

The Future of Marriage

by
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Introduction

The future of marriage is bright, naysayers' claims to the contrary notwithstanding. The institution will remain of vital importance to society and to many individuals for the foreseeable future. That said, social perceptions about the nature and benefits of marriage will continue to evolve, and states will respond to these changing perceptions in very different ways. Some states will impose obligations or confer benefits on individuals in non-marital relationships,¹ whereas other states will try to differentiate even more strongly between marriage and other types of relationships by increasing the number of benefits exclusively reserved for married couples.² While the decisions about which, if any, rights and obligations to confer will be made by the different legislatures, those decisions will be both informed and constrained by the various marriage amendments that were recently adopted, which limit to varying degrees the kinds of steps that can be taken by the state legislatures to address the needs of their citizens.³ Until these amendments are repealed or struck down by the courts, there will be increasing disparity among the

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¹ See Rona Marech, *Gay-Marriage Lobby Set Proponents of Same-Sex Unions Ready to Rally in Support of Bill*, BALT. SUN, Feb. 10, 2008, at 1B, available at 2008 WLNR 2629745 ("Massachusetts is the only state that allows same-sex marriage. Nine other states offer civil unions or domestic partnerships.").

² See, for example, LA. CONST. art XII, § 15 (2004) ("No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.").

³ See Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy and Constitutional Limitations*, 25 LAW & INEQ. 59 (2007). See also Joshua K. Baker, *Status, Substance, and Structure: An Interpretative Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221 (2005).

states with respect to the benefits conferred and obligations imposed on individuals in non-marital relationships.

The increasing disparity among the states with respect to the types of benefits reserved for married couples will impose additional pressures on our federalist system—states will have to decide not only whether to confer rights or impose obligations on individuals whose non-marital relationships were established in that jurisdiction, but also whether to enforce rights conferred or obligations imposed in other jurisdictions when individuals subsequently decide to cross state lines, for example, to be closer to family or to take advantage of employment opportunities. State policies with respect to the enforcement of rights and obligations created elsewhere have the potential to promote forum-shopping to facilitate individuals' promoting their own interests at the expense of others, for instance, by moving to a state whose public policy precludes enforcement of marriage-like rights conferred on unmarried parties in other jurisdictions. Absent congressional action or some kind of general agreement among the states, one can expect ever-increasing numbers of these kinds of interstate disputes with respect to a whole range of family-related issues.

I. The Institution of Marriage

Recent headlines trumpeted that less than half of the United States population is currently married.⁴ While this was merely the continuation of a trend that had already been occurring,⁵ the discovery that more individuals were unmarried than married led to increased calls for measures to bolster marriage.⁶ Regrettably,

⁴ See A. J. Hammer & Brooke Anderson, *Romance in Hollywood - Part I*, CNN News, Dec. 25, 2007, available at 2007 WLNR 55587 (according to the U.S. Census Bureau, "for the first time, unmarried adults represent more American households than families headed by a married couple").

⁵ See Sam Roberts, *51% of Women Are Now Living Without Spouse*, N.Y. TIMES-ABSTRACTS, Jan. 16, 2007, at A1, available at 2007 WLNR 905455 ("Analysis of census data shows that 51 percent of American women were living without spouse in 2005, up from 35 percent in 1950 and 49 percent in 2000.").

⁶ Cf. Stephanie Coontz, *Too Close For Comfort*, N.Y. TIMES, Nov. 7, 2006, at A21, available at 2006 WLNR 19294571

Ever since the Census Bureau released figures last month showing that married-couple households are now a minority, my phone has been ringing off the hook with calls from people asking: "How can we

some of the measures that have already been enacted do nothing to bolster the value of marriage while at the same time diserving the needs of some of the most vulnerable members of the population.

A. *Is Marriage Dying as an Institution?*

When individuals discuss the dire state of marriage, they may have any number of claims in mind. Some will look at statistics suggesting that a lower percentage of the population is married as an indicator that marriage is dying as an institution and that soon no one will choose to marry. Yet, this is clearly an overreaction. The fact that someone is currently unmarried establishes neither that she was never married nor that she never will marry. It has been estimated that the percentage of people who will never marry at any time in their lives is actually quite low,⁷ so the fact that over half of the population is unmarried at a particular point in time may be less telling about the future of marriage as an institution than some commentators seem to think. Indeed, that almost half of the population is currently married might be thought to attest to the vitality of marriage.

It may be tempting to assume that the decline in the number of individuals currently married⁸ must be tied to a societal perception that the value of marriage has itself declined. Yet, it is not at all clear that marriage is now viewed with distaste by the general public, or even that those who never married and never will marry think little of the institution. On the contrary, it may well be precisely because some take seriously the ideals of marriage that they have chosen not to marry—perhaps because they have never found a soul mate with whom to share the joys and

save marriage? How can we make Americans understand that marriage is the most significant emotional connection they will ever make, the one place to find social support and personal fulfillment?"

⁷ See Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 *FAM. L.Q.* 1, 17 (2000) ("One estimate, made in 1991, was that the percentage who never marry in their lifetime will increase from 5 to 'not more than ten' percent, with others simply marrying later.").

⁸ A separate issue is whether the marriage rate has declined. See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 *COLUM. L. REV.* 790, 823 (2007) ("The downward trend in marriage rates leveled off in the mid-1990s and has started rising again.").

responsibilities of life as a family⁹ or because they were never economically ready to marry.¹⁰

By the same token, however, one should not assume that those who remain married must value the institution of marriage quite highly. Individuals choose to marry or choose to remain married for a vast number of reasons, and an individual who is dependent upon a spouse for food, clothing, and shelter might decide to remain married even though she thinks relatively little of the institution as a general matter or of her own marriage in particular.¹¹

B. *The Perceived Threat of Same-Sex Marriage*

Some who worry that the institution of marriage is in great danger have particular perceived threats in minds, such as same-sex marriage. Ironically, the attempts to justify restricting marriage to different-sex couples have sometimes resulted in the demeaning of marriage and of those who can marry. Consider, for example, two recent state supreme court decisions upholding the power of the respective state legislatures to deny same-sex couples the right to marry.¹² The high courts in the states of New York and Washington claimed that reserving marriage for different-sex couples was reasonable because it was more important for those couples to be able to marry, given the possibility that such couples might accidentally have children.¹³ Basically, these

⁹ See LINDA C. McCLAIN, *THE PLACE OF FAMILIES FOSTERING CAPACITY, EQUALITY AND RESPONSIBILITY* 146 (2006) (discussing a National Marriage Project report suggesting that over 90% of the surveyed never-married singles thought that it was important for one's spouse to be one's soul mate).

¹⁰ See *id.* at 140-41 (“Studies of low-income couples’ marital decisions find that they value marriage as an ideal but, like other couples, they do not want to marry until they can do it ‘right’ and begin with a solid economic footing.”).

¹¹ Indeed, some attribute the decline in the number of women currently married to the decline in women’s economic vulnerability. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 18 (2000) (“It is tempting at this point to conclude that Becker is right—women’s new jobs cause family breakdown; it is just that Okin better states the reasons: once women acquire a measure of independence, they become unwilling to put up with the louts they married.”).

¹² See *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

¹³ See *Hernandez*, 855 N.E.2d at 7; *Andersen*, 138 P.3d at 982.

courts suggested that these unintentionally produced children would be better off if they were born into existing marriages, so the state was justified in providing marriage incentives to those couples who might accidentally have children. In contrast, noted these courts, same-sex couples having children were much less likely to have them accidentally, because those couples were either adopting or producing children through advanced reproductive techniques. Because adoption and the use of advanced reproductive techniques require a great deal of planning, these courts believed it less important for same-sex couples to be induced to marry.

This kind of reasoning is disappointing, even if one brackets the demeaning picture of different-sex couples as composed of individuals who are irresponsible and unlikely to plan when or whether they will have children. These courts implicitly endorsed rationales that one would never expect courts to endorse in almost any other context when discussing family matters.

If indeed children do better when they are raised in stable marital homes,¹⁴ then one would expect that the courts and legislatures would want to induce parents to marry, whether their children are (or will be) planned or unplanned. By focusing on preventing unintended births outside of marriage as a justification for limiting marriage to different-sex couples, these courts implicitly make a few mistakes:

First, they imply that planned children outside of marriage do not benefit from the stability that marriage provides. Were the courts not assuming this and instead assuming that marriage provides stability for children whether their births were planned or unplanned, then it would have been irrelevant for the courts to note that different-sex couples are more likely to have children unintentionally.

The suggestion that marriage is important for those who might have children accidentally but not for those whose children are planned is exactly the sort of argument that should enrage marriage proponents, because it suggests that *individuals who in-*

¹⁴ Cf. Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 867 (2005) (“Marriage tends to instill and bring along with it certain relational benefits for the adults, like permanence, commitment and even sexual fidelity, which redound to the benefit of children in the household, as the next subparts demonstrate.”).

entionally have children outside of marriage do not need to marry. This is the exact opposite of the position offered by many marriage proponents, who argue that marriage is beneficial for adults as a general matter and for any children that they might have.

Second, they suggest that the respective legislatures were acting rationally when choosing to give incentives to different-sex rather than to same-sex couples to marry. This is an inaccurate description of the laws at issue in several ways:

At issue here was not a program which gave some couples more of an incentive to marry than other couples, for instance, a program that waived particular fees for certain couples. While such a program might have its own difficulties,¹⁵ the program at issue before these courts was one in which different-sex couples were given a variety of benefits if they married and same-sex couples were denied the right to marry entirely. This is not a matter of comparative incentives but, instead, of offering one group incentives to marry versus denying another group any access to marriage.

At issue here was not a program where the state considered how the couples were relevantly dissimilar and then provided different benefits in light of those differences. For example, if the state's concern was really to reduce the number of accidental pregnancies outside of marriage then the state might have provided free contraception to unmarried different-sex couples to reduce the number of unplanned births. But the state did not do that. Instead, the alleged incentive to different-sex couples was to preclude same-sex couples from marrying, notwithstanding the absence of any reason to think that different-sex couples would be less likely to marry if same-sex couples were also given that option. Thus, even if the goal of inducing different-sex couples to marry is a legitimate one, the state adopted a means that was not rationally related to the achievement of that goal.

Presumably, the real incentives to marry provided by the state involve the great many benefits attendant on marriage.¹⁶

¹⁵ This would depend upon the classification at issue and the closeness of fit between the means employed and the end sought.

¹⁶ Cf. Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 569 n.36 (2007) ("A recent report re-

But this means that the state could have achieved its goal of providing an incentive to different-sex couples to marry, while at the same time permitting same-sex couples to marry. It is not rational for a state to promote a legitimate goal in a way that undermines other legitimate state interests when that same goal can be promoted equally well without at the same time undermining those legitimate interests. Thus, if the real incentives (the benefits) can be offered whether or not same-sex couples are also permitted to marry, then the claimed rationale cannot be the real rationale.

If the purported rationale makes no sense when examined, then it seems likely that there really was a different and unstated reason for the refusal to permit same-sex couples to marry. Yet, the courts' unwillingness to express that rationale and their instead upholding the exclusion on the offering-incentives-to-different-sex-couples-to-marry reasoning suggests that the courts knew that the real rationale would not pass muster. These courts failed to appreciate that permitting marriage to be used as a kind of tool whereby one's disapproval of members of the LGBT (lesbian, gay, bisexual, and transgender) community can be manifested undermines rather than promotes the value of marriage. If the value of marriage is to remain undiminished, it must not come to represent a tool of intolerance or the means by which animus can be expressed.

Third, when these courts suggested that less of a need exists to recognize same-sex marriage because same-sex couples will as a general matter have children as a result of conscious plans rather than accidentally, one might infer (or at least hope) that

leased by the presently-named Government Accountability Office identified 1,138 discrete federal-level benefits that attach to legal marriage.”). Of course, because of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)), the federal benefits that normally accompany a marriage will not accompany a same-sex union. See Sally F. Goldfarb, *Granting Same-Sex Couples the “Full Rights and Benefits” of Marriage: Easier Said Than Done*, 59 RUTGERS L. REV. 281, 288 (2007):

Because of the Defense of Marriage Act, no same-sex relationship will be treated as a marriage under federal law. Thus, for purposes of immigration, Social Security, veterans' benefits, and a host of other federal benefits and programs, same-sex couples—regardless of whether they are accorded the rights of marriage under New Jersey law—will not be considered married by the federal government.

the courts were not offering a non sequitur but instead were employing an enthymeme—individuals who both plan and go to significant expense to have a child together¹⁷ have less of a need for marriage because they already are significantly investing in their child and in their relationship. While it is an empirical question whether individuals already significantly invested in their relationships do not need the additional incentives provided by marriage to be induced to remain together, this is the kind of analysis that should give marriage proponents cause for concern because it too undermines the intrinsic and extrinsic value of marriage.

Commentators have noted that individuals in marital relationships tend to invest more in family relationships than do comparable cohabiting couples,¹⁸ undermining the claim that marriage is unimportant for those already heavily invested in their relationships with each other and their children. Basically, those promoting the value of marriage suggest that as a general matter it provides benefits to members of the family—these additional benefits accrue whether or not the couples have already acted in ways that manifest that they are deeply involved in their relationship.

The point here should not be misunderstood. That people marry is no guarantee that they will remain married. Current divorce statistics¹⁹ and common sense belie the view that marriage solves everything. Many individuals greatly invested in

¹⁷ See June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 *CAP. U. L. REV.* 341, 342 n.8 (2006) (suggesting that it may cost thousands of dollars to adopt a healthy child or have a child through the use of advanced reproduce techniques).

¹⁸ David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 *VILL. L. REV.* 891, 908 (2006) (“married parents appear to invest more in childrearing relationships than do cohabiting parents, even controlling for other factors such as education and income”).

¹⁹ See Sanford N. Katz, *Marriage as Partnership*, 73 *NOTRE DAME L. REV.* 1251, 1274 (1998) (“the United States continues to have the highest divorce rate in the world. As one group of researchers report about the American domestic scene, ‘the probability that a marriage taking place today will end in divorce or permanent separation is calculated to be a staggering 60 percent.’”); Mary Pat Treuthart, *A Perspective on Teaching and Learning Family Law*, 75 *UMKC L. REV.* 1047, 1062 (2007) (suggesting that a “conservative estimate of divorce rates in the United States is that slightly more than forty percent of marriages end in divorce”).

their relationships with each other and with their child nonetheless eventually divorce for a whole multitude of reasons.²⁰ Indeed, while children can give their parents incomparable joys, they also can cause great stress and anxiety,²¹ and few if any parents would suggest that everything is easy once birth has occurred. But the relevant point is not whether marriage or even planning together to have a child guarantees that individuals will remain together for the rest of their lives but, instead, whether marriage will promote the well-being of the adults themselves and their children. If so, then the opportunity to marry should be afforded to both same-sex and different-sex couples, and to couples whose children are planned as well as those whose children are unplanned.

When discussing the importance of providing a stable home for unplanned children, the supreme courts of New York and Washington did not suggest that planned children have no need for stability. Nor did the courts explain how permitting same-sex couples to marry would somehow undermine the state's goal of providing children with stable marital homes in which to live. These courts were willing to uphold state restrictions on marriage, notwithstanding that this would mean that some children, i.e., the children being raised by same-sex couples, would thereby be denied the benefits of a marital home.

A discussion of the benefits of marriage should include the increased tendency of individuals to invest more heavily in marital relationships both financially and emotionally than compara-

²⁰ Dona Playton & Stacey L. Obrecht, *High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYO. L. REV. 295, 305 (2007):

The causes of divorce are often complex, as several factors can lead a person or couple to become dissatisfied with the marriage. Commonly-cited causes for divorce include any combination of the following factors: quality of premarital relationship, partner's relationship styles, poor communication, lack of commitment, infidelity, problem behaviors, financial problems, differences in parenting styles, changes in life priorities, and abusive or neglectful behaviors.

²¹ Cf. Barbara Stark, *Rhetoric, Divorce and International Human Rights: The Limits of Divorce Reform for the Protection of Children*, 65 LA. L. REV. 1433, 1440 (2005) ("children with serious problems can impose strains on families that may cause some couples to separate").

ble individuals invest in cohabiting relationships. Yet, there are other benefits that should not be ignored.

Consider, for example, a family in which one adult is working outside the home and one adult is working inside the home taking care of young children. If the adults can marry, then the adult working inside the home could be covered under the partner's insurance policy.²² Suppose further that the children living in the home are the biological or adopted children of the stay-at-home adult. Assuming that the state does not permit second-parent adoptions,²³ the adult working outside the home may not be able to put the children on her insurance policy unless she can marry her partner.

It is not surprising that some commentators emphasize some of the less obvious benefits of marriage, such as that individuals may be more willing to invest in the relationship in ways that contribute to the welfare of everyone, because the tangible benefits associated with marriage are simply assumed and because the relevant question for many couples is whether they will avail themselves of the option to marry. However, when the focus is on those who are precluded from marrying, both the non-obvious and the obvious benefits must be considered, especially when seeking to assess the opportunity costs imposed on such families by a marriage ban.

C. Marriage as Requiring Potentially Procreating Partners

Some commentators attempt to justify restrictions on marriage by suggesting that marriages must be procreative, at least

²² The same point about providing insurance for the non-marital partner might be made if, instead, the adult staying home were taking care of an elderly parent rather than children.

²³ See Erica Bell, *Formation, Protection and Recognition of Domestic Partnerships and Non-Traditional Families*, 343 *Practicing Law Institute/Estates* 1253, 1269 (2007) ("In a growing number of states, the partner of a biological or adoptive parent can become the legally recognized co-parent of the child(ren) through a proceeding commonly called a 'second-parent adoption.'"). *But see* National Center for Lesbian Rights, Families & Parenting, http://www.nclrights.org/site/PageServer?pagename=issue_families_overview (last visited Oct. 22, 2007) (noting that almost half of the states do not allow second parent adoptions).

potentially.²⁴ Yet, such a position requires a creative understanding of the term “potential,” and in any event does not plausibly capture current law. However, to understand this, a little background might be helpful.

At one point, same-sex marriage opponents focused on the alleged inability and unwillingness of same-sex couples to have or raise children, claiming that recognizing same-sex unions made no sense because the purpose of marriage is to provide a setting in which children might be raised. However, changes in the demographics of marriage made such an argument even less persuasive than it once was. A growing number of married couples are childless, whether voluntarily or involuntarily,²⁵ and the suggestion that the sole purpose of marriage is to provide a setting in which children can be raised implies that this growing number of couples should not be allowed to marry. Perhaps appreciating the difficulties of telling a growing number of the population that they would be precluded from marrying, commentators modified their emphasis, suggesting that the important point is not so much whether the individuals themselves can or will have children but only whether they seem to be of the right “kind.” Thus, these theorists sometimes suggest that the individuals who marry must be able to engage in activity which is of the proper procreative kind.²⁶ Because same-sex couples cannot have children through their union, allowing such couples to marry would allegedly negate the procreative element of mar-

²⁴ See, e.g., Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More than Random Thoughts*, 29 HARV. J.L. & PUB. POL’Y 33, 37 n.16 (2005) (“any association of persons can be legally called a marriage, but such domination has no effect on the truth of what marriage is in terms of conjugal unity and procreative potential”).

²⁵ Cheryl Wetzstein, *More American Women Pull Plugs on Biological Clocks: Higher Wages, Professional Careers Trigger Childless Decision*, WASH. TIMES (D.C.), Nov. 22, 2000, at A2, available at 2000 WLNR 334574 (“Childlessness is growing in America, the Census Bureau stated in a report issued last month. In 1976, 10 percent of women in their 40s said they had not had a child. Two decades later, their number had nearly doubled to 19 percent.”).

²⁶ See Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX L. REV. 921, 926 (1998) (discussing the view that even “the marriages of infertile heterosexual couples take their meaning from the fact that they form a union of the procreative kind, and their bodily union therefore has procreative significance”).

riage.²⁷ Other commentators suggest that different-sex couples who cannot produce children nonetheless provide the correct model when marrying and that this is the reason that their marrying should be permitted.²⁸

Yet, these commentators seem not to appreciate some of the potential difficulties that arise when discussing modeling or the relevant kinds. Arguably, by encouraging individuals to marry who have neither the desire nor capacity to have children, the state might be thought to be endorsing a much different model of marriage, namely, one in which children have no role to play. By the same token, the relevant “kind” represented by these childless married couples might be thought to be “people who love each other and may have no interest in having children” rather than “people who but for their infertility could have had children through their union.”

A further difficulty arises with justifying marriage policies on this basis, namely, that the law is not plausibly construed as reflecting the policy choices advocated by these commentators. Not only do laws not require that individuals be capable of or interested in having children in order to marry but laws do not even preclude individuals incapable of engaging in sexual relations from marrying. Indeed, laws may preclude an individual from seeking an annulment based on non-consummation if it was known prior to the marriage that there would be no sexual relations, for instance, because of the physical incapacity of one or both of the parties.²⁹ Even when an individual can seek to annul

²⁷ See Lynn D. Wardle, *What Is Marriage?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53, 82 (2006) (discussing “the procreative element of the legal definition of marriage”).

²⁸ See Teresa Stanton Collett, *Constitutional Confusion: The Case for the Minnesota Marriage Amendment*, 33 WM. MITCHELL L. REV. 1029, 1049 (2007):

It is true that that the state recognizes marriages between elderly or infertile couples unable to conceive, or younger couples intending to avoid conception through the use of contraception. But these arguments ignore the importance of the modeling to be achieved by encouraging all heterosexual couples to marry, as well as the legitimate self-imposed privacy limits a state may observe in its regulation of the matter.

²⁹ See, e.g., 750 ILL. COMP. STAT. § 5/301 (1999) (“The court shall enter its judgment declaring the invalidity of a marriage (formerly known as annulment) entered into under the following circumstances: . . .

a marriage on such a basis,³⁰ the marriage will be valid until such an annulment is sought and obtained, notwithstanding the lack of sexual relations. This suggests that in the eyes of the law marriages can exist even where there are no conjugal relations. In any event, childless marriages are as valid and binding under the law as are marriages in which children are produced.

An even more compelling example of why the procreative purposes view of marriage does not represent an accurate picture of the law is that some states will only permit the celebration of a marriage between certain parties if they *cannot* have a child through their union. Thus, some states have passed laws which allow first cousins to marry only if at least one is in her sixties or, in the alternative, is not fertile.³¹

It simply is not plausible to construe these laws as promoting procreation. On the contrary, they presumably were passed because the state was afraid that children born of the union might be more likely to have handicaps as a result of their genetic

(2) a party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity”).

³⁰ See OHIO REV. CODE § 3105.31 (2003) (“A marriage may be annulled for any of the following causes existing at the time of the marriage: . . . (F) That the marriage between the parties was never consummated although otherwise valid.”).

³¹ ARIZ. REV. STAT. § 25-101(B) (2005) (“Notwithstanding subsection A, first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.”); IND. CODE § 31-11-8-3 (1999) (“A marriage is void if the parties to the marriage are more closely related than second cousins. However, a marriage is not void if:

- (1) the marriage was solemnized after September 1, 1977;
- (2) the parties to the marriage are first cousins; and
- (3) both of the parties were at least sixty-five (65) years of age when the marriage was solemnized.”);

WIS. STAT. ANN. § 765.03 (1) (2006):

No marriage shall be contracted while either of the parties has a husband or wife living, nor between persons who are nearer of kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile.

make-up. Yet, were the law seeking to communicate that the only purpose of marriage is to provide a setting for those children born through the union of the spouses, and the state was trying to dissuade first cousins from having children through their union, then the state would simply have prohibited their marrying. It is only because the state recognizes that marriage serves several purposes that it would create an exception permitting marriages between first cousins unable to produce through their union. This way, some of the non-procreative purposes of marriage can be met while at the same time the state can be assured that the couple will not have children through their union.

Were the state solely interested in having children raised by both of their biological parents, it would have much different policies on adoption, whether involving an adoption of a spouse's child or an adoption by two individuals not biologically related to the child. The picture of marriage offered by many of these commentators simply does not correspond either with the laws that states have or with current demographic tendencies.

There is yet another reason that the marriage-must-be-of-the-procreative-kind view simply is not plausible, since it is being used to preclude same-sex couples from marrying, *even when those couples have children to raise*.³² It is difficult to understand how it can seriously be argued that individuals who do not and cannot have children can marry but that individuals providing children with nurturing homes cannot, *because of the states' compelling interest in providing a setting in which children can be loved and prosper*.³³ Basically, this line of argumentation suggests that the real reason that marriage is being restricted is not being articulated and that the "real" reason is likely less persua-

³² See Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 AM. U.J. GENDER SOC. POL'Y & L. 207, 208 (2001) (discussing 1998 estimates that between six and ten million gay and lesbian parents are raising fourteen million children in this country alone).

³³ Kari J. Carter, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 230 (2006) ("a number of professional organizations, including the American Academy of Pediatrics (AAP), the National Association of Social Workers, and the American Psychological Association (APA), have 'recognize[d] that gay and lesbian parents are just as good as heterosexual parents, and that children thrive in gay- and lesbian-headed families.'" (citation omitted)).

sive than the articulated reason which, itself, defies common sense.

II. Same-Sex Marriage

A. Marriage and the Proper Roles of the Sexes

Some marriage proponents suggest that same-sex marriage should not be recognized because such unions undermine the appropriate roles of men and women within marriages.³⁴ Yet, a discussion of “appropriate” roles may mask an attempt to perpetuate stereotypes in which the woman is supposed to play a subordinate role within the relationship.³⁵ For a state to incorporate within the idealized version of marriage that the woman should be subordinate to the man in marriage³⁶ runs counter to current more egalitarian views and, further, might well make marriage much less attractive to many. Such a view of marriage is increasingly at odds with the public understanding of what marriages should be like.³⁷

³⁴ See Deborah A. Widiss, et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461, 463 (2007) (“examining the views of those who do reveals how opposition to marriage for same-sex couples is often intertwined with efforts to enforce gender-differentiated family roles”).

³⁵ See *id.* at 469

a restrictive marriage statute discriminates because it relies upon and perpetuates a system under which men and women occupy different marriage and family roles: men must “act like husbands” and women must “act like wives.” The sex stereotyping argument may be understood as vindicating anti-subordination values, on the view that sex stereotypes implicated by the marriage statute are harmful because they perpetuate a patriarchal view of marriage and family that presumes a breadwinner, head-of-household husband/father and a caretaker, subordinate wife/mother.

³⁶ Cf. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 82 (1997) (“large numbers of conservative Christians, Muslims, and Jews in monogamous marriages in the United States today accept a view of wives as subordinate to their husbands”).

³⁷ See McCLAIN, *supra* note 9, at 60:

Since the 1960s, public understandings of both marriage and women’s citizenship have undergone a significant transformation. This transformation establishes sex equality as an important public value and constitutional principle, and signals a shift from marriage as a hierarchical

A separate issue is whether individuals who have more egalitarian notions of marriage will be deterred when the idealized version of marriage is presented as subordinating. Perhaps they will simply reject that understanding of marriage and either opt to create marriages that are more egalitarian or refuse to remain married if the marriage turns out to be subordinating.³⁸ Nonetheless, it is at the very least ironic that those who worry that marriage is becoming less attractive paint it in ways that make it increasingly at odds with societal perceptions concerning equality.

B. Should the State Afford Recognition to Non-Marital Couples?

Increasingly, individuals and couples are choosing to have children without marrying, notwithstanding that the state has associated numerous benefits with marriage.³⁹ The states (and individual employers) must decide which if any benefits to offer to such non-marital families.

Provision of these benefits would not somehow make these individuals married—indeed, assuming that these people could have married, they might well have affirmatively decided that they did not want to marry. Rather, the state's providing these benefits would simply involve the recognition that even unmarried individuals and their children have needs, and that the failure of the state to attend to those needs may result in the

relationship, premised on gender complementarity, to one of mutual self-government, premised on gender equality.

³⁸ See *id.* at 143 (“the gap between women’s expectations of gender equality and marriage equality and their actual experience in marriage is a significant factor, along lines of class and race, leading to disenchantment with marriage and ultimately to divorce”).

³⁹ *Increase in Percentage of Children Living with at Least One Working Parent; Unmarried Birth Rate Increases*, U.S. FED. NEWS, July 13, 2007, available at 2007 WLNR 13412252:

In 2005, 37 percent of all births were to unmarried women, up from 36 percent in 2004. The percentage of all births to unmarried women rose sharply from 18 percent in 1980 to 33 percent in 1994. From 1994 to 2000, the percentage ranged from 32 to 33 percent. The percentage has increased more rapidly since 2000, reaching 37 percent in 2005. The report noted that children are at greater risk for adverse consequences when born to a single mother because the social, emotional, and financial resources available to the family may be more limited.

imposition of burdens on the individuals themselves and on society as a whole. Children, for example, who do not receive timely medical or other types of care may themselves suffer. Society, too, may suffer in the opportunity costs incurred when the children are not as productive or happy throughout their lives as they might have been had these benefits been offered.

States are handling these issues in different ways. For instance, California domestic partnership status is open to both same-sex couples and to different-sex couples who have reached a certain age.⁴⁰ Hawaii's reciprocal beneficiary status, which offers specified benefits, is open to individuals who are precluded by law from marrying,⁴¹ and Vermont's reciprocal beneficiary status offers particular benefits specifically to individuals who are related by blood or adoption.⁴² Several states have reserved civil union status for same-sex couples.⁴³

Many states are trying to address an inequity that is created when couples are precluded by law from marrying. For that they should be applauded. Yet, a different public policy issue is raised when particular benefits will not be provided if the adults in the relationship could marry but choose not to do so. While the state has a legitimate interest in providing incentives to induce people to marry and to provide a stable home for children, that should not end the discussion with respect to whether individuals who could marry but choose not to do so should be precluded from receiving benefits. The state also has a legitimate interest in making sure that the needs of its citizens are met, and it may well

⁴⁰ See CAL. FAM. CODE § 297 (West 2006) (listing requirements for domestic partnership status which include that either both individuals are of the same sex or that at least one is over age 62). See also N.J. STAT. ANN. § 26:8A-4 (West 2004) (specifying that domestic partnerships are limited to individuals who are of the same sex or who are both 62 years of age or older); WASH. REV. CODE ANN. § 26.60.030 (West 2007).

⁴¹ See HAW. REV. STAT. § 572C-1 (1997) ("The purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.").

⁴² See 15 VT. STAT. ANN. § 1301 (2007). Such individuals cannot enter into either a marriage or a civil union with that person. See *id.* at § 1303 (3).

⁴³ See CONN. GEN. STAT. ANN. § 46b-38bb (2006). See also N.H. REV. STAT. § 457-A:2; N.J. STAT. ANN. § 37:1-29; 15 VT. STAT. ANN. § 1202 .

be that both the individuals in the family and society as a whole are harmed when particular benefits are tied to marriage.

The trend in some states to afford same-sex couples access to benefits *may* indicate a willingness to afford benefits to families even where the adults are not married. On the one hand, those states limiting civil union status to same-sex couples may be doing so precisely because same-sex couples do not have the choice to marry.⁴⁴ Basically, the rationale might be that those who can marry can receive benefits by marrying, and other avenues will only be provided for those who are precluded from marrying.⁴⁵ On the other hand, domestic partnership benefits in some states are open to individuals of the same-sex and to elderly, different-sex couples. While same-sex couples are presumably given this opportunity because they do not have access to the institution of marriage, the elderly, different-sex couples are presumably given this opportunity because they can thereby publicly establish their relationships while at the same time retaining certain benefits that they would lose were they to marry.⁴⁶ This sensitivity to the situations and needs of the individuals themselves suggests that states could structure benefits in such a way as to take account of the existing needs and preferences of individuals while at the same time giving individuals some incentive to marry.⁴⁷ States could and likely will create alternative structures that will not be the equivalent of marriage and will not have all of the benefits of marriage, but nonetheless will improve the lives of individuals who for whatever reason refuse to marry. Such

⁴⁴ New Jersey offers domestic partner status to both same-sex couples and to different-sex, elderly couples, but limits civil union status to same-sex couples. *See supra* notes 40 and 43.

⁴⁵ *See generally* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 *LAW & SEXUALITY* 649 (1998) (arguing that different-sex couples should not have access to domestic partnership status because they can marry but are choosing not to do so).

⁴⁶ *See* Daniel I. Weiner, *The Uncertain Future of Marriage and the Alternatives*, 16 *UCLA WOMEN'S L.J.* 97, 105 n.36 (2007) ("The elderly, for instance, are more likely to be widowed and therefore precluded from remarrying if they want to keep various federal benefits.").

⁴⁷ Maine's domestic partner status is not limited to individuals of the same sex, *see* 22 *ME. REV. STAT. ANN.* § 2710 (West 2003), and that status affords individuals certain benefits, e.g., eligibility for insurance. *See* 24-A *ME. REV. STAT. ANN.* § 2741-A.

programs might also have salutary effects for children living in such homes.

C. *The Effect of Marriage Amendments on the Provision of Benefits*

In the past several years, many state constitutions were amended by referendum to limit access to marriage. Almost all of these preclude same-sex couples from marrying.⁴⁸ Where the amendments differ, however, is in what they in addition expressly preclude.

Some of the amendments expressly reserve marriage for different-sex couples but do not include any additional limitations on the state legislature with respect to the actions that can be taken to address the needs of citizens.⁴⁹ Arguably, these amendments permit the respective legislatures to create civil union or domestic partnership status for same-sex couples without thereby offending state constitutional guarantees,⁵⁰ although this ultimately may be a matter for the state courts to resolve. Other amendments not only reserve marriage for different-sex couples but also preclude the state from recognizing a status for same-sex couples that is identical or substantially similar to marriage.⁵¹

⁴⁸ The only one that does not was Hawaii's, which instead gave the power to preclude same-sex marriage to the Legislature. *See* HAW. CONST. art. 1, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

⁴⁹ *See*, for example, ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); MO. CONST. art. I, § 33 (2004) ("That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."); MONT. CONST. art. XIII, § 7 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."); NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."); OR. CONST. art. XV, § 5(a) ("It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.").

⁵⁰ *See* Brad Cain, *Law for Domestic Partners Stands in Oregon*, SEATTLE TIMES, Oct. 9, 2007, at B6, available at 2007 WLNR 19908365 ("State election officials say opponents failed to turn in enough signatures to block Oregon's domestic-partnership law for same-sex couples.").

⁵¹ *See*, e.g., ARK. CONST. amdt. 83, § 2 ("Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas"); KY. CONST. § 233A ("A legal status identical or

Presumably, this prohibition would preclude recognition of civil unions or robust domestic partnerships,⁵² but might permit a status that affords a more limited range of benefits, such as health benefits through a state employer. Still other amendments preclude same-sex couples from marrying or receiving the rights and incidents of marriage.⁵³ However, without a specification of the rights and incidents of marriage, it is simply unclear how broad this sort of prohibition is.⁵⁴

Further, to make matters even more complicated, some of the amendments are not particularly well-written, making it difficult to know what they preclude. For example, Ohio's constitutional amendment reads:

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁵⁵

Courts have had some difficulty in interpreting the second sentence. For example, it was only recently that the Ohio Supreme Court held that the amendment does not preclude the state from extending domestic violence protections to individuals in non-marital relationships.⁵⁶ Before that, the lower courts had

substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); NEB. CONST. art. I, § 29 ("The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.").

⁵² A domestic partnership in California is robust, since it seems to be the equivalent of a civil union, which is the equivalent of marriage as far as state benefits and obligations are concerned. But a state could define domestic partnerships to have only specified and rather limited benefits. For a comparison of some of the different rights and responsibilities associated with different statuses created by the states, see Dominick Vetri, *Domestic Partnerships*, ch. 3, "SEPARATE BUT EQUAL" NO MORE: A GUIDE TO THE LEGAL STATUS OF SAME-SEX MARRIAGE, CIVIL UNIONS, AND OTHER PARTNERSHIPS (Mark Strasser ed. 2007), vol. I in 3-volume set DEFENDING SAME-SEX MARRIAGE.

⁵³ See, e.g., KAN. CONST. art. XV, § 16 (b) ("No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.").

⁵⁴ For a discussion of the differing possible interpretations of the rights and incidents of marriage language, see Strasser, *supra* note 3, at 68-77.

⁵⁵ OHIO CONST., art. XV, § 11.

⁵⁶ See *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007).

split on whether the amendment precluded application of domestic violence protections to different-sex cohabiting couples on the theory that extending that protection would be to extend a benefit of marriage to a non-marital couple.⁵⁷

The Ohio Supreme Court construed the amendment relatively narrowly, suggesting that it merely means that “the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage—a marriage substitute,”⁵⁸ in other words, the amendment was designed to preclude recognition of same-sex marriages, civil unions and robust domestic partnerships. It remains to be seen whether the court will offer a similar analysis in a different case, such as where someone with standing challenges a state entity’s offering employees health insurance benefits for their domestic partners.⁵⁹

Needless to say, it will be unclear what kinds of benefits can be afforded by legislatures to individuals who are in non-marital relationships until the marriage amendments are construed. For example, the Michigan marriage amendment⁶⁰ has been construed to preclude public employers from awarding benefits to same-sex domestic partners,⁶¹ although that opinion itself may be reversed on appeal.⁶²

The various state marriage amendments add a level of complexity to the analysis because they may preclude the legislatures from acting in ways that will address the needs of citizens. Because many but not all states have marriage amendments and because these amendments differ greatly in wording and effect, it seems likely that the states will diverge even more markedly with

⁵⁷ For a discussion of the Ohio amendment, see Strasser, *supra* note 3, at 81-91.

⁵⁸ *Carswell*, 871 N.E.2d at 551.

⁵⁹ See *Brinkman v. Miami Univ.*, 2007 WL 2410390 (Ohio Ct. App.) (denying standing to someone challenging Miami University’s extending health insurance benefits to the same-sex domestic partner of an employee).

⁶⁰ See MICH. CONST. art. I, § 25 (“To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”).

⁶¹ See *National Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139 (Mich. Ct. App. 2007).

⁶² See *National Pride at Work, Inc. v. Governor of Michigan*, 731 N.W.2d 409 (Mich. 2007) (granting leave to appeal).

respect to the kinds of statuses they will recognize and the kinds of benefits that they will permit non-marital couples to enjoy.

D. Will the State Get Out of the Marriage Business?

Some suggest that the state should simply get out of the marriage business,⁶³ permitting religious institutions to perform marriages in accord with their religious traditions but having a separate status—civil unions, for example—which is subject to civil control. Such a proposal might be favored by groups with very different ideological positions and goals.⁶⁴ Some, for example, might believe that church and state should be completely separate. Others might not hold a separationist view regarding the relationship between church and state as a general matter, but nonetheless believe that in this particular instance the func-

⁶³ See Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 *CARDOZO L. REV.* 1161, 1175 (2006):

Civil marriage is a legal monopoly of the definition and terms of marriage, comparable to the monopoly of an established church. Terminating that monopoly, by abolishing civil marriage, would unleash religious and cultural entrepreneurialism as churches, synagogues, and other religious and nonreligious institutions would propound and practice their respective concepts of marriage in a competitive market for marriage.

⁶⁴ See Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships between Adults*, 30 *HARV. J.L. & GENDER* 25, 29 (2007) ("Still others, including some gay rights advocates, believe that the state has no legitimate business regulating adult relationships, and assert that the state should remove itself completely from sanctioning marriage and other intimate relationships."). Some have even suggested that the state may be forced to get out of the marriage business as a constitutional matter. See Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 *U. COLO. L. REV.* 599, 614 (2005):

Alternatively, the Court might hold that a separate but equal scheme in which the state sanctions mixed-sex marriage but bans same-sex marriage is inherently unequal and in violation of the Fourteenth Amendment's Equal Protection Clause, regardless of whether or not the state offers the incidents of marriage under a different name to same-sex couples. The principles of constitutional interpretation . . . suggest that the Court, when confronted with an amendment that expressly defines marriage in the United States as only between one man and one woman, could then order the state out of the business of sanctioning marriage.

tions should be separated, perhaps thinking that this way there would be no same-sex marriages even if there might be same-sex civil unions.⁶⁵ Yet, same-sex marriages would still be celebrated, even were marriage solemnization left solely to the discretion of religious traditions. While particular denominations may not perform same-sex marriages, that does not mean that all denominations refuse to celebrate such unions. Just as it cannot now be said that no state recognizes same-sex marriages, it cannot now be said that no religious denominations celebrate such marriages.⁶⁶

The point here is not that all commentators arguing that the state should get out of the marriage business do so as a way of preserving marriage for different-sex couples.⁶⁷ On the contrary, individuals make such a suggestion for a variety of reasons. Some are same-sex marriage proponents and others make that suggestion for reasons having nothing to do with whether same-sex marriages should be recognized either by the state or by religious denominations.

⁶⁵ See Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 *CARDOZO L. REV.* 1221, 1256 (2006) ("Rather than reinforcing the idea that marriage is a proper subject for civil regulation, religious conservatives should seek to bolster the idea of marriage as a subject for private choice and control by mediating institutions."), and *id.* at 1255 ("The argument that 'the state should leave us alone because we view marriage among our adherents as a religious matter' would be much more plausible if religious communities would take a consistent stand in favor of leaving marriage to private choice.").

⁶⁶ See Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 *SAN DIEGO L. REV.* 1023, 1028 (2005) ("at present, a variety of religious denominations, including Unitarians, the United Church of Christ, Reform Judaism, the Society of Friends, and Episcopalians recognize same-sex unions").

⁶⁷ See Richard A. Epstein, *Of Same-Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 *SUP. CT. ECON. REV.* 75, 98 (2004) ("The state does not provide collective goods (or bads) when two people decide to marry. The best way to maintain civil peace and harmony is to make sure that the state does not put its thumb on the scale in these cultural wars, or gets out of the marriage business altogether."); Todd Seavey, *Libertarians in Bush's World*, 1 *N.Y.U. J.L. & LIB.* 915 (2005) (suggesting that government should get out of the marriage business and allow all couples, including same-sex couples, to contract marriage as a private agreement).

In any event, it seems unlikely that the state will be willing to get out of the marriage business entirely.⁶⁸ Further, even were the state to do so, analogous thorny issues would still arise, such as whether the state should recognize civil unions (or some other status) and, if so, who should be given access to that status and which benefits should be accorded to those who enter into civil unions, domestic partnerships, and so on. Thus, even were the state to get out of the marriage business, it seems very likely that states would differ with respect to which statuses they were willing to recognize, who would be given the choice of whether to enter into a particular relationship recognized by the state, and which benefits would be associated with these different statuses.

E. *Interstate Recognition*

One analysis involves how a state will treat marriages or the rights and obligations arising from marriages and other types of relationships when those relationships were created in that very state. The relevant analysis is more complicated when courts must decide whether benefits conferred or obligations assumed in one state must be enforced in another. In these kinds of cases, federal constitutional and statutory requirements may be implicated in addition to state constitutional and statutory requirements.

As more states recognize either same-sex marriages or non-marital relationships, there will be an increasing number of attempts to challenge the enforcement of the rights or obligations arising from such relationships in jurisdictions where the relationship did not originate. Individuals who contract a same-sex marriage in Massachusetts may try to dissolve that marriage in another jurisdiction.⁶⁹ Or, perhaps, individuals who contract a

⁶⁸ Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 *HOFSTRA L. REV.* 93, 96 (2003) (noting that “the government is, and seems likely to stay, in the business of regulating marriage (and using marital status as a significant category in the assignment of rights, benefits, and obligations)”); Vincent J. Samar, *Privacy and the Debate Over Same-Sex Marriage Versus Unions*, 54 *DEPAUL L. REV.* 783, 787 (2005) (“But, while perhaps desirable [that states get entirely out of the marriage business], that is unlikely to happen in today’s political climate.”).

⁶⁹ See *New England in Brief*, *BOSTON GLOBE*, Oct. 10, 2007, at 2B, available at 2007 WLNR 19845420 (describing case before Rhode Island Supreme

civil union in Vermont might seek to have the civil union dissolved in another state.⁷⁰

One issue will involve who has standing to challenge a court's granting such a dissolution,⁷¹ and another will involve whether the court even has jurisdiction to grant such a dissolution if the state does not recognize civil unions.⁷² Even a state recognizing civil unions will have to decide how it will treat non-marital relationships that are created in other states.⁷³ This might be complicated, at least in part, because a status created in one state might not have all of the rights and obligations of a status created in another state, even if the two states call the status at issue by the same name. Thus, for example, the domestic partnership in Maine is not as robust as the domestic partnership recognized in California.⁷⁴

Parties will ask courts to address a whole host of issues ranging from dissolving a union to enforcing a private agreement for support in the event that a cohabiting couple should separate.⁷⁵ Such agreements might be made where the couple had not previously entered into a marriage, civil union, or domestic partnership—one of the individuals might merely be seeking to enforce

Court where two women who had married in Massachusetts are seeking a divorce in Rhode Island).

⁷⁰ See *Alons v. Iowa Dist. Ct. for Woodbury County*, 698 N.W.2d 858 (Iowa 2005) (involving a challenge to a civil union dissolution granted by a district court); *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (Connecticut residents seek to have their Vermont civil union dissolved by a Connecticut court).

⁷¹ See *Alons*, 698 N.W.2d at 874 (denying third party standing to individuals challenging a civil union dissolution).

⁷² See *Rosengarten*, 802 A.2d at 184 (holding that the court did not have subject matter jurisdiction to dissolve the civil union). Subsequent to the *Rosengarten* decision, the Connecticut Legislature voted to recognize civil union status for same-sex couples. See CONN. GEN. STAT. ANN. § 46b-38bb.

⁷³ See, e.g., N.J. STAT. ANN. § 26:8A-6 (c) (“A domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State.”).

⁷⁴ See *Vetri*, *supra* note 52, at 47-67 (comparing the rights and responsibilities of different domestic partnerships).

⁷⁵ See, e.g., *Posik v. Layton*, 695 So.2d 759, 762 (Fla. App. 1997) (upholding “agreement for support between unmarried adults is valid unless the agreement is inseparably based upon illicit consideration of sexual services”).

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a private agreement.⁷⁶ Or, instead, the parties might seek to enforce an agreement that had been made in light of the parties having entered into a same-sex marriage, civil union or domestic partnership.⁷⁷

A court asked to enforce a separation agreement created in that jurisdiction which was based on a relationship created in another jurisdiction might be asked to uphold the validity of the status created in that other jurisdiction.⁷⁸ Or, the court might be asked to uphold the enforceability of the agreement even if the status itself is not recognized.⁷⁹ Needless to say, the scenario envisioned creates the potential for conflicting dispositions of relevantly similar cases—the decision about whether the recognition of a status created in another jurisdiction violates local policy might be decided differently by different courts, assuming either that no marriage amendment had been passed or that the marriage amendment was rather limited in scope. Those courts holding that a status could not be recognized because it violated public policy might reach very different conclusions about whether a voluntary agreement between the parties was enforceable.⁸⁰

⁷⁶ *See, id.* at 761:

By prohibiting same-sex marriages, the state has merely denied homosexuals the rights granted to married partners that flow naturally from the marital relationship. In short, “the law of Florida creates no legal rights or duties between live-ins.” . . . This lack of recognition of the rights which flow naturally from the break-up of a marital relationship applies to unmarried heterosexuals as well as homosexuals. But the State has not denied these individuals their right to either will their property as they see fit nor to privately commit by contract to spend their money as they choose.

⁷⁷ *See Gonzalez v. Green*, 831 N.Y.S.2d 856 (N. Y. Sup. Ct. 2006) (challenging validity of separation agreement made after breakdown of relationship of same-sex parties who had married in Massachusetts).

⁷⁸ *See Gonzalez*, 831 N.Y.S.2d at 858-59 (“I find the parties’ marriage to be void under the laws of either the state of New York where both parties reside, or the state of Massachusetts where the purported marriage ceremony took place.”).

⁷⁹ *Id.* at 861 (“the agreement is hereby declared valid and in full force and effect”).

⁸⁰ *Compare Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977) (holding cohabitation agreement unenforceable) *with Posik v. Layton*, 695 So.2d 759 (Fla. App. 1997) (holding cohabitation agreement enforceable).

Yet, another scenario will involve whether one jurisdiction must enforce obligations imposed in another jurisdiction when those obligations arose in light of a status created in the latter jurisdiction. Consider, for example, an individual seeking to enforce a judgment from another jurisdiction with respect to rights arising from the dissolution of a domestic partnership. At least one important matter would be whether the couple was composed of two individuals of the same sex or, instead, of different sexes.⁸¹ If the former, this would implicate a provision of the Defense of Marriage Act (DOMA).⁸²

The Defense of Marriage Act permits states not only to refuse to recognize “a relationship between persons of the same sex that is treated as a marriage under the laws of . . . [another] State” but also not to recognize “a right or claim arising from such relationship.”⁸³ While this provision would have to be construed by the courts, it might be taken to mean that property rights arising from a judgment of dissolution of a domestic partnership of individuals of the same sex would not have to be enforced if doing so would be contrary to the public policy of the enforcing state. In contrast, if the members of the domestic partnership were not of the same sex, then this provision of DOMA would not be triggered and the judgment would be enforceable.⁸⁴

DOMA does not distinguish among the rights that might arise by virtue of the same-sex relationship that had been recognized in the other jurisdiction. Thus, for example, pursuant to the dissolution of a same-sex marriage or civil union, a court might award rights of custody or visitation. An individual who disagreed with the reasoning and judgment of the court might seek to have that judgment set aside as unenforceable in a differ-

⁸¹ See *supra* note 40 and accompanying text (discussing domestic partnerships which were open to members of the same sex or members of different sexes if the individuals were over a certain age).

⁸² See 28 U.S.C.A. § 1738C (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”)

⁸³ See *id.*

⁸⁴ A separate issue is whether basing the enforceability of a judgment on the sexes of the parties violates equal protection guarantees.

ent jurisdiction whose public policy precluded enforcement of the rights arising from same-sex relationships. While there is case law suggesting that a custody or visitation decree cannot be avoided so easily,⁸⁵ it is not difficult to imagine cases in which the interests of children could be subverted by individuals taking advantage of jurisdictions whose public policy precluded enforcement of rights arising from same-sex relationships.

Consider two different scenarios. In one, parties to a Vermont civil union seek to dissolve their civil unions and establish their parental rights and obligations in Vermont. Because the Parental Kidnapping Prevention Act (PKPA)⁸⁶ permits the initial court deciding custody and visitation to retain jurisdiction,⁸⁷ a litigant who disagreed with the Vermont court's disposition of the respective parent's rights and responsibilities would have some difficulty in having the case relitigated elsewhere.⁸⁸

⁸⁵ See *Miller-Jenkins v. Miller-Jenkins* 912 A.2d 951, 956 (Vt. 2006):

We granted interlocutory appeal to address the validity of these orders. We conclude the civil union between Lisa and Janet was valid and the family court had jurisdiction to dissolve the union. Further, we decide that the family court had exclusive jurisdiction to issue the temporary custody and visitation order under both the Uniform Child Custody Jurisdiction Act (UCCJA), 15 V.S.A. §§ 1031-1051, and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000). We affirm the family court's determination that Janet is a parent of IMJ, the resulting visitation order, and the order of contempt issued against Lisa for her failure to abide by the visitation order.

See also *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330, 332 (Va. Ct. App. 2006) ("We hold that the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction.").

⁸⁶ 28 U.S.C.A. 1738A.

⁸⁷ See 28 U.S.C.A. § 1738A (d) ("The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.") and 28 U.S.C.A. § 1738A(c) ("A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if . . . such court has jurisdiction under the law of such State").

⁸⁸ See *Miller-Jenkins*, 637 S.E.2d at 335:

The Vermont court was then exercising its jurisdiction under Vermont law and consistently with the provisions of the PKPA. Thus, subsection (g) applied. The Vermont court, by virtue of its June 17, 2004 and July 19, 2004 orders, continued to exercise jurisdiction, giving application

Suppose, however, that the proceeding had been commenced in a state whose public policy precluded recognition of non-marital relationships.⁸⁹ In that event, the relationship between the children and the partner might not be protected. Indeed, the PKPA might be used to preclude one of the parents from establishing her parental rights because the court making the initial determination had retained jurisdiction.

The problems pointed to here are by no means limited to same-sex relationships. If local law (whether constitutional or statutory) precludes according marriage-like rights to non-marital couples, then we should expect to see numerous cases involving individuals seeking to take advantage of that law to undermine the rights or justified expectations of ex-partners, where those rights had not been reduced to judgment. By having a patchwork of laws in the states representing diametrically opposed public policies, we can expect that individuals will seek to take advantage of those laws to disadvantage others.⁹⁰ Absent

to subsection (h). Therefore, under a “plain meaning” statutory analysis, the trial court lacked authority to exercise jurisdiction based upon Lisa’s custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court.

⁸⁹ The state might even be able to exercise jurisdiction if it was not the home state of the children if one of the exceptions to the PKPA and the state version of the Uniform Child Custody Jurisdiction and Enforcement Act had been triggered. *See* Chaddick v. Monopoli, 714 So.2d 1007 (Fla. 1998) (Virginia able to exercise jurisdiction over child custody modification matter notwithstanding that Florida was the home state of the children).

⁹⁰ For example, see *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) and *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. App. 2006). Here, the biological mother of a child sought to have her child’s parentage established in a Virginia court after the child’s parentage had already been recognized by a Vermont court. *See* *Miller-Jenkins*, 912 A.2d at 956 (“Meanwhile, on July 1, 2004, after the Vermont court had already filed its temporary custody and visitation order and parentage decision, Lisa filed a petition in the Frederick County Virginia Circuit Court and asked that court to establish IMJ’s parentage.”) Had the initial decision been made by a Virginia rather than a Vermont court, Lisa might have been able to preclude Janet from having any contact with the child.

An analogous situation involving a different-sex couple might arise if a non-marital partner was taking care of her partner’s biological child for an extended period. Were the couple’s relationship to end, the father might go to a jurisdiction that does not recognize functional parenthood to preclude his ex-partner from continuing to have contact with the child.

congressional action or general agreement among the states with respect to what to do in these kinds of situations, we can expect that the ever greater divergence among the states with respect to their policies regarding non-marital relationships will yield many more cases resulting in unfairness and harm to both adults and children.

Conclusion

The future of marriage is bright. Because of the increased earning power of women, many women do not feel forced into marriage, which might mean that fewer women will feel trapped into marrying or remaining married.⁹¹ Further, this might well promote more egalitarian marriages where both partners can more fully participate in the joys and responsibilities of marriage. Marriage as an institution would seem strengthened when individuals choose to marry rather than are (economically) coerced into marrying and when marital partners share more equally.

Marriage provides a setting in which individuals and their children can prosper. In this age where growing numbers of couples choose not to have children and in which there are growing numbers of blended families, the model of marriage as providing a setting for children to be raised must be expanded. First, marriage should not be understood as fulfilling only one purpose, since marriage as an institution is important to society and to individuals themselves whether or not the married couple has or will have children. The claim here is not that children are an unimportant element of many families, but merely that the idea of marriage is not sullied when individuals who will not or cannot have children choose to marry.

To say that marriage serves the needs of the adults themselves is not to deny the importance of providing a setting in which the young might prosper. Yet, given the increasing number of couples who adopt and the increasing acceptability of adoption and advanced reproductive techniques, it seems too late in the day to suggest that the sole purpose of marriage is to provide

⁹¹ McCLAIN, *supra* note 9, at 143 (“Because women today depend less on marriage as their source of economic security than in the past, they are less likely to put up with a bad marriage out of sheer economic necessity and more likely to leave an unhappy marriage.”) (quotation and citation omitted).

a setting in which children born of the couple's union can thrive. Indeed, marriages in which the couple raises an adopted child or, perhaps, children from a previous marriage of one or both of the parties do not somehow sully the institution of marriage. So, too, same-sex couples who marry do not sully the institution just because a child they are raising is biologically related to neither of them or to only one of them.

Both the state and individuals themselves can derive benefits when the individuals are in stable, long-term relationships. However, it is at best counter-intuitive to suggest that the state and individuals only benefit when those long-term relationships are marital. Even were it true that as a general matter the state and individuals themselves benefit most when in marital relationships, that would hardly establish that all individual couples would benefit most if married.⁹² Further, the state must recognize that many individuals choose not to marry even though they can legally do so. It neither helps the state nor the individuals themselves to say that their refusal to marry should preclude them from receiving benefits, since that may well mean that both society and the individuals and their children will suffer needless opportunity costs.

The states have the opportunity to recognize more types of relationships so that more citizens' needs can be met. This might mean that the states will recognize more kinds of relationships that trigger responsibilities between the parties, as well as more kinds of relationships that trigger receipt of benefits. The former might involve conditions under which one would incur obligations to a non-marital spouse or, perhaps, the children of a non-marital spouse. The latter might include either specified benefits to non-marital spouses of employees or, perhaps, the recognition of an alternate status that would afford some of the benefits of marriage to individuals in non-marital relationships.

Some will suggest that rather than recognize a new status that affords some but not all of the benefits of marriage, the state should simply make marriage even more desirable by reserving even more benefits for those who are married. While making the comparative advantage of marriage even greater might induce

⁹² See *id.* at 129 ("But quality of family life is important: just as healthy marriage may promote adult and child well-being, unhealthy marriage (for example, high conflict marriage) may hinder it.").

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some to marry who otherwise would not, a few cautionary notes should be sounded.

First, there are constitutional constraints on the kinds of disincentive structures that can be imposed. After *Lawrence v. Texas*,⁹³ states are precluded from criminalizing sexual relations between unmarried, consenting adults. Absent constitutional amendment or the Court's overruling *Lawrence*, the state would not be able to criminalize adult fornication as a way to make marriage more attractive.

Second, creating a system that too greatly incentivizes marriage might induce too many bad marriages. This might well mean an increase in the divorce rate or, perhaps, an increase in the number of people who are miserable in their marriages. It is not at all clear that marriage is bolstered as an institution by inducing people to enter into bad marriages.⁹⁴

Some marriage proponents sometimes send very mixed messages. For example, they describe marriage as being of great intrinsic value, but then want the state to reserve particular benefits only for married people, apparently believing that without those special benefits marriage would not be viewed as sufficiently attractive and thus people will either choose not to marry or choose not to remain married. Further, these commentators sometimes seem to use marriage as a means by which to punish disfavored groups, thus undermining the value of the very institution that they wish to uphold. When commentators and courts offer arguments to restrict marriage that are implausible on their face and seem to contradict both legal and societal understandings of the institution, they sacrifice their own credibility and harm their own efforts to support the institution that they allegedly hold so dear.

Two points should not be conflated. The state may well have legitimate interests in awarding particular benefits to married individuals, for example, making it possible for people to have insurance coverage for their children or, perhaps, affording marital coverage to the partner so that she might be free to take care of

⁹³ 539 U.S. 558 (2003).

⁹⁴ Cf. McCLAIN, *supra* note 9, at 132 ("Marriage promoters may underestimate the magnitude of the problem of domestic violence with marriage and its impact on low-income couples and on women across the socioeconomic spectrum.").

children or parents in need. A separate question is whether the state can legitimately refrain from extending some of those same benefits to individuals who are in functionally equivalent positions. The state must not spite itself and its individual citizens in an effort to privilege marriage.

Marriage will continue to be an important institution. However, states will diverge even more with respect to the ways that they provide for the increasing numbers of individuals who are not married. Precisely because of this divergence, there will be increasing opportunities for individuals to undermine the interests of their ex-partners and their children. Absent congressional action or a concerted effort on the parts of states, we can expect that although marriage will continue to be valued and promoted, the treatment of relevantly similar individuals will become more inconsistent across states, leading to the disappointment of justified expectations and the harming of individuals that the law is purportedly designed to protect.

