non-religious spouse to undergo the procedure furthered public policy by promoting the

145. See *Yoder*, 406 U.S. at 215–16.

146. See *Sherbert*, 374 U.S. at 403.

147. Lawrence C. Marshall, Comment, *The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations*, 80 NW. U. L. REV. 204, 214 (1985).

148. See *In re Marriage of Goldman*, 554 N.E.2d 1016, 1024 (Ill. App. Ct. 1990) (finding that the get procedure did not require any act of worship or any expression of religious beliefs); *Minkin v. Minkin*, 434 A.2d 665, 667–68 (N.J. Super. Ct. Ch. Div. 1981) (determining that the get procedure is not religious in nature). *But see* Marshall, *supra* note 147, at 219–22 (arguing that the get procedure is a religious act because it has no secular justification and comparing forced compliance with the procedure to requiring someone to take communion or eat non-kosher foods).

“amicable settlement of disputes” between spouses and “mitigat[ing] potential harm to the spouses and their children” resulting from the divorce process.¹⁴⁹

4. *Public Policy and Contract Law*

Historically, premarital agreements were held per se invalid because they were considered contrary to the public policy of promoting marital stability.¹⁵⁰ It was assumed that such agreements facilitated divorce by allowing the marrying parties to contemplate and prepare for divorce. The Florida Supreme Court instigated change by enforcing a premarital agreement involving alimony payments.¹⁵¹ The court held that premarital agreements were not void ab initio as against public policy and could simply be seen as the reordering of property rights and realistic planning accounting for the possibility of divorce.¹⁵² Soon thereafter, the California Supreme Court held that premarital agreements were invalid only if they induced separation or divorce in a marriage that otherwise might continue.¹⁵³ It would be difficult to argue that the marriage regime proposed in this Article violates this historic public policy concern. Making available the option to restrict the grounds for divorce, or to impose additional burdens on the party seeking divorce, would actually promote, not undermine, marital stability.

As the use of premarital agreements has grown, however, so has the list of concerns related to public policy. Probably the most extreme objection comes from those who compare agreements placing restrictions on divorce to agreements of self-enslavement.¹⁵⁴ This argument rests on the idea that though “[e]very executory contract limits the freedom of the parties by creating an enforceable obligation, on both sides, to perform or pay damages,” a contract of self-enslavement is characterized

149. *Goldman*, 554 N.E.2d at 1023 (quoting Marriage and Dissolution of Marriage Act, Ill.Rev.Stat. ch. 40, paras. 102(3), 102(4) (1987)).

150. See *Developments in the Law—Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2078 (2003) [hereinafter *Marriage as Contract*] (citing *Posner v. Posner*, 233 So.2d 381, 382 (Fla. 1970)).

151. See *Posner*, 233 So.2d at 382, 385–86.

152. *Id.* at 383–85.

153. See *Marriage as Contract*, *supra* note 150, at 2078 (citing *In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976)).

154. See *Kronman*, *supra* note 121, at 778–80.

by the elimination of the option of paying damages.¹⁵⁵ Consequently, even voluntarily chosen restrictions or burdens on the availability of divorce are seen in this view as a “special threat . . . to the promisor’s integrity or self-respect” because they take away the “right to depersonalize his relationship with the other party by substituting damages for the performance he originally promised.”¹⁵⁶

Such self-imposed restrictions on the availability of divorce can be distinguished from self-enslavement on several grounds. First, most restrictions and burdens on divorce that would be adopted under the proposed marriage regime would be simply restrictions and burdens, not absolute prohibitions on divorce. Accordingly, adoption of such marriage terms is not likely to implicate the supposed threat to personal autonomy. Instead, restrictions and burdens on the decision to divorce would only increase the cost of seeking a divorce, which should be seen as reflecting the reliance of one’s spouse on the marriage contract. Thus, only marriage terms that provide for an absolutely indissoluble marriage should be considered violative of the public policy concern raised. Second, enforcement of restrictions or burdens on divorce, even those as extreme as an indissoluble marriage, would not necessarily be inconsistent with decrees of legal separation.¹⁵⁷ This reduces the concern of self-enslavement to a concern that a party would not be able to remarry and would be required to maintain some minimal legal bond with a spouse. Third, although specific performance is not generally granted with respect to contracts, including as to the continuation of partnership agreements, there are situations in which it is appropriate.¹⁵⁸ For instance, it may make sense for courts to enforce specific performance of marriage contracts that provide for restrictions or burdens on the availability of divorce because damages are unlikely to compensate adequately, and specific performance could increase investment in marriage by reducing alternative investments.¹⁵⁹ In addition, because the importance of marriage and family to society is

155. *Id.* at 778.

156. *Id.* at 780.

157. Wolfe, *supra* note 1, at 37, 39.

158. See Haas, *supra* note 1, at 902–06 for an extended comparison of marital agreements to partnership agreements and for discussion of specific performance of personal service and partnership contracts.

159. See *id.* at 905.

much greater than that of any commercial relationship, it makes sense to allow self-imposed restrictions or burdens on divorce even when we do not allow the same in a business context.¹⁶⁰

It also has been suggested that the extension of contract in marriage might create incentives for negative behavior in marriage, which could implicate public policy concerns.¹⁶¹ For example, where a couple has agreed to impose some sort of penalty¹⁶² on a party who files for divorce, there might be an incentive to avoid the penalty by acting in such a way as to induce the other party to file for divorce. This scenario is unlikely, however, because marrying parties who opt into additional marriage terms are likely to foresee this possibility and adopt terms that provide incentives for reinforcing positive marital behavior and disincentives for negative marital behavior. Of course, this still may give rise to concerns similar to those voiced prior to the availability of no-fault divorce that courts are ill-suited for inquiring into such intimate details.¹⁶³

Some commentators have suggested that premarital agreements that place burdens on obtaining a divorce should be considered against public policy because they may result in an unfair distribution of wealth.¹⁶⁴ Accordingly, there have been calls for review of premarital agreements based on the requirement of “substantial fairness.” Despite these concerns, the Uniform Premarital Agreement Act (UPAA), which has been adopted in a slight majority of the states, does not call for substantive fairness review at the time of enforcement.¹⁶⁵

160. *See id.*

161. *See id.* at 909–910 & n.156 (citing *Fincham v. Fincham*, 165 P.2d 209, 213 (1946) (expressing concern that a “husband might become ‘grossly abusive, completely intolerable and deliberately bring about separation’”); *Stefonick v. Stefonick*, 167 P.2d 848, 854 (1946) (expressing concern that a husband might have “everything to gain and nothing to lose by bringing about such a condition of the marital relationship as would render divorce or separation proceedings by the wife imperative”)).

162. To comply with general contract law, any such “penalty” actually would have to constitute some sort of liquidated damages rather than a penalty.

163. *See, e.g.*, Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609–17 (1997).

164. *See* Brod, *supra* note 128, at 234–52; *Marriage as Contract*, *supra* note 150, at 2095–98.

165. Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 716–17 (2001); *Marriage as Contract*, *supra* note 150, at 2081.

Despite this trend, the American Legal Institute (ALI) Principles, which do not merely restate the law but also propose new approaches in the law,¹⁶⁶ call for non-enforcement of premarital agreements where enforcement of particular terms would work a “substantial injustice.”¹⁶⁷ Even under the ALI Principles, however, in order to conclude that substantial injustice would result, a court must find that a certain number of years have passed since the agreement was executed, that a child has been born or adopted by parties who had no common children at the time of the agreement, or that there has been “a change in circumstances that has [had] a substantial impact on the parties or their children”¹⁶⁸ that was probably not anticipated at the time of execution.¹⁶⁹ If one of these circumstances is found to exist, the court may consider various factors to determine whether substantial injustice would result.¹⁷⁰ Although the exact standard employed depends on the law enacted in each particular state, the trend is toward enforcement regardless of the standard adopted.¹⁷¹

Some argue that even the ALI proposal does not go far enough in upholding fairness. For example, one author has argued that the notion of substantial fairness should be extended to include “a presumption of unenforceability for antenuptial agreements that deviate materially from a fifty-fifty division of marital property.”¹⁷² As previously discussed, however, it may be rational for marrying parties to agree to provisions that, if enforced, would result in an inequitable division of property.¹⁷³

166. See *Marriage as Contract*, *supra* note 150, at 2083 (citing *Chief Reporter’s Forward* to AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xvii–xviii (2002) [hereinafter ALI PRINCIPLES]).

167. *Id.* at 2086 (citing ALI PRINCIPLES § 7.05(1)(b)).

168. *Id.* (citing ALI PRINCIPLES § 7.05(2)(c)).

169. *Id.* at 2085–86 (citing ALI PRINCIPLES § 7.05(2)(a)–(c)).

170. *Id.* at 2086 (citing ALI PRINCIPLES § 7.05(3)(a)–(d) (“[subsection (3)] sets out four elements that a court should consider: the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing law, the difference between the circumstances of the objecting party under the agreement and the party’s likely position had the marriage never taken place, whether the purpose of the agreement was to benefit third parties and its success in so doing, and the impact of enforcement on the children of the parties.”)).

171. *Id.* at 2083 & n.47 (“Between 1990 and 2001, four of the five state supreme courts that considered the validity of antenuptial waivers of alimony enforced the agreements.” (citing *Younger*, *supra* note 165, at 707–10)).

172. *Id.* at 2097.

173. See *supra* Part III.C.2.

Such terms could protect and encourage investment in the marriage by increasing the cost to either spouse of seeking alternatives. By enforcing these kinds of agreements, courts would actually further the ultimate goals of “substantial fairness” review because marriages with such agreements would be less likely to end in divorce, thereby avoiding the division of property and earning potential altogether. It is also important to note that the proposed regime does nothing to change the limits already imposed on the distribution of property upon divorce. Accordingly, particular marriage terms might be unenforceable (or modifiable) in whole or in part if they violate particular statutory provisions. For example, provisions that cause one party to become eligible for public assistance would continue to be potentially unenforceable.¹⁷⁴

The shift away from substantive fairness review at the time of enforcement has brought evaluation of premarital agreements more in line with traditional contract law doctrines, such as voluntariness and unconscionability, which focus on the time of execution.¹⁷⁵ The UPAA focuses on these concerns as well as certain disclosure requirements, all of which can be compared to the law of partnership agreements.¹⁷⁶ None of these requirements necessarily conflict with the proposed marriage regime. Terms agreeing to restrictions or burdens on the availability of divorce should not be considered per se involuntary or unconscionable. Instead, courts should determine enforceability on a case-by-case basis according to traditional contract law doctrines. The fact that some terms might be involuntary or unconscionable, however, in no way undermines the entire proposal.

These concerns are already regulated in part by the UPAA and its state variants. For example, the UPAA states that premarital agreements must be executed voluntarily to be enforceable.¹⁷⁷ By providing for the non-enforcement of agreements that are involuntary, even if they do not rise to the level of fraud or duress, the UPAA supports a liberal interpretation

174. See *Marriage as Contract*, *supra* note 150, at 2080 (citing UPAA § 6(b), 9C U.L.A. 48 (1983)).

175. *Id.* at 2081.

176. *Id.*

177. UPAA § 6(a)(1), 9C U.L.A. 48 (1983); see also Elizabeth Barker Brandt, *The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho*, 33 IDAHO L. REV. 539, 540–42 (1997) (giving an overview of § 6).

of the voluntariness requirement similar to a procedural unconscionability inquiry.¹⁷⁸ Therefore, particular agreements or terms would be subject to challenge under the proposed regime. Given that restrictions or burdens on the availability of divorce are often rational choices that maximize an individual's utility, there would be no reason to suspect out of hand that such agreements or terms were entered into involuntarily.

In addition, the UPAA provides that a premarital agreement may be unenforceable if it was unconscionable at the time of execution.¹⁷⁹ A finding of unconscionability under the UPAA, however, requires that the challenging party "did not receive 'fair and reasonable disclosure' of the assets and liabilities of the other party, did not waive his or her right to such disclosure, and did not have adequate actual knowledge of such information."¹⁸⁰ The comments to the UPAA state that the standard intended for unconscionability is the same as that in the commercial context.¹⁸¹ Under this standard, a contract or term will be considered unconscionable where there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."¹⁸² The UPAA and

178. See Brandt, *supra* note 177, at 546.

179. UPAA § 6(a)(2).

180. See *Marriage as Contract*, *supra* note 150, at 2080 (citing UPAA § 6(a)(2)).

181. UPAA § 6 cmt. at 49–50 ("The standard of unconscionability is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprise . . . Hence the act does not introduce a novel standard unknown to the law." (internal citations omitted)).

182. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) ("Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.").

state variants have enacted provisions to allow for broad enforcement in favor of contractual freedom instead of favoring more paternalistic protections for economically weaker spouses.¹⁸³ Accordingly, the standard for unconscionability adopted by the UPAA is weaker than it might have been. The proposed marriage regime is entirely consistent with these developments.

As legislation has granted deference to premarital agreements, so have courts moved toward enforcement of premarital agreements through an emphasis on individual autonomy. For example, the Pennsylvania Supreme Court in 1990, showing great deference, upheld a premarital agreement, stating, "Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements."¹⁸⁴ The court went on to note that "the reasonableness of a prenuptial bargain is not a proper subject for judicial review," because these bargains were "designed to avoid" such review.¹⁸⁵ The proposed marriage regime might be seen as an outgrowth of this trend.

This emphasis on individual autonomy naturally raises the question as to whether individuals would actually be exercising autonomy in a regime that allows and even encourages communities of faith to play a significant role in the development of marriage contracts. Presumably, under the proposed regime, communities of faith might either (1) operate individually, deciding on their own whether to work with couples to develop couple-specific terms or to require couples to adopt a form agreement; or (2) work together, developing standard "religious" marriage terms that anyone in a community would be required to adopt should they wish to obtain a "religious" marriage. Under scenario (1), there should be little concern that individuals will be deprived of autonomous decisionmaking since there would exist a market with a range of possible "religious" marriage terms. Should the marriage market develop along the lines of sce-

183. See Brandt, *supra* note 177, at 548–52.

184. *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990).

185. *Id.* at 166.

nario (2), however, a potential concern arises akin to that of adhesion contracts.

First, even if communities of faith were involved in the proposed marriage regime as under scenario (2) and offered marriage terms on a take-it-or-leave-it basis, the resulting premarital agreements would not necessarily constitute contracts of adhesion. As one court defined them, "'Adhesion contracts' include all 'form contracts' submitted by one party on the basis of this or nothing [and] 'agreements in which one party's participation consists in his mere 'adherence,' unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise.'"¹⁸⁶ Under the proposed regime, contracts resulting under scenario (2) would not meet the definition of adhesion contracts because the party unilaterally requiring adherence to the terms (the community of faith performing the marriage) would not be a party to the contract.

Furthermore, contracts of adhesion are not per se unenforceable. Rather, determining that a contract of adhesion exists is only the first step in the analysis of whether such agreements are enforceable. To be considered unenforceable, contracts of adhesion must include "overreaching by a contracting party in an unfairly superior bargaining position."¹⁸⁷ Sometimes courts also require that there be an absence of meaningful alternatives¹⁸⁸ or that the contract contain oppressive terms, thereby folding a requirement similar to unconscionability into adhesion contract analysis.¹⁸⁹ Again, because communities of faith would not be contracting parties under the proposed regime, marriage contracts under the proposed regime would not constitute adhesion contracts. Nonetheless, there may be concern because communities of faith could work together to exert pressure on couples to adopt additional marriage terms. This seems to be a weak argument, however, because couples would continue to have the option of obtaining a civil marriage

186. *Telxon Corp. v. Hoffman*, 720 F.Supp. 657, 662 (N.D. Ill. 1989) (internal citations omitted).

187. *Id.* (internal citation omitted).

188. *See, e.g., Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 169 (2d Cir. 1997) (finding round-trip plane tickets were not unenforceable contracts of adhesion in part because there were alternative transportation options subject to different terms).

189. *See id.*

from civil authorities and could marry with either no additional terms or whichever additional lawful terms the couple preferred.

IV. CONCLUSION

In view of the decline of the institution of marriage and the fact that a large percentage of American society continues to desire for marriages to be more stable and children to be raised by their married parents, some have naively sought to impose a more traditional normative vision of marriage and the family through the law. Most notable among these efforts has been the call to reinstate a fault-based marriage regime. Such efforts fail to account for the enormous cultural shift that has taken place over the last half-century. Although Americans may desire more enduring marriages, in the wake of the sexual revolution, they also, in large part, have adopted relativistic moral values which demand adherence to the liberal values of equality, individual freedom, and tolerance. As a result, a legal strategy for strengthening marriage will only be effective and capable of implementation if it can appeal to liberal and relativistic moral values rather than making one-size-fits-all moralistic prescriptions for society.

The proposal for a marriage regime with an expanded role for contract appeals to the liberal values of individualism and tolerance, but enables individuals who personally value more traditional or communitarian principles to adopt marriage terms that reflect those values. Furthermore, such choices need not be seen by the broader society as merely sacrificial choices made for the good of the community. In fact, the decision to restrict or burden the availability of divorce can be consistent with the widely accepted notion that individuals should seek to maximize their own utility. Regardless of whether such choices are self-sacrificing or utility-maximizing, the now widely accepted value of tolerance calls for respect for those individuals who would make such choices. Furthermore, pluralism dictates that involvement by communities of faith should be respected alongside marriages officiated by civil authorities. Although the non-legal efforts of some communities of faith, particularly through community marriage policies, have been laudable and effective to some extent, a regime involving legal enforcement would do much more to empower

communities of faith and their individual members to make binding, long-term choices for their marriages.

Although the active, positive role advocated here for communities of faith is likely to be controversial, it stands up under legal and policy challenges. Specifically, premarital agreements to restrict or burden the availability of divorce should be enforced as outlined in this proposal. At the same time, the government should maintain its role in defining marriage by setting the floor for the requirements to enter marriage, as well as the minimum responsibilities of spouses to one another. The public policy of promoting marital stability should serve as a guide both in setting these minimum requirements, as well as in determining which additional marriage terms will be enforced. In addition, contract and constitutional law should continue to set the outer limits for terms agreed to by couples. Such restrictions and burdens, however, should not be deemed unenforceable per se under contract or constitutional law. This proposed marriage regime transcends the culture wars by allowing pluralism in marriage to flourish without imposing a normative prescription for the family, but also would empower individuals to strengthen their marriage bonds by choosing to emphasize more traditional or communitarian values such as interdependence and attachment.