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## The Constitutionality of Covenant Marriage Laws

### Cover Page Footnote

I would like to thank Professor James Fleming for his encouragement and insight while I wrote this Note.

# THE CONSTITUTIONALITY OF COVENANT MARRIAGE LAWS

Melissa Lawton\*

## INTRODUCTION

Reducing the divorce rate has become a priority in America.<sup>1</sup> Researchers contend that divorce causes a myriad of social ills, particularly those suffered by children of divorced parents.<sup>2</sup> Some assert that no-fault divorce laws are the major reason for the increase in divorce during recent decades.<sup>3</sup> No-fault divorce is available in nearly every state.<sup>4</sup> Several states have considered passing covenant marriage laws to reduce the divorce rate.<sup>5</sup> Last summer, Louisiana became the first state to implement covenant marriages when the state legislature en-

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\* I would like to thank Professor James Fleming for his encouragement and insight while I wrote this Note.

1. See Editorial, *The Divorce Debate*, N.Y. Times, Feb. 15, 1996, at A26 (reporting on a "new movement" to toughen state divorce laws); Dirk Johnson, *Attacking No-Fault Notion, Conservatives Try to Put Blame Back in Divorce*, N.Y. Times, Feb. 12, 1996, at A10 (citing several state efforts to reduce the number of divorces).

2. Linda Bird Francke, *Growing Up Divorced* 152-53 (1983) (listing several problems of children whose parents are divorced, such as feelings of anger, sadness, shame, and insecurity, alcohol and drug use, and general aggressive behavior); see also David Blankenhorn, *Fatherless America* 44 (1995) (reporting that divorce increases child poverty); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *Atlantic Monthly*, Apr. 1993, at 47 (citing a 1988 survey which found that children of one-parent families, which included out-of-wedlock children and children of divorce, are more likely than children in two-parent families to drop out of high school, become pregnant as teenagers, or have trouble with the law).

3. See Lenore J. Weitzman, *The Divorce Revolution* xviii (1985) (linking the increase in the divorce rate with no-fault divorce laws); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9, 9-10 (1990) (noting that the change from "fault" to "breakdown" grounds for divorce has resulted in high divorce rates).

4. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. Cin. L. Rev. 1, 5-6 (1987) (listing every state's version of no-fault divorce); see also Stephen D. Sugarman, *Introduction to Divorce Reform at the Crossroads* 1, 2 (Herma Hill Kay & Stephen D. Sugarman eds., 1990) (stating that although "[s]ome lament the shift to no-fault divorce . . . talk of reregulating divorce is virtually absent from the current discourse about reform").

5. Eighteen states have introduced covenant marriage laws: Alabama, Arizona, California, Georgia, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and West Virginia. See S. 606, Reg. Sess. (Ala. 1998); H. 2658, 43rd Leg., 2d Reg. Sess. (Ariz. 1998); S. 1377, Reg. Sess. (Cal. 1997); H. 249, 144th Gen. Ass., Reg. Sess. (Ga. 1997); H. 1052, 110th Gen. Ass., 2d Reg. Sess. (Ind. 1998); H. 2839, 77th Leg., Reg. Sess. (Kan. 1998); H. 756, Reg. Sess. (1997 La.); S. 2935, 80th Reg. Sess. (Minn. 1998); H. 1645, Reg. Sess. (Miss. 1998); H. 1864, 89th Gen. Ass., 2d Reg. Sess. (Mo. 1998); L.H. 1214, 95th Leg., 2d Reg. Sess. (Neb. 1998); H. 567, 122nd Gen. Ass., Reg. Sess. (Ohio 1997); H. 2208, 46th Leg., 2d Sess. (Okla. 1998); S. 961, Gen. Ass., 112th Reg. Sess. (S.C. 1998); H. 2101, 100th Gen. Ass. (Tenn. 1998); H. 1056, Reg. Sess. (Va. 1998); S. 6135, 55th Leg. (Wash. 1998); H. 4562, 73rd Leg., 2d Reg. Sess. (W. Va. 1998).

acted House Bill 756, otherwise known as the Covenant Marriage Act.<sup>6</sup> This Act gives those planning to marry in Louisiana a choice between two options: a standard marriage or a covenant marriage.<sup>7</sup> A covenant marriage differs from the standard marriage in several ways. Most fundamentally, those choosing a covenant marriage must receive counseling prior to the wedding,<sup>8</sup> must agree to pursue additional counseling if the marriage encounters difficulty,<sup>9</sup> and cannot obtain a no-fault divorce absent a lengthy separation.<sup>10</sup>

Activity in both statehouses<sup>11</sup> and op-ed pages reflect the increasing societal interest in covenant marriage.<sup>12</sup> Many are uncomfortable with or angered by such legislation.<sup>13</sup> This Note addresses whether opponents of covenant marriage have a viable legal challenge to the constitutionality of such legislation and, furthermore, whether sound policy arguments counsel against the legislation.

Part I examines the language of Louisiana's covenant marriage law, outlining the obligations required to enter into a covenant marriage. It compares the two marriage choices in Louisiana, underscoring what distinguishes covenant marriages from standard marriages. Part I also compares covenant marriage's divorce requirements to an existing fault divorce system.

Part II examines the constitutional right to marry, including the Supreme Court's recognition of it as a fundamental right and the Court's treatment of regulations restricting the right to marry. This part defines the right to marry and analyzes the various constitutional bases underlying this right. By analyzing *Planned Parenthood v. Casey*,<sup>14</sup> this part also discusses the appropriate level of judicial scrutiny for infringements on the right to marry.

Having concluded that *Casey*'s undue burden standard is proper for judicial review of the right to marry, part III applies that standard to Louisiana's covenant marriage law. Through a hypothetical challenge to the law, part III determines that Louisiana's covenant marriage law is not an undue burden on the right to marry and is, therefore, constitutional. This part then outlines the policy debate over Louisiana's covenant marriage law. It analyzes published articles written on the

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6. La. Rev. Stat. Ann. § 9:272 (West Supp. 1998).

7. *Id.* §§ 9:272, 9:273.

8. *Id.* § 9:273(A)(2)(a).

9. *Id.*

10. *Id.* § 9:307.

11. See *supra* note 5 for examples of statehouse activity on covenant marriage.

12. See Amitai Etzioni, *Marriage With No Easy Outs*, N.Y. Times, Aug. 13, 1997, at A23; Walter Kirn, *The Ties That Bind*, Time, Aug. 18, 1997, at 48; Katha Pollitt, *What's Right About Divorce*, N.Y. Times, June 27, 1997, at A29; Abigail Trafford, *Getting Tough on Divorce is Not the Same as Getting Real*, Wash. Post, Aug. 26, 1997, at Z6.

13. See *infra* Part III.B.1-2 (detailing how some liberals and feminists have criticized the law).

14. 505 U.S. 833 (1992).

subject of covenant marriage laws and, for the purposes of discussion, analogizes expressed opinions of different political groups to illustrate those groups' likely positions on covenant marriage laws' propriety and effectiveness. It concludes by recognizing that covenant marriage laws, though constitutional, may be unsound or unwise for compelling policy reasons.

## I. LOUISIANA'S COVENANT MARRIAGE LAW

This part first analyzes the different sections of Louisiana's covenant marriage law and compares these sections to Louisiana's standard marriage. It distinguishes covenant marriage divorce requirements from New York's current fault divorce system. Finally, this part reviews some criticisms of the law's divorce options.

### A. Statutory Components

Louisiana Revised Statute § 9:272 defines a covenant marriage as one "entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship."<sup>15</sup> The statute emphasizes the importance of preserving covenant marriages by providing for dissolution only where "there has been a complete and total breach of the marital covenant commitment."<sup>16</sup> There are four key components to a covenant marriage: (1) the couple must declare their intent to enter a covenant marriage;<sup>17</sup> (2) counseling is required before the marriage takes place;<sup>18</sup> (3) the couple's marriage certificate will indicate that their marriage is a covenant marriage;<sup>19</sup> and (4) there are special requirements to terminate the covenant marriage.<sup>20</sup> This section will review those requirements in turn.

#### 1. The Declaration

Section 9:273 outlines how a couple must declare their intent to enter a covenant marriage.<sup>21</sup> Each member of the couple is required to recite a declaration professing their belief that marriage is a covenant "between a man and a woman who agree to live together as hus-

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15. La. Rev. Stat. Ann. § 9:272 (West Supp. 1998).

16. *Id.*

17. *Id.* § 9:273(A)(1).

18. *Id.* § 9:273(A)(2)(a), (b).

19. *Id.* § 9:245(A)(1). A marriage certificate is "the record prepared for every marriage on a form approved by the state registrar of vital records." *Id.*

20. *Id.* § 9:307.

21. *Id.* § 9:273. Section 9:275 also gives the option to already married couples to designate their marriage as a covenant marriage. *Id.* § 9:275. Such a couple swears to pursue counseling if marital trouble arises and is obligated to undergo counseling prior to designating their union as a covenant marriage. *Id.* § 9:275(C).

band and wife for so long as they both may live."<sup>22</sup> Couples must also assert that they have selected each other carefully and conveyed to one another everything that could discourage the decision to enter into marriage.<sup>23</sup> Both promise to make efforts to preserve their marriage, including marital counseling if the couple encounters marital problems.<sup>24</sup>

## 2. The Required Pre-Marital Counseling

Sections 9:273(A)(2)(a) and (b) sketch what counseling is required prior to a covenant marriage.<sup>25</sup> The couple must present an affidavit from a clergyman of any religious sect or from a marriage counselor swearing that they have received counseling prior to the marriage.<sup>26</sup> The counseling must include "a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce."<sup>27</sup> The counselor must attest that the parties were counseled on the above and must acknowledge that he or she gave them a standard informational pamphlet prepared by the Louisiana Attorney General.<sup>28</sup>

## 3. The Special Means of Terminating a Covenant Marriage

In addition to the hurdles one must pass to enter a covenant marriage, the law also has special divorce requirements. Section 9:307 lists the grounds for divorce in a covenant marriage.<sup>29</sup> A spouse may obtain a judgment of divorce only upon proof of one of the following: (1) the other spouse has committed adultery;<sup>30</sup> (2) the other spouse has committed a felony and has been sentenced to death or imprisonment;<sup>31</sup> (3) the other spouse has abandoned the matrimonial domicile for a period of one year and has constantly refused to return;<sup>32</sup> (4) the other spouse has physically or sexually abused the spouse seeking the

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22. *Id.* § 9:273(A)(1). The couple makes the declaration upon application for the marriage license, and the declaration is filed with the official who issues the marriage license. *Id.* § 9:272(B).

23. *Id.* § 9:273(A)(1). The statute does not provide information regarding what these disclosures might be.

24. *Id.*

25. *Id.* § 9:273(A)(2)(a), (b).

26. *Id.* § 9:273(A)(2)(a).

27. *Id.*

28. *Id.* § 9:273(A)(2)(b). The pamphlet prepared by the Attorney General "provides a full explanation of the terms and conditions of a covenant marriage." *Id.*

29. *Id.* § 9:307.

30. *Id.* § 9:307(A)(1).

31. *Id.* § 9:307(A)(2).

32. *Id.* § 9:307(A)(3).

divorce or a child of one of the spouses;<sup>33</sup> (5) the spouses have been living apart continuously without reconciliation for two years, if there is no separation judgment.<sup>34</sup> If a separation judgment is obtained, the parties can procure a divorce after one year of separation if there are no minor children of the marriage<sup>35</sup> and one year and six months of separation if there are minor children.<sup>36</sup> Separation judgments can be obtained for the same fault-based reasons as the divorce, as well as for the "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages" if such behavior is "of such a nature as to render their living together insupportable."<sup>37</sup>

### B. *Comparing Louisiana's Covenant Marriage to a Standard Marriage*

There are fewer and less complicated steps to take when entering into a standard marriage in Louisiana than when entering into a covenant marriage.<sup>38</sup> For example, a standard marriage requires neither a declaration regarding the understanding of marriage nor attestations that the parties have disclosed personal facts to each other.<sup>39</sup> There is no counseling requirement either before or during the standard marriage.<sup>40</sup> The most marked difference, however, between the two marriage forms, is the requirements for a divorce. A divorce shall be granted in a standard marriage when any of the following take place: (1) the motion of a spouse, once either spouse has filed for divorce, upon proving that the spouses have lived separate and apart continuously for 180 days;<sup>41</sup> (2) the non-petitioning spouse has committed adultery;<sup>42</sup> or (3) the non-petitioning spouse has committed a felony and has been sentenced to death or imprisonment.<sup>43</sup> In Louisiana, both a standard marriage and a covenant marriage may be dissolved immediately in cases of adultery or the felony imprisonment of the non-petitioning spouse.<sup>44</sup> There are other fault-based grounds for di-

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33. *Id.* § 9:307(A)(4).

34. *Id.* § 9:307(A)(5). A separation judgment is a court order on the disputed issues of the separation. See James T. Friedman, *The Divorce Handbook: Your Basic Guide to Divorce* 165 (1984).

35. *Id.* § 9:307(A)(6)(a).

36. *Id.* § 9:307(A)(6)(b).

37. *Id.* § 9:307(B)(6).

38. Compare La. Civ. Code Ann. arts. 87 (West 1993) (requiring a marriage ceremony, the absence of legal impediment, and the free consent of the parties to get married), with La. Rev. Stat. Ann. § 9:273 (requiring a declaration of intent and proof of marital counseling to get a covenant marriage).

39. See La. Civ. Code Ann. art. 87.

40. See *id.*

41. La. Civ. Code Ann. art. 102 (West Supp. 1998).

42. *Id.* art. 103(2).

43. *Id.* art. 103(3).

44. *Id.*; La. Rev. Stat. Ann. § 9:307(A)(1)-(2) (West Supp. 1998).

voice in a covenant marriage: abandonment<sup>45</sup> and physical or sexual abuse.<sup>46</sup> Because the pre-divorce separation periods are much longer for a covenant marriage, a no-fault divorce is more readily attained by those in a standard marriage in Louisiana.<sup>47</sup>

It is worthwhile to compare Louisiana's covenant marriage, with its lengthy waiting periods for a no-fault divorce, and New York's divorce laws, which technically do not offer a no-fault divorce option<sup>48</sup> and do not offer a choice among types of marriage and divorce.<sup>49</sup> In New York, a petitioning spouse may obtain a divorce based on the following grounds: (1) cruel and inhuman treatment by the non-petitioning spouse such that the conduct "so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant";<sup>50</sup> (2) the abandonment of the petitioning spouse for at least one year;<sup>51</sup> (3) the imprisonment of the non-petitioning spouse for at least three years, as long as the imprisonment began after the marriage;<sup>52</sup> or (4) the adultery of the non-petitioning spouse.<sup>53</sup> To obtain a divorce based on the separation of the spouses, they must live apart pursuant to a separation judgment<sup>54</sup> or a written agreement for at least one year.<sup>55</sup>

New York's divorce alternatives are broader than Louisiana's covenant marriage divorce options. First, New York provides for an immediate end to the marriage in cases of mental cruelty,<sup>56</sup> while Louisiana's covenant marriage law does not.<sup>57</sup> In addition, with a covenant marriage, the parties may have to be separated for two years before obtaining a divorce if they cannot reach a settlement agreement.<sup>58</sup> Even in comparison with New York's fault based regime, covenant marriage's divorce requirements are strict.

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45. La. Rev. Stat. Ann. § 9:307(A)(3) (defining abandonment as leaving the matrimonial domicile for a period of one year and constantly refusing to return).

46. *Id.* § 9:307(A)(4).

47. *Id.* § 9:307(A)(5), (6).

48. See N.Y. Dom. Rel. Law § 170 (McKinney 1988). The only way to obtain a no-fault divorce in New York is if both parties consent. Sugarman, *supra* note 4, at 2.

49. See N.Y. Dom. Rel. Law art. 3 (McKinney 1988).

50. *Id.* § 170(1).

51. *Id.* § 170(2).

52. *Id.* § 170(3).

53. *Id.* § 170(4).

54. *Id.* § 170(5). See *supra* note 34 for a definition of a separation judgment.

55. N.Y. Dom. Rel. Law § 170(6).

56. See *id.* § 170(1).

57. See La. Rev. Stat. Ann. § 9:307 (West Supp. 1998).

58. *Id.* § 9:307(B)(5). By agreeing on settlement terms, a couple with children can get a no-fault divorce in a year and a half; without children, in one year. *Id.* § 9:307(A)(6)(a), (b). Under Louisiana's standard divorce options, a couple can get divorced after a six-month separation. La. Civ. Code Ann. art. 103(1) (West Supp. 1998).



### C. Ambiguities and Weaknesses of the Law

Louisiana's covenant marriage law does not comprehensively outline the provisions that distinguish it from standard marriage.<sup>59</sup> It is clear, however, that only the "innocent" partner can file for divorce on the fault grounds to obtain an immediate end to a covenant marriage.<sup>60</sup> Where a couple meets the separation requirements, it is unclear whether any separation that makes a couple eligible for divorce must be mutually agreed upon to dissolve the covenant marriage.<sup>61</sup> In addition, the statute does not make clear whether the promise to seek counseling applies when marital troubles arise due to abuse, abandonment, or imprisonment.<sup>62</sup> At least one commentator has assumed that, if any of the fault-based grounds for divorce occur, then the counseling requirement falls out.<sup>63</sup> This reading of the statute is compelling because once one spouse commits an act that qualifies the non-offending spouse for an immediate divorce—particularly physical or sexual abuse—it seems unreasonable to delay divorce proceedings so that the parties can receive marital counseling. The statute, however, does not explicitly allow for this exemption from counseling.<sup>64</sup>

In addition to the uncertainty regarding when counseling is required, the statute does not clearly set forth the amount and type of counseling required either prior to or during the marriage, except that it requires the parties and a counselor discuss the sanctity of a covenant marriage and the steps that must be taken to dissolve one.<sup>65</sup> It is also unclear whether the counseling requirement would be waived if a couple cannot afford marriage counseling.<sup>66</sup>

A frequent criticism of Louisiana's law is that the drafters ignored important familial issues. For example, those in a covenant marriage

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59. See La. Rev. Stat. Ann. §§ 9:273(A), 9:307.

60. See *id.* § 9:307(A).

61. See *id.* If the separation must be mutually agreed upon, then the spouse seeking a divorce who cannot get the other spouse to agree to the separation would be precluded from obtaining a divorce absent fault grounds.

62. See *id.* § 9:273(A)(1).

63. See Joanna Weiss, *Covenant Marriage Has No Takers on Its First Day*, Times-Picayune (New Orleans), Aug. 16, 1997, at A1.

64. La. Rev. Stat. Ann. § 9:273(A)(1).

65. *Id.* § 9:273(A)(2)(a); see John Shalett, Letter to the Editor, *License Marriage Counselors*, Times-Picayune (New Orleans), Aug. 16, 1997, at B6. Shalett, President of the Louisiana Association for Marriage and Family Therapy, expressed "grave concern" that the covenant marriage bill provides "no definition of who marriage counselors are" nor "what their qualifications should be." *Id.*

66. Hypothetically, a religious couple could always visit a clergyperson for free counseling. This, however, prompts an additional criticism that clergy are not adequately trained to provide counseling that effectively addresses marital problems. See Zinie Chen, *Couples Get Help in Building Successful Relationships*, Associated Press Pol. Serv., Nov. 16, 1997, available in 1997 WL 2563082 (stating that typically ministers are unqualified to provide couples with the training they need for a successful marriage).

have limited grounds for a fault-based divorce.<sup>67</sup> Critics question whether it is reasonable to deny an immediate divorce if the fault alleged is, for example, extreme emotional abuse, threatening behavior, confinement, or the withholding of financial support.<sup>68</sup> Furthermore, the law does not provide guidance on child custody or support issues that will inevitably arise during the mandated long-term separation.<sup>69</sup> If a couple is amicable enough to reach a settlement agreement, a no-fault divorce can be obtained in one year, absent minor children.<sup>70</sup> If, however, the relationship is contentious, the couple will be unlikely to reach a settlement agreement and cannot obtain a divorce for two years.<sup>71</sup> This is a lengthy period of time for important issues such as support and custody to remain unresolved. While other states do not assist couples in determining these matters, no other fault system has such a lengthy separation period.<sup>72</sup>

Some questions remain as to the drafters' thoroughness and as to how the covenant marriage law should be interpreted. Any criticism that the drafters should have added other grounds for divorce may be addressed through amendments, and any ambiguities involving the law's requirements may be resolved through future interpretation. For those who attack the law's constitutionality, however, the problem is not so easily resolved. The next part provides background analysis on the right to marry to evaluate the strength of arguments against covenant marriage.

## II. THE CONSTITUTIONAL RIGHT TO MARRY

The Constitution does not explicitly protect the right to marry. The Bill of Rights lists individual rights that the Constitution guarantees,<sup>73</sup> while other rights are implicit in the text and afforded similar constitu-

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67. See La. Rev. Stat. Ann. § 9:307(A)(1)-(3).

68. See Ashton Applewhite, *Would Louisiana's "Covenant Marriage" Be a Good Idea for America?: No*, *Insight*, Oct. 6-13, 1997, at 25 ("Who really believes that physical abuse or abandonment must take place to render a marriage intolerable? Certainly no victim of mental cruelty, verbal abuse, confinement, financial or sexual withholding, threats against children or dozens of other reprehensible behaviors against which covenant marriage will offer no recourse."); Pollitt, *supra* note 12 (stating that "[y]ou don't have to be abused or betrayed to have a bad marriage").

69. See La. Rev. Stat. Ann. § 9:307.

70. *Id.* § 9:307(A)(6)(b).

71. *Id.* § 9:307(A)(5).

72. See, e.g., N.Y. Dom. Rel. Law § 170 (McKinney 1988) (providing for divorce in one year if the parties agree on the terms of their separation).

73. See, e.g., U.S. Const. amend. I (including protection of the right to the free exercise of religion and the right to free speech).

tional protection.<sup>74</sup> The Supreme Court has recognized the right to marry as one among many such unenumerated rights.<sup>75</sup>

Whether a right is constitutionally protected or not determines the level of scrutiny<sup>76</sup> with which the Court reviews legislation affecting that right. Over the years, the Supreme Court has developed three different levels of judicial scrutiny used when assessing a law's constitutionality.<sup>77</sup> The Court applies strict scrutiny, the highest standard of review, to statutes that infringe on a fundamental right or rest upon a suspect classification.<sup>78</sup> To survive strict scrutiny, the government must demonstrate that the statute furthers a compelling governmental interest and that the statute is narrowly tailored to achieve that interest.<sup>79</sup> The Court has also developed an intermediate level of scrutiny.<sup>80</sup> The Court employs intermediate scrutiny for statutes that discriminate on the basis of sex,<sup>81</sup> statutes that burden the rights of illegitimate children,<sup>82</sup> and infringements on commercial speech.<sup>83</sup> To survive intermediate scrutiny, the state action taken must "serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>84</sup> The lowest tier of review, or differential scrutiny, demands only that the legislation bear "some rational relationship to legitimate state purposes" for the statute to stand, and applies to statutes that do not infringe on any recognized

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74. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (recognizing that rights can be explicitly or implicitly guaranteed by the Constitution); see also *Shapiro v. Thompson*, 394 U.S. 618 (1969) (recognizing implicit the right to travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (recognizing implicit the right to vote).

75. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (reaffirming the right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating that the right to marry "has long been recognized as one of the vital personal rights").

76. Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 161 (1984) (defining levels of scrutiny as levels of judicial review).

77. See, e.g., *Certain Named and Unnamed Non-Citizen Children and their Parents v. Texas*, 448 U.S. 1327, 1329-30 (1980) (describing the three levels of scrutiny); see *Leading Cases*, 106 Harv. L. Rev. 163, 211 (1992) (stating that "[i]n an effort to avoid endorsing the untrammelled exercise of judicial power," the Court applies varying levels of scrutiny to government actions that restrict fundamental rights).

78. *Rodriguez*, 411 U.S. at 28; see *infra* notes 97-104 and accompanying text (providing definitions of "fundamental right" and "suspect classification").

79. *Rodriguez*, 411 U.S. at 28.

80. See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

81. *Id.* (applying intermediate scrutiny to an Oklahoma law that allowed women to drink alcohol at age 18 while men could not drink alcohol until age 21).

82. See, e.g., *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (applying intermediate scrutiny to a statute that allowed illegitimate children to bring proceedings to establish their paternity only one year after their birth).

83. See, e.g., *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995) (applying intermediate scrutiny to Florida Bar rules which forbade attorneys from mailing solicitations to potential clients within thirty days of any accident).

84. *Craig*, 429 U.S. at 197.

constitutional right or draw upon a suspect classification.<sup>85</sup> The Court, however, has not strictly adhered to this three-tiered approach for reviewing statutes and often mixes elements from the various scrutiny levels to make the standards more or less difficult to pass.<sup>86</sup> In a recent case, *Planned Parenthood v. Casey*,<sup>87</sup> the Court declined to use any of the three traditional levels of scrutiny to review legislation and, instead, applied an undue burden test. This test balances the depth of the infringement against the state interest at issue. Consequently, how fundamental the Court views the right involved determines the depth of protection it grants and, hence, the extent and nature of regulation a legislature can impose.<sup>88</sup>

Although the Supreme Court has traditionally protected the right to marry, it is unclear exactly what conduct the right to marry protects. Individuals do have the right to marry without arbitrary restrictions.<sup>89</sup> In addition, people have the right to get married to a partner of the opposite sex<sup>90</sup> without regard to race.<sup>91</sup> It also includes the right to marry while incarcerated.<sup>92</sup> Although the Supreme Court has never recognized a right to divorce, one Supreme Court Justice has argued that the right to marry includes the right to divorce,<sup>93</sup> because the two

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85. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40, 44 (1973) (applying deferential scrutiny to a Texas school funding provision after concluding that wealth was not a suspect classification and education was not a fundamental right).

86. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 217-18 (1982) (requiring that a statute denying education to children of undocumented aliens further a "substantial" state goal—rather than deferential scrutiny's legitimate state goal—even though education is not a fundamental right and alienage is not a suspect class). See also *Shaman*, *supra* note 76, at 165-72 (explaining how the Court has departed from the three-tier scrutiny levels depending on the right involved). Compare Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court*, 86 Harv. L. Rev. 1, 20-24 (1972) (describing the scrutiny level later employed in such a case as *Plyler* as a "rational basis test with bite"), with *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988) (construing *Plyler* as applying a heightened level of scrutiny).

87. 505 U.S. 833, 874 (1992).

88. *Id.* at 874-75.

89. See *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978) (overturning a law denying marriage licenses to parents who owed child support, in part because the infringement on the right to marry did not further the state interest in child support being paid).

90. See *Defense of Marriage Act*, Pub. L. 104-199, § 3, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 173C (1996) and 1 U.S.C. § 7 (1996)). The Act defined marriage as between two people of the opposite sex in response to the Hawaii case of *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that, under the Hawaii state constitution, denying homosexuals the right to marry was gender-based discrimination subject to strict scrutiny and unconstitutional on its face. *Id.* at 59-67. The Act also granted states the right to withhold full faith and credit to other state laws that grant the right to marry to homosexuals. *Defense of Marriage Act* § 2.

91. *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down a Virginia anti-miscegenation law).

92. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (overturning a prison regulation that denied inmate marriages unless the superintendent found compelling reasons to grant permission).

93. *Sosna v. Iowa*, 419 U.S. 393, 419-20 (1975) (Marshall, J., dissenting) (asserting a right to obtain a divorce because it is so "closely related to the right to marry"); see

“both involve the voluntary adjustment of the same fundamental human relationship.”<sup>94</sup> Additionally, several commentators believe that the right to divorce naturally follows from the right to marry.<sup>95</sup>

This part will explore the constitutional sources for the right to marry. It will first discuss how the Court protects the right to marry through the Fourteenth Amendment’s Equal Protection and Due Process Clauses, including how the right to marry is related to the right to intimate association and the right to privacy. Part II.B will then analyze the proper level of scrutiny courts should use to review statutes restricting the right to marry.

### A. Constitutional Bases for the Right to Marry

Covenant marriage laws implicate the constitutional right to marry. The Supreme Court has grounded the right to marry in the constitutional sources discussed in this section.

#### 1. Constitutional Protection for the Right to Marry and the Fourteenth Amendment

The right to marry is grounded in the Fourteenth Amendment, which, according to the Supreme Court, protects certain unenumerated rights.<sup>96</sup> The Court’s leading formulations for deciding whether an asserted right is fundamental and, thus, constitutionally protected by the Due Process Clause, is the language of Justice Cardozo in *Palko v. Connecticut*<sup>97</sup> and Justice Powell in *Moore v. City of East Cleveland*.<sup>98</sup> In *Palko*, fundamental rights were defined as those rights that are “of the very essence of a scheme of ordered liberty”<sup>99</sup> such that “neither liberty nor justice would exist if they were sacrificed.”<sup>100</sup> *Moore* defined fundamental rights as those “deeply rooted in this Na-

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Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 Stan. L. Rev. 607, 622-26 (1997) (acknowledging that the Supreme Court has never recognized the right to divorce, but asserting that changing social norms may prompt the Court to recognize this right in the future).

94. *Sosna*, 419 U.S. at 420 (Marshall, J., dissenting) (citing *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971)). *Boddie v. Connecticut* involved a state statute requiring all those filing a divorce action to pay approximately \$60 in court costs. 401 U.S. 371, 372 (1971). Though the Court did refer to the importance of marriage in its holding, *id.* at 376, the case was ultimately decided based on the individual’s rights to due process and to access the court system. *Id.* at 388-89.

95. Bradford, *supra* note 93, at 623 (arguing that the right to leave a marriage and thereby become eligible to remarry is a “valid corollary” to the right to marry); Donna J. Zenor, Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 Cornell L. Rev. 649, 652 (1972) (asserting that the right to end marriage “without unreasonable state delay, impediment, or moralism” is a corollary of the right to marry).

96. *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992).

97. 302 U.S. 319 (1937).

98. 431 U.S. 494 (1977) (plurality opinion).

99. *Id.* at 325.

100. *Palko*, 302 U.S. at 326.

tion's history and tradition."<sup>101</sup> Two clauses of the Fourteenth Amendment provide protection for fundamental rights: the Equal Protection Clause<sup>102</sup> and the substantive component of the Due Process Clause.<sup>103</sup>

#### a. *The Equal Protection Clause*

The Court employs the Equal Protection Clause to invalidate statutes that: (1) rest upon a suspect classification<sup>104</sup> or (2) restrict one group from exercising a fundamental right that has been granted to all.<sup>105</sup> By invalidating statutes in the second category, the Court protects fundamental rights regardless of whether the law involves a suspect classification.<sup>106</sup>

#### b. *The Due Process Clause*

The Due Process Clause protects both procedural and substantive rights.<sup>107</sup> As the Court recently explained:

[The Fourteenth Amendment's Due Process Clause] declares that no State shall "deprive any person of life, liberty, or property without due process of law." . . . Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years . . . the Clause

101. *Moore*, 431 U.S. at 503; see *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (citing *Palko* and *Moore* in describing the Court's "established method" of protecting fundamental rights through the Fourteenth Amendment's Due Process Clause). Numerous rights have been found to fall under these formulations, including the rights to marry, to have children, to marital privacy, to use contraception, and to abortion. *Id.* at 2267 (citations omitted).

102. See *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942). The Equal Protection Clause states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

103. See *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897). The Due Process Clause states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

104. See *University of California v. Bakke*, 438 U.S. 265, 290 (1978) (holding that because affirmative action laws classify people based on their race, they are subject to strict scrutiny). Classifications based on race and ethnicity are suspect. *Id.* at 291.

105. See *Skinner*, 316 U.S. at 541, 543 (declaring a statute unconstitutional because it subjected only certain types of criminals to sterilization, denying these criminals the right to procreate).

106. See *id.* at 536, 541 (protecting the right to marry and to procreate for those who had committed felonies "of moral turpitude," without holding that this group was a suspect class); see also *Zablocki v. Redhail*, 434 U.S. 374, 382 (1978) (overturning on Equal Protection Grounds a statute that potentially denied the right to marry to the indigent even though wealth is not a suspect classification under *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)).

107. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (explaining that one aspect of the Due Process Clause "is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State," and another is to protect "individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them'" (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986))).

has been understood to contain a substantive component as well . . . . It is tempting . . . to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view.<sup>108</sup>

Having recognized a substantive component, the Court has employed the Due Process Clause both to protect fundamental rights and to check unfairness in governmental procedures.

The Court has held that the right to marry is a fundamental right.<sup>109</sup> As noted above, the Court historically has recognized and protected unenumerated rights based on whether they are "of the very essence of a scheme of ordered liberty"<sup>110</sup> or are "deeply rooted in this Nation's history and tradition."<sup>111</sup> The Court has found that marriage falls under both Cardozo's and Powell's definitions of a fundamental right. As for determining whether marriage is within the scheme of ordered liberty, the Court stated in *Skinner v. Oklahoma*<sup>112</sup> that "[m]arriage and procreation are fundamental to the very existence and survival of the race."<sup>113</sup> In *Loving v. Virginia*,<sup>114</sup> the Court held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>115</sup> The right to marry is rooted in the nation's history and traditions because marriage predates the Constitution.<sup>116</sup>

The Court has employed both the Equal Protection Clause and the substantive component of the Due Process Clause to protect the right to marry. In 1942, the Court invalidated on Equal Protection grounds a sterilization law for three-time convicts of certain crimes, in part because sterilization infringed on the right to marry.<sup>117</sup> In 1967, the Court first held that state infringements on the right to marry could violate substantive due process under the Fourteenth Amendment when it struck down Virginia's ban on inter-racial marriage.<sup>118</sup> The Court stated that Virginia's restrictions on the right to marry could not be sustained under the Due Process Clause by "so unsupportable a basis"<sup>119</sup> as a state's interest in classifying people by race.<sup>120</sup> Subse-

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108. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (quoting U.S. Const. amend. XIV) (citations omitted).

109. *Zablocki*, 434 U.S. at 386.

110. *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

111. *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

112. 316 U.S. 535 (1942).

113. *Id.* at 541.

114. 388 U.S. 1 (1967).

115. *Id.* at 12.

116. *Id.*; *see Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (stating that marriage is "a right of privacy older than the Bill of Rights").

117. *Skinner*, 316 U.S. at 541.

118. *Loving*, 388 U.S. at 12 (citing *Skinner*, 316 U.S. at 541).

119. *Id.* at 12.

quent cases have continued to ground the right in substantive due process.<sup>121</sup>

## 2. Constitutional Protection for the Right to Marry and the Right to Intimate Association

One source for the right to marry is marriage's status as an intimate association.<sup>122</sup> The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble."<sup>123</sup> The right to associate includes both the right to enjoy expressive association, protected by the First Amendment, and the right to choose to enter and maintain certain intimate relationships, protected by the Fourteenth Amendment.<sup>124</sup> While the Court has not identified every intimate association that qualifies for protection,<sup>125</sup> the Court protects from State interference relationships that "cultivat[e] and transmit[ ] shared ideals and beliefs . . . [and] act as critical buffers between the individual and the power of the State."<sup>126</sup> Such relationships include "those that attend the creation and sustenance of a family."<sup>127</sup> Marriage's status as an intimate association provides a constitutional justification for the status of the right to marry as an unenumerated fundamental right.<sup>128</sup>

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120. *Id.* The Court also overturned this anti-miscegenation law on Equal Protection grounds because the law reflected a race-based, suspect classification. *Id.*

121. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (listing the right to marry as one of the rights protected by substantive due process); *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (reaffirming *Loving's* protection of marriage under substantive due process).

122. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The law at issue in *Griswold* criminalized the use or distribution of contraception. *Id.* at 480. The *Griswold* Court stated that while they were not "a super-legislature" in the position to overturn laws, the Court nonetheless had to intervene because the law "operate[d] directly on an intimate relation of husband and wife." *Id.* at 482.

123. U.S. Const. amend. I.

124. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The Jaycees, or Junior Chamber of Commerce, is a non-profit corporation whose objective is to promote civic organizations and interests. *Id.* at 612-13. The Court has defined the right to associate for expressive purposes as the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Id.* at 622. Membership in the NAACP, for example, qualifies as an association for expressive purposes. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (characterizing the NAACP as "an organization engaged in advocacy of particular beliefs"). The Court in *Roberts* held that, because the Jaycees pursued primarily commercial rather than political or cultural ends, the group's need for protection on expressive association grounds was outweighed by the state's interest in advancing women's status. *Roberts*, 468 U.S. at 626-27. The Court also held that the Jaycees lacked the intimacy and selectivity necessary to secure protection as an intimate association. *Id.* at 621.

125. *Roberts*, 468 U.S. at 618.

126. *Id.* at 619 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

127. *Id.* (noting that marriage constituted such a relationship).

128. The notion of marriage as a special relationship explains the law's treatment of married people. This includes their ability to recover for negligent infliction of emotional distress, see Troy A. Tureau, *Bystander Recovery for Negligent Infliction of Emotional Distress: Louisiana Enters the Twentieth Century*, 37 Loy. L. Rev. 1005,



### 3. The Constitutional Right to Privacy and Its Relationship to the Right to Marry

The right to marry is also linked to a general right to privacy.<sup>129</sup> Like the right to marry, the right to privacy is an unenumerated right protected by the Constitution.<sup>130</sup> *Meyer v. Nebraska*<sup>131</sup> and *Pierce v. Society of Sisters*<sup>132</sup> are the "parents of the privacy doctrine."<sup>133</sup> In these cases, the Court struck down state laws that limited foreign language instruction<sup>134</sup> and private school education for schoolchildren.<sup>135</sup> The Court interpreted these cases as involving familial privacy,<sup>136</sup> including the right of parents to decide what and how a child is taught, and found a need for privacy within the familial realm.<sup>137</sup> Later, the Court used *Meyer* and *Pierce* as precedents for overturning laws that the Court found to infringe on rights involving the intimacies of marriage,<sup>138</sup> procreation,<sup>139</sup> and contraception.<sup>140</sup>

The Court has recognized three forms of privacy: spatial privacy,<sup>141</sup> associational privacy,<sup>142</sup> and decisional privacy.<sup>143</sup> Each provides protection for the right to marry. Spatial privacy refers to freedom from

1014 (1992), their privilege against testifying adversely against a spouse, see Kimberly R. Chapman, *State v. Rush: Admissibility of Out-of-Court Spousal Statements in the Post-Freeman Context of North Carolina Marital Privilege Law*, 74 N.C. L. Rev. 2108, 2116 (1996), and, until somewhat recently, their immunity from prosecution for marital rape, see William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 Wm. & Mary L. Rev. 47, 55-56 (1995).

129. See *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978).

130. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (holding that a right of personal privacy has roots in the concept of liberty guaranteed by the Fourteenth Amendment).

131. 262 U.S. 390 (1923) (overturning a Nebraska statute that outlawed the teaching of a foreign language to children below the eighth grade level).

132. 268 U.S. 510 (1925) (striking down an Oregon statute that directed parents to send their children to public schools).

133. Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 743 (1989).

134. *Meyer*, 262 U.S. at 403.

135. *Pierce*, 268 U.S. at 534-35.

136. The Court did not choose to ground the rights conferred in either an educator's right to teach a foreign language, *Meyer*, 262 U.S. at 396-97 (noting that the plaintiff was an educator and that the statute placed educators at risk of prosecution for teaching non-sanctioned languages), or a school administrator's right to run and profit from a private school, *Pierce*, 268 U.S. at 532 (stating that the school claimed a right to run a business).

137. See Rubenfeld, *supra* note 133, at 743 n.34.

138. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

139. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

140. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977).

141. See *Griswold*, 381 U.S. at 484-86 (discussing spatial privacy).

142. See *id.* at 482-83 (discussing associational privacy).

143. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (focusing on decisional privacy). For a discussion of the development of decisional privacy, see Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal. L. Rev. 521, 527-28 (1989) [hereinafter Sandel, *Moral Argument*]. See also Ronald Dworkin, *Life's Dominion* 53 (1993) [hereinafter Dworkin, *Life's Dominion*] (stating that sometimes privacy is "territorial," such as privacy in the home; some-

governmental intrusion within a certain space, namely within the home.<sup>144</sup> The *Griswold* Court focused on this form of privacy, striking down a Connecticut statute as it applied to married people, which forbade assistance in obtaining and using contraceptives.<sup>145</sup> The Court answered its own question: "Would we allow the police to search the sacred precincts of marital bedrooms . . . ? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>146</sup> That the plaintiffs wanted to use contraception in their marital<sup>147</sup> home was of significance to the *Griswold* Court.<sup>148</sup>

The right to associational privacy also protects the marriage relationship.<sup>149</sup> The Court has recognized the right to privacy within an individual's expressive associations and intimate associations.<sup>150</sup> Married spouses, as family, share possibly the most intimate relationship:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thought, experiences, and beliefs but also distinctively personal aspects of one's life. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.<sup>151</sup>

Due to this intimacy, family members have a right to associate and to do so privately.<sup>152</sup>

Another development in privacy jurisprudence, which provides further support for the right to marry, is the recognition of decisional

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times involves "confidentiality," meaning that people should be able keep some things secret; and at other times confers "sovereignty over personal decisions").

144. *Griswold*, 381 U.S. at 484-85 (explaining how the Third, Fourth, and Fifth Amendments provide the basis for the right to privacy within the space of the home).

145. *Id.* at 485.

146. *Id.* at 485-86.

147. The Court took issue with the statute's effect on married people, as opposed to those who are unmarried, despite the fact that the statute applied equally to each. *See id.* at 480 (quoting the statute at issue, which applied to "[a]ny person"). *Eisenstadt* extended privacy to non-married couples' decisions on contraception. 405 U.S. at 453. But the spatial element of privacy, which hinged in *Griswold* on the space being "marital," was not mentioned in *Eisenstadt*. Instead, the *Eisenstadt* court analyzed a contraception restriction on decisional privacy grounds. *Id.*; *see infra* note 153 and accompanying text.

148. *Griswold*, 381 U.S. at 484-86. The Court also grounded the right to privacy, in part, in the penumbras of the Third Amendment, which prohibits the quartering of soldiers in private homes in peacetime. *Id.* at 484.

149. *Id.* at 482-83 (holding that married couples have a right to associate privately within a marriage).

150. *See supra* note 124.

151. *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984).

152. *See id.* at 618 (stating that the Bill of Rights affords protection for "the formation and preservation of . . . highly personal relationships [and] a substantial measure of sanctuary from unjustified interference by the State").

privacy, or the autonomy to make certain decisions.<sup>153</sup> The Court began to protect privacy “not for the social practices it promoted [such as marriage] but for the individual choice it secured.”<sup>154</sup> The Court has stated that “it is clear that among the decisions that an individual may make without unjustified governmental interference are personal ‘decisions relating to marriage.’”<sup>155</sup>

The Court, then, has grounded the right to marry in several constitutional sources. The amount of protection the Court has granted the right to marry, however, is less than expected for a fundamental right.<sup>156</sup> As explored in the next section, the Court has granted considerable deference to states’ marriage regulations.

### B. *Appropriate Level of Scrutiny for a Restriction on the Right to Marry*

This section will analyze the level of scrutiny that the Court applies to potential infringements on the right to marry. Although the Supreme Court has deemed the right to marry “fundamental,”<sup>157</sup> the Court has always allowed states to heavily regulate marriage. In 1888, the Court stated in *Maynard v. Hill*<sup>158</sup> that:

Marriage, as creating the most important relation in life, . . . has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.<sup>159</sup>

General restrictions on marriage are still imposed by every state’s legislature.<sup>160</sup> Interestingly, the Supreme Court does not apply strict

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153. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1965) (holding that the right of privacy includes the right to be free from “unwarranted governmental intrusion” in child-bearing decisions). Michael Sandel has written on this development: “As the meaning of privacy changed, so did its justification,” for “[a]lthough privacy in *Griswold* prevented intrusion into ‘the sacred precincts of marital bedrooms,’ privacy in *Eisenstadt* prevented intrusion into *decisions of certain kinds*.” Sandel, *Moral Argument*, *supra* note 143, at 528 (quoting *Griswold*, 381 U.S. at 485). For elaboration of the idea of decisional privacy or autonomy to make certain decisions, see James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan. L. Rev.* 1 (1995). See also James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 *Tex. L. Rev.* 509, 526-38 (1997) (criticizing Sandel’s analysis of the right to decisional privacy).

154. Sandel, *Moral Argument*, *supra* note 143, at 528.

155. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977) (quoting *Roe v. Wade*, 410 U.S. 113, 152 (1973)).

156. See *supra* note 78 and accompanying text.

157. See *supra* notes 109-16 and accompanying text.

158. 125 U.S. 190 (1888).

159. *Id.* at 205.

160. See, e.g., Council of State Governments, *The Book of the States* 346 (1996-97) (listing every state’s minimum age for marriage). For examples of other restrictions on marriage, the New York Domestic Relations Law includes the following: incestu-

scrutiny to restrictions on the "fundamental" right to marry.<sup>161</sup> Instead, the Court has applied a standard that amounts to intermediate scrutiny.<sup>162</sup>

### 1. Intermediate Scrutiny as Applied to the Right to Marry

*Zablocki v. Redhail*<sup>163</sup> illustrates how the Court has applied an intermediate level of scrutiny to restrictions on the right to marry.<sup>164</sup> Decided in 1978, *Zablocki* overturned a Wisconsin law requiring anyone having minor children without custody, but with support obligations, to show a court that: (1) he<sup>165</sup> had complied with the support obligations; and (2) the children were not then, or likely to become, public charges.<sup>166</sup> Upon failing to meet these two requirements, the individual could not get a marriage license.<sup>167</sup> Although the Court reaffirmed that the right to marry was fundamental,<sup>168</sup> and strict scrutiny is normally appropriate,<sup>169</sup> the Court applied something less. The majority first stated that the regulation significantly interfered with the right to marry and, therefore, the asserted state interests had to be "critically examined":<sup>170</sup> The statute could not stand unless it was supported by "sufficiently important state interests" and "closely tailored to effectuate only those interests."<sup>171</sup>

This language is tantamount to intermediate scrutiny because it falls somewhere between strict and deferential scrutiny:<sup>172</sup> The Court did not demand compelling state interests in support of the legislation as it would in applying strict scrutiny.<sup>173</sup> Nor did the Court seek merely

ous and polygamous marriages are prohibited, N.Y. Dom. Rel. Law §§ 5, 6 (McKinney 1988); an individual under the age of 14 may not marry, *id.* § 15-a; individuals aged 14 or 15 must get judicial or parental consent to be married, *id.* § 15(3), and African-Americans must take a sickle cell anemia test prior to receiving a marriage license, *id.* § 13-aa.

161. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (applying intermediate scrutiny to a restriction on the right to marry).

162. *Id.*

163. *Id.*

164. *Id.* at 386.

165. The statute at issue used masculine terms rather than gender-neutral language. *Id.* at 375 n.1.

166. *Id.* at 375.

167. *Id.* If such person was current on support payments, then the Court would issue an order allowing a marriage license to be granted. *Id.*

168. *Id.* at 386.

169. *See supra* note 78 and accompanying text.

170. *Zablocki*, 434 U.S. at 383.

171. *Id.* at 388. Interestingly, the Court cited to *Carey v. Population Services International*, 431 U.S. 678, 686 (1977), as precedent for this standard. In *Carey*, however, the Court employed a different standard of review, requiring the state to show "compelling state interests, . . . narrowly drawn to express only those interests" to support an infringement on the right to privacy. *Id.*

172. Nathaniel Abbate, Jr., *Case Notes*, 56 U. Det. J. Urb. L. 537, 548-49 (1979).

173. *See supra* note 78 and accompanying text (defining strict scrutiny).

legitimate state interests as it would in applying deferential scrutiny.<sup>174</sup> Instead, the Court required important state interests.<sup>175</sup> The *Zablocki* Court suggested a rationale behind its choice to apply intermediate scrutiny rather than strict scrutiny to the fundamental right at issue:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.<sup>176</sup>

Less than strict scrutiny is appropriate because there are numerous legitimate regulations on the right to marry. The Court intended to quell challenges to necessary regulations on marriage that might be successful if strict scrutiny were applied.<sup>177</sup> Wisconsin's asserted interests were to "furnish [ ] an opportunity to counsel the applicant as to the necessity of fulfilling" child support obligations and to protect the welfare of children.<sup>178</sup> The Court stated that implicit in these stated interests was the goal of encouraging delinquent parents to pay back child support, although the law did nothing to ensure that payments were ultimately made to children except to disallow marriage until such support was paid.<sup>179</sup>

The majority opinion overturned the law based on the fundamental right strand of the equal protection doctrine, not on substantive due process grounds.<sup>180</sup> The statute's court permission requirement applied only to those individuals who did not have custody of their children and were required by court order to pay support.<sup>181</sup> Of that group, only some individuals—those who were delinquent in making support payments and whose children were either already, or likely to become, wards of the state—were completely prevented from mar-

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174. See *supra* note 85 and accompanying text (defining deferential scrutiny).

175. *Zablocki*, 434 U.S. at 388; cf. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny by requiring important state interests to support a gender distinction in minimum age drinking laws).

176. *Zablocki*, 434 U.S. at 386.

177. See *id.* at 399 (Powell, J., concurring) (fearing Justice Marshall's use of strict scrutiny would interfere with state regulation of "incest, bigamy and homosexuality, as well as various preconditions to marriage, such as blood tests"). Because Justice Marshall did not actually apply strict scrutiny, Justice Powell's interpretation of Justice Marshall's standard of review "reflect[s] a lack of understanding . . . and indicate[s] a misreading of the majority opinion." Abbate, *supra* note 172, at 548; see also Elizabeth G. Patterson, *Health Care Choice and the Constitution: Reconciling Privacy and Public Health*, 42 Rutgers L. Rev. 1, 48 n.230 (1989) (using *Zablocki* to justify the Court's choice of intermediate scrutiny in areas where "the state has traditionally been recognized as having a significant role").

178. *Zablocki*, 434 U.S. at 388.

179. *Id.* at 389.

180. *Id.* at 383.

181. *Id.* at 375.

rying due to their financial status.<sup>182</sup> The Court also noted that persons without the financial means to meet their support obligations would, in effect, “be coerced into forgoing their right to marry.”<sup>183</sup> Furthermore, even those who could make the payments “suffer[ed] a serious intrusion into their freedom of choice.”<sup>184</sup> The Court was also troubled by the law’s potential for discouraging marriage rather than encouraging support payments, which could lead to extramarital relationships and illegitimate children.<sup>185</sup> Ultimately, this statute was held unconstitutional because (1) the restriction on the right to marry could completely preclude marriage; and (2) this preclusion or delay of marriage did not do enough to further the asserted state goal of getting parents to pay child support.<sup>186</sup> Though the state interests were important, the measures taken were not closely tailored enough to achieve those interests.<sup>187</sup> Consequently, the statute did not survive intermediate scrutiny.<sup>188</sup>

## 2. The Undue Burden Standard

A change in the law since *Zablocki* raises the question of whether the intermediate scrutiny test employed in that case would apply to a challenge to a marriage restriction today. In 1992, the plurality opinion of *Planned Parenthood v. Casey*<sup>189</sup> set out a new standard of review falling somewhere between strict and deferential scrutiny.<sup>190</sup> The *Casey* Court reviewed whether several state restrictions on abortion constituted an “undue burden” on the right to have an abortion.<sup>191</sup> *Casey* marked the first time that even a plurality had adopted the undue burden test,<sup>192</sup> although Justice O’Connor had advocated some such test prior to *Casey*.<sup>193</sup> Several factors indicate that this

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182. *Id.* at 387.

183. *Id.*

184. *Id.* While the Court did not explicitly explain how those who can make the payments suffer an intrusion into their freedom of choice, the law did interfere with one’s choice on how to spend money.

185. *Id.* at 390 (stating that “preventing the marriage may only result in . . . children being born out of wedlock . . . [and] the net result of preventing the marriage is simply more illegitimate children”).

186. *Id.* at 389 (stating that though the statute provided an incentive to make support payments, it did nothing to actually deliver money into children’s hands, and, therefore, was unjustifiable).

187. *Id.* at 389-90.

188. *Id.* at 390-91.

189. 505 U.S. 833, 877 (1992) (plurality opinion).

190. *Id.* at 874 (plurality opinion).

191. *Id.* at 877 (plurality opinion).

192. See Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 Temp. L. Rev. 1151, 1154 (1993).

193. See *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O’Connor, J., concurring) (stating that a mandatory hospitalization requirement was constitutional because it was not an undue burden); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.* 462 U.S. 416, 464 (1983) (O’Connor, J., dissenting) (defining undue burden as an

standard may apply to future cases that analyze restrictions on the right to marry. *Zablocki*, where the Court used some variation of intermediate scrutiny to analyze the right to marry, is a precedent for *Casey*'s undue burden test,<sup>194</sup> indicating that the undue burden standard might be the appropriate standard for analyzing a right to marry case. Though *Casey* is not authoritative for right to marry cases, the subsequent analysis demonstrates why the undue burden test is the best method of analysis for such an inquiry. The following section will analyze in detail the Court's holding in *Casey* to provide insight on what constitutes an undue burden.

#### a. Planned Parenthood v. Casey

In *Casey*, restrictions on abortion and on the decision to have one are permissible, provided the individual is not unduly burdened by some substantial obstacle.<sup>195</sup> The government may encourage an individual to make a particular decision if the decision ultimately rests with the individual.<sup>196</sup> If the encouragement rises to the level of coercion, or even a substantial obstacle, the burden becomes undue and, consequently, unconstitutional.<sup>197</sup> Although the Court did not define "coercion" or "substantial obstacle," its analysis of the provisions of

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"absolute obstacle[ ] or severe limitation[ ] on the abortion decision"). Justice Scalia's dissent in *Casey*, however, stated that Justice O'Connor's earlier opinions that employed the undue burden test used stronger terms to characterize the obstacle, such as "absolute" or "severe" instead of "substantial," and that the analysis was used to "express[ ] the conclusion of unconstitutionality" after applying some other standard of review to a statute and finding it passed, rather than to lay out a standard of unconstitutionality. *Casey*, 505 U.S. at 985 n.3 (Scalia, J., dissenting). Scalia called the plurality opinion's formulation "an entirely new version of 'undue burden' analysis." *Id.* Indeed, the plurality also recognized that this version was new, stating that it was "refin[ing] the undue burden analysis." *Id.* at 879.

194. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 *Hastings L.J.* 867, 895 (1994) (labeling *Zablocki* "a particularly important precedent for the *Casey* plurality's 'undue burden test'" because the opinion "adopted a substantial burden threshold" and "focuse[d] on the magnitude of the burden" on the right at issue). In defining "threshold," Professor Brownstein maintains that *Zablocki*, like *Casey*, first determined the weight of the burden before deciding the applicable level of scrutiny. See *id.*; Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 *Wash. U. L.Q.* 295, 301 (1995) (stating that the Court "used phrases suggestive of an undue burden analysis" in *Zablocki*); see also Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 *Harv. L. Rev.* 1175, 1220 (1996) (writing that the language used by the *Zablocki* Court for its level of scrutiny "closely parallels that of the undue burden standard of *Casey*" in concluding that "the *Casey* standard is not anomalous in the Court's privacy doctrine"). Interestingly, Dorf was one of Justice O'Connor's law clerks during the term *Casey* was decided.

195. *Casey*, 505 U.S. at 874 (plurality opinion). *Casey* applied the undue burden test to regulations affecting the decision to have an abortion. *Id.* at 833; see *infra* note 245 and accompanying text (discussing the applicability of the undue burden test to other individual rights).

196. *Casey*, 505 U.S. at 877-78 (plurality opinion).

197. *Id.* at 877 (plurality opinion).

Pennsylvania's abortion statutes provides some guidance on those questions.

*Casey* involved a challenge by several abortion clinics and a physician to the Pennsylvania abortion statute.<sup>198</sup> The challenged portions of the statute required:<sup>199</sup> (1) informed consent; (2) a 24-hour waiting period after receiving information on abortion; (3) parental consent for minors wanting an abortion, with a judicial bypass option; (4) spousal notification of any planned abortion, with some exceptions; and (5) reporting requirements for facilities providing abortion services.<sup>200</sup> Pennsylvania's asserted interests were encouraging childbirth over abortion,<sup>201</sup> promoting thoughtful decisions on abortion, and ensuring health standards.<sup>202</sup>

Applying the undue burden standard, the Court upheld all<sup>203</sup> but the spousal notification requirement.<sup>204</sup> The informed consent requirement directed physicians to inform the woman of the "nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age'" of the fetus.<sup>205</sup> The attending physician had to tell the woman that state-provided materials on abortion and childbirth were available to her, and the woman had to attest to her knowledge of these materials, although she was not required to take or read the information.<sup>206</sup> The Court declared that the informed consent requirement was not an undue burden, but "a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion."<sup>207</sup>

The 24-hour waiting period requirement also did not rise to the level of an undue burden.<sup>208</sup> Having once held that a 24-hour delay for an abortion did not reasonably serve the concern that a woman's

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198. *Id.* at 844-45.

199. Each of the requirements applied in the absence of a "medical emergency." *Id.* at 844. The statute defined a medical emergency as a condition where, unless a woman undergoes an immediate abortion, she faces death or serious risk of substantial or irreversible impairment of a major bodily function. *Id.* at 879 (plurality opinion). The Court held that this definition was constitutional. *Id.* at 880.

200. *Id.* at 844. The reporting requirements mandated that every abortion clinic must file a report to the state for every abortion performed. *Id.* at 900 (plurality opinion). Such reports included, but were not limited to, information identifying the physician involved, the woman's age, the type of procedure, any medical complications, and the weight of the aborted fetus. *Id.*

201. *See id.* at 872 (plurality opinion).

202. *See id.* at 900 (plurality opinion).

203. *Id.* at 881-87 (plurality opinion).

204. *Id.* at 887-901.

205. *Id.* at 881 (plurality opinion).

206. *Id.* The materials consisted of information on the fetus, available childbirth medical assistance, paternal child support requirements, and adoption services. *Id.*

207. *Id.* at 883 (plurality opinion).

208. *Id.* at 885-86.



decision be informed,<sup>209</sup> the Court reversed itself, stating that “[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable.”<sup>210</sup> Even given the possibility of two long trips to the closest clinic and increased exposure to anti-abortion protesters,<sup>211</sup> the Court did not find the waiting period a substantial obstacle to the right to abortion.<sup>212</sup> This method of aiding a woman in understanding the full consequences of her decision did not constitute an undue burden.<sup>213</sup>

The Court also upheld the parental notification and consent requirement for women under eighteen and the reporting requirements for abortion facilities.<sup>214</sup> The Pennsylvania statute required that, to obtain an abortion, a minor must secure consent from one parent or, in the alternative, obtain authorization from a court.<sup>215</sup> Having previously upheld a similar parental consent provision,<sup>216</sup> the Court agreed that the Pennsylvania restriction was constitutional.<sup>217</sup> Likewise, the Court, following precedent,<sup>218</sup> found the reporting requirement constitutional.<sup>219</sup> The Court found a relationship between the provision and the state interest: “Although [the provisions] do not relate to the State’s interest in informing the woman’s choice, they do relate to health.”<sup>220</sup> Despite the fact that the reporting requirements would likely increase the cost of abortion, the increase did not rise to the level of a substantial burden, given that patient information is “a vital element of medical research.”<sup>221</sup>

The spousal notification law was the one provision of the Pennsylvania law found to be an undue burden.<sup>222</sup> The stipulation required that no physician perform an abortion without obtaining a signed statement from the woman that she had informed her husband of her

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209. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 450 (1983) (finding it unconvincing that the interest in a woman’s informed decision was “reasonably served” by an “arbitrary and inflexible waiting period”).

210. *Casey*, 505 U.S. at 885 (plurality opinion).

211. *Id.* at 885-86 (plurality opinion) (recognizing, but ultimately dismissing, the district court’s concerns that women must often travel long distances to reach the nearest clinic and could face hostile anti-abortion protesters).

212. *Id.* at 886 (plurality opinion).

213. *Id.* at 881-87 (plurality opinion).

214. *Id.* at 899-901 (plurality opinion).

215. *Id.* at 899-900 (plurality opinion).

216. *Cf. Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510-19 (1990) (upholding an Ohio parental consent law with a judicial bypass clause in the abortion context).

217. *Casey*, 505 U.S. at 899 (plurality opinion).

218. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 80 (1976) (holding that “[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient’s confidentiality and privacy are permissible”).

219. *Casey*, 505 U.S. at 900-01 (plurality opinion).

220. *Id.* (plurality opinion).

221. *Id.* at 901.

222. *Id.* at 893-94.

choice to have an abortion.<sup>223</sup> Otherwise, the woman must provide one of the following statements: (1) that she was impregnated by someone other than her husband; (2) that her husband could not be located; (3) that the pregnancy was the result of reported spousal rape; or (4) that she believed that telling her husband would result in bodily injury to her person.<sup>224</sup> In finding an undue burden, the Court quoted the district court's detailed findings of fact as to the non-physical harm that could befall a woman as a result of notifying her husband of an unwanted pregnancy.<sup>225</sup> The Court also emphasized the pervasiveness of wife battering.<sup>226</sup> If a woman is the victim of abuse, she may meet the sexual assault or bodily injury exception, but because few women in these situations are willing to disclose such abuse, these exceptions would not help many abused women.<sup>227</sup> Due to the presence and threat of both physical and non-physical injury, the notification requirement would "likely . . . prevent a significant number of women from obtaining an abortion."<sup>228</sup> The provision, therefore, did not pass the undue burden test.<sup>229</sup>

*Casey* requires that even regulations that do not impose an undue burden on an individual right must pass rational basis review.<sup>230</sup> The Court appears to have a high standard for what constitutes an undue burden.<sup>231</sup> For example, the Court upheld the 24-hour waiting period despite recognizing that it created real obstacles, such as two lengthy

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223. *Id.* at 887.

224. *Id.*

225. *Id.* at 888 (listing numerous injuries, such as verbal harassment, the withdrawal of financial support, as well as abuse to one's children, that would not meet the "bodily injury" exception).

226. *Id.* at 888-93. The Court cited surveys which showed, for example, that every year two million women are severely beaten by their male partners and that, in a given year, one in eight husbands assaulted their wives. *Id.* at 891.

227. *See id.* at 890 (agreeing with a district court finding that "[b]ecause of the nature of the battering relationship, battered women are unlikely to avail themselves of the exceptions [of the statute]").

228. *Id.* at 893.

229. *Id.* at 895.

230. *Id.* at 878 (plurality opinion) (stating that, unless a regulation imposes a substantial burden on choosing an abortion, "a state measure designed to persuade her to choose childbirth over abortion will be upheld if *reasonably related* to that goal" (emphasis added)).

231. *See* Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein's Analysis of Casey*, 45 *Hastings L.J.* 961, 961 (1994) [hereinafter West, *Commentary*] (asserting that the effect of *Casey* will be "an increase in the number of state regulations that will significantly, whether or not [in the Court's view] unduly, burden" access to abortion); *see also* C. Elaine Howard, Note, *The Roe'd to Confusion: Planned Parenthood v. Casey*, 30 *Hous. L. Rev.* 1457, 1481 (1993) (claiming that by "holding that trauma, delay and harassment were not unduly burdensome, the Court seemed to believe that the standard contemplates not a substantial obstacle, but a complete impasse"); Jeanne L. Vance, Note, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 *Hastings Const. L.Q.* 827, 837 (1994) (stating that the Court is "unwilling to find excessive restrictions to be undue").

trips to a clinic.<sup>232</sup> The Court, meanwhile, ignored burdens on minors posed by parental consent. For example, a pregnant minor may be a victim of parental physical or sexual abuse, or may be devastated at the prospect of disappointing her parents. A minor in one of these situations may even attempt self-abortion.<sup>233</sup> That these real potential burdens were not discussed by the Court signals the high showing of “burden” the undue burden test entails. Thus, it appears that complete preclusion of the ability to exercise a right is undue, but that highly burdensome restrictions do not rise to that level, provided they rationally further a legitimate state interest.<sup>234</sup>

b. *Application of the Undue Burden Standard Outside the Abortion Context*

Because *Casey* involved an abortion statute, and the Court has not yet applied the undue burden test to cases not involving the right to abortion, it is unclear whether the undue burden test is applicable outside the abortion context.<sup>235</sup> Lower federal courts, however, have not interpreted *Casey* as limited to abortion cases and have applied the undue burden standard to cases involving the right to die<sup>236</sup> and the right to privacy.<sup>237</sup>

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232. *Casey*, 505 U.S. at 885-86 (plurality opinion). The Court's different treatment of parental consent and spousal notification prerequisites before obtaining an abortion is commensurate with the Court's view of minors' rights; the Court has consistently held that minors do not always enjoy the same protections as adults. See *Reno v. ACLU*, 117 S. Ct. 2329, 2347-48 (1997) (striking down a statute which criminalized placing obscene material on the Internet because it limited information for adults, but implying that if it was possible to restrict minor viewing only, the statute would be constitutional); *Ginsberg v. New York*, 390 U.S. 629, 634-37 (1968) (upholding a statute which criminalized the sale of certain material deemed obscene to minors but allowed the sale of the same material to adults).

233. See *Vance*, *supra* note 231, at 837-38 (listing these scenarios as proof that the Court ignored reality when determining that Pennsylvania's parental notification provision was not an undue burden). For another potential risk, see Interview by Nina Totenberg with Walter Dellinger, Former Acting Solicitor General, *Morning Edition* (National Public Radio broadcast, Jan. 21, 1998), available in 1998 WL 3306120, stating that parental notification requirements increase the number of late-term abortions.

234. See *Casey*, 505 U.S. at 885 (plurality opinion) (requiring only that it was *not unreasonable* to assume that waiting periods resulted in more informed decisions when upholding the mandated delay in abortions).

235. Justice Souter has written that, of all the Court-employed standards of review, the undue burden test is the appropriate standard for abortion regulation, *Planned Parenthood v. Casey*, 510 U.S. 1309, 1312-13 (1994) (Souter, J., in chambers), but he did not indicate that the standard was, hence, limited to abortion cases. See *id.*

236. *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1464-66 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1995), *aff'd en banc*, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

237. *Doe v. Sundquist*, 106 F.3d 702, 706 (6th Cir. 1997) (holding that a Tennessee statute allowing disclosure of formerly confidential adoption records did not violate any right to familial privacy and did not unduly burden the adoption process (citing *Casey*, 505 U.S. at 874-79 (plurality opinion))).

In *Compassion in Dying v. Washington*, the Western District of Washington applied the undue burden standard in a case challenging a law prohibiting physician-assisted suicide<sup>238</sup> and held that the statute was an undue burden on the right to die.<sup>239</sup> Once that case reached the Supreme Court under the name *Washington v. Glucksberg*,<sup>240</sup> however, the Court did not utilize the undue burden standard. Instead, the Court used a less stringent standard<sup>241</sup> because it found that unlike the rights to marry and to abortion,<sup>242</sup> the right to assisted suicide is not a constitutional right.<sup>243</sup> The analysis in *Glucksberg* indicates that the undue burden test is inappropriate for infringements on interests that do not rise to the level of constitutional rights, but does not imply that the undue burden standard is inappropriate for challenged statutes that infringe fundamental rights other than abortion.

The undue burden test has been characterized as a synthesis of the three traditional levels of review that were never truly structured along bright lines, rather than as a new test limited to abortion cases.<sup>244</sup> This analysis implies that the undue burden test would apply to other rights. When delineating the undue burden standard, the *Casey* joint opinion associated the decision to have an abortion with decisions involving "marriage, procreation, contraception, family relationships, child rearing, and education."<sup>245</sup> This may imply that *Casey*'s undue burden test should be authoritative in cases involving these rights.<sup>246</sup> Additionally, in *Casey*, the Court noted that abortion is a somewhat "unique" act because it is "fraught with consequences for others."<sup>247</sup> Marriage is also an act that affects many others, particularly if a couple has children and ultimately gets divorced. Therefore, the undue burden test may be applicable when individual actions affect others so personally.

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238. *Compassion in Dying*, 850 F. Supp. at 1464-66.

239. *Id.* at 1465.

240. 117 S. Ct. 2258 (1997).

241. *Id.* at 2271 (applying a rational relationship standard); *see also id.* at 2262 n.5 (explaining how the district court used the undue burden standard instead of the standard from *United States v. Salerno*, 481 U.S. 739 (1987)). *United States v. Salerno* involved a facial challenge to an assisted-suicide ban, and the Court stated that the challengers had to show that "no set of circumstances exists under which the [law] would be valid." 481 U.S. 739, 745 (1987).

242. *Glucksberg*, 117 S. Ct. at 2267.

243. *Id.* at 2271.

244. *See* Brownstein, *supra* note 194, at 876-77.

245. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

246. *See* Jon S. Lerner, Comment, *Protecting Home Schooling Through the Casey Undue Burden Standard*, 62 U. Chi. L. Rev. 363, 370 (1995) (arguing for the application of the undue burden standard to evaluate home schooling because home schooling and abortion share "common jurisprudential ground" in that the issues both have precedents in privacy cases); Vance, *supra* note 231, at 838 (asserting that "[b]ecause abortion and procreative rights both fall within the constitutional rubric of 'privacy,' it is entirely possible that the *Casey* decision will implicate the other rights within the privacy classification").

247. *Casey*, 505 U.S. at 852.

In contrast to the Court's earlier focus on the individual's "right to be let alone,"<sup>248</sup> in *Casey*, the Court considered the impact the exercise of rights would have on people other than the actor. The government has increasingly taken a role in shaping citizens' behavior, hoping that individuals will act in ways beneficial to themselves, others, and society.<sup>249</sup> The Court has upheld state measures that encourage reflection in the hope of fostering more responsible decisions regarding abortion<sup>250</sup> and the refusal of medical treatment.<sup>251</sup> Because the Court has recently supported several attempts to encourage responsible decision-making, demonstrating deference to such state efforts, the Court might also defer to covenant marriage laws. These measures are similar to covenant marriage laws because they are ef-

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248. Justices who recently have invoked the right to be let alone tend to be in dissent, whereas in the past, they were writing majority opinions. Compare *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (stating that the majority failed to see that the case involved "'the right to be let alone'" (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))), with *Whalen v. Roe*, 429 U.S. 589, 598-604 (1977) (overturning a mandatory reporting requirement for certain drug prescriptions based in part on the right to be let alone), and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (citing law review article Erwin N. Griswold, *The Right to be Let Alone*, 55 Nw. U. L. Rev. 216 (1960)). The Court has held that the right to be let alone involves the right to bodily integrity, *Winston v. Lee*, 470 U.S. 753, 758, 761 (1985), and the right to avoid disclosure of personal matters. *Whalen*, 429 U.S. at 598-99.

249. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 904-07 (1996) (discussing government efforts to shape behavior by, for example, promoting recycling and discouraging smoking).

250. In *Roe v. Wade*, the Court supported the right to have an abortion based on the presumption that a physician's involvement in this medical decision would assure that the choice was made responsibly. 410 U.S. 113, 166 (1973). In *Casey*, the state government appropriated the role of ensuring that women will make the decision to have an abortion responsibly. See Linda C. McClain, *The Poverty of Privacy?*, 3 Colum. J. Gender & L. 119, 139-42 (1992).

251. In *Cruzan v. Missouri Department of Health*, the Court held that individuals have a liberty interest in refusing lifesaving treatment, 497 U.S. 261, 278 (1990), but upheld a Missouri statute requiring clear and convincing evidence of an incompetent patient's intent to refuse treatment. *Id.* at 284. The clear and convincing evidence requirement ensured that any of the patient's expressions on the subject of refusing treatment if mentally incapacitated, later acted on by caretakers, were carefully considered. See *id.* at 281. Furthermore, the requirement prohibited family members from making wholly self-interested or hasty decisions regarding the patient's future. *Id.* Recently, in *Washington v. Glucksberg*, the Court held that there is no liberty interest or right to physician-assisted suicide; the decision was reached in part by considering the number of people who may make rash decisions in requesting assisted suicide. See 117 S. Ct. 2258, 2272-73 (1997). The majority noted that those who attempt suicide often suffer from mental disorders, including depression, implying that ending one's own life is often a result of a temporary and impulsive urges. *Id.* at 2272. The Court also expressed concern for disadvantaged people who may be pressured into ending their lives by their families. *Id.* at 2273. This decision is similar to *Cruzan*, where the Court also protected patients from themselves and also from their families' irresponsible decisions by upholding a statute that established obstacles to refusing life-sustaining medical treatment. 497 U.S. at 281.

forts to get people to think before they act.<sup>252</sup> Louisiana is attempting to discourage divorce and to encourage couples to reflect on their decision to marry or divorce prior to taking either action.<sup>253</sup> Given the similarities between the underlying rights in the covenant marriage and abortion cases, the Court is likely to apply the undue burden test to any challenge to covenant marriage legislation. The next section analyzes the viability of such a constitutional challenge to Louisiana's covenant marriage statute.

### III. CONSTITUTIONAL AND POLICY IMPLICATIONS OF COVENANT MARRIAGE LAWS

Covenant marriage laws regulate the constitutional right to marry. Thus, plaintiffs may challenge Louisiana's covenant marriage law as an unconstitutional infringement on that right. The following section analyzes Louisiana's marriage laws by presenting hypothetical plaintiffs contesting the statute on various grounds.

#### A. *Applying the Undue Burden Analysis to Louisiana's Covenant Marriage Statute*

In order to apply the undue burden to Louisiana's covenant marriage law, this section employs a hypothetical challenge to the constitutionality of covenant marriage laws involving two couples, Couple A and Couple B. To successfully establish an undue burden on the constitutional right to marry, they must show that the requirements of covenant marriage statutes pose a substantial obstacle on their decision to marry.<sup>254</sup> The first step of the undue burden analysis is to question whether any of the above complaints pose a substantial obstacle to an individual's exercise of the right to marry.<sup>255</sup> Under *Casey*, if the answer is no, then the statute need only pass rational basis review.<sup>256</sup> If the answer is yes, then the law is unconstitutional and cannot stand.<sup>257</sup>

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252. For example, the regulations included a provision for a 24-hour waiting period, *Casey*, 505 U.S. at 885 (plurality opinion), and Louisiana's covenant marriage law includes a mandatory counseling requirement, La. Rev. Stat. Ann. § 9:273 (A)(2)(a) (West Supp. 1998), which may delay marriage, and a lengthy separation period prior to divorce. *Id.* § 9:307(a)(5). The Court said in *Casey* that "[t]he idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable." *Casey*, 505 U.S. at 885 (plurality opinion).

253. See *infra* note 298 and accompanying text.

254. See *supra* Part II.B.2.b (explaining how the undue burden test applies to right to marry cases).

255. See *Casey*, 505 U.S. at 877 (plurality opinion).

256. See *id.* at 878 (plurality opinion); see also *supra* note 85 and accompanying text (defining rational basis review).

257. See *Casey*, 505 U.S. at 878 (plurality opinion).

### 1. Couple A

Couple A chose covenant marriage when they selected their marriage license. This couple believes that they were coerced into the covenant marriage option because Louisiana implicitly endorsed it as the more committed and sacred—and, therefore, preferable—choice of marriage. In light of *Casey*, the couple argues that the state may not coerce individuals into making certain decisions that restrict their fundamental rights.<sup>258</sup> Couple A contests that they are now locked into a marriage that significantly restricts their ability to divorce.

Couple A claims that Louisiana's covenant marriage law is coercive. If covenant marriage laws are coercive, the coercion must occur through the government's creation of a type of marriage that is self-defined as more sacred, more committed, and generally preferred. License seekers are then forced to choose the covenant marriage and, hence, are bound by stricter divorce laws. Under certain circumstances, individuals desiring to marry would not even consider standard marriage as the availability of a covenant marriage would prompt their spouse, their family, or their government to view them as undedicated or unprincipled. *Casey* held that once a decision implicating one's fundamental rights no longer rested with the individual, due to a state law restriction on free choice, there exists a significant obstacle to exercising the right at issue.<sup>259</sup> Thus, Louisiana's covenant marriage law poses an undue burden on Couple A's right to marry.

In response, Louisiana would likely deny that its covenant marriage law is coercive, but may agree that it probably influences couples in their decisionmaking process. Under *Casey*, influence does not constitute a substantial obstacle to individual decisionmaking.<sup>260</sup> Louisiana is not forcing anyone seeking marriage licenses to enter into a covenant marriage; standard marriage is still available.<sup>261</sup> Additionally, there is a strong argument that having two different types of marriage to choose from does not impede the right to marry because one is still free to choose the standard marriage.<sup>262</sup> Indeed, since the enactment of covenant marriage law in Louisiana, very few couples have chosen

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258. *Cf. id.* at 877 (plurality opinion) (stating, in the abortion context, that the woman, not the state, must have the right to make the "ultimate decision").

259. *Id.*

260. *See id.* at 877-78 (plurality opinion).

261. *See* La. Civ. Code Ann. art. 87 (West 1993).

262. *See* Etzioni, *supra* note 12 (stating that covenant marriage laws may enhance the exercise of autonomy by creating alternatives from which couples may select).

the covenant option.<sup>263</sup> This again provides support for Louisiana's position that the law is not coercive.<sup>264</sup>

The coercion argument used to oppose covenant marriage is analogous to a strategy that plaintiffs unsuccessfully employed in *Harris v. McRae*.<sup>265</sup> In *McRae*, the Court upheld the Hyde Amendment, which denied public funding of some medically necessary abortions to poor pregnant women on Medicaid while providing public funds for childbirth.<sup>266</sup> The law was challenged on several grounds. Plaintiffs argued that the Hyde Amendment improperly coerced women to carry fetuses to term notwithstanding the women's constitutional right to have an abortion.<sup>267</sup> Without funding, some women would be unable to pay for an abortion and the option to have one would be, as a practical matter, unavailable.<sup>268</sup> The Court rejected this argument, stating that the Constitution did not prevent any state from "making a value judgment favoring childbirth over abortion."<sup>269</sup> The government is not required to provide the resources to fund the choice to have an abortion, however, that choice must remain open.<sup>270</sup> The federal government in *McRae* "imposed no restriction on access to abortions that was not already there,"<sup>271</sup> it just "may have made childbirth the more attractive alternative."<sup>272</sup> By providing funding for childbirth but not abortion, the government brands as preferable the choice to carry the child to term, an entirely permissible state action.<sup>273</sup> The Court noted the difference between "State attempts to impose its will by force of law" and "the State's power to encourage actions deemed to be in the public interest."<sup>274</sup> The Court did not view the Hyde Amendment as

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263. Leslie Zganjar, *Louisiana Couples Choose Covenant Marriage*, Charleston (W. Va.) Gazette, Feb. 14, 1998, at C3 (reporting that, out of 11,169 marriage licenses issued since August 15, 1997, the day the covenant marriage law went into effect, only 120 licenses, or one percent, were for covenant marriage).

264. The coercion argument would be greatly weakened if the number of people choosing covenant marriage continues to be low. *Id.* (reporting the low ratio of covenant marriages to total marriages in Louisiana). At this early stage, it is impossible to tell why Louisianans are not entering covenant marriages, but one argument is that not enough people know that the option exists. Janet McConnaughey, *Covenant Marriages Slow-Going in State*, Times-Picayune (New Orleans), Oct. 19, 1997, at A4 (reporting that the law's drafter believes people are unaware of the law, though they will become more aware with time). If this is the case, the number of covenant marriages could increase over time, and the coercion argument would gain strength.

265. 448 U.S. 297 (1980).

266. *Id.* at 326-27.

267. *See id.* at 301, 315; Appellee's Brief at 61-63, 121, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268).

268. *See McRae*, 448 U.S. at 315.

269. *Id.* at 314 (quoting *Maier v. Roe*, 432 U.S. 464, 474 (1977) (upholding a state statute that paid Medicaid recipients for childbirth expenses, but not for nontherapeutic abortions)).

270. *See id.* at 316.

271. *Id.* at 314 (quoting *Maier*, 432 U.S. at 474).

272. *Id.* (quoting *Maier*, 432 U.S. at 474).

273. *See id.* at 315.

274. *Id.*



infringing on the right to decide whether to terminate a pregnancy; rather, it saw any existing restriction as a product of the woman's indigency, not of governmental action.<sup>275</sup>

The Court's analysis in *McRae* can be analogized to reject arguments that covenant marriage laws coerce people into choosing the covenant marriage option. In Louisiana's covenant marriage system, the original formulation of marriage still remains open,<sup>276</sup> just as the abortion option remained available for all women after the Hyde Amendment passed.<sup>277</sup> In *McRae*, the Court found that the obstacle to abortion under the Hyde Amendment was not any action by the government but was, instead, a woman's indigency.<sup>278</sup> Unlike the plaintiff's indigent status in *McRae*, it is difficult to pinpoint what it is about a person that would facilitate government coercion into covenant marriage. Presumably, that characteristic would be less tangible than a person's indigency, a status which the Court has held is not constitutionally protected. The coercive element of covenant marriage laws, therefore, is less likely than the *McRae* restrictions to pose a substantial obstacle to the exercise of a right.

Couple A also claims that once in a covenant marriage, the strict divorce requirements infringe on the right to divorce and remarry. If the Court concludes that the existence of covenant marriage does not unconstitutionally coerce a person, however, any infringement on the right to divorce or remarry would be similarly uncoerced. Indeed, even in the absence of covenant marriage, if Louisiana made its divorce requirements stricter, this would still be constitutional. The Court has never recognized a constitutional right to divorce.<sup>279</sup> Justice Marshall, in dissent in *Sosna v. Iowa*,<sup>280</sup> linked the right to marry to the right to divorce.<sup>281</sup> If individuals cannot obtain a divorce, clearly

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275. *Id.* at 316. The dissenters vehemently disagreed, asserting that the Hyde Amendment "serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have." *Id.* at 330 (Brennan, J., dissenting). Justice Brennan called the law "a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual." *Id.* at 332 (Brennan, J., dissenting). Justice Marshall, whose emphasis on freedom of choice prevailed in *Zablocki v. Redhail*, 434 U.S. 374 (1978), joined the dissent in *McRae*, holding that "denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether." *McRae*, 448 U.S. at 338 (Marshall, J., dissenting). Interestingly, the fact that a poor individual could be denied a marriage license was important to the majority's analysis in *Zablocki*, 434 U.S. at 387, while in *McRae*, the majority was unaffected by the fact that the statute limited the poor alone. *McRae*, 448 U.S. at 316.

276. *See supra* note 38 and accompanying text.

277. *McRae*, 448 U.S. at 316-17.

278. *Id.* at 316.

279. Bradford, *supra* note 93, at 622.

280. 419 U.S. 393 (1975).

281. *Id.* at 420 (Marshall, J., dissenting) (asserting that the rights to marry and to divorce are "closely related" and that "the interest in obtaining a divorce is of substantial social importance").

they cannot exercise their right to remarry.<sup>282</sup> Nevertheless, the *Sosna* Court upheld an Iowa statute which imposed a one-year residency requirement for those filing for divorce.<sup>283</sup> The *Sosna* majority held the requirement did not impose a constitutionally impermissible infringement on the right to travel,<sup>284</sup> and failed to recognize either a right to divorce or to remarry that the statute at issue could potentially infringe.<sup>285</sup> Thus, Couple A's challenges of Louisiana's covenant marriage law likely would be ultimately unsuccessful.

## 2. Couple B

Couple B lives in Louisiana and wants to get married. Couple B can opt to enter a covenant marriage or a standard marriage, yet they do not want to enter into a regular marriage because of the stigma that attaches to those entering into a marriage the state considers less sacred than a covenant.<sup>286</sup> Couple B does not want to choose a covenant marriage, however, due to its stringent divorce restrictions.<sup>287</sup> Couple B argues that the choices created by the covenant marriage law are dissuading them from getting married at all, interfering with their constitutional right to marry and their right to make autonomous choices. To support their argument opposing the act, Couple B proffers a recent affirmative action case holding that a seemingly benign law which attaches a stigma to a group of individuals is unconstitutional.<sup>288</sup>

Couple B claims Louisiana provides two undesirable marriage types, which poses an undue burden on their right to marry. The first option, regular marriage, is inadequate because of the stigma placed on those who take part in it.<sup>289</sup> In *Adarand Constructors v. Pena*, the Court explained that although affirmative action programs increase opportunities for minorities, they stigmatize their beneficiaries.<sup>290</sup> Ac-

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282. See Bradford, *supra* note 93, at 622-24.

283. *Sosna*, 419 U.S. at 408-09. Under the challenged statute, a person petitioning the Iowa courts for a divorce must have been an Iowa resident for one year preceding the filing of the petition. *Id.* at 395 n.1.

284. *Id.* at 405-09.

285. See *id.*

286. See *infra* note 322.

287. See *supra* notes 30-36 and accompanying text (describing covenant marriage's divorce options).

288. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (striking down a "benign" federal affirmative action program that benefited minorities in part due to the stigma that attaches to a minority group considered in need of assistance and somehow less qualified than other races).

289. See McConnaughey, *supra* note 264 (reporting that a Louisiana rabbi rejects covenant marriages because they imply "that some marriages are not sacred" when all marriages should be); see also Editorial, "Super Marriage" Hasn't Caught On, *Baton Rouge Advocate*, Oct. 29, 1997, at B10 (reporting on a Baptist leader's rejection of covenant marriage because he had "never been willing to give in to the idea that a regular marriage is something less than a covenant one").

290. 515 U.S. at 229.

ording to the Court, affirmative action fosters the assumption that minorities are less qualified, which creates, rather than reduces, racial problems.<sup>291</sup> This prompted the Court to treat affirmative action plans with the same skepticism as initiatives that had a discriminatory purpose toward or effect on ethnic and racial minorities.<sup>292</sup> The government should avoid remedies that stigmatize what they want to enrich: the status of minorities in the affirmative action context and that of marriage in the covenant marriage context.

In response, Louisiana would likely assert that covenant marriage laws are less like the situation the Court addressed in *Adarand* and more like that in *Planned Parenthood v. Casey*. The state government in *Casey* preferred childbirth to abortion,<sup>293</sup> but the Court did not find any constitutional stigma.<sup>294</sup> Preferring childbirth over abortions furthered the government's interest in potential life.<sup>295</sup> By analogy, preferring covenant marriage over standard marriage arguably furthers an interest in decreasing broken marriages. *Casey* and *Adarand* involve situations in which the government preferred one result over another. In *Adarand*, however, the Court found that preferring minority sub-contractors on federal projects promoted the negative result of an increase in racism.<sup>296</sup> While the Court may not care that an action such as abortion or standard marriage is stigmatized, it does care when a racial minority is affected. In this way, affirmative action laws are distinguishable from covenant marriage.

Precedents indicate that Louisiana's creation of covenant marriage is unlikely to pose an undue burden. Under *Casey*, then, once the Court finds that the challenged regulation is not an undue burden on the asserted right, the statute need only be reasonably related to a legitimate state interest.<sup>297</sup> The state interests asserted by Louisiana include lasting marriages,<sup>298</sup> which is linked to the decrease of numerous social ills said to be exacerbated by divorce, such as poverty and juvenile crime.<sup>299</sup> These are arguably legitimate state interests. In examining whether a rational relationship exists between covenant marriage laws and discouraging divorce, it is significant that covenant marriage laws mandate delays before marriage and divorce through

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291. *Id.*

292. *Id.* at 227 (applying strict scrutiny to all racial classifications).

293. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

294. *See id.*

295. *See id.* at 876 (plurality opinion).

296. *Adarand*, 515 U.S. at 229.

297. *Casey*, 505 U.S. at 878 (plurality opinion).

298. *See* Richard Locker, "Covenant" Marriage License Restricting Divorce Gets Study, Comm. Appeal (Memphis), Oct. 9, 1997, at B1 (reporting that the state legislator who introduced the covenant marriage bill asserted that the legislation was designed to make marriages more successful, in part by getting couples to discuss their commitment to one another prior to the wedding).

299. *See supra* note 2.

counseling<sup>300</sup> and separation requirements,<sup>301</sup> which at the very least prompt individual reflection—if not a discussion between fiancés or spouses—about the decisions to marry or to divorce. This may lead to postponements or cancellations of marriages of precipitous or previously unreflective couples and may lead to a better understanding between those entering promising marriages. In *Casey*, the Court held that waiting periods reasonably result in more thoughtful and informed decisions.<sup>302</sup> Under this analysis, Louisiana's covenant marriage law is rationally related to a legitimate state interest and passes deferential scrutiny. Accordingly, the measure is constitutional.<sup>303</sup>

By passing a covenant marriage law, the state legislatures are attempting to encourage lasting marriages.<sup>304</sup> They also hope that the choice between two marriage options will prompt deliberation and discussion about commitment and expectations prior to the marriage.<sup>305</sup> While a Court is unlikely to find that the Louisiana statute runs afoul of the Constitution,<sup>306</sup> the question remains whether such

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300. See *supra* note 18 and accompanying text.

301. See *supra* notes 34-36 and accompanying text.

302. *Casey*, 505 U.S. at 885 (plurality opinion).

303. If the Court opts to apply intermediate scrutiny to covenant marriage laws, the Court would likely reach the same conclusion regarding their constitutionality. To pass intermediate scrutiny, a statute must serve important state interests and be substantially related to those interests. See *supra* notes 80-84 and accompanying text. Encouraging families to stay intact and lowering the divorce rate would likely constitute important state interests. The mandated counseling and delays prior to marriage and divorce imposed by covenant marriage laws are arguably substantially related to the state objective under *Casey*. There, the Court held that delays reasonably encourage thoughtful decisions, which could decrease the number of abortions. See *Casey*, 505 U.S. at 885 (plurality opinion). This argument can be analogized to divorces so that covenant marriage laws can pass intermediate scrutiny.

304. See, e.g., Lawrence Viele, *Marriage Bill Sails in Senate*, Fla. Times-Union, Feb. 21, 1998, at B1 (reporting that state senators in Georgia passed a covenant marriage bill in the hope of strengthening marriage).

305. See, e.g., *supra* note 298 (reporting that the Louisiana legislator who introduced the covenant marriage bill did so in the hope of promoting discussion among betrothed couples).

306. Though the analysis in this Note has focused on whether covenant marriage laws violate the Fourteenth Amendment, as explained below, some opponents of covenant marriage laws have deemed them an unconstitutional joinder between church and state. See *infra* notes 327-28 and accompanying text. If opponents of the law argued in court that covenant marriage violates the Establishment Clause, this argument would not likely go far as there is evidence that many churches reject covenant marriage. See *id.* Even if the evidence supporting this argument were stronger, the Court is unlikely to overturn any statute based on this linkage. Opponents of the Hyde Amendment challenged in *Harris v. McRae* also raised the argument that it violated the Establishment Clause because "it incorporate[d] into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time at which life commences." *Harris v. McRae*, 448 U.S. 297, 319 (1980). The Court rejected this argument, holding that "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Id.* (quoting *McGowen v. Maryland*, 366 U.S. 420, 442 (1961)).

laws are prudent, sound, or wise.<sup>307</sup> The problems covenant marriage laws pose for hypothetical couples A and B trigger various policy issues that weigh against covenant marriage laws. The following section discusses those concerns.

### B. *The Policy Debate Surrounding Louisiana's Covenant Marriage Law*

The following is a discussion of the policy arguments both supporting and opposing Louisiana's covenant marriage law. As the first of its kind, Louisiana's two-tier marriage system has garnered a great deal of attention. Due to the very recent passage of the covenant marriage law, comments by political commentators and policy makers make up the bulk of the published views on this legislation.<sup>308</sup> In addition, though constitutional theorists have not opined on the constitutionality of covenant marriage specifically, it is possible to analogize statements such theorists have made in other legal contexts to covenant marriage. The following is a list of three broad political and societal groups and their possible general responses to the covenant marriage law.

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307. This prompts an inquiry into the distinction between what is constitutional and what is "good" or "just." Some constitutional theorists believe there is no clear, radical distinction between what the law is and what the law should be. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433 (1986). If the Supreme Court hands down a decision it believes to be unjust, then they also believe it is unconstitutional. The Constitution's allegiance to human dignity does not allow for objectively unjust laws to remain constitutional. See *id.* These theorists have been accused of interpreting the Constitution in a manner that advances their own value system. See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 44-48 (1980) (commenting on the problems with judges using their own values as sources for making judgments). Some tend to read the constitution literally, not abstractly. See *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting) (stating "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision"); Antonin Scalia, *A Matter of Interpretation* 23-25 (1997) (detailing the author's focus on the constitutional text itself). These interpreters claim to make no value judgments when applying the Constitution. If the text says nothing about a particular societal problem, then no court may utilize the Constitution to right some injustice. Though an unremedied situation may result in some lasting injury, that does not make it unconstitutional. See *Griswold*, 381 U.S. at 510 (Black, J., dissenting).

308. There has been little commentary on the constitutionality of this law. Those who have written on Louisiana's covenant marriage law, however, have suggested legal arguments both for and against the law if the statute were to be challenged. See *infra* Parts III.A, B, & C.

### 1. A Liberal Response

Liberals might argue against the constitutionality of Louisiana's covenant marriage law.<sup>309</sup> The label "liberal" traditionally refers to one who highly values individual autonomy and free choice.<sup>310</sup> Liberals believe in individualism and individual freedom,<sup>311</sup> and also believe that the "government should be neutral among conceptions of the good life in order to respect the capacity of persons as free citizens or autonomous agents to choose their conceptions for themselves."<sup>312</sup> This neutrality would prompt the government to "leave its citizens as free as possible to choose their own values and ends," and, hence, when government prefers one possible avenue over others, this interferes with freedom.<sup>313</sup> Indeed, governmental attempts to define the good life would likely trigger a worry among liberals that the government was abusing its power over an individual. Liberals assert that it is the individual, and not the community or the government, who should be the authority on what is "good."<sup>314</sup> When the community's definition of what is "good" infiltrates politics, it can lead to prejudice and intolerance.<sup>315</sup>

Liberals might oppose covenant marriage laws on the grounds that they interfere with individual free choice.<sup>316</sup> While it may seem illogical to view a statute as anti-choice when it creates two options in lieu of just one, there are two ways that Louisiana's covenant marriage law infringes on individual autonomy. First, the government considers

309. But see *infra* Part III.C for a discussion of pro-responsibility theorists' response, which includes some liberals who support certain measures that encourage responsibility.

310. See Sandel, *Moral Argument*, *supra* note 143, at 522.

311. Robin West, *Foreword: Taking Freedom Seriously*, 104 Harv. L. Rev. 43, 45 (1990) [hereinafter West, *Taking Freedom Seriously*]. Indeed, Mary Ann Glendon critiques the liberal dialect for its "homage to independence and self-sufficiency, based on an image of the rights-bearer as a self-determining, unencumbered individual." Mary Ann Glendon, *Rights Talk* 48 (1991) [hereinafter Glendon, *Rights Talk*].

312. Sandel, *Moral Argument*, *supra* note 143, at 522.

313. Michael J. Sandel, *Introduction to Liberalism and its Critics* 1, 1 (Michael J. Sandel ed., 1984) [hereinafter Sandel, *Introduction*].

314. Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641, 663 (1990) [hereinafter West, *Constitutionalism*]; see Michael J. Sandel, *The Constitution of the Procedural Republic: Liberal Rights and Civic Virtues*, 66 Fordham L. Rev. 1, 2 (1997).

315. Sandel, *Introduction*, *supra* note 313, at 7; see Ronald Dworkin, *Liberalism, in Liberalism and its Critics*, *supra* note 313, at 60, 64 (stating that the "first theory of equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life").

316. Peter D. Kramer, *Divorce and Our National Values*, N.Y. Times, Aug. 29, 1997, at A23. Barbara Dafoe Whitehead, the author of *The Divorce Culture*, has written on the concept of "expressive divorce," which is the notion that divorce has become an instrument for personal growth. Barbara Dafoe Whitehead, *The Divorce Culture* 45-65 (1997). Along with this development, according to Whitehead, came a change in divorce; it became an individual event with a lack of concern for its impact on others. *Id.* at 54.

covenant marriage the more committed marriage, as indicated by the mandatory declaration that all who enter a covenant marriage must attest.<sup>317</sup> Because the government has created such a marriage, individuals may feel that they must choose this marriage type.<sup>318</sup> This results in a marital relationship that is less than truly voluntary.<sup>319</sup> The law influences how people behave, and individuals perceive other people and institutions based on how their government views them.<sup>320</sup> This influence may rise to the level of coercion.<sup>321</sup>

A second way that covenant marriage laws limit a person's autonomy is by creating inadequate options from which an individual must choose to get married. Louisiana's covenant marriage law creates a choice between a devalued regular marriage and a sacred marriage that is very difficult to dissolve should things go awry.<sup>322</sup> Both are unattractive options. "[T]o be autonomous, a person must not only be given a choice but he must be given an adequate range of choices,"<sup>323</sup> and, arguably, covenant marriages laws do not provide this.

Some liberals might also disapprove of covenant marriage because the state defines what is "best."<sup>324</sup> By passing this law, the community, via the legislature, is defining what is best—lasting marriages and

317. See La. Rev. Stat. Ann. § 9:273(A)(1) (West Supp. 1998) which includes:

[M]arriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. . . . [W]e understand that a Covenant Marriage is for life. . . . We promise to love, honor, and care for one another . . . for the rest of our lives.

318. Kramer, *supra* note 316. This argument is weakened by the fact that there are two people entering into this decision. If either party is feeling swayed into selecting the covenant marriage option by its mere availability, the requirement that the other party agree as well makes it less of a conflict between the state and an individual.

319. *Id.*

320. See Peter J. Riga, *Marriage and Family Law: Historical, Constitutional, and Practical Perspectives* 76 (1986) (stating that "[t]he educative force of law in American society is so strong that people tend to draw moral conclusions for practical living from it"); Scott, *supra* note 3, at 12 (asserting that "[a]t least at some intangible level, the law itself, in the way it portrays marriage and in its reinforcement of social norms, influences what people perceive the marital relationship to be"); William A. Galston, *Making Divorce Harder is Better*, Wash. Post, Aug. 10, 1997, at C3 [hereinafter Galston, *Making Divorce Harder*] ("[O]ver time law can help change culture . . . . It is amazing how many people who believe (rightly) that civil rights laws helped change racial attitudes deny that any such consequences can flow from changes in the laws of marriage and divorce.").

321. See Pollitt, *supra* note 12; cf. Dworkin, *Life's Dominion*, *supra* note 143, at 154-59 (acknowledging the validity of governmental coercion in certain areas of life but not others).

322. Lynne Z. Gold-Bikin, *Let's Eliminate the Idea of Covenant Marriage*, Chi. Trib., Sept. 7, 1997, § 13, at 9 (stating that Louisiana has "cheapen[ed] marriage by suggesting that you and I were not serious when we exchanged our vows and that . . . Louisiana knows how to provide a real marriage").

323. Joseph Raz, *The Morality of Freedom* 373-74 (1986) (explaining how a person who has only trivial options or only potentially deplorable options has completely inadequate choices and does not have an autonomous life).

324. See *supra* notes 310, 314 and accompanying text.

two-parent families—and imposing this definition on individuals.<sup>325</sup> This interferes with our nation's traditions, which value autonomy in decision-making, self-expression, and self-reliance.<sup>326</sup>

The American Civil Liberties Union (“ACLU”) takes another liberal view, arguing that covenant marriage laws are an impermissible joinder of church and state insofar as the legislation incorporates Christian values into law.<sup>327</sup> The ACLU asserts that the term “covenant” has biblical connotations and promotes marriages found in the Bible, complete with a dominant husband and submissive wife.<sup>328</sup> Indeed, the original legislation was proposed by a Promise Keeper,<sup>329</sup> and graduate of Liberty University.<sup>330</sup> In addition, leaders of certain faiths in Louisiana have encouraged covenant over standard marriages, with some having announced plans to refuse to hold non-covenant marriages in their churches or to preside over standard marriages if held elsewhere.<sup>331</sup>

## 2. A Feminist Response

Feminists are divided on the issue of covenant marriage, with supporters and detractors both claiming that their view best advances wo-

325. Pollitt, *supra* note 12.

326. Kramer, *supra* note 316 (asserting that divorce is often a positive thing and is in synch with Americans' independent nature). It is arguable, however, that commitment to family is also a part of our nation's history. See Blankenhorn, *supra* note 2, at 1-62 (studying the recent increases in and problems of one-parent families and encouraging the return to two-parent families).

327. See Duren Cheek, “Covenant Marriage” May Soon Be Option, *The Tennessean*, Oct. 9, 1997, at A1.

328. See Pollitt, *supra* note 12 (stating that a covenant marriage “means a marriage that mirrors what fundamentalists see as the relation between Christ and Humanity, with a loving husband as Lord ruling an obedient wife along lines set down in the Bible”).

329. Cheryl Wetzstein, *Legislative Pioneer Credits Power of Prayer*, *Wash. Times*, Oct. 9, 1997, at A2. The Promise Keepers is a men's Christian group which “urges men to take their biblically defined role as the ultimate heads of the household.” Scott Bowles, *Promise Keeper's Troubled Past*, *USA Today*, Oct. 30, 1997, at A3.

330. Wetzstein, *supra* note 329. The former televangelist, Jerry Falwell, founded Liberty University. J.A. Adande, *When Giving Thanks Draws a Penalty*, *Wash. Post*, Sept. 1, 1995, at A1.

331. Bruce Nolan, *Churches Weighing “Covenant Marriage,”* *Times-Picayune* (New Orleans), June 25, 1997, at A1 (reporting that, Episcopalian leaders plan to wed only couples with covenant marriage licenses). These circumstances can be viewed as evidence that the law joins church and state. See Pollitt, *supra* note 12. *But see Catholic Bishops to Bless Either Form of Civil Marriage in Louisiana*, *Baton Rouge Advocate*, Oct. 31, 1997, at B12 (reporting that unlike Southern Baptist leaders, Catholic, Jewish, and Methodist leaders do not support covenant marriage, though all agree the legislation's focus on families is “commendable”). Catholic leaders will not endorse Louisiana's covenant marriage law because it requires priests to explain the law's divorce requirements and the Church does not allow divorce. See Nolan, *supra*. Some church leaders do not support the law based on their beliefs that every marriage is a covenant. Julie Kay, *Covenant Couples Few*, *Baton Rouge Advocate*, Oct. 25, 1997, at C1.



men's interests.<sup>332</sup> Feminists are largely split between those who support the notion that Louisiana's law protects women who tend to be abandoned by self-indulgent husbands,<sup>333</sup> and those who find that the legislation's efforts to protect women from divorce demeaning, or worse, dangerous.<sup>334</sup>

Some feminists who support the covenant marriage movement are likely to disagree with the liberal emphasis on autonomy.<sup>335</sup> These feminist legal scholars have asserted that an emphasis on autonomy hurts women because women often lack self-autonomy due to cultural restraints.<sup>336</sup> Supporters of this view may see covenant marriage laws as a necessary check on the only true autonomous individuals in a marriage: husbands.<sup>337</sup> Louisiana's new law helps women because it restores power to the innocent spouse, and it is typically the woman who has the legal power to file for a fault-based divorce.<sup>338</sup> Women

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332. Compare Katherine Shaw Spaht, *Would Louisiana's "Covenant Marriage" Be a Good Idea for America?: Yes*, Insight, Oct. 6, 1997, at 24 (praising covenant marriages and their potential effects on the high divorce rate), with Applewhite, *supra* note 68, at 25 (doubting that covenant marriage will impact the divorce rate and asserting that the law will affect families and women negatively).

333. See Spaht, *supra* note 332.

334. See Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 61 (1989) (stating that "[f]eminist theory sees the family as a unit of male dominance, a locale of male violence and reproductive exploitation"); Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 Tul. L. Rev. 1435, 1450 (1992) (asserting that proposals to prevent divorce "would not significantly deter the husband and would have the unintended effect of injuring the wife and children").

335. See Tracy E. Higgins, *Democracy and Feminism*, 110 Harv. L. Rev. 1657, 1666 (1997) (describing the weaknesses of the liberal emphasis on autonomy).

336. See *id.* at 1696-97 (arguing that liberal constitutionalism ignores the cultural restraints that limit women in their democratic participation); Robin West, *Reconstructing Liberty*, 59 Tenn. L. Rev. 441, 453-61 (1992) [hereinafter West, *Reconstructing*] (describing the inequality in the labor force, women's fear of sexual violence, and the general vulnerability of women).

337. See Lacey, *supra* note 334, at 1448 (asserting that men "are permitted by our system to make basic choices about their identity from birth, while many women are denied this option until they are mature enough to create their own choices").

Just as there is disagreement over whether covenant marriage is good for women, there is an analogous debate over whether no-fault divorce has been good for women. One of the initiatives the women's movement promoted was the passage of no-fault divorce laws. See Susan Faludi, *Backlash: The Undeclared War Against American Women* 315 (1991). This effort was later criticized. See Weitzman, *supra* note 3. Weitzman claimed, for one, that divorced women experience a seventy-three percent decline in their standard of living in the first post-divorce year. *Id.* at 338. Weitzman's research methods, however, have been criticized as flawed. Faludi, *supra*, at 20-25. Some research shows that it is actually men who are worse off after divorce. *Id.* at 25-26 (citing studies that men suffer from depression and other health problems post-divorce and are reportedly more devastated and less happy after a break-up than women).

338. Spaht, *supra* note 332. On a related note, fault-based divorce can be seen as an advantage for women when negotiating separation agreements with men who want a quick divorce. See Weitzman, *supra* note 3, at 28-31; see also Milton C. Regan, Jr., *Family Law and the Pursuit of Intimacy* 139 (1993) (stating that under a no-fault re-

sacrifice more when they assume that the relationship is for life because they are more likely to forgo pursuit of a career upon marriage and motherhood.<sup>339</sup> Consequently, measures that encourage longer marriages protect women to a greater extent.<sup>340</sup> Men, having been raised to pursue self-fulfillment, are too comfortable with abandoning a family.<sup>341</sup> Covenant marriage can discourage this impulse by mandating longer separation periods and counseling.

The concept that women lack autonomy, and therefore need the protection of covenant marriage laws, can also be used to condemn such laws. A woman who is not truly independent-minded is more likely to find herself in an abusive or unhappy marriage.<sup>342</sup> Thus, covenant marriage may pose dangers to women, because covenant marriage's stricter divorce requirements may restrict a woman's ability to escape an abusive husband.<sup>343</sup> Covenant marriage laws fail to address "the potential for oppression between the individual and other forms of organized social authority," such as the family.<sup>344</sup>

A second feminist critique of covenant marriage would not reject, but rather champion, autonomy arguments. This view finds assumptions that women welcome protection from divorce sexist because they assume that men are both the wage earners and the ones who want out of a marriage.<sup>345</sup> These feminists argue that women are generally not helpless; indeed, women are the ones who file for the majority of divorces.<sup>346</sup> No-fault divorce laws came to fruition as women gained in political power for a reason—because women wanted and

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gime, one may see "a higher incidence of opportunistic behavior, because that behavior will not be penalized in a divorce proceeding").

339. Spaht, *supra* note 332.

340. *See id.*

341. *See* Blankenhorn, *supra* note 2, at 4 (stating that the fact that America is "fatherless" is due in part to a "me-first egoism" among men that serves only the most "puerile understanding of personal happiness").

342. *See* Barbara Dafoe Whitehead, *The Divorce Trap*, N.Y. Times, Jan. 13, 1997, at A17. If feminist theorists who claim that women lack autonomy are correct, *see supra* note 336, that may account for the number of women in abusive relationships. *See* Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 8 (2d ed. 1996) (reporting statistics on domestic violence, including the National Criminal Victimization Survey that estimates 50% of American couples have experienced at least one incident of assault, and that in over 90% of those incidents, the victim was female). *See generally* Lacey, *supra* note 334, at 1443-46. (explaining the need for a prompt divorce when a woman is abused).

343. Lacey, *supra* note 334, at 1443-46. This idea is further linked to the notion that the liberal state crafts its laws in favor of men. *See* MacKinnon, *supra* note 334, at 162 (stating that the "liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender . . . [and] the state's formal norms recapitulate the male point of view on the level of design").

344. West, *Reconstructing Liberty*, *supra* note 336, at 449.

345. Applewhite, *supra* note 68.

346. Faludi, *supra* note 337, at 26; Lacey, *supra* note 334, at 1449 (citations omitted).

needed these laws.<sup>347</sup> For these reasons, divorce should remain easily obtainable by women. Covenant marriage, however, makes divorce less accessible on account of its limited allowance of fault-based divorce<sup>348</sup> and lengthy separation requirements for no-fault divorce.<sup>349</sup>

### 3. A "Pro-Responsibilities" Response

A person who is "pro-responsibilities" is one who, in contrast to rights-oriented liberals, may desire the protection of rights against state encroachment, but also wants the state to encourage individuals to exercise their rights responsibly.<sup>350</sup> Prominent figures in political and constitutional discourse from different backgrounds might be characterized as pro-responsibility. They include conservative,<sup>351</sup> liberal,<sup>352</sup> and progressive<sup>353</sup> theorists. Each has different conceptions of

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347. See Herma Hill Kay, *Beyond No-Fault, in* *Divorce Reform at the Crossroads*, *supra* note 4, at 6, 6 (stating that, between the years 1969 and 1985, all fifty states adopted some form of no-fault divorce); Applewhite, *supra* note 68 (reporting that "advancements in women's social and political status correlate with access to affordable divorce").

348. See La. Rev. Stat. Ann. § 9:307 (West Supp. 1998).

349. *Id.*

350. See Linda C. McClain, *Rights and Irresponsibility*, 43 *Duke L.J.* 989, 998-1013 (1994). Robin West has argued that a "robust respect for rights is not only a necessary condition for individual liberty . . . but is also a condition for the exercise of individual responsibility, without which freedom is either inconsequential or morally unpalatable." West, *Taking Freedom Seriously*, *supra* note 311, at 79.

351. One example is the conservative Mary Ann Glendon, who has criticized Ronald Dworkin's notion of the American "lone-rights bearer," described in Ronald Dworkin, *Taking Rights Seriously* (1977) [hereinafter Dworkin, *Taking Rights Seriously*], who is connected to others and society only by choice. Glendon, *Rights Talk*, *supra* note 311, at 47-48. Glendon argues that other countries, where the individual is recognized, as well as individual responsibility to the community, have a moral fabric superior to America. *Id.* at 61-66. She finds that European countries have more of a balance between the individual and society and notes that this interconnection can greatly benefit individuals instead of creating an imposition. *Id.* Though Glendon has not written specifically on covenant marriage, for over a decade she has been an advocate of making divorce more difficult. See Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 *La. L. Rev.* 1553, 1563 (1984).

352. See William A. Galston, *Liberal Purposes* (1991). Rather than curtailing independence, Galston asserts that government's active involvement in fostering virtue will create enriched freedom. *Id.* at 6. By advocating a strong work ethic and delayed gratification, government can strengthen families and community. See *id.* at 223. Society is in dire need of citizens possessing these attributes, according to Galston, because an emphasis on freedom for freedom's sake has contributed to a variety of social ills, including the breakdown of the two-parent family. *Id.*

Even Ronald Dworkin, a proponent of "taking rights seriously," see Dworkin, *Taking Rights Seriously*, *supra* note 351, at 184-205, has tentatively supported the role of government in promoting responsibility. See Dworkin, *Life's Dominion*, *supra* note 143, at 150-51. Originally, the responsibility argument urged by Glendon was in response to those like Dworkin who zealously focused on the importance of taking individual rights seriously. Glendon's criticisms of America's focus on individual rights is in part a jab at Dworkin's celebration of individual rights. See Glendon, *Rights Talk*, *supra* note 311, at 47-66. More recently, Dworkin has also supported government attempts to promote responsibility and reflection. See Dworkin *Life's Dominion*,

what is responsible behavior and distinct reasons for supporting measures aimed at that behavior. For example, when defining responsible behavior, conservatives tend to welcome private groups setting normative standards of what is responsible behavior, with the government implementing the standards the groups set.<sup>354</sup> Liberals and progressives prefer the government to set social norms without influence from private groups who may want to further an "illegitimate private hierarchy."<sup>355</sup> Despite their differences, pro-responsibility advocates share a belief that government may seek to encourage people to exercise their rights responsibly through lawmaking.

Pro-responsibility types are likely to endorse covenant marriage laws.<sup>356</sup> They see such laws as helping "restore balance and fairness to a system which at present gives little weight to important individual

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*supra* note 143, at 150-51. Arguably, Dworkin did not have much choice in the matter, for Dworkin's strategy of protecting rights "depends upon the judiciary's willingness, and not just its ability, to enforce the moral principles that determine those rights." West, *Taking Freedom Seriously*, *supra* note 311, at 59 (emphasis omitted). The Supreme Court has not cooperated with Dworkin's view of the role of the judiciary, and he has moved toward the pro-responsibility side, albeit only to a limited degree. *See* Dworkin, *Life's Dominion*, *supra* note 143, at 151-59.

353. Progressives include, for example, Cass Sunstein, *see* Sunstein, *supra* note 249, and Robin West, *see* West, *Constitutionalism*, *supra* note 314. Progressives support government's authority to shape responsible citizens; progressives encourage such "shaping" measures rather than fretting over the potential for undue governmental influence. *See id.* West agrees that Dworkin's emphasis on individual rights fails to protect liberty without judicial cooperation. West, *Taking Rights Seriously*, *supra* note 311, at 79. West has reported that individualism is "under attack" by the Supreme Court and freedom is no longer being protected. *Id.* at 45. Instead, the Court is granting more leeway to state measures at the expense of the individual. *Id.* at 43-44. West faults Dworkin's and other liberals' tendencies to insulate the individual from public scrutiny when exercising the individual's rights, which leaves people and their rights vulnerable. *Id.* at 71. By insulating the individual, it is impossible for others to understand why the rights should be protected. *Id.* Because individual rights are no longer ardently protected by the Court, West believes that "the people rather than the courts are to be charged with the duty of protecting freedom." *Id.* at 79. Hence, West focuses on responsibility so that Americans who must be charged with protecting individual rights—as opposed to courts being so charged—will agree to take up that role. *Id.* This argument follows the notion that voters must be able to sympathize with others so that they will protect rights that they themselves may not need or want. *See id.* If the general community learns how and why rights are exercised, and understands that they are exercised responsibly, then voters will protect rights for all individuals. *See id.*

354. West, *Constitutionalism*, *supra* note 314, at 643.

355. *Id.* West writes that while liberals place authority in the individual when defining what is good, and conservatives look to the community, progressives encourage legislatures to define norms based on how the "relatively disempowered," or those who are low in the "social hierarchy," define what is good. *Id.* at 662, 679 (emphasis omitted).

356. *See* Glendon, *Rights Talk*, *supra* note 311; Mary Ann Glendon, *Abortion and Divorce in Western Law* 113-24, 131-38 (1987). *See* Galston, *Making Divorce Harder*, *supra* note 320. Mary Ann Glendon has long argued that the emphasis on individualism in America has destroyed its families.

and social interests in strengthening marriage.”<sup>357</sup> The creation of a choice in marriage “provides a model of how a state can foster what it considers a virtue—in this case, stronger marriages—by giving people the opportunity to be virtuous, but not penalizing them if they choose not to.”<sup>358</sup>

The groups listed above offer constitutional and policy arguments on behalf of and in opposition to covenant marriage laws. Some of these notions are directly applicable to the hypothetical plaintiffs from the constitutional analysis. The following section analyzes these arguments.

#### D. *Policy Arguments Against Covenant Marriage as Applied to the Hypothetical Plaintiffs*

Couple A objected to the limits covenant marriage places on their ability to divorce. Though there is no constitutional right to divorce,<sup>359</sup> arguably it is sound policy for the state not to delay divorce once a couple has decided to obtain one. This would be true even where a couple has chosen to follow more restrictive divorce laws. Individuals planning a wedding rarely believe that they will get divorced.<sup>360</sup> Once an individual realizes that, contrary to one’s original beliefs, divorce is inevitable, there are sound reasons why the state’s granting of the divorce should not be delayed. For one, lengthy state-imposed separations interfere with an individual’s freedom to live one’s life as one sees fit.<sup>361</sup> More specifically, delaying divorce may harm the entire family unit. Although studies have shown that divorce results in emotional and financial harm to children,<sup>362</sup> “witnessing or being party to parental conflict is what harms children,” and “covenant marriage ensures prolonged exposure to children to the most damaging possible circumstances: parents who fight.”<sup>363</sup> It is unclear whether the majority of Americans support efforts like covenant marriage to encourage people to stay married, for “[e]veryone is against divorce in the abstract, but in the concrete, they understand why particular people they know had to have a divorce.”<sup>364</sup> Such beliefs likely account for recent poll results indicating that fifty-nine per-

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357. Galston, *Making Divorce Harder*, *supra* note 320.

358. Etzioni, *supra* note 12.

359. *See supra* note 93 and accompanying text.

360. *See* Trafford, *supra* note 12 (reporting that those getting married believe that their marriage will last); *see also* Margaret Carlson, *Till Depositions Do Us Part*, *Time*, July 7, 1997, at 21 (describing the “hopefulness” of engaged couples, making them unlikely to expect divorce and more likely to choose covenant marriage).

361. *See supra* notes 312-13 and accompanying text.

362. *See supra* note 2 and accompanying text.

363. Applegate, *supra* note 68; *see* Whitehead, *supra* note 342 (stating “[n]othing is more emotionally devastating to children than a prolonged conflict among their parents”).

364. Kim, *supra* note 12.

cent of Americans said that the government should not make it harder for people to get a divorce.<sup>365</sup>

Both Couple A and Couple B objected to government encouragement of responsible behavior—namely choosing covenant marriage in the hope of staying married rather than getting a divorce. Couple A felt coerced by the government into choosing covenant marriage because their government preferred it over standard marriage. Though all laws influence or coerce an individual to adopt some mode of behavior, such as paying taxes or protecting endangered species, such laws do not affect one's life in the same way as laws involving marriage do.<sup>366</sup> Americans have a history of resenting government efforts to guide their personal lives.<sup>367</sup>

Couple B, meanwhile, was dissuaded from marrying altogether because they felt that the government's preference for covenant marriage placed a stigma on standard marriage. By creating two types of marriage, Louisiana has, in the process, lessened the commitment involved in a standard marriage.<sup>368</sup> This is a questionable way of bolstering marriage generally. Instead, states should keep "standard" marriage as the only option and find different ways to discourage divorce.<sup>369</sup>

Another policy argument weighing against covenant marriage laws is the potential for women to be coerced by their fiancés to choose covenant marriage. Women are more likely than men to be pressured

365. *Id.* (reporting results of a Time/CNN Poll conducted May 7-8, 1997).

366. *Cf.* Dworkin, *Life's Dominion*, *supra* note 143, at 154-55 (making the same comparison to abortion laws).

367. *See* Frank Bruni, *Self-Help Credo: I'm O.K., You're Not*, N.Y. Times, Aug. 31, 1997, § 4, at 10 (asserting that "Americans feel one way about didacticism that has the muscle of law," such as no smoking laws, "and another way about didacticism that has no authority and spawns recommendations," such as how-to and self-help books by private figures).

368. *See* Ellen Goodman, *On the Highway of Love, Louisiana Will Road-Test Marriage Choices: Regular or High-Test*, Boston Globe, Aug. 10, 1997, at D7 (questioning how the institution of marriage is bolstered by creating different classes of marriage, asserting that "regular" marriage has been downgraded by the creation of "a premium product"); Clarence Page, Editorial, *Happily Ever After?: Fix Marriages Before They Start*, Chi. Trib., Aug. 20, 1997, § 1, at 19 (asserting that covenant marriage "implies that any other kind of marriage is somehow cheap and flighty").

369. It is worthwhile to compare covenant marriage to other innovations designed to lower the divorce rate. Most suggestions aim to change behavior prior to when the marriage takes place. One locally-based effort that is growing in popularity is the concept of "Community Marriage." Hara Estroff Marano, *Rescuing Marriages Before They Begin*, N.Y. Times, May 28, 1997, at C9. These policies are in effect in over fifty cities and require clergy and judges to require couples they marry to have premarital counseling. *Id.* Another private effort involves pairing newlyweds with older married couples who serve as mentors. William Raspberry, *Marriage Mentors*, Wash. Post, Jan. 12, 1996, at A15. One legislative effort, proposed by a Michigan State Representative, makes couples who have not received premarital counseling wait longer to receive marriage licenses than those who have. H.B. 4631, 89th Leg., Reg. Sess. (Mich. 1997). These efforts lack the attributes of covenant marriage that many take issue with: the denigration of standard marriage by creating a higher grade of marriage.

into such a decision because they can lack autonomy.<sup>370</sup> The Court has acknowledged the widespread incidence of battering of women by their husbands and boyfriends.<sup>371</sup> Women paired with an abusive fiancé likely would be intimidated into a covenant marriage, and this is just the type of marriage that should be easiest to dissolve.<sup>372</sup>

These policy concerns intimate that covenant marriage laws may damage individuals as well as the institution of marriage. While covenant marriage laws are constitutional, this does not make them a positive contribution to society or an effective way to lower divorce rates and its concomitant social ills.

### CONCLUSION

Though likely constitutional, covenant marriage laws pose a number of problems. Louisiana has proposed a way to encourage lasting marriages, but the state's method may be ineffective or otherwise undesirable. The response to covenant marriages in the only state where they are available, Louisiana, has been underwhelming<sup>373</sup> and this reaction may be due to individuals' resentment of this statute. The unenthusiastic response, however, may not necessarily be due to some statement of rejection of the law, but may simply demonstrate that such a law is ineffective in practice. If this is the case, there is a possibility that state governments may step up their encouragement of lasting marriages, and enact a different, more intrusive law designed to discourage divorce. For example, a law could go further by subjecting marriage license applicants to a state official's questions regarding their commitment. It is a legitimate concern that a state will try to go too far to foster a specific virtue.<sup>374</sup> If the number of divorces does not decrease in a covenant marriage state, the question remains whether future legislation will abandon virtue encouragement as ineffective or step up the coercion level, thereby compromising individual citizens' autonomy.

Whether one finds that Louisiana's covenant marriage law has a coercive effect, is totally ineffective, or somewhere in between, the

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370. See *supra* note 336 and accompanying text.

371. See *supra* notes 226-27.

372. See *Bill to End No-Fault Divorce in Florida Would Make It Harder to Break Up*, N.Y. Times, Dec. 29, 1996, § 1, at 19 (providing an example of a battered woman benefiting from Florida's no-fault divorce option and fearing the effects of the no-fault divorce law's repeal).

373. See Zganjar, *supra* note 263 (reporting how only one percent of couples getting married have chosen covenant marriages after six months). This works against opponents' arguments that the law coerces people into choosing the covenant option, but it could be that citizens are sending a message that they resent the government's "suggesting" what kind of marriage is preferable. Given that the law has only been in effect since July 15, 1997, see H.B. 756, 1997 Reg. Sess. (La. 1997) (listing date of enactment), it is too early to determine what is behind the fact that people are not choosing covenant marriage means.

374. See Sunstein, *supra* note 249, at 965.

above analysis demonstrates that it is very likely to survive any constitutional challenge. If governmental efforts to encourage responsibility, like the covenant marriage law, are upheld by the Court, perhaps similar legislation more directly infringing on the right to marry would be overturned. Those displeased with the potential for infringement on the right to marry posed by covenant marriage measures should closely review pending legislation. The pro-responsibilities fervor should not diminish one's constitutional right to expect autonomy in personal decisionmaking concerning such fundamental matters as marriage.