Contracting Out of the Culture Wars:
How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments

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Abstract

This article attempts to transcend the "culture wars" as they are played out in the family law arena by drawing on postmodern values, such as individualism and neutrality, to allow individuals who so desire to *choose* to emphasize more traditional or communitarian values, such as interdependence and attachment. This article argues, then, as others have, that the role of contract in marriage should be extended for those who choose to agree to additional terms. Here, the argument goes a step further, however, by positing an active, positive role for communities of faith to play in a marriage regime of expanded contract. Specifically, this article argues that communities of faith should not only be allowed but, in fact, should be encouraged to define the types of commitments they wish to bless as marriage.

This article first lays out some of the background for understanding changes in marriage and divorce in America, including views on what marriage is and should be as well as developments in society's conceptions of morality and the role of law. It is in this context that this paper presents some of the major legal and non-legal attempts that have been made to strengthen marital commitments. After giving an overview of what others have already written on how expanding the role of contract might be used in this effort, this article builds on successful non-legal approaches used by communities of faith by introducing the idea that such communitiesalso should participate in developing marriage contracts. The rest of this article defends this proposition, both explaining why communities of faith might desire to be involved in such a project as well as attempting to answer critics, especially those concerned about furthering their particular vision for the family in America – whether more progressive or traditional.

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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 since the 2004 presidential election. While the underlying issues related to 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 since the heart of the ongoing fight is over competing visions of the family and intra-familial relations. Many writers have enlisted with one side or another, and effectively 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 have attempted to develop practical solutions that bridge such divergent perspectives on the family. Since no side appears anywhere close to "winning," it is imperative that we develop family law solutions that bridge some of the differences.

This paper attempts to build a bridge by proposing a greater pluralism in marriage law to enable individuals to make choices that further their particular vision of the family, without imposing that vision upon the whole of society. 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 such a

historically unjust social institution. This article takes an approach that cuts across the divide by arguing, as others have,[1] 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 postmodern values, such as individualism and neutrality, to allow individuals who so desire to *choose* to emphasize more traditional or communitarian values, such as interdependence and attachment. This article takes the argument a step further, however, by positing an active, positive role for communities of faith to play in a marriage regime of expanded contract. Specifically, I argue that communities of faith should not only be allowed but, in fact, should be encouraged to define the types of commitments they wish to bless as marriage.

This article first lays out some of the background for understanding changes in marriage and divorce in America, including views on what marriage is and should be as well as developments in society's conceptions of morality and the role of law. After laying out the shifts that have taken place in the last half-century or so, I present some of the major legal and non-legal attempts that have been made to fix marriage. Then, I give a brief overview what others have already written on how expanding the role of contract might be used to strengthen marriage. Building on the fact that communities of faith have already proven successful in some non-legal approaches to strengthening marital commitments, I introduce the somewhat controversial idea that they also should be

[1] *See* Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990); Christopher Wolfe, *The Marriage of Your Choice*, 50 *First Things* 37 (1995); Ann Laquer, *Embracing Pluralism in American Family Law*, 63 Md. L. Rev. 540 (2004); Barbara Stark, *Marriage Proposals: From One-Size Fits-All to Postmodern Marriage Law*, 89 Cal. L. Rev. 1479 (2001); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879 (1988); Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & Religion 67 (2000-01); *but see* Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. Chi. Legal F. 295 (2004); James Herbie Difonzo, *Customized Marriage*, 75 Ind. L.J. 875 (2000).

involved in strengthening marriage by participating in developing marriage contracts. The rest of this paper defends this proposition, both explaining why communities of faith might desire to be involved in such a project as well as attempting to answer critics. In addressing likely criticism, I respond to several of the major anticipated concerns; however, the reader should note at the outset that the defenses offered sacrifice depth with regard to any particular anticipated critique in favor of breadth.

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.[2] People are increasingly less likely to enter marriage, and when they do their marriages have a high likelihood of ending in divorce. The divorce rate, calculated as the number of divorces per year per 1,000 married women age 15 or older, rose from 9.2 in 1960 to 22.6 in 1980, and then decreased slightly to 19.5 in 1996.[3] Fully half of all marriages entered into today are likely to end in divorce.[4] At the same time as marriages have become increasingly likely to end, people have become less and 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.[5] This decline in the marriage rate may account at least in part for the leveling of divorce rates in the

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[2] U.S. Census Bureau, *Statistical Abstract of the United States: 1998*, Table No. 156; U.S. Census Bureau, *Statistical Abstract of the United States: 1985*, Table No. 120; U.S. Census Bureau, *Statistical Abstract of the United States: 1970*, Table No. 75.

[3] *Id.*

[4] The National Marriage Project, *The State of Our Unions 2002: The Social Health of Marriage in America* 23 (2002).

[5] U.S. Census Bureau, *Statistical Abstract of the United States: 1998*, Table No. 156; U.S. Census Bureau, *Statistical Abstract of the United States: 1985*, Table No. 120; U.S. Census Bureau, *Statistical Abstract of the United States: 1970*, Table No. 75.

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 1960[6] to 2.85 million in 1990 and 4.9 million in 2000.[7] This represents a growth "[a]s a percentage of the total households in the United States from .8% in 1960 to 2% in 1980 to 4.5% in 2000." [8]

While there is no doubt that 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 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. While it seems obvious that the ease of divorce in some sense encourages and de-stigmatizes divorce, for the most part, the passage of no-fault divorce laws simply allowed the law to catch up with society with regard to its changing attitudes toward marriage and divorce.[9] While the impact of these laws in facilitating and de-stigmatizing divorce should not be understated, it is important to recognize that critics of no-fault divorce often have over-emphasized the extent to which changes in divorce law itself wrought change.[10]

Some praise these developments insofar as they hail the demise of what they see as an inherently exclusive and/or patriarchal institution that should have no place in a

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[6] L.M. Casper et al. *How does POSSLQ measure up? Historical estimates of cohabitation*, Population Division Working Paper No. 36 (1999), as cited in Sean E. Brotherson and William C. Duncan, *Rebinding the Ties that Bind: Gov'l Efforts to Preserve and Promote Marriage*, 53 Family Relations 459, 460 (2004).
[7] T. Simmons and G. O'Neill, *Households and families: 2000*, *Census 2000 Brief* (2001), as cited in Brotherson and Duncan, *supra* n. 6, at 460.
[8] J. Fields and L. Casper, *America's families and living arrangements*, Census Bureau Current Population Reports P20-537 (2000), as cited in Brotherson and Duncan, *supra* n. 6, at 460.
[9] James Q. Wilson, *The Marriage Problem*, 162-166 (2002) (discussing the causes and consequences of no-fault divorce).
[10] *See, e.g.* Family Research Council, *Deterring Divorce*, at <http://www.frc.org/get.cfm?i=BC04D02> (last visited April 9, 2005) (claiming, "Much of the rise in divorce rates can be attributed to no-fault divorce laws . . . .").

progressive society. [11] The Scandinavian countries, and Sweden in particular, often are held up as a model for actively seeking to end all forms of gender discrimination.[12] In its quest, Sweden has attempted to eliminate any legal or social pressures to marry and has carved out an active role for the State in extinguishing any economic consequences of divorce,[13] through, for example, state allowances.[14] The fruit of such policies is seen in the fact that 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.[15] Finally, there is little, if any, social pressure in Sweden for a couple with children to marry or to stay married, should they in fact marry.[16]

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[11] The following examples were compiled in James Herbie DiFonzo, *Unbundling Marriage*, 32 Hofstra L. Rev. 931 (2003) of authors who have criticized the institution of marriage: *See* Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* 228-29 (1995) (calling for the elimination of special rules governing marriage and divorce, and for regulating relationships between adult sexual partners according to the ordinary rules of civil and criminal law); Judith Stacey, *Brave New Families: Stories of Domestic Upheaval in Late Twentieth Century America* 269 (1990) (arguing in favor of eliminating marriage as an "ideological concept that imposes mythical homogeneity on the diverse means by which people organize their intimate relationships"); Gayle White, *Weighing the Pros & Cons of Marriage: Con: Shift Focus to Caretakers, Dependents*, Atlanta J. Const., Mar. 29, 2003, at B1; *see also* Summer L. Nastich, *Questioning the Marriage Assumptions: The Justifications for "Opposite-Sex Only" Marriage as Support for the Abolition of Marriage*, 21 Law & Ineq. 114, 115-116 (2003) (arguing that "while limiting legal marriage to opposite-sex couples is completely unjustifiable, marriage itself is unjustifiable--whether opposite-sex, same-sex, or both" and that "elimination of the legal institution of marriage would accomplish the social goals and objectives of marriage more successfully than marriage currently does"); Emily Taylor, Note, *Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws*, 28 Ohio N.U.L. Rev. 171, 174 (2001) (advocating the dismantling of all current marriage laws and their replacement by "civil union laws to be used by all couples who seek the state derived benefits of their partnership").

[12] *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).

[13] *See Id.* at 118 (discussing changes in Swedish tax law that removed incentives for marriage).

[14] *See* Carlson, *supra* n. 12, at 69, 118 (noting increasing Swedish government child allowances and marriage-neutral tax policy).

[15] *See, e.g. Id.* at 70-71 (noting that by 1986 nearly 50% of all children born in Sweden were illegitimate); Noelle Cox, *Nordic family ties don't mean tying the knot*, USA Today (December 15, 2004) at http://www.usatoday.com/news/world/2004-12-15-marriage_x.htm (last visited May 2, 2005) (noting that half of all children in Scandinavia are born to unmarried mothers).

[16] *See, e.g.* Cox, *supra* n.14 (discussing the lack of social stigma attached to out-of-wedlock births in Scandinavia).

Despite the trends toward cohabitation and divorce, which might suggest otherwise, polling data indicate that the vast majority of Americans still regard the institution of marriage as very important to them personally.[17] Consistent majorities view the high divorce rate as a "Very Serious Problem."[18] In one survey, 62% of respondents said that divorce in this country should be harder to obtain than it is now.[19] Another survey found that 61% of respondents believed it should be harder for married couples with children to get a divorce.[20] Surveys shows people support measures that would make it more difficult for couples to divorce. For example, 78% of respondents to one poll agreed with a specific proposal that would require all married couples with children go to counseling before a divorce is granted.[21]

Similarly, a high percentage of Americans sees marriage as especially significant for the raising of children. These opinions hold despite the fact that a majority of people no longer finds cohabitation by unmarried partners morally troubling.[22] 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."[23]

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[17] In one poll, 92% of respondents said having a successful marriage was "Very Important" to them. Wirthlin Worldwide, August 1996, as cited in *The Family, Marriage: Highly Valued*, 17 Public Perspective (1998). In another poll, 81% of respondents said having a good marriage was "Absolutely Necessary" to consider his or her life a success. Research, Strategy, Management & Belden Russonello & Stewart for American Assoc. of Retired Persons, *Money and the American Family Survey* (Jan. 23 - Feb. 21, 2000).
[18] Hart and Teeter Research for NBC News, *Wall Street Journal*, June 16-19, 1999.
[19] Chilton Research for *The Washington Post*, Harvard University, and the Kaiser Family Foundation, July 29 – Aug. 18, 1998.
[20] *Time*/CNN poll, May 7 -8, 1997, as cited in Walter Kirn, *The Ties That Bind: Should Breaking Up Be Harder to Do? The Debate Over Easy Divorce Rages On*, *Time*, Aug. 18, 1997, p. 49.
[21] Wirthlin Worldwide poll, July 7-10, 2000.
[22] Gallup Organization for CNN, *USA Today*, May 18-20, 2001.
[23] Jerald G. Bachman et al., *Monitoring the Future: Questionnaire Responses from the Nation's High School Seniors*, The Monitoring of the Future Study, Survey Research Center, Institute for Social Research (2000).

At the same time, a significant majority of people believes it is best for children to grow up in two-parent families.[24] Not only do Americans think it best that 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.[25] These results are especially significant given that Americans are divided as to the morality of unmarried cohabitation. A significant proportion of those who do not find unmarried cohabitation morally troubling believe it is nonetheless not the ideal family situation for the raising of children. This shows disapproval of the high divorce rate and 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. Senator Daniel Patrick Moynihan issued his provocative report in 1965, "The Negro Family: The Case for National Action."[26] In that report, he outlined how poverty among African-Americans was linked, at least in part, to a breakdown in family structure.[27] While his report was widely criticized as "blaming the victim" when it was originally published, [28] his analysis emphasizing the significance of

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[24] When asked, "Please tell me if you agree or disagree with the following statement of family and child rearing: It is generally best for children to grow up in two-parent homes. Agree strongly, agree somewhat , disagree somewhat, disagree strongly?", 72% of respondents said they "Agree Strongly" and another 15% said they "Agree Somewhat." Public Agenda, *Necessary Compromises Survey*, June 1-15, 2000.

[25] A 1996 Los Angeles Times Poll found 71% of respondents agreed, "It's always best for children to be raised in a home where a married man and woman are living together as father and mother…" *Los Angeles Times* poll, April 13-16, 1996, as cited in *Families: A Strong Yes to the 'Traditional' Structure*, Public Perspective 20 (Feb/Mar 1998).

[26] Daniel Patrick Moynihan, *Moynihan Report: The Negro Family: The Case for National Action*, March 1965, United States Department of Labor Office of Planning and Research, available at <http://www.dol.gov/asp/programs/history/webid-meynihan.htm> (last visited April 8, 2005).

[27] *Id.*

[28] William Ryan, *Blaming the Victim* 64 (2d ed. 1976).

family breakdown has come to be respected over time by those on the right as well as the left as his predictions have come to pass.[29]

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

Understanding 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 rise of postmodern morality, 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 what has taken place in the United States over the last half-century or so. Accordingly, this paper merely outlines these developments and then focuses on the implications of these developments for the topic at hand.

The liberalization in moral attitudes regarding family and sexuality has come to be recognized as the "sexual revolution." The changes wrought in society through this revolution are profound in terms of the changes in both attitudes and actions. For example, in the short four-year period between 1969 and 1973, the percentage of American who said they believe "it is wrong for people to have sex relations before marriage" decreased from 68% to 48%.[30] The dramatic changes wrought in sexual

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[29] By the 1980s, Moynihan's central argument came to be accepted by 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 Christenson, *Time for a New 'Moynihan Report'? Confronting the National Family Crisis*, The Family in America, vol. 18, no. 10 (Oct. 2004), available at <http://www.profam.org/pub/fia/fia_1810.htm#fn4> (last visited April 8, 2005). *See also* Robert Rector, *Welfare Reform and the Healthy Marriage Initiative*, available at <http://www.heritage.org/Research/Welfare/tst021005a.cfm> (last visited April 8, 2005).

[30] E. Shorter, *The Making of the Modern Family* 114 (1975), as cited in Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1843-1844 (1985).

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 18-29, 27.4% of women 30-39, 33.8% of women 40-49, and 55.1% of women 50-59.[31] These survey results illustrate the sharp change in sexual behavior between women 50-59 and women 40-49, those who came of age in the 1970s.

Not surprisingly, despite increased availability and use of birth control as well as abortion, this increased sexual behavior outside of marriage led to rapid increases in conceiving and bearing children outside of marriage. During the years 1960-64, 74% of first births among women age 15-29 were conceived after marriage, compared to 47% during 1990-94.[32] The changes are further seen in the rise in the 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 about one-third of all births.[33] Furthermore, changing morés regarding sexual behavior made it more socially acceptable for these women to bear and raise their children out of wedlock.

This waning of traditional moral values, particularly those related to the Judeo-Christian tradition, has led directly to the law dropping statements of moral aspiration.[34] In the family law context, it has been shown that the law largely "has deserted its function of prescribing and describing norms of conduct whose purpose is to maintain

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[31] Edward O. Laumann et al., *The Social Organization of Sexuality: Sexual Practices in the United States* 214 (1994).
[32] Amara Bachu, *Trends in Premarital Childbearing 1930 to 1994*, Current Population Reports, P20-543, U.S. Census Bureau, Table 2 (2001).
[33] Stephanie Venture et al., *Nonmarital Childbearing in the United States, 1940*-99, National Vital Statistics Reports 48, Table 1 (2000); Joyce A. Martin et al., *Births: Final Data for 2000*, Table D.
[34] Schneider, *supra* n. 30, at 1845.

families as places for interdependent, collective living and the nurture of children."[35] It is not that that law has traded in its moral ideals for another set of moral ideals about 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."[36]

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 with the abortion issue. On this particular issue, Americans continue to be divided with both sides making strident moral appeals. By providing such a stark contrast to other legal debates, however, counterexamples such as the abortion issue only highlight the extent to which moral discourse has been eliminated from the law.

As postmodern morality has taken a 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.[37] In her widely-cited comparative work *The Transformation of Family Law*, Mary Ann Glendon detailed how this shift has taken place in the United States and Western Europe. As Glendon wrote, family and the institution of marriage once were but now no longer are "the essential determinants of an

[35] 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)).
[36] Woodhouse, *supra* n. 35, at 264, citing Glendon, *supra* n. 35, at 297.
[37] Woodhouse, *supra* n. 35, at 246.

individual's economic security and social standing."[38] As a result, the law now protects the family because it serves individual fulfillment rather than because it serves society.[39]

Furthermore, despite the fact that postmodern (a)morality has resulted in family law no longer explicitly promoting a particular ideal family life, the postmodern veil of neutrality "masks a bias favoring the values of equality, individual freedom, and tolerance."[40] 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."[41] A consequence of this individual-centeredness may be that "[t]his ordering paradoxically works to the detriment of individuals as well as families, for individuals are born into and must suffer the fates of families."[42]

Debates on family law present a false dichotomy when they are reduced to the question of whether the law should set a standard to be lived up to or should simply reflect the reality of people's lives.[43] This approach ignores 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, yet at the same time the system *implicitly* favors the values of "equality,

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[38] Glendon, *supra* n. 35, at 292, as cited in Woodhouse, *supra* n. 35, at 263.
[39] Glendon, *supra* n. 35, at 292-293, as cited in Woodhouse, *supra* n. 35, at 263.
[40] Woodhouse, *supra* n. 35, at 264.
[41] *Id.* at 255, citing Martha Minow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 Wis. L. Rev. 819, 893-894; David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. Mich. J.L. Ref. 805 (1985); Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. Mich. J.L. Ref. 1015 (1985); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. Mich. J.L. Ref. 835 (1985); Michael S. Wald, *Introduction to the Family, the State and the Law*, 18 U. Mich. J.L. Ref. 799 (1985).
[42] Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 Tex. L. Rev. 245, 255 (1990)..
[43] *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).

individual freedom, and tolerance."[44] As a result, innovative solutions must discover ways to emphasize these favored values by empowering individuals to choose to emphasize more traditional or communitarian values such as interdependence and attachment, which in turn can strengthen family and societal stability.

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 periods and premarital counseling.[45] Attempts to cause more careful reflection upon divorce similarly have included waiting periods, counseling, and mediation.[46] Other proposals have gone so far as to call for a to return to a fault-based divorce regime.[47]

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 in Spain,

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[44] Woodhouse, *supra* n. 42, at 264.

[45] For example, Florida and Utah have passed legislation to fund premarital preparation. Similarly, the federal government provided for TANF grants to states for marriage education efforts. *See* Sean E. Brotherson and William C. Duncan, *Rebinding the Ties that Bind: Gov'l Efforts to Preserve and Promote Marriage*, 53 Family Relations 459, 461-62 (2004).

[46] For example, the Michigan Mediation Project refers couples considering divorce to mediation before they enter legal proceedings. *See Id.*

[47] *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).")

began as early as the 1970s.[48] What has been called the "marriage movement", however, began in earnest in the mid-1990s with groups such as Marriage Savers and Smart Marriages.[49] 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."[50] Under this new marriage regime, when a couple marries they select whether to opt into standard or 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 pre-marital counseling and that they have explained to them the additional exit requirements imposed on those opting for covenant marriage.[51]

It remains too early to thoroughly assess 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

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[48] William J. Doherty and Jared R. Anderson, *Community Marriage Initiatives*, 53 Family Relations 425 (2004).
[49] *Id.* at 425-426.
[50] For the text of the legislation passed in Louisiana, *See* La. Rev. Stat. Ann. §§ 9:272-275.1, 307-309 (West 2004). For detailed analysis, *See* Katherine S. Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 63 (1998).
[51] The Louisiana statute, for example, requires some form of premarital counseling and an explanation of the additional requirement of Covenant Marriage. La. Rev. Stat. Ann. § 9:272 (West 2004).

among wives."[52] 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."[53]

Each of the states that has enacted a covenant marriage statute also makes it more difficult to exit a covenant marriage than a standard marriage. While 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 the divorcing spouse complies with a waiting requirement that allows divorce only after the couple is separated for some specified period of time, [54] presumably to prevent hasty divorces.

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 and/or mediation before proceeding to divorce.[55] Of the most noteworthy and possibly effective non-legal means that have been used recently to combat divorce are "Community Marriage Policies."[56]

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[52] Sanchez, L.A., Nock, S.L., Deines, J.A., & Wright, J.D. *Can covenant marriage foster marital stability among low-income fragile newlyweds?*, Paper presented at the Nat'l Poverty Conf. On Marriage and Family Formation Among Low-Income Couples: What Do We Know From Research? (2003), as cited in Sean E. Brotherson and William C. Duncan, *Rebinding the Ties that Bind: Gov'l Efforts to Preserve and Promote Marriage*, 53 Family Relations 459, 464 (2004).
[53] *Id.* at 464.
[54] For example, the Louisiana statute sets out various periods of separation that qualify a spouse of a Covenant Marriage to file for divorce depending on the circumstances of the marriage and of the separation itself. La. Rev. Stat. Ann. § 307 (West 2004).
[55] For extended discussion of such groups, *See* William J. Doherty and Jared R. Anderson, *Community Marriage Initiatives*, 53 Family Relations 425 (2004).
[56] Michael McManus, *Marriage Savers: Helping Your Family and Friends Avoid Divorce* (2d 1993).

While they vary depending on the locality in which a policy is adopted, the basic idea in 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.[57] Community Marriage Policies often involve clergy committing to not marry couples unless the couples first undergo premarital counseling or take part in what is called a "premarital inventory" for couples.[58] Community Marriage Policies were first implemented in 1986 when Mike and Harriet McManus worked with leaders in the city of Modesto, California.[59] The couple began traveling around the country promoting the implementation of similar policies.[60] 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."[61]

Marriage Savers has developed an intense program relying on grass-roots activity to mentor couples just starting out as well as those who are married and experiencing problems. Marriage Savers sees developing mentor couples who will work with engaged and newlywed couples as one of its principal goals.[62] Local pastors select couples considered to have a vital, long-term marriage to participate in twelve hours of training over two days.[63] This training prepares the mentor couples to administer and discuss a premarital inventory and to lead mentored couples through exercises related to

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[57] *Id.* at 293-318.
[58] *Id.* at 293-318.
[59] Doherty and Anderson, *supra* n. 55, at 427.
[60] *Id.*
[61] *See* < http://www.marriagesavers.org> (last visited April 16, 2005).
[62] William J. Doherty and Jared R. Anderson, *Community Marriage Initiatives*, 53 Family Relations 425, 427 (2004).
[63] *Id.*

communication and conflict resolution.[64] 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.[65]

Marriage Savers claims that Community Marriage Policies have reduced divorce rates substantially where they have been implemented.[66] 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 while the marriage rate increased by 12.3% as of 1999 (based on the last available data).[67] 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.[68] The study is significant in that it found there is a statistically significant impact on divorce rates where a Community Marriage Policy has been implemented.[69] While 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 grass-roots effort can actually make a statistically significant impact on divorce rates.[70] The study matched counties with similar underlying trends in divorce rates to evaluate

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[64] *Id.*
[65] *Id.*
[66] Michael J. and Harriet McManus, *Testimony Before the Subcommittee on Human Resources of the House Committee on Ways and Means*, Hearing on Welfare and Marriage Issues (May 22, 2001), at < http://waysandmeans.house.gov/legacy/humres/107cong/5-22-01/5-22mcma.htm> (last visited April 9, 2005).
[67] *Id.*
[68] Doherty and Anderson, *supra* n. 62, citing Michael J. McManus, *Marriage Savers Annual Report* (2002), no longer available as cited at <http://www.marriagesavers.org/annual%20Report.htm> (visit attempted April 9, 2005).
[69] Paul James Birch, Stan E. Weed, and Joseph Olsen, *Assessing the Impact of Community Marriage Policies on County Divorce* Rates, 53 Family Relations 500 (2004).
[70] *Id.*

the differences attributable to the Community Marriage Policies themselves.[71] The study estimated reduction in divorce rate of 2% more per year in counties that implemented Community Marriage Policies.[72] 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.[73]

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. While pastors agree to uphold the requirements of the Community Marriage Policy adopted, nothing legally binds them to uphold their commitments. That pastors held to their commitments is not especially surprising, however, since their social position suggests they would suffer a high social cost for reneging on their commitments. Still, we might expect a subset of pastors, those unlikely to suffer such social costs, to not make such commitments in the first place or to renege on their commitments, thereby reducing the impact of Community Marriage Policies by wooing couples seeking wedding facilities and less onerous premarital requirements. Finally, the results are also surprising because nothing about the conflict resolution procedures or any other aspect of the program is binding (legally or otherwise) on the couples once married and the couples themselves are not subject to the same social costs as pastors.

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; similar to the

[71] *Id.*
[72] *Id.* at 502.
[73] *Id.* at 500.

way we allow businesses to structure their financial relationships.[74] The call for customized contractual marriage has expanded beyond the scholarly realm and was recently discussed in the left-leaning San Francisco Chronicle,[75] and thereafter in a small wave of blogs.[76] In the commercial context we see contracts as 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 to some commitment, 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.

While 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.[77] Her analysis fits well in the marriage context, where individuals may have the long-term goal

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[74] *See* Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225 (1998); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990); Christopher Wolfe, *The Marriage of Your Choice*, 50 *First Things* 37 (1995); Ann Laquer, *Embracing Pluralism in American Family Law*, 63 Md. L. Rev. 540 (2004); Barbara Stark, *Marriage Proposals: From One-Size Fits-All to Postmodern Marriage Law*, 89 Cal. L. Rev. 1479 (2001); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879 (1988); Ghada G. Qaisi, Note, *Religious Marriage Contracts: Judicial Enforcement of Mahr Agreements in American Courts*, 15 J.L. & Religion 67 (2000-01); *but see* Brian H. Bix, *The Public and Private Ordering of Marriage*, 2004 U. Chi. Legal F. 295 (2004); James Herbie Difonzo, *Customized Marriage*, 75 Ind. L.J. 875 (2000).

[75] 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 (last accessed Feb. 7, 2006).

[76] *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 accessed Feb. 7, 2006); Daniel Larison, *Corporate Millets*, Jan. 25, 2006, http://larison.org/archives/000559.php (last accessed Feb. 7, 2006).

[77] Scott, *supra* n. 74, at 13.

of a lifelong marriage, yet absent additional precommitment, 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.[78]

Critics who argue against the idea of extending contract principles to marriage include scholars from a range of legal, political, and sociological perspectives. These critics include communitarians who 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.[79] At the same time, some critics simply say contract principles are inappropriate for intimate relationships because individuals are less likely to be motivated by their own self-interest since such relationships are characterized by altruism and coercion. [80] Feminists have argued this approach constitutes a thinly veiled effort to reinvigorate traditional gender roles.[81] Social conservatives fear 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.[82] Others have appealed to a conception of human nature as

[78] Scott and Scott, *supra* n. 74, at 1231.
[79] Examples of such works include, Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of* Belonging, 1991 BYU L. Rev. 1 (1991); Martha Minow, *supra* n. 41; Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 Utah L. Rev. 605 (1993); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).
[80] Michael J. Trebilock and Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, in Peter Benson (ed.), *The Theory of Contract Law: New Essays* 45-85 (2001).
[81] James Herbie Difonzo, *Customized Marriage*, 75 Ind. L.J. 875, 936 (2000).
[82] Heather K. McShain, *For Better or For Worse? A Closer Look at Two Implications of Covenant Marriage*, 32 Fam. L.Q. 629 (1998).

constantly changing to criticize a marriage regime in which "earlier selves" could unfairly bind "later selves."[83]

Allowing individuals to bind themselves to one another in more enduring ways would further the postmodern 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 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 more explicitly make choices that value interdependence and attachment. Using contract to strengthen marriage rather than other legal means, such as a return to a fault-based system, would avoid conscripting a coercive state into 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 widely accepted postmodern 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 in that it continues to set allthe terms of both of the two legal regimes. In contrast, advancing contract in marriage further

[83] Difonzo, *supra* n. 81, at 940-944.

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 a couple agrees to apart from any state influence or endorsement. This approach avoids controversy because it is neutral on its face and directly advances postmodern 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.[84]

II. Involving Communities of Faith in Extending Contract in Marriage

As others have advocated, I argue that the use of contract in marriage should be expanded and legally enforced. In particular, while 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 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) arbitration or mediation in the

[84] *See* Barbara Stark, *Marriage Proposals: From One-Size Fits-All to Postmodern Marriage Law*, 89 Cal. L. Rev. 1479, 1529-42 (2001) (outlining three possible forms of marriage under a postmodern conception of marriage terms, including the "gender equity," "relational," and "customized" models).

event either or both spouses seek a divorce, or (4) how custody and visitation should be determined for any children born or adopted during the marriage. In most circumstances, enforcing such provisions would further postmodern 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 paper takes this line of argument a step further by positing an active positive role for communities of faith to play in a marriage regime of expanded contract. We 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 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, as discussed in this paper). This calls for a shift in the current understanding of the role of communities of faith in performing weddings. Currently, communities of faith may only limit who they will marry based on what the couples say or do prior to 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 through the life of the marriage.

This proposed marriage regime could result in a number of possibilities. At one extreme, this proposal could lead to marriages with a wide variety of marriage terms, varying depending on the particular community of faith involved with each wedding.

There might be significant differences as to the required terms for marriage both on an interfaith as well as an intra-faith basis. It is not even clear whether interfaith differences would be as significant as intra-faith 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 a great degree of 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, as those in some cities have already worked together to adopt Community Marriage Policies. Banding together would allow communities of faith to raise the level of commitment required for entering religious marriage of any kind. For such 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. If the proposed marriage regime produced this kind of cooperation among communities of faith, there might be more reason to be concerned about coercion. Even if such cooperative action ensued, however, the proposed regime would continue to allow civil ceremonies administered by public officials for couple who need meet only the minimum state entry requirements and the minimum level of commitment required by the state. Furthermore, because cooperative action by communities of faith will result only in the least stringent level of obligations agreed to by all cooperating communities, the additional commitment required in the event of cooperation is not likely to be very great.

Given that people would retain the option of civil marriage with no additional requirements, this proposed marriage regime should not be seen as coercive.

Thus, there would be no significant coercion regardless of whether the proposal were to result in great diversity among contract terms varyingbycommunity , cooperation 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 postmodern values of pluralism and diversity by allowing variety and group expression of identity.

The basic proposal of this paper 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.[85] Second, communities of faith should be encouraged to expand their role in calling for greater commitment from the couples for

[85] *See* Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990).

whom they perform marriage ceremonies through particular contractual provisions, similar to the way they 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 paper focuses on contractual restrictions and burdens placed on the availability of divorce. This focus is warranted because such contractual innovations may be the most significant innovations under a more contractual approach to marriage for stemming the tide of divorce. This is especially salient as much social science research has shown divorce causes greater repercussions in couples' lives and especially the lives of their children than was previously known.[86] In addition, such terms may be the sort that people with very different normative goals might be able to embrace. Contractual restrictions and burdens on the availability of divorce may serve as an example solution for other seemingly intractable problems in family law by using broadly shared postmodern values to empower individuals who so choose to emphasize more traditional or communitarian values in their own lives. In particular, I argue that 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

[86] *See, e.g.* JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE (Hyperion 2000); LINDA J. WAITE ET AL., DOES DIVORCE MAKE PEOPLE HAPPY?: FINDINGS FROM A STUDY OF UNHAPPY MARRIAGES (Institute for American Values 2002) available at http://www.americanvalues.org/UnhappyMarriages.pdf (last accessed 2/15/06).

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 number of objections that might be raised against this proposed marriage regime from a variety of perspectives. This paper addresses philosophical, results-minded, constitutional, public policy, and contractual concerns. Furthermore, I argue that there is no reason to believe that advancing contract in marriage necessarily undermines the state's ability to set the floor for 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 undoes 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, it seems that this proposal could only improve the state of marriage in America.

III. Limiting Divorce through Restricted Grounds and Added Consequences

This section focuses on how couples might use contract to strengthen their marriages by either restricting the grounds available to them for divorce and/or agreeing in advance to particular consequences for a spouse if he or she seeks divorce. This section begins by explaining, using pre-commitment theory, how it could be rational for individuals to opt into this kind of more restrictive marriage regime. Furthermore, this paper contributes to pre-commitment theory in the marriage context by explaining why communities of faith might decide to only marry couples that agree to additional terms which comport with the particular community's definition of marriage.

After detailing the theory and the proposal, I respond to the arguments of critics who say such a regime is deficient on theoretical as well as policy grounds and is subject to challenges under constitutional and contract law doctrines. I emphasize how this proposal's added dimension of involvement by communities of faith does not increase the viability of these concerns that are likely to be raised. This section illustrates my general proposition that increased contractual freedom in marriage can further postmodern as well as traditional or communitarian values: allowing individuals to choose restrictive terms in a marriage contract furthers the postmodern values of individualism and pluralism while allowing individuals who so choose to increase their commitment to traditional or communitarian values such as interdependence and attachment.

A. Pre-Commitment 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."[87] In arguing for this proposal, somewhat tongue in cheek, one of Christopher Wolfe's goals is to show that the current marriage regime, in fact, forces people to be free.[88] 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."[89] Wolfe contrasts this perspective with that of traditional communities, such as Roman Catholics, who though they "deny the absolute value of the autonomous life" they are "not permitted to make

[87] Christopher Wolfe, *The Marriage of Your Choice*, 50 *First Things* 37, 37-41 (1995).
[88] *Id.*
[89] *Id.*

legally enforceable contracts binding themselves to abide by what they take to be the moral law."[90]

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.[91] The communitarian approach might say either "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."[92] 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.[93] While this approach provides a rational explanation as to why one might opt for a restrictive marital regime, this paper 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 postmodern 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

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[90] *Id.*
[91] Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879, 882-83 (1988).
[92] *Id.*
[93] *See Id.* at 883, n. 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) (legislative control of marriage justified by the importance of marriage to "the morals and civilization of a people"); Pope Pius XI, *Encyclical Casti Connubii* (December 31, 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.").

maximize their own happiness.[94] Furthermore, marriage laws currently embody this assumption in that no-fault, easy-dissolution divorce laws are rooted in the idea that individuals should remain free to maximize individual utility.[95] Even assuming these strong values of individualism, individuals might rationally choose a more restrictive marital regime. Proposals have been as restrictive as the "indissoluble marriage" proposed by Christopher Wolfe, or as modest as short waiting periods from the time a divorce is sought until the divorce may be granted.

Proponents of pre-commitment in marriage often draw an analogy to Ulysses and the Sirens to illustrate how pre-commitment might be a rational strategy in marriage.[96] 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 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."[97] A person may use pre-commitments to "reinforce long-term goals,

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[94] *See* Haas, *supra* n. 91, at 883-84, n. 25, citing R. Bellah et al, *Habits of the Heart: Individualism and Commitment in American Life* (1985); J. 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.").
[95] Haas, *supra* n. 91, at 883-84.
[96] *See Id.*; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 40-44 (1990); *but see* James Herbie Difonzo, *Customized Marriage*, 75 Ind. L.J. 875, 942-43 (2000) (arguing that the Ulysses analogy to precommitment in marriage is problematic in that it fails to address the "unpredictability of human development").
[97] Scott, *supra* n. 96, at 40.

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.

Theodore Haas uses a game theoretic approach to imagine the utilitarian calculus in marriage in terms of cooperative or selfish behavior.[98] In his conception, 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 spouse.[99] The decision matrix below[100] represents a rough sketch of the spouses' choices and their resulting payoffs using a simple utilitarian calculus:

Figure 1

Wife's Behavior

Husband's Behavior	**Selfish**	**Cooperative**
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 payoff than if they both were to 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 the incentive to switch to selfish behavior.

[98] Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879, 884-90 (1988).
[99] *Id.*
[100] *Id.* at 884.

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.[101] 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.[102] The following decision matrix[103] sketches choices and payoffs under this second rubric:

Figure 2

Wife's Behavior

Husband's Behavior	**Selfish**	**Cooperative**
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.[104]

Haas argues that spouses or prospective spouses confront not one, but both of these matrices.[105] While an individual may view the second matrix as a "vision of the happy life," a rational individual will incorporate the first matrix into decisionmaking

[101] *Id.* at 886.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*

because he or she is aware that human nature is not entirely altruistic.[106] Because current divorce law does not protect the decision to cooperate (i.e. 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.[107] 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.[108]

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

(1) Directly adding to the cost of seeking a divorce;

(2) Indirectly promoting cooperative behavior and reducing conflict during marriage by reducing the likelihood that divorce will be considered; and

(3) Fostering careful decisionmaking about marriage, which would discourage impulsive marriages and encourage decisions consistent with an individual's long-term preferences.[109]

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."[110] Consequently, short-term preferences are given less immediate weight in the decision calculus since over time these preferences will be

[106] *Id.* at 887.
[107] *Id.* at 888.
[108] *Id.* at 888.
[109] Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 44, 46 (1990).
[110] *Id.* at 49.

less significant in the long-term cost-benefit analysis.[111] Scott recognizes that pre-commitment theory presumes that short-term preferences will change from time to time, while long-term preferences remain relatively stable.[112] While 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 pre-commitment devices because, as in other long-term contractual relationships, "the threat of legal enforcement reduces the temptation to defect and reinforces cooperative patterns of behavior."[113]

Together, the game theoretic and pre-commitment 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 Pre-Commitments

Not only could individuals rationally choose a more restrictive form of marriage, but also communities of faith could rationally encourage such choices. In fact, communities of faith could play an important role in strengthening the institution of marriage by requiring that the couples they marry adopt more restrictive marriage terms. A particular community of faith might rationally require that such terms be adopted for two major reasons. First, a community might see itself having a social responsibility to play a part in cultivating more enduring marriages such that the communitarian vision of

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

benefits to the broader society is more fully realized. Second, the community might desire for its members' civil marriages to more accurately reflect the community's more binding religious understanding of marriage.

While some, or even many, communities might decide not to require additional marriage terms, others might prefer a more distinct 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. While this would enhance the role they play, their role still would be limited by the extent to which couples are willing to accede to demands by the community.

While 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 "mandatory" minimum additional marriage terms for *any* religious marriage, couples could always turn to the civil authorities, which would validate marriages without additional terms. Whether or not particular couples decide to adopt or reject a community's required terms, communities would play a potentially important role because they would gain social power to approve or disapprove of particular marriage terms. While this increased social power might raise some concerns, communities of faith are likely to look favorably upon this proposal for this reason.

C. Overcoming Challenges to Allowing a More Restrictive Marriage Regime

Already, 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 are

likely to intensify in response to this call for communities of faith to be allowed and encouraged to limit who they marry to those couples who agree to additional legally enforceable marriage terms that reflect a particular community's definition of marriage. 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) public policy and contract law objections.

First, this paper addresses the philosophical challenges by arguing that the proposed regime is more consistent with postmodern social values such pluralism and individualism than the current marriage regime. Second, this paper 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 consequences. Third, this paper explains 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 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 paper argues that public policy objections should not be sustained because the proposed regime actually would further the public policy of promoting marital stability and the proposed regime would not *per se* violate contract law. While additional marriage terms should not be rejected out of hand, this paper does argue, however, that courts should use public policy and contract law to

invalidate particular unenforceable terms, similar to the way courts approach commercial contracts.

1. Philosophical Challenges

While each of the existing philosophical challenges to a marriage regime allowing people to choose more restrictive marriage terms likely would grow stronger in intensity in response to the role I have outlined for communities of faith, this paper is unlikely to generate opposition that is different in *kind* from the concerns that already have been raised. 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 would 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.[114] 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."[115] Thus, according to this approach, turning to private pre-commitment strategies constitutes "giving up" on this shared public commitment to marriage.[116] Communitarians maintain that this public commitment should be preserved because of the significance of marriage

[114] *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).
[115] *Id.* at 509.
[116] *Id.*

for children and because marriage continues to be the "primary foundation of the family, which is the foundational unit of our society's structure."[117]

The communitarian contention that private ordering constitutes "giving up" on a shared public commitment to marriage is partly correct. This proposal takes account of the fact that there now exists a widely shared public commitment to the postmodern values of pluralism and individualism. Rather than cling to the notion that all of society must live out communitarian values—which it, in fact, does not—this proposal is more modest in simply allowing room for those who do wish to live out these values. At the same time, however, this proposal would not surrender the shared public commitment to marriage since this proposal would not eliminate 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.

Other critics argue that a more restrictive marriage regime allowing the use of pre-commitment mechanisms is paternalistic in that this approach only allows individuals to limit (and not expand) their future options.[118] If current marriage and divorce laws significantly restricted individual freedom as to future options, this argument would be more plausible. However, in light of pervasive no-fault divorce laws and the wide-ranging enforcement of prenuptial agreements that protect individuals' assets upon entering marriage, it is difficult to see how individuals' future options might be expanded. Under current law, marriage can only limit future options to a very small degree. Accordingly, there is no room, let alone need, to allow individuals to expand

[117] *Id.*
[118] James Herbie Difonzo, *Customized Marriage*, 75 Ind. L.J. 875, 941 (2000).

future options, yet there is room, and an expressed need, for expanding individuals' ability to limit future options.

Similarly, it has been said 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, which is seen by some as just as paternalistic as making the choice for the couple.[119] 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,"[120] but this proposal does not go so far. Whereas forcing 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 would allow couples to marry without any additional marriage terms. Some would argue, though, 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. This extreme view seems to be a strained understanding of paternalism.

Finally, critics have argued that a marriage regime relying on pre-commitment mechanisms does not adequately deal with the unpredictability of human development.[121] Such critics see pre-commitment as inherently problematic in that earlier "selves" are empowered to constrain the freedom of later "selves."[122] Furthermore, it is argued that

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[119] *Id.* at 959, citing Janet L. Dolgin, *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).
[120] Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand. L. Rev. 397, 399 (1992).
[121] Difonzo, *supra* n. 118, at 943.
[122] Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 58-62 (1990) (attempting to address the philosophical problem of earlier "selves" binding later "selves"); Difonzo, *supra* n. 118, at 942-45 (expressing concern that pre-commitment seriously restricts personal autonomy by not allowing an "escape hatch" in the event of changed long-term preferences).

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."[123] Scott addresses the concern that long-term preferences will change by reasoning that the pre-commitment devices themselves are likely to promote cooperative behavior, resulting in "compatible rather than alienated later selves."[124] While changes in long-term preferences may in fact be rare, she fails to address directly how pre-commitment theory can deal with truly changed long-term preferences.

A more direct response to this criticism is the following:

(1) This approach to marriage rests on the assumption that individuals should be allowed to assess whether they are likely to gain or lose from binding themselves. Furthermore, this approach 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) The fact that some individuals' long-term preferences will not be protected does not undermine the soundness of the proposed marriage regime. Critics of proposals involving pre-commitments ignore the fact that the current marriage regime does not protect those whose

[123] Difonzo, *supra* n. 118, at 944.
[124] Scott, *supra* n. 122, at 62.

long-term preferences would be protected by enforcing pre-commitments. The proposed marriage regime would simply shift the law from favoring those whose long-term interests are served by non-enforcement of pre-commitments to favoring those whose long-term interests are served by enforcement. This shift makes sense given that (a) more individuals may have long-term interests in enforcement of pre-commitments than in non-enforcement[125], and (b) 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 negative disparate impact on women. In fact, however, this proposal is likely 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 they "undermine the precarious socioeconomic status of women and sharpen gender inequality in the distribution of wealth."[126] 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.

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[125] This proposition rests partly on the ideas elaborated previously regarding the rationality of choosing pre-commitment devices in the first place. In addition, the pre-commitment model may overcome some of the social psychology problems that lead to sub-optimal marriage and divorce decisions. For extended discussion, *see* Scott, *supra* n. 122, at 62-69.

[126] Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229 (1994).

Allowing parties to opt into a more restrictive divorce regime increases the bargaining position of the economically disadvantaged party by protecting marriage-specific investments. 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 person's investment can be eliminated by his or her spouse filing for unilateral no-fault divorce.[127] Parties who opt into a more restrictive marital regime are likely at the outset to consider this possibility and accordingly will design terms that protect the economically weaker spouse. 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 as to 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.[128] 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.[129] Advocates for contractual autonomy have been called "new paternalists" for seeking to purchase marriage stability "at a cost which is unacceptable, unnecessary, and unknowable."[130] The feminist concern is that freedom of contract in

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[127] Eric Rasmusen and Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L.J. 453, 466-69 (1998).
[128] Difonzo, *supra* n. 74, at 936.
[129] *Id.* at 936, 960-61; Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 Tul. L. Rev. 1435 (1992).
[130] Difonzo, *supra* n. 74, at 961.

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" and the lessons of harm to children and the illusion of freedom in going from marriage to marriage have already been learned.[131]

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 agreed to a division of labor in which husbands were in the market labor force and wives 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 *per se* sexist 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 the "new paternalists" who merely make "obeisance to nonsexist linguistic norms."[132] Instead, such feminists should be seen as paternalistic elites who seek to impose their values by coercing couples to "choose" androgynous roles and for both spouses to work in the marketplace.

Feminists are not the only group to voice concerns about the ultimate impact of treating marriage more like a contract, however. 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 and polygamy.[133] A move toward contract in marriage might lead to

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[131] *Id.* at 961.
[132] *Id.* at 961.
[133] Heather K. McShain, *For Better or For Worse? A Closer Look at Two Implications of Covenant Marriage*, 32 Fam. L.Q. 629 (1998).

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, albeit according to less enduring terms.[134] Similarly, others would argue that the logic favoring increased private ordering in intimate relationships counsels in favor of even further private ordering, such as for homosexuals and polygamists.

The state of commitment in marital commitments in America, however, has reached such a low point that (1) things cannot get much worse for the institution of marriage, and (2) even if these forms of marriage were to spring up as a result of the proposed innovation,[135] on balance, the institution of marriage would still be strengthened through legally enforcing a more binding subset of marriages. Once given the option, a significant proportion of people may choose more binding forms of marriage. While there may be a small minority that would opt for a less exacting marriage relationship, it is difficult to imagine many people would choose an explicitly "second class" kind of relationship.[136] Some would say this reinforces the notion that extending contract principles in this area is inapt by showing people would not be free to pursue their "true" preferences. Instead, it seems more likely that the "true" preference of most people is for a lifelong committed relationship. Because most individuals begin marriage hoping for it

[134] *Id.* at 637-639.
[135] Assume for the sake of argument that these forms of marriage would in fact negatively impact the institution of marriage and/or society at large.
[136] *See* Christopher Wolfe, *The Marriage of Your Choice*, 50 *First Things* 37, 37-41 (1995).

to last and believing that it will last, extending contract principles is the only way to give individuals the tools to actually accomplish their lofty goals.

3. Constitutionality Under the Establishment and Free Exercise Clauses

The proposed marriage regime could implicate church/state 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 raises free exercise clause concerns because enforcement of some contractual provisions could amount to forcing individuals to perform religious acts.

While the particular marriage terms focused on in this paper—restrictions and burdens imposed on the availability of divorce—do not appear to seriously implicate such church/state concerns, 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 had been 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.[137]

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[137] *See Avitzur v. Avitzur*, 446 N.E.2d 136 (N.Y. App. Div. 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. Ct. App. 1990) (holding ketubah which parties signed prior to marriage ceremony was intended to be contract requiring that status and validity of marriage would be governed by Orthodox Jewish law and court order requiring 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); 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); Kent Greenawalt, *Religious Law and Civil*

The establishment clause essentially requires that the state be neutral and detached from religious activities.[138] The Supreme Court set out its three-prong test for violations of the establishment clause in *Lemon v. Kurtzman*: "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.'"[139] The proposed marriage regime satisfies each of these conditions. First, there are multiple secular purposes: the proposal furthers individuals' freedom of association and contract and also advances the long-established public policy of promoting marital stability. Second, while 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 furthering religion *per se*. Instead, the primary effect would be neutral with respect to religion, simply granting 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 only allows religious bodies to serve as gatekeepers as to the kinds of marriages *they* bless. While religious doctrine might inform the kinds of restrictions or burdens on divorce that a couple might adopt, there

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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).

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

[139] 403 U.S. 602, 612-613 (1971).

would be no entanglement because such terms are not likely to be expressly religious in nature.[140]

The free exercise clause of the U.S. Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[141] Violations of the free exercise clause must be based on a sincere religious belief and must be the result of government action.[142] 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.[143] Burdens on the free exercise of religion have been categorized as: (1) forcing one to do something forbidden by one's religion, (2) preventing one from doing what is required by one's religion, (3) making religious observance more difficult or expensive, or (4) forcing someone to do something "religious," which the person does not wish to do, though such an objection may not be based on religious beliefs.[144]

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. While it is possible that an individual might only agree 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"

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[140] *See Jones v. Wolf*, 443 U.S. 595 (1979) (adopting "neutral principles" approach, allowing courts to examine all but expressly religious doctrine).
[141] *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).
[142] *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972).
[143] *Sherbert*, 374 U.S. at 403.
[144] 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).

procedure – which frees the religious spouse to remarry under the dictates of Orthodox Judaism – before a Jewish tribunal does not impinge on the non-religious spouse's free exercise rights.[145] 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 "amicable settlement of disputes" between spouses and "mitigate[ing] potential harm to the spouses and their children" resulting from the divorce process.[146]

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.[147] It was assumed that such agreements facilitated divorce by allowing the marrying parties to contemplate and prepare for divorce. The Florida Supreme Court led the charge toward change by enforcing a premarital agreement involving alimony payments.[148] The court held that premarital agreements were not *void ab initio* against public policy and instead they could simply constitute the reordering of property rights and realistic planning accounting

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[145] *See Goldman*, 554 N.E.2d at 1024 (finding that the get procedure did not require any act of worship or any expression of religious beliefs); *Minkin*, 434 A.2d at 667-68 (determining that the get procedure is not religious in nature); cf. Marshall at 219-23 (arguing that requiring a Jewish religious divorce, called a "get," is a religious act because it has no secular justification and comparing this act to requiring someone to take communion or eat non-kosher foods).

[146] *Goldman*, 554 N.E.2d at 1023.

[147] *Posner v. Posner*, 233 So.2d 381, 382 (1970) ("It has long been the rule in a majority of the courts of this country and in this State that contracts intended to facilitate or promote the procurement of a divorce will be declared illegal as contrary to public policy. See *Gallemore v. Gallemore*, 1927, 94 Fla. 516, 114 So. 371; *Allen v. Allen*, 1933, 111 Fla. 733, 150 So. 237. The reason for the rule lies in the nature of the marriage contract and the interest of the State therein.").

[148] *Posner* at 382.

for the possibility of divorce.[149] Over time, courts held that agreements were invalid only if they went further such that they induced separation or divorce in a marriage that otherwise might continue.[150] It would be difficult to argue that the proposed marriage regime violates this historic public policy concern since making available the option to restrict the grounds for divorce or to impose additional burdens on the party seeking divorce would actually further, not undermine, the underlying public policy of promoting marital stability.

As the use of premarital agreements has grown, however, so has the list of public policy-related concerns. Probably the most extreme objection comes from those who compare agreements to place restrictions on divorce to agreements to self-enslavement.[151] This argument rests on the idea that though "every 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 by the elimination of the option of paying damages.[152] 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."[153]

Such self-imposed restrictions on the availability of divorce can be distinguished from self-enslavement on several grounds. First, most restrictions and burdens on

[149] Note, *Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 Harv. L. Rev. 2075, 2078 (2003).
[150] *Id.*
[151] Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 778-80 (1983).
[152] *Id.* at 778.
[153] *Id.* at 780.

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. This suggests that 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.[154] 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, while 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.[155] It may make sense, however, 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.[156] In addition, because the importance of marriage or family to society is much greater than any commercial relationship, it makes sense to allow self-imposed

[154] *See* Christopher Wolfe, *The Marriage of Your Choice*, 50 *First Things* 37 (1995).
[155] For extended comparison with partnership agreements and discussion of examples of specific performance, *see* Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C.L. Rev. 879, 902-06 (1988).
[156] *Id.* at 905.

restrictions or burdens on divorce even when we do not allow the same in a business context.[157]

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.[158] For example, where a couple has agreed to impose some sort of penalty[159] 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 may raise concerns similar to those voiced prior to the availability of no-fault divorce that courts are ill-suited for inquiring into such intimate details.[160]

Some commentators have raised concerns 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.[161] 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

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[157] *Id.*

[158] *See* Haas, *supra* n. 155, at 909-910, citing *Fincham v. Fincham*, 165 P.2d 209, 213 (1946) (husband might become "grossly abusive, completely intolerable and deliberately bring about separation"); *Stefonick v. Stefonick*, 167 P.2d 848, 854 (1946) (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).

[159] To comply with general contract law, any such "penalty" actually would have to constitute some sort of liquidated damages rather than a penalty.

[160] *See, e.g.* Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 Stan. L. R. 607, 610-17 (1997).

[161] *See* Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 Yale J.L. & Feminism 229, 234-52 (1994); Haas, *supra* n. 155, at 907, 911-913, 116 Harv. L. Rev. at 2095-98.

been adopted in a slight majority of the states, has shifted away from "substantive fairness" review at the time of enforcement.[162]

Despite this trend, the American Legal Institute ("ALI") Principles, which do not merely restate the law but also propose new approaches in the law, call for nonenforcement of premarital agreements where enforcement of particular terms would work a "substantial injustice."[163] Even under the ALI Principles, before a court can find "substantial injustice" would result, certain circumstances must be met: either a certain number of years must have passed since the agreement was executed, a child must have been born or adopted by parties who had no common children at the time of the agreement, or there must have been a "change in circumstances that has a substantial impact on the parties or their children" that was probably not anticipated at the time of execution.[164] If one of these circumstances is met, the court may consider various factors to determine whether substantial injustice would result.[165] While the exact standard employed depends on the law enacted in each particular state, the trend is toward enforcement regardless of the standard adopted.[166]

Some argue that even the ALI proposal does not go far enough in upholding fairness. For example, one author has argued the notion of substantial fairness should be

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[162] 116 Harv. L. Rev. at 2081; Judith T. Younger, *Antenuptial Agreements*, 28 Wm. Mitchell L. Rev. 697, 716-17 (2001).
[163] 116 Harv. L. Rev. at 2080, citing Principles of the Law of Family Dissolution: Analysis and Recommendations, at xvii (2002) [hereinafter ALI Principles], § 7.05(1)(b).
[164] 116 Harv. L. Rev. at 2085-86, citing ALI Principles, § 7.05(2)(a) – (c).
[165] 116 Harv. L. Rev. at 2086, citing ALI Principles, § 7.05(3)(a) – (d) (listing the factors to be considered as "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.").
[166] 116 Harv. L. Rev. at 2081 (noting that "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* n. 162, at 707-10.

extended to include "a presumption of unenforceability for antenuptial agreements that deviate materially from a fifty-fifty division of marital property."[167] 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. Such terms could protect and encourage investment in the marriage by increasing the cost of either spouse 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 be eligible for public assistance would continue to be unenforceable.[168]

The shift away from "substantive fairness" review at the time of enforcement has been toward an evaluation of more traditional contract law doctrines, such as voluntariness and unconscionability, which focus on the time of execution.[169] The UPAA focuses on these concerns as well as certain disclosure requirements, all of which can be compared to the law of partnership agreements.[170] 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

[167] 116 Harv. L. Rev. at 2097.
[168] *Id.* at 2080 (citing Unif. Premarital Agreement Act, § 6(b)).
[169] 116 Harv. L. Rev. at 2081.
[170] *Id.*

unconscionable, but particular agreements or terms that meet the traditional contract law requirements for involuntariness or unconscionability would be deemed unenforceable under the proposed regime. 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.[171] By providing for the nonenforcement of agreements that are involuntary even if they do not rise to the level of fraud or duress, the UPAA supports a liberal interpretation of the voluntariness requirement similar to a procedural unconscionability inquiry.[172] Therefore, particular agreements or terms would be subject to challenge under the proposed regime. Given that restrictions or burdens on the availability of divorce may be rational choices that maximize an individual's utility, though, 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 is unenforceable if it was unconscionable at the time of execution.[173] 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."[174] The notes to the UPAA state that the standard intended for unconscionability is the same

[171] UPAA, § 6(a)(1); *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 section 6 of the UPAA), as cited in 116 Harv. L. Rev. at 2098 n. 29.
[172] *See* Brandt, *supra* n. 171, at 546.
[173] UPAA, § 6(a)(2).
[174] 116 Harv. L. Rev. at 2080, citing UPAA, § 6(a)(2).

as that in the commercial context.[175] 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."[176] The UPAA and 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.[177] 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 upheld a premarital agreement with great deference 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

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[175] *See* Brandt, *supra* n. 171, at 565, citing UPAA, § 6 comment at 377 ("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.") (citations omitted) (quoting the Commissioner's note to Unif. Marriage and Divorce Act § 306, 9A U.L.A. 216-17 (1987)).

[176] *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (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.").

[177] *See* Elizabeth Barker Brandt, *The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho*, 33 Idaho L. Rev. 539, 548-52 (1997).

terms of their agreements."[178] The court went on to note "the reasonableness of a prenuptial bargain is not a proper subject for judicial review" and determinations of reasonableness at execution or divorce "are exactly the sorts of judicial determinations that such agreements are designed to avoid."[179] 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 require that a form agreement be adopted by couples or to work with couples to develop couple-specific terms, 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 would be deprived of autonomous decisionmaking since there would exist a market likely to offer a range of possible marriage terms. Should the marriage market develop more along the lines of scenario (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

[178] 116 Harv. L. Rev. at 2081-82 (quoting *Simeone v. Simeone*, 581 A.2d 162, 165 (Pa. 1990)).
[179] 116 Harv. L. Rev. at 2082 (quoting *Simeone*, *supra* n. 178, at 166).

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."[180] 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, but 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 a superior bargaining position."[181] Sometimes courts also require that there be an absence of meaningful alternatives[182] or that the contract contain oppressive terms, thereby folding a requirement similar to unconscionability into adhesion contract analysis.[183] Again, because communities of faith would not be a *contracting* party 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 from civil authorities and they could marry with either no additional terms or whichever additional lawful terms the couple preferred.

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[180] *Telxon Corp. v. Hoffman*, 720 F.Supp. 657 (N.D. Ill. 1989).
[181] *Id.* (emphasis added).
[182] *E.g.*, *Klos v. Lotnicze*, 133 F.3d 164 (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).
[183] *See id.*

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 more stable marriages 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. While Americans may desire more enduring marriages, in the wake of the sexual revolution, they also in large part have adopted postmodern values, which demand adherence to the values of equality, individual freedom, and tolerance. As a result, a legal strategy for strengthening marriage will only be effective and capable of being implemented if it can appeal to postmodern values rather than making one-size-fits-all moralistic prescriptions for society.

This proposal for a marriage regime with an expanded role for contract appeals to the truly postmodern values of individualism and tolerance, while enabling individuals who 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 postmodern 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. While the non-legal efforts of some communities of faith, particularly through Community Marriage Policies, have been laudable and effective to some extent, only a regime involving legal enforcement can truly empower communities of faith and their individual members to make binding long-term choices for their marriages.

While the role advocated here for communities of faith is likely to be controversial, their active positive role in the proposed marriage regime stands up under legal and policy challenges. Specifically, premarital agreements to restrict or burden the availability of divorce should be enforced as wet out 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 historical 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 would carry out now widely accepted postmodern values by allowing pluralism in marriage to flourish, but would also empower individuals to strengthen their marriage bonds by choosing to emphasize more traditional or communitarian values such as interdependence and attachment.