A "JUDEO-CHRISTIAN" ARGUMENT FOR PRIVATIZING MARRIAGE

Daniel A. Crane[*]

Opponents of same-sex marriage propose to nationalize the definition of marriage through a constitutional amendment that would define marriage as the union of one man and one woman.[1] Other, more federalist-minded defenders of traditional marriage express discomfort with a federal amendment and propose instead to constitutionalize the definition of marriage at the state level.[2] Either way, most opponents of same-sex marriage are committed to state or federal constitutional reforms that define marriage traditionally, ostensibly on the grounds that a legal definition of marriage as heterosexual union is necessary to save the marital institution.

Curiously, the push to constitutionalize—to *legalize* and *nationalize*—the definition of marriage comes primarily from conservative religious communities, particularly Christianity and Judaism,[3] whose traditions and theology are generally opposed to state intervention in the institution of marriage. Catholic tradition regards marriage as a spiritual estate or sacrament and hence the province of the church, not the state. Protestant tradition, while expressing skepticism about the sacramentality of marriage, asserts that marriage has a highly spiritual dimension that requires mediation by the church. Jewish

[*] Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University; J.D., University of Chicago, B.A., Wheaton College. I thank Paul Shupack, Arthur Jacobson, and my co-contributors to this mini-symposium—Nancy Knauer, Charles Reid, Carol Sanger, and Ed Zelinsky—for their thoughtful comments. My colleague Ed Stein provided invaluable encouragement and ideas. Mark Edelstein contributed excellent research assistance.

[1] Most prominently, President Bush has called for a constitutional amendment defining marriage as the union of one man and one woman. Press Release, Office of the Press Secretary, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html (calling for a constitutional amendment limiting marriage to one man and one woman). Representative Marilyn Musgrave (R-CO) in the House and Senator Wayne Allard (R-CO) in the Senate have introduced the "Musgrave/Allard Amendment" to achieve this result. *See* H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003); S.J. Res. 30, 108th Cong. (2004).

[2] *E.g.*, Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U. ST. THOMAS L.J. 137 (2004).

[3] *Defense of Marriage Act, 1996: Hearing on S. 1740 Before the S. Comm. on the Judiciary* 104th Cong. (July 11, 1996), *available at* 1996 WL 387296 (testimony of David Zwiebel, General Counsel and Director of Government Affairs for Agudath Israel of America, in support of Defense of Marriage Act).

tradition regards Jewish marriage as the province of Jewish law—*Halakhah*—and not of civil law. In neither the Jewish nor the Christian tradition is marriage understood as primarily the province of the state.

The current political movement against same-sex marriage threatens, perhaps unwittingly, these religious conceptualizations. By insisting that legally defining marriage is necessary to preserving the institution of marriage, these religious communities are implicitly acknowledging and confirming the state's right to dictate the definition and contours of marriage. If a uniform legal definition is necessary to save marriage, it must be because marriage owes its legitimacy to the government. By pushing to legalize, even nationalize marriage, religious conservatives are reifying marriage as a *legal*, rather than *religious*, construct contrary to their conventional, religious view of marriage.

This essay presents a theological argument against the secular legalization of marriage and in favor of the secular privatization of marriage. It argues that the traditions of Judaism and Christianity understand marriage as an institution whose legitimacy derives not from the state but from the sanction of religious communities. As such, marriage is the province of religious communities, and not the state, and empowering the state to define marriage uniformly not only profanes a holy institution but threatens the ultimate autonomy and authority of religious communities with respect to marriage.

Four caveats are necessary at the outset. First, by focusing on the Christian and Jewish traditions, I do not mean to suggest that the "Judeo-Christian" tradition should enjoy a privileged political position or to exclude other religious traditions from the dialogue. The argument in this essay is limited to those traditions with which I am most familiar.[4] Further, proponents of traditional marriage often invoke the "Judeo-Christian tradition" in support of legal norms defining marriage conventionally.[5] While I doubt that the Jewish and Christian traditions are quite as unified with respect to marriage as that slogan would suggest,[6] it is important to respond to the argument on its own terms.

Second, speaking of the "Christian tradition" or "Jewish tradition" with respect to marriage is perhaps a naïve enterprise because there are,

[4] In the interest of full disclosure, my roots are in the evangelical Protestant tradition and I claim no expertise in Jewish law or custom.

[5] *See, e.g.*, H.R. REP. NO. 104-664, at 16 n.54 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905 (defending Defense of Marriage Act on grounds that heterosexual marriage better comports with the "Judeo-Christian" tradition); *see also* Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U. L. REV. 21, 25 (2004); Martin E. Marty, *The Religious Foundations of Law*, 54 EMORY L.J. 291, 315 (2005).

[6] Noah Feldman argues that the very idea of a "Judeo-Christian" tradition is a fundamentalist Christian invention designed to broaden the political support base for the fundamentalist Christian agenda. *See* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005).

of course, *many* competing Christian and Jewish traditions, including many that concern the state's responsibilities with respect to marriage. As already noted, the Protestant Reformers tended to reject the sacramental nature of marriage recognized in Roman Catholic and Eastern Orthodox thought, which arguably paved the way for the establishment of marriage as a secular, legal institution. While acknowledging some of the tensions within the several traditions, this essay does not attempt to catalogue all of the relevant impulses or to provide a comprehensive historical account of marriage in Christian and Jewish thought. Rather, it seeks to muster dominant contemporary and historical themes from the two traditions in support of the privatization argument.

Third, there are, of course, many normative arguments against privatizing marriage that do not stem from religious doctrine or practice. Some feminists may argue that leaving marriage up to families or mediating institutions would render marriage a more oppressive institution to women. Some gays and lesbians may view closing down legal control of marriage just as they were about to gain access as akin to closing down public swimming pools in order to avoid integration.[7] These and other interesting normative arguments in favor of maintaining state control over marriage are outside the purview of this essay, which seeks exclusively to respond to one dominant argument in favor of continued legal control.

Finally, this essay does not address the question whether privatizing marriage would be practicable given how deeply entrenched marriage is in civil law. My colleague Edward Zelinsky ably addresses that question in his contribution to this mini-symposium,[8] and I leave my own arguments on that subject to another day. It is worth noting, however, that "practicability" arguments against privatizing marriage are often not about practicability at all, but rather about symbolism or cultural control. For example, the argument that loosening state control over marriage would lead to erosion of the family is not really about whether disentangling the state from marriage would be feasible but whether it would lead to undesirable cultural results. This essay is only about the theoretical desirability of privatizing marriage from the "Judeo-Christian" perspective, assuming that such privatization is possible.

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[7] *See* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that municipality's closing of public swimming pools in order to avoid desegregating the pools was motivated by racial animus against African-Americans and therefore unconstitutional).

[8] Edward A. Zelinksy, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); *see also* Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15.

I. MARRIAGE IN THE CHRISTIAN TRADITION

In St. Augustine's Platonization of Christian theology following the political adoption of Christianity by the Roman Emperor Constantine, Christians are simultaneously citizens of an earthly, temporal kingdom and a spiritual, transcendent kingdom and owe obligations to both spheres.[9] Augustinian dualism provided a lasting framework for Christian political thinkers to divide jurisdiction over various social enterprises between the rulers of the spiritual and temporal realms. An allocation of marriage to either spiritual or civil authorities was conceivable, and the two spheres have struggled mightily within Christendom for control over marriage and divorce. Although that battle has not always yielded conclusive winners, it is possible to locate within the Christian tradition what we lawyers refer to as the "better view" of the precedents: Marriage is an inherently spiritual activity whose legitimacy depends on the sanction of the Church and whose regulation requires the involvement of a Christian magistracy.

A. *Marriage in the New Testament*

1. Jesus on Divorce and Adultery

The search for "the authentic Christian tradition" is a perilous one, but there is no safer place to start than Jesus' teachings on marriage.[10] According to the Gospel accounts, Jesus showed an active interest in marriage,[11] performing his first miracle at a wedding festival in Cana.[12] Accounts of Jesus' direct teachings on marriage generally center on adultery and divorce. In the Sermon on the Mount, Jesus spoke against adultery[13] (extended to include looking lustfully at a woman) and against divorce (except in the case of adultery).[14] The Sermon on the Mount was one of the earliest public sermons of Jesus' career and it was attended by a large gathering.[15] Jesus' early teachings were thus widely

[9] AUGUSTINE, POLITICAL WRITINGS (Ernest L. Fortin & Douglas Kries eds., Michael W. Tkacz & Douglas Kries trans., 1994); *see generally* Jean Bethke Elshtain, *Why Augustine? Why Now?*, 52 CATH. U. L. REV. 283, 291-96 (2003).

[10] In saying this, I betray my Protestant bias for the primacy of scriptural text over tradition. But, as will become clear shortly, the Protestant half of the privatization argument is by far the harder, so my textualist bias comes in handy.

[11] Although he himself did not marry, except in *The DaVinci Code*.

[12] *John* 2:1-11. All citations of the Bible are to the New International Version.

[13] *Matthew* 5:27-30.

[14] *Matthew* 5:31-32.

[15] *Matthew* 5:1.

reported and made their ways to Jesus' perennial antagonists, the Pharisees.

It is in Jesus' encounter with the Pharisees over divorce that the Christian case for the privatization of marriage most strongly appears. *Matthew* 19 records that the Pharisees came to Jesus "to test him." They asked, "'Is it lawful for a man to divorce his wife for any and every reason?'"[16] The question was a trap, for the Pharisees knew that Jesus had already condemned divorce in the Sermon on the Mount, yet divorce was permitted by Mosaic law. Thus, Jesus would be forced either to repudiate his prior teaching on marriage or contradict Mosaic law, which would have diminished his credibility with his Jewish constituency.

Jesus answered by appealing to the Genesis prescription of marriage:

> "Haven't you read . . . that at the beginning the Creator 'made them male and female,' and said, 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh?' So they are no longer two, but one. Therefore, what God has joined together, let man not separate."[17]

These words, which were to become canonical in Christian wedding liturgy, reaffirmed Jesus' prior proscription of divorce. If God put a man and woman together, how could human law purport to take them apart?

The Pharisees rejoined by pointing out that the law of Moses permitted a man to divorce his wife, provided only that he give her a certificate of divorce.[18] Mosaic law did not restrict divorce to adultery. Indeed, the only condition specified was that the wife "becomes displeasing [to the husband] because he finds something indecent about her."[19] But this merely provided Jesus with the occasion to differentiate between the *spiritual* and *legal* institutions of marriage: "Moses permitted you to divorce your wives because your hearts were hard. But it was not this way from the beginning. I tell you that anyone who divorces his wife, except for marital unfaithfulness, and marries another woman commits adultery."[20] In other words, civil family law was merely an accommodation of human shortcomings, but it was not the ideal in marriage, nor did it reflect the moral foundations of marriage, which preexisted human legal institutions.

In line with his more general teaching that the "Kingdom of God" was spiritual rather than political, Jesus distinguished sharply between

16 *Matthew* 19:3.
17 *Matthew* 19:4.
18 *Matthew* 19:7.
19 *Deuteronomy* 24:1.
20 *Matthew* 19:8-9.

the civil and spiritual institutions of marriage. Significantly, the legal institution did not even do the minimum work necessary to prevent immorality. One could abide by civil rules of marriage and divorce and still, according to Jesus, be an adulterer. True marriage—the way God intended it "in the beginning"—required a completely different conceptualization than that afforded by civil law. Importantly, Jesus did not advocate reforming civil law to track his spiritual ideals of marriage, just as he did not advocate expanding the law of adultery to track his pietistic equation of mental lust and adultery. To the contrary, he defended an *actual* adulteress against execution of the sanction specified by the civil law (stoning).[21] The gospel accounts reflect a spiritualistic, rather than legalistic, rendering of marriage and sexuality and a sharp dichotomization between the spiritual and civil spheres of marriage.

2. St. Paul, the Bachelor, on Matrimony

The Apostle Paul, himself trained as a Pharisee, gave systematic shape to the New Testament doctrine on marriage, although there is occasionally some equivocation in the Pauline position on particular marital practices.[22] Paul, a bachelor, instructs the Corinthian church that it is better for a man not to marry so that he can devote himself to ministry, but permits marriage for the weak who cannot otherwise control their sexual passions.[23] By contrast, in his first epistle to his acolyte, Timothy, Paul instructs that younger widowed women *should* remarry[24] and seems to make marriage a criterion for elders and deacons.[25] In his first epistle to the Corinthians, Paul exhorts believers who are married to unbelievers not to divorce,[26] but in his second epistle to the Corinthians he instructs believers not to be "yoked" to unbelievers.[27] Regardless of any ambiguities in the development of a comprehensive Christian doctrine of marriage, Paul's frequent didactic instructions in his letters to geographically dispersed congregations

[21] *John* 8: 1-11. I should note that many of the earliest and most reliable manuscripts of the Gospel of John do not contain this passage, which raises questions as to its authenticity as an authoritative Scriptural text.

[22] I recognize that much modern critical scholarship disputes Paul's authorship of many of the "Pauline" epistles, just it questions whether Jesus actually spoke the words attributed to him in the Gospels. For the sake of the argument *from the Christian tradition*, however, the authenticity of the Scriptural canon must be assumed.

[23] 1 *Corinthians* 7.

[24] 1 *Timothy* 5:14.

[25] 1 *Timothy* 3:2.

[26] 1 *Corinthians* 7:12-14.

[27] 2 *Corinthians* 6:14-18.

institutionalize a Christian tradition of marriage apart from the prevailing secular legal norms of the gentile or Judaic worlds.

For present purposes, the more significant aspect of the Pauline tradition is not his effort to systematize Christian marital practices but rather his theological account of marriage as a mystical spiritual estate. Paul repeatedly refers to marriage as a grace-dispensing mechanism that reflects the mysteries of God's relationship with Israel and Christ's relationship with the church. In his epistle to the church in Rome, which consisted largely of Jewish converts to Christianity, Paul uses marriage to explain that Jewish Christians are no longer bound by Mosaic law.[28] The matrimonial bond dies with the death of the husband or wife, just as the Mosaic legal regime expires with the death of its subjects. In his epistle to the Ephesians, Paul exhorts spouses to "feed and care" for one another in love because the marriage relationship mystically represents the relationship between Christ and the church.[29] In I *Corinthians*, Paul uses the mystical relationship between Christ and individual believers—"your bodies are members of Christ himself"—as the grounds for his prohibition on sexual relations with prostitutes, which are an illicit form of marriage since sexual unions involve the partners becoming "one flesh."[30] In the Pauline tradition, marriage as a temporal human institution is inseparable from its spiritual representations. Hence the need for a uniquely Christian set of doctrines concerning marital practices.

The Pauline epistles unmistakably present marriage as a spiritual estate distinct from civil law. Other New Testament writings corroborate the Pauline account. The Apostle John infuses his eschatological vision in the Book of Revelation with marital imagery to describe the relationship between Christ and the church[31] and Christ and the New Jerusalem.[32] The church, the bride of Christ, is contrasted with "the kings of the earth" who commit adultery with Babylon.[33] Like Paul, John imagines the relationship between a husband and wife as an image of the greater truth of the redemptive relationship between Christ and his followers. In short, New Testament writings paint marriage as a thoroughly spiritual, albeit temporal, estate representative of transcendent and eternal moral truths.

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28 *Romans* 7:1-6.
29 *Ephesians* 5:22-33.
30 1 *Corinthians* 6:12-20.
31 *Revelation* 19:7.
32 *Revelation* 21:9.
33 *Revelation* 18:2-3.

B. *Marriage as Sacrament: The Catholic Tradition*

1. Hostility Toward Marriage and Sexuality in the Early Church

Before making the affirmative case for marriage as the sacred province of the church, it is necessary to address the currents in early Christian thought that viewed marriage as a disfavored estate. It is common to think that the early church repudiated and reviled marriage and sexuality, and there is some truth to that claim. Pronouncements by early church fathers articulating a preference for celibacy over marriage and disdaining marital sexuality abound.[34] A representative diatribe from the Acts of Thomas expresses disdain for marriage, sexuality, and children: "'Know that if you refrain from this filthy intercourse, you will become holy temples, pure, free of trials and difficulties, known and unknown, and you will not be drowned in the cares of life and of children, who lead only to ruin.'"[35]

Without engaging in an elaborate historical discussion of the reasons for this early hostility toward sexuality and marriage, three influences can be identified, none of which continued as part of the mainline Christian tradition beyond the earliest generations of Christianity.

First, taking literally Jesus' promise to return and New Testament writings admonishing Christians to live in the expectation of an imminent second coming, some early church fathers expressed a preference for celibacy in order to hasten Christ's return or because earthly things seemed unimportant in light of the impending rapture.[36] As decades, then centuries, passed without occurrence of the eschatological event, the church ceased to hold its breath for the second coming and began to focus on systematizing and implementing Christian doctrine. Any comprehensive code of morality and ethical living for the long run necessarily comprehended a greater appreciation of the importance of family and procreation—indeed, the growth of the church depended on it.

Second, Stoic philosophy's condemnation of sexual pleasure influenced the systematization of early Christian thought.[37] St. Jerome, for example, picked up on Seneca's belief that "[a]ll love of another's

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[34] *See generally* Glenn W. Olsen, *Progeny, Faithfulness, Sacred Bond: Marriage in the Age of Augustine*, *in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY 101-45 (Glenn W. Olsen ed., 2001) [hereinafter Olsen, *Progeny, Faithfulness*]; THEODORE MACKIN, MARRIAGE IN THE CATHOLIC CHURCH: THE MARITAL SACRAMENT 88-101 (1989).

[35] *Acts of Thomas*, *in* MARRIAGE IN THE EARLY CHURCH 57, 61 (David G. Hunter ed. & trans., 1992).

[36] DAVID MACE & VERA MACE, THE SACRED FIRE: CHRISTIAN MARRIAGE THROUGH THE AGES 59 (1986).

[37] Olsen, *Progeny, Faithfulness*, *supra* note 34, at 75; MACKIN, *supra* note 34, at 95-97.

wife is shameful; so, too, too much love of one's own wife. A wise man ought to love his wife with judgment, not affection."[38] Clement of Alexandria relied on Stoic philosophy to support his claim that sexuality should always be exercised in a purely rational manner, thus solely for procreative purposes.[39] While the Stoics did not disapprove of marriage *per se* and indeed made positive contributions to the ideal of family life, their distaste for sexual pleasure exerted a considerable influence over early Christian views of marital relations.

Third, Gnostic influences contributed significantly to early church aversion to sexuality and marriage.[40] The Gnostics were radical dualists who reviled the material world in favor of the spiritual.[41] It followed that relations of flesh, such as marriage, were condemned. Gnosticism was discredited by prominent church fathers including Irenaeus and Tertullian and was conceptually rejected in church dogma.[42]

To summarize, early Christian rejections of marriage generally stemmed from an expectation of Christ's imminent return which turned out to be wrong, importation of Stoic philosophy, or Gnostic thought condemned as heretical. While it may be triumphalist to claim that none of these influences represents the "genuine" Christian tradition, two thousand years of church history have turned the Christian tradition in a markedly different direction. The sacramental tradition, which highly reverences marriage, represents the far more dominant and consistent Christian position.

2. The Sacramental Tradition of the Roman Catholic Church

The claim that marriage is a Christian sacrament, akin to baptism and the Eucharist, provides the most compelling basis for Christian aversion to state control over marriage and insistence that the church, not the state, defines, sanctions, and regulates Christian marriage. Imagine a proposed constitutional amendment defining communion as the taking of the bread and cup in a particular order or on a particular day.[43] Or imagine a proposed constitutional amendment requiring that baptism be accomplished by sprinkling rather than immersion, or vice

38 MACKIN, *supra* note 34, at 95.

39 MARRIAGE IN THE EARLY CHURCH, *supra* note 35, at 41.

40 MACKIN, *supra* note 34, at 100-02.

41 For a general description of Gnostic beliefs during the patristic era, see RIEMER ROUKEMA, GNOSIS AND FAITH IN EARLY CHRISTIANITY: AN INTRODUCTION TO EARLY CHRISTIANITY (John Bowden trans., 1999).

42 *See* DONALD K. MCKIM, THEOLOGICAL TURNING POINTS: MAJOR ISSUES IN CHRISTIAN THOUGHT 26-30 (1988).

43 It bears remembering that, during Prohibition, a special exception had to be made to ensure that Catholics and other Christian communities could continue to use wine for communion. *See* National Prohibition Act, ch. 85, Title II, §6, 41 Stat. 305, 311 (1919).

versa.[44] Such state interference with religious rituals would be shocking in the United States, given its longstanding rejection of governmental establishment of religion.

We are now so accustomed to thinking of marriage as civilly ordained that the comparison to baptism and the Eucharist may seem strained. But it would not have seemed odd to Christian thinkers for hundreds of years of church history, and the comparison finds ample support in the continuing dogma of the Catholic and Eastern Orthodox churches as well as many Protestant denominations. For marriage, like baptism and the Lord's Supper, is considered a sacrament—a mysterious means of dispensing God's grace to believers.

The sacramental understanding of marriage emerged early in church history, although it was not until the middle ages that marriage was theologically formalized as a sacrament. As one authority on sacramental marriage writes, "[t]he induction of marriage into the ranks of the Christian sacraments was a long and gradual process."[45] It is difficult to identify the moment that marriage emerged as a Christian sacrament both because Christian theology was developed through a series of long-simmering conflicts culminating in ecclesiastical councils and creeds, and because it is easy to misunderstand, or misuse, the words chosen by Christian writers over centuries of theological and etymological development.

For instance, the patristic authority Tertullian, writing in the late second century, described marriage as a "sacramentum" and expressly understood the marital relationship as a vehicle for the dispensation of grace: "If then such a marriage as this is affirmed by God, why should it not go on happily? Why should it not be spared wounding from sorrows and tensions and obstacles and sins, since it goes on in the patronage of God's grace."[46]

Yet Tertullian, like many other early Christian authorities, probably did not understand marriage as a formal sacrament of the church in the same category as baptism and the Eucharist.[47] His chief concern was with explaining the relationship between Christ and the church through the metaphor of marriage rather than exploring human marriage on its own.[48]

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[44] Indeed, such was the prerogative of the Church of England against which Madison, Jefferson, and other founders reacted in proposing the disestablishment of religion. *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE TO RELIGIOUS LIBERTY 53-54 (1990).

[45] MACKIN, *supra* note 34, at 120; *see generally* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997).

[46] MACKIN, *supra* note 34, at 120-21 (citing 2 TERTULLIAN, AD UXOREM, Chap. 7, PL 1:1299).

[47] *Id*. at 122.

[48] *Id.* Writing in about 365 A.D., Bishop Zeno of Verona also used "sacramentum" to describe Christian marriage and seems to have understood the term to refer specifically to human

Writing a century later, St. Augustine also touched on marriage, also described it as a sacrament, and also left some doubt as to whether marriage was included in the list of high ecclesiastical sacraments.[49] The trouble is that Augustine used many distinct words—figure, allegory, prophecy, symbol, ritual, mystery, sacrament—loosely and interchangeably.[50] Although, for Augustine, marriage was undoubtedly a sacrament, "sacrament" could describe almost any "observable manifestation or enactment of a sacred reality" or, in a secondary sense, "sensately observable things and actions as symbols or figures or images of invisible sacred realities."[51] Thus, even uses of "Amen" and "Alleluia" could be considered sacraments.[52]

It would be possible to lose the forest for all the trees in attempting to pin down the precise theological meanings of the early Christian writers. Whether Augustine understood marriage sacramentally as later church creeds explicitly designated it, he clearly understood Christian marriage as distinct from the civil institution of marriage. Augustine frequently wrote of the three-fold good of marriage. In his essay *On Marriage and Concupiscence*, he expressed the three-part good as follows: "Fertility makes marriage good; its fruit is offspring. Chastity makes it good; its bond is fidelity. And a certain *sacramentum* also makes it good where the marriage is of Christians."[53] While marriage was a good for all, its ultimate good was limited to Christian marriage. The limitation of the sacrament to Christian marriages has often been reaffirmed throughout church history, providing a compelling reason for a Christian understanding of sacramental marriage limited to Christians. Writing shortly before Augustine, Ambrose, Bishop of Milan, adjudged that the sacrament would be absent in any marriage between a Christian and a "pagan," since Biblical law prohibited such marriages.[54]

By the dawn of the middle ages, the association of marriage and sacrament was firmly engrained in writings by prominent Christian thinkers. This association appears in Jerome (fifth century),[55] Pope Leo I (fifth century),[56] Rabanus Maurus (eighth century),[57] Gratian (twelfth century),[58] Hugh of St. Victor (twelfth century),[59] and Thomas Aquinas

marriage and not merely the spiritual relationship between Christ and the church. *Id.* at 167.

49 MACKIN, *supra* note 34, at 197-226.

50 *Id.* at 197.

51 *Id.* at 198.

52 *Id.*

53 *Id*. at 220.

54 *Id*. at 193.

55 *Id*. at 245.

56 *Id.* at 261.

57 *Id.* at 248-50.

58 *Id.* at 288-89.

59 *Id.* at 299-301.

(thirteenth century).[60] By the twelfth century, the sacramentality of marriage came to rest firmly and permanently in the official dogma of the Catholic Church. The Second Lateran Council (1139) listed marriage as a sacrament[61] and by the Fourth Lateran Council (1215) marriage formally became the seventh in the iconography of the seven sacraments.[62] This iconography survives to this day in the theology of the Catholic and Eastern Orthodox churches.[63] Canon 1055 in the revised code of canon law, which became effective in 1983 under Pope John Paul II, provides:

> 1. The matrimonial covenant, by which a man and a woman establish between themselves a *consortium* of the whole life, is by its nature ordered to the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of sacrament.
>
> 2. For this reason a matrimonial contract cannot validly exist between baptized persons unless it is also a sacrament by that fact.[64]

As marriage was recognized as a spiritual institution, it followed that the church, and not political rulers, should control it.[65] Not long after the close of the patristic age and Constantine's legalization of the Christian religion in the Roman Empire, the church gradually began to assert control over marriage and divorce. As the power of the church grew, so did its ability to supplant local custom and practice in favor of uniform religious control over family law.

In the early years, the church had to peddle its influence with civil rulers to seek promulgation of family laws consistent with Christian doctrine. For example, the Eleventh Council of Carthage, held in June of 407, issued a canon prohibiting remarriage by divorced persons and calling for the promulgation of an imperial law on this subject.[66] As the power of the church grew, it gradually sought to establish control over marriage directly.[67] By 1563, the Decree on Matrimony that emerged from the Council of Trent (in reaction to the Protestant Reformation)

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60 *Id.* at 334-45, 353-56.

61 *Id.* at 318.

62 Glenn W. Olsen, *Marriage in Barbarian Kingdom and Christian Court: Fifth Through Eleventh Centuries*, *in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY, *supra* note 34, at 164, 174 [hereinafter Olsen, *Marriage*].

63 JOHN MEYENDORFF, BYZANTINE THEOLOGY: HISTORICAL TRENDS AND DOCTRINAL THEMES, 196-99 (1983) (describing Eastern Orthodox theology of marriage).

64 THE CODE OF CANON LAW: A TEXT AND COMMENTARY (James A. Coriden et al. eds., 1985).

65 For a discussion of the relationship between the sacramental view of marriage and the assertion of ecclesiastical jurisdiction over family law matters, see MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 26 (1989).

66 MACKIN, *supra* note 34, 252-43.

67 GLENDON, *supra* note 65, at 23-25.

declared: "If any one saith, that matrimonial causes do not belong to ecclesiastical judges; let him be anathema."[68] Since the Council of Trent, the Catholic Church has consistently maintained that marriage is both a formal and ecclesiastical matter, meaning that marriage should be ritualized and that the church should control the rituals.

To be sure, the church did not always obtain or retain the juridical control over marriage that it sought. The history of the power struggles between popes, on the one hand, and kings, emperors, and local practices, on the other, is long and complex. What is most interesting for present purposes is not the degree of success enjoyed by the church in asserting jurisdiction over marriage but rather the fact that it consistently sought to do so. Consistent with the sacramental view, marriage could not be left to the control of civil rulers.

In a June 1, 1879 letter to the Italian bishops of Piedmonte, Pope Leo XIII reaffirmed the church's jurisdiction over marriage in words highly relevant to the contemporary marriage debate:

> The conjugal union is not the work or invention of man; God himself, the Supreme Author of nature, from the beginning of creation, ordained such a union for the propagation of the human race and the constitution of the family. In the order of grace, He willed this union be further enriched by imposing on it the divine seal of a sacrament[.] Therefore, insofar as the substance and sanctity of the bond are concerned, marriage for Christian jurisprudence is an essentially sacred and religious act, the regulation of which naturally belongs to the religious power, not by a delegation of the State, nor by consent of the Princes, but by the mandate of the Divine Founder of Christianity and Author of the sacraments.[69]

The teaching of the Catholic church leaves little doubt that matrimony is sacramental and is the province of the church, not the state.[70]

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[68] THE CANONS AND DECREES OF THE COUNCIL OF TRENT, THE TWENTY-FOURTH SESSION 196 (J. Waterworth trans., 1848); *see generally* Olsen, *Marriage*, *supra* note 62, at 172.

[69] Letter from Pope Leo XIII to the Episcopate of the Ecclesiastical Provinces of Turin, Vercelli, and Genoa (June 1, 1879), *in* PAPAL TEACHING: MATRIMONY 126-27 (The Benedictine Monks of Solesmes eds., Michael J. Byrnes trans., 1963).

[70] Some proponents of same-sex marriage have argued that same-sex marriages can be fully sacramental and therefore are worthy of recognition. *See* Gary Chamberlain, *A Religious Argument for Same-Sex Marriage*, 2 SEATTLE J. FOR SOC. JUST. 495, 501-02 (2004); EUGENE F. ROGERS, JR., SEXUALITY AND THE CHRISTIAN BODY: THEIR WAY INTO THE TRIUNE GOD 242 (1999). In a secular state committed to the separation of church and state, the merits of such an argument must be left to private citizens and associations. Any argument about whether or not same-sex marriage is properly viewed as sacramental underscores the need to have decisions about marriage eligibility resolved outside the governmental sphere.

C. *Companionate Marriage: The Protestant Tradition*

Scholars often maintain that the Protestant Reformation of the Sixteenth Century spelled the end of church control over marriage by desacramentalizing it and making it a companionate relationship based on affection rather than a mystical vehicle of God's grace.[71] As John Witte writes, summarizing the Calvinist and Lutheran positions: "As part of the earthly kingdom, marriage was subject to the state, not the church. Civil law, not canon law, was to govern marriage. Marriage was still subject to God's law, but this law was not to be administered by magistrates who were God's vice-regents in the earthly kingdom."[72] Similarly, Mary Ann Glendon has noted that the very idea of marriage as a civil institution, unknown to the Romans and medieval scholastics, arose during the Reformation.[73]

The claim that Protestantism laid the foundation for the secularization of marriage poses an obstacle to the effort to articulate a convincing "Judeo-Christian" argument that the structuring and regulation of marriage should be left to mediating institutions such as churches, synagogues, and religious institutions. In its strongest form, this historical perspective suggests a fracturing of the "Christian" half of the tradition into Protestant and Catholic camps (before we have even inquired whether there is cohesion on marriage between the Christian and Jewish traditions). On the one hand, the Catholic sacramental tradition requires a strong role for the church in the regulation of marriage as a religious institution, while, on the other, the Protestant social tradition views the state as the primary custodian of matrimony as a civil institution.

As with the claim that the early church fathers reviled sexuality and marriage, there is a significant strand of truth in the claim that Protestantism played a role in the secularization of marriage and its consequent reification as a civil institution. Yet, for at least three reasons, the Protestant tradition with respect to matrimony need not be understood to stand in opposition to a spiritual understanding of

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[71] *See, e.g.*, Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 243 (2004) ("While Protestants rejected the sacramental aspect of marriage, the public aspects and social aspects of marriage were strengthened in the Protestant traditions which resulted in state secular assumption of the power to confer the legal benefits of marriage."); John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1052 (2001) ("Protestants gave no place to the marital good of sacramentum—either in the Augustinian sense or symbolic stability or in the medieval Catholic sense of a permanent channel of sanctifying grace."); John Witte, Jr., *God's Joust, God's Justice: An Illustration from the History of Marriage Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 406, 414-16 (Michael W. McConnell et al. eds., 2001).

[72] WITTE, *supra* note 45, at 5-6.

[73] GLENDON, *supra* note 65, at 15.

marriage nor to lay the groundwork for civil control over that institution in the post-modern liberal state.

1. Ambiguity in the Protestant Theological Tradition

Even as a matter of pure theological doctrine, the Protestant rejection of the sacramental character of marriage is not as unequivocal as one might take it to be simply from reading selections from writings by some Reformers. Even within the writings of the two most prominent Reformers, Martin Luther and John Calvin, one finds ambiguity about the extent to which marriage among Christians is different in kind from marriage among unbelievers. While both men denied to some degree that marriage should be understood as a sacrament, both also asserted that marriage has a strongly spiritual character.

Calvin vehemently denied the sacramentality of marriage, observing that marriage is "a good and holy ordinance of God[,]" but no more so than "agriculture, architecture, shoemaking, and shaving[.]"[74] Nonetheless, when writing about the evil of adultery, Calvin found that marriage was instituted by God, "sanctified with his blessing[,]" and "entered into under his authority[.]"[75] As discussed below, Calvin also ensured a prominent role for the Geneva consistory—an essentially religious body—in the adjudication of family law matters.

Luther, more than Calvin, vacillated on the sacramental question. First, he asserted that marriage is *not* a sacrament: "[S]ince marriage has existed from the beginning of the world and is still found among unbelievers, there is no reason why it should be called a sacrament of the New Law and of the church alone."[76] Writing a year later, however, Luther appeared to say the opposite:

> The holy apostle Paul says that as man and wife united in the estate of matrimony are two in one flesh, so God and man are united in the one person Christ, and so Christ and Christendom are one body. It is indeed a wonderful sacrament, as Paul says [Eph. 5:32], that the estate of marriage truly signifies such a great reality.[77]

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74 JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 646-47 (Henry Beveridge trans., 1989).

75 *Id*. at 348.

76 MARTIN LUTHER, *The Babylonian Captivity of the Church*, *in* 36 LUTHER'S WORKS: WORD AND SACRAMENT II 11, 92 (Abdel Ross Wentz & Helmut T. Lehmann eds., A.T.W. Steinhauser trans., 1959).

77 MARTIN LUTHER, *A Sermon on the Estate of Marriage*, *in* 44 LUTHER'S WORKS: THE CHRISTIAN IN SOCIETY I (James Atkinson & Helmut T. Lehmann eds., James Atkinson trans., 1966).

Perhaps Luther would respond that the devil is in the details of language and that, just as with Augustine, the word "sacrament" can be used in a variety of different ways depending on the context. Nonetheless, it is apparent that Luther and his associates did not view marriage as a merely social convention equally beneficial to Christians and non-Christians. Philip Melanchthon, the early systematizer of Lutheran theology, wrote that "matrimony, which is a very lovely, beautiful fellowship and church of God, if two people in true faith and obedience toward God cheerfully live together, together invoke God, and rear children in the knowledge of God and virtue."[78] Whether marriage was sacramental in a strict theological sense, it was an institution constituted by God, not man, and uniquely suited for the needs of Christians.

Of course, it is not sufficient to rest a dissection of the Protestant tradition on Luther and Calvin. Protestantism, like Judaism, is difficult to pigeonhole theologically because there is no centralized authority accountable for religious doctrine. In contrast to traditional Catholic teaching, Protestantism insists on the priesthood of all believers, lay interpretation of scripture, and the primacy of scripture over tradition.[79] In consequence, there are many instances of "the Protestant tradition."

Despite the resistance of some early Protestants to the sacramental understanding of marriage, later Protestants continued to understand marriage as a mysterious, if not strictly sacramental, institution. The English poet and preacher John Donne, an Anglican, wrote:

> Marriage amongst Christians, is herein *Magnum mysterium,* A Sacrament in such a sense; a mysterious signification of the *union of the soule* with Christ; when both persons professe the Christian Religion, in *generall*, there arises some signification of that spirituall union: But when they both professe Christ in *one* forme, in one Church, in one Religion, and that, the right; then, as by the *Civill Contract*, there is [a] union of their *estates*, and *persons*, so, as that they two are made one, so by this *Sacramentall*, this mysterious union, these two, thus made one, between themselves, are also made one with Christ himself; by the *Civill* union, common to all people, they are made *Eadem caro*, The same flesh with one another; By this mysterious, this Sacramentall, this significative union, they are made *Idem Spiritus cum Domino*; The same Spirit with the Lord.[80]

Donne's rendering of marriage has been said to "embody the Protestant dilemma regarding marriage: the poet makes a private,

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[78] MELANCHTHON ON CHRISTIAN DOCTRINE: LOCI COMMUNES 1555, 323 (Clyde L. Manschreck ed. & trans., 1965).

[79] For a concise discussion of the Protestant and Catholic traditions, surveyed through the parallel lens of constitutional law, see SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

[80] 8 THE SERMONS OF JOHN DONNE 104 (Evelyn M. Simpson & George R. Potter eds., 1956).

personal sacrament of his own transfigured desire; the preacher tries to salvage something of the unique holiness of Christian marriage without embracing the full sacramental theology of the Catholic Church."[81] Significantly, marriage retained a sacramental function that was uniquely available to Christians, even though Christians could achieve the sacrament through civil marriage.

John Milton pilloried Protestant rejection of the sacramental character of marriage, albeit with a different motivation. In *The Doctrine and Discipline of Divorce*, Milton pointed out the inconsistency between denying the grace-dispensing function of matrimony while continuing to prohibit divorce. According to Milton, Protestant theologians

> dare not affirm that marriage is either a Sacrament, or a mystery, . . . and yet they invest it with such an awfull sanctity, and give it such adamantine chains to bind with, as if it were to be worshipt like some *Indian* deity, when it can conferre no blessing upon us, but works more and more to our misery.[82]

If marriage is merely a human institution, then it is difficult to understand how men and women can be expected "to grind in the mill of an undelighted and servil copulation . . . with such a yokefellow, from whom both love and peace, both nature and Religion mourns to be separated."[83] Milton was writing in favor of liberalizing divorce laws and therefore intended to tweak Protestant theologians with their own theology rather than advocate the sacramentality of marriage. But the force of his point works equally in reverse. If Protestantism continued to oppose divorce, it needed to provide some compelling reason why marriages should continue to hold together despite the travails of married life. The sacramental tradition—the view that God's grace could overcome marital strife and bring unique blessing through the "one flesh" of marriage—provided a complete response.

Surveying prominent Protestant authorities on marriage, it is possible to locate a distinctive Protestant tradition that is both ambivalent toward the sacramental understanding of marriage yet insistent that marriage remains a spiritual institution. One does not find the Reformers opining that marriage belongs wholly to the Kingdom of Man or that it is a merely temporal institution without spiritual ramifications. To the contrary, Protestantism continued to respect the uniqueness of Christian marriage, whatever the theological problems of referring to it as a sacrament.

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[81] R.V. Young, *The Reformations of the Sixteenth and Seventeenth Centuries*, *in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY, *supra* note 34, at 269, 291.

[82] JOHN MILTON, *The Doctrine and Discipline of Divorce*, *in* 2 COMPLETE PROSE WORKS OF JOHN MILTON 217, 277-78 (Ernest Sirluck ed., 1959) (internal citations omitted).

[83] *Id*. at 258 (internal citations omitted).

2. The Political Practices of the Reformers

A second reason that it would be erroneous to think that the Reformation is primarily responsible for the secularization of marriage is that, in structuring their earthly political kingdoms, the Reformers continued to assign the church an important role in constituting and regulating marriage. As Luther explained, "'[i]t is sheer folly'" to treat matrimony as "'nothing more than a purely human and secular state, with which God has nothing to do.'"[84] Thus, in the north European principalities that adopted Lutheranism, churchmen and theologians were considered indispensable in formulating matrimonial law.[85] Although civil authorities nominally had jurisdiction over marriage and family law, they adopted a practice of steady consultation with clergymen and canon law experts on family matters.[86] The religious authorities did not merely weigh in on generalized theological questions but issued advisory opinions on the proper resolution of litigated matrimonial cases.[87] As Mary Ann Glendon notes, "although Luther and others had claimed that marriage was properly subjected to the control of civil, rather than church, courts, they never dreamed that it would be regulated according to other than Christian principles."[88]

Calvinist Geneva—constituted as a Christian commonwealth—followed an even closer path of engagement between civil and ecclesiastical authorities. The 1545 Marriage Ordinance assigned the consistory—on which Calvin sat as Moderator of the Company of Pastors—a primary role in the adjudication of matrimonial litigation.[89] Under the ordinance, "'[a]ll matrimonial causes concerning personal relationships and not goods shall receive attention in the first instance in the consistory where an amicable solution, if one can be found, shall be effected in the name of God.'"[90] Only if a greater degree of coercion in the form of an actual judicial sentence were required would the matter be referred to the Council, the civil magistracy.[91] Apparently, referral was rarely made to the Council,[92] suggesting that the consistory's moral suasion was strong (if not the reality that appeal to the Council was unlikely to produce a different outcome). As John Witte observes, Calvin's covenantal theology of marriage "add[ed] a spiritual dimension to marriage life in the earthly kingdom, a marital obligation to spiritual

84 WITTE, *supra* note 45, at 52 (quoting Luther).
85 *Id.* at 53-54.
86 *Id.*
87 *Id.* at 54.
88 GLENDON, *supra* note 65, at 31.
89 WITTE, *supra* note 45, at 87-88.
90 *Id.* at 87.
91 *Id.*
92 *Id.*

life in the heavenly kingdom, and complementary marital roles for both church and state in the governance of both kingdoms."[93] Whatever Calvin's denial of the sacramental nature of marriage, it would have been unthinkable in Calvinist Geneva to delegate jurisdiction over marriage solely to the state without strong collaboration from the church.

Post-Reformation practice in England also tended to assign a great deal of authority over marriage to the Church. Of course, the Reformation came to England as the result of a political fight over marriage—Pope Clement VII's refused to permit Henry VIII to divorce Catherine of Aragon so that he could marry Anne Boleyn. The immediate effect of the Act of Succession and Supremacy Act of 1534 was to install the British monarchy as supreme over the Church of England. The 1533 Act in Restraint of Appeals declared that "'all causes of matrimony and divorces'" would lie exclusively "'within the King's jurisdiction and authority.'"[94] In practice, however, ecclesiastical courts continued to exercise plenary control over matrimonial matters throughout the sixteenth and seventeenth centuries, interrupted only briefly between 1640 and 1660 by the Puritan Commonwealth.[95]

In this regard, it is interesting to consider the significance for the privatization argument of the 1753 Act for the Better Preventing of Clandestine Marriages, popularly known as Lord Hardwicke's Act. Seeking to formalize the process of marriage, the Act invalidated all marriages not preceded by an official ecclesiastical license and by the calling of banns in the Anglican Church.[96] As Mary Anne Case observes, when "the English state finally and definitively asserted control over marriage, it did so through its Established Church."[97]

Despite the anti-sacramental and social ideology of the Reformers with respect to marriage, the Reformers and their heirs did not divorce matrimony from the church nor relegate ecclesiastical authorities to a position far below the one they enjoyed with respect to family law during medieval times. To the extent that civil, rather than ecclesiastical, courts obtained jurisdiction over matrimonial matters, the Reformers assumed that the civil courts would consist of a Christian magistracy. The secularization of marriage, although perhaps enabled in various ways by the Reformation, occurred later and as a result of different social forces.[98]

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93 *Id.* at 111.

94 *Id.* at 154.

95 *Id.* at 164.

96 Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1767 (2005).

97 *Id.*

98 In particular, the anti-clericism of the French Revolution played a significant role in moving marriage into a purely secular category such that ecclesiastical marriage became

3. The Rise of Contractarian Theories of Marriage

A third reason that the Protestant tradition comfortably supports the privatization of marriage is that Protestant thinkers contributed to recasting marriage in contractarian terms. As I discuss further below, the interplay of the sacramental and contractarian models of marriage makes privatizing marriage the optimal solution for Christians in the modern liberal state. If marriage among Christians is the province of the church, and yet the church cannot claim a role in regulating marriage without the consent of the couple in a secular state, then contract becomes the vehicle by which the church reprises its authority over Christian marriage. Thus, the Protestant understanding of marriage as agreement provides a crucial ingredient in the privatization argument.

As a general matter, Protestantism stressed individual choice and accountability and the importance of personal conscience. In Max Weber's words, Calvinism in particular accentuated "individualistic motives of rational legal acquisition by virtue of one's own ability and initiative."[99] This individualistic and acquisitive ideology influenced the development of matrimonial law and culture by recasting marriage as an individually created estate. Further, Protestantism's egalitarian ethos empowered the consent of the woman to equal the consent of the man as the foundation of a marital contract. In tandem, these aspects of Protestant ideology enabled the development of a contractarian view of marriage.

Many of the Protestant political writers of the Seventeenth and Eighteenth centuries addressed marriage as part of broader social contractarian discourses. For instance, Samuel Pufendorf, a Seventeenth Century Lutheran, built a natural law argument for marriage as a contractual institution. Writing in reaction to Hobbes's argument for a sovereign of unlimited power, Pufendorf cast the individual as the original sovereign who could alienate aspects of his sovereignty through voluntary undertakings. In the natural state, every man and woman is equal in sovereignty to every other and has no claim over the body of any other.[100] Nonetheless, the Creator had ordained the "commingling of bodies" as the exclusive means of procreation and "implanted in the sexes a mutual propensity and strong impulses toward

irrelevant from the state's perspective. James Hitchcock, *The Emergence of the Modern Family*, *in* CHRISTIAN MARRIAGE: A HISTORICAL STUDY, *supra* note 34, at 302, 317-18; Daniel Borrillo, *Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J.L. & FEMINISM 89 (2005); GLENDON, *supra* note 65, at 71.

[99] MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 179 (Talcott Parsons trans., Charles Scribner's Sons 1958) (1905).

[100] THE POLITICAL WRITINGS OF SAMUEL PUFENDORF 198-200 (Craig L. Carr ed., Michael J. Seidler trans., 1994).

one another."[101] In order to fulfill the Creator's design without violating natural law, "whatever right a male has over a female, as over someone equal to himself, must be acquired from her consent."[102]

Foremost among the Protestant contractarians is John Locke, whose social contractarian view provided a model not only for political legitimacy but also for the legitimacy of marriage. In his *Two Treatises on Government*, Locke argued that men and women were free and equal in the state of nature and would, of necessity, enter into compacts to secure the benefits of joint assistance and fellowship.[103] In this way, the marital contract that constituted the family resembled the social contract that constituted the government—a ground-up construction based on consent and delegation. Just as a people were free to delegate greater or lesser power to their government through the social contract, a couple should be free to delineate the scope of rights and responsibilities attendant to their unique relationship: "*Conjugal Society*, might be varied and regulated by that Contract, which unites Man and Wife in that Society, as far as may consist with Procreation and the bringing up of Children[,] nothing being necessary to any Society, that is not necessary to the ends for which it is made."[104]

The importance of Protestant thought in the development of the contractarian model of marriage should not be exaggerated. On the one hand, consent had long been an important ingredient in the Catholic matrimonial tradition (often juxtaposed with consummation),[105] although the consent of the paterfamilias might be more important than that of the woman. On the other hand, the Reformers resisted the characterization of marriage as a purely contractual event. Calvin, for example, contrasted marriage to other kinds of contracts. Choice with respect to marriage was limited to the question *whether* to marry (since marrying might sometimes be a religious obligation) and *who* to marry.[106] Otherwise, the default rules were mandatory.

To the extent that Locke in particular articulated a much more expansive contractarian view than the Reformers, it is fair to ask whether his views represent the conventional Protestant tradition or Enlightenment innovation. By the time of John Stuart Mill's even more aggressively contractarian arguments about marriage a century and a half later,[107] the argument had clearly shifted from the vestiges of the Reformation to beginning of modernity. Yet the role of Protestantism

101 *Id.* at 198.

102 Pufendorf adds "or through a just war," a caveat that need not concern us here. *Id.* at 199.

103 JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., Cambridge at the Univ. Press 1960) (1698).

104 *Id.* at 340.

105 Olsen, *Marriage*, *supra* note 62, at 158-62.

106 WITTE, *supra* note 45, at 110.

107 *See id.* at 200-02.

in thinking about the autonomy of the individual and the importance of voluntariness should not be neglected. By decentralizing authority from the clergy to the laity and deputizing every Christian as an equal interpreter of Scripture, the Reformation laid the groundwork for an individualistic and contractarian approach to marriage.

D. *Reconstructing the Christian Tradition*

The Christian tradition with respect to the sacramentality, and hence spirituality, of marriage and the appropriate allocation of responsibilities between the state and the church is complex and varied. Although there are distinctive Catholic and Protestant traditions, their respective legacies for modernity in general, and the privatization question in particular, are ambiguous. For instance, although the Catholic tradition's insistence on the sacramentality of marriage could be read to support a reversion to private ordering under the auspices of the church rather than the state, one could also view the Catholic matrimonial tradition as authoritarian and anti-individualistic, and hence uncomfortable with a "privatized" system based largely on individual choice. On the other hand, although the Protestant Reformers arguably set in motion forces that led to the secularization of marriage and hence civil control, it could be argued that the individualistic, contractarian, and tolerationist themes of Protestant theology ultimately enabled the existence of a privatized matrimonial system whereby religious authorities could be empowered to play an important role.

Indeed, it is not uncommon to observe modern Catholics arguing for greater state control over marriage and modern Protestants arguing for less. The example of two great Christian writers of the twentieth century, J.R.R. Tolkien, a Catholic, and C.S. Lewis, an Anglican, provides a case in point. During his war-time radio talks, Lewis defended the liberalization of England's divorce laws, arguing that there are "'two distinct kinds of marriage; one governed by the State with rules enforced on all citizens, the other governed by the Church with rules enforced by it on its own members.'"[108] Indeed, Lewis married Joy Davidman, an American divorceé, in a civil ceremony simply to assist her in gaining residency status in England. Lewis considered the civil marriage irrelevant to his moral relationship with Davidman, and did not live with her or otherwise hold himself out as married. Later, Lewis fell in love with Davidman and married her in an ecclesiastical ceremony. To Lewis, it was undoubtedly the second ceremony, not the

[108] COLIN DURIEZ, TOLKIEN AND C.S. LEWIS: THE GIFT OF FRIENDSHIP 156 (2003).

first, that made him Davidman's husband. For Lewis, civil marriage was unimportant and ecclesiastical marriage everything.

Tolkien, an academic colleague of Lewis's who played a significant role in Lewis's conversion to Christianity, privately disapproved of Lewis's relationship with Davidman and publicly disputed Lewis's separation of marriage into legal and spiritual spheres. Tolkien argued that "'[n]o item of compulsory Christian morals is valid only for Christians.'"[109] Lewis's arguments for separation between secular and religious marriage amount "'merely to a way of (perhaps?) getting an extra mileage out of a few selected machines.'"[110] For Tolkien, "'[t]oleration of divorce—if a Christian does tolerate it—is toleration of a human abuse.'"[111]

Both Lewis and Tolkien could lay claim to strands within the "authentic Christian" tradition supporting their respective views. I have argued elsewhere that Lewis's view is more consistent with core values of the Christian tradition.[112] But I need not be right about that to make the Christian case for privatizing marriage. Even if both views enjoy equally strong support in the historical traditions of Christianity, there remains the question of which view provides the best case for the flourishing of Christian marriage in the post-modern secular state. I shall answer that question in Part III. But first, an inquiry into the other half of the "Judeo-Christian" tradition is required.

II. MARRIAGE IN THE JEWISH TRADITION

At the outset, it is worth observing that the "Judeo-Christian" argument for privatizing marriage does not depend on any supposed equivalence between Jewish and Christian notions of marriage. Indeed, the differences are many and significant. There is no correspondence in the Jewish tradition for the early, and to some degree persistent, Christian ambivalence toward sexuality and marriage. The Jewish view of marriage is unequivocally positive. In the Jewish tradition, "[m]arriage is wholesome fulfillment, a sacred bond, an inherent good, a divine command."[113] Indeed, drawing on the Genesis command "Be fruitful and multiply," Jewish law prohibits celibacy and affirmatively mandates marriage and procreation.[114] On the other hand, Jewish law

109 *Id*. (quoting Tolkien).
110 *Id*. (quoting Tolkien).
111 *Id*. (quoting Tolkien).
112 Daniel A. Crane, *Pick Your Shibboleths Wisely*, CHRISTIANITY TODAY, Oct. 2004.
113 Eugene Mihaly, *The Jewish View of Marriage*, *in* THE JEWISH MARRIAGE ANTHOLOGY 290 (Philip Goodman & Hanna Goodman eds., 1965).
114 Solomon Schechter, *Prohibition of Celibacy*, *in* JEWISH MARRIAGE ANTHOLOGY, *supra* note 113, at 303, 303-04.

does not sacramentalize marriage in the way that at least the Catholic tradition does.[115] Jewish marriage looks more contractarian and social.[116]

Recognizing that the Jewish tradition differs considerably from the Christian, it is nonetheless possible to find an important parallel with respect to the question of which entity should control the marital institution—the state or the religious community. For Judaism, like Christianity, maintains that marriage among Jews is its province and not the state's.

The argument from the Jewish tradition for privatizing marriage proceeds in two parts. First, Halakhah views Jewish marriage as a religious function and considers civil marriage largely irrelevant to the marital status of Jews. Second, the Noahide Code, while requiring decent marital standards for a person to be considered "righteous," does not require that the act of marrying be controlled by the state. Thus, Jewish law both seeks to protect the right of the Jewish community to control its own marriages and does not require other communities to have their marriages controlled by a central sovereign power.

A. *The Irrelevance of Civil Marriage to Marriage Between Jews*

According to Maimonides, Jewish marriage consists of two stages: (1) betrothal (*kiddushin*) and (2) nuptials (*chuppah*).[117] Each of these stages is subject to a long litany of rules and traditions. Similarly, the responsibilities of spouses to one another following marriage and their entitlement to, and privileges upon, divorce are heavily regulated by Jewish law. Jewish marriage "must follow the process ordained by 'the laws of Moses . . . and of Israel,' the Oral Law as developed by the teachers in the Talmud, Codes, and Responsa."[118]

It follows that Jewish law presumptively does not recognize the legitimacy of civil marriages between Jews. Jewish resistance to civil marriage finds numerous iterations, in large part because of historical efforts by European and other governments to force Jews to undergo civil marriage ceremonies.[119] The halakhic "authorities agree that civil

115 Philip Goodman & Hanna Goodman, *Preface* to the JEWISH MARRIAGE ANTHOLOGY, *supra* note 113, at viii (observing that "Jewish matrimony is not comparable to a 'sacrament' performed by a priest, for it is the Jewish bridegroom who weds the bride under the guidance of a rabbi or another qualified person").

116 For a fuller comparison of Christian and Jewish views of marriage, see MAURICE LAMM, THE JEWISH WAY IN LOVE AND MARRIAGE, at xiv, 162 (1980).

117 *Id.* at 146.

118 *Id.* at 169.

119 *Id.* at 170.

marriage is a violation of the [Jewish] law"[120] and a "couple's participation in civil marriage is taken as a statement that they do not believe in 'the laws of Moses and Israel.'"[121] Any wedding celebrated according to civil secular law and not according to Jewish law is *prima facie* improper.[122]

One important difference between the Christian and Jewish traditions is that Judaism, unlike Christianity, has not sought to universalize its principles of marriage. Jewish marriage is exclusively for Jews. This could be explained by the historical fact that, in the diaspora, Jews have usually been a minority population in political regions dominated by Christians, Muslims, or other religious or ethnic groups, but the phenomenon of Jewish marriage as an exclusively Jewish enterprise has deeper normative roots. In Israel, civil marriage does not exist. Marriage between Jews is governed by Jewish law and marriage between people of different religions is celebrated according to their respective traditions.[123] Israeli law thus "leaves matters of personal status to be decided by the religious or customary tribunals of the group involved."[124] If a Jewish couple is married abroad in a civil ceremony, subsequent legal issues concerning their marriage are decided under private international law under the principle of *lex loci celebrationis* (the law of the location where the ceremony was celebrated governs).[125]

It would probably be going too far to say that Halakhah prohibits civil marriage between Jews. Rather, Jewish law generally considers a civil marriage *irrelevant* to the marital status of Jews. When two Jews are married in a civil ceremony but not in a Jewish ceremony, complicated questions arise regarding their status under Jewish law—for example, do they require a *get* (a Jewish divorce document) if they wish to marry other people?[126] This goes to the question of whether their civil marriage meant anything under Jewish law, but the civil marriage is not itself a prohibited act. By contrast, marriage between Jews according to the rites of a different faith *is* a prohibited act: "The Halakah takes note of two differences between cult marriage and civil marriage. First, in civil marriages the 'laws of Moses and Israel' are ignored; in cult marriages, they are openly rejected. Second, church or

120 *Id.*

121 *Id.* at 170-71.

122 Ben-Zion Schereschewsky, *Civil Marriage*, *in* THE PRINCIPLES OF JEWISH LAW 371, 373 (Menachem Elon ed., 1975).

123 Section 2 of the Rabbinical Courts Jurisdiction (Marriage and Divorce Law) 5713-1953.

124 GLENDON, *supra* note 65, at 15.

125 Schereschewsky, *supra* note 122, at 373.

126 *Id.* at 372.

cult marriage is a contradiction of Jewish marriage, but civil marriage is not."[127]

It therefore appears that Jewish law does not prohibit a Jewish couple from entering into a civil marriage in addition to a Jewish marriage in order to secure whatever legal entitlements the relevant jurisdiction confers. From this it might be argued that nothing in Jewish law stands in opposition to civil marriage as a means of social control in a secular state. To the extent that this is true, two important qualifications are necessary.

First, civil marriage is a harmless appendage to Jewish marriage only so long as the rules governing the civil marriage do not conflict with Halakhah. Historically, there have been many occasions on which civil authorities have sought to force the Jewish community into marital regulations anathema to Jewish law. My colleague Rabbi David Bleich recounts an incident in Eighteenth Century Trieste where the Hapsburgs sought to assert state control over Jewish marriage practices.[128] The Austro-Hungarian Civil Code of 1786 "established a civil definition of marriage and asserted total secular jurisdiction over the establishment of that relationship."[129] State courts were given exclusive jurisdiction over matrimonial matters and rabbis were forced to officiate over marriages that were prohibited under Jewish law.[130]

Conflict between Jewish and civil law with respect to marriage continues to this day, as illustrated by the efforts of some family courts in the United States to force Jewish husbands to grant their wives a *get* so that the wife can be divorced under both Jewish and civil law.[131] Thus, even if a civil marriage is not strictly prohibited by Halakhah, the extension of civil control over Jewish marriage threatens to undermine the jurisdiction of rabbinical courts over Jewish family law. The autonomy of the Jewish community to police its own marital practices would be far more secure if the state understood marriage to be a private matter rather than one constructed by the legislature and supervised by civil courts.

Second, the argument in this essay is not that either the Christian or the Jewish tradition views some concept of civil marriage as prohibited, but that these traditions view their own institutions as the primary custodians of matrimony among their adherents. The argument for

127 LAMM, *supra* note 116, at 171.

128 J. David Bleich, *A 19th Century Agunah Problem and a 20th Century Application*, 38 TRADITION 15, 15-16 (2004).

129 *Id.* at 16.

130 *Id.*

131 *See* Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117 (1996); Jody M. Solovy, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of a Religious Mandate*, 45 DEPAUL L. REV. 493 (1996).

privatization of marriage is the flip side of the argument against secularization of marriage. The more that marriage is reified as a secular and civil institution—for example, by a federal constitutional amendment defining marriage in a uniform manner for all states—the greater the threat to Jewish marriage as the province of Jewish law. It is sufficient support for the privatization argument that Jewish law has no use for civil marriage. Proving active hostility toward civil marriage is not required to make the privatization argument.

B. *Marriage and the Noahide Code*

Although nothing in Halakhah mandates the existence of a civil law of marriage for Jews, there remains a question whether Jewish tradition requires that, in order to be considered righteous, gentiles establish a system of formal law to govern their own marriages. Judaism posits the existence of an unwritten legal code, known as the Noahide Code, consisting of seven commandments that are binding on all humanity.[132] In addition to specifying rules of decision for Jewish courts concerning the rights and obligations of non-Jews subject to their jurisdiction, the Noahide laws are "invoked as a criterion in the Jewish judgment of the moral status of any particular gentile society."[133]

Generally, the Code contains six prohibitions—no bloodshed, theft, adultery, blasphemy, idolatry, and eating a limb torn from a live animal—and a seventh commandment (*dinin*) requiring the establishment of courts.[134] Two of these commandments seem potentially relevant to privatizing marriage. First, the prohibition on adultery can be understood more broadly to include a general prohibition on all sexual immorality.[135] Second, the commandment to establish courts can be understood to require "the adoption of a civil legal code."[136] In Maimonides's words, "courts must be established to punish those who violate Noahide law 'so that the world will not be destroyed.'"[137] Other Jewish authorities have defined "'dinin' as commanding the establishment of an ordered system of jurisprudence

132 *See generally* DAVID NOVAK, THE IMAGE OF THE NON-JEW IN JUDAISM: AN HISTORICAL AND CONSTRUCTIVE STUDY OF THE NOAHIDE LAWS (1983); NAHUM RAKOVER, LAW AND THE NOAHIDES (1998); AARON LICHTENSTEIN, THE SEVEN LAWS OF NOAH 31-43 (1981); Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 889 (1993); J. David Bleich, *Jewish Law and the State's Authority to Punish Crime*, 12 CARDOZO L. REV. 829, 831 (1991).

133 NOVAK, *supra* note 132, at 259.

134 Suzanne Last Stone, *Sinaitic and Noahide Law: Legal Pluralism in Jewish Law*, 12 CARDOZO L. REV. 1157, 1157 (1991).

135 *Id.*

136 *Id.*

137 *Id*. at 1185 (citing Maimonides, The Code of Maimonides, Laws of Kings 10:11).

for the governance of financial, commercial and interpersonal relationships," apparently including marriage.[138] Putting together these commandments, it is possible that Noahide law would require a gentile community to adopt a system of civil law to preserve sexual morality through marriage, or at least to retain a system of judicial jurisdiction over marital matters. Hence, privatizing marriage would be an affront to Noahide principles because it would represent an abdication of responsibility to adjudicate family law matters and, further, would enable the commission of adultery.

The possibility is not frivolous. Judaism has shown an interest in the marital practices of gentiles, not merely because the gentiles might be trying to coerce Jews to follow gentile practices, but because the practices themselves were of relevance under Noahide law. For example, Talmudic commentaries appear to distinguish between gentile societies in which homosexuality is tolerated as a practice and those in which homosexuals are permitted to enter into marriage contracts, the former being far less serious a moral shortcoming than the latter.[139]

It seems unlikely, however, that a political decision by a gentile state to privatize marriage would be an affront to Noahide law. First, it appears that gentiles do not have marriage at all in the Jewish sense. In asking whether the gentiles have divorce, the Palestinian Talmud observes that "'[w]e have indeed learned that the gentiles do not have marriage . . . .'"[140] David Novak explains that the Talmud does not mean to negate the possibility that gentiles have marriage in any sense, but to relegate gentile marriages to a species of civil contract:

> Rather, the text assumes that Jewish marriage in the sacral sense of *kiddushin* is not the same as the gentile marriage bond, which seems to be some sort of civil contract. As such, one cannot expect the gentiles to regard divorce in the same way Jews do, namely, as the dissolution of a sacral bond, the dissolution of a covenant.[141]

The Talmud goes on to note that *Malachi* 2:16's prohibition of divorce as the breaking of a covenant refers to the "God of Israel," thus suggesting that halakhic divorce rules do not apply to gentiles.[142] If gentiles do not have sacral marriage but rather a mere species of civil contract, then there seems to be no reason under the Noahide Code that the regulation and dissolution of these contracts could not be relegated to informal dispute resolution mechanisms.

Further, as discussed in the next section, privatizing marriage would not mean that the state would relinquish any responsibility for

138 Bleich, *supra* note 132, at 853.
139 NOVAK, *supra* note 132, at 215.
140 *Id*. at 208.
141 *Id.*
142 *Id.*

enforcing matrimonial agreements, even among religious adherents. Civil courts would still play a role in enforcing marital contracts, usually by compelling arbitration before the religious tribunal that the couple had previously selected in an arbitration clause or enforcing the judgments of that tribunal. This is already the practice of many Orthodox Jews who enter into prenuptial agreements including arbitration clauses specifying that a Bet Din will hear any disputes arising under the prenuptial.[143] Jewish law is not hostile to arbitration of commercial disputes either. Orthodox Jews frequently resort to arbitration in commercial contexts where they have a substantial presence.[144] If marriage among gentiles is merely a civil contract from the perspective of Jewish law, then there seems to be little impediment to encouraging arbitration rather than litigation in matters of gentile family law. It seems highly doubtful, then, that privatizing marriage would transgress the principle of *dinin*.

There remains the question of whether privatizing marriage would effectively encourage adultery, including the various forms of sexual immorality comprehended by that broad category. That question, however, seems to be moot in contemporary American life given the Supreme Court's de-privileging of marital status in the regulation of sexual practices.[145] Privatizing marriage would not encourage greater sexual promiscuity among unmarried persons, since (putting aside statutory rape) sexual relations among unmarried persons are almost entirely unregulated.[146] It is also unlikely to encourage adultery by lessening the penalty for marital infidelity, since adultery is becoming less and less relevant to divorce proceedings.[147] If anything, restoring at least some subset of marriage dispute adjudications to religious tribunals (through the mechanism of arbitration clauses) might increase

143 Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 583 n.264 (2004).

144 Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

145 *E.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating anti-sodomy statute as applied to unmarried homosexual couple); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold v. Connecticut*'s right of privacy for married couples to purchase contraceptives to unmarried couples).

146 *E.g.*, *In re* J.M., 575 S.E.2d 441 (Ga. 2003) (invalidating anti-fornication statute under state constitutional right of privacy); *In re* Lane, 372 P.2d 897 (Cal. 1962) (invalidating municipal anti-fornication ordinance).

147 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 497-98 (2d ed. 1988) (internal citations omitted):

> Adultery is a subject of interest to novelists and playwrights, and social scientists have found it to be not uncommon in our society, but in the contemporary law of divorce it is statistically unimportant. Although it is a ground for divorce in about twenty-eight states today, for a variety of obvious reasons it is relied upon in only a very small proportion of cases.

the effective penalty for adultery, since religious tribunals may be more apt than civil family courts to penalize infidelity.

In short, the Jewish tradition supports the privatization of marriage even more clearly than does the Christian tradition. Halakhah views marriages among Jews as a subject for private rather than civil regulation and the Noahide Code does not stand in the way of a decision by a state to relegate marriage to the status of a civil contract and encourage its enforcement by privately selected religious tribunals.

III. CONTEXTUALIZING THE PRIVATIZATION ARGUMENT

As the foregoing discussion has made clear, there is too much ambiguity, inconsistency, divergence, and dynamism in these traditions to permit the unqualified assertion that the "Judeo-Christian tradition" supports "privatization" of marriage. Not only does the assertion of a "Judeo-Christian tradition" rest on controversial assumptions, but "privatization" itself is a concept that rests on fragile premises. Are there really such things as "public" and "private" spheres between which choices about human activities can, or should, be shuttled?[148] How would such privatization be accomplished without damaging core values of the Jewish and Christian traditions? In this last section, I explore the meaning of "privatizing" marriage in modern context and the imperative for such a program from the "Judeo-Christian" perspective, as reconstructed for modern times.

A. *The Meaning of Privatization*

In its simplest form, the privatization of marriage in the modern state would take a contractarian shape. Contrary to the proposed marriage amendment and reams of family law legislation, the state would no longer attempt to define the parameters of marriage or to specify mandatory rules other than those necessary to preserve the minimum values of a liberal state.[149] To the extent that the state still

[148] *See, e.g.*, Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1982).

[149] This last caveat, of course, entails a very substantial question as to what are the minimum values of a liberal state with respect to marriage. Some are relatively obvious, such as a prohibition on strong forms of coercion to marry (extortion and physical force being obvious examples) and marriage of children below a certain age. It is not my purpose here to propose a set of criteria for the minimum requirements of the liberal state. For present purposes, it is enough to observe that it is quite consistent with liberal democratic theory to think about governmental regulation as requiring compliance with minimum norms of acceptable behavior while leaving a range of conduct above the minimum norms to private choice. *See generally*

played a role with respect to marriage, it would be limited to enforcing contracts between private parties. Since the enforcement of contracts usually entails a substantial amount of default rule creation,[150] and the creation of default rules with respect to marriage would re-involve the state in regulating the substance of marriage, the state could encourage private arbitration before tribunals specialized in the religious traditions of the relevant family. The state would then defer to the judgments of these religious tribunals, only overturning their judgments with respect to matrimonial matters for the sorts of abuses already recognized as grounds for invalidating arbitral decisions.[151] The effect of such "privatization" would be to make religious tribunals the primary arbiters of legal matters involving marriage, at least for religious couples opting into private arbitration. From the perspective of the state, marriage would be relegated to a form of private contract, subject to the usual rules of enforceability and arbitration.[152]

It may seem odd, particularly from the Catholic perspective, to cast marriage as a purely contractual obligation. To the extent that the contractarian mode is an outgrowth of radical Enlightenment individualism, it departs significantly from the Catholic sacramental model.[153] Similarly, the Jewish tradition views the legal foundations of marriage as consensual, but Jewish marriage is not merely contractual since the substance of Jewish marital obligations derives from Jewish law, independently of any agreement of the parties. Except for classical liberal Protestants like John Locke,[154] the notion of marriage as a

JOHN RAWLS, POLITICAL LIBERALISM (1993). While drawing such lines may be difficult, that is the great project of political liberalism.

150 *See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

151 Under the Federal Arbitration Act, 9 U.S.C. § 10(a) (2000), an arbitration award may only be vacated where the award was procured by corruption, fraud, or undue means; there was evident partiality or corruption in the arbitrators; the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. To the extent that some judicial review of matrimonial arbitration awards might be necessary to ensure that religious tribunals respected the minimal values of a liberal state, it might be necessary to pass an arbitration act specifically addressing matrimonial arbitrations that would provide for some limited judicial review in the event of gross or systematic violations of liberal values such as equality and due process.

152 *C.f.* Maynard v. Hill, 125 U.S. 190, 211 (1888):

> It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract.

153 *See* WITTE, *supra* note 45, at 194-215 (examining the final transformation of marriage from sacrament to contract during the Enlightenment).

154 *See supra* text accompanying notes 103-07.

contract malleable at the will of the parties does not coincide with the "Judeo-Christian" perspective.

But while it is odd to think of marriage as purely contractual from the "Judeo-Christian" perspective, the "privatization" proposal does not ask the *Jewish or Christian traditions* to think of marriage as purely contractual. Rather, it asks *the state* to think of marriage as contractual so that the Jewish and Christian traditions—and any other—can think of marriage however they want to think about it.

Functionally, this would occur through the couple's voluntary delegation of jurisdiction over their marriage to a specified religious institution.[155] A marrying couple would enter into a prenuptial agreement agreeing that any dispute that arose concerning their marriage would be arbitrated before a designated religious tribunal and that principles of religious law, as determined by the tribunal, would control. From the perspective of the state, this would be merely a contract to be honored as any other contract. If one of the spouses sought to litigate a marital matter in the secular courts, arbitration would be compelled before the appropriate religious tribunal.[156]

From the perspective of the religious community, however, the prenuptial agreement would merely represent the relationship between the couple and the state. The contractual nature of the marriage would end there. The far more important relationship would be that of the couple to the community, which (by virtue of the legally enforceable contract) would be regulated by the norms and traditions of that community. Although the ultimate authority to adjudicate disputes might be vested in a formal ecclesiastical or rabbinical body, the elimination of secular courts as the ultimate arbiters of disputes would invest the religious community with a greater incentive to play an informal role in mediating disputes since the opinions of that community might be given greater credence and importance in the religious court than in a civil court.

Thus, the "privatization" envisioned here would much more resemble a Tocquevillian system of private mediating institutions than a narrowly contractarian or individualistic one.[157] Within the norms of the communities, churches, synagogues, and other associations invested with jurisdiction over marital matters through agreement of the couple, there would be ample room for sacramental, communitarian, companionate, covenantal, and many other constructions of marriage.

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[155] Of course, no one would be forced to delegate authority over marriage to a religious institution. Interfaith or non-religious couples could chose a secular arbitration forum or merely content themselves with whatever default rules the civil courts provide.

[156] *See* 9 U.S.C. §1 (2000) (permitting a court to compel arbitration pursuant to a valid arbitration agreement).

[157] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 509-17 (Jacob P. Mayer ed., George Lawrence trans., 1969).

So long as it respected the minimal norms of liberal democratic society, each tradition could realize its own vision with respect to such matters as marital obligation, divorce, and remarriage. Although this amounts to "privatization" in the modern political sense, it would not deprive marriage of its communal and public character when viewed from the perspective of religious mediating institutions.

Privatization would thus restore religion to marriage, and marriage to religion. This is not to say that the ecclesiastical jurisdiction would be restored to the dominant position it once held during the Middle Ages. Whereas the church once occupied the role of a competitor sovereign to the Holy Roman Emperor or regional feudal lords, and ecclesiastical courts vied with civil courts for exclusive, universal jurisdiction over family matters, the rise of the modern secular state and the disestablishment of religion have relegated the religious institutions to a "private" role with respect to marriage. But private need not mean impotent. Given the importance of voluntary choice in the liberal state, there remains an important role for religious institutions in mediating and regulating marriage through contractual delegation of jurisdiction.

The beauty of privatization from the "Judeo-Christian" perspective is that it preserves the most important aspects of each component of that amalgamated tradition. To the extent that the Catholic and Jewish traditions lean heavily toward communitarian and spiritualistic norms of family law, privatization provides the vehicle by which those values can be re-infused into matrimonial dispute resolution. To the extent that the Protestant tradition leans toward individualism and volunteerism, the privatization approach honors those impulses as well. The values excluded by the privatization approach are those of top-down cultural planning following progressive secular norms. But those values find the least support in the "Judeo-Christian tradition."

B. *The Imperative for Privatization*

One objection to the "Judeo-Christian" argument for privatization of marriage is that there is nothing to prevent devout religious adherents from agreeing to arbitrate their disputes before a religious arbitral body, as some already do today.[158] Arguably, nothing in the legal status quo stands in the way of greater religious involvement in family law matters, so legal efforts aimed at "privatizing" marriage are unnecessary. Religious adherents concerned about the erosion of "traditional moral values" need not compromise their views about the

158 *See* Estin, *supra* note 143; James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875 (2000).

appropriate legal definition of marriage in order to secure a greater role for the church or Bet Din in adjudication of family law matters. In this view, religious conservatives should press for a constitutional amendment defining marriage in the traditional "Judeo-Christian" manner (heterosexual, monogamous) even while seeking a greater role for voluntary associations in policing marriage and family law.

For two significant reasons, the vision of simultaneous political and social engagement with marriage is unlikely to be effective in the modern liberal state. First, the push for greater state definition of, and control over, marriage weakens the claims of religious conservatives for autonomy to pursue their own vision of marriage. Second, the greater the degree of state involvement with marriage, the more that religious adherents begin to perceive marriage as a secular, rather than religious subject. This alignment of marriage and the state has the cultural effect of weakening the influence of religious teaching about matrimonial matters.

1. Independence

As Richard Duncan has observed, comparing the Jewish exile in the Babylonian captivity to the position of conservative Christians in twenty-first century America, "Babylonian law will typically reflect the morality and values of Babylon, not those of Jerusalem. Thus we need to reduce significantly the size of the state, particularly that part of the state that limits our ability to raise God-fearing children and to pursue happiness in a manner that is pleasing to God."[159] To be sure, the conservative religious community presently has a good deal more political leverage than the Jewish community had during the Babylonian captivity (witness the importance of the evangelical Christian vote during the 2004 presidential election). But political power is transient and underlying cultural trends do not favor long-term evangelical political power. For example, at least some polling data shows a steady growth in public support for same-sex unions,[160] which could eventually

159 Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 354, 355-56 (Michael W. McConnell et al. eds., 2001).

160 Richard Morin & Claudia Deane, *Poll Finds Growing Support for Gay Civil Unions*, WASH. POST, Mar. 10, 2004, at A6; *see also* Pew Forum on Religion and Public Life, http://pewforum.org/gay-marriage/ (reporting that "[p]oll results over the past couple of years reveal that most Americans oppose same-sex marriage, although support has increased slightly since the mid-1990s") (last visited Sept. 25, 2005). *But see* Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. PUB. L. 569, 621-22 (2004) (citing polling data suggesting recent decline in support for same-sex marriage).

mean wide-spread acceptance of a practice unacceptable to many religious conservatives.

What would be the consequence of a majoritarian decision that marriage should be equally available to all same-sex couples? In the short run, this would only mean that the state would grant marriage licenses to same-sex couples, and members of the clergy could continue to marry only heterosexual couples if they so chose. But permissive legal norms can quickly turn into mandatory legal norms—what first was *permitted* soon is *required*. It does not take much to imagine that, with the passage of time, a church or synagogue's denial of access to same-sex couples could be viewed as transgressing minimum non-discrimination norms of a liberal democracy, in much the same way as racial discrimination by religious institutions is viewed as unacceptable today.[161] "Religious liberty" would not necessarily be available as a defense to state efforts to sanction religious organizations that restricted marriage to same-sex couples, since laws of general applicability that disproportionately burden religious minorities are not subject to challenge on federal constitutional grounds.[162]

Of course, state coercion of religious institutions to conform to progressive views of marriage could happen whether religious communities advocate for a particular legal view of marriage, but such coercion is more likely to occur if religious communities have been at the forefront of promoting marriage as a legal institution. The argument that "the state should leave us alone because we view marriage among our adherents as a religious matter" would be much more plausible if religious communities would take a consistent stand in favor of leaving marriage to private choice. Moments of political power for religious conservatives should not be squandered on scoring short-lived public policy points but rather invested in securing a fundamental, structural understanding about the importance of private choice and autonomy in regulating family life.

An even greater threat than non-discrimination norms to religious autonomy over marriage would be a governmental effort to prevent private adjudication of family law matters. Although alternative dispute

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161 *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that a private Christian university that discriminated on the basis of race could be denied tax exempt status).

162 Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990). Although Congress attempted to overturn *Smith* through the Religious Freedom Restoration Act ("RFRA"), in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court invalidated that statute as exceeding Congress's powers under Section 5 of the Fourteenth Amendment. While RFRA may still apply to acts of the federal government, *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999), this is of relatively little relevance to marriage issues, which are typically regulated by state, rather than federal law. *But see* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 241 (1998) (examining state constitutional clauses granting rights of exemption from state laws disproportionately disadvantaging religious adherents).

resolution is generally favored in the American legal system, out-of-court adjudication begins to face hostility when it is perceived as achieving results unfavorable to suspect classes such as women or racial or ethnic minorities.[163] Given that the traditions of some religious groups treat men and women differently for certain purposes, or otherwise transgress commonly held non-discrimination norms, pressure toward uniform civil regulation of family law matters is predictable.

Indeed, it is not only predictable, but occurring. The Government of Ontario recently announced that it would move to outlaw private religious tribunals for matrimonial and family law matters in response to a proposal that would have allowed Muslims to use Shariah (Islamic law) to settle family disputes.[164] Jews and Christians have reportedly resorted to private arbitrations for years under Ontario's Arbitration Act, but the specter of unfairness to women under Shariah is poised to lead to an abridgement of all private religious arbitrations.[165] Ontario's premier was quoted as saying: "There will be no Shariah law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."[166]

The idea of a mandatory, uniform body of family law embodying the progressive norms of secular society should cause concern to religious conservatives. Over the long run, such norms are likely to grow increasingly unfavorable to conventional religious doctrine. Rather than reinforcing the idea that marriage is a proper subject for civil regulation, religious conservatives should seek to bolster the idea of marriage as a subject for private choice and control by mediating institutions.

2. Efficacy

Another consequence of religious arguments for a civil definition of marriage is that religious adherents cease to understand marriage as a religious subject and begin to internalize the view that marriage is merely a governmental creation. As religious conservatives insist that preserving a particular civil definition of marriage or particular family law rules are essential to preserving the integrity of marriage, they in effect concede that marriage owes its legitimacy and organizational

163 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (lamenting tendency of alternative dispute resolution to favor the powerful over the less powerful).

164 Associated Press, *Ontario Will Ban Shariah Arbitrations*, N.Y. TIMES, Sept. 12, 2005, at A6.

165 *Id.*

166 *Id.*

power to the state. It would be much easier to persuade religious adherents to conform to religious, rather than secular, marital norms if religious communities clearly differentiated between the two. By lumping them together, religious communities encourage their adherents to view the civil rules as the relevant ones. Even when religious adherents understand that their religious tradition might require a different standard of marital morality than the prevailing legal norm, they are less inclined to follow the religious norm if their religious community has focused on civil legal standards as the most important social battleground.

Many religious conservatives already look to civil legal norms to guide their decisions about important matrimonial decisions even when the civil norm is clearly contrary to the norm of their religious community. For example, a 2004 survey of 3,614 adults by the Barna Research Group, an evangelical Christian organization, showed that evangelical Christians were just as likely to divorce as the general population:

> Although many Christian churches attempt to dissuade congregants from getting a divorce, the research confirmed a finding identified by Barna a decade ago (and further confirmed through tracking studies conducted each year since): born again Christians have the same likelihood of divorce as do non-Christians.
>
> Among married born again Christians, 35% have experienced a divorce. That figure is identical to the outcome among married adults who are not born again: 35%.[167]

It might be possible to account for the equivalence in practices between evangelicals and the general population by hypothesizing that evangelicals have ceased to believe that divorce is morally problematic, in line with attitudes in the prevailing culture. However, the same survey showed that evangelicals were two and a half times more likely than the general population to affirm that divorce is a sin.[168] In other words, although evangelical Christians are more than twice as likely as the general population to believe that divorcing is sinful, they are just as likely as the general population to divorce.

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[167] The Barna Group, *Born Again Christians Just As Likely to Divorce As Are Non-Christians*, (Sept. 8, 2004), *available at* http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=170. Barna controlled for the fact that many non-evangelicals live together outside of marriage whereas evangelicals tend to view unmarried cohabitation as taboo, which possibly led to a comparatively lower divorce rate among non-evangelicals. Even so, "[i]f the non-born again population were to marry at the same rate as the born again group, it is likely that their divorce statistic would be roughly 38%—marginally higher than that among the born again group, but still surprisingly similar in magnitude." *Id.*

[168] *Id.* Twenty-four percent of evangelicals affirmed that divorce is a sin compared to a 10% affirmation rate in the non-evangelical population.

One account for this diversion between belief and practice is that evangelicals have accepted, and indeed reinforced, the equation of marriage with the civil license granted by the state. Many conservative Christians vocally opposed the liberalization of divorce law during the 1950s, 60s, and 70s, arguing that it would spell the demise of the family.[169] When they lost that political battle, it was too late to claim that whatever the state did with respect to marriage was unimportant since Christian marriage should be understood as a distinct institution with more restrictive rules. Many conservative Christian leaders instead adopted a "told you so" approach, blaming the political left for the social ills resulting from liberalization of divorce law.[170] This only further reinforced the notion that marriage really is whatever the state says it is and that the church's only recourse is to mount a political challenge to progressive family law legislation.

The federal marriage amendment goes even further than the divorce liberalization debate in reinforcing the church's admission that marriage is a civil relationship controlled and administered by the state. The amendment would categorically define marriage, for all purposes: "Marriage in the United States shall consist only of the union of a man and a woman." Whether or not the amendment is adopted, the mere fact of the proposal reinforces the idea that marriage is politically created. Adoption of the amendment would defeat the perceived evil of same-sex marriage but constitutionally establish matrimony as a governmentally defined institution. Defeat of the amendment would have the psychological effect of establishing the inverse of the amendment as a social and legal proposition: Marriage in the United States consists of things *other than* the union of a man and woman. Either way, the conventional claims of Christianity and Judaism to marriage as a spiritual institution distinct from civil law are weakened.

CONCLUSION

It is all too easy for modern people of faith to think about marriage as a creation of the state. As Mary Ann Glendon has observed, citizens of liberal Western states "have for the most part forgotten that marriage

169 LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980).

170 For example, in 1996 Pat Robertson reminisced to the Christian Coalition: "And I watched little by little an unremitting assault by the left-wing forces, the ACLU, and the National Organization of Women, and other radical groups who began . . . then to assault the institution of marriage . . . . [S]tarting about 1970 . . . in almost every state this left-wing radical extremist coalition battered down the walls of intact families and passed what were called no-fault divorce laws." *Speaker of the House Newt Gingrich (R-GA) Participates in the Christian Coalition Faith and Freedom Celebration*, (1996 Presidential Campaign Press Materials Aug. 15, 1996).

and family matters were once left mainly to regulation by manners, custom, ethics, or religious norms."[171] To the extent that there is such a thing as a unified "Judeo-Christian" tradition with respect to marriage, it insists on the spirituality of marriage and the uniqueness of the marital relationships of Jews and Christians respectively. The Catholic and Jewish traditions resist state interference with matrimonial matters, providing a clear-cut case for privatizing marriage. And while Protestantism may have facilitated the rise of secular marriage, the Reformers did not conceive of marriage as a purely civil relationship controlled exclusively by the state. To the contrary, they considered essential the presence of the Church as a mediating institution in regulating matrimonial relationships. At its lowest common denominator, then, the "Judeo-Christian" tradition requires active involvement by religious communities in blessing, defining, nurturing, structuring, and regulating marriage.

The role for religious communities envisioned by these traditions is broad enough to exclude the possibility that the state could serve as an effective co-arbiter, at least in the modern state. In a liberal state constitutionally committed to the separation of church and state, it is no longer possible for civil law to specify a formal role for religious mediating institutions in matrimonial matters. Any such involvement must occur in the space that constitutional law designates as the private sphere—the space constituted by voluntary agreement of individuals. Thus, to return the Christian and Jewish religious communities to a marital-regulatory role, marriage would have to be "privatized" within the meaning of constitutional law. Instead of seeking to define uniform matrimonial rules, the state would view marriage as a species of private contract and would encourage management of the contractual relationship through arbitral bodies specified in advance by the couple.

It is ironic that the push for greater legal control of marriage—a constitutional amendment uniformly defining marriage—comes primarily from those constituencies that stand to lose the most from a precedent establishing marriage as a civil relationship requiring uniform rules. Religious conservatives are on offense just when they most need to be on defense. In the long run, traditional religious conceptions of marriage will increasingly be seen as idiosyncratic and out of step with contemporary values. Refocusing on the church or synagogue as the only viable hope for achieving desired marital norms would do a great deal more than the marriage amendment to advance the "Judeo-Christian" vision of marriage.

171 GLENDON, *supra* note 65, at 15.