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MARRIAGE AND BELONGING

*Ann Laquer Estin**

PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION. By Nancy F. Cott. Cambridge: Harvard University Press. 2000. Pp. v, 297. \$27.95.

Marriage is a quintessentially private institution. Justice Douglas put the point this way in 1965, writing for the Supreme Court in *Griswold v. Connecticut*:¹

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.²

Ironically, this appeal to history elided the fact that the Court's decision made a substantial break with a longstanding tradition of marriage regulation. In hindsight, *Griswold's* paean to privacy stands as an important turning point. American family law changed quickly and radically in the years that followed. What has remained constant is the belief that family life is private, even as the meaning of family privacy has changed.

The subject of Nancy Cott's *Public Vows: A History of Marriage and the Nation*³ seems startling at first in view of this conventional understanding. As she suggests, "[t]he monumental public character of marriage is generally its least noticed aspect" (p. 1). Cott addresses this oversight with a sweeping investigation into marriage and family policy throughout American history. She argues that "[f]rom the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, sprouting repeatedly as the nation took over the continent and established terms for the inclusion and exclusion of new citizens" (p. 2).

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1. 381 U.S. 479 (1965).

2. *Id.* at 486.

3. Nancy Cott is Stanley Woodward Professor of History and American Studies, Yale University.

The approved model of marriage in American law and policy, based on religious tradition and the English common law, was quite specific: lifelong, monogamous, Christian marriage. Founded on a principle of mutual consent, marriage echoed and reinforced the prevailing political ideals (pp. 2-3). In *Public Vows*, Cott traces the political and rhetorical uses of this model of marriage in national debates about federal Indian policy, immigration law, polygamy in the Mormon territories, citizenship for former slaves after the Civil War, and labor and employment policy during the New Deal. She demonstrates that “positive and punitive laws and government policy choices” established a political definition of marriage with a pervasive influence on the body politic and the entitlements and obligations of American citizens (pp. 2-3).

Cott’s book also challenges the conventional understanding in the United States that family regulation is the exclusive province of state governments. For that reason, this volume adds an important dimension to legal historical work focused on the evolving norms and rules of family law in the states during the eighteenth and nineteenth centuries.⁴ As she demonstrates, the national government was centrally involved in definition and regulation of the family, from a time long before the recent wave of “nationalization” or “federalization” of family law.

The discussion that follows briefly considers this history in three stages. For the earliest period, Cott charts the strong link between domestic and political governance in the philosophy of the founding generation. Her account demonstrates that, during the nineteenth century, marriage became central to the definition of citizenship, and marriage norms were deeply embedded in debates over the civil and political rights of former slaves, Native Americans, Asian immigrants, and women. By the twentieth century, with the character of the national polity well established, marriage was effectively disestablished, as laws enforcing gender roles and creating barriers to divorce and nonmarital childbearing were abandoned. Cott’s analysis describes how marriage was rewritten in economic terms, and how new norms of family privacy and liberty accompanied these political and economic changes.

Beyond its historical significance, Cott’s thesis about the public character of marriage serves to illuminate the contemporary politics of family life. Her detailed and nuanced historical account ends with a discussion of recent debates over same-sex marriages and welfare reform. Cott sees the conservative policies implemented in both of these areas as illustrations of “the national government’s continuing investment in traditional marriage” (p. 223). The second portion of

4. See particularly MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

this Review takes up this proposition and considers some of the similarities and differences between the current debates and their historical antecedents.

I. MARRIAGE AND THE NATION

A. *Sculpting the Body Politic*

As Cott elaborates, political theorists in the eighteenth century understood both the family and the state as forms of governance and drew explicit parallels between the two. In the American context, the patriarchal equation of father and king gave way to a new image based on the marriage bond, in which the legitimacy of governance derived from the voluntary consent of the governed. Once the consensual relationship was established, the parties took on reciprocal rights and obligations, and once formed, it could not be dissolved. Cott writes that “[t]he suitability of the marital metaphor for political union drew tremendous public attention to marriage itself in the Revolutionary era.”⁵

In both Christian tradition and the common law of the period, marriage was a strongly hierarchical relationship. Under the system of coverture, a married woman’s legal and economic identity merged into her husband’s. Cott notes that a man’s citizenship was enlarged by marriage, which made him both the political and legal representative of his wife. “He became the one *full* citizen in the household, his authority over and responsibility for his dependents contributing to his citizenship capacity” (p. 12). This connection between marriage and men’s citizenship status is a centrally important theme in the larger story that Cott tells.

The right kind of marriage and family life were also understood to be important for fostering necessary social and political virtues in citizens of the new republic. Writers of this period saw close links between domestic government and political government. Following Montesquieu, they disapproved particularly of polygamy. “The harem stood for tyrannical rule, political corruption, coercion, elevation of the passions over reason, selfishness, hypocrisy — all the evils that virtuous republicans and enlightened thinkers wanted to avoid. Monogamy, in contrast, stood for a government of consent, moderation, and political liberty.”⁶

Despite the importance of marriage to the national self-definition in the earliest days of the nation, the national government had few op-

5. P. 16. Cott also notes the reappearance of the marital metaphor for national union in political rhetoric during the Civil War era. *See* p. 77.

6. P. 22. Cott points out that most of the peoples and cultures around the globe were not strictly monogamous during the 18th century, and the “predominance of monogamy was by no means a foregone conclusion.” P. 9.

opportunities to implement its vision of appropriate marriage norms. Cott describes federal Indian policy as one arena, pointing out that the government “consistently encouraged or forced Indians to adopt Christian-model monogamy as the *sine qua non* of civilization and morality” (p. 26). She notes that federal policy encouraged intermarriage between white men and Indian women and periodically offered land and citizenship to “heads of households” — presumably male — who agreed to give up their tribal affiliations (p. 28).

During this period, direct regulation of marriage was carried out by state legislatures and courts, which defined who could be married and how a marriage was solemnized, what the consequences of marriage were, and when and how a marriage could be terminated. Cott explains that informal marriage and divorce (or desertion) were widespread, and that the incidence of bigamy was probably substantial. In the early years, local communities played a significant role in tolerating or sanctioning marital misbehavior. Between 1820 and 1860, state legislatures began enacting divorce statutes and revising the system of coverture through married women’s property acts. Cott notes that while the legislation was not identical in different states, the direction was consistent, and that by midcentury a “uniquely American system” of divorce laws was in effect across the country (p. 51).

B. *Marriage and Citizenship*

Against this background, Cott considers the central role that marital norms played in the transformation of the republic during the nineteenth century. As she demonstrates, “[m]arriage values and practices animated the rhetoric of both sides” of the debate over slavery (p. 57). Abolitionists preached against “the master’s power to sever relationships between slave couples and families; the inability of enslaved women to prevent unwelcome white masters, overseers and sons from using their bodies sexually; and slave men’s inability to act effectively as protectors or defenders” (pp. 57-58). For their part, the defenders of slavery emphasized its more benign parallels to marriage: wives and slaves both were dependents, subordinated to the authority of the husband or master and subject to his guidance and protection. As Cott points out, this parallel found support in the legal tradition categorizing both master-servant and husband-wife relationships under the rubric of “domestic relations.”⁷

Following the Civil War, the tension between these views of slavery and marriage played out in the passage of the Thirteenth and Fourteenth Amendments, and Cott traces the appearance of marital

7. P. 62. In the North, of course, the parallel between slavery and marriage had a different resonance, and Cott also describes the uses of this polemic by opponents of traditional marriage, including early women’s rights reformers and “free love” advocates. Pp. 63-72.

norms as Congress debated (and rejected) formulations that would have extended full legal and political rights to women (pp. 80, 95-98). She describes the Reconstruction-era philosophy that free labor and marriage rights were complementary. Full citizenship was equated with taking on rights and responsibilities as a husband and father (pp. 81-82, 92-95). While former slaves embraced the opportunity to marry as an important civil right, Cott also documents the significant pressure exerted by the federal Bureau of Refugees, Freedmen, and Abandoned Lands on freedmen and women to formalize their marriages and conform to a stringent set of new social norms.⁸

The other great theme Cott tracks in these debates is federalism. Before the Civil War, both marriage and slavery were conceptualized as domestic institutions, within the states' power to regulate.⁹ While the Civil War Amendments put an end to slavery, they did not address the states' power to enact marriage legislation — specifically, laws against racially mixed marriages (pp. 98-101). Cott notes that couples contested antimiscegenation statutes in many states during the nineteenth century on the basis “that marriage was a contractual right which state laws could not constitutionally abridge,” but without success (p. 101). The courts concluded that marriage was not simply a private contractual right, but a social and status relationship, and that the states were entitled to regulate it without federal interference.¹⁰

Cott describes significant turbulence in the institution of marriage during the period following the Civil War, with increasing rates of divorce and the specter of Mormon polygamy in the Utah territory (p. 105). The result was substantial public anxiety over the future prospects of Christian, monogamous marriage.¹¹ Despite significant discussion of national standards to regulate marriage and divorce, the argument for federalism was never overcome (pp. 103-04, 110-11). For almost thirty years, however, the federal government conducted an extensive campaign against polygamy joined by a series of Presidents,

8. Pp. 83-92. Federal Indian policy later in the century followed a similar course. As Cott points out, “‘Civilizing’ meant instituting faithful monogamous households, turning Indian men into farmers motivated by the work ethic, and urging Indian women toward norms of modesty and domesticity.” P. 121. *See generally* pp. 120-23.

9. Pp. 99-103. The Republican Party characterized slavery and polygamy as the “twin relics of barbarism” and asserted the federal government’s right to prohibit both of these evils in federal territories. P. 73 (quoting the Republican party platform of 1856).

10. Pp. 101-03. Later, Cott discusses a new wave of efforts to punish interracial marriage in the early twentieth century, *see* pp. 163-64, and the Supreme Court’s eventual rejection of antimiscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967). P. 198.

11. Divorce “allowed the possibility of more than one sexual partner in a lifetime, rather like polygamy.” P. 107. Gender norms also played a role here. Cott continues: “If married men’s sexual adventures outside of marriage had often been tacitly accepted, married women’s had not — yet divorce was available to both, and more women than men sought and gained divorces.” *Id.*

the Congress and the Supreme Court.¹² Cott points out that, with its decision in *Reynolds v. United States*,¹³ the Court associated monogamy with democracy and polygamy with despotism, casting polygamy in racial terms as the preserve of “Asiatic and of African people.”¹⁴

Congress also acted to bolster monogamous marriage and suppress “immoral” sexual behavior by passing the Comstock Act in 1873, which criminalized the use of the mails to distribute information or materials that were “obscene” or intended for immoral use, including birth control (pp. 123-26). Following this lead, many states directly outlawed abortion and contraception so that extramarital sex would be risky and marital sex would remain linked to childbearing (pp. 123-26). In many states, these laws remained in effect for almost a century, until the Supreme Court’s declaration in *Griswold* that they represented an unconstitutional intrusion into rights of marital privacy.¹⁵ Cott writes that in the late nineteenth century, however, the Comstock Act and the battle against polygamy helped to set the normative bounds of marriage, based on “[a] refurbished alliance between national authority and Christian monogamous morality” (pp. 130-31).

The strength of the link between marriage norms and national self-definition is revealed particularly powerfully in a chapter that considers national immigration policy. Cott writes: “Marriage bore on the shape of the body politic just as immigration policy did. Together the two had dynamic potential to create new kinds of citizens for the United States, because children born on American soil would be U.S. citizens regardless of their immigrant parents’ own capacity for naturalization” (p. 132). Given the close link between notions of marriage and citizenship, it is not surprising that national immigration policy incorporated the prevailing norm of the male citizen as the representative and head of a household.¹⁶

12. Pp. 111-20. The federal government also attacked polygamy among Native American people as part of the campaign to “civilize” them. Pp. 120-23.

13. 98 U.S. 145 (1879).

14. Pp. 113-14 (quoting *Reynolds*, 98 U.S. at 164). Cott notes the influence here of the Christian missionary movement and the association in their discourse of whiteness, Europe, monogamy, and civilization. Pp. 115-18.

15. See *supra* notes 1-2 and accompanying text. The federal appellate courts reversed their position on birth control, concluding that it was not “obscene,” in the late 1930s. See pp. 181-82.

16. By the late nineteenth century, women could become citizens by marriage to a United States citizen, p. 133, and women lost their citizenship by marriage to a foreign citizen. Pp. 143-44. These rules were modified in the 1920s and 1930s. P. 165. Some policies were designed to allow male immigrants to bring their family members into the United States, on the theory that they would be better and harder-working citizens. See, e.g., pp. 141-43 (citing an exemption to literacy tests for immediate family members of male immigrants); pp. 145-46 (describing an agreement allowing immigration of wives and children of Japanese men already present in the United States).

Cott's research uncovers a fascinating interaction between marriage norms and the increasingly restrictive immigration laws of the late nineteenth and early twentieth centuries. In her discussion of the harsh restrictions on Asian immigration during this period, Cott points out that alien cultural practices such as arranged marriage and polygamy were constituted as racial difference.¹⁷ Immigration rhetoric evinced a particular concern with forced labor and with prostitution, which implied a threat to American values.¹⁸ Polygamists were directly prohibited from immigrating,¹⁹ and arranged marriages were equated with fraud and prostitution (pp. 149-54). "While marriage was rarely the cardinal issue in contestation over immigration, insistence on a given model of monogamy was implicit in concerns about the virtue and character of the people. Nonconforming marriages represented all that was 'racially' unassimilable in a given group" (p. 155).

C. *Modern Marriage*

Along with technological and social changes at the advent of the twentieth century, Cott describes a new shape and new understandings of marriage. "In the twentieth century the public framework of marriage would be preeminently economic, preserving the husband's role as primary provider and the wife as his dependent — despite the growing presence of women in the labor force" (p. 157). She suggests that the instrumental importance of families as a means of direct political governance became less important as "the polity itself and national solidarity became firmly established."²⁰ Moreover, "as the post-Victorian generation enjoyed what they considered a sexual revolution, they gave up their parents' exaggerated public emphasis on linking monogamous morality to political virtue" (p. 157).

17. Cott writes:

Jews and Asians were more easily accused of masking prostitution as marriage because of American officials' willingness to believe that "racially" different and non-Christian groups were likely to commit such grotesquery. . . . Both Asians and Jews — the latter via the Old Testament — were tainted by association with polygamy. . . . Also, both Jews and Asians in their home cultures used arranged marriages, in which overt economic bargaining and kinship networks beyond the marrying pair played acknowledged parts.

P. 149.

18. P. 137. Regarding the fear of prostitution, see generally pp. 136-38 and 146-49.

19. P. 139 ("[P]olygamists and anarchists always appeared in sequence as excludable, deportable, and ineligible for citizenship, as if disloyalty to monogamy were equivalent to overthrowing the government.").

20. P. 157. In the modern context,

no state needs to work through household heads to locate or govern family members: the interweaving or intrusion of government presence in the lives of individuals through their employment, schooling, immigration, taxation, social welfare, travel, and so on, has advanced so far that all are already in the state's grasp.

P. 213.

Women received the right to vote in 1920 and gained greater citizenship and nationality rights in the decades that followed.²¹ Cott emphasizes, however, that marital roles and the entitlements of male citizens as heads of households remained the “template” within which federal support for families was inscribed (p. 158). This was a pattern initially established by Civil War pensions and the policies of the Freedmen’s Bureau, and it was broadened and generalized across the population with the passage of New Deal legislation, particularly the Social Security Act.²² Cott writes that “New Deal policy innovations revived the fading connection between citizenship and marital role through economic avenues. These choices diluted the formal political equality of women and deeply imprinted marriage on citizenship entitlements, while refiguring what those entitlements were” (p. 174). In this new system, “men were defined as individuals, workers and husband-providers, and women were defined as wives and mothers first” (p. 178).

The government programs that reinvented marriage and marital unity during the New Deal were followed by others in the period after the Second World War, including particularly the GI Bill and the new combined income tax return for married couples (pp. 190-93). During and after the war years, traditional gender roles and family ideals were strongly promoted by the government as central to freedom and the American way of life (pp. 185-91). Nonetheless, Cott identifies the decade of the war as an important turning point. “Even while public policy fortified the ‘normal’ family, challenges to the long-prevailing model of marriage could not be prevented” (pp. 194-95). During the 1940s the Supreme Court abandoned its hostility to migratory divorce, and the American Bar Association recommended moving to a no-fault principle in divorce (pp. 195-96). In the decade that followed, the American Law Institute proposed a Model Penal Code that eliminated all criminal sanctions for consensual sexual conduct.²³

By the 1960s, the Supreme Court articulated a new vision of marriage. “Where mid-nineteenth-century judges and other public spokesmen had hardly been able to speak of marriage without mentioning Christian morality, mid-twentieth-century discourse saw the hallmarks of the institution in liberty and privacy, consent and freedom” (p. 197). Cott describes the tremendous importance of the

21. Pp. 164-67. Cott notes, however, that various aspects of coverture were unevenly discarded. Pp. 160-63, 168-70.

22. P. 158. On the Civil War pension system, see pp. 103-04; on the Freedmen’s Bureau, see pp. 84-95; on the New Deal legislation, see pp. 172-79.

23. Pp. 196-97. Cott notes, however, that the Model Penal Code preserved the marital rape exemption, pp. 196-97, and that it was not until the 1980s that this aspect of coverture was gradually abandoned. Pp. 211-12.

Court's decisions in *Griswold v. Connecticut*,²⁴ *Loving v. Virginia*,²⁵ and *Eisenstadt v. Baird*,²⁶ but she concludes that these decisions "were just keeping pace with the upheavals in society," and that larger social and legal changes were about "to uncouple morality from marriage" (p. 199).

The last chapter of *Public Vows* catalogues the sweeping changes in norms of marital and sexual behavior that occurred between 1965 and the closing years of the twentieth century. In the United States and many other countries the demographic trends were dramatic: "rates of formal marriages and of births tumbled; divorces and proportions of births outside formal wedlock both shot up" (p. 202). Large majorities of women, including married women with young children, entered the labor force. Just as divorce and nonmarital childbearing became normalized, open cohabitation, same-sex relationships, and sex before and outside of marriage were increasingly unremarkable. Cott observes that courts and legislatures involved themselves in the economic aspects of family relationships — enforcing prenuptial or cohabitation agreements, dividing marital property at the time of divorce, ordering parents to pay child support — and largely abandoned the project of enforcing standards of marital behavior and assessing blame for marital breakdown (pp. 208-10).

Cott's analysis emphasizes the discontinuity between contemporary marriage and family practices and the model that once dominated political and social life. She depicts the change in the relationship between marriage and the state as fundamental and draws an analogy to the abandonment of state-supported religion:

This alteration in the relation between marriage and the state might be called "disestablishment," if the term can be borrowed from the history of religion. . . . Disestablishment did not mean that piety or religious institutions disappeared. On the contrary, the consequence more often was that religious sects proliferated, while no single model was, any longer, supported by the state. (p. 212)

Based on this analogy, Cott suggests that "one could argue that the particular model of marriage which was for so long the officially supported one has been disestablished," and further that "with the weight of the one supported faith lifted, plural acceptable sexual behaviors and marriage types have bloomed" (p. 212). Cott rejects the disestablishment thesis, however, based upon the conservative "family values" backlash that has developed since the mid-1970s. She identifies a resurgence of the old "established" marriage model in two bills passed by Congress in 1996 — the Defense of Marriage Act and the Personal

24. 381 U.S. 479 (1965).

25. 388 U.S. 1 (1967).

26. 405 U.S. 438 (1972).

Responsibility and Work Opportunity Reconciliation Act — and concludes: “If disestablishment of formal and legal Christian-model monogamy were real, public authorities would grant the same imprimatur to every kind of couple’s marriage. This has not happened” (p. 215).

Ultimately, Cott understands both of these bills, along with the “myriad marital obligations and benefits in the federal legal apparatus,” as illustrations of “the national government’s continuing investment in traditional marriage” (p. 223). She concludes by meditating on the “resiliency of belief in legal marriage” and the “preeminent stature of marriage in public opinion” despite the “sweeping reformulations” of the last quarter century (pp. 224-27).

Cott explains Americans’ continuing faith in marriage not with reference to traditional values, but based upon “the relief it seems to offer from the ineffable coercions and insistent publicity of the post-modern world” (p. 225). She states that marriage “recently and paradoxically signifies freedom in a chosen space,” and it “harmonizes the seeming opposites of choice and dependability” (p. 226). Marriage is both public and private, “allying privacy with personal liberty and putting public authority behind that alliance” (p. 226). With this description of marriage and its contemporary significance, Cott embraces a perspective that sounds very much like Justice Douglas’s opinion in *Griswold*.

II. CONTEMPORARY POLITICS AND FAMILY LIFE

Nancy Cott has provided an enormous service to legal scholars by marshalling the historical evidence that marriage as a social norm and a legal category has been actively constructed and enforced over more than two centuries through the combined agency of local communities and state and national governments. She identifies the tension between the ideology that conceived of marriage as based on natural or divine law and the historical practice in which legislators have repeatedly asserted the power to shape and change it.²⁷ Whatever its private meanings and importance, her book teaches us that marriage in the United States, today and through history, has been politically defined.

It is also clear from Cott’s scholarship that the public structuring of marriage during the eighteenth and nineteenth centuries served important government purposes. Her epic touches on every aspect of American history, and she identifies over and over again the instrumental use of marriage to further other political ends.²⁸ Often, those

27. See, e.g., pp. 46-47, 53, 56, 219.

28. As Cott notes in her Introduction, this instrumental use of marriage is not uniquely American:

Typically, founders of new political societies in the Western tradition have inaugurated their regimes with marriage regulations, to foster households conducive to their aims and to sym-

other purposes have had to do with fundamental questions of membership and belonging in American society.

In light of the history she presents, Cott's conclusion that the national government maintains an interest in "traditional" marriage deserves further exploration. What is that interest? Why, when the politics and the conventional morality of the nineteenth century have been almost entirely discarded, are its marital and sexual norms still powerful enough to exclude a large group of Americans from full membership in the civil polity? The observation that marriage is a valuable source of private and public meaning does not explain why law and policy continue to privilege particular forms of marriage.

A. *The Debate Over Same-Sex Marriage*

Following the pervasive disestablishment of marriage that Cott describes, the only aspects of the traditional legal and moral norms that are still widely enforced are restrictions on homosexual sex and the corresponding prohibition of same-sex marriage.²⁹ In the Supreme Court, the privacy revolution that began with *Griswold* came abruptly to an end with the 1986 decision in *Bowers v. Hardwick*.³⁰ A few years later, when courts in Hawaii and Alaska raised the possibility of legal recognition for same-sex marriage, Congress joined the legislatures in thirty-five states in enacting legislation designed to prevent the recognition of same-sex marriages.³¹ As Cott writes, "Where public authorities a century earlier had been primed to defend Christian-model monogamy from free love, interracial coupling, polygamy, self-divorce, and commercial sex, now the Congress found heterosexuality the crucial boundary to maintain" (p. 220).

Cott points out the similarity between the rhetoric about marriage used by sponsors of the "Defense of Marriage Act" and the prevailing marital rhetoric in the nineteenth century.³² "In the 1996 debate as in the past, observance of Christian-model monogamy was made to stand

bolize a new era — whether in colonial Virginia, revolutionary France, the breakaway republic of Texas, or the unprecedented Bolshevik system in the Soviet Union.

P. 6.

29. Cott notes: "The morality that the law has dropped or soft-pedaled with respect to consensual heterosexual acts still lives in the law's prosecution of homosexual behavior." P. 215.

30. 478 U.S. 186 (1986). For other illustrations of the more conservative family politics of the Court in the mid-1980s, see, for example, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); and *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

31. See pp. 216-18. This wave of legislative action is reminiscent of the Comstock Act, which was passed by Congress in 1873 and followed by parallel legislation in about half of the states. See pp. 124-26.

32. Pp. 219-21. For example, Cott quotes Jesse Helms's speech declaring that "the moral and spiritual survival of this Nation" was at stake. P. 221.

for customary boundaries in society, morality and civilization; the nation's public backing of conventional marriage became a synecdoche for everything valued in the American way of life."³³

Beyond rhetoric, the controversy suggests other parallels to the family politics of the nineteenth century. Cott reminds us of the long-standing debate over antimiscegenation laws and the prominent place of marriage among the civil rights extended to former slaves after the Civil War. She writes:

Lesbians and gay men seek legal marriage for some of the same reasons ex-slaves did so after the Civil War, to show that they have access to basic civil rights. The exclusion of same-sex partners from free choice in marriage stigmatizes their relationship, and reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy. Tailoring their legal arguments to current constitutional doctrine, same-sex couples have underlined the association of marriage with consent and with privacy rights. (p. 216)

This analogy between antimiscegenation laws and laws barring same-sex marriage was explicitly embraced by the Hawaii Supreme Court in its pathbreaking 1993 decision recognizing the potential right to same-sex marriage.³⁴ The importance of marriage rights to full membership in the political community is a more subtle point, which finds contemporary support in the Vermont Supreme Court's 1999 decision in *Baker v. State*.³⁵ Both the Hawaii and Vermont courts conceptualized the same-sex marriage question as a matter of civil rights, noting the wide range of statutory rights and obligations that flow from marriage under state law, rather than as a question of sexual morality.³⁶

Striking parallels also exist between the campaign against same-sex marriage and the longstanding battle against divorce and polygamy.³⁷ Both divorce and polygamy were perceived in the nineteenth century as serious threats to the national moral character. Divorce laws varied considerably among the states, which created tensions in a federal sys-

33. P. 219. As Cott notes, this issue served as a rallying point for New Right conservative groups whose "partisans . . . openly voice the desire to reinstate a patriarchal model of marriage with the husband/father as the provider *and* the primary authority figure." P. 214.

34. *Baehr v. Lewin*, 852 P.2d 44, 61-63 (Haw. 1993) (discussing parallel to *Loving v. Virginia*, 338 U.S. 1 (1967)).

35. *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999) (addressing marriage rights as one of the "common benefits" of state citizens).

36. See *Baker*, 744 A.2d at 883-84 (listing benefits and protections of marriage under state law); *Baehr*, 852 P.2d at 58-59 (same). See generally Ann Laquer Estin, *When Baehr Meets Romer: Family Law Issues After Amendment 2*, 68 U. Colo. L. Rev. 349, 370-71 (1997).

37. See generally David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53 (1997).

tem (pp. 49-52, 110-11). Opponents of divorce preached from a national pulpit (pp. 105-07), but their efforts to establish uniform national restrictions on divorce did not succeed. The national conversation about divorce continued, and states continued to display considerable diversity in their divorce policies until the no-fault divorce revolution a century later.

State laws regulating the family rights and obligations of same-sex couples are similarly divergent. In the present era, however, federalism concerns are more readily swept aside. National politics are directed toward preventing the possibility that states can effectively broaden their definition of marriage, or toward limiting the wider consequences if one state or group of states move in that direction.³⁸

By contrast, the practice of polygamy during the nineteenth century seems to have been limited to the Utah Territory, and to have had few defenders in other parts of the nation. Laws for the territory were written by Congress, and Utah did not achieve statehood until after the Mormon church renounced polygamy in 1890 (p. 120). Since that time, there has been very little public concern with polygamy, and no movement toward changing this aspect of marriage law.³⁹

The contemporary debate, like its precursors in the nineteenth century, is a definitional one, about fundamental questions of membership and belonging. Mormon polygamists were an easily identifiable group, separated from the mainstream by their unique religion and geography as well as their marital practices. In a time when racial difference and the progress of civilization loomed large in American consciousness, Mormon cultural variance was particularly threatening (pp. 114-18). Mormons were politically organized and actively resisted national authority, raising another alarm for a nation still recovering from the Civil War.⁴⁰ In contrast to polygamists, individuals who pursued divorces could not be so easily isolated and stigmatized, and

38. In addition to DOMA, there are recent proposals to amend the U.S. Constitution to prohibit same-sex marriage. See Jonathan Rauch, *Leave Gay Marriage to the States*, WALL ST. J., July 27, 2001, at A87 (discussing proposed "Federal Marriage Amendment"). Cott notes that a constitutional amendment prohibiting polygamy was debated in Congress during the 1885-86 year. P. 119

39. Cott points out that the practice has been revived among fundamentalist Mormons in Utah and Arizona. P. 213. With regard to public opinion, Cott notes the 1946 decision in *Cleveland v. United States*, 329 U.S. 14 (1946). The majority opinion by Justice Douglas quoted from *Reynolds v. United States*, 98 U.S. 145 (1879), and held that Mormon polygamy was an immoral practice within the definition of the Mann Act. *Cleveland*, 98 U.S. at 18. This time, however, there was a dissenting opinion in which Justice Frank Murphy argued that polygamy was "a form of marriage built upon a set of social and moral principles" which could not be equated with debauchery or prostitution. *Id.* at 24-29; see also p. 194.

40. Cott writes that "[s]evere antipolygamist pronouncements of the 1880s commonly likened the Mormons' political threat to the peril posed by the Confederacy, and even suggested that another civil war might be necessary." P. 118. On the Mormon political threat, see Mary K. Campbell, *Mr. Peay's Horses: The Federal Response to Mormon Polygamy, 1854-1887*, 13 YALE J.L. & FEMINISM 29 (2001).

states with more liberal divorce laws remained solidly within the union. For all the anxiety about divorce, membership in the larger political community was never at risk.

Although state-sanctioned discrimination against homosexuals is somewhat comparable to racial discrimination before the Civil Rights Act, significant differences remain. Because sexual orientation is more readily concealed than race, gays and lesbians more often choose — or feel compelled — to pass or to cover.⁴¹ Sexual orientations are widely distributed across geographic regions and across social class, political, racial, ethnic, religious, and family groups. These factors will make it much more difficult over the long range to sustain the kinds of legal rules that exclude gays and lesbians from full membership in the civil polity.⁴²

Considering these parallels, Cott may be too quick to discard her thesis about the disestablishment of marriage. While she notes correctly that large majorities in Congress supported the Defense of Marriage Act, (p. 220), it is not clear how many of the Senators and Representatives who voted for the Act shared the ideological stance of its sponsors.⁴³ By the time of the 2000 presidential election, prominent politicians noted their opposition to marriage rights for gay and lesbian couples, but they argued in favor of extending many of the rights incident to marriage to these couples through devices such as domestic partnerships.⁴⁴ In the last decade, Hawaii, California, and Vermont have made available comprehensive statewide domestic partnership registration. In Vermont, the 2000 civil union law established a close equivalent to marriage for same sex partners.⁴⁵ Even within the

41. See generally Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 875-78, 889, 925-27 (2002).

42. This also suggests that change in attitudes will be a gradual process. See generally William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 881 (2001) (“The genius of Vermont’s equality practice is that the state insisted that traditional family values give way to the recognition of lesbian and gay rights, but lesbian and gay family values give way to accommodation of traditionalist anxieties for the time being.”).

43. Some of those who voted for the act indicated substantial ambivalence about the bill. See, e.g., Eric Schmitt, *Panel Passes Bill to Let States Refuse to Recognize Marriage*, N.Y. TIMES, June 13, 1996, at A15 (quoting comments of Rep. Sonny Bono, R-Cal.); John E. Yang, *House Votes to Curb Gay Marriages*, WASH. POST, July 13, 1996, at A1 (quoting comment of Rep. Peter Deutsh, D-Fla.); .

44. See, e.g., Jim Fitzgerald, *Hillary Voices Opposition to Gay Marriage — First Lady Says She Supports Full Benefits for Same-Sex Couples but not Matrimony*, NEWARK STAR-LEDGER, Jan. 11, 2000 available at 2000 WL 4250754; Bob Hohler & Susan Milligan, *Mild Tone Marks Gore-Bradley Exchange*, BOSTON GLOBE, Mar. 2, 2000, at A23 (reporting that both Al Gore and Bill Bradley support domestic partnership but not same sex marriage); see also Estin, *supra* note 36, at 363 n.76 (citing comments by Ann Landers, William Safire, and Roy Romer made in 1996.)

45. Codified in part at VT. STAT. ANN. tit. 15, §§ 1201-1207 and tit. 18 §§ 5160-5169 (2000). Other countries including Denmark, Norway, Sweden, Iceland, the Netherlands, France, Germany, and Finland have extended benefits to registered same-sex domestic part-

Supreme Court, the authority of *Bowers v. Hardwick* has been undermined by the more recent ruling in *Romer v. Evans*.⁴⁶ These changes have entailed controversy, but polling data suggests that at least half of Americans support extension of health insurance, Social Security benefits, and inheritance rights to same-sex partners, and that about a third support same sex marriage.⁴⁷

Over time, if public opinion continues to shift, same-sex marriage will no longer be so unthinkable. Cott's book shows us that interracial marriage was actively disputed before the Civil War and for more than a century afterward (pp. 40-45, 98-103, 163-64, 184-85, 198), and the liberalization of divorce laws was a process that returned to state legislatures regularly for at least 150 years (pp. 47-52, 106-11, 195-96, 205-07). By comparison, the debate over same-sex marriage has progressed remarkably quickly.⁴⁸

Ironically, as Cott underlines, the campaign by gays and lesbians for access to marriage rights has bolstered the status of marriage by enhancing our understanding of its public and private benefits both for a couple and for the larger society (p. 225). What is most striking about the Vermont compromise, however, is the decoupling of "rights and benefits" and the institution of marriage. The greater obstacle for advocates of same-sex marriage rights may not be the New Right, but the nagging discomfort that many in the political center or left still feel with the prospect of broadening the definition of marriage to include gays and lesbians.⁴⁹

ners. The Netherlands also permits same-sex couples to marry. See Keith B. Richburg, *Dutch Legalize Same-Sex Marriages*, WASH. POST, Sept. 13, 2000, at A28.

46. 517 U.S. 620 (1996) (applying equal protection principles to invalidate an amendment to the Colorado constitution that prevented enforcement of laws or ordinances prohibiting discrimination against gays, lesbians, or bisexuals). See generally Estin, *supra* note 36, at 365-70. Although *Bowers* has not been overruled, the Georgia statute it considered was found to be an unconstitutional infringement of the right to privacy under the state constitution in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

47. See Will Lester, *U.S. Mixed on Same-Sex Marriage*, DENVER POST, June 1, 2000, at A06 (reporting that 51 percent of respondents opposed same-sex marriage while 34 percent approved). When constitutional amendments to bar same-sex marriage went to the voters in Hawaii and Alaska in 1998, more than two-thirds of the voters in each state supported the ban. See Eskridge, *supra* note 42, at 874.

48. See also Yoshino, *supra* note 41, at 783-84 (noting argument that movement for gay rights has moved further and faster than any previous movement).

49. See David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 956 (2001) (suggesting that the prospect of change to a more inclusive institution of marriage "threatens or unsettles the identities of marriage conventionalists who currently benefit personally from marriage's symbolism"); see also David L. Chambers, *The Baker Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5, 12 (2000). Of course, there are also different views within the lesbian and gay community as to the desirability and importance of full marriage rights.

B. *Marriage and the Shape of Welfare Reform*

Cott argues that marriage in the twentieth century has been defined primarily in economic terms, and the national government has repeatedly reinforced traditional marriage patterns by using them in structuring public programs (pp. 174-79, 190-94). In this context, it is not surprising to encounter marriage norms embedded in the welfare reform legislation enacted by Congress in 1996. Cott notes the recitals at the beginning of the bill, which declare marriage to be “the foundation of a successful society,” and “an essential institution of a successful society which promotes the interests of children” (pp. 221-22). These recitals reflected the belief by many of the act’s proponents that public assistance programs undermine both marriage and parental responsibility.⁵⁰

The concern for family life that animates the welfare reform law is notably different from the concern that structures other benefit programs targeted at non-poor families. In earlier chapters of her book, Cott describes the distinction made under the 1935 Social Security Act between the more generous social insurance benefits targeted at full-time (white, male, able-bodied) workers and the more stringent public assistance programs available for families without male breadwinners.⁵¹ Benefit levels were higher for married men, and while policy-makers understood that they were overtaxing single men and all women contributors, they saw this inequity “as a useful incentive to men to marry and have families, and to women to be stay-at-home wives and mothers” (p. 177). Cott notes the interaction of the federal program with state family support laws: “The Social Security program rewarded men for taking on family responsibilities, while state-level apparatus policed them if they faltered in delivering support” (p. 176).

The politics of the welfare reform bill reflect an ideal of family financial independence that flies in the face of the American experience.⁵² Cott points out that the rhetoric suggested that “the marriage

50. Cott writes

Proponents assumed rather than probed what were the reasons behind the correlation between marriage and economic stability. They did not give equal attention to highly relevant and complex issues of sex segregation and racial stratification in the labor market; they did not question how far the rise of illegitimacy and female-headed households, and the decline in marriage, were larger phenomena not caused by welfare.

P. 222.

51. Pp. 174-78. Cott notes that while there was no explicit reference to gender or race in the law, the act excluded coverage of “part-time, seasonal, agricultural, domestic, philanthropic, and government employees (including teachers), and the self-employed. These were exactly the areas where women wage-earners, and African-American and Latino men as well, were concentrated.” P. 175.

52. See generally STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 68-92 (1992) (arguing that “depending on support beyond the family has been the rule rather than the exception in American history”).

ceremony itself magically solved the problem of poverty” (p. 222). There are echoes in the legislation of the approach taken by the Freedmen’s Bureau, “linking legal marriage to the requisite ethic of hard work and reinforcing normatively the husband’s and father’s responsibility to support his dependents” (pp. 222-23). In the late twentieth century, paid work became “a requirement and an emblem of full citizenship for both women and men” (p. 223). Women and men who are not self-sufficient, or not able to support their children, are seen as less than full members of the polity, and therefore are denied some of the rights that go along with citizenship.⁵³

This is also a problem of membership and belonging. The most important right denied to poor families is precisely the one that now defines family life. Cott writes, “The national value placed on marital and familial privacy did not extend to families in need of help. Welfare mothers and fathers could not enjoy ‘a private realm of family life where the state cannot enter’ ” (p. 223). Rather than supporting privacy and autonomy, federal welfare laws have “brought public oversight into the lives of the poor” (p. 223). Because poor families are subject to public oversight, they are subject to public condemnation on moral grounds for behaviors, such as nonmarital cohabitation and childbearing, that no longer provoke sanction or comment among the rest of the population.

Seen in the larger historical perspective, these politics seem unlikely to change. Intrusive and punitive regulation of poor families has a very long history.⁵⁴ Current policy continues to move in this direction, with new initiatives to promote marriage among the poor at the center of early debate over reauthorization of the 1996 law.⁵⁵ Nothing in the history Cott recounts suggests much willingness to guarantee all families a measure of economic security, or to understand poor families as equally deserving of privacy and autonomy in the family choices they make.

These politics are both the same as and entirely different from those surrounding same-sex marriage. As Cott suggests, both pieces of legislation reflect a resurgence of traditional values in national legislation. In both, the coercive power of government is evident. But we might also note a contradiction: while the national government exhorts one group of citizens to embrace traditional marriage, it simulta-

53. Public condemnation of “deadbeat dads” and increasingly harsh methods of child support enforcement, including suspension of passports, as well as occupational, recreational, and driving licenses, is one illustration of this trend.

54. Cott notes the racial and gender politics at work here. P. 221.

55. See, e.g., Amy Goldstein, *Looking Beyond Jobs in Welfare Reform; Conservatives Advise States to Promote Marriage, Abstinence, Stronger Families*, WASH. POST, Sept. 6, 2001, at A21; Robin Toner & Robert Pear, *Bush Urges Work and Marriage Programs in Welfare Plan*, N.Y. TIMES, Feb. 27, 2002, at A18; Robin Toner, *Welfare Chief is Hoping to Promote Marriage*, N.Y. TIMES, Feb. 19, 2002, at A1.

neously forecloses the opportunity to another group. Marriage is both pushed and pulled, urged and denied, extended and withheld.

III. CONCLUSION

With *Public Vows*, Nancy Cott demonstrates that the national political stage has been a central location for normative pronouncements about marriage and family life throughout American history. Marriage has been the language used to define and debate fundamental questions of citizenship and belonging in the larger national community. As the national character has changed and evolved, so have the particulars of what marriage means.

As a result of the sweeping disestablishment of marriage during the middle years of the twentieth century, Americans now understand choices about family life as more private, and individuals are accorded correspondingly greater freedom in making these choices. At the same time, marriage norms are still central to the government's provision for families, organizing large numbers of rights and obligations at both the state and federal level. Marriage norms are still interjected into political discourse to define some families as deviant and to mark off some individuals as less worthy of full membership.

Like a coin or a sword, the public structure of marriage has two sides. One, more benevolent, lends symbolic and material support to private family commitments. The other, more coercive, marshals the state's authority to control and regulate the most personal aspects of our lives. For the political majority, however, this coercive face is rarely felt or identified. As Cott writes, "the more that marriage is figured as a free and individual choice — as it is today in the United States — the less the majority can see the compulsion to be involved at all" (p. 8). With *Public Vows*, Cott shows us what lies behind and underneath our "common sense" about marriage, challenges us to reconsider the things we take for granted about families, and reminds us that for some Americans, there is another side to the story.