Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage

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I. INTRODUCTION

Most happy couples eager to make their wedding vows are not looking for increased state involvement as they prepare to enter their private act of marriage. However, recent covenant marriage legislation presents American couples with the opportunity to foster a more lasting marital commitment through thoughtful preparation and informed discussion of alternatives to divorce. Legal scholars and lawmakers, who acknowledge the significance of marriage in society, are now recognizing the value of encouraging couples to spend more time building a relationship, rather than establishing methods to end it efficiently.

1. Julie Kay, Covenant Couples Few; Only 5 Licenses Obtained in Baton Rouge, ADVOC. (Baton Rouge, La.), Oct. 25, 1997, at 1C (reporting that the clerks who issue Louisiana marriage licenses say that very few couples inquire about covenant marriage; most do not understand what it is; most want their licenses immediately; and many turn down the option of returning later with notarized records of premarital counseling); see Ed Anderson, Divorce Discussion Discouraged; Covenant Couples Might Lose Option, TIMES-PICAYUNE, Apr. 3, 1999, at A3 (stating that no more than three percent of marriages have been covenant marriages in the two years since they became available in Louisiana).

2. See Katherine Shaw Spaht, Marriage: Why a Second Tier Called Covenant Marriage?, 12 REGENT U. L. REV. 1, 2 (1999) (explaining that covenant marriage legislation offers couples a new opportunity to publicly uphold their unions as serious, permanent commitments and gives America the chance to refurbish its outlook on marriage).

the same time, more sociologists and scholars studying marriage and the family now recognize the critical role marriage plays in the well-being of children and adults. Yet, debate continues over how marriage should be defined, and the question of just how much the law can or should affect


[F]amily scholars who have not always seen eye to eye are converging on a number of findings that fly in the face of our cherished myths. We agree that the effects of divorce are long-term. We know that the family is in trouble. We have a consensus that children in divorced or remarried families are less well adjusted as adults than those raised in intact families.

Id.; LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 148 (2000) (citing Waite's unpublished research, which found that eighty-six percent of people surveyed, who were unhappily married in the late 1980s yet stayed with the marriages, said they were happier five years later). Three-fifths of the previously unhappy couples called their marriages either "very happy" or "quite happy." Id.

5. THE NATIONAL MARRIAGE PROJECT, supra note 3; MARRIAGE DECLINE IN AMERICA: TESTIMONY BEFORE THE SUBCOMMITTEE ON HUMAN RESOURCES COMMITTEE ON WAYS AND MEANS 1 (2001.) (testimony of David Popenoe). Popenoe reports:

The social science evidence is now overwhelming that children fare better in life if they grow up in a married, two-parent family. Children who grow up in other family forms are two to three times at greater risk of having serious behavioral and emotional problems when they become adolescents and adults. Many of today's youth problems can be attributed, directly or indirectly, to the decline of marriage.

Id.; see also THE NATIONAL MARRIAGE PROJECT, supra note 3, at 30-31 (explaining the evidence that shows stable and satisfying marriages are critical to adults' well-being and emphasizing that marriage is even more vital for the overall well-being of children). The American trend toward single-parenting is the family trend that affects children and teens the most. Id. at 31. Children in these single-parent families have "negative life outcomes at two to three times the rate of children in married, two-parent families." Id. The report also cites the U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P20-514; MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE), which reports that in 1998 twenty-eight percent of children lived in single-parent families, an increase of nineteen percent since 1960. Id.

human behavior within marriage remains unsolved.\textsuperscript{7} Invoking a modest response to the complex matter of how to make marriages last, proponents of strengthening marriage introduced the concept of covenant marriage.\textsuperscript{8}

Covenant marriage legislation, a recent phenomenon in Louisiana, Arizona,\textsuperscript{9} and Arkansas,\textsuperscript{10} arose for three reasons. First, research connecting the rise in the American divorce rate to the availability of no-fault divorce sparked reconsideration of stricter requirements to obtain a divorce.\textsuperscript{11} Second, concerns about the well-being of children affected by divorce inspired a system that encourages lengthier separation and reflection periods for couples so that they may consider reconciliation.\textsuperscript{12} Third, and as a consequence of the first two concerns, particular

\textsuperscript{7} Elizabeth S. Scott, \textit{Social Norms and the Legal Regulation of Marriage}, 86 Va. L. Rev. 1901, 1903-04 (2000) (explaining that some scholars argue that the law cannot regulate behavior in intimate relationships, but suggesting that some legal reforms do have the power to reinforce positive social norms).

\textsuperscript{8} Spaht, \textit{Why a Second Tier, supra note 2, at 2 (suggesting that covenant marriage legislation works to strengthen marriage).}


\textsuperscript{10} See E-mail from Arkansas State Representative Russ Hunt to author (Oct. 1, 2001, 17:59 EST) (on file with author) (offering Arkansas’s “horrendous divorce rate” and the “public policy interest” as his principal reasons for sponsoring a covenant marriage bill).

\textsuperscript{11} \textit{Id.} at 31 (explaining the covenant marriage legislation drafters' commitment to restoring marriage in a no-fault divorce era); Jeanne Louise Carriere, \textit{“It's Déjà Vu All Over Again”: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality}, 72 Tul. L. Rev. 1701, 1746 (1998) (concluding that the potential for covenant marriage to improve the state of modern families lies in its call for a transformation in the modern approach to marriage, not in its legal result with respect to divorce). Every state accepts some form of no-fault divorce. John De Witt Gregory et al., \textit{Understanding Family Law} 188 (1993). Fifteen states hold “irreconcilable differences” or “irretrievable breakdown” as the sole ground for divorce. \textit{Id.} Twenty states list traditional fault-based grounds and add a no-fault ground to their lists. \textit{Id.} The other states grant no-fault divorce after a showing of living separately and apart for a required period of time. \textit{Id.}

conservative religious groups in the South devoted themselves to reaffirming the meaning of marriage.\footnote{13}

Covenant marriage introduces unique ideas and many uncertainties to the family law arena.\footnote{14} Questions include: how marriage will change if it is modified by an additional covenant;\footnote{15} how couples' behavior will adjust to a different option in the law;\footnote{16} and how legislators will respond to the limited participation in covenant marriage where it is currently available.\footnote{17} This Comment will address these issues and ask why, despite their positive symbolic value, covenant marriage laws have had minimal practical success.\footnote{18} An inquiry into the roots and rationales of covenant marriage legislation provides possible explanations for the laws' seeming ineffectiveness. This Comment also provides possible suggestions for refocusing the laws' effort.\footnote{19}

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\begin{itemize}
\item\footnote{13. See, e.g., Spaht, Beyond Baehr, supra note 6, at 297 n.88 (reporting the Louisiana Baptist Convention's endorsement of covenant marriage).}
\item\footnote{14. See, e.g., David M. Wagner, The Constitution and Covenant Marriage Legislation: Rumors of a Constitutional Right To Divorce Have Been Greatly Exaggerated, 12 REGENT U. L. REV. 53 (1999) (anticipating constitutional attacks on covenant marriage from a substantive due process perspective); Marie Summerlin Hamm, Opportuning Virtue: The Binding Ties of Covenant Marriage Examined, 12 REGENT U. L. REV. 73, 89 (1999/2000) (suggesting changes in covenant marriage's pre-marital and pre-divorce counseling requirements); Lisa Milot, Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family, 87 VA. L. REV. 701, 702, 707 (2001) (discussing the overlapping doctrines currently regulating marriage and arguing that laws designed to protect families ought to extend to families formed outside legal marriage).}
\item\footnote{15. James Herbie DiFonzo, Customized Marriage, 75 IND. L.J. 875, 954 (2000) (arguing that urging couples into binding marital contracts displays a new paternalism that favors the restriction of marital options and the restoration of traditional marriage).}
\item\footnote{16. See Scott, supra note 7, at 1902-03. Professor Scott concludes that the complicated interaction between laws and norms, combined with individuals' disguised preferences, frustrates the ability to predict how changes in marriage regulations will result. Id. at 1902-05.}
\item\footnote{17. See Anderson, supra note 1; Telephone Interview with David Petersen, Arizona State Senator (Sept. 26, 2001) (speaking at length about the issues facing Arizona's Covenant Marriage Act). Senator Petersen knows of only 400-500 covenant marriages, out of approximately 40,000 marriages, obtained in Arizona since the law took effect in 1998. Id. Arkansas has not recorded official statistics thus far but reports that several couples have chosen covenant marriage since its availability in August 2001. E-mail from Chris Pyle, Director of Family Policy under Arkansas Governor Mike Huckabee, to author (Oct. 18, 2001, 15:56 EST) (on file with author). Similarly, Arkansas expects low participation at first and slow initial growth. See id.}
\item\footnote{18. See supra note 16. Beyond the limited participation in covenant marriage, some authors question if courts would even enforce a premartial covenant marriage agreement. Scott, supra note 7, at 1903.}
\item\footnote{19. See infra notes 303-28 and accompanying text.}
\end{itemize}
II. SCOPE

This Comment first examines the value and importance that various Christian denominations arriving in America originally placed on the institution of marriage. Next, it assesses the fragile condition of modern marriage and traces the cultural implications of no-fault divorce and its effects on children. This Comment then describes the concept of covenant marriage and its effort to thwart the rising divorce rate. This Comment outlines the meaning and content of new covenant marriage legislation in Louisiana, Arizona, and Arkansas. In addition, this Comment analyzes different religions' enthusiasm for, hesitancy toward, or absence of involvement in covenant marriage legislation in light of their respective doctrines on marriage. Finally, this Comment addresses why so few couples participate in covenant marriage in the three states where it is available and suggests that this apparently sound effort toward strengthening marriage would have benefited from the additional support of varied religions. Ultimately, this Comment concludes that the absence of interfaith religious discourse before the passage of covenant marriage acts, and the lack of religious collaboration in implementing covenant marriage laws, has resulted in their limited public acceptance.

III. RELIGIOUS ROOTS AND LEGISLATIVE HISTORY OF COVENANT MARRIAGE

A. Early American Religious Doctrine on Marriage

This section describes the influence of religion on marriage in the United States, beginning with the early arrival of Christianity. Drawing on Professor John Witte, Jr.'s examination of marriage from different religious constructs in the West, this section points out that the Christian Church's early construction of the law and theology around marriage became the "cornerstone of the Western tradition of marriage for nearly two millennia." Finally, this section describes the roots of the Catholic and Protestant traditions surrounding marriage and considers the distinctions between the two to suggest a foundation for their later stances on covenant marriage.

20. See infra notes 21-62 and accompanying text.
22. See infra notes 23-63 and accompanying text.
1. Early American Catholicism and Its Teachings on Marriage

a. Catholicism Comes to America

The European religious movements that arrived with the first pioneers inspired the basis and organization of early American family and marriage law. Roman Catholicism was practiced by colonists, particularly in Maryland and also in the territories that were previously under the authority of Spain. Other Catholic, non-Spanish colonists came from their homelands in Europe to settle in Baltimore, Philadelphia, New York, Boston, and eventually the Western states.

When the United States eventually acquired the Spanish territories, they were under the jurisdiction of Catholic Bishops who upheld the Church's canon laws on marriage. Upon acquisition of the territories, the United States replaced the Bishops' control over marriage with the laws of Congress and local government. For over a century thereafter, lawmakers consistently promoted an anti-Catholic sentiment regarding marriage in American law. The clergy who remained in the newly acquired territories remained free, however, to teach and promote Catholic values concerning sex, marriage, and the family. These early church leaders not only led their own religious following, but also encouraged state officials to adopt laws consonant with the Catholic faith. Consequently, American common law largely encompassed Christian norms respecting the grounds for entering marriage, and these ideals spread with the American Catholic immigrants who settled throughout the country during the nineteenth century.

24. Id. (indicating that the laws and theology of the Western tradition are rooted in ancient, enduring perspectives on the goods and goals of marriage). These territories included Louisiana, Florida, Texas, New Mexico, and California. Id.
25. Id. at 1071 n.233. The non-Spanish settlers followed a different version of Catholic canon law, which recognized secret, mutually consented to marriages as valid. Id. This notion of marriage was eventually written out in the 1917 Code of Canon Law when Tridentine legislation was implemented. Id.
27. Id. at 1060.
28. Id. at 1060-61. Specific changes involved removing ecclesiastical jurisdiction over marriage and ending the bans on inter-religious marriages, divorce, and remarriage. Id. at 1061.
29. Id.
30. Id.
31. Id.
b. Traditions Behind Catholic Teachings on Marriage in America

Both Jesus Christ and Saint Paul, the most prolific and famous first century Christian, emphasized marriage as an image of the Kingdom of God, analogizing the love and sacrifice that spouses offer one another to the love and sacrifice offered by God to God’s “bride,” the Church. During the establishment of the autonomous Roman Catholic Church, the papacy of Pope Gregory VII emphasized the sacramental value of marriage. The Church’s newly autonomous, separate identity within the Christian world caused a remarkable shift in Western society. The new Christian culture embraced a “systematic theology and law of marriage,” which Catholicism laid out in its doctrine:

Marriage was conceived at once (1) as a created, natural association, subject to the laws of nature; (2) as a consensual contract, subject to the general laws of contract; and (3) as a sacrament of faith, subject to the spiritual laws of the church. These three perspectives were designed to be complementary, each emphasizing one aspect of marriage: its natural origin, its legal form, and its spiritual significance respectively. It was the sacramental quality of marriage, however, that provided the theological and legal integration of these three perspectives into a systematic model of marriage.

The Roman Catholic tradition, in its regulation and promulgation of marriage law, upheld the three goods of marriage: procreation, faith, and sacrament. The Church especially exalted the sacramental value of marriage because the sacrament enabled grace to form an indissoluble bond between man and woman, thus representing their participation in Christ’s indissoluble union with the Church.

32. Witte, supra note 21, at 18.
33. Id. at 22-23. Pope Gregory VII guided Catholic teachings during the years 1073-1085. Id. at 22.
34. Id. at 23.
35. Id.
36. Id.
37. Witte, supra note 23, at 1035.
38. Id. at 1036-37. Thomas Aquinas’s teaching clarifies Augustine’s thought and illustrates the modern Catholic teaching on marriage. Id. at 1034-35. Witte explains: Augustine called marriage a sacrament to demonstrate its symbolic stability. Aquinas called marriage a sacrament to demonstrate its spiritual efficacy. Augustine said that marriage, as a perennial symbol of Christ’s bond to the Church, should not be dissolved. Aquinas said that marriage, as a permanent channel of sacramental grace, could not be dissolved. Augustine called marriage a sacrament because it was indissoluble. Aquinas called marriage indissoluble because it was a sacrament.

Id. at 1037-38 (footnotes omitted).
Today, the Catholic Church teaches that marriage is a sacramental covenant, "by which a man and a woman establish between themselves a partnership of the whole of life. . .". While the Catholic Church upholds the sacramental aspect of marriage, in 1604 the Anglican Church officially denied the sacramental theology behind the marital union and promoted the commonwealth model of marriage instead. This early divergence in doctrine may explain some of Catholicism's reluctance to embrace the covenant marriage movement. With its own teachings in place concerning the covenant between man, woman, and God in marriage, the Catholic Church is hesitant to support an idea that may elevate contractual notions of marriage within its culture.

2. Early American Protestantism and Its Foundations for Marriage

a. Protestant Pluralism Reaches America's Shores

Protestant theology figured quite prominently in early American law; Protestant theologians who promoted the three goods of marriage as "procreation, love, and protection" significantly influenced the laws' formation. Many Protestant writers focused on the additional benefits of health and prosperity that usually accompanied marriage. The pluralist Protestant society of early America advanced Christian ideals about marriage but rejected the Catholic notion of marriage as a sacrament. Unlike Catholicism, Protestants allowed divorce and inter-religious marriages and encouraged remarriage for the divorced or widowed. Overall, the Protestant concept of marriage as an ideal, beneficial, and fundamental institution permeated early American social ideals and legal thought.

40. See Witte, supra note 21, at 166-67. "The commonwealth model of marriage provided a new rationale. This model served at once to rationalize and routinize the many marital doctrines that had been settled, and to seek settlement over the disputed doctrine of divorce.” Id. at 167.
41. See infra notes 220-27 and accompanying text (exemplifying the Catholic Church’s general reluctance to support covenant marriage).
42. Witte, supra note 23, at 1064.
43. Id. at 1063.
44. Id. at 1064.
45. Id. at 1063-64.
46. Id.
47. See id. at 1065-66 (citing various instances in which legal commentators maintained the Protestant notions of the goods of marriage to underscore their importance in legal matters). Witte refers to prominent legal texts and treatises of the late
b. Traditions Behind the Protestant Ideal of Marriage

The Protestant Reformation, provoked by disagreement with the Catholic doctrine, including the doctrine on marriage and divorce, provided another dominant religious model for marriage in America.\(^4\) The major Protestant reformatations promoted new characterizations of marriage that did not focus on spiritual or sacramental concepts.\(^4\) Rather, leaders such as Martin Luther, John Calvin, and Thomas Becon emphasized marriage as a "social estate," a "covenantal association of the civil and ecclesiastical order," and a "domestic commonwealth within the church and commonwealth of England," respectively.\(^5\) While early Catholic scholars rejected the idea that marriage might have values beyond the goods of procreation, faith, and sacrament,\(^2\) Protestant reformers expanded endorsement to the social and political goods offered by marriage.\(^5\)

1800s that upheld marriage as a fundamental structure of society's morals, religion, and progress. \(\text{id.}\)

48. \(\text{Witte, supra note 21, at 42. Witte explains:}\)

Questions of marriage occupied Protestant theologians and jurists from the beginning of the Reformation. . . . The Protestants' early preoccupation with marriage was driven in part by their theology. Many of the core issues of the Protestant Reformation were implicated by the Roman Catholic theology and canon law of marriage that prevailed throughout much of the West on the eve of the Reformation. The Catholic Church's jurisdiction over marriage was, for the reformers, a particularly flagrant example of the Church's usurpation of the magistrate's authority. . . . Issues of marriage doctrine and law thus implicated and epitomized some of the cardinal theological issues of the Protestant Reformation.

\(\text{Id.}; \text{see also id. at 43. "[The] three Protestant reformatations of marriage... all replaced the traditional sacramental model of marriage with a new model that played up another dimension of marriage besides its spiritual qualities." Id.}\)

49. \(\text{Id.}\)

50. \(\text{Id. at 42-43. For a discussion of Luther's views on the church, the law, and justice, see F. \text{Edward Cranz, An Essay on the Development of Luther's Thought on Justice, Law, and Society 116-17 (1959).}}\)

51. Augustine viewed the three goods of marriage as procreation, fidelity, and sacrament and did not rate one over the others as primary. \(\text{Witte, supra note 23, at 1031. Thomas Aquinas, developing Augustine's thought, was concerned with reactions against the limited list of marriage's three goods and considered whether they should focus on marriage's "useful" characteristics, instead of its "virtuous" ones. Id. at 1033-34. Ultimately, Aquinas combined the Augustinian virtues of marriage more clearly and described how each good was equally necessary in grounding the natural, contractual, and spiritual dimensions of marriage. Id. at 1035-36 (citing ST. \text{Thomas Aquinas, Summa Theologica 2724-29 (Fathers of the Eng. Dominican Province trans., 1948)).}}\)

52. \(\text{Id. at 1053 (noting that Protestant leaders promoted new goals of marriage partially based on their new interpretation of the Bible and other classical sources and partially on their disapproval of celibacy and monasticism).}\)
The Reformation altered Catholic teaching on marriage in three significant ways. First, the good of faith was cast in terms of marital love and friendship, and ending a marriage could be justified, though it was a sin against fidelity. Second, reformers added to the marital good of procreation by asserting that it was accompanied by a responsibility to educate and nurture children. This notion of marriage is reflected in the covenant marriage movement’s dedication to children’s well-being. Third, Protestantism did not maintain the sacramental good of marriage. While Protestants did believe that marriage should be stable and indissoluble, they acknowledged that breaking one of the other marital goods allowed for dissolution. In other words, “[m]arriage was a means to love, to children, and to protection. Where such goods failed, the marriage failed, and such goods should be sought in a second marriage.” A particular difference arose from the concept that marriage protected a spouse against sexual sin, which bolstered the reformers’ conviction that widows, widowers, and divorcees ought to remarry. Professor Witte notes that many of the leading reformers who forwarded a utilitarian sentiment toward marriage took an active role in drafting the first evangelical marriage laws. In many ways, formation of modern covenant marriage law is a reflection of the sentiments and efforts of the early reformers.

The Protestant reformation introduced the beginnings of the secularization of marriage, as Protestants believed that the three social institutions to which every individual belongs – the family, the church,
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and the state – "are divine in origin and human in organization." Thus, it is possible to make a connection between the evangelical Protestant inclination to participate in lawmaking and contrast it to other religions' hesitancy. Specifically, regarding the Protestant perspective on marriage as an institution to teach and govern, one can understand the more active evangelical movement's participation in covenant marriage. As will be asserted, the Baptists' willingness to attempt to legislate public virtue is anchored in the original Protestant teaching on the institution of marriage.

B. The Origin of the Covenant Marriage Concept

This section will connect the roots of religious belief about marital goods to the introduction of the first covenant marriage law. By recognizing the shifts of cultural attitudes toward marriage and acknowledging the troubling consequences for families, the reasoning behind covenant marriage becomes clear. Specifically, this section will define covenant marriage and discuss the roles that the availability of no-fault divorce, and its harmful effects on children, have played in developing the concept.

Covenant marriage legislation came about as a strong reaction to America's transformation of marriage into an institution focused more on individual well-being and based on an easily abandoned contract. A covenant marriage, where a couple makes an addendum to their marriage license to indicate stricter rules governing their union and their ability to separate, is now available in the states of Louisiana, Arizona, and Arkansas. The development of these acts is grounded upon the cultural evolution of marriage, the advent of no-fault divorce, and the

64. *See infra* notes 65-88 and accompanying text.
65. *See* MARY ANN GLENDON, *STATE, LAW, AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* 1 (1977). Professor Glendon explains this transformation:
   "Beginning in the middle 1960s, there has been an unparalleled upheaval in the family law systems of Western industrial societies. . . . [T]his change equals and surpasses in magnitude that which occurred when family law matters passed from ecclesiastical to secular jurisdiction in most Western countries in the age that began with the Protestant Reformation."
68. ARK. CODE ANN. §§ 9-11-801 to 9-11-811 (Michie 2002).
more recent divorce counterrevolution that focuses on the well-being of children.69

Since the civil rights movement of the 1960s, the sexual revolution, and the cultural recognition of more egalitarian gender roles, traditional marriage notions have changed drastically.70 Reflecting the rapid social change in family structure and tolerant attitudes toward alternative intimate relationships,71 marriage has faced increasing instability.72 One serious factor contributing to the decline in marriage is the ease with which divorce can now be obtained.73

The no-fault divorce revolution did not aim to make radical changes in family form.74 Rather, the minds behind divorce reform in the 1970s focused on removing the adversity that fault-based divorce brought to the process and eliminated the collusion couples often employed to dissolve a marriage that they had both agreed to end.75 However, the change brought with it an unintended increase in divorce and family upheaval.76 The nation’s new stance on divorce77 revealed that personal

69. See e.g., O'Brien, supra note 3, at 430-32; Spaht, Louisiana’s Covenant Marriage, supra note 12, at 74-77.
70. See O’Brien, supra note 3, at 430-32.
72. See Scott, supra note 7, at 1936.
73. See Spaht, Why a Second Tier, supra note 2, at 1. Professor Spaht explains the effects of changing divorce laws:
Law with all of its symbolic value essentially “defined marriage down” from a sacred indissoluble union of man and woman to a companionate relationship that endures until either spouse loses affection for the other. Law accomplished this remarkable feat by unilateral no-fault divorce laws permitting one spouse to dissolve a family without good reason within a matter of a few months and by judicial opinions which, while recognizing a constitutional right to marry, chose to define marriage from one party’s individualistic perspective only, which is predictable when one speaks of rights without correlative obligations.
Id.
74. See Scott, supra note 7, at 1941.
75. See id.
76. Michael J. Sandel, Democracy’s Discontent: America in Search of a Public Philosophy 112 (1996). Sandel explains that “[d]ivorce rates more than doubled from the 1960s to the late 1970s, to the point where half of all marriages are expected to end in divorce. With the rise in divorce came a growing tendency to cast off the obligations of parenthood.” Id. (footnote omitted). He also notes that most children of divorce live with their mothers, that half of them do not see their fathers for over a year, that only about forty percent receive the child support payments that their fathers owe them, and that fifty-six percent of children in single female-headed households live in
ideals of autonomy took precedence over the community good, that individuals held their own rights as paramount, and that divorce was increasingly becoming an individual right. Consequently, by 1998 family breakdown had increased by four times what it was in 1970. One probable cause of the increase in the frequency of divorce was easier access to unilateral, no-fault divorce. Likewise, the marriages of children of divorced couples exhibit a much higher rate of divorce than the marriages of children from intact families. Recent public discourse elevates rights over responsibilities, independence over self-discipline, and freedom over order in such a way to convince many that this pattern is acceptable. Sponsors of covenant marriage, however, believe otherwise and invite a reasonable public response to what clearly has become a serious public problem.
The detrimental effect of divorce on children’s lives became a specific concern of policy makers in the 1990s, and legal scholars reporting divorce’s grave implications called for a reassessment of the law. For example, multiple empirical studies reveal that divorce increases the risk of interpersonal problems in children and that these problems may become worse in adulthood. Other studies indicate that children suffer divorce’s effects cumulatively over time. Judith Wallerstein’s twenty-five-year-long study reports:

The impact of divorce gathers force as [children] reach young adolescence, when they are often insufficiently supervised and poorly protected, and when, additionally, they are required then (if not earlier) to adjust to new stepparents and stepsiblings. The impact gathers new strength again at late adolescence when they are financially barred from choosing a career or obtaining an education equivalent to that of their parents. And again, at young adulthood, their fears that their own adult relationships will fail like those of their parents rise in crescendo. The effect of the parents’ divorce is played and replayed throughout the first three decades of the children’s lives.

Covenant marriage was proposed in response to the combination of concerns about both the increasing divorce rate and its consequences for children in broken families.

Florida was the first state to consider covenant marriage in 1990. However, the Florida legislature did not act on the bill. The proposed


87. Id.

88. See Kohm, supra note 9, at 33-38 (describing how author Elizabeth C. Scott of the University of Virginia furthered the idea of contract theory in relation to family law and how Katherine Shaw Spaht drafted the Louisiana covenant law marriage bill based on the welfare of children).

89. Id. at 34 (citing H.R. 1585, Reg. Sess. (Fla. 1990)).

90. Id. at 34-35.
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bill required the premarital steps of counseling, a declaration of intent to marry, and proof of adultery for marital dissolution; such requirements drastically differed from the no-fault divorce framework then supported by Florida law. Eventually, Florida settled on an act that makes premarital counseling optional and rewards couples who opt for the precautionary measures by reducing their marriage license fee. Likewise, other states concerned with strengthening marriage, but unwilling to adopt a full-fledged covenant marriage law, have proposed and enacted premarital counseling amendments to their marriage laws. While premarital counseling bills do not go as far as the more stringent demands of a covenant marriage bill, their existence and acceptance convey the states' general acknowledgement of the need to respond to the high rate of divorce and its impact on children.

The social need to strengthen marriage appears to be widely acknowledged, and covenant marriage offers one small step toward answering this call. As this Comment reveals, the covenant marriage laws in Louisiana, Arizona, and Arkansas invite churches and civil society to take part in the restoration of individual marriages. Covenant marriage invites religious support, but it also provides a secular path to obtain a “more permanent marriage by civil covenant.” Through this effort, the nature of the Protestant notion of marriage is once again reflected in the utilization of marriage to invoke social and communal goods.

C. Covenant Marriage Legislation: Its Form and Function in Louisiana, Arizona, and Arkansas

This section sets forth the Louisiana Covenant Marriage Act and highlights the distinctions between this original legislation and the

91. Id.
93. See Kohm, supra note 9, at 35.
95. See id. at 36.
96. See supra notes 62-93.
97. See Spaht, Beyond Baehr, supra note 6, at 289-90.
98. Id. at 288-90 (footnotes omitted).
99. See id. at 288-89. Spaht explains that citizens can help restore permanence in marriage by committing to covenant marriage, and thus she seems to revive the Protestant ideal of marriage as a vehicle for social utility. See id.
subsequent covenant marriage acts of Arizona and Arkansas. Louisiana's Act will be explained through its four main components, and the differences present in Arizona's and Arkansas's corresponding components will be raised. Finally, this section analyzes the various acts' counseling requirements, their guidelines for the content of counseling, and the reactions of various religious traditions.

1. Louisiana's Covenant Marriage Law: Its Major Components

The form and function of Louisiana's Covenant Marriage Act offer the first model of covenant marriage legislation and have been used by other state legislatures in preparation of their own bills.100 The Act was an addition to the Louisiana Civil Code Articles on marriage and divorce and contains four major components.101

a. Definition of Covenant Marriage and Declaration of Intent

The first component of Louisiana's Covenant Marriage Act defines a covenant marriage and establishes the requirement of a declaration of intent.102 A covenant marriage is defined as a marriage between a male and a female who understand marriage as a lifelong relationship.103 The declaration of intent to enter a covenant marriage lists an oath to be recited by the parties, in which the woman and man state in writing:

[M]arriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage.104

The declaration must also contain an affidavit affirming that the couple underwent premarital counseling with a "priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor" to discuss (1) the seriousness of covenant marriage; (2) the fact that a covenant marriage is a commitment for life; and (3) their promise to undergo marriage counseling should there be marital difficulties.105 In addition, there must

100. See Kohm, supra note 9, at 34-39. Although the Louisiana Covenant Marriage Act was the first covenant marriage act passed, other legislatures had previously considered similar acts. Id.
102. Id. § 9:272(A).
103. Id.
104. Id. § 9:273(A)(1).
be an attestation by the counselor stating that the parties discussed the nature and purpose of marriage.\textsuperscript{106}

When Louisiana originally passed the covenant Marriage Act in 1997, the Act required the counselor who performed the premarital education to discuss the exclusive grounds for terminating a covenant marriage by divorce.\textsuperscript{107} Two years later, however, Louisiana legislators amended the Act to enable Catholic priests to act as counselors, no longer requiring any counselor to discuss the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a separation from bed and board\textsuperscript{108} because the Catholic Church opposes divorce.\textsuperscript{109} This amendment to the Act has particular significance when assessing the Catholic Church's general hesitancy toward covenant marriage.\textsuperscript{110}

Both the Arizona and Arkansas Acts contain language that closely parallels the declaration of intent required by Louisiana law.\textsuperscript{111} However,
subtle differences in counselor requirements and the content of premarital counseling become significant when analyzing the religious support for the acts. An amendment by the Arizona Senate’s Committee of the Whole struck out a phrase that required the couple to receive counseling from clergy of “a recognized religion.” A requirement of counseling from “a member of the clergy or from a marriage counselor” replaced the prior language. Relatively speaking, the new clause in the Arizona law gives couples slightly broader options in choosing counselors. The amended act closely parallels the Louisiana and Arkansas Acts, which specify that couples may choose counseling from “a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor.” Arizona State Senator Petersen noted that the state did not aim to promote certain premarital counselors or certain counseling content; rather, it focused on the idea that any counseling would be better than quick, uninformed decision making.

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received authorized counseling on the nature, purposes, and responsibilities of marriage.

ARK. CODE ANN. §9-11-804(a)(1) (Michie 2002). The statute requires that the couple sign an affidavit that certifies their premarital counseling discussion of the seriousness and life commitment of covenant marriage, their obligation to seek marital counseling in times of difficulties, and their understanding that the exclusive ground for legally terminating their covenant marriage is divorce according to the terms of the statute. Id. § 9-11-804(a)(2)(A). Finally, the counselor must provide an attestation that the couple received the authorized counseling. Id. § 9-11-804(a)(2)(B).

112. See infra Part IV.

113. See S.B. 1133, 1 Ver., 43rd Leg., 2nd Reg. Sess. § 25-901(B)(2) (Ariz. 1998), at http://www.azleg.state.az.us/legtext/43leg/2r/bills/sb1133p%2Epdf (last visited Feb. 6, 2003). Version I of Arizona’s covenant marriage bill originally required that a couple’s declaration of covenant marriage contain a written statement that included “an affidavit by the parties that they have received premarital counseling from the clergy of a recognized religion or from a marriage counselor.” Id. § 25-901(B)(2).

114. ARIZ. REV. STAT. ANN. § 25-901(B)(2) (West 2000); see S.B. 1133, 43rd Leg., 2nd Reg. Sess. (Ariz. 1998), Senate Fact Sheet for S.B. 1133: Covenant Marriages, at http://www.azleg.state.az.us/legtext/43leg/2r/summary/s.1133fr.fs.htm (last visited Feb. 6, 2003) (explaining that the Committee of the Whole amended the act to “[s]trike[] the reference to recognized religion thus clarifying that a member of the clergy (or a marriage counselor) must perform premarital counseling before a couple can be married under covenant marriage”).


116. Senator Petersen Interview, supra note 17.
Arizona's and Arkansas's Acts do not mirror the amendment that Louisiana made to its required counseling content in response to the Catholic Church's concerns. All three Acts indicate that the counseling discussion must address the seriousness of covenant marriage, its demand for a commitment for life, and the obligation to seek counseling in times of marital difficulties. However, an important distinction arose because Louisiana struck the language demanding that counselors discuss divorce, or legal dissolution of marriage, as a possible final option. Instead, the responsibility to describe the conditions for divorce in Louisiana shifted to state employees who would simply give the couple a pamphlet at the courthouse outlining covenant marriage's terms for divorce. Since enacted, however, the revised covenant marriage law still finds little support with Catholic officials.

b. Applicability of Covenant Marriage to Already-Married Couples

The second component of Louisiana's Act gives married couples the opportunity to designate their marriages as covenant marriages by undergoing a similar declaration of intent. A couple that is already married must file a copy of their marriage license with an attached

119. See Anderson, supra note 1 (explaining that Representative Tony Perkins, the sponsor of the Louisiana Covenant Marriage Act, believed that removing the counselors' required discussion of divorce might gain more support from the Catholic Church and its members). A lobbyist for the Catholic bishops conference also remarked that should the bill pass, the Catholic Church in Louisiana would not require a couple to have a covenant marriage, but they would not discourage a couple from having a covenant marriage. See id.; see E-mail from Bruce Nolan, Reporter, TIMES-PICAYUNE, to author (Oct. 1, 2001, 14:07 EST) (on file with author). Nolan explains: "The Catholic Church's current position is essentially one of benign neglect. That is to say, Louisiana's bishops applaud the values enshrined in the act, but do not require Catholics to secure a covenant marriage license at the local courthouse before approaching the altar." Id.
120. E-mail from Bruce Nolan, supra note 119.
121. See id.; Interview with Grant Jenman and Camille Kazayoux, in Wash., D.C. (Sept. 2, 2001) (discussing the preparations for their Catholic wedding in Louisiana). Recently, a couple preparing to be married in the Catholic Church in Louisiana in October of 2001 discussed their notions about covenant marriage options. Id. The bride, who had heard of covenant marriage only as a concept in law school, admitted that her pastor had never mentioned the idea to her. Id. She explained that she had not even considered the option of signing a covenant marriage agreement because she regarded her marriage in the Church as permanent. Id. Likewise, the groom, a recent convert to Catholicism, regarded the option as "pointless" and agreed that the couple had never been offered the option. Id. If they had, he added, they would not have considered it. Id.
declaration of intent to enter into a covenant marriage. The declaration includes a statement that the parties "understand that a Covenant Marriage is for life. . . and [that they] renew [the] promise to love, honor, and care for one another as husband and wife for the rest of [their] lives." Additionally, the couple must sign an affidavit revealing that they discussed – with one of the approved counselors – their intent to designate their marriage as a covenant marriage and their obligation to seek marital counseling in the event of marital difficulties.

Arizona and Arkansas also permit an already-married couple to convert their marriage into a covenant marriage. In both states, the couple must record the same declaration that is required for new couples and file it as an attachment to their original marriage license. However, one distinction arises under Arizona's Act: the husband and wife are not required to participate in the premarital counseling that new couples must complete.

c. Terms for Divorce in a Covenant Marriage

The third component of the Louisiana Covenant Marriage Act sets out the terms for dissolution of marriage by divorce. To receive a divorce, the couple must have participated in counseling, and the spouse requesting divorce must prove that the other spouse (1) committed adultery, (2) committed a felony and received a sentence of death or imprisonment with hard labor, (3) abandoned the household for one year and refused to return, (4) physically or sexually abused the divorce seeker or one of the spouses' children, or (5) has been separated and living apart for two continuous years without reconciliation. The Act

123. Id. § 9:275(B)(1).
124. Id. § 9:275(C)(1)(a).
125. Id. § 9:275(C)(1)(b)(i) (listing a "priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor" as approved counselors).
130. Id. § 9:307(A)(1).
131. Id. § 9:307(A)(2).
132. Id. § 9:307(A)(3).
133. Id. § 9:307(A)(4).
134. Id. § 9:307(A)(5).
also allows divorce for spouses who have been living separately for one year after a judgment of separation from bed and board. Further, if there are any minor children from the marriage, in order to get a divorce, the couple must have lived separately for a year and a half since separation was granted, unless child abuse was the reason for the separation. In comparison, while Louisiana's Covenant Marriage Act permits no-fault divorce only after a two year separation and upon agreement of the parties, for non-covenant marriages, Louisiana state law permits unilateral, no-fault divorce after six months of separation.

An assessment of the other states' grounds for dissolution reveals that Arizona gives couples somewhat more latitude in terminating a covenant marriage. Arkansas, however, dissolves a covenant marriage on almost identical grounds as those accepted by Louisiana.

137. Compare id. § 9:307(A)(5), (A)(6)(a), (A)(6)(b), (B)(5), with LA. CIV. CODE ANN. art. 102, 103 (West 2000). A covenant marriage requires a longer period of mutually-agreed-to separation before a bilateral no-fault divorce will be granted. See LA. REV. STAT. ANN. § 9:307(A)(5) (West 2000). Divorce will be granted after the couple has lived separately for two years without reconciliation. Id. Likewise, if spouses have been granted a separation by a judge and have lived separately for one year since the judgment, divorce will be granted. Id. §9:307(6)(a). If minor children are involved, the waiting period for divorce is lengthened by six months, unless abuse is involved. Id. § 9:307(A)(6)(b).
138. See ARIZ. REV. STAT. ANN. § 25-903 (West 2000). Arizona's Covenant Marriage Law will dissolve a marriage if: (1) the respondent spouse committed adultery; (2) the respondent spouse committed a felony and has been sentenced to death or imprisonment; (3) the respondent spouse abandoned the marital home for at least one year and refuses to return or is expected to remain away for the required period; (4) the respondent spouse physically or sexually abused the other spouse, any child, or a relative of either spouse permanently living in the home; (5) the spouses have been living separately and apart for a continuous period of at least two years or it is expected that they will live apart for that time; (6) the parties have lived separately and apart continuously, without reconciliation, for at least one year since a decree of separation; (7) the respondent spouse habitually abused drugs or alcohol; or (8) the husband and wife both agree to a dissolution of marriage. Id.
139. See ARK. CODE ANN. § 9-11-808(a) (Michie 2002). In Arkansas, the terms for a divorce under a covenant marriage, after counseling has been received, include proof that: (1) the other spouse committed adultery; (2) the other spouse committed a felony or an infamous crime; (3) the other spouse physically or sexually abused the spouse seeking the divorce or a child of one of the spouses; (4) the spouses have lived separate and apart continuously, without reconciliation for a period of two years; (5) the spouses have lived separate and apart for a period of two years since the date of judgment of judicial separation, continuously and without reconciliation; (6) the spouses have a minor child or children of the marriage and have lived separate and apart for a period of two and a half years from the date the of judgment of judicial separation; or (7) child abuse was the basis for the separation judgment and the spouses have lived separate and apart for one year since the judgment of separation. Id.
d. Terms for Legal Separation in Covenant Marriage

Finally, the Louisiana Covenant Marriage Act grants separation from bed and board upon proof of any of the requirements for divorce.\(^{140}\) Louisiana does make a distinction between divorce and separation by allowing an additional ground for separation in the case of "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable."\(^{141}\)

Arizona gives slightly broader grounds for separation than Louisiana and Arkansas.\(^{142}\) In Arkansas, the terms for separation generally mirror those in Louisiana.\(^{143}\) Considering all three of the acts’ terms for divorce and separation, Arizona’s Covenant Marriage Act seems to be the most distinct.\(^{144}\) Compared to the other statutes, Arizona’s law gives couples the most latitude in terminating a marriage.\(^{145}\) Most significantly, it alone allows for an immediate bilateral no-fault divorce if both the husband and the wife decide to dissolve the marriage.\(^{146}\) Likewise, Arizona’s law allows spouses in abusive relationships to end the marriage with greater ease.\(^{147}\)

\(^{141}\) Id. § 9:307(B)(6).
\(^{142}\) Arizona’s Covenant Marriage Act permits legal separation for any of the Louisiana statute’s grounds for divorce discussed above. Compare ARIZ. REV. STAT. ANN. § 25-904 (West 2000), with ARIZ. REV. STAT. ANN. § 25-903 (West 2000). In addition, in the case of abandonment, an abandoned spouse may receive a decree of legal separation if the other spouse left the marital home for at least one year. Id. § 25-904(3). The abandoned spouse may file for separation before this period of absence is fulfilled if he alleges that he expects the spouse to be gone for the required time. Id.
\(^{143}\) Arkansas will grant judicial separation to a couple in a covenant marriage upon proof of any of the terms for divorce listed in the Louisiana statute above. Compare ARK. CODE ANN. § 9-11-808(b) (Michie 2001), with ARK. CODE ANN. § 9-11-808(a) (Michie 2001). Similarly, the couples must live separately and apart for at least two years without reconciliation for a judicial separation. Id. § 9-11-808(b)(4). In addition, the other spouse’s habitual drunkenness for one year, cruel and barbarous treatment endangering the life of his or her spouse, and offering of such indignities so as to make his or her condition intolerable are also grounds for judicial separation. Id. § 9-11-808(b)(5).
\(^{146}\) ARIZ. REV. STAT. ANN. § 25-903(8) (West 2000).
\(^{147}\) Id. § 25-903(4). Physical or sexual abuse of the spouse, any child, or “a relative of either spouse permanently living in the matrimonial domicile” constitutes a fault-based
D. The Birth, Amendment, and Passage of Each Covenant Marriage Act

This section describes the legislative histories of the existing Covenant Marriage Acts. It discusses the reasons that led sponsors to introduce the bills, the efforts made to promote their passage, and the results of the final votes in each state’s respective legislature. Ultimately, this section displays the unique legislative development of covenant marriage in each state and points to certain relevant factors for assessing subsequent religious support.

1. Louisiana

On August 15, 1997, Louisiana was the first state in which covenant marriage legislation took effect.\(^1\) After over a decade of research on and revision of the state’s civil code by the Louisiana State Law Institute, its Persons Committee finally proposed a covenant marriage structure to “endorse the historical and jurisprudential model of a man and woman covenanti ng for life.”\(^2\) Katherine Shaw Spaht, the principal drafter of Louisiana’s Covenant Marriage Act and Professor of Family Law at Louisiana State University Law Center,\(^3\) points to case development in Louisiana family law that affected her thinking on covenant marriage.\(^4\) She cites *Stallings v. Stallings*,\(^5\) which maintained that marriage is more than a regular civil contract, and *Hurry v. Hurry*,\(^6\) which highlighted the differences between marriage and other contracts, as decisions that emphasized the distinct specifications of marriage contracts and lent credence to the notion of covenant marriage.\(^7\) Finally, it is significant that the Louisiana notion of covenant marriage only came to fruition after the Persons Committee considered multiple approaches toward the

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\(^1\) Spaht, *Beyond Bahr*, supra note 6, at 288; see also Kohm, *supra* note 9, at 38.

\(^2\) Kohm, *supra* note 9, at 37.

\(^3\) Spaht, *Why a Second Tier*, supra note 2, at 1 n.*.


\(^5\) 148 So. 687, 688 (La. 1933).

\(^6\) 81 So. 378, 380-81 (La. 1919).

\(^7\) Spaht, *Revision of the Law of Marriage*, supra note 151, at 1133-34 n.17.
termination of marriage. The committee originally considered a pure no-fault system as the answer to the increasingly adversarial process of divorce. However, consideration of the plight of children who experience their parents' divorce redirected the plan toward covenant marriage.

Placing children's interest in stable marriages first, Spaht emphasized that the purpose of covenant marriage is "[t]o preserve and to nurture those most important . . . our children. . . . The children of the marriage are third party beneficiaries of the promises made by their parents and benefit in both tangible and intangible ways - economically, physically, psychologically, and emotionally." With strong intentions to help children and preserve families, Spaht and Representative Perkins developed the Louisiana bill. Certainly, their efforts reflect the early Protestant ideal that placed marriage in a position to cultivate social and community goods. This phenomenon is most evident in Spaht's description of the "covenant couples'" ability to set examples for their communities, provoke discussion about covenants, and direct cultural perception toward lifelong marriage.

Louisiana's bill passed the House and the Senate with relative ease upon its first submission. An overwhelming majority voted for covenant marriage in the House, with ninety-one yeas, eight nays, and six abstentions. A similar positive response in the Senate resulted in

155. See Kohm, supra note 9, at 37 n.37 (citing Katherine Shaw Spaht, Symposium: Family Law, 44 LA. L. REV. 1545, 1547-52 (1984)). Kohm explains:

Before the committee determined to go ahead with the covenant marriage concept, they leaned toward developing a pure no-fault divorce law, intent on relieving the negative effects of divorce litigation on the courts. The more discussion, however, the more they determined that consequences to children were more critical than consequences to the judicial system, which would more easily be accomplished through covenant marriage legislation. Consequently, the committee proposed covenant marriage.

Id.

156. See id. at 37.

157. See id. at 38-39.

158. Spaht, Louisiana's Covenant Marriage, supra note 12, at 63-65 (footnotes omitted).

159. Id. at 64-74.

160. See supra notes 48-63 and accompanying text (explaining early Protestant beliefs about marriage).

161. Spaht, Louisiana's Covenant Marriage, supra note 12, at 72.


twenty-eight yeas, nine nays, and two abstentions. Clearly, in comparison to the other states, the Louisiana legislature passed their covenant marriage law most emphatically.

2. Arizona

The legislative history behind the passage of Arizona’s Act reveals more struggle than that endured by the Louisiana legislation. In Arizona, Senator David Petersen introduced the covenant marriage bill in January of 1998. It passed in the Senate by three votes, only after adding three amendments, including the Family Services Committee’s amendment discussed above, which allowed for earlier filing for separation or divorce based on abandonment. Senator Petersen noted significant opposition from groups that criticized the law from an anti-domestic violence agenda. He indicated the Act’s sensitivity to abusive circumstances and pointed to the considerable exceptions made to remove spouses from abusive situations rapidly.

The state’s legislative staff asked the Arizona Catholic Conference to “weigh in” on its covenant marriage legislation. The Director of the Catholic Conference, Monsignor Ryle, helped revise specific language and provisions in the bill in response to some of the Democratic members’ concerns. It remains to be seen whether these measures will make a difference in achieving more participation from the public or

164. Id.

165. See infra notes 166-68, 184-88 and accompanying text.


169. Senator Petersen Interview, supra note 17. Petersen explained that critics of covenant marriage were concerned that women might become trapped in abusive situations. Id. He added that the act addressed these concerns in its provision allowing for spouses to end a covenant marriage quickly if violence were to occur. Id.

170. Id.

171. See E-mail from Tara McCollum Plesse, Arizona Catholic Conference, to author (Sept. 28, 2001, 14:26 EST) (on file with author).

172. Id. Even after working with legislators on the bill, the Catholic Church of Arizona did not issue a formal statement on covenant marriages. Id.
further support from mainstream religious groups, especially because
the Act requires the counselor to discuss possible dissolution of the
marriage. Senator Petersen pointed out that the Catholic Church did
not support covenant marriage, but it did not oppose it either. He also
emphasized the importance of the Catholic leadership's involvement in
the bill's formation. The Catholic Church's partial involvement in
Arizona's legislation and subsequent decision to avoid an official
statement seems to be testimonial in and of itself. In other words, the
Church's hesitancy to become involved in a government response to the
public problem of increased divorce may reflect its deeply held belief
that marriage is a sacramental union and its fundamentally different
position on promoting civic good through lawmaking. As discussed
above, the marital traditions of the Catholic Church do not parallel the
Protestant perception of marriage's social utility and community
function. Rather, to a certain extent, the sacramental traditions clarify
why the Church offered only reserved, and always unofficial,
participation in a contract-centered marriage movement.

3. Arkansas

In February of 2001, Arkansas State Representative Russell Hunt
introduced the covenant marriage bill as part of Governor Huckabee's
legislative package. Emphasizing the Governor's public policy concern

173. Telephone Interview with Arizona Administrative Office of the Courts (Oct. 15,
2001). Since Arizona's covenant marriage law went into effect on August 21, 1998,
couples obtained approximately 20,000 marriage licenses, and only 340 of those were
covenant marriages. Id. These statistics represent only six of Arizona's fifteen counties.
Id. However, the administrator reported that most counties reflect a similar trend of low
participation and that in most counties there "usually aren't any" covenant marriages. Id;
see also E-mail from Tara McCollum Plese, Arizona Catholic conference, to author (Oct.
1, 2001, 14:50 EST) (on file with author).

174. ARIZ. REV. STAT. ANN. § 25-901(B),(C) (West 2000).

175. Senator Petersen Interview, supra note 17.

176. Id.

177. Discussion with Professor Helen Alvaré, Associate Professor of Law, The
Catholic University of America, Columbus School of Law, former Director of Information
and Planning for the National Catholic Conference of Bishops' Pro-Life Office (Oct. 29,
2001).

178. See supra notes 31-40 and accompanying text (describing marriage as a sacrament
in Catholicism).

179. See supra notes 31-40 and accompanying text.

180. See supra notes 31-40 and accompanying text.

181. Michael Rowett, Bill Would Let Couples Enter Covenant Marriage Contracts,
ARK. DEMOCRAT-GAZETTE, Feb. 24, 2001, at B1; E-mail from Representative Russ
Hunt, supra note 10; Violet Law, Census Couples Skipping Legal Ties, ARK. DEMOCRAT-
GAZETTE, Nov. 11, 2001, at B1 (reporting Arkansas as the state with the fifth highest
about lowering the state's third-highest divorce rate in the country, Representative Hunt urged his colleagues to pass the bill. Likewise, in a May 2001 radio address to his constituents, Governor Huckabee discussed his goal of cutting Arkansas's divorce rate in half by 2010 and described the Covenant Marriage Act of 2001 as a significant step toward that end.

After amending the original bill several times, both houses passed the act. The amendment process focused on the issues of acceptable counselors and the length of time for separation before divorce. The Arkansas House of Representatives first passed the bill with a vote of fifty-seven to thirty-seven. After amendment in the Senate, the bill passed by five votes. The House then passed the Senate's amendments without substantive protest. However close the contest was, especially in the Senate, Governor Huckabee's Director of Family Policy, Chris Pyle, explained that no organized opposition confronted the bill and no one testified against it in the committees.

Arkansas emphasized the public policy objectives behind its covenant marriage proposal more fervently than the other states. Comparatively
speaking, sponsors of covenant marriage legislation in Arkansas did rally some specific religious leaders to testify before the bill was passed, but they "relied primarily on the testimony of counselors who have seen the effectiveness of pre-marriage counseling and counseling in times of marital distress." Arkansas's promotion of its covenant marriage law, perhaps more so than the other states, reveals modern lawmaking's secular response to the religious pluralism present in the United States. Arkansas neither seized the Protestant use of marriage to advocate religiously based community goodness, nor did it urge the Catholic Church to take a doctrinal stance; rather, Arkansas deliberately kept religion out of the bill's language and development.

4. Covenant Marriage Proposals in Other States

Covenant marriage legislation has been entertained or is pending in sixteen other states; most forms of the law parallel the four major elements set forth in Louisiana's law. States of particular significance include Georgia, Texas, Oregon, and Oklahoma, where covenant marriage bills have passed in one house but not in the other. Legislators who are considering covenant marriage laws for their states will most likely turn to the existing laws in Arizona, Arkansas, and Louisiana for direction and to predict public response. Therefore, scrutinizing the pioneering states' experiences and their implications for

192. E-mail from Arkansas State Representative Russ Hunt to author (Oct. 25, 2001, 10:22 EST) (on file with author).
193. E-mail from Chris Pyle, supra note 190.
195. See E-mail from Chris Pyle, supra note 190.
197. See id. at 41.
199. See generally id. (comparing covenant marriage laws and proposed bills for various states).
further law carries primary importance. Likewise, the legislative techniques used to achieve religious support must be examined for their effectiveness.

IV. AN ANALYSIS OF COVENANT MARRIAGE’S MINIMAL PARTICIPATION AND LIMITED RELIGIOUS SUPPORT

This section describes the minimal participation in covenant marriage and suggests that there would be greater participation if the concept of covenant marriage had more multi-denominational religious support. Next, this section explains the three different approaches taken by the states to achieve religious backing and how religions responded to those efforts. Additionally, this section critiques the states’ attempts to rally religious fervor only after the bills had passed and suggests that a call for cooperation before the bills’ passage could have led to a greater degree of religious support. Finally, this section speculates that the hesitancy of the Catholic Church and some Protestant denominations to participate in the covenant marriage effort, despite its modest attempt to remedy a social issue, stems from their traditional notions of marriage and of the relationship between marriage and the law.

A. Limited Participation

Louisiana, Arkansas, and Arizona encouraged the reintroduction of commitment and religiously based marriage values into their civil laws, but they have done so with only partial success. While most citizens who hear the term “covenant marriage” recognize the religious tones endorsing marriage, the typical response comes in one of two ways. The would-be natural constituents, religiously devout couples, do not hear their pastors, reverends, or leaders advocating covenant marriage, and therefore they view participation as unnecessary. Those with a more secular approach to marriage have no interest in additional

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200. See generally id. (scrutinizing the different states’ laws very specifically and accurately).
201. See supra note 17 (discussing the low number of covenant marriages).
202. See infra notes 203-05.
203. See Anderson, supra note 1; Bruce Nolan, Baptists Say “I Do” to Covenant Marriages; But 2 Local Pastors Say They Don’t Require It, TIMES-PICAYUNE, June 14, 2001, at 1 (suggesting that because no religious denominations in Louisiana require engaged couples to choose covenant marriage as a condition to bless their ceremonies, couples over the past four years seldom requested it). Anderson explains: “None of the mainstream religions has endorsed the law, but many of the more conservative fundamentalist groups have.” Anderson, supra note 1 (suggesting possible reasons why only three percent of marriages in Louisiana from 1997-1999 were covenant marriages).
requirements and disregard the option as futile.\textsuperscript{204} Some go even further to question the roles of church and state.\textsuperscript{205} Consequently, in Louisiana, no more than three percent of marrying couples entered a covenant marriage during the first two years it was available.\textsuperscript{206} Arizona reports that approximately four percent of new couples participated in covenant marriage.\textsuperscript{207} Similarly, Arkansas’s law, which went into effect on August 13, 2001, has been “slow to catch on.”\textsuperscript{208} Covenant marriage proponents believe that the new legal concept has true potential to renew the meaning of marriage, but have witnessed only a limited public response thus far.\textsuperscript{209}

\textbf{B. Searching for Support from Religious Leaders}

\textit{1. How Louisiana Sought Religious Support for Covenant Marriage Legislation}

The ultimate purpose of covenant marriage legislation, as it was first presented in Louisiana, was to reintroduce the traditional notion of permanency in marriage.\textsuperscript{210} The original drafter of the bill highlighted the legislation’s intent to offer couples the opportunity to choose a “more binding, more permanent marriage,”\textsuperscript{211} and encouraged the participation of the Church.\textsuperscript{212} By referring to the Church as “an institution which possesses moral authority and [as] uniquely qualified to help preserve marriage,”\textsuperscript{213} Spaht indicates just how critical it is for covenant marriage legislation to have religious support.\textsuperscript{214} She characterizes the legislation as “an attempt by committed people of faith to invite the assistance of

\textsuperscript{204} See Joanna Weiss, \textit{Covenant Marriage Has No Takers on Its First Day}, \textit{Times-Picayune}, Aug. 16, 1997, at A1 (illustrating the hesitation of couples to enter into a covenant marriage).
\textsuperscript{205} David Waters, \textit{Churches, Not New Laws, Should Teach Marriage Is Sacred}, \textit{Knoxville News-Sentinel}, July 7, 2001 at B3 (suggesting that the Church, not governments, should concern itself with strengthening marriages).
\textsuperscript{206} Anderson, \textit{supra} note 1.
\textsuperscript{207} Senator Petersen Interview, \textit{supra} note 17.
\textsuperscript{209} Spaht, \textit{Louisiana’s Covenant Marriage, supra} note 12, at 69-71.
\textsuperscript{210} Spaht, \textit{Beyond Baehr, supra} note 6, at 286-88.
\textsuperscript{211} \textit{Id.} at 288.
\textsuperscript{212} \textit{Id.} at 289.
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} Spaht, \textit{Why a Second Tier, supra} note 2, at 4 (describing the Church’s particularly adept ability to counsel couples before and during marriage and emphasizing the covenant marriage proponents’ hope for covenant marriage laws to direct spouses to the church for help).
the church. Rather than banishing religion from the public square, covenant marriage legislation invites religion back into public life to offer a service that religion is uniquely qualified to perform – preserving marriages.\textsuperscript{215} After a four-year experiment, an examination of how the narrow process of religious rallying and collaboration failed to invigorate a real movement for covenant marriage reveals why few citizens have participated.\textsuperscript{216}

The Louisiana legislation made room to include a variety of religions by setting general parameters – but not specific content – for the requisite counseling sessions.\textsuperscript{217} However, it seems to have done so under the assumption that many different religions would be eager to cooperate.\textsuperscript{218} In reality, covenant marriage in Louisiana has not received unanimous support from various religions.\textsuperscript{219} For example, the Catholic Church in Louisiana responded to the legislation unenthusiastically.\textsuperscript{220} While the Catholic Bishops accepted and commended the aims of the Act, it strictly forbade its clergy from administering the counseling required by the law;\textsuperscript{221} after all, presenting dissolution of marriage as an option directly opposes the Catholic teaching that marriage is a lifelong sacramental union.\textsuperscript{222} Further, the Church has its own marriage

\begin{footnotesize}
\textsuperscript{215} Id.
\textsuperscript{216} Compare Spaht, \textit{Louisiana's Covenant Marriage}, supra note 12, at 75-76 (inviting religions to participate in the movement for covenant marriage), \textit{with} Spaht, \textit{Beyond Baehr}, supra note 6, at 297-98 (discussing various religions' unenthusiastic response).
\textsuperscript{217} See Spaht, \textit{Beyond Baehr}, supra note 6, at 290. Spaht explains that the only requirement for counseling under Louisiana's Covenant Marriage Act is discussion of the seriousness of marriage and both spouses' commitment to a life-long union. \textit{Id.} Specifying further details, she commented, would be "too intrusive into religion's appropriate role in encouraging and preserving marriage." \textit{Id.}
\textsuperscript{218} See id. at 289-90.
\textsuperscript{219} Id. at 295-98 nn.86-88.
\textsuperscript{220} Id. at 295-96 n.86 (quoting \textit{Pastoral Statement, The Catholic Bishops of Louisiana} (Oct. 29, 1997)).
\textsuperscript{221} Id. The Bishops stated:
Because there are elements in this particular Covenant Marriage Act which require those preparing couples for marriage to offer instruction on divorce contrary to the Church's teaching, Catholic ministers preparing couples for marriage will concentrate their focus on the Church's responsibility and teaching. The task to offer guidance with regard to the specifics of the Covenant Marriage Act will then be left to those who render this service in the name of the State. It would be inappropriate for those ministering to couples preparing for marriage in the Catholic Church to confuse or obscure the integrity of the Church's teaching and discipline by also providing this service, contradictory to Church teaching and mandated by this state law.
\textit{Id.}
\textsuperscript{222} See id.
\end{footnotesize}
preparation program and expects its members to fulfill those Church-prescribed requirements. The Church concluded that it would accept either a standard or a covenant civil marriage license for its parishioners' certification but noted that anyone choosing a covenant marriage must receive the state-required counseling from a state-sanctioned counselor. A couple's choice of one form of licensing over another, the Church pointed out, would have no impact on the celebration of their marriage in a Catholic ceremony.

Even though the statute was amended to remove discussion of divorce from the counseling requirement, the Church still refrains from indicating favor or disfavor toward covenant marriage. The practical effect of the amendment surfaced in licensing procedures; now, if a Catholic couple chooses to obtain a covenant marriage, the court clerk hands them a brochure describing the limited routes to gain a divorce, and the premarital counselor or priest does not need to mention divorce at all.

Other religious groups were also wary of embracing Louisiana's new marital concept. The Bishop of the Methodist Church in Louisiana took a stance against the Covenant Marriage Act, calling it "intrusive" and "redundant," explaining that the "covenant is the intent and purpose of the church's marriage ceremony while the license is the state's authorization for persons to enter into a legally binding relationship. . . . The United Methodist marriage ceremony already is and always will be clearly focused on a life-long commitment." Likewise, the pastor at a First United Methodist Church in Baton Rouge described covenant marriage as adding bureaucracy to an institution that should not involve bureaucracy. The Episcopal Bishop-elect of Louisiana actually criticized the Act for returning couples to the age of fault-based divorce. He stated that Americans have already experienced a system where collusion and cynicism surrounded divorce and concluded that "it

223. Id.
224. Id.
225. Id.
226. See E-mail from Bruce Nolan, supra note 119.
227. Id.
228. See infra text accompanying notes 229-33.
229. Spaht, Beyond Baehr, supra note 6, at 290 n.65 (quoting Release from Bishop Dan E. Solomon, Methodist Church in Louisiana, Statement on Covenant Marriage (June 27, 1997)).
230. See Kay, supra note 1.
doesn’t work." Finally, Jewish leadership did not make an official statement on their position but indicated that they did not support the Act.

Religious groups rallying around the initiative, however, include the Louisiana Baptist Convention, the Baptist Missionary Association of Louisiana, and other evangelical Protestant denominations, including the Assembly of God, Pentecostal Church. The Louisiana Southern Baptists have especially encouraged their clergy to promote covenant marriage among their members. Likewise, Southern Baptists from other states have demonstrated their enthusiastic support. Some pastors even suggest that they will not marry couples if they do not choose the covenant marriage option.

Covenant marriage has been available in Louisiana for five years, and very few couples have requested it for their union. One explanation offered is the fact that to date no religious denomination demands covenant marriage as a requisite for a marriage blessing. Representative Tony Perkins, who authored and sponsored the bill, showed little concern about the slow response to covenant marriage in his state. He was confident that churches and communities would pass the idea along and more interest would develop. Unfortunately, the idea has not caught on, even after subsequent efforts were made to

232. Id.
233. Id.
235. Id. The Louisiana Baptist Convention issued a resolution that contained a recognition of the failure of no-fault divorce law and a statement to “encourage pastors and churches to become familiar with the law concerning Covenant Marriage and to use any tool available to strengthen the institution of marriage among the people to whom we minister.” Id. (quoting *Resolution on Covenant Marriage of The Louisiana Baptist Convention* (Nov. 17, 1997)).
236. Nolan, supra note 203, at 1 (reporting that over 9,000 messengers came to the Southern Baptist Convention’s annual meeting in Louisiana on June 13, 2001 and approved a resolution urging states to pass covenant marriage laws like Louisiana’s).
237. *See id.* Reverend Danny Akin of Louisville told the Times-Picayune: “If I were pastoring in Louisiana, I would not marry anyone that did not go the covenant marriage route.” *Id.*
238. *See id.*
239. *Id.* Even the Southern Baptist Church in Louisiana does not require a covenant marriage. *Id.*
240. Weiss, supra note 204.
241. *See id.*
enable Catholics to participate.\textsuperscript{242} Now that the amended Act is in place, Louisiana leaders still look to church ministers to advance the effort.\textsuperscript{243}


Supporters of Arizona’s Covenant Marriage Act sought mainstream religious support somewhat more proactively than the Louisiana leadership.\textsuperscript{244} The legislative staff drafting the bill asked the Arizona Catholic Conference to “weigh in” on the legislation,\textsuperscript{245} and the Catholic Church did not speak against the effort.\textsuperscript{246} Monsignor Ryle, who directs the Conference, testified on behalf of the amended bill, but the Church never issued a formal statement on covenant marriage.\textsuperscript{247} Likewise, Senator Petersen pointed out that Arizona’s Act does not outline strict requirements for premarital counseling; thus, religious counselors have discretion regarding the guidance they offer, but they still must discuss the exclusive grounds for divorce.\textsuperscript{248} Petersen did not comment on particular religions’ support or opposition in Arizona but remarked generally on how he believes the churches of Arizona will “take up the banner” and encourage covenant marriages throughout the state.\textsuperscript{249}

Furthermore, Senator Petersen revealed high expectations for the Act’s future success.\textsuperscript{250} He commented, however, that public response had not been nearly as positive as he had hoped.\textsuperscript{251} Since the bill’s passage in May of 1998, only about four hundred new marriages were covenant marriages, and about thirty or forty married couples converted

\textsuperscript{242} Nolan, supra note 203, at 1. Bruce Nolan reports as of June 14, 2001: “Yet the four-year experience in Louisiana is that engaged couples rarely request covenant marriage, in large part because no religious denomination requires it as a condition for blessing their ceremonies.” Id. 

\textsuperscript{243} Id. (reporting that the Southern Baptist Convention’s annual meeting occurred on June 13, 2001 at the Superdome to approve a resolution to urge states to adopt covenant marriage acts like Louisiana’s). 

\textsuperscript{244} See E-mail from Tara McCollum Plese, supra note 17. 

\textsuperscript{245} Id. 

\textsuperscript{246} Senator Petersen Interview, supra note 17. 

\textsuperscript{247} E-mail from Tara McCollum Plese, supra note 17. 

\textsuperscript{248} Senator Petersen Interview, supra note 17. 

\textsuperscript{249} Id. 

\textsuperscript{250} Id. 

\textsuperscript{251} Id. Senator Petersen admits that the initial marketing of covenant marriage was not as strong as it could have been. Id. Ten thousand pamphlets were produced and distributed upon request. Id. Limited funding, however, stifled any additional marketing techniques. Id.
their traditional licenses to covenants. The pure numbers, he said, were not good, but he was not discouraged. Senator Petersen remained optimistic about the bill for two main reasons. First, the law gives people an option they did not have before. It does not require covenant marriage, nor does it give financial incentives to obtain one. Second, the people who sought a covenant marriage bill were people in the faith community. They were pleased by the passing of the Act and are planning events with the Senator to encourage covenant marriage. For example, Petersen is currently working with a pastor to organize a mass conversion of previous marriages into covenant marriages. If covenant marriage is brought to the faith community’s attention, more participation is likely to follow.

To change the perspective of most citizens in the faith community, another method of enlivening covenant marriage is necessary. Senator Petersen reports that many faithful citizens agree that the covenants are a “nice” idea, but they continue to ask, “so, what?” Petersen suggests that only a mobilization of pastors and church leaders behind the Act will change these attitudes. He is not discouraged by the limited

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252. Id. In Arizona, there is another problem that occurs on the most local level. Senator Petersen explains that the clerks at the marriage license offices do not effectively promote covenant marriage and may inadvertently discourage the covenants by their presentation of the extra steps necessary to obtain a covenant marriage. Id. He acknowledges that most couples who go to the office to get their licenses want them immediately, and if they had not heard of or planned for a covenant marriage before arriving there, it is unlikely that they would decide to wait and take the extra steps. Id.

253. Id. In planning efforts to energize the act, Senator Petersen mentioned the idea of writing legislation to allow pastors to execute the marriage licensing procedure for a covenant marriage, by providing a notary for the pastor and enabling him to send the forms directly to the county clerks. Id. This, he suggests, would eliminate the extra paperwork at the clerk’s office that seems to deter couples from participating. Id.

254. Id.
255. Id.
256. Id.
257. Id.
258. Id.
259. Id. Petersen thinks that in a year or two, after covenant marriage receives more exposure, participation will pick up markedly. Id.

260. Id.
261. Id.

262. Id. Petersen also mentioned many reasons that would justify pastors’ support. Id. He believes that covenant marriage legislation will truly affect marriages and strengthen the institution of marriage. Id. He refers to research listed by P.A.I.R.S. (Practical Application of Intimate Relationship Skills, available at http://www.pairsfoundation.com) that shows premarital counseling is successful in making marriages last. Id. Further, Peterson recognizes the powerful symbolism in the law and its ability to strengthen the
participation in the Act’s first three years and expects results only to get better.\footnote{253}

3. How Arkansas Sought To Avoid a Religious Label on Covenant Marriage

In contrast to Louisiana’s alteration of its law and Arizona’s search for guidance to avoid disapproval from the Catholic Church, Arkansas took a different approach to garnering religious support.\footnote{254} The Director of Governor Huckabee’s Family Policy, Chris Pyle, commented that the Governor’s office did not try to mobilize religious groups (though some of them certainly showed support) because it hoped to substantiate a public perception that covenant marriage transcends religious and ideological boundaries.\footnote{255} It is only now, after the bill’s passage, that the Governor and Representative Hunt plan to market their idea to the clergy and ask for their support.\footnote{256} Governor Huckabee is a former Southern Baptist minister, and his office hopes to use his “bully pulpit” to promote covenant marriages.\footnote{257} Only after the Act passed did the Governor’s office begin its mass-mailing to each member of the clergy in Arkansas.\footnote{258} A personal request from Governor Huckabee to promote covenant marriage among religious couples and a brochure explaining covenant marriage are included in the mailing.\footnote{259} Representative Hunt took a similarly hopeful look into the future when he commented: “We sure hope the clergy in the State supports it.”\footnote{270}

C. Minimal Interfaith Collaboration Before Covenant Marriage Laws Passed

1. The States’ Shortage of Interdenominational Discourse

Before passing their respective Covenant Marriage Acts, Louisiana, Arizona, and Arkansas did not actively seek cross-denominational community’s notion of marriage. Because Arizona has one of the highest rates of divorce, Senator Petersen places high hope on the Act’s ability to turn the trend around. \textit{Id.}

\footnote{263}{\textit{Id.}} \footnote{264}{See E-mail from Chris Pyle, \textit{supra} note 190.} \footnote{265}{\textit{Id.}} \footnote{266}{See \textit{id.}} \footnote{267}{See \textit{id.}} \footnote{268}{See \textit{id.}} \footnote{269}{See \textit{id.}} \footnote{270}{E-mail from Representative Hunt, \textit{supra} note 182.}
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religious participation. A local newspaper columnist who followed the legislation in Louisiana reported the complete absence of interfaith discourse around the bill before its passage. He explained how the Act "sailed out of the legislature largely below radar." The hearing in the Louisiana House contained testimony from sponsors at the grass roots level, including organizations associated with evangelical Christian beliefs and public policy lobbyists. However, recognizing the low citizen participation, Representative Tony Perkins felt the need to mobilize clergymen in the Act's aftermath.

Arizona reports its work with the Catholic Church as an attempt to foresee mainstream religions' possible reactions to the Act. Despite these positive efforts, most work to drum up support came after the Act, in the form of outreach to clergymen and counselors who might become involved given the law's clergy counseling provision. Similar to Louisiana's "stealth" advance, this action hardly equals an enthusiastic canvassing for support from cross-denominational religions.

Comparatively speaking, sponsors of covenant marriage legislation in Arkansas did rally some religious leaders to testify before the bill was passed, but they relied primarily on nondenominational marriage counselors for testimony. Representative Hunt explained that a Baptist pastor and a counseling pastor from Fellowship Bible Church, a very large Little Rock non-denominational church, testified before the State Senate. Governor Huckabee, a former Baptist minister himself, was well seated to influence the leaders of Southern Baptist ministries. He encouraged passage of the bill by asking some constituent-preachers

271. See E-mail from Bruce Nolan, supra note 119; Senator Petersen Interview, supra note 17; E-mail from Chris Pyle, supra note 190 (explaining that support from religious groups might ruin the notion that covenant marriage crosses religious and ideological boundaries).
272. E-mail from Bruce Nolan, supra note 119.
273. Id.
275. See Anderson, supra note 1.
276. See Senator Petersen Interview, supra note 17.
277. See id.
278. Carter, supra note 162, at 28 (explaining that most divorce and family lawyers at the Louisiana State Bar meeting in June of 1997 had no knowledge of the fact that the Louisiana House of Representatives had passed a Covenant Marriage Bill).
279. See E-mail from Representative Russ Hunt, supra note 192.
280. E-mail from Chris Pyle, supra note 190.
281. E-mail from Representative Russ Hunt, supra note 192.
282. E-mail from Chris Pyle, supra note 190.
to call their legislators to voice their support. The most concerted effort, however, seems to be happening only after passage, by mass-mailing pamphlets and informing local ministers of the law. Arkansas followed its predecessor states in its deficiency of interfaith contributions to the law's substance before drafting the bill. The Arkansas legislature undertook equal or slightly more proactive measures during the passage of the bill by finding conservative religious leaders to testify and urging ministers to call legislators to encourage their vote; still, Arkansas really worked to energize the religious communities only after the bill had passed by soliciting from them subsequent grass roots efforts. Overall, however, Arkansas sponsors and lawmakers admit that they tried to "portray covenant marriage as good public policy" and did not perceive organized religion as having an overt role in developing the law.

2. Religious Hesitancy Based on Fundamental Views of Marriage

Considering the foundations of different religious views of marriage helps to explain the unenthusiastic religious response to covenant marriage and the covenant marriage sponsors' limited mobilization of various religions. Catholicism, for example, fundamentally professes that marriage is a sacramental union between man, woman, and the Church. The nature of permanent covenant marriage as a civil law contract is less appealing to the Church. Likewise, certain mainline Protestant religions are reluctant to forward their virtuous aims through

283. See E-mail from Representative Russ Hunt, supra note 192.
284. E-mail from Chris Pyle, supra note 190 (explaining that the Governor's office was preparing a mailing list of clergymen in the state in October 2001).
285. Neither Representative Hunt's nor Governor Huckabee's Office reported any interfaith discussion - beyond the circle of conservative Christian religions - that added to the bill's content. See E-mail from Chris Pyle, supra note 190; E-mail from Representative Russ Hunt, supra note 192. Rather, both noted reliance on the notion that it was good public policy to lower the divorce rate as a way to cross over multiple religious boundaries.
286. See E-mail from Chris Pyle, supra note 190 ("[Covenant marriage] will succeed in Arkansas to the extent that our clergy promote it with the couples they marry."). Pyle discussed the mass-mailing of covenant marriage pamphlets to clergymen in the state that occurred after the passing. Id.
287. E-mail from Representative Russ Hunt, supra note 192.
288. Id.; E-mail from Chris Pyle, supra note 190.
289. See supra notes 32-41 (discussing Catholic marital traditions).
290. See supra note 38 (discussing Aquinas's description of marriage as a sacramental union).
291. See supra note 221 and sources cited therein (reporting the Catholic Bishops' statement on covenant marriage).
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Given these religious cultures, which refrain from endorsing public laws, it is not surprising that there was no true religious movement behind covenant marriage laws' attempt to strengthen marriage.

V. COMMENT

A. Mobilizing a Concerted Religious Effort Behind Marriage

1. Learning from the Civil Rights Movement

Covenant marriage legislation has the potential to solidify marriage in society, but it cannot do so without widely based religious mobilization. Because there are limits to the extent that law can truly affect marital behavior, advocates must utilize alternate avenues to effect change in citizens' attitudes toward marriage. Social norms often impose and monitor acceptable familial practices more directly than legal regulation, and religious convictions provide a basis for these norms.

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292. Discussion with Professor Helen Alvaré, supra note 177.
293. See id.
294. See Patrick Smyth, Evangelicals Put Obstacle Course in Way of Divorce, IRISH TIMES, Nov. 17, 2001, at 13. Michael McManus, leader of an organization called "The Community Marriage Covenant and Marriage Savers," which promotes marriage education, believes that the clergy play the largest role in the marriage movement because three-quarters of couples still get married under religious auspices. Id. Cf. O'Brien, supra note 3, at 442 (explaining how religion played a large role in the social structure that initiated the civil rights movement). O'Brien emphasizes religion's role in America, stating:

Religious perspective may be a dissident and discordant voice in the marketplace of ideas. . . . But religion is there in the midst of it all. This is a crucial point. The religious perspective is not important because religion itself says it is important. A religious perspective is important because it has been around for a very long time: it is rooted in revelation. In the case of the Roman Catholic Church, it is a tradition about to enter its third millennium. Second, religion is important because it has entered and remains within the fray of American social life; religion is a player. . . . Third, religious perspective is important because it invokes an international character, advocating positions and programs responsive to all humankind. Therefore, the contribution of a religious perspective to family matters, particularly any change in the definition of marriage, is consequential.

Id. at 458.
295. See Scott, supra note 7, at 1903-04.
296. See Discussion with William Duncan, Co-Director, The Marriage Law Project, The Catholic University of America, Columbus School of Law (Sept. 2001).
297. See Scott, supra note 7, at 1903-04.
298. See Margaret Brinig & Steven Nock, Covenant and Contract, 12 REGENT U. L. REV. 9, 23 (1999). The authors suggest:
Consequently, faith communities are one common source for American society's moral guidelines. Even though politics and popular culture seem to suggest otherwise, Professor Stephen Carter explains:

Religion matters to people, and matters a lot. Surveys indicate that Americans are far more likely to believe in God and to attend worship services regularly than any other people in the Western world. . . . Even though some popular histories wrongly assert the contrary, the best evidence is that this deep religiosity has always been a facet of the American character and that it has grown consistently through the nation's history.

Throughout American history and culture, religious values have effected true change in societal customs – often prompting the law to follow. Because the United States Constitution allows for a dynamic pluralism to flourish by means of its Establishment Clause, one cannot satisfactorily assess America's diverse culture without acknowledging

The idea of a purely private religion is unthinkable, as is the idea of a purely private language. Religion is also a social institution. A person's private faith is not a religion until it is held by others. A community of believers is a social reality. . . . Those who share a religious faith are bound together in a fundamentally social relationship. They all conform, to some degree, to the rules, norms, moral values, and beliefs of fellow believers. Durkheim [French sociologist] argued that the ability of religious beliefs to direct behaviors is inherently social. The social pressure to conform to group norms, he argued, is experienced as a divine power – something not springing from the group, but arising outside of it.

Id. (footnote omitted).


300. Carter, supra note 299, at 4. Carter cites a recent Gallup poll that reports ninety-six percent of Americans say they believe in God, including eighty-two percent who describe themselves as Christian, and two percent who describe themselves as Jewish. Id. at 279 n.2.

301. See O'Brien, supra note 3, at 442. O'Brien explains the significance of religion:

Religion is important to people, both to people who believe in its precepts, and to people who are served by its schools, hospitals, shelters, and other social action ministries. It is also important because it supplies a meaning to countless social issues based on revelation and history. So too, it is important as an external moral critic, and as a source of values and meaning. . . . A system and a community, a sense of what is right and wrong and a spill-over of religion into secular society, are facts of life.

Id. at 443 (footnotes omitted).
citizens' beliefs as steeped in religious heritage. Society can seek a constitutionally acceptable cooperation between religion and government that facilitates valuable social growth. For example, during the 1960s civil rights movement, religious inspiration and spiritual leadership guided activists and altered the American perception of race. The laws that eliminated segregation and discrimination came about only after a change in social attitudes had been activated by religious ideals. As Professor Carter explains, "[t]he movement's public appeals were openly and frankly religious, and many of the nation's political leaders joined in these appeals, and even echoed them in supporting legislation." As religious ideals have proven to be a powerful force motivating social change in American history, there is no reason to exclude religion from the grassroots movements supporting modern legislative initiatives.

In the context of covenant marriage, many sponsors of the acts are religious themselves and hold evangelical Christian beliefs. Yet, sponsors face the opposition of numerous other religious denominations. The supporters' hesitancy to seek mainstream religious backing before codifying these laws may have made a particular


303. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 233 (1993) ("It remains for churches, synagogues, and other religious communities to demonstrate that religion does have a social dimension and that creative ways can be found to bring religion and government together.").

304. See O'Brien, supra note 3, at 442 (explaining that religion had a "decisive role to play" in the Supreme Court's decision of Loving v. Virginia, which deemed anti-miscegenation laws unconstitutional); see ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 113-14 (1988) (surveying American religious life in the past four decades and specifically addressing how religious groups developed for special social purposes like the civil rights movement).

305. O'Brien, supra note 3, at 442. ("And no one can contest the fact that the civil rights movement was inspired and in point of fact, led, by a man with religious perspective, Martin Luther King. Indeed, religious hymns, church basements and marching clergy are the hallmarks of the mid-sixties civil rights movement in America.").

306. CARTER, supra note 299, at 227.

307. See Perry, supra note 299, at 221 (arguing that lawmakers in the United States can legitimately rely on religiously grounded morality and still comply with the principles of a liberal democracy).

308. O'Brien, supra note 274, at 364. Certain evangelical Christian organizations, including Representative Tony Perkins's group, Promise Keepers, spoke in favor of the Louisiana Act. Id. at n.144.

309. Id. at 366.
symbolic statement. This, however, made for a less successful overall movement for covenant marriage.

Bringing religiously based values into public dialogue about the law is controversial in American liberal democracy, but leaving religion out of the discussion and placing it quietly into the law does not present a valid model for the interaction between law and religion. Citizens' and legislators' moral and religious beliefs should enter the debate from which laws on marriage result, and believers should not hesitate to seek support from other faiths.

2. Religious Discussion in American Politics

Covenant marriage proponents have made an honorable effort to develop a working law that contributes to the public good and have grounded their policies in sound, Judeo-Christian moral beliefs. Conversely, American politics often encourage a stifling of important religious ideals, and, in this case, deterred leaders from recruiting multiple religious perspectives to enrich legislative debate. Comparing the current situation to that of the American founders, among whom religious beliefs also varied widely, reveals that they agreed on at least one conviction: “that the moral goods promoted by the churches largely coincided with the moral goods promoted by the government, and . . . that the churches had a role to play in making the moral calculus of

310. See Perry, supra note 299, at 218.
311. See Carter, supra note 162 (explaining that most divorce and family lawyers at a Louisiana State Bar meeting in June of 1997 had no knowledge of the fact that the Louisiana House of Representatives had passed a covenant marriage bill). The possibility that divorce lawyers would likely form one of covenant marriage’s largest oppositions may explain their lack of knowledge.
312. All three legislative sponsors of the covenant marriage acts explain their movement as a search for good public policy, an attempt to lessen divorce rates, and a legislative initiative where religious leaders and believers can make a large impact. See Senator Petersen Interview, supra note 17; E-mail from Chris Pyle, supra note 190; Spaht Why a Second Tier, supra note 2, at 3. The author acknowledges that additional religions’ belief systems also further societal goods and admits that this Comment has limited its scope to those Christian denominations promoting or commenting upon covenant marriage legislation.
313. See Kent Greenawalt, Religion and American Political Judgments, 36 WAKE FOREST L. REV. 401, 404 (2001) (calling for an intermediate use of religious grounds in politics). A significant tension exists between the American political position that insists on the exclusion of religious arguments for or against laws and the political position that citizens and lawmakers should be able to rely on any source - including religion - that develops a personal understanding of how the law ought to stand. Id. at 40-06.
republicanism actually work." Mark Noll, a Professor of Christian Thought, finds the early work of Christian evangelicals remarkable in its ability to promote public morality through voluntary societies. For example, Noll mentions efforts in the 1800s to stop Sunday delivery of mail and missions to stop the removal of Cherokees from Georgia. In these campaigns, Noll asserts, the evangelicals showed their ability to advance "a nonestablishmentarian, yet still vigorously religious, effort to provide the morality without which a republic would collapse." In the same vein, activating more religious collaboration in the formation of covenant marriage laws could have resulted in laws reflecting well-argued, balanced, plural viewpoints.

Inviting religions to take part in deliberations about the laws in the initial stages of debate could have ensured that church leaders performed the more vigorous religious mobilization needed to give covenant marriage a real foothold in society. A law promoted by an interfaith movement to resurrect marriage may have invited a broader base of participants. Because marriage laws can only affect the behavior of couples to a limited degree, it is crucial for covenant marriage law proponents to actively encourage couples to pursue lifelong marital commitments. Like Spaht, the drafter of the Louisiana act, recognized, church leaders and clergymen are particularly capable of influencing couples to choose permanence through covenant marriage. The


315. Id. at 151. Noll notes that the founding period of America was not strongly influenced by the modern notion of evangelical religions (as defined by today's conservative Protestants), but that evangelism only began to play a large role in American society at least a generation after the founding. Id. at 153. He points out that the "voluntaristic, non, or antiestablishmentarian forms of evangelicalism that came to prevail widely in the nineteenth century were closely bound to the ideals of the founders about the relationship of religion and society." Id.

316. Id. at 150-51.

317. Id. at 151.

318. This is not to say that those churches who criticized the law would necessarily endorse another form of it. It is simply to suggest that their input may have expanded legislative thinking, enhanced the law's attractiveness, and increased the subsequent religious activism around participation.

319. See Spaht, Louisiana's Covenant Marriage, supra note 12, at 75 (describing how covenant marriage calls on churches to perform the unique function of preserving marriage).

320. See Discussion with William Duncan, supra note 296; Discussion with Professor Helen Alvaré, supra note 177.


322. Id. at 75 n.48.
essential error came about in the legislators’ assumptions that most
religions would be willing and enthusiastic to join the effort, although
they had not been included in the bills’ drafting. The practical results
show otherwise.
Many religious couples choose to bypass a civil law that promotes a
religious aim that is easily accessible through their own church. These
religious couples would seem to be natural allies to the covenant
marriage movement, but absent any encouragement from their religious
leaders, their participation wanes. Sponsors of covenant marriage
should request that all churches encourage members to pursue a
co ventan marriage not only for the couples’ own marital benefit but also
to set an example on the civil level by spreading the message of
commitment and encouraging the community to take marriage more
seriously. Legislation written to strengthen marriage will only be
effective if the law reflects wide religious enthusiasm for a marriage
movement. Lawmakers cannot single-handedly invigorate covenant
marriage participation by rallying only those local religious groups in
accord with their message. Rather, the symbolic strengthening of the
institution becomes a practical reality if the natural allies – religious
citizens and communities – take it upon themselves to effectuate
change.

B. Symbolism Has Significance, But Action Has Impact

Katherine Shaw Spaht, the drafter of Louisiana’s Covenant Marriage
Act, emphasizes that public debate surrounding the state of marriage and
the rising divorce rate in American society is a significant step in and of
itself toward strengthening marriage. Undeniably, covenant marriage

323. See supra Part IV.B. 324. Anderson, supra note 1 (discussing possible reasons why only three percent of
marriages in Louisiana from 1997-1999 have been covenant marriages). “None of the
mainstream religions have endorsed the law, but many of the more conservative
fundamentalist groups have.” Id. Because no religious denominations in Louisiana
require engaged couples to choose covenant marriage as a condition to bless their
ceremonies, couples over the past four years seldom requested it. Nolan, supra note 203.
325. See Nolan, supra note 203.
326. Spaht, Louisiana’s Covenant Marriage, supra note 12, at 69-70. Spaht clearly
indicates this incentive as one of the purposes of covenant marriage. Id. 327. Discussion with William Duncan, supra note 296; Discussion with Professor
Helen Alvaré, supra note 177.
328. See O’Brien, supra note 274, at 346 (concluding that, along with other social
pressures, “the allowance of greater religious involvement in marriage preparation and
divorce will precipitate a reawakening of marriage”).
329. Spaht, Louisiana’s Covenant Marriage, supra note 12, at 72 n.32.
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legislation provokes interest and debate in an area of vital importance to the American public and indirectly prompts a change in citizens' attitudes toward marriage.  

In a post-modern society where interpretations of the First Amendment's Establishment Clause urge many to refrain from offering a moral opinion if it is based on religious faith, proponents of legislation usually do not emphasize religious ideals related to a law. In fact, most legislators or sponsors veer away from religious bases or implications and focus on the practical effects of the law. Covenant marriage sponsors have made a positive step in introducing legislation that reflects the solidly grounded beliefs of people who seek to reestablish the value of permanency within marriage. Unfortunately, their efforts to date have not gathered support and mobilization from interfaith communities that are critical to covenant marriage law success.

VI. CONCLUSION

Covenant marriage enables shared ideals about marriage to be recommended in a secular manner by the state for the common good. For those who believe marriage is a religious institution, covenant marriage has little appeal because most people who marry make a covenant in their own church; thus, they find it unnecessary to take additional bureaucratic steps to strengthen their marriage. However, for those who are not religious, being able to strengthen marriage in a civil way may still be attractive. Arguably, strengthening marriage will be most appealing if public awareness is stirred by concerned religions.

331. U.S. CONST. amend. I.
332. See generally Smith, supra note 194, at 496-497 (2001); Perry, supra note 299, at 218.
333. See Perry, supra note 299, at 218 (quoting Connecticut Senator Joseph Lieberman on his disbelief "that there must be a place for faith in America's public life").
334. Spaht, Louisiana's Covenant Marriage, supra note 12, at 72.
335. O'Brien, supra note 274, at 364-65. ("While covenant marriage shares a religious basis of commitment, the process adopts the more secular right of an individual to choose a form of marriage less easily dissoluble upon divorce.").
336. Patrick S. Poole, Covenant Marriages Offer Society False Hope, CHATTANOOGA FREE PRESS, Jan. 11, 1998, at B5 (explaining that covenant marriage legislation will not have any positive effect on marital health because the problem of dissolution is "spiritual, not legislative"); Weiss, supra note 204 (reporting that most couples who sought marriage licenses in Louisiana the day after the law had passed were unsure about the meaning of covenant marriage).
337. See Spaht, Louisiana's Covenant Marriage, supra note 12, at 86.
A multi-denominational movement that would precede future covenant marriage debate and legislation will likely increase participation in and awareness of covenant marriage.\textsuperscript{338}

\textsuperscript{338} See supra Part IV.