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TWO MODELS OF DISESTABLISHED MARRIAGE

Vaughn Bryan Baltzly

A growing number of theorists have observed that the response to the same-sex marriage controversy most congruent with basic liberal principles is neither the retention of the institution of marriage in its present form, nor its extension so as to include same-sex unions along with heterosexual ones, but rather the *disestablishment* of marriage.[1] On this proposal, the state—rather than taking a stand on the controversial question as to which types of unions for life partnership properly deserve to be accorded the title of "marriage"—instead sidesteps this contentious issue by "getting out of the marriage business" altogether.

Less commonly observed, however, is the fact that there are two competing models for how the state might effect a regime of disestablished marriage. On the one hand, there is a "deflationary" approach, on which the state ceases to confer *marital* status: the sanctification of life partnerships as "marriages" is wholly devolved to the private sector (a question for churches, synagogues, and mosques to decide, rather than legislatures and courts). But the state does remain in the status-conferring business. For on this approach, the state would still bestow a certain "thinner," more "neutral" *legal* status—as it does when it creates civil unions, for instance. In recognition of the fact that this approach retains the use of public, legal status to recognize certain caregiving domestic partnerships, we might term this the "Status Model" of disestablished marriage.

On the other hand, there is an "eliminativist" approach, on which the state ceases to confer any sort of status at all—not even the thin or neutral status of "civilly united." There simply are no publicly registered domestic partnerships. What there is, is contract law, and individuals entering into contracts for life partnership—contractual arrangements that might assume any of a wide variety of forms. As with any sort of contractual relationship, the state acts as a third-party enforcer to these life-partnership contracts—this is its only involvement with the institution of marriage. As on the Status Model, of course, private individuals and institutions remain entitled to perform whatever marriage rites or ceremonies they wish. In recognition of the fact that this approach dispenses with the use of public legal status altogether, and relies (for the regulation of caregiving domestic

partnership arrangements) solely on the resources provided by extant contract law, we might term this the "Contract Model" of disestablished marriage.[2]

In this paper, I explore the merits of these competing models. After briefly discussing what it means to speak of "disestablishing marriage," and examining the case for disestablishment, I proceed to consider the advantages and disadvantages of each model. My tentative conclusion is that the Contract Model is the one that best instantiates cardinal liberal virtues.

1. Disestablished Marriage?

What does it mean, precisely, to speak of marriage as being "established" or "disestablished"? As is probably already clear, the language of (dis)establishment is borrowed from US constitutional law, where it is used to describe the state's proper stance with respect to religion. The First Amendment to the US Constitution begins with the stipulation that "Congress shall make no law respecting an establishment of religion"; this has come to be known as the "Establishment Clause." Just as the framers of the Constitution recognized the wisdom of barring the state's endorsing one among several contested conceptions of religious truth, so too do contemporary marriage disestablishmentarians commend the prudence of the state's refraining from endorsing any of several competing ideals of marriage.

To urge marriage's being disestablished, of course, implies that it is currently *established*. How plausible is this claim? Here, I cannot hope to improve upon Tamara Metz's discussion of the topic, so I shall quote her at length:

> I use the term ["established marriage"] to refer to a historically specific arrangement where the state actively controls, privileges and utilizes a specific account of marriage to regulate the intimate and caregiving lives of its citizens. To say that marriage is established is to imply that citizens hold deeply divergent views of what marriage *is* and how intimate life ought to be arranged. . . . In this context, to define and promote "marriage" is to privilege one version of the institution over all others.

This "privileging of one version of the institution over all others" manifests itself in a variety of ways:

> The state establishes its preferred version of marriage by providing exclusive material, legal and expressive benefits to those who (may) opt for marital status, and by punishing those who violate the norms embodied in the status.[3]

That the state punishes those who violate publicly promulgated marriage norms may not seem obvious at first, but Metz elicits a host of examples: historical examples, like "the criminalization and prosecution of polygamous and interracial marriage," and more contemporary examples, like that of Mormon polygamist Tom Green. Of Green, Metz writes: "Although he and his many wives claimed to be married under religious but not legal authority, Green received a 5-year prison

term for his hubris. So vital is final control of the label that even non-legal use of the marital appellation, it appears, is unacceptable."[4] More recent examples include British Columbia's (failed) prosecution of Mormon polygamists in 2009, and a Utah county's 2011–2012 investigation of the family of Kody Smith, stars of the popular reality television show *Sister Wives*.

Later, Metz writes that

> [j]ust as the "establishment of religion" refers to the state's involvement in defining, inculcating and reproducing a particular religious worldview and institution, so the "establishment of marriage" highlights the state's integral role in reproducing and relying on belief in a particular comprehensive account and institutional form of intimate life and its tie to the community.[5]

As noted at the outset, the principal virtue of disestablishmentarianism is its elegant solution to the dilemma currently posed to liberalism by proposals to "legalize" same-sex civil marriage.[6] In what way do proposals to amend[7] the current institution of civil marriage, so as to include same-sex unions along with heterosexual ones, pose a *dilemma* for liberalism? That there is a dilemma here can best be seen by casting the issue in terms of liberal neutrality. For on any of the common contemporary specifications of the ideal of neutrality (viz., neutrality of justification, neutrality of effect), it is clear that there is no resolution to this controversy that remains neutral with respect to citizens' competing understandings of the proper nature and scope of the institution of civil marriage. Whether individual states and/or the federal government[8] retain the institution of marriage in its present form, or extend it to include same-sex unions, their policies will certainly run afoul of the deeply held beliefs and values reasonably (we may suppose) held by broad swaths of their citizenries.[9] The appeal of disestablishmentarianism, then, is that it offers a "third way" that goes right through the horns of this dilemma. By quitting the field of marriage policy altogether, and getting out of the business of determining which unions are legitimately certifiable as "marriages," the state *does* have a way to remain neutral with respect to its citizens' contested visions of the institution.[10]

A further virtue of disestablishmentarianism will appeal to those whose animating concern is less the preservation and protection of the state's liberal credentials (viz., its fairness, its neutrality), and more the preservation and protection of the institution of marriage itself. To foreshadow somewhat, the analogy with disestablished religion (developed more fully in section 5) is instructive in this regard. Many commentators have observed the high degree of religiosity in the United States compared to that displayed by citizenries in other Western democracies, and speculated that this fact is historically connected with American ecclesiastical disestablishment. Just as the vigor and vitality of religious life in the United States is plausibly associated with its history of separation from the state, so also might the health and vigor of the institution of marriage be improved by its

being divorced from the state. Tamara Metz expresses the analogy thusly: "[I]f we follow the comparison to religion, history would seem to be on our side in the prediction that the unique expressive value of marriage would increase were the state to relinquish control over the institution."[11]

For these reasons, among others, marital disestablishmentarianism has generated considerable attention in the recent scholarly literature, from theorists of widely divergent political and philosophical perspectives.[12] However, just as we find that citizens of contemporary liberal polities endorse competing conceptions of civil marriage—the very fact that makes disestablishmentarianism an appealing theoretical option in the first place—so also are we beginning to observe that disestablishmentarians themselves cleave into two camps, each with a competing understanding of what it means to "disestablish" marriage.

2. The Status Model

The first such group includes those we might term "Status Theorists." Proponents of the Status Model argue that the state should abstain from conferring the status of *married* on any unions for life partnership. In its place, however, they recommend that the state still confer a thinner, more neutral status upon such partnerships—for instance, the sort of status conferred when the state joins persons into civil unions. In this respect, Status Theorists advocate that the state take a deflationary approach to the legal status it confers upon registered domestic partnerships by "leveling down" to civil unions. Meanwhile, private institutions—most prominently, religious institutions—would remain free to perform marriage ceremonies and rites as they saw fit, with some electing to recognize same-sex partnerships and others preferring to reserve the institution of "marriage" for heterosexual couples, as the case may be. This arrangement[13] preserves the autonomy of such private institutions, while still extending the benefits of registered partnership to a wider range of persons. We may think of Status Theorists as recognizing the merits of two equally forceful claims—which nevertheless stand in some tension with one another—and as offering a compromise between them. On the one hand, they make the "Pluralist" recognition that *marriage* is a contested notion—subject to reasonable disagreement as to its proper scope and nature. On the other hand, Status Theorists make the "Public Endorsement" recognition that it is legitimate and desirable for the state to recognize, protect, encourage, and regulate (at least some forms of) domestic partnership, and that this public involvement with domestic partnerships should involve the conferral of certain benefits—material and otherwise.[14]

Status Theorists further cleave into what we might term the "Conservatives" and the "Radicals." Conservative Status Theorists wish, we might say, to conserve both (i) as much as possible of the extant legal apparatus already utilized to recognize, protect, encourage, and regulate domestic partnerships, and (ii) the only alterna-

tive legal status (alternative, that is, to marriage) currently in existence: that of *civil unions*. Radical Theorists, on the other hand, propose alternative arrangements—alternative, not only to marriage, but also to civil unions—as the best approach to affording the public recognition that domestic partnerships require.

Representative recent examples of Conservative Status Theorists include Torcello (2008) and March (2011). Torcello offers us the "Marriage Privatization Model" (MPM), a proposal under which "the state endorsement of any marriage is inappropriate"; rather, "state authority must be confined to exclusively endorse civil unions for both heterosexual and homosexual couples."[15] Couples are still more than welcome to utilize private institutions to further certify their unions as *marriages*, if they wish, and no such institution will be forced to perform marriage ceremonies, or to recognize marriages, to which they object. Torcello bases his proposal on an appeal to Rawls's conception of public reason—which, if taken seriously, "leads to the idea that the legalization of same-sex marriage may be just as unbalanced as its ban."[16] Andrew March, meanwhile, argues that "a liberal state should get out of the 'marriage business' by leveling down to a universal status of 'civil union' neutral as to the gender and affective purpose of domestic partnerships."[17] He specifically characterizes his view as a version of the Status Model (though he does not use the term)—citing as one of his background assumptions the position that "it is justified for a liberal state to recognize some forms of domestic partnerships or families in the first place."[18] As if to ensure that his reader understands his Status Model allegiance, March immediately proceeds to contrast his view with more "contractualist" versions (though again, he does not use the term) of marital disestablishmentarianism:

> It is, of course, possible to imagine the argument that the liberal state gets out of the marriage business by getting out of it entirely—by extending no recognition or positive rights to families whatsoever beyond negative noninterference rights. However, I am interested in the dilemma of a society broadly like existing liberal ones which is committed both to recognizing (and/or subsidizing) families.[19]

Representative recent examples of Radical Status Theorists include Brake (2010, 2012), and Metz (2007, 2010). Elizabeth Brake advocates a legal framework in which "individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically," with "no principled restrictions on the sex or number of spouses or the nature and purpose of their relationships, except that they be caring relationships."[20] Though two of the three terms interchangeably used by Brake to refer to her proposal utilize a form of the word "marriage" ("marital pluralism" and "minimal marriage"), it is clear from her third term ("disestablishment"[21]) that her proposal is best understood as a version of marital disestablishmentarianism, and not as an inflationary argument for simply expanding the current institution so as to include same-sex and polygamous unions. This is further made clear by Brake's insistence that "[m]inimal

marriage would also reduce the marital rights available": "many current marital rights would be eliminated in an ideal liberal society," which would not provide health care, basic income, or "economic assistance on the assumption of dependency between spouses."[22] Even so, Brake's proposal is not fully eliminativist: she allows that "there is a rationale within public reason for a legal framework supporting nondependent caring relationships between adults," and that "this framework is a fundamental matter of justice."[23] As such, certain legal privileges would remain: alone among the multitude of rights and privileges that characterize current marriage policy, minimal marriage "would consist only in the rights which *recognize* (e.g., status designation, burial rights, bereavement leave) and *support* (e.g., immigration rights, caretaking leave) caring relationships."[24] The retention of these two categories of rights, furthermore, demonstrates that—while fully in the disestablishmentarian fold—Brake's proposal belongs to the Status Theorist's camp, rather than to the contractualist's:

> Although I argue for reducing state restrictions on the terms of marriage, I also argue for retaining marriage as a distinctive legal category, and for this reason, minimal marriage is not the contractualization of marriage. Minimal marriage consists in rights which recognize and support caring relationships; these rights designate a status, and their content is accordingly standardized.[25]

This position is taxonomized as a species of the *Radical* Status Model, furthermore, on account of its proposal to regard marital rights as severable: under a regime of minimal marriage, individuals can

> select from the rights and responsibilities exchanged within marriage and exchange them with whomever they want, rather than exchanging a predefined bundle of rights and responsibilities with only one amatory partner. . . . [It] would allow a person to exchange all her marital rights reciprocally with one other person or distribute them through her adult care network.[26]

Brake illustrates the contemplated severability of minimal marital rights with the example of Rose, who has distributed her marital rights across the members of her adult care network in exactly this way. She has formed a legal partnership with her (platonic) cohabitant Octavian, to regulate the terms of their shared property-ownership; she has bestowed her employer's health care benefits on her ailing Aunt Alice, who lives nearby; she has delegated powers of attorney, executorship, and emergency end-of-life decision making to her bioethicist kindred spirit Marcel; and, despite all this, Rose still lives separately (and, presumably, at a great distance) from the long-term love of her life, Stella. Because "[t]here is no single person with whom Rose wants or needs to exchange the whole package of marital rights and entitlements," the proposed regime of minimal marriage allows her to effect marital relationships with multiple partners, inasmuch as she "wants and needs to exchange some marital rights with several different people."[27] Minimal marriage "allows 'traditionalists' and romantic lovers to exchange their complete

sets of marital rights reciprocally, while Rose and others like her distribute and receive marital rights as needed. Minimal marriage is a law of adult care networks, including 'traditional' marriages."[28]

Meanwhile, Tamara Metz advocates replacing *marriage* and *civil unions* with the status of "Intimate Care-Giving Union," or ICGU. Noting that "care is essential for the survival and flourishing of both individuals and society,"[29] and noting further that "giving care, especially intimate care in a market-based economy, is risky," Metz concludes that, in order to "insure that intimate care is given—at all, and well—and that its benefits and burdens [are] distributed fairly, the state rightly protects intimate caregiving."[30] This the state does by instituting a public legal category of *membership in an ICGU*. An ICGU status

> would look a lot like marital status today. It would afford legal recognition from which would flow various legal presumptions (i.e. lines of rights and responsibility), protection (e.g. from certain types of intrusion), and material benefits (e.g. tax benefits, etc.). As with marital status now, an ICGU status would be defined, conferred, and if necessary, dissolved by the state.

Because "a civil status expressly tailored to protecting intimate caregiving would be more appropriately crafted and accurate in its target," and because this proposed change "would benefit gender equality," "[d]isestablishing marriage and creating an ICGU status would better serve equality, fairness, and care than do legal regimes currently in place in most liberal democracies."[31]

3. The Contract Model

We may think of Contract Theorists as those who share the Status Theorists' Pluralist recognition, vis-à-vis the reasonable contestability of the proper understanding of the institution of civil marriage, but who afford the Public Endorsement recognition less weight. Contract Theorists may come to their hesitance regarding the Public Endorsement recognition via either of several routes. They may believe, for example, that domestic partnerships are indeed worthy of some public recognition, support, encouragement, and regulation—but that the public purposes served by any sort of legal recognition are outweighed by the ills that unavoidably attend to the state's endorsing, via its choice of "public partnership regime," some subset of its citizenry's conflicting understandings of the institution. Alternatively, Contract Theorists may simply deny that domestic partnerships demand any sort of public recognition or support, or to be otherwise enshrined in any sort of legal status. Yet other Contract Theorists may actually affirm a position articulated in section 2 above: that—far from requiring public, legal recognition—the institution of marriage (or of domestic partnership more broadly) is of such vital social importance that it must be sheltered and immunized from the dangers of legislative definition, judicial interpretation, and bureaucratic regulation.[32] Regardless of their exact position on the merits of public legal endorsement, these Theorists affirm an eliminativist

stance with respect to the state's conferral of legal status in this domain. Existing contract law, they maintain, is sufficient for the task: the state's only involvement in the institution of marriage—or of domestic partnership more generally—is to act as a third-party enforcer of privately drawn contracts for life partnership. Recent examples of Contract Theorists include Shultz (1982); Fineman (1995, 2004); Card (1996, 2007); Boaz (1997); Garrett (2009a, 2009b); and Baltzly (2012); the position has historical antecedents in von Humboldt (1993), who defended it in 1831.

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The views of still other writers do not fit neatly within the theoretical dichotomy of "Status/Contract." While Robin West (2007) is best characterized as a Status Theorist, her view is worth considering separately inasmuch as she offers a model that is really a hybrid of the Conservative "leveling down to civil unions" approach, *and* of traditional civil marriage. On her proposal, civil unions are expanded such that they are (i) available in every jurisdiction, and (ii) open (along with traditional marriages) to heterosexual partners, and even to non-conjugal partners as well. The cultural "market" is then left to determine which form of legal union (if either) shall prevail. West counsels proponents of marriage equality to adopt a two-pronged approach, wherein advocates pursue first a "legislative strategy"—namely, an effort to secure the expansion of civil unions contemplated in (i) above—and then a "cultural campaign" to encourage all parties—same-sex partners, heterosexual couples, and even non-conjugal partnerships—to exercise their civil union option when selecting a legal category to recognize their domestic partnerships rather than their *marriage* option.

Sunstein and Thaler (2008), meanwhile, defy easy categorization. With the "science fiction" scenario that opens their paper, they envision a regime wherein a set of "default rules" is triggered whenever individuals enter into (otherwise personally crafted) contractual unions for life partnership. These rules govern, for example, the distribution of jointly held property upon the dissolution of the union, whether through death or departure. These default rules are just that, however—defaults—and can be overridden by the parties to the union, as they see fit. In describing this scenario, they mention both a generally Status approach, and a generally Contract approach, as alternative means of implementing this science fiction scenario—but endorse neither.

4. Competing Merits

Having surveyed a representative range of the disestablishmentarian positions on offer, we turn now to an evaluation of their merits. In this section I will outline several of the virtues and vices of each competing model, before hazarding (in the fifth and concluding section) the verdict that the Contract Model is to be preferred on grounds that it better instantiates cardinal liberal virtues.

4.1 Strengths of the Status Model

The Status Model has at least two chief attractions: what we might term the "Ease of Migration" feature, and what we might term the "Preserved Public Recognition" feature. Let us consider each in turn.

4.1.1 Ease of Migration

The first thing to note in favor of the Status Model is the ease with which we can effect the transition from the laws, regulations, and policies—of both public and private institutions—of the current regime of established civil marriage, to laws, regulations, and policies of a civil *union* regime. It is barely an oversimplification to state that, in terms of amending extant policies, all that would be required would be to replace any appearance of the word "marriage" (in, e.g., administrative laws respecting the provision of Social Security survivor benefits) with the phrase "civil union," and perhaps also appearances of the word "spouse" with the phrase "registered domestic partner."

This picture is complicated for us slightly by the existence of those I previously identified as the "Radical" Status Theorists, who wish not only to eliminate the state's use of the marital label, but also to reform marriage's successor institution in various ways. Even here, though, the picture is not too complicated: typically, Radical Theorists wish to preserve intact many of the current legal features of civil marriage, and simply to "prune" the institution by eliminating others of the current legal arrangements. Radical Theorists typically do not—and this is the point that is salient for our purposes—advocate for the addition of a substantial body of new administrative law, or otherwise for a *wholesale* revision of current legal arrangements.

4.1.2 Preserved (and Expanded) Public Recognition

Aside from administrative convenience, though, the ease with which current policies respecting the institution of marriage can be transformed into policies respecting a new, more inclusive (but less morally loaded) institution of civil union points to another, more important, reason telling in favor of the Status Model. For much of the importance of the Ease of Migration consideration is inherited from the importance with which many[33] liberal theorists invest current public policies respecting the institution of marriage in the first place. If the current state treatment of marriage were largely a matter of indifference, after all, it wouldn't strike these theorists as quite so important that current state treatment of marriage be largely replicated in the new state treatment of civil unions. Instead, we would be apt to prefer whatever regime of civil union law might be transitioned to with the maximum convenience—irrespective of how disruptive such regime may (or may not) be with respect to civil marriage. But the current state treatment of marriage is *not* wholly a matter of indifference to those liberal theorists who believe, with Metz, that "[t]here are compelling liberal reasons—beginning with the physical health and well-being of citizens and

the polity—for the state to recognize and protect intimate caregiving unions."[34] And when it comes to effecting this role, these theorists believe, the state can ill afford to rely on private contracting: "[C]ontract . . . is an ill-suited mechanism for governing relations of intimate care and interdependency. *Status*—a publicly defined and defended identity that carries (and invites enforcement of) a bundle of rights and responsibilities—is, however, well suited to the challenges of outside involvement in relationships of intimate care."[35]

The Ease of Migration consideration strikes us as important, that is, because it assures us that we will be able to preserve much, perhaps all, of the state's current favorable treatment of marriage—a favorable treatment that Status Theorists applaud. And it assures us that this favorable treatment will be even more extensive than before, inasmuch as same-sex couples will now fall within its purview. Lastly, it secures this more widely distributed favorable treatment without implicating the state in a controversial value judgment regarding the proper understanding of the venerable institution of *marriage*. This accomplishment will be welcomed (though perhaps not enthusiastically applauded) by Traditionalists—those who oppose amending the current institution of civil marriage so as to include same-sex couples—as preferable to the legalization of gay marriage. And it does so without depriving Traditionalists of their revered institution of marriage: Traditionalists can still associate with institutions of civil society (churches, synagogues, mosques, etc.) that perform (full-blooded) *marriage* ceremonies, according to their preferred traditions. What's not to love?

4.2 Weakness of the Status Model: Vulnerability to Abuse

Well, there is one thing not to love here, though it's not immediately obvious. And that is that the Status Model of disestablished marriage presents certain opportunities for abuse—vulnerabilities largely (though not wholly) absent from the current regime of civil marriage. There are two stages in the explanation of how this danger arises. The first stage involves demonstrating that the status of *registered domestic partner*, or the institution of *civil union*, will likely have to extend, not only to same-sex couples as well as heterosexual ones, but likewise to polygamous partnerships. The second stage involves demonstrating that, once open to polygamous unions as well as to couples, the institution of civil unions is vulnerable to exploitation and abuse. To each stage in turn.

4.2.1 Civil Unions: Inclusive Enough for Polygamists

A full defense of the claim that if constituted so as to include same-sex unions, the institution of civil unions needs be constituted so as to include polygamous unions as well, is beyond the scope of this paper.[36] But we can make two brief observations in support of this claim. The first observation is that seemingly any consideration that favors including same-sex unions along with heterosexual ones will likewise favor including polygamous unions as well. (To motivate this observation, consider a

simple rights-based deontological argument for expanding civil marriage to include same-sex unions along with heterosexual ones. Consider further the application of this simple argument to the case of polygamists. If gay and lesbian citizens' equal rights are violated by their exclusion from an institution open only to heterosexual couples, is it not the case that the rights of would-be polygamists are violated when the same institution is restricted to *couples* only? If the argument applies to same-sex unions, it seems to extend to polygamous unions.)

The second observation supporting the claim that the institution of civil unions will likely have to include polygamous unions is that seemingly any consideration that favors restricting civil unions to couples only, and barring any other form of *n*-tuple, will likewise also favor restricting the institution to only heterosexual couples. Thus, for example, an appeal to the "traditional understanding of domestic partnership" as an exclusively two-person affair actually favors restricting the institution only to *heterosexual* couples—akin to an appeal to the "traditional institution of marriage." For plausibly, there is no "traditional understanding of domestic partnership" that is not at the same time an understanding of it as a fundamentally *heterosexual* partnership—and one that is centered on the production and rearing of children, to boot.

An alternate tack in this vein is a modified appeal to tradition—one that allows that the heterosexual character of marriages, as traditionally conceived, is a merely contingent, historically conditioned feature, while its *dyadic* character is an essential feature. Thus, one could block the purported slide into allowing polygamous unions with an appeal to *monogamy* alone as the traditional central feature of all domestic partnerships—and one that must continue to be preserved, even if the time has now come to progress to a more inclusive understanding of the institution that permits the recognition and celebration of same-sex dyadic unions. Perhaps what is essential to the marital bond after all is (as Christian Coons has expressed it[37]) the promise to treat a single other individual (of whatever gender) *uniquely* among all persons; to love, honor, and cherish *one* other person, to the exclusion of all others, as having unique value in one's world. I concede that this is likely the most promising approach to defending the legal recognition of same-sex partnerships without at the same time recognizing polygamous unions. However, it has at least two severe limitations. First, *any* appeal to tradition is beset by the difficulty that there is likely just as strong a case for the "traditionality" of polygamous unions, as there is for the traditionality of two-person unions *simpliciter* (irrespective of gender). Second, one must be careful in deploying the "love requires regarding another individual as unique" maneuver. Consider, for example, the implications of this position for parents who have more than one child. Is the parental love experienced by an only child superior to that experienced by his cousins, each of whom must share the spotlight with his or her siblings? Does a parent's love for her first child diminish when she has her second, insofar as she can no longer regard her first-born as being *uniquely* valuable? If we are

comfortable acknowledging the capacity of parents to manifest full parental love and devotion to multiple children—as we quite rightly are—we should at least be cautious of cavalierly insisting that conjugal love and devotion contrariwise require exclusivity.

So, without further ado, let us consider the case to be closed: if civil unions are to be open to same-sex unions, they are to be open to polygamous unions as well. What of the second stage in my two-staged explanation of the Status Model's vulnerability to abuse?

4.2.2 Inclusive Civil Unions: Dangers of Fraud

If the state confers certain legal benefits (e.g., tax breaks) on registered domestic partnerships, and said partnerships need not be restricted to parties of two, then what is to prevent opportunistic groups of three or more individuals from exploiting the policies of a civil union regime for purposes of acquiring ill-gotten access to these benefits? In the course of defending his version of the Status Model, Andrew March considers this objection, which he articulates as follows:

> In societies where the point of civil unions or registered domestic partnerships is to materially subsidize families in various ways, an objection to [including polygamous unions within the purview of these unions] could be leveled that the temptation for fraud to access these benefits would be great, or even that the costs of extending them to sincere families would be an unfair burden on others.[38]

To illustrate the worry, imagine a "household" consisting of five unrelated members—a house rented out to a group of graduate students, for example. What is to prevent these five householders—none of whom bear any romantic feelings toward any of the others—from joining together in a five-person registered domestic partnership—thereby securing ill-gotten access to, for example, the tax benefits that are intended to accrue to genuine households under a civil union regime—planning all the while to dissolve their "domestic partnership" once, say, their dissertations are defended, and they all go their separate ways? Call this the "Group House Objection," in recognition of the temptation that such a regime offers to people thus situated. What the Group House Objection demonstrates is not that vulnerability to this sort of fraud and abuse is unique to the marital regime contemplated by the Status Model. Rather, it demonstrates that—by contemplating a maximally expansive and inclusive institution of Civil Unions—the Status Model also thereby greatly expands and broadens both the incentives and the opportunities for fraud and abuse.

March endeavors (unconvincingly, by my lights) to demonstrate that inclusion of polygamous unions within the purview of a civil union regime will not pose undue societal burdens or costs in this way. An alternative response the Status Theorist can make here is that "it comes with the territory": free-rider problems are pervasive, and are endemic to a wide range of worthwhile social policies.

As the plot devices of numerous Hollywood romantic comedies and television sitcom episodes illustrate, even the contemporary institution of civil marriage is subject to such exploitation: people already marry for convenience, for insurance coverage, for pension benefits, for immigration sponsorship and residency status, and the like. That the civil union regime favored by many Status Theorists is likewise vulnerable is not necessarily a mark in its disfavor. One further response is to urge the erection of additional safeguards, to supplement the (less restrictive, more expansive and inclusive) institution of civil unions. Perhaps prospective partners could be required to produce independent evidence of their genuine commitment—not wholly dissimilar to the current US practice of affording extra scrutiny to the *bona fides* of couples seeking immigration sponsorship for their would-be spouses. Perhaps, for example, they must have a joint bank account, or jointly hold other assets.[39]

But an even more forceful and obvious response is available: if the state confers no tax or legal benefits upon those it officially recognizes as having a particular status (viz., being a member of a registered civil union), then there are no benefits available to be exploited, defrauded, or ill-gotten. If there's simply nothing "up for grabs," there will be no grabbing. But this is just to say that the solution to the Group House objection to the Status Model is simply to embrace the Contract Model! So, having just identified one advantage of this competing model, let us segue into a fuller consideration of its virtues and vices.

4.3 Strengths of the Contract Model

As we have just observed, on the Contract Model of "privatized marriage," the state does not confer any status upon persons attendant to their undertaking certain voluntary arrangements for life partnership. That is the first strength of the Contract Model—it will not be liable to fraud and abuse in the way we have just seen the Status Model is. Having observed this symmetry between our two models with respect to the "Vulnerability to Abuse" consideration—namely, that the weakness thereby attributed to the Status Model is likewise a (mild) strength of the Contract Model, insofar as it is immune to this weakness—let us grant the analogous symmetry between the two models with respect to the two *strengths* of the Status Model, discussed above. That is, let us acknowledge at the outset that two (mild) weaknesses of the Contract Model are that it fails to embody the advantages described in our discussion of Migratory Ease and Preserved Recognition, above. But beyond these (mild) corresponding strengths and weaknesses, is there anything further to be said for, or against, the Contract Model? In the remainder of section 4.3, I discuss two further strengths of contractualism with respect to marriage—and, by implication, a further two (mild) weaknesses of the Status approach. In section 4.4, then, I comment on the two (mild) weaknesses of the Contract Model whose existence we conceded just above—offering mitigating considerations that seek to demonstrate that matters don't stand quite so

poorly in these respects; that these mild weaknesses of the Contract Model are even milder than they first appear.

4.3.1 Historical Momentum (vis-à-vis the Status of Status*)*

Nineteenth-century American anthropologist Henry Sumner Maine famously observed that the development of modern legal arrangements out of pre-modern regimes is represented by the evolution from "Status to Contract."[40] Consider, then, just how odd a practice it is in the first place, for modern liberal polities to be conferring *status* on persons in the manner currently observed in the institution of civil marriage, and in the manner still countenanced by the Status Model. And make no mistake: conferring status—in exactly the manner that feudal systems of old recognized the statuses of "nobility" and "commoner"—is precisely what the state does when it deems you to be *married* (or when it recognizes you as a *registered domestic partner*). Following Anita Bernstein, Jeremy Garrett cites other forms of legal status that have been enshrined in law: "unsavory examples" including "the status of 'wife' under coverture law, and the classifications of 'subnormal mentality' (including 'moron,' 'low moron,' and 'idiot')."[41] It's worth noting that under coverture law, wifely status "not only denied women access to property of their own but also, in important respects, entailed that they were actually themselves the property of their husbands."[42] As societies have advanced, industrialized, democratized, and (in a word) liberalized, the trend has been to eliminate these statuses as legal categories; persistence of a recognized legal status designating one's membership (or lack thereof) in a registered domestic partnership would seem to stand athwart this long-run trend.

But there is a difficulty here for the Contract Theorist: namely, to what extent does this anti-status argument generalize? Specifically, the Contract Theorist needs to confront the implicit suggestion that her invocation of this consideration commits her to the position that *all* legal statuses ought to be abolished. This is especially a concern for anyone who enthuses—as the Contract Theorist does—about the resources offered by *contract law* as an alternative means to capture much (or all) that is worthwhile in our present regime of civil marriage. For contract law itself—no less than bygone institutions and arrangements like that of nobility—presumes an extensive role for *status*. For note that there are many other forms of public status that hover in the vicinity of contract law—limited liability partnerships, for example. Does the Historical Momentum argument imply that we need to do away with these too? If so, the contractualist's case—insofar as it relies on an appeal to the virtues or merits of contract law—may be undermined.

4.3.2 Informed Consent

Numerous philosophers, legal scholars, and feminist theorists have critiqued the peculiar "hybrid" character of marriage—as part contract, part pre-formed public status—as allowing (even promoting) members' ignorance as to the fundamental terms of the contractual relationships into which they enter (as well as of the terms

governing these relationships' dissolutions) when they choose to marry. Jeremy Garrett has assembled a collection of these critiques, and I will quote liberally from his summary:

> Anita Bernstein . . . [notes] of preformed legal statuses in general that "legal consequences follow to status-bearers without consent; only a rare person who acquires a comprehensive status understands what it means before the label is bestowed" (2003, p. 133). . . . Barbara Stark puts the matter in its starkest terms, noting that civil marriage involves plunging "blindly into legal relationships" that partners "know little or nothing about" (2001, pp. 1479, 1482–83). For example, many persons would be unlikely to know or appreciate in advance that the rights and responsibilities assigned to legal marriage can change (and change significantly) should one move to a new jurisdiction. This fact can have important ramifications for numerous terms of the marriage contract, including such important terms as property and child custody arrangements. . . . What happens, then, is that one's status of being legally married becomes the dominant consideration, not the particular terms under which one contracted.[43]

To illustrate the danger posed by the fact that your marital status is what travels with you when you cross state and national boundaries (rather than the contractual terms of the marital regime binding in the jurisdiction in which you originally tied the knot), consider Claudia Card's discussion of the case of Betty Mahmoody. Ms. Mahmoody "found after arriving in Iran that she had no legal right to leave without her husband's consent, which he then denied her, leaving as her only option for returning to the United States to escape illegally (which she did)."[44] Garrett correctly diagnoses the problem here: "[T]he facilitating element is clearly the status component of civil marriage, which allows for substantive difference in contractual terms to be brushed over in favor of a comprehensive social identity."[45]

While the civil union regime favored by Status Theorists would inherit this difficulty vis-à-vis the uneasy hybrid contract/status character of civil marriage, a contractualist regime avoids it altogether. Instead, it

> encourages substantive familiarity with the contractual terms under which one is agreeing to be bound, if for no other reason than the fact that one would be *designing* (though not necessarily creating *de novo*) the broad contours of those terms. This increases significantly the likelihood that the martial contract will be [in the words of Susan Moller Okin] a "fully articulated act of will."[46]

Of course, apropos the Betty Mahmoody worry, a corresponding worry might be thought to arise under a regime of marital contractualism: namely, what happens to a couple (or other *n*-tuple) who draws up a contract in one country and moves to a second one, where the latter jurisdiction (for whatever reason) refuses to recognize the validity of their contract? Here, all we can do is to note that matters would stand no differently than they presently do with other types of contracts—and the

matter of transnational recognition and enforcement of contractual obligations is not unknown to scholars and lawyers. There is an established body of thought, and an institutional apparatus, concerning international commercial arbitration, for instance—see, for example, the United Nations' "Project on Dispute Settlement in International Trade, Investment and Intellectual Property."[47] This body of work could likely lend precedent (if others do not already exist) for navigating the sorts of challenges liable to arise in these contexts.

As with the Historical Momentum consideration, however, there is a slight difficulty for the Contract Theorist here, and it is similar to the one that attends to that same consideration. To wit: the marital contractualist must be cautious about pressing this point too strongly, lest it undermine the general confidence in extant contract law that underlies her endorsement of it as a suitable alternative to civil marriage. Consider that ignorance of contractual terms seems to be ubiquitous; it is hardly a defect of *marital* contracts alone. To allege that contracting ought not to occur except in conditions wherein contractees are fully apprised of every term and condition of the contracts they sign, is to advocate for the disruption of a whole wide swath of human activity—not only the contractual elements of civil marriage. (The unconvinced reader is invited to consider whether he read every word of that last software license agreement he "signed," or whether she read every word of the first lease or mortgage agreement she ever signed.)

4.4 Weaknesses of the Contract Model, Mitigated

The principal weaknesses of the Contract Model were first noted above, when we remarked that it cannot claim the two important advantages (if they are advantages) of the Status Model. In this section, though, I offer some considerations that mitigate these concerns.

4.4.1 Preserved Recognition*, Reconsidered (Or, Parental Status as an Alternative Means of Protecting Children)*

Note that the Contract Theorist need not sacrifice all the advantages of public, status-like recognition of domestic partnerships, countenanced in our discussion of the Ease of Migration consideration above. The marital contractualist can concede that marriage policy is currently put to use, albeit clumsily, in serving worthwhile social goals. In particular, we can easily locate much of the appeal of official state recognition of partnerships—much of what Status Theorists like about the family, and much of why they are cheered that on the Status Model, lifelong committed relationships and families receive the same level of support, recognition, encouragement, and subsidization that (only heterosexual) unions now receive under the regime of civil marriage—in the role that such recognition plays in protecting and supporting *children*. But notice that the state can just as well serve this vital public interest—indeed, can likely *better* serve this compelling public interest—by treating of the matter *directly*, rather than via the proxy

institution of marriage (or registered domestic partnership more generally). If the protection of children's interests constitutes a compelling justification for recognizing, encouraging, and subsidizing domestic partnerships, then it ought to provide an even *more* compelling justification for measures explicitly designed to encourage the proper care and upbringing of children. A system of state policies could be formulated that is more direct and less clumsy in this regard—and furthermore, these policies could easily be designed in such a way that they are *not* subject to the same (degree of) manipulation and exploitation that earlier (in section 4.2.2) we saw might threaten policies regulating the formation and protection of multi-member domestic partnerships. And what is true of child welfare promotion is likely true of other goals for which the institution of civil marriage serves as a proxy social policy. As Garrett puts it, "many issues now treated (often awkwardly) as issues in marriage law could be dealt with through other areas of the law (torts, crimes, property, etc.) and through other legal categories (parenthood, guardianship, personal service contracts, etc.)."[48] Note, further, that even many Status Theorists support the separation or disentanglement of legal frameworks for domestic partnership and legal frameworks for protecting children.[49]

Granted, domestic partnerships are socially valuable apart from their effects on children, and apart from the ease with which the institution of the family facilitates the raising up of the next generation. Observing that domestic partnerships have these non-child-rearing functions and values has been an important weapon in the arsenal of same-sex marriage advocates. Jonathan Rauch, for one, has forcefully urged that such partnerships serve to "civilize males" and to encourage the care of ailing mates.[50] And granted, shifting our instruments of social policy from a regime subsidizing *families*—child-producing or otherwise—to a regime subsidizing *parents* (whether single, dual, or otherwise—though perhaps incentives could be built in to encourage dual-parenthood—or maybe simply "multi-parenthood"—over single parenthood) will cause us to sacrifice some of the policy instruments that might otherwise promote child-less domestic partnerships, with all their attendant social benefits. But it still might be worth it.

4.4.2 Ease of Migration*, Reconsidered*

When considering the putative Migratory Ease advantage of the Status Model, it is important not to underestimate contract law's flexibility, and its historical performance in quickly and nimbly adapting to new legal and social realities. As Garrett puts it: "The law is a highly resourceful and flexible instrument with a rich evolutionary history of negotiating and solving a wide range of practical problems. Contract law, in particular, has dealt successfully with an impressive array of tough cases and seems quite promising for addressing [the Contract Model]'s potential vulnerabilities."[51] Legal scholar Anita Bernstein observes that contract law is already familiar with this subject: "[C]ourts today must construe cohabitation contracts, antenuptial contracts, separation agreements,

child custody agreements, and other knotty bargains between intimate partners."[52] There seems no reason to believe that, were marriage to be disestablished in the manner envisioned by contractualists like Garrett and Boaz, contract law would be any less flexible, nimble, and adaptable to a new social reality: that of pairs, triples, and other domestic caregiving *n*-tuples, drawing up contracts for life partnership—not *de novo*, but from a menu of customizable pre-set templates.[53] Considering the matter in this way lessens the impact of the Migratory Ease advantage of the Status Model.

4.5 Expressivist Arguments

Having completed the foregoing survey of the theoretical virtues and vices of each competing model, we must now, before turning to the matter of rendering a verdict, pause to examine one final argument. The "Expressivist Argument" might, at first blush, appear to support the Status Model over the Contract Model. Despite its initial attraction, however, this is not an argument to which the Status Theorist, upon full inspection, will wish to appeal. While it is not likely to be a weapon of choice in the contractualist's arsenal either, Expressivism does perhaps bear more strongly in favor of the Contract Model.

The *Expressivist*, for our purposes, argues that, in at least some cases, when the state defines and confers a pre-formed legal status, it thereby expresses the fact that there is a certain kind of special value in obtaining and brandishing that status. Thus formulated, this is a very general position; more germane to our purposes is a position we might term *Marital Expressivism*—the view that, in defining *marital* status as a pre-formed legal arrangement, the state communicates that there is special value in being married. Marital Expressivism is a familiar position, shared by nearly all contemporary disputants (of whichever persuasion) to the same-sex marriage debate. Among same-sex marriage advocates, it is explicitly defended by (among others) Wedgwood (1999), Cruz (2001), and Calhoun (2002). Wedgwood, for instance, articulates his Expressivism thusly: "[T]here is a basic inequality in the fact that same-sex couples, unlike opposite-sex couples, are denied the *marital status itself*; and we must also argue that this marital status is an important matter, not a mere piece of legal flummery."[54] While all three of these authors are pro-same-sex marriage Marital Expressivists, Calhoun is perhaps the most explicit in her insistence that, not only is it important that gays and lesbians obtain full access to the institution of civil marriage (for expressive reasons, as well as others), it is furthermore important *how* gays and lesbians come to secure this access. She is, we might say, a *Procedural Expressivist* with respect to the marriage equality movement, in addition to being a *Substantive Expressivist* with respect to the meaning and import of the institution itself. Calhoun contends that "[t]he moral significance of extending rights is to a large extent a function of the sorts of arguments that get culturally circulated in the process of extending rights. . . . It is especially because it matters *which* arguments get culturally circulated

that I think the positive arguments for same-sex marriage rights warrant careful scrutiny."[55] Specifically, for Calhoun, it is important that the process of reforming the current regime of civil marriage be premised on the notion that gay and lesbian citizens are in every respect the co-equal of their heterosexual peers, and have just as much right as they do to enter into the institution of marriage and family life; the reform must be conducted so as to emphasize and explicitly signal this commitment to the full equality of gay and lesbian citizens. In contrast to the reform envisaged by the Status Model, reforming marriage along the lines contemplated by the Contract Model, it might be argued, does not express the full equality of gays and lesbians in the way that Calhoun urges. Expressed colloquially, we might say that the contractualist's preferred reform of the institution of marriage expresses something like the following message to gay and lesbian citizens: "Do what you want; each couple is on its own." Conspicuously, it does not say: "Gay people are as good as anybody else to enter into this highly revered institution."[56] Call *this* the "Expressivist Argument"; it is sure to tempt many proponents of the Status Model. Why do I think it fails?

The first weakness of this argument should already be apparent from the label I've applied to its prominent proponents in the preceding paragraph. That is, it is most naturally understood, not as an argument for the Status Model over the Contract Model, but as an argument for marital establishment over disestablishmentarianism. The argument, in other words, might be a Trojan Horse for the Status camp: by admitting its validity, Status Theorists may well be committing themselves to abandoning disestablishmentarianism after all, and favoring a more conventional "marriage equality" stance, which advocates for the inclusion of same-sex unions within the purview of traditional civil marriage.

We might consider, then, a modified version of the Expressivist Argument—one that is indifferent or ambivalent as to the expressive value communicated by specifically *marital* status, but which remains committed to the importance of the state's maintaining and conferring some important pre-formed legal status to recognize, encourage, and protect intimate caregiving unions, and to generally express its approval of such unions. Call this position *Status Expressivism*, in contrast to the more full-blooded *Marital Expressivism* considered above. And call the argument that marital contractualism (unlike the Status Model) inadequately preserves the state's proper expressive role with respect to domestic partnership, the "Status Expressivist Argument." Even when its deployment is restricted to internecine conflicts among disestablishmentarians, though, the Status Expressivist Argument fails to sustain the Status Model as preferable to the Contract approach. In the first instance, this is because the Contract Theorist is actually in a better position to appropriate the Marital Expressivist's insight—and to deploy it to non-establishmentarian purposes—than is the Status Theorist. For even if it is granted that full equal participation in the institution of marriage is an important expressive good, currently denied to gay and lesbian citizens, the Contract

Theorist can argue that this equal participation is better effected under the Contract Model than the Status Model. For under the former, all citizens—gay, lesbian, and heterosexual alike—have equal inclusion in the institution of marriage: an institution that is (newly) privatized. Expressed colloquially, we might say that the state's transition from the current marital regime to the Status Model seems to express something like the following message to gay and lesbian citizens: "Hey, we can't be calling your same-sex unions *marriages*—that's a bridge too far. But, we also recognize that it's improper for us to treat you unequally. So let us compromise, and call *none* of our officially sanctioned unions 'marriages'; instead, we'll call *all* of them 'civil unions'—and we'll let you join in on the action! There—isn't that better?" Plausibly, the message here is more demeaning than any that could be construed to attend a transition from the current marital regime to a fully contractual one. For the theorist antecedently committed to marital disestablishment, yet sensitive to the expressive dimension of the state's choice of policy regimes in this regard, the Contract approach is likely to be seen as preferable on expressive grounds.

Furthermore, there is an additional expressive dimension that must concern any theorist who, like Calhoun, is concerned to ensure that martial reform not instantiate expressive harm to gay and lesbian citizens: the worry of *dilution* with respect to the meaning of marital status. As we saw in section 4.2.1 above, once decoupled from its connection to the "traditional institution of marriage," it will likely be difficult to contain the expansion of civil unions at just the point at which it includes same-sex couples along with heterosexual ones, without also effecting further expansion so as to include polygamous unions as well. Now, for many gay and lesbian citizens, this will not be problematic: they will not mind sharing in a (newly expansive) institution of *civil union* (or, for that matter, a newly expansive institution of *civil marriage*) that also welcomes into the fold their polygamously inclined fellow citizens—any more than many heterosexual citizens today would mind sharing in a (newly expansive) institution of civil marriage (or, for that matter, a newly deflated institution of civil union) that also welcomes into the fold their homosexual fellow citizens. But there are apt to be some gay and lesbian citizens who *do* so object—and to so object, precisely on the expressive ground that, in thus expanding the institution in such a drastic manner, the state has effectively "diluted" the institution of civil unions (or, for that matter, of civil marriage) to the point where it has been drained of any meaning it might otherwise have had. By making the institution *so* widely available, in other words, the state has undermined its very ability to make the expressive maneuver that the Status Expressivist finds so important in the first place. Expressed colloquially, we might say that the state's transition from the current marital regime to (a fully inclusive version of) the Status Model seems to express something like the following message to gay and lesbian citizens: "Hey, sure—we'll let in the gays and lesbians . . . *and* all the polygamists, and

whatever other deviants wish to join the fold as well. Because, at this point, why not?" Plausibly, this is the message that many (gay, lesbian, *and* straight) citizens will find embedded and expressed in the state's implementation of a maximally inclusive civil union regime; to the extent that this interpretation is reasonable (I take no position as to its reasonableness here), it is unclear that the Status Expressivist Argument can be sustained as an argument for the Status Model over the Contract Model.

Of course, one might think that a similar worry arises for the Contract Model: insofar as, under a regime of marital contractualism, some institutions of civil society (traditionalist or fundamentalist strains of Mormonism, for example) will perform marital rites for polygamous *n*-tuples, one might conclude that a transition to the Contract Model likewise expresses a certain objectionable dilution of the institution of marriage, or of civil union. But there is an important difference here, owing to the distinction between the state's actively promulgating and enforcing a certain legal status, versus the state's merely tolerating the private control and distribution of an analogous, non-legal version of that status by the institutions of civil society. An analogy with *sacraments* may be instructive here: as a Lutheran, I may feel it an important matter of faith that there are but two sacraments—baptism and communion. Am I concerned that my Catholic brethren's conviction that there are fully seven holy sacraments dilutes *my* sacramental experience when, for example, I partake in the Eucharist? Most Lutherans are unlikely to feel that Catholic belief and practice expresses any disrespect or dilution to their understanding of the sacraments. Things would likely stand differently, though, were the state to contemplate getting into the business of *sacramental establishment*. (By this term, I mean the state's promulgating, encouraging—perhaps even enforcing—a position as to the number and nature of the sacraments. In one weaker sense of the term, sacramental establishment is already partially in effect, inasmuch as marriage is one of the Catholic Church's seven sacraments, and is—as we have argued above—already established.) At this point, it might become a matter of great import for me which understanding of the sacraments becomes established—and I may indeed feel that the state's endorsement of the Catholic teaching on sacraments expresses disrespect for my Lutheran understanding. I may feel that the state's establishment of all seven sacraments *dilutes* the importance I ascribe to baptism and communion. In similar fashion, the state's tolerance of Mormon polygamous marriage under a contractualist regime would not be regarded as having the same import as the state's including polygamous unions within the scope of its regime of civil unions.

Having now dispensed with this initially promising, but ultimately faltering, line of argument, let us consider our survey of the terrain to be complete. Can we now render a verdict? In the fifth and final section, I hazard the conclusion that the Contract Model is the more promising of the two rival understandings of disestablished marriage.

5. Conclusion: Contract Model More Congruent with Cardinal Liberal Virtues

So how do we adjudicate the conflicting visions of disestablished marriage, offered by Status Theorists and Contract Theorists? It is methodologically too crude to note simply that each position has two major strengths (each one of which implies a corresponding—mild—weakness in its rival) and call it a draw. It is too crude still to take note of further nuances—for example, the fact that we'd identified one major weakness of the Status Model (Vulnerability to Abuse), and no corresponding major weakness in the Contract Model; or the fact that the Contract Model *just may* be able to claim a version of the Expressivist Argument as a consideration in its favor; or the fact that sections 4.4.1 and 4.4.2 offered considerations that mitigated the Contract Model's mild weaknesses, implied by its rival's corresponding strengths—and on this basis declare the Contract Model the victor. Nevertheless, I will hazard that, as an intuitive matter, the balance of reasons does favor the Contract Model. And to further motivate this intuitive assessment of the reasons' balance, I conclude by drawing an instructive analogy with another important institution that (in the United States at least) is fully disestablished: religion.

Notice what *disestablished religion* means in the US context: it is not as if there is some neutral public status of *religionist*, which people can register for if they wish. Imagine such a state for a moment: certain public, legal benefits would be available to persons who self-identify as religionists (though to qualify, citizens need not—since this is a neutral state, with "disestablished" religion—be of any *particular* religious affiliation), but not for non-religionists. To qualify as a religionist, one would simply need to publicly avow acceptance of, or commitment to, one or another faith from a predetermined "menu" of religions—a menu maintained by the state. Most liberal theorists would think it ludicrous—not *least* because it would be liable to manipulation and abuse—to confer legal rights and benefits on religionists in this way—even were the state to vigilantly maintain its neutrality when it comes to defining who counts as a religionist.[57] No: in the domain of religion, our regime of disestablishment falls squarely under the "privatization" model. Note, though, that in defending the state's use of civil unions, Status Theorists are defending a regime of disestablished marriage nearly perfectly analogous to the just-contemplated regime of civil religion. Liberals who believe the Status Model provides the most natural or defensible vision for a regime of disestablished marriage, then, should take pause at just how *un*natural and *in*defensible a regime of civil religion appears, when contrasted with our current regime of fully privatized religious affiliation.

Or consider the same analogy with disestablished religion, in a slightly different way. To conclude our discussion in the same manner in which Sunstein and Thaler opened their 2008 article "Privatizing Marriage," imagine a "science

fiction" scenario wherein a state (similar in other respects to the United States) has a completely state-dominated established religion. Now imagine that that state decides, in effect: "It is now obvious to us that the US model has proven historically victorious, and so we are going to emulate it—we shall disestablish our religion." How would it be most natural for this state to proceed? By saying: "So here is what we are going to have, in lieu of our current regime of established, state-sponsored religion: we shall specify a generic, neutral status of 'religious,' and confer it upon persons who affiliate with a religious tradition—*any* religious tradition (within the broad confines we determine). We will make certain benefits available to these publicly-registered religionists"? Or by saying, rather: "Individuals are now free to associate with whatever religious organization they choose, or none at all. It will simply be of no concern to the state what they do in this regard, henceforth"? Does not the latter approach seem a much more natural and defensible way to disestablish one's state religion? But if so, how can one defend, as the best way to disestablish marriage, an approach so closely analogous to the former?

University of Maryland

NOTES

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1. See, for example, Shultz, "Contractual Ordering"; Fineman, *Neutered Mother* and *Autonomy Myth*; Card, "Against Marriage" and "Gay Divorce"; Boaz, "Privatize Marriage"; West, *Marriage, Sexuality, and Gender*; Metz, "Liberal Case" and *Untying the Knot*; Sunstein and Thaler, "Privatizing Marriage"; Torcello, "Is the State Endorsement"; Garrett, "Marriage Unhitched" and "Public Reasons for Private Vows"; Brake, "Minimal Marriage" and *Minimizing Marriage*; March, "Is There a Right to Polygamy?"; Baltzly, "Same-Sex Marriage, Polygamy, and Disestablishment"; and Keleher, "Civil Unions for All."

2. A similar distinction is drawn by Jeremy Garrett, who distinguishes *thin marital contractualism*—"a minimal legal framework of support for caring relationships sans additional antecedent restrictions, such as those thickly defining their nature" from *liberal marital contractualism*—the view that the liberal state "ought to treat marriage as a primarily private affair worked out between or among partners" (Garrett, "Public Reasons for Private Vows," 261). Garrett does not use the language of disestablishment.

3. Metz, "Liberal Case," 198; cf. *Untying the Knot*, 3, and associated notes at 163.

4. Metz, "Liberal Case," 198.

5. Ibid., 205; cf. *Untying the Knot*, 113–14 and *Untying the Knot*, 11.

6. I put the term "legalize" in quotes in recognition of the infelicity of expression

here, which implies that same-sex civil marriage is currently "illegal." Civil marriage is a "creature of the law"—it is a legal status that certain couples may enter into, with the conditions of entry (and exit) being wholly constituted by extant legal arrangements. Inasmuch as these legal arrangements currently (generally) permit only heterosexual couples to enter into this status, same-sex civil marriage is not so much "illegal" as it is *impossible*. (I am indebted to Christopher Morris for making this point clear to me, and in particular for this way of expressing it.)

7. It should be noted that, at the time of this writing, this amendment of the traditional institution of civil marriage has already taken place in seventeen US states (California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington), plus the District of Columbia, and in at least seventeen countries around the world (Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, portions of Mexico, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, portions of the United Kingdom, and Uruguay).

8. In what follows, I will limit my discussion to the situation in the United States, but the substance of the argument should generalize to any (liberal) polity.

9. Some readers will no doubt object here to my characterization of this dilemma, on grounds that there is at present no *reasonable* disagreement with respect to same-sex marriage. These readers are apt to invoke a comparison between today's climate of public opinion and the prevalence of anti-miscegenation sentiment at the time of the US Supreme Court's 1967 decision in *Loving v. Virginia* (388 U.S. 1), which found state laws prohibiting interracial marriage to be unconstitutional. According to this objection, the Court did not then act impermissibly non-neutrally, despite the controversial nature of its decision, because opposition to interracial marriage was simply not reasonable. By parity of reasoning, the objection continues, today's opposition to same-sex marriage is unreasonable, and so state action to effect same-sex marriage similarly need not be construed as non-neutral. Readers unable to countenance as reasonable contemporary diversity of opinion regarding the proper scope of marriage are invited to consider instead a potential (some would argue inevitable) future controversy: that which pits "2030 progressives" (those who advocate extending the institution of marriage so as to include polygamous unions, along with same-sex and heterosexual ones) against "2030 traditionalists" (who advocate maintaining the 2030 status quo, which limits the institution to—same-sex or opposite-sex—couples). Would not the dilemma of non-neutrality, contemplated in the text as arising in the present controversy over same-sex marriage, at least arise with respect to a 2030 citizenry divided along *these* lines?

10. Of course, such a state does not maintain a posture of neutrality with respect to the merits of a position we might term *marital statism*—the position that, *however* precisely it construes the scope of the institution, the state ought to be in the business of ratifying certain unions (but not others) as marriages. A regime of disestablished marriage is decidedly "non-statist" on this question. However, this is a species of a more general phenomenon, which arises for a wide range of cases wherein the state stakes out a stance of neutrality with respect to some disputed issue X—namely, that the state is then at odds with (what we might term) *non-neutralism* with respect to X. But this is simply a formal feature of neutralism about *anything*, and as such, is of no greater concern in this domain, than it is with respect to neutralism about anything else. If this is a problem for marital

disestablishmentarians, in other words, it is a concern for theorists of liberal neutrality more generally.

11. Metz, *Untying the Knot*, 142–43.

12. For example, those who would commonly be labeled as "libertarians" (like Boaz), and those whom many would label as "pragmatists" or "moderates" (like Sunstein and Thaler). The same holds for *philosophical* ideologies as much as for labels more commonly associated with *political* taxonomies: Torcello and Brake argue for disestablishment from a Rawlsian perspective (the former appealing to Rawls's account of public reason; the latter arguing that care is a primary good, and that the *social bases* of caring relationships are *social* primary goods); Shultz, Fineman, West, and (less clearly) Metz argue from a feminist perspective; Metz might also be described as simply arguing from a broadly or generically liberal perspective; Baltzly appeals to the value of liberal neutrality; and so forth.

13. Supplemented, perhaps, by "robust religious-conscience exceptions, which provide that religious organizations need not recognize same-sex unions against their will." For more on this proposed means of effecting compromise between traditionalists and same-sex marriage advocates, see Blankenhorn and Rauch ("Reconciliation on Gay Marriage"), from which the quotation in the preceding sentence was taken.

14. The claim that domestic partnerships per se are the proper object of such recognition and promotion is not uncontroversial, however. As an antidote to the notion that public recognition and promotion of domestic partnerships—even where such partnerships are construed broadly enough to include same-sex couples—represents an optimal regime of family law, the interested reader is directed to Polikoff, *Beyond (Straight and Gay) Marriage*. She capably documents the many ways in which a "partnership-centric" approach to family law ill-serves the interests of (and oftentimes outright harms) the vulnerable and dependent members of diverse family forms—particularly children. In chapters 7–11, Polikoff offers some concrete reform proposals that would more effectively and equitably (in the words of her subtitle) "value all families under the law."

15. Torcello, "Is the State Endorsement," 44.

16. Ibid., 51.

17. March, "Is There a Right to Polygamy?," 246.

18. Ibid., 247.

19. Ibid., 247–48.

20. Brake, *Minimizing Marriage*, 157, 158; cf. her "Minimal Marriage," 303, 305.

21. Brake introduces these terms at "Minimal Marriage," 305: "Minimal marriage institutes the most extensive set of restrictions on marriage compatible with political liberalism. . . . It might also be described as marital pluralism or disestablishment." Cf. her *Minimizing Marriage*, 158.

22. Brake, "Minimal Marriage," 305, 309; cf. *Minimizing Marriage*, 158, 162.

23. Brake, "Minimal Marriage," 303; cf. *Minimizing Marriage*, 156.

24. Brake, "Minimal Marriage," 307 (emphasis added); cf. *Minimizing Marriage*, 160.

25. Brake, "Minimal Marriage," 308–09; cf. *Minimizing Marriage*, 162.

26. Brake, "Minimal Marriage," 156, 161.

27. Ibid., 312; cf. *Minimizing Marriage*, 166–67.

28. Brake, *Minimizing Marriage*, 167.

29. Metz, "Liberal Case," 210.

30. Ibid.; cf. her *Untying the Knot*, 127.

31. Metz, "Liberal Case," 210–11; cf. *Untying the Knot*, 134.

32. Cf. the religious disestablishmentarian arguments of those whose animating purpose is theological or ecclesiastical, rather than civic or political. For these theorists, the much-vaunted "separation of Church and State" is required as much (or more) out of respect for the integrity of the Church, than for that of the State. "We must keep the State out of Religion" is their rallying cry—rather than: "We must keep Religion out of the State." It should be noted that this position is not unique to Contract Theorists: Metz herself believes that in a "diverse, liberal democratic polity such as the United States, freedom, equality, fairness, and *marriage itself* would be better served were marriage disestablished" (*Untying the Knot*, 134; emphasis in the original; cf. also her remarks at 88 and 114). Central to Metz's position in this regard is a Hegelian argument that marital status must be conferred by an entity mutually recognized as an "ethical authority," and that the modern liberal state is especially ill-suited to this role. Disestablishing marriage would therefore invigorate the institution by creating space for *genuine* ethical authorities to step in and take the state's place:

> [R]emoving the state's definition of marriage from the range of available options would create a 'definitional vacuum' into which diverse cultural groups would carry their unique and complex definitions of marriage. Now unimpeded by the stifling and weighted competition of the state's definition, other definitions would gain social prominence, in turn enhancing their expressive value. By invigorating cultural authorities and by giving room to their diverse and complex accounts of marriage, the proposed regime would benefit marriage by invigorating the constitutive force of the status. (*Untying the Knot*, 146; cf. remarks at 119 and 145)

33. Many, but not all. As noted in endnote 14, far from regarding marriage as beneficial or benign, some authors regard the present legal arrangements that attend civil marriage to be downright *dangerous* when it comes to the welfare of women, children, and vulnerable members of families more generally. See, for example, Polikoff, *Beyond (Straight and Gay) Marriage*; and Card "Against Marriage," and "Gay Divorce." For disestablishmentarians of this bent, the preservation of most marriage-like features in a regime of thoroughgoing civil unions will be a vice, rather than a virtue.

34. Metz, *Untying the Knot*, 14.

35. Ibid., 61–62; emphasis added.

36. But for a fuller discussion, see, for example, Calhoun, "Who's Afraid?"; Mahoney, "Liberalism"; Nussbaum, *Liberty of Conscience*, 179–98; March, "Is There a Right to Polygamy?"; Baltzly, "Same-Sex Marriage, Polygamy, and Disestablishment"; and Brake, *Minimizing Marriage*, 139–45.

37. Personal communication.

38. March, "Is There a Right to Polygamy?," 268.

39. I am indebted to an anonymous reviewer for *Public Affairs Quarterly* for suggesting this response to me.

40. Quoted in Bernstein, "For and Against Marriage," 131: "[W]e may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."

41. Garrett, "Marriage Unhitched," 162.

42. Ibid., 162n2.

43. Ibid., 165.

44. Card, "Against Marriage," 12.

45. Garrett, "Marriage Unhitched," 165.

46. Ibid., 166.

47. Available at http://unctad.org/en/Pages/DITC/DisputeSettlement/Project-on-Dispute-Settlement-in-International-Trade,-Investment-and-Intellectual-Property.aspx (accessed October 3, 2013).

48. Garrett, "Marriage Unhitched," 173.

49. See, for example, Brake, *Minimizing Marriage*, 149–51.

50. Rauch, "Who Needs Marriage?," 262–65.

51. Garrett, "Marriage Unhitched," 174.

52. Bernstein, "For and Against Marriage," 135n18.

53. In this context, it is instructive to consider the parallel between the contemplated regime of marital contractualism and our current practice of managing bequests and inheritance—a practice that proceeds without the aid of official state licenses and statuses, and to no apparent ill effect. When one decides to create a will, one simply consults an attorney and draws one up. Could not a similar system work, then, for life-partnership arrangements? In such a system, whenever a couple or *n*-tuple wanted to establish such an arrangement, they would simply seek legal counsel and draft a contract suitable to their purposes.

54. Wedgwood, "Fundamental Argument," 227; emphasis in original.

55. Calhoun, "Defending Marriage," 150.

56. I am indebted to an anonymous reviewer from *Public Affairs Quarterly* for making this point (and in particular for this way of expressing it), and for urging me to consider the importance of Expressivist Arguments more generally.

57. It is worth noting that in the United States, religious *institutions* are afforded certain public benefits—favorable tax status, for example—as are many other types of institution deemed to be of a charitable or broadly public-spirited nature. However, this is quite distinct from a regime of religiously denominated individuals, as contemplated in the text.

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