

Marriage against the State Toward a New View of Civil Marriage

by Jason Kuznicki

Executive Summary

As U.S. courts have repeatedly declared, marriage is fundamentally a private, individual right. One implication of this view, clear but not always consistently applied, is that the federal role in marriage should be to get out of the way. When it cannot, it should behave in predictable, orderly, and low-cost ways so that individuals may conduct their family and private lives as they think best. When the federal government must act in this area, it should do so only with a view toward preserving individual rights. This paper considers federal marriage policy in a new light by suggesting that some, though far from all, of the federal provisions governing marriage may be understood as protections of this kind, or as guarantees of individual responsibility, as in the case of children. When marriage acts in such a way, it merits federal recognition, but not otherwise.

Although privatizing all aspects of marriage may well be appealing, such an approach would result, at both state and federal levels, in much greater government interference in family life, higher taxes for married couples, invasions of privacy, difficulties related to child custody, and other negative consequences. In some areas, marriage is a defense against state power, and such a defense should not be lightly discarded. However, marriage should be decoupled from the tax code by adopting a flat tax; the Defense of Marriage Act should be repealed; and Congress should adopt language making it clear that civil and religious marriage are not the same institution, and that the existence of marriage as a legal category is neutral with respect to religion. Wherever possible, marriage penalties and bonuses in the tax code and welfare system should be eliminated.

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Introduction

Much like the old saying about the British Empire, federal marriage policy seems to have developed in a fit of absence of mind. It's rare to find legislators giving any systematic or sustained consideration to how the federal government ought to treat married couples. Unlike many other discrete areas of policy, such as housing, agriculture, or trade, one seldom finds legislation whose explicit focus is marriage in a wide variety of its aspects. Instead, in one largely unrelated policy area after another, legislators have added provisions that address marriage in the context at hand, but in no others. This approach has had the effect of setting up different treatment for married couples, or sometimes just for husbands or wives, one provision at a time. Seldom have these scattered provisions had a common goal or even a coherent set of goals.

The result has been the accretion of more than 1,100 rights, responsibilities, prerogatives, duties, entitlements, tax breaks, and tax obligations for married couples.¹ Some are recent, like the marriage-related provisions in the health insurance subsidy enacted by the current Congress. Others are much older, going all the way back to the ancient common-law protection that allows one spouse to refuse to testify against the other. Some, like the joint income tax return, are accepted as commonplace in the United States, even though they are relatively rare elsewhere in the developed world.² Other legal incidents of marriage are nearly universal to societies with mature legal systems, such as the presumption that one spouse is entitled to at least some share of the other's estate if he or she dies without having made a will. With so many different powers and duties, so many different rights and obligations, it should be no surprise that cross purposes, perverse incentives, and strange windfalls have grown over time. These unexpected incentives can be found in marriage, in singlehood, and even in divorce. As the nation changes demographi-

cally, they fall with varying severity and frequency on various populations, sometimes in ways that their framers clearly did not intend. Confusion proliferates in the world of policy analysis as well; assumptions about the costs and benefits of various marriage-affecting policies often diverge wildly from their actual effects.

Advocates for single people argue, often with some justice, that many of the federal benefits of marriage amount to discrimination against single-headed households, which now make up the majority of all households. Gay and lesbian advocates observe, again with some justice, that many of the desirable incidents of marriage are reserved for heterosexual relationships only. While some of these benefits can be had by alternate methods, quite a few of them cannot be. Indeed, every one of the specific legal incidents of marriage mentioned in the paragraph just above is impossible to obtain short of actually marrying. Contracts, civil unions, domestic partnerships, and other "marriage-lite" arrangements are all incapable of providing these legal incidents. None of the exclusively federal incidents of civil marriage—like the ability to sponsor a spouse for immigration—can be had even with a state-level same-sex marriage, because the federal government is legally barred from recognizing such marriages.

Evaluating all of the many marriage-related provisions in federal law would make an exceedingly long and dull policy analysis. It is also a feat that no author on marriage policy appears to have ever attempted. Nor will I attempt it here. Instead, I would like to propose one defensible underlying purpose for much—though certainly not all—of federal marriage policy. I will then briefly outline some major federal marriage policies and consider whether these are consistent with the rationale I advance. Finally, I will suggest that a more consistent adherence to this rationale would do much to calm some contentious debates about taxation, same-sex marriage, and perhaps other areas of marriage policy. What I propose here is a tool of analysis for looking at civil marriage in a new light.

Why Even Have a Federal Marriage Policy?

One obvious try at a solution is to declare that there should be no federal marriage policy whatsoever. After all, the word “marriage” appears nowhere in the U.S. Constitution. Like education or housing, there is no express mandate for federal action here, and it is not immediately obvious what the federal government can add to the institution of marriage. This objection remains in place, and even gains some strength, when we consider that there are at least two aspects to what we commonly call marriage—a religious and a civil aspect.

The power to regulate the *religious* aspect of marriage is of course properly left to churches and other faith communities, which do not always agree about the proper conditions of entry or exit, the proper norms of continuance of a marriage, or what constitutes an “ideal” marriage at all. Yet faith communities’ actions in these areas aren’t rightly subject to either state or federal interference, thanks to the First Amendment. On the margin, those looking for a faith community likely choose one based on the congruence of a given community’s marriage norms with their own. Or they may remain within a community while agitating for a change in marriage norms, through whatever channels that community has to offer. Differences proliferate, as does change over time. Governments, federal and otherwise, have nothing to contribute to the process.

Civil marriages, however, are recognized by the state governments. Such recognition takes place under a patchwork of common-law jurisdiction, state constitutional authority, and legislative enactments, often drawing on states’ abilities to regulate public health and order via their police power. Diversity prevails here as well, owing to model legal codes, residual common-law understandings, particular local concerns of individual states, and the principle of comity, by which states typically recognize marriages performed in other states, even against their existing laws for

entry into marriage, with a view to simplifying family law and avoiding confusion.

On the civil side, entry and exit from marriage has almost always been left to the states, in nearly all respects. Yet statutes have varied over time. These statutes have added or removed blood tests, waiting periods, and various (sometimes conflicting) definitions of incest and age of consent, as well as many very diverse regulations for dissolving a marriage. In recent years, state laws have variously authorized or forbidden same-sex marriages as well. At times, individuals have traveled to other states for their easier marriage and/or divorce terms, particularly during and before the first half of the 20th century.³

Yet despite the legal and religious diversity, most people who do get married usually have had both the civil and religious aspects performed at the same time, even usually by the same officiant. Though outwardly religious, nearly all marriage ceremonies in the United States have been legally deemed simultaneously to be secular/civil in nature as well, and religious officiants are commonly delegated the authority to marry individuals under the civil laws of various states. This legal fiction skirts the First Amendment’s wall of separation between church and state and perhaps makes for some added convenience to married couples. Yet the setup seems one likely source of confusion in American marriage policy, by which concerns about the sacred regularly intrude into government business. Likewise, it could be a reason why fears about government management of religious business are perhaps not entirely unfounded. The convenience of a single marriage act, both civil and religious, comes at the cost of some clarity about what marriage is—a conglomerate institution with both civil and religious aspects, each of which is independent of the other. One way to clarify this distinction, while changing nothing about the institution of marriage itself, would simply be to write federal law so as to refer to “civil marriage” in all cases, making it plain that marriage law exists independently of churches and other faith communities.

One obvious solution to the federal marriage policy is to declare that there should be no federal marriage policy whatsoever.

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It remains possible to have a religious marriage without a civil one, even though clergy do typically recommend against it. It is also possible to have a civil marriage without a religious one—a preferred choice, obviously, for secular-minded couples. The commonality of officiants in most marriages should never be taken to mean that civil and religious marriages are one institution. Just as there are civil oaths and religious oaths, civil offices and religious offices, and civil laws and religious laws, there are also civil marriages and religious ones. It's just that nearly everyone has both, and both are generally performed simultaneously.

So why does the federal government need to be involved in this confusion at all? And by what authority does it act? If no authority can be found, then presumably the federal government should indeed step aside, exactly as it is told to in the Tenth Amendment to the U.S. Constitution, and permit states and churches to do what they have been doing all along—experimenting, bargaining, and modifying the institution in response to local concerns. Why not let the federal government get out of the way?

There is great merit to the argument that it should. For one thing, removing federal involvement would settle once and for all the debate about same-sex marriage, at least at the national level. Separation of marriage and state would also be at least roughly congruent with earlier church/state separation, and as such it may appear a very welcome step in the advance of private life and the retreat of the state. The argument might be entirely convincing, except for one very important fact: The U.S. Supreme Court has consistently held that individuals have a fundamental *liberty interest* in marriage, and that government must act to recognize and protect that interest.

What does a liberty interest mean in this context? It means that the government may not interfere unduly in private marriages. And that fundamentally, all marriages are really private already. It means that marriage may be recognized by the state, but that marriage comes from somewhere deeper and more important

than even the state itself. If the state is to act in this area, it must be only to protect and preserve one of the institutions that gives human life its dignity and value—an institution without which we could hardly be called “free” at all.

A good way to think of the relationship between marriage and the state is that marriage is *ontologically prior* to the state. Although all existing marriages are chronologically younger than the U.S. government, they are not dependent upon it for their survival. If the government were to dissolve, probably no one would imagine that their marriages and families had also been dissolved. On the contrary, in such alarming circumstances, perhaps our first thoughts would be for the protection and maintenance of our families. Even in the resulting disorder, churches, families, and couples would very likely continue to practice marriage. And if they wanted to preserve their freedoms, one of these would surely be the freedom to marry. As the Court wrote in the landmark case *Loving v. Virginia* (1967),

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.⁴

Or, as the Court wrote in *Griswold v. Connecticut* (1965),

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully en-

during, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁵

Marrying and forming a family, the court has repeatedly said, are fundamentally personal acts. As such, they are acts that governments should not be allowed to interfere with for anything less than compelling reasons. Yet there are clearly at least some ways that state or federal governments can interfere unacceptably with marriage, as with most other individual rights. Such actions are forbidden to the U.S. federal government, because to marry, to have children, and to raise and educate them according to the dictates of one's own conscience are all a part of what it means to have a free society. By the same token, the government of a free society must respect those instances when this liberty has been exercised—and therefore perhaps must formally recognize them. In other words, perhaps the government should recognize marriages *only* so it can more effectively leave them alone.

This may seem a subtle point at first. It gains in clarity, however, when we consider what doing more, or less, might mean. Although marriage is not mentioned as such in the Constitution, a federal government that forbade all marriage, or that denied it arbitrarily to a few, would be an illiberal one indeed. *Loving v. Virginia* is a celebrated case precisely because it struck down one such barrier. One of the case's implicit assumptions, it turns out, is that a wholly private institution of marriage might in fact under-protect the families created under it, because it could leave those families unacceptably open to government interference—interference that families with a recognized marriage would never have to suffer.

That's because marriage creates a set of default legal capacities that all of us may even-

tually rely on—capacities involving, among other things, property, children, inheritance, and medical and legal decisionmaking. These capacities are recognized by the federal government, above all, to deny them to anyone outside the marriage bond, be they more distant family, state agents, corporations, or any other entity. Sometimes, it may turn out that the government must agree to get out of the way, and do so in a permanent, publicly acknowledged way, for the sake of the very freedoms that it claims to protect. Sometimes it must likewise declare that the family lives of others are none of *our* business either—and, thanks to the institution of civil marriage, we now have an easy way of recognizing most such cases. And this is exactly how marriage policy could and should be recast: as a strategic, principled withdrawal of the government and outsiders from family and intimate life, guaranteed by the act of civil marriage itself.

Still, that's far from an exhaustive description of what marriage currently does. Civil marriage also includes a set of positive entitlements or grants of state power or resources that are designed to “help” families more actively. These often come at the expense of others, such as singles, who have at least plausible grounds to object. Such positive rights that attach to civil marriage remain deeply problematic under this theory of civil marriage.

As we shall see, many of the more important positive rights encoded in federal-level civil marriage are also very difficult to justify or even to understand in a consistent manner. There is no guidance for applying this bundle of welfare rights in the federal constitution, and it has been tinkered with over the years in some very haphazard ways, with some very perverse incentives as a result. Marriage considered as a conduit for social welfare has little or no connection to marriage as a prepolitical institution. It represents the government intruding in a place where it has no business.

To those who mistrust government involvement in marriage at all, civil marriage is far less objectionable or threatening when it is understood, or perhaps reformed, purely as

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a means of protecting oneself and one's family from the state and other outsiders, or as a formal withdrawal of external power from a clearly delineated area of life, and not as a bundle of welfare rights. By this standard, the existing federal recognition of marriage and family may have a more solid foundation, but only in certain of its aspects. The right to marry, and thus to become free from state interference in the formation of one's family, is akin to the right to travel, to seek employment, or to choose one's apparel within certain very broad limits. None of these rights are mentioned in the Constitution either, but they are retained all the same, and U.S. courts have intervened to protect them.⁶ We would think it tyrannical for a government to interfere with these acts without some very strong—indeed some compelling—interest. There is no reason that treating marriage likewise poses any great burden on our liberties, and it is arguably liberty-enhancing.

If we consider civil marriage as the recognition of an individual liberty interest, rather than as a grant or exercise of power by the state, then we may begin to look at each of the more than 1,100 federal provisions governing it in an entirely new light. Are these provisions also “implicit in the concept of ordered liberty,” as the courts demand when litigants assert an unenumerated right? Are they at least somehow related to ordered liberty? Do they recognize individual autonomy and empower people to lead their own lives as they see fit? Does a given policy act to ensure the long-term plans and goals of family members themselves, as against the interference of third parties? If so, we may be on comparatively solid ground.

If, however, a given regulation amounts merely to a grant of economic privilege, or a nudge of citizens' behavior in one direction or the other, or even an arbitrary discrimination among different classes of citizens, then the regulation is unrelated to what may be the only justifiable grounds for federal involvement in marriage in the first place. The proper way to evaluate federal laws touching on marriage is one at a time, keeping continu-

ously in mind that any federal right to marriage is on its soundest footing—if it has any proper footing at all—only as a recognition of an individual negative right, at least as far as the federal government is concerned.

Given the loose interpretation of the Constitution that prevails today, we should not be surprised if these issues of constitutional scrutiny turn out to be largely academic. In a more general sense, however, provisions that add welfare benefits or impose new obligations on married couples aren't likely to be acting as checks on the power of the state. They are instead adding to state control over our intimate associations, and discriminating against a large number of American citizens—indeed, the majority of adults, who are now single. It's here that many federal marriage provisions also run into the objections of singles' rights advocates. Such advocates do not commonly oppose marriage as a lifestyle or even necessarily as a legal status, but they do oppose government-granted privileges for married people. An understanding of marriage as a set of negative rights, with no welfare components, would do a lot to satisfy their concerns.

Inquiring about the liberty interest in federal marriage has considerable analytical power, as can be seen in the following examples. In each of the following sections, I will examine a different facet of federal marriage law and ask whether it can be justified as part of a framework of negative rights. Some policies can be so justified, while others cannot. Moving toward an understanding of federal civil marriage as a purely negative right would, I argue, leave individuals free to decide what their own marriage, and those of their neighbors, means in the context of their own family, community, and faith. It would create a space for diversity and for healthy, civil disagreement about marriage, rather than politicized bickering. As individual and communal understandings of marriage have changed throughout history, this framework would likewise offer considerable flexibility.⁷ It would further minimize the inconvenience experienced by third parties who object to some or all forms of marriage

subsidy. It could even point the way toward sounder public policy in many more conventional categories of analysis.

The Income Tax Trilemma

Let's consider the tax code. It has passed into the popular mind that most, or perhaps even all, couples today face a "marriage penalty," in which they are taxed at a higher rate than they would be if they were single. The truth is actually a great deal more complicated, and it serves as an excellent example of just how convoluted the federal laws concerning marriage have become—to say nothing of the tax code's own complications.

First, a relatively modest net marriage penalty does exist today for many married couples. This penalty was formerly both higher and applied to many more couples. It was significantly—though temporarily, and not entirely—reduced by the Jobs and Growth Tax Relief Reconciliation Act of 2003.⁸ This temporary reduction is scheduled to expire at the end of this year, and no fewer than eight bills and amendments have been introduced in the current session of Congress that would eliminate various aspects of the penalty either individually or as a group. Notably, President Obama's proposed budget for FY 2011 would make permanent the marriage penalty abatement measures of 2003, and passage of some form of permanent abatement seems very likely.⁹

But why was there ever a marriage penalty in the first place? It arose because, given the nature of our tax system, we are confronted with three popular but competing goals. Each of these goals has strong defenders, and some may even wish they could achieve all three goals at once. This, however, is mathematically impossible. The goals are: (1) a *progressive tax structure*, (2) a tax code that is *neutral with respect to marital status*, and (3) *equal taxation of married couples with equal total incomes*, regardless of income distribution between the partners. Each is desirable to at least some people, but they cannot all be had together.

Taking the progressive tax structure as a given, we are faced with a dilemma. On the one hand, if tax law also ignores marital status, then it is possible that two married couples with identical total household incomes would pay very different levels of income tax. Consider the following example. In couple A, the husband is the sole breadwinner, and he finds himself in a high tax bracket, where he pays relatively more in taxes on each marginal dollar he earns. In couple B, the husband and wife both work and make equal individual incomes. Their combined income equals that of the husband in couple A. Yet neither the husband nor the wife in couple B is in the higher tax bracket—and thus none of their income will ever be taxed at the higher rate. Their total tax bill would be lower. Many would find this situation unacceptable, and indeed, our tax code is structured in part to avoid it.

On the other hand, let's suppose that we fully equalize taxation between couple A and couple B. If we do so by raising taxes on couple B, then we have created a *marriage penalty*. Couple B would be better off financially if they got divorced. If we attempt to equalize taxation by lowering taxes on couple A, then we have created a *marriage bonus*, in which the very wealthy may find they would do well to take a nonworking wife for tax purposes. Neither scenario is terribly appealing from the standpoint of moral incentives or social order.

In practice, the pre-2003 tax code tended to penalize *dual-earner* marital units, because on marriage, the partners were treated as though they held one—albeit higher—household income. This placed them in a higher marginal tax bracket, and they paid more tax than they would if they had remained unmarried, much like couple B after their taxes are raised to the level of couple A's. As dual-earner marriages came to make up a greater and greater proportion of married households, the marriage penalty was felt more widely, and more couples found that divorce was, perversely, a way to save money on taxes. Some couples, however, particularly

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at the very highest end of the income spectrum and those in which one spouse did no paid work, still found that they actually saved money by getting or staying married, owing to differing taxation schedules between single and married individuals. In short, earlier versions of the tax code contained significant marriage penalties and marriage bonuses.

Getting back to our original trilemma, if the United States were to enact a flat tax—that is, if it were to abolish the progressive tax structure—it would mean that couples with equal total incomes would pay equal amounts of income tax, and no penalties or bonuses would ever exist for getting married or divorced. Across marriages of equal total income, but unequal income distribution, the spouses would simply pay different *individual* amounts of tax, proportional to their personal share of the total income, while their total household tax burden would be equal in all cases. The tax code would treat married and unmarried people alike, and it would also treat every married couple of a given total income alike.¹⁰ Tax progressivity would be deliberately abandoned, but with it would go the unseemly penalties and bonuses associated with marriage and singlehood for various levels and distributions of income. Under a regime of tax progressivity, such penalties and bonuses, and/or inequalities across households, are inevitable. Indeed, a good deal of the extant marriage penalty abatement consists of enlarging the 15 percent tax bracket where many married couples' incomes fall—in effect, much of the marriage penalty abatement consists of making the tax structure a bit flatter for many couples. Making it flat for everyone would do away with marriage penalties and bonuses entirely.

It's worth considering just how unseemly the tax incentives for and against marriage really are. First, the marriage penalty remains greatest, proportionally speaking, for low-income dual-earner marriages. That's because some of the marriage penalties remaining in the tax code center on the Earned Income Tax Credit, a means-tested tax credit designed to help lower-income families with children. As

the Alternatives to Marriage Project, a national nonprofit organization for singles' advocacy, describes it,

When two low-income people marry, their combined income—though still modest by any standard—can disqualify them from benefiting from programs such as the Earned Income Tax Credit. It is ironic that some welfare policies promote marriage for low-income families, while income tax policies and welfare benefit formulas penalize many low-income families for marrying. . . . In sum, bonuses benefit married couples with so-called 'provider/dependent' marriages. Penalties hurt low-income couples, and well-off married couples with balanced incomes.¹¹

In other words, current tax and welfare laws incentivize single-earner status for lower-income families. But because a career as a homemaker isn't usually possible for the poor, the real incentive may lie in the direction of just not getting married. Social conservatives have noted that the demographic decline of marriage is most pronounced among the poor, and they have roundly condemned the tax code for making marriage unappealing at the margin. They are right to do so. Yet current tax law also rewards, on the margin, those highly traditional upper-class marriages in which only one adult works.

It would be virtually impossible to retrofit a consistent rationale—even a consistently *perverse* rationale—to explain such a policy. Stay-at-home moms (or perhaps dads) appear to be a good thing, but having a stay-at-home spouse in the family is very difficult or impossible for many poor families. Meanwhile, the rich, who can already afford the luxury of a stay-at-home spouse, could also see this decision rewarded with thousands of dollars of tax savings. The overall effect is to incentivize stay-at-home spouses among the wealthy, and to severely discourage marriage itself among the poor. Although this disparate treatment has been ameliorated somewhat in recent years, by

no means has the complex web of penalties and bonuses disappeared, and the basic incentive structure remains intact.¹²

What, one might ask, is the proper way to treat married couples, given the considerations of the proper federal role in marriage that we have outlined above? That is, what tax level is most consistent with marriage considered as a negative liberty interest? When put in these terms, the question has no ready answer, and it may have no answer at all. (Of course, “no taxes for anyone” might be the most appealing choice, but achieving *that* aim remains little more than a fantasy.)

Yet the whole issue is relatively easy to resolve when we return to the framework implied in *Loving* and *Griswold*: can it seriously be suggested that these penalties and bonuses, graded by income tax brackets, separating the married from the unmarried, adding here and subtracting there, are “implicit in ordered liberty”? Can these differing monetary payments by the rich and the poor, the dual-income households and the single-income ones, be said, plausibly, to be part of “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system?” The questions are hard to pose straight-faced. Obviously none of these things have any relationship at all to “deep” marriage—to the institution of marriage considered as a profoundly private individual liberty. Taxation, then, should be made marriage-neutral, perhaps by enacting a flat tax, which would have just that effect.

Of course, there are many reasons to criticize progressive taxation and favor a flat tax even outside of the current tax regime’s strange effects on marriage. Flat taxes reduce the costs of tax compliance and are therefore more efficient than complicated systems like our current tax code. Flat taxes discourage fraud, corruption, and evasion, and they appear to stimulate economic growth.¹³ And once we admit the necessity of taxation, and the near-impossibility of crafting a liberty interest in differential taxation, the “proper” treatment of marriage by the federal government would appear to be tax neutrality, both with respect to

marriage—no marriage penalty—and with respect to different distributions of income between marriages of equal total income—family equality in taxation. This is one area where the federal government most certainly should withdraw from marriage.

Immigration

Let’s consider, however, another facet of federal marriage policy—the ability of one spouse to sponsor the other for residence and potentially for permanent legal immigration. Gay and lesbian advocates have frequently noted that this is an extraordinary power of marriage, one that comes solely from the federal government, not from the states. Further, it cannot be replicated through any other means. Contracts, domestic partnerships, and civil unions are legally inadequate for this purpose, and even state-level same-sex marriages do not achieve it, owing to the federal Defense of Marriage Act, which prohibits the federal government from recognizing state-level same-sex unions as marriages at all.

Although immigration rights may not be a concern for very many marriages, for those marriages they do affect, the difference is profound. The ability to live with one’s marriage partner is fundamental to virtually all other private aspects of marriage, and denial of it is often tantamount to ending a potential marriage before it begins.

Surely, if marriage is a right “as old as society itself [and] that forms a cornerstone of any decent society,” then this right encompasses the ability of the married couple to live in the same country. This ability should not be interfered with on the pretext that the two individuals exercising that right were born in different countries or hold different citizenships. Marriage is older than, and superior to, the law of nations. It would be a strangely limited U.S. citizenship, more of a curse than a privilege, if it entailed never marrying the one you loved. Such it would remain even if the limitation fell only on a few citizens, and it would only be in this case more arbitrary. And when we consid-

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er that the power to force a couple to live in separation is very nearly the power to end a marriage, or to destroy much of its private significance, we find ourselves confronting a power that the federal government, under our proposed framework, certainly should not have. Marriage considered as a liberty interest leads directly to supporting the right of U.S. citizens to marry foreigners, and for the two of them to live in the United States.

Marriage is not of idle or arbitrary interest to the immigrant; it is, rather, of the profoundest interest. Yet the state may act, as we well know, to forestall even profound desires or interests if these conflict with similar interests on the part of other citizens. With regard to foreigners, this may manifest simply as border control—the federal government decides whom to admit and whom to exclude. Why *can't* it do the same with these potential spouses, just like with all other immigrants? Why should they be an exception to an otherwise inflexible rule?

One reason might be simply that there aren't that many of them. The exemption is demographically insignificant. In 2009, the U.S. State Department reported that it issued 40,645 K visas. These are the type that allow the fiancé(e)s of U.S. citizens to stay in the country legally. In the same year, the department issued 43,876 visas for the representatives and staff of international organizations, and 124,275 for intracompany transferees.¹⁴ Other categories added hundreds of thousands more. The visas that accompany marriage amount to a tiny fraction of all immigration, yet these are perhaps one of the more important types of visas, given the liberty interests implicated in them. It is not easy to estimate the number of visas that might be granted for same-sex partners under a regime of immigration equality. Some same-sex couples may be opting to keep a low profile to avoid detection and deportation of one of the partners. Others may have obtained other types of visas through more circuitous or risky routes. Still other couples have simply broken up.

Reliable estimates of the number of same-sex couples taking any of these routes simply

aren't available, but they are probably a small group. Because immigrants of this type, whether gay or straight, present no serious fears of demographic inundation, they can easily be separated from the general run of immigrants, and an exception can be made, perhaps solely for them, or perhaps with a few others too, even amid a broader immigration policy that is generally hostile to immigrants. Then again, there are independent policy reasons to reject such a generally restrictive immigration policy, but these are beyond the scope of this paper.¹⁵

Another reason to understand immigration rights as stemming from a liberty interest inherent in marriage is that the exclusion of immigrants who wish to marry and remain here also harms the liberty interests of U.S. citizens. It is hard to imagine that anyone would agree to a social contract containing this provision if they were to do so behind a Rawlsian veil of ignorance—and thus not know whether, during the course of their lives, they might fall in love with a Mexican or a Vietnamese immigrant.

Surely, too, if anyone is positioned to recognize a potential U.S. citizen, and to instruct that person in the requirements of citizenship, it would be the individual's intended spouse. American spouses would also have the strongest incentives to help ease this transition for their foreign husbands and wives. If only, we might be tempted to say, if only *all* immigrants were so lucky. And thus our laws make an allowance for private marriage, as well they should.

The Presumption of Legitimacy

Marriage creates a set of default rules for child custody and for presumed relations of guardianship. These rules are sensible, well-understood, and best left in place. Privatizing marriage—getting the state out of the marriage business—would leave all children in great uncertainty, because legal custody would not be guaranteed for any children, in

any life situation, whether their parents were (privately) married or not. Privatizing marriage sounds reasonable until we realize that it entails privatizing child custody, alimony, and child support, providing some private mechanism of assurance and trust for them, and then providing a private enforcement mechanism as well. Each of these has aspects of a public good, however, in that we all benefit from the proper care of the rising generation. Each also may implicate some use of force, and thus there are two plausible causes for at least some minimal state action.

Just as marriage is natural and prepolitical, childrearing obviously is too, and it is an expected, highly anticipated part of most marriages. This expectation is ratified in the common-law doctrine known as the presumption of legitimacy. This doctrine dictates that all children born into a marriage are presumed legitimate, and that the married couple is presumed, though rebuttably, to be the child's parents, with all the attendant parental duties.¹⁶

The presumption of legitimacy does much of the practical work that social conservatives rightly praise marriage for doing. It ties sex and reproduction to childrearing and support, ideally in the context of a stable biological family. It allows the family to get on with the business of raising their children, free from most forms of inquiry about their origins, and certainly from any routine ones. If that family ever does break apart, the legal obligations of child support, which have been presumed all along, do not end; these were created at the time of marriage, not at the time of conception (at which, after all, the husband may not have been present), and they endure until the child is legally an adult. The presumption of legitimacy also dovetails well with adoption law, under which married adoptive parents are not required—indeed, are not permitted—to file adoption petitions separately.

Without civil registration of marriages, however, it becomes unclear where the state may and may not enforce custody and liability for raising children. How, for example, would

we recognize parents as the bearers of obligations toward their legal charges? Privatizing marriage would mean abandoning the common-law presumption, probably letting many unwilling parents off the hook. The result would be a deluge of claims and counterclaims about child custody and paternity, as partners fought either to establish or relinquish custody without any clear advance guidance from the government about how they will be treated. It is hard to imagine the state being more *in* a private family's business than this.

Genetic testing suggests itself as an obvious answer, but even in our technologically advanced world, there may be some deep wisdom in the presumption of legitimacy. Many nonbiological children, the products of extra-marital relations, have been happily raised in a stable home thanks to this sensible presumption, which does much to shield children's interests and deflect litigation from jealous outsiders. The presumption of legitimacy may even discreetly paper over a sexual transgression, allowing the marriage, and the family, a second chance if the parties want it.

Genetic testing as the default rule looks still worse when we consider the sheer logistical nightmare of performing it for every live birth in the United States, and the insuperable privacy concerns this policy would raise. Under a fully privatized marital regime, the invasions of privacy would, ironically, increase still further. Even happy marriages without any custody disputes would be forced to apply anew for child custody every time they had another child, because this custody, in the absence of civil marriage, could not be presumed. Besides genetic testing, applying for custody of a child could require any number of invasive fitness tests—we can easily imagine well-meaning legislators inventing them—and this in itself would likely be a highly politicized process. Perhaps such custody examinations would come to resemble those found for adoptive parents, with interviews by social workers, financial evaluations, filing fees, medical exams, home inspections, and other intrusive measures.

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Married couples who divorce may make use of the gift tax exemption, but cohabiting couples are liable for taxes.

Compliance would be another serious problem. Even a modest filing fee might bring widespread noncompliance—marriage is private, the reasoning might go—and the result, in the long term, would be more genuine illegitimacy, more acrimonious custody fights later on, and more children without mothers or fathers. The state would be forced repeatedly to intervene in complex, unpredictable ways, rather than the one simple and very predictable way that it does now. By saying that married partners have a presumed joint custody of any children born to the marriage, the state retreats from private life, exactly as it should.

As a final note, civil marriage's presumption of legitimacy serves a significant equality interest as well. If child custody had to be legally established anew at every birth, the burdens of childrearing would fall even more heavily on women than they already do, and men would be even more removed from the consequences of their sexual behavior than they already are. Establishing maternity is easy—childbirth is self-evident proof in almost all cases; it is, as sociologist James C. Scott would have it, an eminently *legible* phenomenon.¹⁷ But establishing paternity is very hard. Paternity is relatively *illegible*, to the state and to everyone else, particularly when the men in question are not cooperative. And why should they be? Mere paternity, as opposed to marriage, has comparatively little to offer men in the way of mutual help, legal protections, and companionship with the opposite sex. Paternity without marriage would be all responsibility and no reward, and we could hardly blame men in such a regime from fleeing it whenever they could.

Marriage, Divorce, and Disposition of Property

One of marriage's many effects at the federal level concerns the disposition of property within the relationship and the attendant tax liabilities. Tax lawyer Robert W. Wood recently offered an argument for same-sex

marriage that is seldom cited even by its proponents: within a marriage, property is arbitrarily transferable, without any taxes or limits. If you are not married to a gift's recipient, you may give no more than \$13,000 in a year to a given recipient without incurring a tax or eating into your lifetime ceiling of \$1 million in tax-free inheritance. A gift of a new car from one unmarried partner to another is thus potentially taxable, although a husband or wife giving their spouse the same new car would not face a tax.

On separation, matters grow still more complicated—and expensive. Married couples who divorce may make use of the gift tax exemption to divide up their property as they see fit, but cohabiting couples or those in civil unions or domestic partnerships don't have that option. Such couples are liable for federal taxes on transfer of property—rendering the federal government effectively a third partner in their dissolving relationship. Once again, getting the state “out” of marriage only means more state intrusion. Wood writes, “If you look at a many-year relationship with significant assets, the taxes at stake can be enormous. In fact, the tax bill can be so big that in some cases, unmarried couples trying to untangle joint assets might consider getting married just so they can then qualify for the benefits of a tax-free divorce!” At least one heterosexual couple Wood knows has done so, he reports.¹⁸

While strategic marriage is hardly exemplary behavior, the intent of the tax laws is actually quite clear, if only this once. It would be a severe impediment to household management if all significant spousal wealth transfers were subject to taxes. It would require a great deal of federal surveillance of even frequently intimate matters. Gifts to other loved ones are intuitively different from gifts to spouses, and this difference stems from the fact that spouses' finances are almost always inextricably mingled. Inserting the federal government into the arrangement does little more than to help pry it apart. Here again, federal recognition of marriage serves to leave people alone and makes them more free to live their lives as they see fit.

The Scope of Marriage: Who Can Marry?

So far we have been talking a great deal about the nature of the federal legal benefits and protections offered to married couples, and such a discussion is necessary in any serious treatment of federal marriage policy. But another question is important, too: Who is able to partake of these benefits? Which people get them, and which do not? Again, the claim that marriage should serve only as a protection of a negative right may be useful.

As discussed in the previous sections, claiming the existence of a negative unenumerated right means that we must first establish that that right is deeply rooted in our nation's traditions. Yet deep-rootedness can be turned about to further all sorts of very tight restrictions. Much depends on how widely or narrowly we construe the right in question. For example, in *Gonzales v. Raich* (2005), the landmark medical marijuana case, the question of fundamental rights was dismissed entirely, largely on the basis of a narrow construction of rights: In short, the plaintiff was not found to have a fundamental right to use cannabis. It would be absurd to say that cannabis, of all things, was *implicit* in the concept of ordered liberty, argued the prosecution. The U.S. Supreme Court agreed.¹⁹

There is certainly some weight to this claim. The extinction of the entire *Cannabis* genus would not meaningfully change how we think about the nature of rights or of society. It would send no political philosophers back to their drawing boards in the way that, for example, the abolition of marriage might do. But the counter-argument is obvious—namely that the right has been too narrowly construed. Surely ordered liberty includes the right to seek medical treatment when you are sick, and we would think it atrocious if a government deliberately kept sick people from their medicine. Surely it is also implicit that individuals may make an honest living by practicing medicine, and that these practitioners may recommend treatments to their patients. It only follows that patients may take

the prescribed treatments. What else, we may ask, are these recommendations for? Liberty clearly doesn't demand that we bear every illness stoically and without treatment. Liberty must include the general right to try to assuage suffering, or else the "pursuit of happiness" has virtually no meaning. In this light, *Raich* appears to have been obviously incorrect.²⁰

We may easily analogize between *Raich* and the choice of a marriage partner, and some of these analogies again point out the importance of choosing the scope of one's question. For example, can it seriously be claimed that there is a "deeply rooted" right for Scientologists to marry? Certainly not—because Scientology was only founded in 1953. What about the right of a blogger to marry a spacecraft engineer? Both are quite new as professions, aren't they? Indeed, a sufficiently robust view of government power might just allow us to forbid both professions themselves, and then allow us to forbid the individuals from marrying, just for good measure. None of these can be deeply rooted, and thus they can't be fundamental rights.

At some point, though, we must concede that something has gone badly awry in this line of reasoning. "Ordered liberty" can't plausibly mean a totally arbitrary level of government control. Such a state of affairs would not be "liberty" in any sense at all. Some showing of cause is required, at the very least, for prohibitions on new actions. It remains to be seen how federal courts will ultimately rule with regard to same-sex marriage, but these questions are at the heart of the matter.

Once again, the division of marriage rights into negative and positive rights becomes very important. One common objection to same-sex civil marriage is that it compels some taxpayers to support homosexual marriages in violation of their deeply held religious beliefs. Their tax money, like all others', goes to subsidize the positive or welfare rights that accompany marriage. Extending these rights to homosexuals would compel a transfer of wealth for an activity that objectors find abhorrent. "Call yourselves whatever you like,"

The claim that marriage should serve only as a protection of a negative right may be useful.

Simple legal rules would arguably save the government money when compared with the fresh litigation of every new question.

the argument seems to run, “but don’t make me subsidize it.”²¹

There is clearly some inconsistency here with another often-heard social-conservative critique of the welfare state, namely that it tends to *disincentivize* marriage.²² One doesn’t typically disincentivize a behavior by subsidizing it. If *this* were the case, then the objectors would presumably be eager to extend welfare-laden marriage rights to homosexuals. Although costly, these rights would tend to destroy the unwanted homosexual unions, just as our current welfare state on the margin tends to weaken heterosexuals’ unions by fostering a culture of dependency on the state, or even by directly subsidizing the choice to divorce. We can’t easily understand civil marriage as tending to destroy heterosexual, but to incentivize homosexual, unions. Presumably, something has to give. Yet, as we have seen, the matrix of federal entitlements and obligations is exceedingly complex, and perhaps there is just barely some room for both claims to survive here or there.

Besides its coherence, there is also room to question the relative strength of the taxpayers’ objection to same-sex marriage. Considered as just one competing among many, it is surely no stronger, and arguably a great deal weaker, than the objection raised by the Religious Society of Friends (Quakers) that their tax money goes to pay for war, an activity which they likewise find abhorrent. And the sum of tax money that pays for warmaking is orders of magnitude greater than that which would subsidize same-sex marriage.

Indeed, in 2004, the Congressional Budget Office estimated that on balance, legalization of same-sex marriage, both federally and throughout all 50 states, would lead to slightly *higher* net federal revenues, in large part because the residual marriage penalties in our tax code would then be incurred by same-sex couples as well. This effect would not be fully offset by the new exemptions from the estate tax that would be created for same-sex couples. And on the spending side, although Social Security outlays would increase, outlays for other programs, including Supplemental Security Income, Medicare, and Medicaid

would decrease. These decreases would come through changed determinations of eligibility, which would force same-sex couples to declare a now-married partner’s income and assets, thereby disqualifying themselves. Under current law, these assets and incomes must not be declared, as the partners are not married.²³

Let’s admit, however, that those who object to taxpayer-funded same-sex marriages still have a valid point. Although same-sex marriages might be revenue-enhancing on net, still, one might prefer not to provide those incidents of marriage that do cost money, such as the Federal Employees Health Benefits Program, or Medicaid’s spousal impoverishment exemption—under which “a noninstitutionalized spouse may shield a home and some other jointly owned assets from Medicaid’s resource limits,” thus allowing the spouse to retain his or her possessions despite costly nursing home bills.²⁴ However, selectively subjecting a same-sex couple to an income tax marriage penalty while denying the couple such a protection is remarkably punitive, and when placed in such stark terms, the intuitive “don’t make me pay for it” argument loses much of its shine.

One way to dispense with all of these difficulties—if not for war, then at least for marriage—is perhaps to provide *no* welfare benefits to any marriages, and to provide *only* protections of negative rights, such as the default understandings about property and child custody, the legal immunities, immigration sponsorship, medical and legal decisionmaking, and the like. Yet as the above considerations from the CBO illustrate, we are a long, long way from anything like such a marriage regime. Scrapping protections for indigent people whose spouses owe Medicare premiums isn’t likely to be a political winner in any case.

Still, the prepolitical institution of marriage owes nothing whatsoever to Medicare. And the sheer fact of having simple legal rules to follow in some otherwise quite vexing cases would arguably save the government money when compared with the fresh litigation of every new question entailed by the patchwork of marriage, civil union, contractual, and domestic partnership regimes for same-sex

couples that exists today. These savings would be accompanied by the elimination of probably significant deadweight loss in legal fees and paperwork. Although hard to estimate—the CBO didn’t even try—these gains surely exist and are substantial. Recognizing same-sex marriages in like manner to heterosexual ones could well be the cheapest means of dealing with them, and is certainly less expensive than current approaches. If the objection to same-sex marriage really is about not having to pay for it, then opponents should welcome such a change.

Conclusion

The institution of marriage is a bundle of both private and public items. Federal marriage law is likewise a confusing patchwork. The central contention of this analysis is that federal law is on its strongest footing when it recognizes marriage as a set of guarantees for negative rights that are implicit in the *prepolitical* institution of marriage. The federal role in marriage is to get out of the way, and when the government cannot get out of the way, its role is, at the very least, to behave in predictable, orderly, and low-cost ways to ensure that individuals may conduct their family and private lives as they think best. Attaching welfare rights to marriage makes for a good deal of confusion, whatever its other consequences, and attaching differential tax status to marriage creates perverse incentives under a progressive income tax regime. Although it is not clear that all of these difficulties can ever be removed, they should at least be acknowledged and considered carefully when crafting subsequent marriage policy at the federal level.

In light of these principles, some reasonable steps toward improving federal marriage policy would include the following:

- Repeal the Defense of Marriage Act.
- Adopt a flat tax so as to prevent marriage penalties or bonuses and to guarantee equality of taxation among married couples of similar total incomes.

- Maintain the legal capacity to sponsor spouses for immigration and extend it to same-sex couples.
- Take steps to separate more clearly the civil and religious aspects of marriage, including adopting the term “civil marriage” wherever marriage is referenced in federal law.
- Consider in future legislation that marriage is fundamentally a private, individual right, and that governmental recognition of marriage exists above all to protect that right, not to engage in social engineering or the redistribution of welfare rights.

Almost no one disputes that marriage is an institution worth saving. “Marriage,” however, is complex enough that the blunt instrument of the federal government tends to do more harm than good when it is applied to marriage policy, particularly insofar as this policy implicates deeply private and spiritual values. Much of the resulting confusion can be dispelled by separating welfare rights from marriage, separating civil marriage from religious marriage, and preserving only those aspects of federal-level civil marriage that act as safeguards of individual rights.

Notes

1. For the unequal treatment of gays and lesbians in the recent health-insurance legislation, see <http://www.hrcbackstory.org/2010/03/house-posts-health-care-bill-leaves-out-lgbt-specific-provisions/>.
2. Lily Kahng, “One Is the Loneliest Number: The Single Taxpayer in a Joint Return World,” *Hastings Law Journal* 61, no. 3: 651–86, February 2010, <http://ssrn.com/abstract=1371902>.
3. Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000). This book details many of these legal changes.
4. *Loving v. Virginia*, 388 U.S. 1 (1967), <http://case.law.lp.findlaw.com/cgi-bin/getcase.pl?navby=case&court=us&vol=388&invol=1>.
5. *Griswold v. Connecticut*, 381 U.S. 479 (1965), <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?nav>

Much confusion can be dispelled by preserving only those aspects of federal civil marriage that act as safeguards of individual rights.

by=case&court=us&vol=381&invol=479.

6. For travel, see *United States v. Guest*, 383 U.S. 745 (1966); for apparel, among other considerations, see *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). The right to seek employment remains an admittedly contested area of constitutional law, in which courts have not always acted consistently.

7. Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2005).

8. Government Printing Office, “Jobs and Growth Tax Relief Reconciliation Act of 2003,” <http://www.gpo.gov/fdsys/pkg/PLAW-108publ27/html/PLAW-108publ27.htm>.

9. Joint Committee on Taxation, *Description of Revenue Provisions Contained in the President’s Fiscal Year 2011 Budget Proposal* (Washington: Government Printing Office, 2010), <http://www.jct.gov/publications.html?func=startdown&id=3703>.

10. Gregg A. Esenwein, “The Federal Income Tax and the Treatment of Married Couples: Background and Analysis,” CRS Report for Congress, March 29, 2001, <http://wikileaks.org/wiki/CRS-RL30800>.

11. Alternatives to Marriage Project, “Federal Income Taxes,” <http://www.unmarried.org/federal-income-taxes.html>.

12. Kahng, Table 1, p 658.

13. Chris Edwards and Daniel J. Mitchell, *Global Tax Revolution: The Rise of Tax Competition and the Battle to Defend It* (Washington: Cato Institute, 2008).

14. U.S. State Department, “MultiYear Table XVI,” <http://www.travel.state.gov/pdf/MultiYearTableXVI.pdf>.

15. Jagadeesh Gokhale, “Globalization: Curse or Cure? Policies to Harness Global Economic Integration to Solve Our Economic Challenge,” Cato Institute Policy Analysis no. 659, February 1, 2010; “Immigration,” in *Cato Handbook for Policymakers*, 7th ed. (Washington: Cato Institute, 2009).

16. For the evolution of this doctrine and its implications for custody and child support in the American context, see Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000). See also, Hartog, *Man and Wife in America*.

17. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).

18. Robert W. Wood, “Gay or Straight, Marriage Matters—For Taxes,” *Forbes.com*, August 17, 2010, <http://www.forbes.com/2010/08/17/gay-marriage-divorce-taxes-irs-personal-finance-tax-lawyer-wood.html>.

19. *Gonzales v. Raich* (previously *Ashcroft v. Raich*), 545 U.S. 1 (2005).

20. For an anticipation of this line of argument, see Frank H. Easterbrook, “Abstraction and Authority,” 59 *University of Chicago Law Review* 349 (1992).

21. See, for example, Mike Adams, “Nothing Gay about It,” Rightly Concerned (a blog of the American Family Association), <http://www.afa.net/Blogs/BlogPost.aspx?id=2147498502>, which warns that “Income taxes will be increased . . . Social security taxes will be increased . . . [and] Medical insurance premiums will rise” as the result of same-sex civil marriage.

22. Charles Murray, *Losing Ground: American Social Policy, 1950–1980*, 10th anniversary ed. (New York: Basic Books, 1994). Although subsequent reform to the American welfare system did much to answer Murray’s objections, significant disincentives to marriage remain, as we have already discussed, above all for the poor, and are chiefly located in the tax code.

23. *The Potential Budgetary Impact of Recognizing Same-Sex Marriages* (Washington: Congressional Budget Office, 2004). A similar analysis has not been completed in light of the Patient Protection and Affordable Care Act (2010).

24. *Ibid.*, p. 9.

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