The Bonds of Matrimony and the Bonds of Constitutional Democracy

Lynn D. Wardle
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I. INTRODUCTION

A. A Voyage of Rediscovery

This Article considers the influence of marriage on the form of government and the potential impact of legalizing alternative forms of intimate affiliation upon our constitutional system. Those inquiries raise foundational, a priori questions about marriage, our constitutional government, and the relationships between them. The answers to such basic questions define a society, but once it is established, the questions recede and the reasons for the answers to the foundational questions tend to be taken for granted or forgotten. Every generation in any society reconsiders some foundational assumptions or principles, and that is good because as time passes and circumstances change the reasons that gave rise to some foundational rules become anachronistic, some assumptions lose validity because of changes in the world, and some old, established principles become obsolete. It is also good because it may lead to the rediscovery of critical knowledge and reaffirmation of critical beliefs about the core institutions, principles, and values of a society, and reestablishment of the very identity of the society.

Professor Linda C. McClain, the Hofstra University School of Law, and the Hofstra Law Review deserve thanks for sponsoring this Symposium on Marriage, Democracy, and Families to explore the assumptions regarding the relationship between forms of intimate

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It is a valuable prerogative of scholars as well as of the young to examine, probe, and challenge basic assumptions and established orthodoxies. That is part of the formula for social progress and improvement of laws. The academic voice is valued in part because scholars are expected to know and understand and value the history and purpose of the institution or practice being considered, which is necessary for informed criticism and intelligent change. In the tradition of academic freedom, the respectful but robust expression of different views and the vigorous debate considering all perspectives should go to characterize the academic contribution.

This Article undertakes a voyage of rediscovery to identify and examine the foundational assumptions about the relationship between the form of intimate associations given legal status in our society and the constitutional government of our nation. It reveals (in Part II) that at the time of the founding of the Constitution, it was widely believed that a certain form or organization of family (the marriage-based family) was essential to cultivate civic virtue, which was understood to be an indispensable prerequisite for any republican (representative democratic) government. The marriage-based family was the substructure upon which the superstructure of the Constitution was erected. Next, it shows (in Part III) that the Supreme Court has repeatedly endorsed that connection between marriage and our constitutional liberties as a justification for protection of the marriage-based family as an unwritten constitutional liberty. It also establishes (in Part IV) that the general relationship between family, virtue, and republican self-government is still recognized in contemporary political and social theory. It also suggests an eclectic, pragmatic theory of critical mass and the marriage-based family. Finally, it suggests (in Part V) that a consequence of extending marital or marriage-like status to alternative (such as same-sex) relationships will undermine our Constitution.

Before launching on that journey, this Introduction (Part I.B) offers a few comments on the presentation made by Professor Martha Fineman at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (“Conference”). Her comments invite a focused consideration of the relationship between marriage and our constitutional democracy.
B. Some Comments on Professor Fineman's Dependency/Abolition Theory

Martha Fineman is one of the most influential feminist scholars in America. At the Conference, she presented her well-known dependency paradigm for marriage, as well as suggested the abolition of marriage (as a thought exercise, at least). The impact potential of her proposals on marriage, family, and principles of constitutional democracy deserve careful examination.

Professor Fineman's paper on The Meaning of Marriage correctly distinguishes individual meanings of marriage from societal meanings of marriage and suggests that participants in the debate “be specific about the roles or functions they ascribe to marriage.” Thus, I agree with her that “society has to justify the coercive expression of its interest in marriage by stating exactly what that interest is and making the argument that intervention is necessary to preserve or manifest it.”

Professor Fineman suggests that “[t]here is no reason for the state to be involved in the articulation and imposition of [the] terms [of marriage] any more than it would be involved in the enforcement of contacts in general,” and that “for all relevant and appropriate societal purposes, we do not need the legal institution of marriage at all.” As a “thought experiment,” she suggests substitution of contract for status in regulating intimate adult relations (such as marriage). The first flaw of this proposal was identified in Professor Don Browning's thoughtful paper; citing Habermas and other social theorists, he observed that one risk of reducing marriage to contract is the colonization of market rationality in an inappropriate setting of family life, reducing to mere “cost-benefit logics and functional universalism” relations that have much richer, deeper dimensions.

2. Id. at 11. However, Professor Fineman may not appreciate and apparently does not value religious and historical perspectives in assessing the societal meaning of marriage, and her marginalization of those views would distort and impoverish the discourse. See, e.g., id. at 10-13 (criticizing religious and other traditional influences); id. at 3 (positing a vision of marriage “freed from the religious and common law history of the institution”).
3. Id. at 1.
4. Id. at 2.
5. See id. at 38-44.
Professor Fineman takes a few other curious positions in her paper. For instance, there is some inconsistency between opposing the privatization of marriage in the sense of viewing marriage as a private enclave into which the state should normally not intrude and regulate,\(^7\) and at the same time calling for the privatization of marriage as an enclave for more private contractualization free from state regulation.\(^8\) Also, approving the developments of the law which endorse the contract equality of women in premarital agreements rather than taking a paternalistic-protective approach, she cites the Uniform Premarital Agreement Act,\(^9\) which does enforce freely negotiated antenuptial agreements.\(^10\) Curiously, she also suggests that the American Law Institute’s *Principles of the Law of Family Dissolution* ("ALI Principles"), Chapter 7, in this respect is "[l]ike the Uniform Premarital Agreement Act and the majority of case law,"\(^11\) which is surprising since the ALI Principles take a huge step back toward protective paternalism by adding numerous grounds for nonenforcement of premarital agreements—such as because a party could not adequately comprehend how some factors might affect the outcome (such as having a child, or agreeing to a covenant marriage).\(^12\) Moreover, it is hard to understand her conclusion that Chapter 6 of the ALI Principles is a step "from [p]rotected to [p]artnered,"\(^13\) since Chapter 6 authorizes a court to retroactively (and paternalistically) impose on nonmarital couples alimony and property division obligations essentially identical to marriage, even if the parties or either of them considered and explicitly rejected marriage, and even if the financial effects of alimony and property division were the specific reason for declining to marry.\(^14\)

Professor Fineman suggests that historically there has been a lot of domestic violence in marriage,\(^15\) but fails to add that there has been even more (much more) domestic violence in virtually any and all other forms

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7. See *FINEMAN, The Meaning of Marriage, supra* note 1, at 1.
8. See *id.* at 38-44.
10. See *FINEMAN, The Meaning of Marriage, supra* note 1, at 31; see generally UNIF. PREMARITAL AGREEMENT ACT, supra note 9.
11. See *FINEMAN, The Meaning of Marriage, supra* note 1, at 32.
13. See *FINEMAN, The Meaning of Marriage, supra* note 1, at 27, 32-34 (discussing how the ALI PRINCIPLES use “the nature and quality of the relationship that the partners have crafted” rather than formalistic requirements “to assess rights and responsibilities” in domestic relationships).
14. See ALI PRINCIPLES, supra note 12, § 6.05.
15. See *FINEMAN, The Meaning of Marriage, supra* note 1, at 40.
of adult intimate relationships, including dating couples, separated and
divorced couples, and especially in nonmarital couples, including same-
sex couples (particularly lesbian couples). While domestic violence,
especially in this violent era when violence is celebrated hourly in the
mass media, is a serious problem that must be constantly addressed, the
data clearly shows that of all forms of intimacy, marriage is the safest,
most protective of women, and the safest and most protective for
children. From the perspective of protecting women from domestic
violence, the prospect of "opening up" marriage to include more violent,
abusive, types of intimacy, as Professor Fineman proposes, seems
incoherent.

Professor Fineman worries about the vulnerability of the
dependent—especially women and children. She generally favors
making women completely independent of men (husbands), and giving
them independent control of their dependent children. One wonders
whether, perhaps, the relationship of marriage (at least successful
marriages, which are still the majority in this country) is distorted by
forcing it into a simplistic dependency-or-independence classification
scheme. Perhaps there is more to most marriages than an all-or-nothing
contest for control, power, and conflict between dependency and
independence. The perspective of interdependence offers an alternative
paradigm that captures much of the richness, mutuality, and practical
reciprocity of real marriages that is overlooked by the independent-
dependent model.

Professor Fineman acknowledges that dependency in human family
relationships is here to stay until we quit having or caring for children. She
fails to mention that there are many other forms of human
dependency that are inevitable parts of the human condition. We also
may lose our independence through illness and through disability, which
may come unexpectedly to any of us, leaving us significantly dependent.

MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY 155-59 (2000);
David Popenoe & Barbara Dafoe Whitehead, Should We Live Together? What Young Adults Need
to Know About Cohabitation Before Marriage, A Comprehensive Review of Recent Research, The
17. See FINEMAN, The Meaning of Marriage, supra note 1, at 38, 41-42.
18. See, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY
AND OTHER TWENTIETH CENTURY TRAGEDIES 101-25, 166 (1995); Martha Albertson Fineman,
Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 AM. U. J.
GENDER SOC. POL’Y & L. 13, 20-22 (1999); Martha Fineman, Masking Dependency: The Political
Other forms of dependency besides infancy, disability, and illness are common (and important parts) of the human condition. For example, education and upward mobility involve periods of partial (sometimes total) dependence on others (and the support is often masked by honorific labels like "scholarship" or "grant" or "prize" or "graduate award"). Aging produces various forms of dependency (again, often masked by independence-suggesting terms like "pension" or "retirement" or "deferred earnings" or "social security" or "assisted living"). In our independence-obsessed culture, we employ many euphemisms to help us mask the realities of how truly dependent we are on others.) In all decent societies, caring for the dependent is both a family and a social concern because we care for those we love even (if not especially) when they are dependent. Perhaps we need to fear and demonize dependency less and to begin to nurture a culture in which we respect and value even those who are dependent, and recognize how much we who are healthy, able-bodied, financially self-sufficient adults can learn from them, and how much they enrich our lives and our society.

Professor Linda C. McClain has written extensively about the importance of the family “caring” in a democratic society, and of the unfortunate devaluation of “caring” in contemporary America.

Caring for each other is the most basic form of civic participation. We learn to care in families, and we enlarge our communities of concern as we mature. Caring is the essential democratic act, the prerequisite to voting, joining associations, attending meetings, holding office and all the other ways we sustain democracy. Care, the noun, requires families and workers who care, the verb. Caring, the activity, breeds caring, the attitude, and caring, the attitude, seeds caring, the politics.20

She has noted that some emphasis on the economic value of personal work “seems to neglect the idea that caregiving—that is, attending to children’s needs for care—makes a valuable social contribution worthy of recognition and support.”21 It is “vital to affirm not only the public value of care work, but also the importance of such work as part of what ‘working families’—as well as other caregivers—do.”22

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22. Id. at 100.
Professor Fineman has long been a leading voice for recognizing the value of the child-rearing and home-building work that women do as well as for the economic independence of women. Yet one wonders whether the demonizing of dependence and the rejection of interdependence marriage models conveys a message that stigmatizes and marginalizes women who devote themselves first and primarily to childrearing and homemaking roles, as well as devalues the aged, the poor, the disabled, and others who are in dependency conditions and periods of the human life cycle. The abolition of marriage would harm, not help, most women who care for children and others, and would certainly disadvantage those who are dependent upon them. Beyond the private consequences for individuals and families, what effect would the abolition of marriage have upon our constitutional government? Professor Fineman's thought exercise invites us to consider the public consequences of that proposal.

II. FOUNDERS' PERSPECTIVES ON THE MARITAL FAMILY AS THE SEEDBED OF REPUBLICAN CIVIC VIRTUE

We come into possession of our public institutions and values the same way we come into possession of public buildings and monuments—someone else builds them and we simply inherit them. And like public buildings and monuments, our public institutions and values tend to deteriorate and wear out if they are neglected or not maintained. It is difficult, expensive, and burdensome to restore a historic building to a condition of high functional strength and beauty when it has been neglected and allowed to fall into disrepair. The same is true of public institutions and values. The cost of neglecting structures like historic buildings and monuments is paid in dollars and cents that buy mortar, bricks, shingles, and paint. The cost of neglecting marriage is paid in human suffering, in lost generations, and in years (sometimes lifetimes) of sorrow, pain, and regret. Many in our society are paying that price already. If we embrace the legalization of alternative family forms as equivalent to marriage, the toll will be even higher. Thus, it is important for each generation to rediscover for itself the foundational principles upon which our constitutional system is built, and the principles by which it operates, and the principles by which it is nurtured and preserved.

To rediscover the foundational principles for the American constitutional system, it is helpful to consider what the Founders wrote and said about fundamental relations and government. The Founders
believed emphatically that certain preconditions were essential to successfully create and maintain the Constitution, and among those preconditions were marriage and civil virtues nurtured in the marriage-based home. James Madison noted in Federalist No. 55 that humans have a dual nature (for good and for evil), and that “[r]epublican government presupposes the existence of [positive] qualities in a higher degree than any other form.”

The Founders considered Americans’ “domestic habits” (or, as de Tocqueville later called them, “habits of the heart”) as necessary “preconditions” for maintaining the constitutional Republic. The Founders included these domestic habits among the cornerstones of liberty, even though they did not consider them “rights” in the narrow meaning of the word that then prevailed. These domestic habits included and were nurtured by the traditions of marriage, parental authority, and family integrity. The domestic institutions of marriage and family, especially, were believed to foster virtue, which was deemed the indispensable prerequisite for a republican form of government. For example, Benjamin Franklin stated that “only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters.” Madison likewise declared: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.” John Adams acknowledged: “Our constitution was made only for a moral and religious people. It is

23. See, e.g., Allan Carlson, The Family and the Constitution, in DERAILING THE CONSTITUTION: THE UNDERMINING OF AMERICAN FEDERALISM 128-29 (Edward B. McLean ed., 1995) (stating that “the family was deeply embodied in the unwritten constitution of the new United States, in the social views that the Founders held” and arguing “that their work rested on assumptions about the social order that need underlie a free republic, assumptions about the sort of people they were dealing with, and about the way that we citizens would live”).
25. See ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 310 (Phillips Bradley ed., 1972) (referring to the “habits of the heart” as the American character traits which form the foundation for American democracy); see also FRANCIS J. GRUND, THE AMERICANS, IN THEIR MORAL, SOCIAL, AND POLITICAL RELATIONS 171 (Johnson Reprint Corp. 1968) (1837).
27. Id.
29. THE WRITINGS OF JAMES MADISON 223 (Gaillard Hunt ed., 1904).
wholly inadequate to the government of any other." Thus, "[v]irtue . . . was the substructure upon which the superstructure of constitutional rights and government was built. If the foundation slipped, the government and the liberties it protects would not survive." And virtue was generated and guarded first and foremost in the home.

Nancy Cott’s political history of marriage in the United States concurs that the Founders saw what she calls “Christian marriage” as the essential seedbed of republican virtue. “American revolutionaries’ concern with virtue as the spring of their new government motivated [their] attention to marriage.” “Virtue,” the political catchword of the Revolution, meant not only moral integrity, but public-spiritedness. . . . How would the nation make sure that republican citizens would appear and be suitably virtuous? Marriage supplied an important part of the answer.” American republicans saw “marriage as a training ground of citizenly virtue.” Likewise, “it served as a ‘school of affection’ where citizens would learn to care about others.” One founding era writer noted that “by marriage ‘man feels a growing attachment to human nature, and love of his country.’”

Marriage also provided the Founders with “a model of consensual juncture, voluntary allegiance, and mutual benefit.” Professor Cott notes that European political theorizing had long noted that legal monogamy benefited social order, by harnessing the vagaries of sexual desire and by supplying predictable . . . support for the young and the dependent. The republican theory of the new United States assumed this kind of utilitarian reasoning and went beyond it, to give marriage a political reason for being. From the French Enlightenment author the Baron de Montesquieu, whose Spirit of the Laws influenced central tenets of

32. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9-23 (2000); see also Frohnen, supra note 26, at 941-42 (1995) (stating founding generation believed that virtue would be cultivated in local communities and that “the main task of government was to foster and protect the multitude of associations in which proper character was formed”).
33. COTT, supra note 32 at 18.
34. Id.
35. Id.
36. Id. at 19.
37. Id.
38. Id. at 18.
American republicanism, the founders learned to think of marriage and the form of government as mirroring each other. 39

John Adams concluded that

the foundations of national Morality must be laid in private Families. In vain are Schools, Accademics [sic] and universities instituted, if loose Principles and licentious habits are impressed upon Children in their earliest years . . . . How is it possible that Children can have any just Sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers. 40

Professor Cott observes that Adams was not alone in this belief. For many “Revolutionary-era leaders, marriage had several levels of political relevance, as the prime metaphor for consensual union and voluntary allegiance, as the necessary school of affection, and as the foundation of national morality.” 41 Compared to other forms of marriage, Christian “[m]onogamy . . . stood for a government of consent, moderation, and political liberty.” 42 For example, “the most widely read college text on the subject in the first half of the nineteenth century,” William Paley’s The Principles of Moral and Political Philosophy, “touted the private happiness and social benefits of monogamous marriage.” 43 The belief that polygamy bred “despotism, and coercion,” while the Christian marriage of monogamy fostered “political liberty, and consent . . . resonated through the political culture of the United States” not only during the Founding decades, but “all during the subsequent century.” 44

America’s Founders understood marriage and the family to be “schools of republican virtue.” 45 The family was one of the “pillars of republican virtue.” 46 With Edmund Burke, they believed “that ‘to be

39. Id. at 10.
40. Id. at 21.
41. Id.
42. Id. at 22.
43. Id. (discussing William Paley, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (1785)).
44. Id. at 23.
46. See Gerald J. Russello, Liberal Ends and Republican Means, 28 SETON HALL L. REV. 740, 756 (1997) (reviewing PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1997)) (maintaining that “two significant pillars of republican virtue” were religion
attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affection.”

Thus,

George Mason argued that republican government was based on an affection “for alters and firesides.” Only good men could be free; men learned how to be good in a variety of local institutions—by the firesides as well as at the altar. . . . Individuals learned virtue in their families, churches, and schools.

The Founders were heavily influenced by classical Greek and Roman writings. Aristotle noted that the “first concern” of the responsible legislator would be to set rules to regulate marriage.

Aristotle (emulating Plato, in part) prescribed a whole series of laws on the ideal ages, qualities, and duties of husband and wife to each other and to their children.

The Roman Stoics repeated and glossed these classical Greek views about marriage, even while many of them celebrated celibacy as the higher ideal. Cicero (106-34 B.C.), the leading jurist and moralist of his day, for example, called marriage a “natural partnership” of the person and property of husband and wife that served for procreation, for companionship, and ultimately for the broader cultivation of “dutiful affection, kindness, liberality, good-will, courtesy, and the other grace of the same kind.”

Cicero described marriage as creating “the first bond” of society and as “the foundation of civil government, the nursery, as it were, of the state.” Legal scholars have noted that numerous other well-known
Greek and Roman writers emphasized the essential social importance of marriage.  

Other influential political philosophers familiar to the Founders taught the foundational role of marriage in society. For example, John Locke's influential Second Treatise of Government explains that "[t]he first Society was between Man and Wife, which gave beginning to that between Parents and Children," which was "made by a voluntary Compact between Man and Woman." Clearly, the Founders' belief that marriage was the foundation of the Constitution, and that the form of government of a society reflected the form and principles of marriage in the society was hardly a novel insight even in 1787.

The connection between marriage and social order was recognized by observers from Europe. Shortly after the founding of the American Republic, the perceptive French social commentator, Alexis de Tocqueville, observed:

There is certainly no country in the world where the tie of marriage is more respected than in America or where conjugal happiness is more highly or worthily appreciated. . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. There his pleasures are simple and natural, his joys are innocent and calm; and as he finds that an orderly life is the surest path to happiness, he accustoms himself easily to moderate his opinions as well as his tastes. . . . [T]he American derives from his own home that love of order which he afterwards carries with him into public affairs.

He also remarked that "the feeling [a citizen] entertains towards the state is analogous to that which unites him to his family." "Tocqueville concluded that family stability produces social responsibility and order, whereas family instability fosters social misbehavior."

53. See Witte, supra note 51, at 1022-29 (citing Plato, Plutarch, Musonius Rufus, and others).
55. DE TOCQUEVILLE, supra note 25, at 315.
56. Id. at 98.
Thus, throughout the founding era, the marriage-based family was seen as the foundational unit of society and the seedbed of government. The Constitution was seen as requiring and resting upon the foundation of marriage-based families where the necessary republican civil virtues would be nurtured.

III. SUPREME COURT RECOGNITION OF THE MARITAL FAMILY AS THE SPRING OF CONSTITUTIONAL SOCIETY

The importance of marriage for society and the link between the marital family and the form of government have frequently been noted by the Supreme Court of the United States. In *Reynolds v. United States*, 58 upholding congressional legislation that banned polygamy from the federal territories and rejecting a free exercise of religion claim for exemption from the law, the Court described the high and central status of marriage in these terms: "Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."59 The Court suggested that polygamy was associated with the autocratic, despotic, oppressive societies of "Asiatic and of African people," and "fetters the people in stationary despotism," while monogamy was the well-spring of the enlightened, liberal societies of the "northern and western nations of Europe."60

In another polygamy case, *Murphy v. Ramsey*, 61 the Court reiterated the connection between marriage and civilization, including form of government.

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.62

58. 98 U.S. 145 (1878).
59. Id. at 165.
60. Id. at 164-65, 166.
61. 114 U.S. 15 (1885).
62. Id. at 45.
A short time later, in *Maynard v. Hill*, Justice Field noted that "[m]arriage, as creating the most important relation in life, [has] more to do with the morals and civilization of a people than any other institution." The Court upheld legislative divorce even without basic procedural protection because of the importance of sustaining state authority to regulate marriage.

In *Davis v. Beason*, the Mormon defendant was convicted of attempting to register to vote in violation of an Idaho territorial law which denied Mormons the right to vote or hold public office. Upholding that draconian provision, Justice Field emphasized the connection between social order and marriage form.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment.

In *Skinner v. Oklahoma*, and again in *Loving v. Virginia*, the Court emphasized that "[m]arriage and procreation are fundamental to the very existence and survival of the race." In *Griswold v. Connecticut*, the Court observed:

Marriage is a coming together for better or for worse, hopefully enduring, 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.

Six years later, in *Boddie v. Connecticut*, the Supreme Court emphasized that "marriage involves interests of basic importance in our
society,"75 because it relates to the States’ interest in “the stability of their social order, . . . the good morals of all their citizens, and . . . the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages.”76

The value of marriage to social interests in paternal support of children and for rehabilitating incarcerated criminals can be inferred in the last two Supreme Court cases addressing the constitutionality of marriage regulations.77 As recently as 2001, the Supreme Court may be interpreted to have acknowledged the social consequences of marriage and family form in upholding a paternity rule of the Immigration and Naturalization Service that imposed a higher burden of proof on unwed fathers than either married fathers or unwed or married mothers.78

Clearly, the Supreme Court has recognized and endorsed the connection between form of marriage and social order, including nature of government.

IV. CONTEMPORARY RECOGNITION OF THE ROLE OF THE MARITAL FAMILY IN CULTIVATING CIVIC VIRTUE

A number of contemporary theories of political and social science recognize the importance of marriage for the stability of society and the form of government. Civic republican theories emphasize the importance of marriage and marriage-based families in nurturing the habits, commitments, and virtues of citizenship that are necessary for a liberal democratic republic to flourish. Liberal theories of the role of government in liberating individuals to pursue happiness also underscore the value of marriage. Consequentialist theories based on utilitarian assumptions have inspired a great amount of social science research that validates the importance of marriage for the well-being of individuals, families, and society.

A. Contemporary Civic Republicanism Supports the Importance of Marriage for Our Constitutional System

The modern “communitarians” and civic republicans have called attention to the role of the marriage-based family in fostering civic

75. Id. at 376.
76. Id. at 389 (Black, J., dissenting).
republican principles. The basic theory is well expressed by Jane B. Weinhold:

The family is the social microcosm that creates and reflects the strengths and weaknesses of the larger social structures. The family, as the basic building block of society, is also the primary agent of socialization and acculturation. The family experience may be so powerful in shaping a person’s behavior that it creates an internal construct of reality that is then used to create the external world. From the experiences while growing up in their families, people use what they learn in social institutions, such as schools, businesses and Governments. Individuals who experienced democratic practices in their families are more likely to support, and expect, democratic social institutions, while those who experienced totalitarian practices in their families are likely to tolerate and create totalitarian social structures.  

Professor Linda C. McClain adds:

There is a close affinity between virtues important to democratic self-government and those important to personal self-government because self-government begins with “governing the self,” a task taught especially well by families. For example, one report, A Call to Civil Society, characterizes the family as first among the seedbeds of virtue and the “cradle of citizenship,” because there a child learns “the essential qualities necessary for governing the self: honesty, trust, loyalty, cooperation, self-restraint, civility, compassion, personal responsibility, and respect for others.” Families are at the heart of the agenda for renewal: a core goal for “moral renewal” of democracy is stemming the “steady break-up of the married couple child-raising unit,” which is viewed as the “leading propeller of our overall social deterioration.”

Professor McClain elsewhere cites contemporary political theories that support the belief that our constitutional order is built upon certain presuppositions. Building on the writing of Michael Sandel, Professor McClain asserts that “[t]he Constitution permits and depends upon, if not authorizes or even requires, a formative project,” meaning “the task of constituting civic virtue [by] fostering persons’ capacities for democratic


self-government," and that "in a good society, families (ideally) will play a role in cultivating civic virtue (and democratic self-government) . . . [and] other forms of virtue and contribute vitally to personal self-government." Marriage is important in democratic formation theory because there is a "spillover" between the development and qualities of personal virtue (the qualities and character of being a good person) that are manifest in and essential to happy family living, and the development and qualities of civic virtue ("the set of qualities of character, skills, and dispositions that are necessary for democratic self-government.").

Noted advocate of same-sex marriage, William Eskridge, also cites Sandel in developing a theoretical argument that legalizing same-sex marriage would promote the common good in a framework of "Rawlsian rights and Sandelian remedies." However, even Professor Eskridge concedes that marriage as the union of man and woman is deeply imbedded in our cultural and cognitive awareness and widely associated with the type of virtue (selflessness) that we want to cultivate in the citizens of our country.

Most Americans associate male-female marriage not only with procreation, but also with the complementarity of the sexes, romantic love till death do us part, and the ideal of a happy childhood presided over by mom and dad. At a higher level of abstraction, different-sex marriage is closely associated with such concepts as unselfishness and citizenship, because the best examples we can imagine of other-regarding conduct involve romantic love between married husbands and wives, matched only by the parental love that the (married) mother and father show their offspring. . . . Same-sex marriage, for many people, destabilizes patterns of thinking that go beyond the construction of the family.

82. McClain, The Domain of Civic Virtue, supra note 80, at 1619; see also Linda C. McClain & James E. Fleming, Some Questions for Civil Society-Revivalists, 75 CHI.-KENT L. REV. 301, 308 (2000) (civil society is as important to "enabling people to decide how to live their own lives" as it is to "preparing them [to participate] in democratic life"); Linda C. McClain, Toward a Formative Project of Securing Freedom and Equality, 85 CORNELL L. REV. 1221, 1249-57 (2000) (considering theories of how government can foster culture that preserves freedom and equality).

83. McClain, The Domain of Civic Virtue, supra note 80, at 1621.

84. Id. at 1624-28; see also McClain, Citizenship Begins at Home, supra note 21, at 101 (arguing that childcare should be recognized "as a component of [parents'] responsible self-government" which is linked with "other forms of personal responsibility").

85. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE 165 (2002).

86. Id. at 114.
These views have been long recognized in modern scholarship.\textsuperscript{87} The family has been recognized as the "launching pad" from which an individual enters public life.\textsuperscript{88} There is a "cognitive fit" between the family and democracy.\textsuperscript{89} Brigitte Berger argues that while children reared in marriage-based families learn the virtues and skill that allow them to progress in life and democracy to flourish, children reared in single-parent families are more prone to authoritarian styles of government or leadership, and less politically inclined.\textsuperscript{90} Robert Putnam notes that "the quality of governance [is] determined by longstanding traditions of civic engagement" developed in "networks of organized reciprocity and civil solidarity,"\textsuperscript{91} the family is an important source of social capital, and "successful marriage (especially if the family unit includes children) is statistically associated with greater social trust and civic engagement."\textsuperscript{92}

\section*{B. Liberal Theories Support the Value of Marriage for the Individual Pursuit of Happiness}

Liberal theories generally see the purpose of the state to protect individual liberty so that by the "pursuit of happiness" men may find personal fulfillment that they cannot experience when they are acting under compulsion. Liberty is the essential requirement for individual pursuit of happiness, and the pursuit of happiness produces social goods, including the preservation of liberty and stability in the social order. Thus, in a theory of familial liberalism, marriage is the formative place where the skills for developing individual happiness are learned, and the preconditions for the successful exercise of personal liberty are mastered.

\begin{small}
\begin{itemize}
\item \textsuperscript{87} In 1940, Una Baird Sait explained that democracy is best taught in the home for three reasons: (1) children are educated in the home from the day they are born; (2) family life offers day-to-day experience with democracy; and (3) continued practice in democratic living "fosters the growth towards full human stature of every family member." Una Baird Sait, Democracy and the Family, LIVING, Feb. 1940, at 7.
\item \textsuperscript{88} See Brigitte Berger, Roots of Prosperity: The Unexpected Influence of the Family, CURRENT, June 1998, at 7.
\item \textsuperscript{89} \textit{Id.} at 8-9.
\item \textsuperscript{90} See \textit{id.} at 9.
\item \textsuperscript{92} Robert D. Putnam, Tuning, In, Tuning Out: The Strange Disappearance of Social Capital in America, 28 PS: POL. SCI. & POL. 664, 671 (1995) (noting that "married men and women are about a third more trusting and belong to about 15-25% more groups than comparable single men and women").
\end{itemize}
\end{small}
Dean Bruce C. Hafen has explored from this perspective the importance of marriage and kinship ties as a foundation for a liberal (democratic) society. He asserts that the marriage-based family has "contributed enormously to the ultimate purposes of a democratic society by providing the stability and the structure that are essential to sustaining individual liberty over the long term." By providing for the needs of children (especially their needs for parental bonding and affection), marriage helps lay the foundation for their moral and political maturation as responsible wielders of personal liberty. As the place of most influential socialization, the home teaches individuals (especially children, but also spouses and parents) the lesson of "obedience to the unenforceable," which is the first principle of a free (liberal) society. In the family, spouses, parents, and children learn "[t]o be attached to the subdivision, to love the little platoon we belong to in society," which Burke designated "the first principle . . . of public affections." As a primary mediating structure in our democracy, the family (whatever its form) is a value-generating, and hence state policy-influencing institution, that provides "emotional and spiritual comfort, as well as human fulfillment" for individuals, and as protects them from the oppressive forces of the state. As Hafen notes, D.H. Lawrence wrote: "[T]he marriage bond . . . is the fundamental connecting link in Christian society. Break it, and you will have to go back to the overwhelming dominance of the State, which existed before the Christian era." Lawrence further declared that

Perhaps the greatest contribution to the social life of man made by Christianity is—marriage. . . . Christianity established the little autonomy of the family within the greater rule of the State. . . . It is marriage, perhaps, which has given man the best of his freedom . . . . Man and wife, a king and queen with one or two subjects, and a few square yards of territory of their own: this, really, is marriage. It is true freedom.

94. Id. at 473.
95. See id. at 473-75.
96. See id. at 476-78.
97. Id. at 479.
98. Id. at 479-82.
99. Id. at 483 (quoting D. H. LAWRENCE, A PROPOS LADY CHATTERLEY'S LOVER 35-36 (Haskell House Publishers 1973) (1930)).
100. Id.
Thus, the role of the marriage-based family in liberating humanity and providing them with their greatest chance for the successful pursuit of happiness goes to the heart of the purpose of the state in modern liberal political theory. Professor Hafen notes that marriage has become “an enormously important element in the rise of stable political systems and dynamic economies.” “As Professor Hayek has rightly pointed out, the rise of the West is due in great part to its ability to define the law with certitude . . . . At the heart of any stable law of property is a clear and universal legal doctrine of marriage.”

Further, “[c]oncepts such as marriage . . . have played a supremely important role over the years in staking out broad, clear boundaries that give guidance to an arm of the legal system that is already overwhelmed with subjective determinations.” Thus, liberal political theory views marriage and family as important in empowering individuals to achieve personal freedom and succeed in their “pursuit of happiness.”

C. Consequentialist Social Science Research Confirms the Importance of Marriage for Society

Utilitarian theories promoting what works best to foster the well-being of most citizens underlie much of the social science research about the effects of various family forms and styles that have been very popular in recent years. Social science research shows clearly, both directly and indirectly, that marriage is good for society because “providing children the care, nurturing, and moral education necessary to become good people ultimately helps them to become good citizens.”

One notable compilation of social science research is Linda Waite and Maggie Gallagher's *The Case for Marriage*. Waite, a University of Chicago sociologist, and respected journalist Gallagher noted research finding that married men and women enjoy better health than their unmarried peers, and the effects of divorce on health are comparable to the effects of smoking—for men divorce reduces life expectancy about the same as smoking one pack of cigarettes per day. A five-year study shows that married people have better emotional health, even after

101. *Id.* at 485 (quoting Johnson, *The Family as an Emblem of Freedom* 2 (Am. Fam. Inst., 1980)).
102. *Id.* at 489.
104. WAITE & GALLAGHER, supra note 16.
105. See *id.* at 47.
controlling for other factors, including selection bias. Studies show that married couples have more sex and enjoy it more, finding it more physically satisfying and emotionally satisfying than nonmarried couples. The positive effect of marriage in preventing or reducing poverty is hardly new information. Waite and Gallagher recount how Benjamin Franklin in 1785 told a bachelor friend who said he was too poor to marry:

A single man has not nearly the Value he would have in that State of Union. He is an incomplete Animal. He resembles the odd Half of a Pair of Scissors. If you can get a prudent, healthy Wife, your Industry in your Profession with her good Economy will be a Fortune sufficient.

Marriage generally provides the best environment for raising children. Children of divorce or without fathers in their home are at the greatest risk of crime, child abuse, premarital sex, premarital pregnancy, poverty, lower education, perform less well in school, and achieve less career success. Women and men are safer in marriage than out of marriage. Single and divorced women are four to five times more likely to be victims of crime, ten times more likely to be victims of rape, and three times more likely to be victims of assault than married women. Single and divorced men similarly are four times more likely to be victims of violent crime. Likewise, comparing married and other women, if married women experience domestic violence once, cohabitating women will experience it three times, single women twenty-five times, and the violence will be more frequent and more serious. Waite and Gallagher conclude that marriage is not just one of a multiple of “equally good” alternative forms of family relationships, but it is the most superior form of family relationship. Society and all its members incur the costs of higher crime, welfare, education, and healthcare expenditures and in reduced security for their own marital investments when marriage disintegrates or is bypassed. “When society as a whole helps support marriage as an institution, we are all better off.”

106. See id. at 69-70.  
107. See id. at 79-85.  
108. Id. at 97.  
109. See id. at 124-34.  
110. See id. at 152.  
111. See id.  
112. See id. at 155-57.  
113. See id. at 186.  
114. Id.
A host of other social science studies confirm and emphasize the benefits of marriage-based families for society. For example, behavior involving significant health risks, "including marijuana use, drinking and driving, substance abuse, and the failure to maintain an orderly lifestyle," is substantially higher for divorced men and women than it is for either widowed or married men and women. 115 Similarly, research indicates "that married men and women face lower risks of dying at any point" than other persons. 116 A recent study of the relationship of marital status and individual happiness reported that the strong positive relationship between marital status and personal happiness exists in sixteen of the seventeen nations examined. 117 The report found that being married increased happiness equally for men and women, and marriage was more than three times more closely associated with happiness than was nonmarital cohabitation. 118 Marital status is more closely associated with avoiding child poverty than any other factor. It is said that more than half of the increase in child poverty in the United States between 1980 and 1988 "can be accounted for by changes in family structure during the 1980s." 119 According to a 1990 study the "relationship between crime and one-parent families" is "so strong that controlling for family configuration erases the relationships between race and crime and between low income and crime." 120 The likelihood that a young male "will engage in criminal activity doubles if he is raised without a father, and triples if he lives in a neighborhood with a high concentration of single-parent families." 121 Thus, the social science

116. Id. at 488-89.
118. See id. at 534, 535.
119. David J. Eggebeen & Daniel T. Lichter, Race, Family Structure, and Changing Poverty Among American Children, 56 AM. SOC. REV. 801, 806 (1991). The study further indicated that "the official child poverty rate in 1988 would be approximately one-third less than the rate actually observed" had family structure remained constant proportionally since 1960. Id.
121. Kenneth F. Boehm, The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary, ST. LOUIS U. PUB. L. REV. 321, 355 (1998); see also Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, § 100(3)(o); M. ANNE HILL & JUNE O'NEILL, UNDERCLASS BEHAVIORS IN THE UNITED STATES: MEASUREMENT AND ANALYSIS OF DETERMINANTS 91 (1993) (stating that "the father's absence is associated with a 4 percent point increase in the probability of a jail sentence," and "being raised in a family that has no father, that is on welfare, that lives in public housing in a high welfare neighborhood is associated with rates of low work, going to jail, unwed fatherhood, and failure to complete high school that are roughly double the average").
evidence of the utilitarian benefits of marriage-based families for individuals, society, and efficient government is overwhelming.

D. A Hybrid, Pragmatic Theory of The Role of Marriage in Sustaining Constitutional Democracy

While convincing connections may be drawn between marriage and our constitutional system of liberties under all three theories reviewed above (and others, like those reviewed by Professor Browning), it is likely that the truth lies somewhere in between the theories. That is, it is likely that civic republicanism, liberalism, and utilitarianism all provide valid insights into the relationship between marriage and government, but that none of the theories is perfect or encompasses all of the truth. An eclectic or hybrid and pragmatic approach may provide a more complete perspective.

I suggest that society has an interest in promoting individual happiness, and in encouraging social stability, and in fostering good citizenship, and in preventing the explosion of social problems, and that these interests gives it a direct interest in fostering secure, happy,

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122. See supra text accompanying note 6.

123. Pragmatic theory is usually ascribed to John Dewey, William James, and Charles Pierce. See Alexei Sharov, Pragmatism and Umwelt-Theory, at http://www.ento.vt.edu/~sharov/bs Roosevelt/umwelt.html (last visited Jan. 21, 2004) (It is a monistic philosophy that assumes that all distinctions or boundaries are subjective (i.e., operational, instrumental, or conventional) . . . . Subjectivity does not mean pure arbitrariness or randomness, instead it always has a component of self-interest or usefulness (hence the term 'pragmatism'). Because of usefulness, subjectivity is partially predictable. Usefulness implies activity that supports (or creates) existence (Dewey 1998). It also implies that structures and boundaries have a meaning for the system, because they perform functions that support the existence of the system . . . . Pragmatism sees the meaning of existence in its consequences . . . . The ethical principle of pragmatism is to create existence by caring about consequences and to bring meaning to life by doing this. In contrast, positivism is satisfied with a meaningless existence.); see generally John Dewey, in Internet Encyclopedia of Philosophy, at http://www.utm.edu/research/iep/d/dewey.htm (last visited Jan. 21, 2004); John R. Shook, Pragmatism is a Theory of Learning in its Natural and Historical Context, at http://www.ghiraldeii.pro.br/shook.htm (last visited Jan. 21, 2004). "Legal pragmatism—which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—renounces the entire project of providing a theoretical foundation for constitutional law." Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1332 (1988). Farber’s example of Roe v. Wade, 410 U.S. 113 (1973), as a paradigmatic example of legal pragmatism is not a very encouraging idea for those interested in principled legal analysis, much less the rule of law. See id. at 1366-76.
marriage-based families.\textsuperscript{124} Marriage is the best, most promising foundation for lasting, growing, individual, and family happiness and security. It also is "the very seedbed of democracy. Home is the place where we get our first ideas about ourself [sic], our attitudes toward other people, and our habits of approaching and solving problems."\textsuperscript{125} It is in the home that spouses as well as children learn lessons about cooperation and commitment, sharing and sacrifice, and obedience to the unenforceable that form the foundation for self-government. It is from their marriages that husbands and wives learn how to make the best of shortages, how to care for others, how to be happy, to love liberty, to fulfill one's duty, and the critical citizenship skills of mutual respect and cooperation.\textsuperscript{126} It is in marriage and in raising children that most adults relearn the importance of and refine the techniques of sacrificing for others, how to really care for the next generation, to look beyond the present, to nurture the basics of life and community. The interconnectedness of our lives, the first lesson of all government, especially self-government, is learned first (as children) and most thoroughly (as spouses and parents) in the home. The home is the first and the most important schoolhouse in a democracy. Husband and wife, as well as parents and children, learn the most important lessons of happy, successful living as they work together, play together, plan together, cooperate together, laugh together, weep together, prosper together, and share each others' pains and sorrows. It is in the home that trust in others and in the future is nurtured—or hindered—and that is the indispensable prerequisite for democracy. Marriage-based families are best for children, providing the potentially optimal environment in which children may be conceived, raised, and taught the lessons of responsible living.

The normative nature and structure of marriage and family are closely tied to the model of state authority. "[The family has a] critical role in raising good citizens.... The localist theory of family law affirms the vital role that families play in preserving the fundamental

\textsuperscript{124} See, e.g., CHRISTINE BEASLEY, DEMOCRACY IN THE HOME 11 (1954) (The two fundamental ideas on which democracy rests are: (1) a belief in the worth, dignity, and creative capacity of every individual human being; and (2) a belief in the value of creative participation and co-operation of all individuals within a group.... Democracy, then, is a process which succeeds only in so far as it achieves for each and every one of its members the happiness, productivity, and creative relationships which it is his drive to seek; its success lies in its measure of harmony with the needs of man.).

\textsuperscript{125} Id. at 25.

\textsuperscript{126} See, e.g., id. at 12 ("A basic feeling of respect for every individual human being, no matter what his age or status or personal peculiarities, is the very cornerstone of democracy.")
liberal values underlying the constitutional structure."127 This is true not just in western societies. In Japan, for example, the structure of the family and the cultural values inculcated by the family affect the successful use of informal dispute resolution procedures in courts.128 And after World War II, the Allies insisted on the dismantling of the traditional ie family structure in Japan because they believed that there was a direct link between that potentially autocratic family form and the social, political, and militaristic values of the nation.129

Marriage structures that underscore public commitment are an important foundation for self-government because such marriages are as much for the community as for the individuals. Couples say their vows for the community who gather to witness them pledge their troth to each other.130 Their marriage reaffirms a community value, the identity of the community and of the couple.

The concept of marriage is founded on the factual reality that the union of two persons of different genders creates something unique, a special relationship of unique potential strengths and inimitable potential value to society. The integration of the universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity constitutes the core and essence of marriage. The heterosexual dimensions of the relationship are at the very core of what makes "marriage" what it is, and why it is so valuable to individuals and to society.131

The relationship between two persons of the same sex is fundamentally different from heterosexual "marriage" because men and women are fundamentally different. Marriage is unique. No other companionate sexual relationship provides the same great potential for benefiting individuals and society as the life-time covenant union of a man and a woman. In the words of Professor Daniel Cere:

Marriage promotes a unique public form of life and culture geared to bridging the sex-divide; it sustains a complex form of social interdependency between men and women; it provides a social frame for heterosexual procreativity; it supports an integrated form of

127. Dailey, supra note 46, at 1792-93.
parenthood (genetic, gestational and social); and it treasures and maintains connections between children and their natural parents.\textsuperscript{132}

The bonding of male and female are essential features of human existence and of marriage.

Marriage is an institution that attempts to work with this vast and complex domain of cross-sex bonding social life. It provides social-sexual intimacy for male-female bonding. This unique and ever-evolving institution constantly struggles to adapt changing social and cultural contexts in order to nurture stable conjugal unions that span the sexual divide between men and women.\textsuperscript{133}

Marriage protects and channels:

the fundamental facets of conjugal life: the fact of sexual difference; the enormous tide of sexual desire in human life; the massive significance of male/female bonding in human life; the procreativity of heterosexual bonding, the unique social ecology of heterosexual parenting which bonds children to their biological parents, and the rich genealogical nature of heterosexual family ties.\textsuperscript{134}

At least eight social interests (or groups of interests, since all of these interests are multifaceted) for marriage can be identified that relate to the questions addressed by this conference. These include (1) safe sexual relations, (2) responsible procreation, (3) optimal child-rearing, (4) healthy human development, (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers, (6) securing the stability and integrity of the basic unit of society, (7) fostering civic virtue, democracy, and social order, and (8) facilitating interjurisdictional compatibility.

On the basis of history and common experience across cultures, advocates of preserving marriage exclusively for male-female couples may reasonably assert that committed heterosexual unions we call marriages make unique and important contributions to achieving these public and social purposes of marriage. Committed heterosexual unions of marriage seem to provide the best setting for the safest and most beneficial expression of sexual intimacy. Heterosexual marriage also appears to provide the best environment into which children can be

\textsuperscript{132} Daniel Cere, Marriage/Parenthood, Laws of Dissolution 5 (Mar. 12, 2003) (copy on file with author).
\textsuperscript{133} Id. at 14-15.
\textsuperscript{134} Id. at 15.
Heterosexual marriage likely provides the most advantageous environment in which children can be reared, providing profound benefits of dual-gender parenting to model inter-gender relations and show children how to relate to persons of their own and the opposite gender. Heterosexual marriage arguably provides the most enriching and liberating relationship to facilitate human adults to personally develop and achieve their fullest potential. Heterosexual marriage historically has provided the best security for those who take the greatest risks and invest the greatest personal effort in establishing and maintaining families, especially wives and mothers. Heterosexual marriage seems to provide the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills, and reflects the understanding of marriage that has been constant across cultures and throughout history.\footnote{135 See infra Part IV.C.}

Marriage is of such profound importance to society that there is great danger if its meaning and definition become ambiguous. It could be said that changing the meanings of marriage would be like moving the furniture in the house of a person who is blind.\footnote{136 Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 780 (2001).}

V. THE DESTRUCTION OF CONSTITUTIONAL GOVERNMENT BY "MODERNIZING" DOMESTIC RELATIONS

Francis Grund, the Austrian counterpart and contemporary of Alexis de Tocqueville, emphasized the importance of preserving our domestic virtue in words that are very sobering in light of the challenges to marriage and family today. He wrote:

I consider the domestic virtue of the Americans as the principal source of all their other qualities. . . .

No government could be established on the same principle as that of the United States, with a different code of morals. The American Constitution is remarkable for its simplicity; but it can only suffice a people habitually correct in their actions, and would be utterly inadequate to the wants of a different nation. Change the domestic habits of the Americans, their religious devotion, and their high respect for morality, and it will not be necessary to change a single

\footnote{137 Institute for American Values, Consultation on Same-Sex Marriage, Cambridge, Massachusetts, Apr. 2003.}
Proposals to abolish marriage (per Professor Fineman) or legalize same-sex marriage would radically “change the domestic habits of the Americans” that inevitably would lead to a radical variation of our constitutional government.

Society can accommodate some “free riders” living in alternative, nonmarital relationships. Our democratic society can carry on adequately despite some family form deviation, some domestic failure, some breakdown of family integrity, but when the quantity of those problems become significant, they burden the entire society and undermine society and its institutions.

[Society] requires a critical mass of married, two-parent families, both to raise their own children well and to serve as models for those who are being reared outside of the “conventional” family. The great tragedy today is that there are communities—especially low-income communities—where we have already lost that critical mass.

The price of devaluing marriage is being paid already by many in our society who have suffering, broken, and dysfunctional families, who have experienced sorrow, pain, and regret. It is paid by society in general in heightened incidence and rates of premarital sexual exploitation and pregnancy, nonmarital childrearing, single parenting, juvenile crime, lowered academic achievement, increased physical and mental health problems, drug use and alcohol abuse, increased poverty, and reduced productivity. If we embrace the legalization of alternative family forms as equivalent to marriage, the toll will be even higher.

Society has an interest in fostering family structures that produce these kinds of positive and socially beneficial results, results that avoid lost productivity, reduce tax expenditures for medicines, health services, social security, and prevent to some degree the social costs of broken homes. Thus, society has a direct and measurable interest in fostering good, happy marriages, and stable, loving families.

Once the institution of marriage slips off its foundation, it is very difficult to restore. The family demographer William Goode suggested that after marriage is weakened in a society it is nearly impossible to revitalize it without perhaps some traumatic and dramatic external pressure such as military conquest, economic collapse, or natural

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disaster of widespread proportions. One wonders whether even those external disasters are not a natural consequence of radical alteration of the foundation of a society.

Conferring the label and legal status of “marriage” on same-sex unions and other noncapital relationships will not magically transform them into the kind of socially valuable units historically called marriage. The defect of that classic Kelsenian (positivist) flaw was exposed by Abraham Lincoln when he asked how many legs a dog would have if you counted a tail as a leg. To the response “five legs,” Lincoln said, “No; calling a tail a leg doesn’t make it a leg.”

Viewed from almost any credible theoretical framework, including civic republicanism, liberalism, utilitarianism, and pragmatism, it can be shown that marriage is the seedbed of government. The bonds of marriage are reflected in the bonds of citizenship, and the bonds that tie us to support and preserve our constitutional government imitate the bonds of responsible marriage-based families. Our Constitution was founded on a particular vision of marriage. An abolition or radical redefinition of marriage will have extreme consequences for our government, probably within a generation.

140. See WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 318, 335-36 (1993).

141. Hans Kelsen was one of the leading exponents of legal positivism in the civil law system. See, e.g., HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945) (discussing the philosophical foundations of legal positivism in the civil law system); HANS KELSEN, PURE THEORY OF LAW 1-69 (Max Knight trans., 1967) (describing positivist theory of law); Hans Kelsen, The Natural-Law Doctrine Before The Tribunal of Science, in WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS BY HANS KELSEN 137, 141 (1957) (describing legal positivism).


143. One wonders whether some extreme developments in constitutional doctrine in recent years, and the authoritarian attitudes reflected in decisions disregarding federalism, less consensus-building, more “hard-ball” politics, etc., are not the result of the radical loosening of the bonds of marriage more than a generation ago (e.g., by the adoption of unilateral, no-fault divorce in the early 1970s). See Lynn D. Wardle, Legal Claims for Same Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. TEX. L. REV. 735, 762-66 (1998).
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