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## MARRIAGE IN AMERICA

Mark E. Brandon \*

PRISCILLA YAMIN, *AMERICAN MARRIAGE: A POLITICAL INSTITUTION* (2012). Pp. 224. Hardcover \$59.95.

ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* (2012). Pp. 256. Hardcover \$99.00.

In Act II of *Our Town*, the sage and omniscient Stage Manager presides over a wedding between George and Emily, the play's two young central characters.<sup>1</sup> As the ceremony closes, the Stage Manager suspends the action and speaks directly to the audience:

I've married over two hundred couples in my day. Do I believe in it? I don't know. M.... marries N.... millions of them. The cottage, the gocart, the Sunday afternoon drives in the Ford, the first rheumatism, the grandchildren, the second rheumatism, the deathbed, the reading of the will,--Once in a thousand times it's interesting.<sup>2</sup>

For reasons that Thornton Wilder himself might enjoy were he alive today, marriage has indeed become interesting. The central reason, of course, has to do with debates over the legal and constitutional status of same-sex marriage. But it has to do also with a range of other policies and practices that implicate marriage—polygamy, polyamory, and access to public assistance, to name just three. At bottom, these legal (and political and societal) debates have asked a common question: what forms of family should society embrace, or reject, through law? Behind this question is another: if we embrace certain forms besides heterosexual monogamy, what are the limits to the forms of family we shall be obliged, as a matter of constitutional logic, if not of morality, to respect?

Priscilla Yamin's *American Marriage: A Political Institution*<sup>3</sup> and Elizabeth Brake's *Minimizing Marriage: Marriage, Morality, and the Law*<sup>4</sup> speak to these questions in useful and interesting ways, albeit from different angles. Yamin provides an

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1. THORNTON WILDER, *OUR TOWN* (1938).

2. *Id.* at 96.

3. PRISCILLA YAMIN, *AMERICAN MARRIAGE: A POLITICAL INSTITUTION* (2012).

4. ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* (2012).

historical investigation that is situated in a larger literature in political science concerning American political development. Brake's book presents an argument that draws from moral philosophy and liberal political theory. Neither is concerned with legal or constitutional doctrine, strictly construed, but each contributes to our understanding of the status, forms, and functions of marriage—and their implications for law and policy.

Some observers might marvel that these are even live issues. Has not the monogamous heterosexual marital family been an essentially uncontested element of civilization for millennia? Has it not been so in the United States from the beginning? How did it come to pass that the meaning of marriage is so unsettled? Part of the answer to these questions is historical. As it happens, the shape and content of family have been contested in North America since before the Constitution and continued to be so even after the Constitution was ratified. Another part of the answer has to do with the ethical DNA of the American constitutional order—combining democracy, liberty, and equality in ways that have altered society, politics, and law.<sup>5</sup>

#### I. A POLITICAL INSTITUTION?

As the title suggests, Yamin's book argues that marriage is a "political" institution. How so? Her initial answer is that marriage "functions via imperatives, norms, and practices that are produced by past institutional developments."<sup>6</sup> This is a bit cryptic, not to mention wide-ranging. Less cryptically, Yamin says that marriage is political in several additional senses. It is both a subject and a product of political debates, even as it has influenced those debates.<sup>7</sup> It has been involved in nation-building.<sup>8</sup> It has been central to debates over inclusion, citizenship, and the status of persons, especially persons or groups who are subordinated by race, gender, class, or sexual orientation.<sup>9</sup> Most of all, says Yamin, marriage is political because it has been repeatedly implicated in debates involving liberal equality, with rights on the one hand and "feudal" hierarchy and obligations on the other.<sup>10</sup> To show how family is political in these ways, Yamin focuses on five discrete episodes of American politics—two from the late nineteenth and early twentieth centuries and three from the 1960s forward.<sup>11</sup>

The first episode, during the Civil War and Reconstruction, involved the redefinition of the rights and status of former slaves and their emerging relations with whites and white culture.<sup>12</sup> Slaves had no legal right to marry nor to maintain familial relations.<sup>13</sup> Beginning with emancipation, former slaves acquired the right

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5. For studies on both fronts, see Nancy Cott's excellent treatment in NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000) and MARK E. BRANDON, *STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER* (2013).

6. YAMIN, *supra* note 3, at 16 (2012).

7. *See id.*

8. *See id.*

9. *Id.* at 11.

10. *Id.* at 4-5.

11. *Id.*

12. *Id.* at 23.

13. *Id.*

to marry.<sup>14</sup> The national government, however, emphasized the obligations that attached to the right.<sup>15</sup> Hence, in “contraband” camps run by the Union Army and in programs of the Freedmen’s Bureau, the nation began to teach former slaves that monogamous marriage itself was an obligation, rooted in true religion, and that within marriage certain rules applied: sexual fidelity, gendered hierarchy, and the husband-father’s obligation to support his family materially through productive labor.<sup>16</sup> In these ways, family promoted moral and economic responsibility, which in turn supplied a foundation for citizenship.<sup>17</sup> Around the same time, however, states limited the right to marry by enforcing prohibitions against interracial marriage.<sup>18</sup> These prohibitions were not new (nor were they confined to the South, though Yamin largely neglects this), but they acquired greater urgency after the Civil War.<sup>19</sup> They promoted the semblance of racial purity and with it, racial hierarchy.<sup>20</sup> Following Nancy Cott, Yamin observes that this regime contracted the sphere of black citizenship by dividing the political and legal spheres, which provided enforceable rights, from the social, which imposed stark racial limits on privilege.<sup>21</sup> She also claims that anti-miscegenation policies reinforced patriarchy;<sup>22</sup> however, in my view, she does not demonstrate persuasively the mechanism for this relationship.

The second episode was in the Progressive Era, spanning the late nineteenth and early twentieth centuries.<sup>23</sup> With the rise of industrialization, urbanization, and immigration, various Progressives were concerned about problems related to social cohesion, the “vigor” of the population, and cultural continuity.<sup>24</sup> Yamin observes that states and the nation adopted three sorts of policies to deal with these problems.<sup>25</sup> Marriage was implicated in all three.<sup>26</sup> First, by 1907 most states had enacted laws not only providing for public licensure of marriages, but also requiring that marriages be conducted in a public rite by a person authorized to preside over the exchange of vows.<sup>27</sup> (Yamin says the presiding officer was an “officer of the state,”<sup>28</sup> but this overstates the connection between the state and the presiding officer, who was typically a religious figure.) Second, states began enacting eugenics laws that, *inter alia*, prohibited certain persons from marrying: the feeble minded, epileptics, lunatics, and habitual criminals.<sup>29</sup> The animating assumption was that certain traits

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14. *Id.*

15. *Id.*

16. *Id.* at 23-24.

17. *Id.* at 25-26.

18. *Id.* at 36.

19. *Id.* at 37.

20. *Id.* at 39.

21. *Id.* at 39; *see also* COTT, *supra* note 5.

22. YAMIN, *supra* note 3, at 34.

23. *Id.* at 47.

24. *Id.* at 47-48.

25. *Id.* at 48-49.

26. *Id.* at 49.

27. *Id.* at 51.

28. *Id.*

29. *Id.* at 55-60.

were genetically transmissible.<sup>30</sup> The fear was that the widespread transmission of these traits would debase society and dilute the genetic stock of the dominant white race.<sup>31</sup> (Yamin describes the dominant racial identity as Anglo-Saxon.<sup>32</sup> There is no denying identity's salience in some circles, but it was plainly too narrow for a society that had long been populated with whites from "non-Anglo-Saxon" stock.) Third, the nation adopted policies of naturalization and expatriation that promoted racial exclusion from the polity and maintained masculine supremacy in households.<sup>33</sup> Under the law, a foreign wife of a male citizen took the citizenship of her American husband to ensure that all family members had the same national identity as the male head-of-household.<sup>34</sup> Officials began to worry that some were using this system for immoral purposes—to import women for prostitution, not marriage.<sup>35</sup> This worry was especially strong toward women who emigrated from China.<sup>36</sup> Technically, they could not become citizens because of various exclusionary laws. But their children who were born in the United States could.<sup>37</sup> This, too, was perceived to be a threat to the racial integrity of American society.<sup>38</sup> Beginning in 1907, any American woman who married a foreigner took her husband's nationality and involuntarily forfeited her own U.S. citizenship.<sup>39</sup>

In discussing the first and second episodes, Yamin makes two broad claims. The first is that each episode was part of a larger move toward a nationalist sensibility and the nationalization of policies toward marriage.<sup>40</sup> This is a modest overstatement, in my view. There is no denying that the policies and practices of the Union Army and the Freedmen's Bureau were "national" in the sense that they were carried out by agents of the nation. The same is true of policies of naturalization, exclusion, and expatriation. Moreover, there is no denying that most Progressives were ardent nationalists and that many of their concerns pertained to a national society. That said, the bulk of legal regulation of marriage remained in the hands of states, subject to whatever constitutional limits the courts might impose. The concerns that drove state policy were persistently, though not exclusively, localist. Yamin's second claim is that the story of policies during the periods under review is a story in which a view of marriage as private contract was gradually supplanted by a view of marriage as a public obligation, with publicly enforced obligations and restrictions, which served to connect persons to the state.<sup>41</sup> This, too, is an overstatement, in my view. To be sure, marriage was an institution both private and public in character, but these twin elements were present from the moment that marriage

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30. *Id.* at 56.

31. *Id.* at 57.

32. *See id.* at 58.

33. *Id.* at 61.

34. *Id.*

35. *Id.* at 62.

36. *Id.*

37. *Id.* at 63.

38. *See id.* at 66.

39. *Id.*

40. *See generally id.*

41. *Id.*

became regulated by law, which occurred well before the United States came to be a corporate entity. With these two caveats, Yamin's discussion is apt and interesting.

The last three chapters of the book consider how the threads of these two episodes extended through the latter half of the twentieth century and into the first decade of the twenty-first.<sup>42</sup> The 1960s and 1970s were a time of social and political ferment.<sup>43</sup> Three issues were hallmarks of that period: the movement for racial equality, the war on poverty, and the women's movement.<sup>44</sup> Yamin shows that marriage was implicated in all three. To illustrate, Yamin discusses President Johnson's commencement address at Howard University in 1965—a speech written by Daniel Patrick Moynihan, who had just completed his report on *The Negro Family: The Case for National Action*.<sup>45</sup> In the speech, as in Moynihan's report, Johnson noted that the challenge of civil rights for blacks was to move from formal legal and political equality to social and material equality in fact.<sup>46</sup> One impediment to achieving the latter forms of equality, he said, was the black family, from which husbands and fathers were frequently absent.<sup>47</sup> The solution was to bring husbands and fathers back into black families, to help provide the economic independence that could underwrite enjoyment of the full fruits of citizenship.<sup>48</sup> Critics argued that Johnson and Moynihan were making marriage obligatory, as if as a prerequisite to citizenship, and, in so doing, were forcing blacks into a white model of family.<sup>49</sup> As I read her, Yamin agrees with the critics. On a second front, the Supreme Court famously held in *Loving v. Virginia*<sup>50</sup> that states' prohibitions on interracial marriage were unconstitutional.<sup>51</sup> In doing so, the Court declared that “[m]arriage is one of the ‘basic civil rights of man.’”<sup>52</sup> Yamin argues that, because *Loving* did not alter the definition of marriage, it “reinscribed . . . the primacy of the white family as the ideal structure,” “domesticated” black civil rights, and conditioned blacks' inclusion in the polity on their participation in monogamous marriages.<sup>53</sup> In my view, Yamin does not adequately explain or justify these claims.

Her discussion of the women's movement is quite effective. In a manner of speaking, marriage was traditionally obligatory on women, both as a cultural matter and to some degree as an economic matter, too. In marriage, women pursued their highest calling—the care of home and the propagation and care of children—subject to the command, control, and (hopefully) protection of their husbands. For obvious reasons, feminists viewed this traditional, male-headed, procreative mar-

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42. *Id.* at 17-19.

43. *Id.* at 75.

44. *Id.* at 76-78.

45. *Id.* at 78-79.

46. Lyndon B. Johnson, President of the United States, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965).

47. *Id.*; YAMIN, *supra* note 3, at 78-81.

48. See Johnson Speech, *supra* note 46.

49. YAMIN, *supra* note 3, at 81-82.

50. *Loving v. Virginia*, 388 U.S. 1 (1967).

51. *Id.* at 12.

52. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

53. YAMIN, *supra* note 3, at 93.

riage not as a vehicle for emancipation and fulfillment, but as an element of patriarchal oppression. Better, liberal feminists argued, to reform the institution to make it suitable for genuine emancipation for women. Even better, insisted radical feminists, to abolish marriage and family altogether and hence to liberate women entirely from the obligation.

Notwithstanding her earlier claim that *Loving* implicitly retained a notion that marriage was obligatory,<sup>54</sup> Yamin notes in a subsequent chapter that *Loving*, combined with two later decisions of the Supreme Court, reflected the view that marriage is “a right and a matter of individual choice.”<sup>55</sup> If so, two national policies in the 1990s attempted to ensure that the scope and content of the right were subject to regulation and limitation. The first was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”),<sup>56</sup> which, in the words of then-presidential candidate Bill Clinton, aimed to “put an end to welfare as we have come to know it.”<sup>57</sup> Conservative critics of welfare argued that the relative absence of marriage, and with it the rise of illegitimacy, were a primary cause of poverty, which became entrenched because of intergenerational reliance on welfare.<sup>58</sup> Technically, this claim was not solely about black families, but the assumption, reinforced by demographic data, was that the trends were especially strong among African Americans. There is no doubt that conservatives of the 1990s, unlike Moynihan and LBJ in the 1960s, sought to make marriage mandatory for the poor—or at least for many who received public assistance. As enacted and signed by President Clinton, PRWORA included a lifetime limitation of five years’ public assistance (to limit intergenerational dependence on welfare) and provisions facilitating the establishment of paternity for children born to unmarried mothers (as a step toward making fathers take responsibility for their children so that government would not have to do so).<sup>59</sup>

The second policy was the passage in 1996 of the Defense of Marriage Act (“DOMA”),<sup>60</sup> which attempted to ensure that marriage between persons of the same sex was neither obligatory nor a right.<sup>61</sup> DOMA regulated marriage in two ways. In § 2, it provided that no state is required to recognize or respect a marriage performed in any other state.<sup>62</sup> In § 3, it defined “marriage” for the purposes of federal law as consisting solely of the union of one man with one woman.<sup>63</sup> (In June 2013, the Supreme Court held that Section 3 was unconstitutional.<sup>64</sup> Yamin’s book was released

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54. See *Loving*, 388 U.S. 1.

55. YAMIN, *supra* note 3, at 102-03. The later decisions were *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Turner v. Safley*, 482 U.S. 78 (1987).

56. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-93, 110 Stat. 2105 (1996).

57. Bill Clinton, Governor of Arkansas, Remarks to Students at Georgetown University: The New Covenant: Responsibility and Rebuilding the American Community (Oct. 23, 1991).

58. See YAMIN, *supra* note 3, at 131.

59. Personal Responsibility and Work Opportunity Reconciliation Act § 408.

60. Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2149 (1996).

61. See *id.*

62. *Id.* at § 2.

63. *Id.* at § 3.

64. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

before the Court's decision.) Yamin is clearly correct that DOMA was Congress's (failed) attempt to keep contests over same-sex marriage in political domains instead of in the courts and to nationalize a presumption against the legality of same-sex marriage.<sup>65</sup> Her treatment of DOMA as an episode in the "culture war" over marriage makes perfect sense. But I'm not sure I fully agree with some lessons she draws from DOMA. She says, for example, that DOMA "plac[ed] certain groups outside the boundaries of the nation,"<sup>66</sup> and "DOMA pulled marriage out of the realm of private decision . . . and placed it firmly in the public realm."<sup>67</sup> There may be something to those claims, but they seem overstated. Nor, I think, does it make sense to think of DOMA as "starkly reveal[ing] the tension between obligations and rights."<sup>68</sup> Still, Yamin's discussion of the politics of DOMA is illuminating.

Of course the culture war did not end with the passage of DOMA. If anything, it might have intensified as gays and lesbians pushed more intensively for the right to marry, and cultural conservatives battled for "the soul of the nation."<sup>69</sup> On the latter front, Yamin considers the "marriage movement"—a political movement to resurrect a "marriage culture," a culture that recognizes, in the words of George W. Bush, that marriage is one of "the unseen pillars of civilization."<sup>70</sup> From a political perspective, one of the notable, and ironic, aims of this movement has been to enhance the legal authority of the nation, albeit to promote marriage, reduce divorce, and prevent births outside of marriage.<sup>71</sup> These efforts succeeded in allocating a non-trivial amount of tax money to the Healthy Marriage Initiative, administered by the federal Department of Health and Human Services.<sup>72</sup>

On the other side of the cultural divide has been the movement for what has come to be known as marriage equality.<sup>73</sup> This movement has deployed resources to promote political change through state legislation and to litigate legal and constitutional decisions in state and federal courts.<sup>74</sup> As mentioned, the Supreme Court struck down one of the central provisions of DOMA during the 2012 Term.<sup>75</sup> But this was not the sole victory for proponents of same-sex marriage. To date, nineteen jurisdictions in the United States, including the District of Columbia, recognize same-sex marriage.<sup>76</sup> Yamin says that the joinder of claims between cultural conservatives and proponents of marriage equality demonstrates that "marriage is the only site in which discussion of state obligation versus individual obligation is found."<sup>77</sup> This again overstates the situation. But it is clear that marriage is one of

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65. YAMIN, *supra* note 3, at 117.

66. *Id.* at 118.

67. *Id.* at 116.

68. *Id.* at 118.

69. *Id.* at 122.

70. *Id.* at 122.

71. *Id.* at 126.

72. *Id.* at 133-36.

73. *See id.* at 138.

74. *Id.* at 136-40.

75. *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

76. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited Jan. 6, 2014).

77. YAMIN, *supra* note 3, at 146.



the important issues around which conversations about the “collective national life” of the country are being hashed out. Yamin helps us see how that is so, even if the scaffolding of rights versus obligations cannot sustain all of the weight she is placing upon it.

## II. MINIMAL MARRIAGE

Elizabeth Brake’s important book intelligently and unflinchingly contributes to the nation’s conversation about marriage. As noted above, she sees her role not as a foot soldier in the culture war, nor even as a proponent of one or another constitutional position, but as a moral and political philosopher. Her philosophical perspective is liberal, not radical, though her views will seem radical enough for most people. Brake begins by asking two skeptical questions: Why is marriage privileged over other companionate relationships? And why, in privileging marriage, does law prescribe a one-size-fits-all arrangement for those who would enter into it?<sup>78</sup> Her answers to those questions lead her to embrace what she calls “minimal marriage.”<sup>79</sup> To understand part of what motivates her embrace, it makes sense to revisit a debate from the early twentieth century between two schools of human psychology. Family was central to both.

On one side was Sigmund Freud, who famously argued that human beings are saddled with two innate drives: aggression and sex.<sup>80</sup> Each resides psychically in the id and, in a slightly refined way, the ego. According to Freud, achieving and maintaining civilization depends on the suppression of these drives in a way that inhibits the interests of the individual for the sake of the greater good of the community, regulated under law. How is this accomplished? His answer was the monogamous family, which regulates and channels the sexual instinct in ways that tend to avoid social disruption. It also creates an enclosed social sphere that gives rise to a third psychic form: the super-ego. This third form is the seat of conscience, which provides individuals with the capacity for self-regulation, which in turn makes possible the rule of law, because the rule of law depends on an inclination for compliance, even if compliance is not universal. Freud’s theory is plainly a regime of obligation, not liberty. The enduring presence of obligations is a source of no small amount of frustration and neurosis in individuals, but it is the price of civilization.

On the other side was Bertrand Russell. If Freud’s theory was preoccupied with psychic suppression, Russell’s theory focused on liberty.<sup>81</sup> If Freud was concerned about the pre-conditions for civilized community, Russell was concerned about individual fulfillment. If for Freud, marriage was an indispensable institution, for Russell it was expendable. And if for Freud, monogamy was central to the definition and function of marriage, for Russell sexual exclusivity was optional. The reasons for marriage are not primarily reproductive, Russell said, nor are they essentially about the raising of children. They are instead centered on love, happiness,

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78. See BRAKE, *supra* note 4.

79. *Id.* at 5-7.

80. See generally SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey ed., trans., 1961).

81. Compare BERTRAND RUSSELL, MARRIAGE AND MORALS (1970), with FREUD, *supra* note 80.

and the emotional satisfaction of adult partners. When these goods dissipate, the reasons for marriage come to an end, even if children are present. Better to raise children with one parent, usually the mother, he said, especially when the other parent, usually the father, is brutal or neglectful, and especially when the state may be relied upon to keep the children of a single parent from destitution.

Brake is plainly allied with Russell as against Freud. But the strategy and structure of her argument borrows from John Rawls.<sup>82</sup> Brake begins with a few observations. First, monogamy in which spouses choose each other has not been the dominant form of marriage across cultures and over time.<sup>83</sup> Second, marriage has historically been a site for imposing legal and social disabilities on women and restrictive gendered social roles on both women and men.<sup>84</sup> Third, the rules of access to marriage have historically reflected racial and heterosexual prejudice.<sup>85</sup> And fourth, marriage is now the legal site for all manner of privileges and benefits.<sup>86</sup> This fourth observation is the platform for diving into the questions that animate the first half of the book: What, as a matter of morality and justice, justifies marriage's privileged position? What is the good—or what are the goods—of marriage? What, if anything, makes marriage special?

One possible answer is that marriage is morally distinctive because it is created by a promise, as evidenced by an exchange of vows. Brake argues, however, that wedding vows do not amount to promises.<sup>87</sup> Here is why: Promises are indeed moral obligations. Thus, breaking a promise “is morally impermissible in the absence of morally overriding circumstances or release by the promisee.”<sup>88</sup> But, she says, unilateral divorce is now morally permissible in North America, and this creates an incongruity, for it permits what should be logically prohibited: non-consensual divorce.<sup>89</sup> To make sense of this incongruity, Brake considers several options: that “unilateral divorce [assuming this accurately describes American practice] . . . is [in fact] impermissible promise-breaking;” that “morally overriding conditions . . . are present in most [cases of] divorce[;]” and that “marital promises . . . are tacitly conditioned” on the continuation of love between the parties.<sup>90</sup> She rejects each of these in turn, concluding instead that “[w]edding vows, in large part, are not promises at all.”<sup>91</sup> Why not? Brake's answer rests on a categorical claim and an inference from social observation. The claim is that an unenforceable promise is not a promise. The social observation is that divorce has become pervasive. (In the United States, forty-to-fifty percent of marriages end in divorce).<sup>92</sup> The inference is that, as a social matter, a vow to continue to love is not an enforceable promise. This is so, not only be-

82. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971); JOHN RAWLS, POLITICAL LIBERALISM (1993).

83. See BRAKE, *supra* note 4, at 139.

84. *Id.* at 111.

85. *Id.* at 125.

86. *Id.* at 129-30.

87. *Id.* at 26.

88. *Id.* at 25.

89. *Id.* at 25-26.

90. *Id.* at 26.

91. *Id.*

92. *Id.* at 34.

cause divorce is permitted, but also because one cannot conscientiously promise to continue to love another.<sup>93</sup> We cannot will ourselves to love.<sup>94</sup> Nor can love be commanded.<sup>95</sup> Might we revise the promise—not necessarily to love, but to behave in a way consistent with love? We may not, Brake says, because such a view is inconsistent with people’s general understanding of the vow.<sup>96</sup> Therefore, the vow, as it is widely understood, is not obligatory.<sup>97</sup> Thus, the vow is not a promise.<sup>98</sup>

There’s a bit of slipperiness in framing the matter this way. For one thing, the first option—that unilateral divorce is a form of promise-breaking—may be more difficult to topple than Brake concedes. For another, it might be possible to distinguish the moral status of the marital vow from its enforceability. In short, even if not enforceable, the vow might still count as a moral and promissory speech-act. Furthermore, although the premise that promises are binding is undeniably a moral claim, it is not clear that the second proposition—that unilateral divorce is permissible—is an essentially moral claim. It is more accurate to say that unilateral divorce is a legally permissible option. To be sure, it may be freighted with moral implications, but its availability is not contingent on the moral basis for, or implications of, divorce. Moreover, it is not obvious why the frequency of a social practice says anything about the moral status of the action, so long as moral status, as Brake herself argues, is not strictly a function of social belief or habit. In sum, her moves from moral philosophy to legal status, to social practice, to social understanding, and back to moral philosophy require more explanation than she supplies.

If marriage is not a promise, perhaps it is a commitment, and can be justified by virtue of that fact. Brake argues that marriage is indeed a way of making a commitment.<sup>99</sup> Commitment, then, captures something of the emotional content of wedding vows.<sup>100</sup> Nonetheless, making a commitment, even in marriage, does not and cannot obligate spouses to be committed. One reason is that being committed, or having a commitment, is a psychological disposition, like love, that can be neither willed nor commanded.<sup>101</sup> Another reason is that, as a moral matter, every commitment is conditional, in that it is “only as valuable as the objects of commitment—or as the alleged virtue of committedness.”<sup>102</sup> In short, the obligation depends on the justness of the relationship, and some marriages are unjust. What follows is that certain interests—like personal safety, or, as I read her, the dissipation of feelings toward the (once) beloved, or, as I read her, the emergence of feelings toward another—may justify either repudiating or fundamentally altering the terms of the relationship.<sup>103</sup> Although an obligation to care for an infant or minor child may not be

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93. *Id.* at 32-34.

94. *Id.* at 34.

95. *Id.* at 32.

96. *Id.* at 37.

97. *Id.* at 32-33.

98. *Id.* at 32.

99. *Id.* at 43.

100. *Id.* at 32.

101. *Id.* at 32-35.

102. *Id.* at 4.

103. *Id.* at 39-41.

forsworn, and, on Brake's view, is subject to a juridical framework entirely distinct from marriage, a commitment between, or among, adults is always conditional.<sup>104</sup> Law should neither impose undue burdens on an exit from marriage, nor structure incentives designed to keep people married to each other. But law should protect the vulnerable.<sup>105</sup>

Maybe, however, the nature of marital commitment is different still. Maybe the central commitment of marriage, drawing from arguments sounding in natural law, is to irreducible human goods, like sexual intimacy, procreation, and marital friendship. Or, as Roger Scruton puts it, marriage makes possible virtuous erotic love, which is an element of human flourishing.<sup>106</sup> Brake rejects these defenses of marriage.<sup>107</sup> For one thing, says Brake, arguments from virtue and human flourishing are "comprehensive" doctrines.<sup>108</sup> Borrowing from Rawls's "political liberalism," she insists that such justifications are off limits in a liberal order.<sup>109</sup> This is an odd, and, I believe, unsupportable, position even for a liberal. Brake's second reason for rejecting arguments from human flourishing is that the virtues they presuppose "can exist outside marriage."<sup>110</sup> Put differently, "[m]arriage is neither necessary nor sufficient" for the creation or maintenance of the relevant virtues.<sup>111</sup>

Even so, it may be that the natural-law virtues are more likely to be present within the emotionally compressive confines of monogamy. If so, society may be justified in preferring it. Brake does not address this possibility. This is striking, given her earlier reliance on social practice to explain how the rate of divorce undermines the view that a marriage vow is a promise.<sup>112</sup> But she does agree that marriage—or some marriages—can be valuable.<sup>113</sup> The crux of a valuable marriage—of any valuable adult relationship—is the provision of interpersonal care.<sup>114</sup> Care, to borrow from Rawls, is a primary good.<sup>115</sup> But, says Brake, it is a good "only in the context of rights and justice."<sup>116</sup> Thus, "care must be supplemented with an account of fairness and universal equal worth."<sup>117</sup> Any legal regime that unjustly excludes relationships from benefits or status violates the basic precepts of fairness and equality.<sup>118</sup> The injustice of marriage, she says, is twofold. The first resides in historical practices that have reinforced sexism and racism.<sup>119</sup> The second is that heterosexual monogamous marriage excludes other valuable relationships of

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104. *Id.* at 35.

105. *Id.* at 116.

106. *Id.* at 4.

107. *See id.*

108. *Id.* at 65-66.

109. *Id.* at 134-37.

110. *Id.* at 4.

111. *Id.*

112. *Id.* at 34.

113. *Id.* at 4.

114. *Id.* at 81.

115. *Id.* at 175.

116. *Id.* at 4.

117. *Id.* at 84.

118. *Id.*

119. *Id.* at 111.

care.<sup>120</sup> It does this in two ways. One is that it is heteronormative, to the exclusion not only of gays and lesbians, but also of any non-exclusive, non-dyadic relationship; the other is that it is “amatormative,” preferring erotic love to the exclusion of non-amorous but caring relationships.<sup>121</sup> Among those who are excluded from the legal benefits of marriage, then, are friends, “urban tribalists, quirkyalones, polyamorists, and asexuals.”<sup>122</sup> Unless and until marriage corrects these deficits of justice, it cannot be sustained as a matter of political liberalism.

A traditionalist might ask, what is the wrong in excluding these persons from the definition of marriage? Brake’s answer, as I read her, is simple: they are denied equal concern and respect.<sup>123</sup> A liberal-democratic response to her answer might go something like this: Liberal societies are multifaceted and complex, with a wide array of associational possibilities. And individuals may choose freely among them. But choice is not costless. One reason is existential. But another reason is that a democratic society may allocate certain benefits to certain associations and deny or restrict benefits to others. These costs and choices are an unavoidable aspect of living in a socially complex and differentiated (i.e., liberal-democratic) society. For Brake, however, the very existence of costs—regardless of their source and notwithstanding democratic pedigree—is harmful to the social status and lives of excluded persons, and law should rectify the harms.

In her view, the only way to repair marriage, redress its harms, and make it habitable for women and non-conformists is not only to de-moralize it, but also to restructure it, and in doing so to save it.<sup>124</sup> This pits Brake against radical critics of marriage, who argue that it is irredeemably unjust. The history of marriage’s role in reinforcing patriarchy and covering a number of sins (including violence) against women is well documented.<sup>125</sup> Even when a marriage was awful, it could sometimes be difficult to leave, as economic and other opportunities for women—married or unmarried—have historically been limited.<sup>126</sup> In these ways and others, including women’s socially defined role in raising children, marriage helped make women vulnerable, to borrow from Susan Moller Okin.<sup>127</sup> In the wake of that history, some feminists have argued that marriage should be abolished entirely.<sup>128</sup> Against that view, Brake argues that it be reformed by removing gender from its internal operation, as a legal matter, and by abolishing its mandatory amatormative and dyadic structure.<sup>129</sup> But why? Given her ethical commitments and political aims, why not simply make marriage a matter of private contract? She offers two reasons. One is that retaining a reformed version of marriage permits the state publicly to rectify

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120. *Id.* at 88.

121. *Id.* at 89-91.

122. *Id.* at 89.

123. *Id.* at 88-102.

124. *Id.* at 107.

125. For a discussion of this history, see YAMIN, *supra* note 3; see also BRANDON, *supra* note 5; COTT, *supra* note 5.

126. BRAKE, *supra* note 4, at 114.

127. *Id.* at 116 (see SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989)).

128. *Id.* at 111.

129. *Id.* at 123.

past injustices; the other is that it avoids “ced[ing] control of this still socially powerful institution to the churches and other private-sector groups.”<sup>130</sup>

The de-gendering of marriage means not only that law may not prescribe or support gendered roles in the family, but also that access to marriage may not be barred on the basis of sex.<sup>131</sup> The latter, Brake says, will help to reinforce the former, as gay and lesbian spouses become salutary non-gendered examples for different-sex spouses.<sup>132</sup> But restructuring marriage is not merely a matter of correcting injustices related to gender. It must also address a history of racial discrimination, most visibly in prohibitions against inter-racial marriage.<sup>133</sup> Brake argues, however, agreeing substantially with Yamin, that even after the Supreme Court declared anti-miscegenation laws to be unconstitutional, the current law of marriage continues to discriminate by race, for it “recognizes and benefits a eurocentric form of marriage that is less prevalent among African Americans.”<sup>134</sup> This form “disproportionately benefits white [relationships] and excludes from benefits relationships more prevalent among African Americans.”<sup>135</sup> The point here is to ensure that the law of marriage—including importantly the social entitlements attached to marriage—extend also to relationships, like “othermothering” and “revolutionary parenting” (à la bell hooks),<sup>136</sup>

This last move is puzzling. It’s not that we can’t identify demographic differences among racially identifiable groups with respect to parenting and partnering. The puzzle is that Brake wants to disentangle the legal regulation of marriage, involving relationships between adults, and the legal regulation of intergenerational responsibility, in the forms of parenting, guardianships, and other forms of care toward children. To put a finer point on it, although she rejects “child welfare . . . as a reason for restricting marriage,”<sup>137</sup> Brake embraces the welfare of children to justify expanding marriage to accommodate non-European—if that is the right way to phrase it—forms of marriage and family.<sup>138</sup> It is also puzzling because the Supreme Court has written into American constitutional law the very principle that Brake says is absent from the American law of marriage: that states may not define family so restrictively as to exclude or impose disadvantage on forms of parenting and relationships that don’t fit the (white) nuclear model.<sup>139</sup>

So where does this leave us? How, as a legal matter, should marriage be defined? Brake’s answer rejects all the following sources for the meaning of marriage: morality, history, “previous legal definitions,” “social definitions,” and dictionaries.<sup>140</sup> She rejects arguments from “comprehensive doctrines,” including but not

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130. *Id.*

131. *Id.*

132. *See id.*

133. *Id.* at 129.

134. *Id.* at 128.

135. *Id.*

136. *Id.*

137. *Id.* at 6.

138. *Id.* at 172.

139. *See Moore v. City of East Cleveland*, 431 U.S. 494, 505-08 (1977).

140. BRAKE, *supra* note 4, at 128.

limited to religion.<sup>141</sup> And she implicitly rejects democratic decision. What is left? Marriage must be defined by principles of political philosophy, derived from John Rawls's *A Theory of Justice*<sup>142</sup> and *Political Liberalism*,<sup>143</sup> framed from a liberal-feminist perspective.<sup>144</sup> This is rarified terrain.

Brake argues that, in an ideal liberal society, marriage would be “minimal” in several ways.<sup>145</sup> Restrictions on access to marriage would be reduced to a minimum.<sup>146</sup> The very concept of marriage would be reduced to a core essential meaning: caring relations between or among consenting adults.<sup>147</sup> The form of caring may or may not be sexually intimate.<sup>148</sup> The state may not presume dependency between or among the parties to a marriage.<sup>149</sup> Hence, if the spouses want to provide for property or material support, they must do so by contract.<sup>150</sup> The state may not impose a template of rights, roles, and obligations—other than that the relations be caring.<sup>151</sup> Nor may the state impose “bundles” of marital rights.<sup>152</sup> Thus, when individuals commit to care in whatever form or fashion, the commitments need not be reciprocal but may be asymmetric.<sup>153</sup> That is, if *A* commits to providing a form of care to *B*, *B* need not commit to provide the same to *A*. The shape and content of minimal marriage are plastic.<sup>154</sup>

One aspect of marriage, however, is distinctly non-minimalist: the structure and function of marriage are subject to requirements of liberal justice.<sup>155</sup> This means not only that the institution of marriage is subject to liberal principles of fairness, equality, and liberty, but also that the liberal state is obliged to provide “juridical rights designed to support caring relationships,” mainly by facilitating the maintenance of care.<sup>156</sup> Among the juridical rights to be provided are participation in one another's health, disability, life insurance, and pension plans; protecting the marital estate against attachment by one another's creditors; visitation privileges in hospitals and prisons; eligibility for spousal immigration, employment assistance, relocation assistance, and preferential hiring; employment leave for the provision of health care or for bereavement; entitlement to be buried beside a spouse in a veterans' cemetery; spousal immunity from legal testimony; and designation of a spouse for benefits from third parties, like employment incentives or family rates at

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141. *Id.* at 135.

142. RAWLS, *A THEORY OF JUSTICE*, *supra* note 82. .

143. RAWLS, *POLITICAL LIBERALISM*, *supra* note 82.

144. BRAKE, *supra* note 4, at 134.

145. *Id.* at 156.

146. *Id.* at 158.

147. *Id.*

148. *Id.* at 160.

149. *Id.* at 160–61.

150. *Id.* at 162.

151. *Id.*

152. *Id.* at 161.

153. *Id.*

154. *Id.* at 164–65.

155. *Id.* at 160.

156. *Id.*

public accommodations.<sup>157</sup> Thus, if marriage is minimal in some respects, the liberal state is not.<sup>158</sup>

Who may and may not marry whom? Unilateral marriage is prohibited; both spouses must consent to the relationship.<sup>159</sup> Marriage with or between minor children is prohibited.<sup>160</sup> So, too, is marriage between persons and non-human animals.<sup>161</sup> These prohibitions aside, the state may not denigrate nor deny recognition to relationships that are marked by a commitment to care.<sup>162</sup> Plainly, same-sex marriage is permitted. Arranged marriage is permitted, as long as it is consensual.<sup>163</sup> Polyamory and polygamy are permitted.<sup>164</sup> So is marriage between or among friends and providers of care.<sup>165</sup> Marriage between or among adult siblings is also permitted,<sup>166</sup> although I am uncertain whether Brake would permit intergenerational adult incestuous marriage. And an adult person may be married to a number of persons in the same or different ways.<sup>167</sup> Hence, *A* may marry *B* and *C* for sexual intimacy, *D* for deep intellectual companionship, and *E*, *F*, and *G* for friendship and emotional support.<sup>168</sup> While *B*, *C*, *D*, *E*, *F*, and *G* are not married to one another by virtue of their marriage to *A*, they may marry one or more of the others, for one or more types of caring purposes, if they choose to do so.<sup>169</sup>

This suggests all manner of complexity in marital relations. It also suggests some questions. For example, how will the parties keep track of their obligations? Just as important, for purposes of social respect and legal enforcement, how will government and third parties keep track? Brake's answer is that the state may provide a boilerplate form "giving prospective spouses a list of entitlements. . . . Spouses could tick off boxes" indicating the rights they choose to transfer to one or more spouses.<sup>170</sup> This has the virtue of choice and transparency. But it also includes risks from checking the wrong box or failing to check a box that's desirable.

Are there limits to the number of persons one may marry? Brake suggests a conceptual limit: any persons who marry must be in a caring relationship.<sup>171</sup> This means they must "be known personally to one another, share history, interact regularly, and have detailed knowledge of one another."<sup>172</sup> As Brake notes, there are practical, psychological, and material limits to one's capacity for care.<sup>173</sup> Consider a

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157. *Id.* at 161.

158. *Id.*

159. *Id.* at 163.

160. *Id.*

161. *Id.* at 163–64.

162. *Id.* at 164.

163. *Id.* at 165.

164. *Id.* at 161.

165. *Id.*

166. *Id.* at 164.

167. *Id.* at 166.

168. *See id.* at 166–67.

169. *Id.*

170. *Id.* at 163.

171. *Id.* at 158.

172. *Id.* at 164.

173. *Id.*



possible scenario. What happens if a new commitment adversely affects one's prior commitments, either by diluting the level of care and attention one gives to the other or by reducing the intensity of care? What happens, moreover, if a current spouse objects to her partner's taking on a new commitment? May a current spouse veto subsequent relationships? I do not detect in Brake's policy an enforceable limit on the number of relations one may enter. Nor do I detect a spousal veto over the emergence of new commitments. The aggrieved spouse always has the capacity for exit, which the state is prohibited from burdening. But in principle, as I read the argument, the current spouse may not bar the acquisition of new relations in the ideal liberal state.

Even so, don't the maintenance and dissolution of marriages raise questions of justice? Brake concedes that they do, especially in the non-ideal, or "transitional," liberal state.<sup>174</sup> Therefore, she builds into her framework devices for inhibiting a slide to poverty either through marriage or through dissolution.<sup>175</sup> Poverty aside, she wants also to ensure that exit options are good ones, especially for women, who, in the transition to a gender-neutral society, may continue to face systematic vulnerabilities that a formal right of contract cannot consistently avoid.<sup>176</sup> Thus, "[l]iberal egalitarianism does not require unregulated free contract and so can admit involuntary, [legally enforceable,] mechanisms to protect against dependency."<sup>177</sup> A traditionalist might ask whether this framework debases marriage. To put a point on it, does it not run a substantial risk of inhibiting the level or intensity of practical commitment in marriage? Brake answers the question by rejecting its premise.<sup>178</sup> Instead of weakening marriages, the robust capacity for exit may actually improve them, as spouses understand that they have "reason to keep each other happy."<sup>179</sup> This, à la Bertrand Russell, is the primary point of minimal marriage.<sup>180</sup>

This would be a bold experiment, and potentially costly, too. The administrative cost of managing relations at this level of complexity would be substantial. But maybe the cost is worth the gain to individual liberty. So, too, the private and public cost of providing material support in the amounts that Brake's theory proposes would be huge. But maybe the cost is justified for the sake of social welfare.

What is more difficult to measure are the potential non-material costs of moving to a system of plural relationships. Freud has taken many hits in recent years, but it is possible he still has something to say about the value of dyadic relations. Here, unlike Freud, I make no assumption that the dyad must be opposite-sex. Perhaps monogamy does contribute to a kind of civilization, marked by rule of law, marked also by a kind of individual liberty. Perhaps there is social and psychic value in the compressive intimacy of nuclear relations. Perhaps, then, it is telling that, historically and culturally, we tend not to see non-dyadic forms formally protected by

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174. *Id.* at 189.

175. *Id.* at 192.

176. *Id.*

177. *Id.* at 196.

178. *Id.* at 197.

179. *Id.*

180. *Id.* at 148.

law in modern liberal democracies. I say, “formally protected.” It is clear that liberal democracies—including the United States—have tended to protect a partially autonomous civil sphere, marked by principles of privacy and individual liberty, in which people have adopted ways that are at bottom domestic friendships, urban tribes, and polyamory. The question is not whether these forms should be protected as a private matter. I am happy to concede that they should. The question is whether they must be given formal public sanction by the state. Although the constitutional arguments supporting state prohibitions of same-sex marriage have crumbled to oblivion, the arguments against formal recognition of non-dyadic relations, or even dyadic incestuous relations, have not—at least not yet, in my view. Constitutional law aside, Brake has provided an intelligent and forthright philosophic defense of extending formal recognition beyond the dyad. Although I am not convinced, I admire the effort.

### III. MARRIAGE AND DEMOCRACY

If marriage today is interesting—if its meaning and indeed its very form are contested—this is nothing new. The resolution of the contestation, if there is to be a resolution, is at bottom a matter of politics. In the United States, this means that, in the first instance, it is a matter of a kind of democratic politics. Priscilla Yamin’s informative book presents historical slices that show how centrally marriage has been to the politics of the nation.<sup>181</sup> She shows also just how messy politics can be, especially when the object of contestation is what people perceive to be an elemental social form.<sup>182</sup> To the extent that people perceive it to be elemental, marriage draws on people’s most deeply held views—of how and why human beings came to be, and of who we are to be now that we are here. Some of the inspiration for some of these views for some persons is undeniably religious. Much of the inspiration for many of these views for most people derives from some version of a comprehensive doctrine—if not of natural law, then of basic understandings of the point of human existence.

Elizabeth Brake’s (and John Rawls’s) attempt to root out comprehensive doctrines from the public domain is curious. For example, when she claims that “arguments from nature have no role to play in liberalism,” Brake writes John Locke, to mention just one, out of the pantheon of liberalism.<sup>183</sup> And it seems simply inaccurate to say, “[m]inimal marriage does not endorse any contested conception of the good” and therefore does not rest on a comprehensive doctrine.<sup>184</sup> Thus, part of what is curious about “political liberalism” is that it is so profoundly unpolitical. It’s simply undemocratic—and, in a manner of speaking, illiberal—to attempt to police public discourse by taking certain views out of circulation simply because they’re connected to an expansive—or even comprehensive—worldview. People are entitled to argue over even things that matter a great deal. What’s more, trying to wall

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181. See YAMIN, *supra* note 3.

182. See *id.*

183. BRAKE, *supra* note 4, at 139.

184. *Id.* at 171.

off discourse against conscientious positions is usually futile and, in most cases, perverse. This is so, even if the Supreme Court has ostensibly removed some issue or policy from the realm of politics. People in a constitutional order, after all, are entitled to try to overturn decisions of the Court, if the Court does not reverse itself—as it not infrequently has been known to do.

Having said all this, and despite my questions about her argument and her bottom line, Brake has written a bravely honest book. She argues clearly. She always gives reasons. She generally treats fairly the arguments of others. And she is unfailingly careful in describing the implications of her positions. Her book—and Yamin's—will be important resources as people of good will continue to argue about the future of marriage in America.