Forthcoming in *Contemporary Political Theory*.

The Liberal Case for Disestablishing Marriage

Introduction

What role should the liberal state have in recognizing and regulating marriage as such? Until recently this question received surprisingly little attention among liberal political theorists. Yet with its numerous public-private border crossings marriage challenges and unsettles one of liberalism's most cherished methods for protecting liberty, equality and fairness (Shklar, 1989). Hence, the question of how, if at all, the state – the most public of forces – should engage with this most insubordinate of institutions is elemental. Tensions in contemporary debates suggest that these challenges remain unaddressed and thus, invite attempts to formulate a coherent and compelling model of the relationship between marriage and the liberal state. This article offers a partial response to this invitation.

Marriage -- though not the question I pose -- has long been a concern of liberal thinkers. From John Locke to Susan Moller Okin, the conjugal institution has received steady, if under appreciated, attention in the liberal canon (Locke,1988; Mill, 1970, 1997; Okin,1989). Typically this attention focused on the dual (contract/status) character of marriage, or more recently, on its role in (re)producing gender inequality. Especially those thinkers concerned with gender have exposed the ideological character, and often obfuscating and oppressive effects of the 'public/private divide' (Fineman, 1995; Pateman, 1988; Okin, 1989) While both concerns and the critical insights they bear out are essential to any adequate account of marriage and the state, they do not account for all

that must be covered. If we wish to grasp the sources of confusion and silences in contemporary debates, and formulate robust liberal model of marriage and the state, we must examine the functions – intended and effective -- of public recognition of marriage.

In light of such an examination, the relevance to the marriage-state relationship of familiar liberal approaches to negotiating the religion-state relationship becomes apparent. Drawing on these approaches and liberal feminist thought, I sketch a model of marriage and the state that aims to expand the area of protected freedom without sacrificing equality, fairness or marriage. I argue that the optimal balance of these liberal commitments would obtain were marriage be disestablished. No longer would the state confer marital status, or use 'marriage' as a category for dispersing benefits. Legitimate public welfare goals traditionally treated through marriage – guarding privacy, protecting the vulnerable, supporting intimate caregiving, and securing property -- would be addressed through an intimate caregiving union (ICGU) status.

The analysis and argument presented here add to very recent attention among liberal political theorists to the question of how the state should be involved with marriage (Duggan, 1995, 2004; Shanley, 2004; McClain, 2004, 2006; Fineman, 1995; Shell, 2004). More broadly, the article contributes to the burgeoning conversation among contemporary political theorists about dependency, family, and intimate caregiving (McClain, 2006; Fineman, 1995, 2001; Tronto,1993; Kittay, 1999). And although marriage is the immediate focus, the conceptual considerations speak to broader concerns within liberal political theory. Precisely because marriage and the goods and practices it houses so frequently straddle the public/political-private/non-political divide, they are the focal point of some of the most pressing dilemmas caused by the increased cultural,

ethnic and religious diversity of most liberal democratic polities. From head scarves to group rights, feminists and scholars of multiculturalism have shown, these dilemmas go to the heart of liberal democratic theory (Okin, 1999; Nussbaum, 1999; Deveaux, 2000; Spinner-Halev, 2000; Shachar, 2001; Arneil, et al, 2006). By contributing to the essential and on-going project of scrutinizing and redrawing the proper limits and reaches of state action, this article helps liberalism address these challenges.

Establishment of Marriage

To argue that marriage should be *dis*established is to imply that marriage is established (Cott, 2000, 212).[1] Although in this article I refer primarily to the U.S., this description aptly applies to other liberal democracies.[2] The American arrangement, for instance, has deep roots in British political history – where church and state courts jointly governed marriage since the earliest stirrings of the liberal state in the late seventeenth century until well into the nineteenth century (Stone, 1990, 25). While neither synonymous with nor a direct effect of the establishment of religion, the establishment of marriage is historically correlated with and conceptually akin to the former. I use the term to refer to a historically specific arrangement where the state actively controls, privileges and utilizes a particular account of marriage to regulate the intimate and caregiving lives of its citizens.

To say that marriage is established is to imply that citizens hold deeply divergent views of what marriage *is* and how intimate life ought to be arranged. Debates concerning same sex marriage, high divorce rates, and divergent views on infidelity, polygamy and the proper roles of husband and wife, evince profound disagreement about what marriage *is*. Flourishing diversity of family forms highlights the lack of consensus –

in theory and practice – regarding intimate caregiving life (Stacey, 2003). In this context, to define and promote ‘marriage’ is to privilege one version of the institution over all others, and, crucially, over all other kinds of intimate caregiving arrangements. In the U.S., as in most other polities, the current variety of choice is the declaredly monogamous, heterosexual, ideally childbearing and life-long union.

The state establishes its preferred version of marriage by providing exclusive material, legal and expressive benefits to those who (may) opt for marital status, and by punishing those who violate the norms embodied in the status. Benefits are, by now, well-rehearsed.[3] Punishments for non-conformity may seem less obvious. But current and historical examples abound: criminalization and prosecution of polygamous and interracial marriage, non-recognition of marriage between slaves and individuals of the same sex (Cott, 2000; Grossberg, 1985).The establishment of marriage is also facilitated by the state’s jealously defended, final control of the public definition and conferral of ‘marriage’ – against religious, cultural and individual authority. A striking example of how vigorously the state guards this control is the recent prosecution of Mormon polygamist Tom Green. Although he and his many wives claimed to be married under religious but not legal authority, Green received a five-year prison term for his hubris. So vital is final control of the label that even non-legal use of the marital appellation, it appears, is unacceptable (Utah v. Green, 2001).

The language of establishment and religion-state relations draws attention to how, through its control of marital status, the state plays a pivotal role in an institution, a unique, unavoidable – if often underplayed or ignored -- purpose of which, I shall argue, is to inculcate a comprehensive account of intimate life and its place within the

community into its citizens. The force of this aspect of the analogy becomes clearer as we address prominent tensions and awkward silences in contemporary debates.

Before turning to contemporary debates, two points: First, the establishment of marriage has rarely been noticed as such and never been adequately justified. In the U.S., for instance, lawyers, judges, reformers and scholars ply various reasons to explain this or that policy, court decision, new statute or general approach to state regulation of marriage. Some liberal theorists defend marriage and its connection to political life but do not explain why the state must control marriage in order for marriage to produce its special goods (Galston, 1996a, 1996b; Shell, 2004). Yet none has presented a comprehensive and compelling justification of the establishment of marriage in a diverse, liberal democratic polity. A growing number of scholars are contributing to a convincing rejection of this arrangement (Duggan, 1995, 2004; Shanley, 2004; McClain, 2004, 2006; Fineman, 1995, 2001; Cornell, 1998). Still, a dominant silence obscures practical and principled problems with the establishment of marriage.

Second, by some accounts the establishment of marriage is weakening. In the U.S., Cott identifies an uneven but steady trend towards the state relinquishing control over the conjugal union. The demise of fault-based divorce, the increasing legal recognition and protection of non-married cohabitants and the criminalization of marital rape suggest that the state has 'let go of [its] grip on the institution of marriage along with [its] previous understanding of it' (Cott, 2000, 212). Similar trends are evident across Europe.[4] To be sure, contrary developments are also evident: federal and state level laws and amendments that define marriage as a heterosexual union, and the advent of covenant

marriage among them (Cott, 2000, 213). This article presents a liberal defense of the movement towards disestablishment.

The Extra Value of "Marriage" and the Ambivalence It Engenders

The case for disestablishing marriage begins with tensions, confusions and silences lurking in the shadows of contemporary debates. Consider two recent court cases, *Baker v. State of Vermont* (1999) and *Goodridge v. Dept. of Public Health* (2003). In both, the courts ruled that same sex couples could not be justly excluded from the civil benefits of marital status. The Vermont case produced civil union status, while the Massachusetts court held that marital status had to be expanded to include same sex couples. Lost in the hubbub caused by the bold steps taken by these courts is a peculiar ambivalence concerning the value of what one prominent participant called 'the "m" word' (*Opinion,* 2004).

At first glance, *Baker* portrays the goods at stake in the battle over legal recognition of same sex marriage as the myriad concrete legal and material benefits and burdens attached to marital status. On this logic the court could suggest that marital status and civil union status are essentially the same – the sum of the delineable benefits attached to the status. Put another way, this position assumes that 'marriage' is simply what I call an *instrumental status,* that is, one that conveys concrete, delineable goods (material or legal) and, at most, a generic, coincidental kind of public sanction that would attach to any benefits-bearing legal status. At least when 'marriage' is defined and conferred by the state, the appellation carries no unique expressive value. Or so the court assumed. For only by assuming that marriage is an instrumental status could the court equate marital and civil union status.

This account of state-conferred marital status has a long history in liberal political thought. From John Locke to John Stuart Mill and contemporary scholars, liberal thinkers have tended to focus on the material side of marriage and the instrumental purpose of marital status – at least when considering the state's role therein. The focus makes sense because it allows marriage to fit easily into a liberal tradition that depicts the state as properly limited to matters of material concern, of action and behavior, not belief and meaning (Metz, forthcoming, 2007).

But, to return to *Baker*, if marital status and civil union status are the same, why create civil union status at all? Why not bestow marital status on all? Or, conversely, why not civil union for all? If the value of legally defined and conferred marital status is the sum of a delineable set of benefits and burdens, then why not avoid the perils of negotiating competing definitions of 'marriage' and simply use 'civil union' to convey these goods?

Here the subterranean incoherence in the marriage debates becomes evident. The court's explicit reasoning cannot explain the reservation of the marital label. The immediate answer seems obvious: it was a prudent political move. The court and legislature knew that a majority of Vermonters would find legal recognition of same sex *marriage* unacceptable. And so, to soften the blow, they called the same-benefits-bestowing status by another name. But the fact that Vermonters might care about the name, and the court's resulting equivocation reflects a deeper, unspoken logic. The reservation suggests that 'marriage' adds something extra to the instrumental status – something that the court seems to want *to both deny and protect*.

What is the extra value of marital status that caused the court's reluctance to embrace it fully? The *Baker* court gave only hints of the source of its ambivalence. The court's emphasis on the instrumental purposes of state control of marital status suggests that its reluctance had something to do with seeing state control of this extra value as incompatible with traditional liberal views of the proper role of the state.

The Massachusetts court took a different tack in dealing with the political and principled challenges posed by same sex marriage. In *Goodridge v. Dept. of Public Health*, the court ruled that the state's exclusion of same sex couples from the *legal status of marriage* – not just the concrete benefits attached to it -- was unconstitutional.

To many, the *Goodridge* decision corrected the contradictions of the earlier *Baker* decision by acknowledging that 'marriage' is more than an instrumental status: 'Marriage… bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family….' (*Gooodridge*, 2003, 27). Marital status is a unique kind of expressive good, the value of which exceeds the sum of the delineable benefits and burdens that attach to it. Thus, to withhold it from same sex couples would be to treat them unequally. In contradistinction to the *Baker* court, the *Goodridge* court openly embraced marital status as both an *instrumental* and, without fully explaining or defending it, as a *constitutive status*.

One might think that in acknowledging that 'marriage' carries expressive cache the *Goodridge* court answered the question raised by *Baker*: what is the extra value attached to marital status and why should the state be wary of it? Unfortunately, the court

did little more than assert the importance of this extra value. The Massachusetts court did not explain or defend fully the content of the ideals of marriage, or how these ideals affect the desired outcome. The court failed to explain how state control of the status is essential to its extra value or why this special status is essential for the state to achieve its goals. Nor did the court defend the state's capacity to effectively produce and trade in this extra-value status, or the legitimacy of its doing so. In other words, despite the fact that dissenting Justice Sosman explicitly raised the possibility, the court never explained why the state should *not* replace marital status with a universal civil union status. But the position that the state properly and necessarily defines and confers marital status is one that must be defended. Stowed away in the inarticulate confusion of contemporary debates are questions about marriage, the functions of public definition and conferral of marital status, and the role of the state therein that remain unanswered at the potential peril of basic commitments to freedom, equality and fairness.

The tensions and awkward silences in these two cases reflect a long history of the unacknowledged and unresolved challenges posed by marriage to liberal theory and practice. The challenge is this: in liberal polities marriage has long been a vital social institution firmly grounded in both sides the public/political-private/non-political divide; marriage is both a religious and a civic institution, it involves material and expressive goods, influences behavior and belief, and is quintessentially familial *and* political, personal *and* communal. How, if at all, can the liberal state support and rely on marriage without violating commitments to freedom, equality and fairness?

To answer this question we must address questions raised but often ignored in contemporary debates. First, we must elaborate the extra value attached to marital status.

What makes marital status different from civil union status? What are its products and how does it produce them? What does this extra-value status assume of those who receive it and those who bestow it?

Second, in light of answers to these questions, we must consider whether the liberal state should deal in the currency of this extra value. Should the state be in the business of defining and conferring any constitutive status and marital status in particular? What are the legitimate aims of the liberal state with regard to intimate caregiving life? Must the state control marital status in order for marriage to flourish or for the state to secure its legitimate public policy goals?

To address the first set of questions, I begin with G.W.F. Hegel. For the second set, I draw on liberal traditions governing religion-state relations and attempt to sketch a model of marriage and the state that is true to the values of liberty, equality and fairness, *and* to the very public nature and importance of marriage.

The Extra Value of Marital Status: Its Constitutive Potential

What is the extra value attached to marriage? Answering this question requires thinking about the meaning side of marriage – that is, the social, psychological and moral meaning that the institution and the status do, or are intended to, represent, inculcate and reproduce in individuals and communities. Liberal thinkers, canonical and contemporary, have tended not to consider the meaning side of marriage (Metz, forthcoming, 2007). Thus, I turn outside of the liberal tradition to Hegel. Hegel placed the social-psychological influence of social and political institutions at the center of his political philosophy. Thus, unlike many liberal thinkers, he placed the meaning side of marriage at the heart of his analysis of the institution and its place in political life.[5] His descriptions of

marriage and the functions of public recognition of the conjugal union thus help elaborate the logic implicit in the contemporary view of marriage as a constitutive institution.

To avoid confusion: I use Hegel's account of marriage for very limited purposes, more for suggestive insights about the unique social-psychological dynamics at play in the public control and exchange of marital status than for an argument about what the relationship between marriage and the state is or ought to be.[6] Hegel's full account of marriage contains elements that liberals rightly reject, including his views about women (Pateman, 1988) and, crucially for our purposes, his idea that the *state* must control marital status in order for its extra value to be realized. We can and should reject both of these elements of Hegel's account and still gain useful lessons from his description of the functions of public definition and conferral of marital status. In fact, my point is precisely this: his account helps us identify and better understand illiberal moments contemporary marriage law of polities like the U.S.

The marriage contract, Hegel argues, is different from other kinds of contracts. Its unique purpose is to facilitate the transcendence of its contractual starting points (1952, P163). Marriage starts as a legalistic agreement between two distinct individuals. Its ultimate purpose, however, is realized when these two individuals no longer see themselves in that light, as two separate parties to a contract, but rather as partners in something bigger than themselves – individually and as a couple. The initial legalism of contract is transcended when the individuals to the marriage contract understand themselves as a unit, deeply intertwined with each other and with the community that confers marital status (1952, P163, A158).

The public – and for Hegel, the legal -- definition, conferral and acceptance of marital status play integral parts in affecting this transformation. He argues that when the state confers marital status, it is not – as the instrumental view suggests -- merely tagging individuals as appropriate recipients of legal recognition, and material support. Rather, it is conveying, and is understood to be conveying, its weighty moral approval and a complex story about the meaning of marriage. The bestowal and acceptance is a communally understood performance intended to alter how all involved see themselves (1952, P164).

Hegel insists on state control of marital status for reasons of both cause and effect. Receiving marital status from the state causes citizens to experience and understand the state as the source of and guide to their true freedom (1952, A158; 1956, 422). At the same time, because citizens experience the state in this manner, the public conferral and acceptance of marital status effectively alters their self-conception *vis a vis* their conjugal partner and the state. Leaving aside the complexities, or some would say incoherence, of Hegel's apparently tautological reasoning, the useful point for our purposes is this: to transform self-understandings marital status must be bestowed by what he calls an *ethical authority,* that is, a representative of the conferring community whose commands are experienced by individuals in the community as freedom-guiding not freedom-limiting (1952, fn. 30, P176).

Traditionally, liberals have treated the commands of the state as limiting action (not belief) for the narrow purposes of insuring social order, protecting citizens from harm, and guaranteeing political fairness (Locke, 1988; Mill, 1970, 1997; Berlin, 1969; Shklar, 1989; Rawls, 1971, 1993, 2001; Dworkin, 1978; Van Parijs, 1995; Cornell,

1998). Generally, the state confers legal status for instrumental convenience, not to alter self-understanding in any deep and enduring way. Hence, we call this instrumental status. The familiar idea behind the limited state is that freedom consists, in large part, in individuals being free from interference to live according to their own design. In contrast, on Hegel's account, the state's commands are, or ought to be, experienced as freedom-guiding in the sense that the citizen understands, accepts that the commands guide her to some freedom or good beyond that which she, herself, may currently perceive (1952, P207). For an authority's commands to be experienced as freedom-guiding, then, the commanded individual must believe that the authority possesses special insight into her true good and that the authority can be trusted to guide her in that direction. The power of ethical authority rests on the belief, shared by commander and commanded, in the ethical nature of their relationship. In the case of marital status, effective ethical authority assumes shared understandings about the nature of the relationships (between the parties to marriage and between the couple and conferring community) it labels, about the purposes of the status, and, crucially, about the appropriateness of that authority's commands in matters of the most intimate nature. Recognition intended to alter self-understanding in the way, we may call constitutive recognition and the related status, constitutive status.

It is important to note that a constitutive status differs from what we might call an *instrumental plus* status, such as citizenship. It seems accurate to say the state intends to alter self-understanding when it confers citizenship status. And yet, I want to argue that this status is not a constitutive status in the sense described above. Citizenship differs from Hegel's constitutive status on three important counts. First, its aim is narrowly

limited to publicly known and, at least ostensibly, supported political purposes. Second, its object is limited to political self-understanding, as opposed to that of a constitutive status which extends even to the sense of 'sexuate' self (Cornell, 1998). Third, while affecting belief is clearly purpose of citizenship status, it is not the primary purpose. Instrumental concerns provide the initial justification for the state's creation and use of the status. Thus even an instrumental plus status does not rely on the sort of ethical community assumed by a constitutive status.

While Hegel's description of the state's commands as freedom-guiding, and the relationship between citizen and state it assumes, contrast with the liberal picture of the state, his more general claims about the functions of public recognition of marriage are familiar. Something like this is what many understand to be happening when a couple stands in front of their community – whether a collection of hippies in a northern California redwood grove, or a traditional congregation in a Catholic church -- and accepts the marital status bestowed by that community. The community's conferral and the couple's acceptance of marital status are understood as intentionally, mutually constitutive acts.[7]

I propose that this – the expansively transformative potential of marital status -- is what distinguishes 'marriage' from 'civil union.' The extra value attached to the marital title is the community's constitutive recognition, the weighty moral approval and the complex normative account of the relationship it names and that is intended to reconstitute the most intimate aspects of self-understanding. The transformative power of mutual recognition and obligation between couple and community is the special value

widely but often inarticulately attributed to marriage that feeds the ferocity of contemporary debates.

We can now see why it is especially appropriate to speak of marriage as established. Just as the 'establishment of religion' refers to the state's involvement in defining, inculcating and reproducing a particular religious worldview and institution, so the 'establishment of marriage' highlights the state's integral role in reproducing and relying on belief in a particular, comprehensive account and institutional form of intimate life and its tie to the community.

The comparison to religion suggests causes of the prevalent silences and ambivalences with regard to state control of marital status in liberal theory and practice. Hegel describes the promise of freedom as bound up in the state functioning as an ethical authority. In contrast, liberal freedom is assured when the state functions as a limited authority, protecting citizens from each other, protecting the vulnerable from harm, and supporting only those institutions, norms, and actions essential to a functioning liberal democracy. It is no wonder then that liberals have both embraced and rejected state control of marital status: at least since the rise of liberal political theory in the late seventeenth century, marriage has served as a, if not the, primary institutional home for many of any society's most important social relationships and distributive mechanisms (Stone, 1990, 1-24). In addition, it advertises unparalleled potential to integrate public and private, individual and community. Yet this potential appears to depend on qualities that the liberal state does not and ought not reliably posses. So: if marriage requires constitutive recognition from an ethical authority, yet the liberal democratic state cannot (and should not try to) effectively provide such recognition, what is to be done? Must we

choose between a healthy marital institution and liberal commitments and institutional arrangements? My answer is no.

The Case for Disestablishing Marriage

The suggestion implicit in the comparison to religion -- that there may be good reason for the state to withdraw from its pivotal role in controlling marital status – is compelling. Marriage should be disestablished. We can and should distinguish between instrumental and constitutive statuses. We can and should distinguish between the marriage and the actions, intimate associations and caregiving often, though not always, housed within its ideational folds. The state can achieve its legitimate public welfare goals – in this case, of protecting intimate association and caregiving – without defining and conferring marital status. In a diverse, liberal democratic polity freedom, equality, fairness, and *marriage itself* would be better served were marriage disestablished and an I.C.G.U. created.

Freedom and Marriage

Disestablishing marriage would be a boon for both liberty and marriage. On the most basic level, releasing 'marriage' from the hands of government would protect a unique kind of expression. Unlike under the current regime where citizens can be prosecuted for unsanctioned use of the marital title – as was polygamist Tom Green – under the proposed regime, citizens who wished to call themselves married could do so without fear of state punishment (Utah v. Green, 2001). As with baptismal status, nongovernmental authorities would confer the label. While it would carry no legal weight, marriage would still carry its constitutive potential. Call this the freedom of marital expression.

This may seem a trivial freedom, or worse, a trivializing freedom. Leaving the conjugal appellation to the whims of individual choice, one might argue, would effectively undercut its constitutive and transformative power for *all* by undermining its necessarily communal foundation. While understandable in the context where 'public' and 'state' are often conflated, this concern is misguided. If I am right about the extra value of marital status, then *state* control is not essential to its realization. In fact, it is reasonable to conjecture that the unique expressive value of the status and therefore marriage would benefit were the state to relinquish control over the institution. Like its religious kin, ethical authority depends on being chosen in one sense – i.e. not forced -- but also *not* chosen, in the sense of simply being experienced as ethical authority by its adherents. Thus, the constitutive potential of marital status is more likely to be realized or felt when the conferring authority is chosen/not chosen in this sense. Such an authority might, for some people, be a religious leader. For others an ethical authority might be the head of a cultural group, or the esteemed representative of one's family. The key to effective ethical authority in marriage is that the conferrer and recipients share the understanding that the conferrer possesses the authority to bestow and wield the resulting responsibility that their shared vision of marriage entails.[8] Non-state entities -- associations of civil society -- represent just such potential authorities. So, by releasing 'marriage' from state control into the arms of these entities, the non-establishment of marriage places control of a constitutive status into the hands of those best suited for wielding it effectively. In addition, under the proposed regime, acquiring marital status would be the ticket to one thing – the constitutive recognition of a community of shared understandings – and not to a vast array of legal and material benefits. Changing the

benefits would change the motivations for seeking the status. As many same sex couples do already, couples would acquire marital status when they wanted meaningful recognition from a community that held ethical sway in their lives (Goodstein (2004), Campton (2004). Moreover, shifting control of marital status to voluntary groups in civil society would increase the likelihood that marital status would be assumed in the context of a community of shared understandings about marriage. This improved fit between the couple's understanding of marriage and that of their conferring community could also bolster the force of the special value of marital status. By changing incentives for acquiring marital status, increasing the fit between conferring community and recipients, and invigorating cultural authorities and their diverse – and, admittedly, not always liberal, a point to which I return shortly -- accounts of marriage, the proposed regime would benefit marriage by invigorating the constitutive force of the status.

Disestablishing marriage would guard freedom in another way: it would protect particularly vulnerable individuals from unnecessary state coercion, exclusion, and undue punishment. Just as the non-establishment of religion insures that a citizen's right to vote cannot depend on her religious affiliation, so too the disestablishment of marriage would guarantee that government-provided benefits for intimate caregiving would not hinge on an individual's public acceptance of a particular vision of marriage. Martha Fineman persuasively shows that when the state uses marital status as the primary avenue through which to support caregiving, it significantly disadvantages many actual caregivers. Social welfare policies aimed at discouraging unwed, single-motherhood are powerful examples of this dynamic. Not only do such policies perpetuate the view that single motherhood is bad in itself and the cause of a great many social evils, but they actually make it more

difficult to be a successful single mother (Fineman, 1995, 100-142). By disentangling marriage from state support of intimate caregiving, the state would no longer unduly burden caregivers who chose not to clothe their relationships in the thick, normative dressing of marriage. [9]

Freedom of intimate association would also benefit under the proposed regime. In the American constitutional tradition, for instance, marriage has long served to justify protection of this freedom (Griswold v. Connecticut, 1965; Loving v. Virginia, 1967; Zablocki v. Redhail, 1978; Bowers v. Hardwick, 1986; Cornell, 1998, 37-45). And yet, as Drucilla Cornell persuasively argues, the marital origins of this protection obscure the wider ethical and political importance of a protected imaginary domain (Cornell, 1998). Doing away with the marital category would be one crucial step in dislodging marriage from its seat as the reigning proxy for relationships that need and deserve such protection. The move would help highlight the fact that all human beings, married or not, heterosexual, homosexual, single, paired, sexual or celibate, need a space within which to imagine and enact their 'sexuate' lives.

Care, Equality and the Case for I.C.G.U.

Disestablishing marriage might well bolster the meaning side of the institution, and protect important kinds of expression and association, but what about equality and fairness -- especially with regard to the material side of marriage, and the legitimate public welfare concerns that the state currently addresses through marriage? Does liberal commitment to liberty outweigh those to equality and fairness?

Equality, fairness, and protecting the vulnerable are no less important than liberty. Further, any account of marriage and the state that ignores the historical connections

among marriage, intimate caregiving, and inequality (gender, sexual, and familial) would be inadequate. Fortunately, disestablishing marriage and creating an I.C.G.U. status would do better by these commitments than do legal regimes common in contemporary liberal democracies.[10] Leaving the definition and conferral of marital status to civil society is no different from leaving the control of baptismal status to civil society. In neither case do we assume that the state thereby withdraws from its role in protecting the vulnerable and promoting equality. What we *do* assume is that the best way to balance liberty, equality and fairness in a diverse society is for the state to be concerned primarily with regulating action, not expression or thought, and then only to the extent necessary to protect other citizens from harm, or to guarantee a reasonably fair distribution of the benefits and burdens of social cooperation. We can and should distinguish between the meaning side of marriage (the normative accounts expressed by 'marriage' that infuse the institution with particular meaning), and the material side of marriage (the associated goods and relationships—divisible goods (money, property), practices (labor distribution), and all forms of intimate caregiving).

Fairness (or justice), equality, and prudence recommend state involvement with elements of the material side of marriage, and intimate caregiving relationships more generally. Justice, because care is essential, always already given, and risky. Equality, because intimate caregiving has long been the site and source of significant but remediable social and political inequalities. Prudence, because in our society care is most often and most effectively given and received in intimate caregiving relationships.

To defend this position, I must say a bit about care: care is essential because of our inevitable vulnerability and hence mutual dependency (Tronto, 1993; Kittay, 1999;

Hirschmann, 1992). All human beings experience periods – some long, some short, some predictable, some unpredictable – when they are incapable of meeting their own needs. Human beings are, first and foremost, *interdependent,* not – as long advertised by much of Western political thought – independent. Since human survival and flourishing rely on care, any time one human being exists and interacts with another, we know that care has already been exchanged. This means, as theorists of care argue, that the real political and ethical questions with regard to care are not *whether* it happens, but *how*: by whom, to whom, in what manner, and with what support?

These questions are especially pressing because giving care is risky. The chain of interdependency extends beyond the caregiver and dependent, for providing care itself creates vulnerability: care givers must expend resources on care receivers that they might otherwise use to care for themselves. Thus, caring for vulnerable people generates its own vulnerability. Fineman calls this 'derivative dependency' (1995, 8). Hence, protecting the utterly dependent requires supporting caregiving and protecting care-givers.

Intimate care is a special but very common variety of care. In our society, much of the survival and nurturance care takes place in intimate relationships, and this is good: stable, intimate caregiving relationships are uniquely consonant with human attachment, particularity, diversity and freedom. (Roughly, and ideally, these relationships are characterized by a thorough familiarity and primarily by non-contractual motivations. They involve unmonitored, unpredictable, and rarely if ever strictly reciprocal exchange of diverse and often incommensurable goods – psychological, social, spiritual, physical, financial and material goods. Intimate care often takes place in relationships that extend

over long periods of time in shared habitation. Intimate caregiving units come in many forms (Stacey, 2003, 338; McClain, 2004, 2006; Wheeler, 2005): de facto parent(s)-child(ren); husband-wife; long-term, cohabitating hetero- and homosexual lovers and partners; lesbigay units; non-sexually intimate, adult units or groups.) Because intimate care is typically unpaid, unrecognized, under-valued and not seen as producing marketable skills, in any market-based economy the risks associated with it are especially severe. Feminists have long shown that these risks are predominantly shouldered by women and that this unequal and unrecognized distribution of un(der)-paid but essential labor is a linchpin of gender inequality.[11] Finally, notice that even fit adults need care, that they frequently give and receive care in the context of intimate relationships, and that these relationships too involve risk.

In short, care is essential for the survival and flourishing of both individuals and society. But giving care, especially intimate care, in a market-based economy, is risky. To insure that intimate care is given – at all, and well -- and that its benefits and burdens distributed fairly, the state rightly protects intimate caregiving.

With the distraction of marriage is removed, it becomes clear that the real challenge with state involvement in intimate affiliations is how to balance liberty – and especially privacy of intimate association – against equality and just caregiving arrangements. How do we protect freedom of thought, expression and action (in intimate association) and, at the same time, insure that the burdens and benefits of caregiving are realized and distributed fairly? I propose an intimate caregiving union status (I.C.G.U.) best balances these demands. It does so by limiting the object and intent of state action to the material and instrumental. The distinctions between material and meaning sides of

marriage, and instrumental and constitutive status may be imperfect. But they are recognizable. These distinctions make civil union acceptable to many who are unwilling to conscience same sex marriage. They underpin some in the gay community's tepid acceptance of civil union. The difference may be matters of intent and degree, but for reasons I hope I have made clear these matters do and should matter.

In many ways, an I.C.G.U. status would look a lot like marital status today (Metz, forthcoming, 2007). It would afford legal recognition from which would flow various legal presumptions (i.e. lines of rights and responsibility), protection (i.e. from certain types of intrusion), and material benefits (i.e. tax benefits, etc.). As with marital status now, an I.C.G.U. status would be defined, conferred, and if necessary, dissolved by the state. Unlike marriage, however, I.C.G.U. would be expressly tailored to protecting intimate care in its various forms. So, for example, the status would reflect assumptions of longevity and resource sharing. Also, to protect the norms of unmonitored reciprocity and to protect caregivers, at dissolution property would be divided to achieve substantive post-dissolution equality. Crucially, I.C.G.U. status would be designed with instrumental not constitutive purposes in mind. Any special expressive significance attached to I.C.G.U. status would be incidental (as opposed to the intentionally mind-altering significance of a constitutive status).

Disestablishing marriage and creating an I.C.G.U. status would better serve equality, fairness, and care than do legal regimes currently in place in most liberal democracies. First, this change would shift the focus of public discussion from interminable disagreement about the definition of marriage to questions about the importance, nature and distribution of intimate care. Exposing the real costs and benefits

of caregiving would increase the chances that they would be distributed fairly and that actual caregivers would be supported adequately. Defining caregiving would undoubtedly evoke controversy. But controversy is inevitable and is far better than obfuscating silence. In addition, a civil status expressly tailored to protecting intimate caregiving would be more appropriately crafted and accurate in its target. Therefore, it would be more effective than 'marriage' as a tool for realizing the legitimate public welfare goals of supporting intimate caregiving broadly defined (and therefore the material side of marriage as well). Similarly, the proposed changes would make it easier for the state to simultaneously meet its legitimate public welfare goals and realize the aspiration to treat citizens equally. Replacing the imprecise and distracting prism of marriage as the primary means for supporting intimate caregiving with a narrowly focused instrumental status would increase the chances that all actual caregivers would be served equally by the law. Such a status would be less likely to exclude and punish *actual* caregivers and therefore, actual caregivers would be equally served.

The proposed changes would benefit gender equality. By bringing the reality of caregiving to the fore of public discussion, disestablishing marriage would shine light on the derivative vulnerabilities and gender inequalities often created by current intimate caregiving arrangements. No longer hidden behind the veil of marriage, questions of how the unpaid elements of intimate caregiving are distributed, at what cost and benefits, and to whom, would move inexorably to the center of public discourse, and thus, increase the chances that the costs and benefits would be distributed fairly.

Three Objections

My proposal is likely to elicit three important objections. The first objection concerns equality: if marriage is left to associations of civil society, do we not run the risk of pushing further from public scrutiny the inequality and oppression often shrouded behind the conjugal veil? For instance, would not disestablishing marriage effectively allow polygamy and therefore promote gender inequality?

This worry invites three responses: First, yes: were marriage disestablished, some groups would openly sanction polygamous marriage and undoubtedly gender inequality would flourish in many of these unions. Even more: if these groups both fit and chose to assume the socially determined but functionally defined prerequisites of an I.C.G.U. status, they would gain support and protection from the state. Crucially, however, they would receive support by virtue of their willingness to enter into the civil status, with its protection and responsibilities for *caregiving* activities, not by virtue of being *married*. In this sense, my proposal promotes gender inequality no more than do current regimes that permit but do not – ostensibly -- promote traditional (gendered) marriage. Second, gender equality would benefit under the proposed regime because the increased recognition of and support for caregiving would insure that even women who opted for polygamous or, less radically, traditional gendered marriages would be less vulnerable as a result of gendered division of power and labor within their families. Still, the critic might say, by increasing the power of potentially illiberal communities the proposal promises to increase their sway over the way people *think* and therefore, behave, and even on your own account, this is no small power. [12] To this, I offer my third response: we must balance liberty and equality. Even with this very real danger, I believe that proposed model does a better job balancing these two commitments. It increases liberty by limiting

the objects and intent of state action (along lines that have deep roots in liberal theory and practice) without relinquishing influence over the most significant sources of inequality.

The second objection accepts that marriage is a constitutive status, that it conveys a comprehensive normative account of the relationships it labels, and that its function is to alter behavior and belief. Self-identified liberal advocates of this position think, however, that the state *should* be in the business of defining, conferring and privileging this status because, they believe, it is a uniquely effective mechanism for supporting families. They admit that such an approach puts the state in the role of robust ethical authority, but are untroubled by this fact. After all, they would say, even an I.C.G.U. status casts the state in the role of ethical authority. These scholars tend to be untroubled by the exclusions caused by using marriage to convey social support for intimate caregiving. Against what they see as an 'anything goes' policy, they advocate one that promotes caregiving in a particular form.[13]

My proposal is neither an 'anything goes' policy, nor is it grounded on libertarian intuitions. Both marriage and I.C.G.U. status reflect value judgments. In defining and conferring either status the state is acting in a way that reflects particular political commitments. This is true, and it is good. As I argue, there are compelling reasons for the state to recognize, protect and support intimate caregiving. The case against state control of marriage is not that it reflects a substantive commitment, but rather that it entangles the state in an institution, the unique and perhaps primary purpose of which is to alter self-understanding in ways that go beyond what it necessary to the legitimate public welfare concerns of the state. State actions that reflect political commitments are not the problem; casting the state in the role of robust ethical authority is. Instrumental and constitutive

statuses differ on precisely this count. I agree that 'marriage' matters: it carries a unique value, beyond the material and legal benefits that attach to it, even beyond the generic expressive goods that comes with any legally privileged position. To ignore this extra value is naïve and detrimental for marriage, equality, liberty and fairness. But marriage is not the only or even the best means by which stable caregiving relationships can be understood and protected. It is, for the potential benefits to those who are moved by marriage, an institution that should be afforded public support and protection. From civil society it can receive its constitutive recognition. From the state marriage, and all other caregiving relationships can and should receive instrumental support. If state-controlled marital status were the only way for the state to recognize and support intimate caregiving, this objection would be more compelling. However, I have shown that this is not the case. On the contrary, we have good reason to believe that disestablishing marriage and creating an I.C.G.U. status would bolster both marriage and intimate caregiving.

The third objection claims the opposite of the second: 'marriage' can function as an instrumental status and therefore that the state is justified in using to promote legitimate public welfare ends. As far as the state is concerned, this position implies, 'marriage' is simply shorthand for 'those who commit to caring for each other and for their offspring.' Whether individuals attach more normative significance to the title is irrelevant as far as the state is concerned. The conferring power neither assumes ethical authority, nor aims to reconstitute the self-understandings of those labeled. Given its historical effectiveness and current popularity, this objection holds, the state should

continue to support and use marriage, albeit in ways that bolster gender equality and incorporate same sex couples.[14]

In essence, this is the position with which we started in *Baker* and *Goodridge.* But, as I argue, the awkward silences of these cases both highlight and obscure the fact that 'marriage' is loaded with a unique kind of meaning. Even if the explicit purposes of state control of marital status are instrumental, the history of marriage in Western societies means that the status is imbued, unavoidably, with a constitutive purpose. Politicians say, 'civil union, yes; same sex marriage, no,' because 'marriage' carries unique social meaning. Why use a label so obviously laden with diverse, incommensurable, and deeply normative meanings if it is meant to serve only as a convenient proxy for a set of instrumental rights, benefits and obligations? If the state's reasons for controlling marital status are instrumental, then a label that more directly identifies these commands and expectations is appropriate. To use the appellation 'marriage' is to imply more than a straightforward set of legal and material benefits. An I.C.G.U. status has the advantages of status without the problems of constitutive status and without leaving adult intimate caregiving affiliations to the drawbacks of contract (Pateman, 1988; Shanley, 2004).

Conclusion

For a political theory that relies on distinguishing between public/political and private/non-political matters, marriage is inherently disruptive. And yet, liberals have been loath to confront some of its most serious challenges. As dramatized by the two court cases with which we began, this avoidance has facilitated confusion and harmful exclusions. *Baker* and *Goodridge* invite us to unpack the extra value attached to marital

status. Only then can we decide whether the state should control and use marital status. Our inquiry into the functions of public control of marital status yielded the first of three novel claims presented here – the distinction between instrumental and constitutive statuses. At least in the dominant view -- as expressed in public debates in the U.S. and elsewhere -- marriage is best understood as a constitutive status. Whether or not any particular lawmaker intends it, marital status carries with it the function of altering the deepest self-understandings of those it labels, of cultivating a tie between the couple and the community that extends even into their sense of 'sexuate being' (Cornell, 1998). The second generalizable lesson offered here is that intent can be buried in the history of an institution, and still deeply relevant to political decisions. Awkward silences and confusions in public policy and debate may be the first indication of this intention.

The third claim I have tried to defend is that intent matters. Where a primary function of government action is to influence the beliefs and self-understanding of citizens, liberal commitments to freedom and equality demand special vigilance. Without claiming that government can or should attempt to avoid influencing belief completely, the position defended here is that liberty, equality, and prudence recommend that these moments be clearly identified, not hidden underneath public confusion or inarticulacy, and that they have narrowly political purposes.

In the case of marriage, these three insights highlight the virtues of moving toward full disestablishment. This policy change would give freedom wider protections while at the same time, benefiting equality, fairness and marriage itself.

The relevance of the analysis and argument presented here extends beyond marriage to a wide range of concerns in contemporary political thought. From questions

about the place of religious law in liberal democracies, to cultural group rights, to debates about same sex parents and adoption policy, these considerations should prove illuminating. To give freedom widest berth without abandoning actions necessary to protect equality and fairness, we must be attuned to and critical of buried intentions and effects of government action. As liberal democratic polities become increasingly diverse and religion reemerges as a significant force in the political life of these polities, this task becomes all the more pressing.

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8,329 words, excluding endnotes.
Date resubmitted: March 22, 2006

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[1] Lisa Duggan also uses this language. She and I arrive at similar policy conclusions, though the overall logic and focus of our work are distinct (Duggan, 1994, 2004).

[2] See, for example Belgium, France, Britain (in Boele-Woelki, Katharina, and Angelina Fuchs, eds., (2003), and Hamilton, Carolyn, and Alison Perry, eds., (2002)). I thank Matthew Guarnieri for research assistance on this topic.

[3] For a list of the over 1,400 material and legal benefits that accrue to marital status in the state of Massachusetts, see: http://www.glad.org/rights/PBOsOfMarriage.pdf.

[4] See, for example: Boele-Woelki, Katharina, and Angelina Fuchs, eds., (2003), and Hamilton, Carolyn, and Alison Perry, eds., (2002).

[5] Moreover, through his influence on prominent nineteenth century American legal scholar, Francis Lieber – whose writings provided the philosophical basis for the seminal *Reynolds* case that outlawed polygamy in America – Hegel had a direct influence on the liberal regimes he criticized (Robson, 1942, 227-249; Cook and Leavelle, 1943, 213-236; Straussberg; 1997).

[6] For a similar approach to using Hegel, see Cornell (1998), 100-102.

[7] I thank Peter Steinberger for help in thinking through the importance of intentionality here.

[8] For those skeptical about the claim that informal, secular groups will produce ethical authorities capable of conferring effective constitutive recognition, consider a recent article in the New York Times Styles section: “Need a Minister? How About Your Brother?” (Lehmann-Haupt, 2003, 9.1.).

[9] Though Fineman does not use the terms of disestablishment, her policy conclusion is essentially the same.

[10] See: Boele-Woelki, Katharina, and Angelina Fuchs, eds., (2003), and Hamilton, Carolyn, and Alison Perry, eds., (2002).

[11] See, Okin (1989, chapter seven). Okin calls marriage the linchpin of gender. On her compelling description, the division of labor is a key part of what makes it so.

[12] I thank one of the anonymous reviewers of this article for making this concern especially vivid.

[13] For example, Shell (2004). Linda McClain defends state control and use of marital status for some of these reasons. She, however, expressly rejects many of the exclusions – especially, of same sex marriage – that Shell accepts (McClain, 2006).

[14] I take Linda McClain’s powerful argument in *The Place of Families* to fall somewhere between these two objections.