I. MARRIAGE AND ITS ALTERNATIVES

When Are Adult Partners a Family?

A generation or two ago, family had a fairly clear connotation, although many people even then did not live in families that fit the standard image. Today, however, the meaning of family is contested in many realms of life. In 2010, for the first time, less than 50 percent of all American households consisted of married couples; 20 percent of all households consisted of married couples with children, down from 44 percent in 1960, and 28 percent consisted of married couples without children, compared to 31 percent in 1960. Linda A. Jacobson et al., Household Change in the United States, 67(1) Population Bulletin 3 (Sept. 2012). This study also found that marriage was much more common among the well-educated.

In 2013 the Centers for Disease Control reported that between 2006 and 2010, almost half of all women lived with a partner rather than marrying as their first family-like union, compared to about a third of women in 1995. Cohabitation was especially common among less-educated women; 70 percent of them cohabited as a first union, compared to 47 percent of women with a bachelor’s degree. Casey E. Copen et al., First Premarital Cohabitation in the United States: 2006-2010 National Survey of Family Growth (National Health Statistics Reports No. 64, Apr. 4, 2013). Commenting on this trend six years earlier, a demographic trends analyst said, “We seem to be reverting to a much older pattern, when elites marry and a great many others live together and have kids.” Blaine Harden, Numbers Drop for the Married with Children: Institution Becoming the Choice of the Educated, Affluent, Wash. Post, Mar. 4, 2007.

This chapter begins to explore legal questions that arise in light of this social development.

• Should the law make distinctions among people based on their family status at all?
• When family membership matters, how should it be determined? On the basis of formal markers such as blood relationship or legal ceremony, or on the basis of function?

• If family is defined by function, what kinds of behavior indicate that people belong to a family?
• What are the roles of legislatures and judges in making these decisions?

These issues will continue to arise throughout the following three chapters in this part. Chapter 2 explores in some detail the ways in which the law does treat adults differently if they are “married” or in an equivalent relationship. Chapter 3 examines the law of
formal marriage, and Chapter 4 deals with informal domestic arrangements among adults. Chapter 13 returns to some of these issues in the context of the parent-child relationship. Consider the following excerpts as you think about these questions.

**Martha Albertson Fineman, Why Marriage?**

…I argue that for all relevant and appropriate societal purposes we do not need marriage, per se, at all. To state that we do not need marriage to accomplish many societal objectives is not the same thing as saying that we do not need a family to do so for some. However, family as a social category should not be dependent on having marriage as its core relationship. Nor is family synonymous with marriage. Although both of these things might historically have been true, things have changed substantially in the past several decades. Marriage does not have the same relevance as a societal institution as it did even fifty years ago, when it was the primary means of protecting and providing for the legal and structurally devised dependency of wives.

The pressing problems today do not revolve around the marriage connection, but the caretaker-dependent relationship. In a world in which wives are equal partners and participants in the market sphere, and in which the consensus is that bad marriages should end, women do not need the special protection of legal marriage. Rather than marriage, we should view the parent-child relationship as the quintessential or core family connection, and focus on how policy can strengthen this tie. Thus, in a responsive society, one could have a marriage [or other long-term sexual affiliation] without necessarily constituting a “family” entitled to special protection and benefits under law. Correspondingly, one might have dependents, thereby creating a family and gaining protection and benefits, without having a marriage.

If this suggestion seems extreme and radical, it only serves to demonstrate the extent to which marriage continues to be uncritically central to our thinking about the family. What is bizarre is that it remains central in spite of the fact that the traditional marital family has become a statistical minority of family units in our society. The tenacity of marriage as a concept explains the relatively unsophisticated and uninformed policy debates. Marriage, as the preferred societal solution, has become the problem. The very existence of this institution eclipses discussion and debate about the problems of dependency and allows us to avoid confronting the difficulty of making the transformations necessary to address these problems.

**Carol Sanger, A Case for Civil Marriage**
*27 Cardozo L. Rev. 1311, 1311-1322 (2006)*

…Professor Edward Stein has posed a straightforward question: Should civil marriage simply be abolished? In this mini-symposium, Professors Edward Zelinsky and Daniel Crane have provided two answers to his question: yes and yes.
Let me explain the double positive. Both authors agree that marriage should not, in Professor Zelinsky’s words, be “recognized, defined, or regulated by the state.” Both are content to use contract to create enforceable marriage-like obligations. Yet their reasons for abolition differ in ways that distinguish their yeses. Both agree that civil marriage should be abolished, but as we see from their paper titles, Professor Zelinsky wants to deregulate marriage and Professor Crane wants to privatize it.…

Zelinsky offers several practical reasons why the state should get out of the marriage business. He explains that marriage is no longer necessary for issues of parentage, custody, or adoption; it is not necessary for significant areas of wealth transmission, such as pensions or inheritance. Moreover, the benefits that are often associated with marriage—medical decision-making, evidentiary privilege, hospital visitation—are not as robust as most people think. In short, Zelinsky argues that, if civil marriage is abolished, the world will not look so very different than it does now. It will certainly not look worse and, from a marital perspective, it may well look much better. Active competition among firms will strengthen the institution. People will feel more committed to domestic arrangements that they have affirmatively chosen. The polity itself will be better off because there will be less squabbling over the meaning of marriage. We can each be “married” in our own way.

As a Contracts professor, I am honored that my subject has been chosen for this important assignment. At the same time, I am wary about just how well it is going to perform.…

…I agree with Professor Zelinsky that many couples, even those who are represented by lawyers, will contract incompletely and then turn to gap fillers provided by the state. It is interesting to think for a moment about why parties to a marriage contract may be especially unlikely to provide for the range of likely disputes. As Lynn Baker and Robert Emery discovered in their study of newlyweds, there is an enormous optimism about marriage by those standing on its cusp. Although the study’s subjects were well aware of the general dismal statistics on divorce, not one of them thought that their own marriage would bust up. In addition to the optimism bias, all the standard reasons that contracting parties leave things out apply: fear of introducing the deal breaker and a reluctance of parties in on-going relationships to spell out every expectation, demand, or obligation. For all these reasons, there is likely to be substantial recourse to gap fillers.

I wonder, however, whether the default rules will begin to operate as a shadow regime, establishing baselines for marital obligation and support so that the law of marriage contract will over time not differ much from the law of civil marriage. If, as Professor Zelinsky acknowledges, marriage contracts are a unique kind of contract and therefore “require…unique rules,” I would prefer to have the rules straight up rather than through indirect resort to contract.
My greater concern, however, is not about the terms parties leave out but about the enforcement of terms they explicitly include. What is a court to do with provisions that limit the number of children to the marriage or that forbid the use of contraception by either spouse? What about a contract that provides only fault-based grounds for dissolution or no grounds for divorce at all? The immediate answer is that the complaining parties consented to the agreement and are stuck with their bargain. But how will courts handle breach in cases where the wife has used a diaphragm or the husband has had an affair in violation of contract terms? Should judges enforce liquidated damage clauses that deny the breaching spouse property? Can a plaintiff sue for specific performance so that the defendant spouse might be enjoined from marrying again, just as defecting sports players cannot sign with other teams?

There is also a deeper question about the contract-based marital regime. Professor Zelinsky envisions an array of standard form contracts from which couples may choose. I am sure this will be so should his proposal prevail; we are energetic capitalists and just as umbrellas appear for sale on every Manhattan corner within two minutes of a thundershower, marriage entrepreneurs will be out there faster than you can say “Party of the First Part.” There will be contract options to cater to every relationship taste and preference. But how customized can a marriage contract be before it falls outside the marital regime altogether? Is there a list of topics or terms that must be included before the arrangement is not marriage but something else, something perhaps closer to an employment contract or a property transfer or a friendship pact? Must the contracting parties reside together or be economically interdependent? Must there be provision for mutual support?…

It may be that this question—what have we got here?—is no longer the state’s business. If states get out of the marriage business, they would seem to have little room to object to whatever arrangements substitute in. That, I think, is part of Professor Zelinsky’s goal. Marriage law has produced virulent debate over the meaning of the institution. If marriage is deregulated, gay and lesbian couples can marry just like any other persons with contractual capacity. Getting rid of civil marriage takes a contentious issue off the political table: there is no more state interest in private domestic arrangements other than policing the contracts by which the relationships are established.…

I fear that the preference for deregulation reflects something of an insider’s perspective. Marriage may seem like very little when it can be declined, but it is much more significant when it is withheld.…

Professor Crane has presented a theological case for the privatization of marriage.…

…Each religious tradition can offer and can “realize its own vision with respect to…marital obligation, divorce, and remarriage,” limited only by respect for “the minimal norms of a liberal democratic society.” When disputes arise, the parties turn, for arbitrated resolution, to “tribunals specialized in the religious traditions of the relevant family.”…
…[Professor Crane] assures us that nothing too bad can happen under this form of privatization because the religious regime cannot fall below the “minimal norms of liberal democratic society.” That sounds good and upon first reading the phrase, all my liberal, feminist, upper west side fears were allayed. Let the churches take back marriage; the minimum norms of a liberal democratic society will protect anything I might be worried about. But the matter is not quite so simple.

To begin, what are the minimum norms of a liberal democratic society? The phrase is not a determinate one and has no technical meaning. Because we are all law-trained, we can probably fill in a likely set of minimum norms without much trouble. I suspect our list would include concerns about equality, participation, the rule of law, and perhaps respect for autonomy.

But these are exactly the areas where religion lets us down. In few religions do women and men participate equally with one another, whether as celebrants, members, and certainly as founders. As political theorist Susan Okin has stressed, Christianity, Judaism, and Islam, certainly in their more orthodox forms, are organized around the authority of husbands and the subservience of women. Husbands control such things as the punishment of children and wives, the availability of divorce, and the distribution of property. This is not a feminist claim; it is a descriptive statement. I am sure that most of us can uncontroversially come up with examples from within our own traditions.

Participatory norms are also challenged by religious marriage. Not all religions permit marriage outside the faith so that marriage to one’s chosen partner may not be permitted at all. To demonstrate the value of civil law in such circumstances, political theorist Jeremy Waldron directs us to Romeo and Juliet, that most unhappily married couple. Prevented from marrying by the “traditions of the relevant family,” the star-crossed lovers had to leave their respective communities and decamp to Verona. Waldron uses the case to illustrate the importance of an external “structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments.” Civil marriage performs exactly this function: it provides a “basis on which individuals…can reconstitute their relations and take new initiatives in social life without having to count on the affective support of the communities to which they have hitherto belonged.”

Just as some religious traditions restrict entrance to marriage, not all faiths permit exit from the institution. Restrictions on divorce implicate issues of autonomy and of equal participation, particularly for women. As Okin has explained, women’s vulnerability within a marriage is intensified by their inability to leave it. The distribution of power at home impacts significantly on participation and influence in the public realm: “the more a culture requires or expects of women in the domestic sphere, the less opportunity they have of achieving equality with men in either sphere.”…
Without using the vocabulary of multi-culturalism, Professor Crane’s privatization endorses a multi-cultural regime for marriage. Each couple (or each plurality in the case of polygamous religions) chooses and then is bound by the religious traditions to which they feel most closely tied. From the perspective of cultural accommodation, this is good. The authority of the group is recognized; its autonomy strengthened. But such accommodation is also likely to work against less powerful members within the group, those whom Les Green has called minorities within minorities. As Green observes, “without respect for internal minorities, a liberal society risks becoming a mosaic of tyrannies.” This may be particularly true in the area of family law where as Shachar has noted, “the violation of rights are systemic rather than accidental.”

For all these reasons, it is therefore not enough simply to invoke minimum norms to satisfy concerns about unjust practices in religious marriage. Religions are markedly undemocratic, concerned not with rights or equality or principles of non-discrimination but with the demands of faith. Moreover, I suspect few religions would accept the importation of democratic norms, minimal or not, as a condition of governance. It means nothing to cede authority to religious tradition if the religion must first sign on to an incompatible set of civic values and practices.

…However, I think it is worth letting all committed couples ask this of one another: to commit to the full extent that is possible at law. And it is marriage law—not contract law—that ought to do the heavy lifting here, not as a functional matter—we can probably kick contract law into sufficient shape to do the job if necessary—but as a matter of the legitimacy of state authority over marriage. Just as the state has interests in marriage, citizens have an interest in the state articulating and defending its interests, as it was eventually unable to do with miscegenation, prohibitions on contraception, or as an absolute requirement for parenting. The nature of the state’s interest in marriage is often contested, as it should be. As historian Nancy Cott has pointed out, “the public benefit of governmental involvement in marriage no longer goes without saying.” But the explication of the state’s interest is less likely to be produced by adjusting the definition of consideration or narrowing the application of injunctive relief.

**Marsha Garrison, The Decline of Formal Marriage: Inevitable or Reversible?**


Formal marriage signals intention. It signals each partner who enters into a new marital union, their friends, and their families. It also signals strangers; those who meet or do business with the married couple understand that each spouse has entered into a binding commitment that entails expectations of fidelity, sharing, and lifetime partnership. Formal marriage also signals intention to the state; government officials can and do
assume that the married couple has undertaken obligations to each other that both justify treating them as an economic unit and assuming that a deceased spouse would want his or her marital partner to obtain the lion’s share of the decedent spouse’s assets.

Formal marriage accomplishes all of these signaling functions prospectively, efficiently, and unequivocally. After a couple marries, there is no question about what sort of relationship they intend. No litigation will be necessary to determine their relational status. No decisionmaker will be required to sift through heaps of self-serving testimony about individual promises made and understandings reached. One partner cannot surprise the other by bringing a fraudulent claim, nor can one partner surprise the other by trying to evade a just claim.

Informal marriage lacks all of these merits. It must be proven and thus offers only a retrospective status. Gaining that status will almost invariably necessitate costly and time-consuming litigation.

These basic disadvantages of informal marriage are compounded by the evidentiary problems inherent in fact-based determination of marital status. Marital intent is subjective; when not publicly expressed, it is extraordinarily hard to prove. This basic problem is exacerbated by the range of meanings associated with cohabitation and the fact that cohabitants often do not agree about the nature of their relationship.…

Given the lack of uniformity in cohabitants’ understandings and behaviors, the mere fact of living together provides little evidence of what understandings a particular relationship has produced. One partner may deeply believe that the relationship is committed; the other may deeply believe the reverse. A breakup can only enhance such disagreement, setting the stage for disappointed expectations and resulting litigation. These difficulties are bad enough when both cohabitants are able to testify at a hearing; they are even worse when the issue of marital understanding is tested in a proceeding brought after one partner dies.…

Formal marriage is also associated with a range of benefits to adult partners and their children. Cross-national surveys show that marriage is associated with higher levels of subjective well-being throughout the industrialized and nonindustrialized world. Researcher after researcher has reported that married individuals typically live longer and healthier lives than the unmarried; husbands and wives get more sleep, eat more regularly, and visit the doctor more often; they abuse addictive substances and engage in risky behaviors less frequently. Married men and women also do better economically than their unmarried counterparts. Married men earn more than either single men or cohabitants. Married couples also have a higher savings rate and thus accrue greater wealth than the unmarried.
The marital advantage also provides benefits to a couple’s children. Because of the greater stability that marriage provides, marital children are exposed to many fewer financial, physical, and educational risks; these lower risks are associated with higher levels of well-being. There is also evidence that the advantages conferred by marital childbearing and rearing transcend the specific benefits associated with residential and economic stability. For example, married fathers appear to be more involved and spend more time with their children than unmarried fathers; if parental separation occurs, they see their children more often and pay child support more regularly.

For both adults and children, the marital advantage is concentrated in low-conflict relationships. Researchers have found that the continuation of a high-conflict marriage is negatively associated with the health and happiness; indeed, longitudinal surveys show that “parents’ marital unhappiness and discord have a broad negative impact on virtually every dimension of offspring well-being.”

Selection effects also explain away a significant portion of the marital advantage. To the extent that those who marry are wealthier—or happier, or healthier—before marriage, they should maintain these advantages after marriage. Although the jury is still out on the extent to which the marriage “premium” derives from preexisting characteristics or the married state, we know that both marriage and marital parenting are strongly associated with higher socioeconomic status.

However, despite these caveats, the evidence strongly suggests that the marital advantage is real, and that it persists across national, cultural, and socioeconomic boundaries.

Despite the advantages associated with formal marriage, all across the industrialized world young adults are marrying later and increasing numbers may not marry at all. With the notable exceptions of Asia and southern Europe, the proportion of children born outside of marriage has also skyrocketed. The decline of marriage and marital childbearing is not evenly distributed across the population, however. College-educated women were once less likely to marry than others; this is no longer the case and, at least in the United States, these well-educated women are equally or more likely to stay married than they were several decades ago. In the United States and, to a lesser extent, some European nations, nonmarital fertility is also concentrated among the poorly educated. Because of these divergent trends, in the mid-1990s, only 10% of the children of U.S. college-educated women lived in single-parent households—a percentage that has not increased since 1980—as compared with more than 40% of children whose mothers lacked a high-school diploma.

Marital and reproductive behavior also diverges sharply by race and ethnicity. In the United States, the decline of marriage has been much more pronounced among black than
white Americans. Blacks have long had a high rate of marital disruption, but they are now much less likely to marry, too. Slightly more than two-thirds of black women born between 1960 and 1964 married by age forty, compared to eighty-seven percent of those born two decades earlier and eighty-nine percent of non-Hispanic white women. Conversely, sixty-eight percent of black children are now born outside of marriage, compared to twenty-eight percent of non-Hispanic white children. Black cohabitants are also much less likely than white cohabitants to marry after their child’s birth or even to remain a couple….

Because the decline of marriage results from a number of different factors, policymakers face large difficulties in reversing the trend. These policy-making difficulties are magnified because the personal benefits of marriage are concentrated in long-term, harmonious marital relationships. Initiatives that encourage couples with weak, highly conflicted relationships to enter into formal marriage along with those who have strong, unconflicted relationships may foster the signaling function of marriage but cannot produce significant gains in adult or child well-being. Ideally, then, public policy would encourage couples to defer marriage—formal or informal—and childbearing until they have determined that their relationship has good prospects for long-term success. It would also encourage them to enter into formal, ceremonial marriage when and if they make a positive determination about their long-term prospects. Achieving a result this nuanced is obviously very difficult given the range of variables that appear to affect marital decision-making and our limited understanding of how those variables work together….

Given these concerns, shifts in the law that assimilate some cohabitational relationships to marriage would appear to be particularly undesirable. These shifts seem to be motivated, in large part, by the sense that women in long-term cohabitational relationships are disadvantaged at relationship dissolution as compared to their married peers and aim at reducing that disadvantage. Some such schemes rely on individualized fact-finding; others, more numerous, rely on the duration of cohabitation or the birth of a common child. The individualized schemes [create] fact-finding problems…; the durational and common-child approaches resolve some of the fact-finding difficulties of the individualized schemes but reduce individual autonomy and risk the imposition of obligations on individuals who lack marital understandings or—worse—who have affirmatively chosen to avoid marital obligations by remaining single. Although these reasons alone should deter policymakers from initiating such “conscriptive” regulatory schemes, policymakers inclined toward this type of initiative should additionally consider the fact that conscriptive schemes not so subtly signal that the decision to marry is unimportant. Such a signal has the potential to contribute to the perception that public support for formal marriage is declining and thus to trigger exactly that….
On the other hand, policies that neutrally, but sharply, distinguish marriage from cohabitation appear to be warranted and appropriate. These policies reinforce the perception that marriage is not just a piece of paper and thus encourage both thoughtful marital decisions and decisions that segregate those with marital intentions from those without such intentions. These policies may also reinforce public opinion in favor of formal marriage for those with marital intentions and childbearing within such relationships.

_Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation_

The social science findings about cohabitation support the extension of legal protections to cohabitants. Cohabitation is likely, though not always, a less stable relationship than marriage, one that is more likely to involve domestic violence; and it involves substantial economic interdependence. A large number of individuals involved are likely to be poor, to come from disadvantaged racial or ethnic minorities, and to have children. All of these are powerful reasons to recognize their unions for purposes of government benefits, to extend a variety of legal remedies upon the ending of their relationships, and to grant them rights against third parties. The very instability of cohabiting unions is a strong reason to provide rights to property and support upon dissolution, so long as the relationship has lasted a certain period of time or has produced a child.

If, as recent studies indicate, cohabitants are more likely to merge their finances than to keep them separate, and the presence of a cohabitant in the household adds substantially to the ability of an otherwise single mother to support her child, then we need to worry about vulnerability of the parties if the relationship ends. Legal remedies for the custodial parent (usually the mother)—remedies beyond the child support she can presumably command from the child’s biological father—may be very important for the welfare of the children involved….

A number of legal scholars argue that we should not give legal protection to cohabitation because to do so will harm the institution of marriage, which is, or should be, the societal ideal. Given the statistics on the increase in cohabitation, this could be a case of sacrificing the good in a futile search for the best.…

The argument that to give legal status to cohabitants will harm the ideal embodied in marriage assumes that refusal to recognize cohabitation will lead people to marry instead, and that marriage by many of the people currently cohabiting would not be characterized by the bad effects that accompany their cohabitation. Arguments to this effect are seriously flawed in a number of respects.

First, legal incentives do not seem to affect people’s private behavior in this way. Indeed, most people are unlikely even to know what their legal rights and obligations are, at least
until they get divorced…. Many people in the United States mistakenly believe that the law in fact does protect them after a certain period of cohabitation, although common law marriage is recognized only in a handful of states…. 

We now have a number of studies, primarily in the context of welfare reform, about the impact of legal incentives upon the rate of marriage. Without exception they show that welfare programs designed to encourage marriage have had no statistically significant effect on the marriage rate. Indeed, one study suggests that entry into marriage is negatively associated with the incentives offered by the new federal welfare initiatives which drastically limit payment of benefits to unmarried mothers. These results are consistent with evidence that variations in welfare benefits do not affect the non-marital birth rate either. Human beings apparently do not regulate behavior as private as union formation and childbirth in response to incentives from the state.

If people did think and act in this way, however, the incentive structure provided by the current legal treatment of cohabitation in this country is perverse. By not imposing any legal obligations on cohabitants, the stronger partner economically is given an incentive not to marry, because to do so would mean being required to share his or her property upon dissolution of the relationship and possibly to support the former partner in the short or long run…. 

The comparisons of most immediate interest are those with Western European countries that have in fact extended legal protections to cohabiting couples, such as the Netherlands, Sweden, and France. In the Netherlands, heterosexual couples may choose between marriage and registration as domestic partners, which is virtually identical to marriage in legal status. Yet the rate of cohabitation to marriage in the Netherlands (25% of unions are cohabitations) is identical to that in the U.K., where legal protections are denied to heterosexual cohabitants. In Sweden, heterosexual cohabitation has been accepted for the longest period of time and is given very favorable treatment by the government, and cohabitants’ property is distributed equally between them at the end of their relationships. Yet Eurobarometer surveys show that 90% of Swedish young people are in favor of marriage, and 61.2% of cohabiting women aged 15 to 44 in Sweden eventually marry their partners, compared with 48% in the United States. In short, giving positive legal treatment to cohabitation does not seem to discourage the transition to marriage and may in fact encourage it.

In France, where the Pacte Civil de Solidarité allows cohabitants who register to receive some of the benefits of marital status, about 83.5% of adult women will cohabit between ages 15 and 45, compared to about 50% in the U.S. Approximately equal proportions of cohabitants will end their cohabitation by marrying or by separating: 46.3% will marry in France and 48% in the U.S.; 53.7% will separate in France and 52% in the U.S…. 

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In sum, offering legal recognition and support to cohabitants and making their lives easier does not appear to discourage marriage, and in fact the opposite may be true..…

While people’s familial behavior has been changing, the law of marriage, cohabitation, and parentage has changed too. Perhaps the most dramatic change was the opening of marriage to same-sex couples, a process that culminated with the Supreme Court decision in Obergefell v. Hodges in 2015. That opinion begins with this ode to the joys of marriage by Justice Kennedy, who at that time had been married for more than 50 years.

**OBERGEFELL V. HODGES**
135 S. Ct. 2584 (2015)
(The remainder of this opinion is excerpted at page 144.)

Justice Kennedy delivered the opinion of the Court….From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. This wisdom was echoed centuries later and half a world away by Cicero, who wrote, “The first bond of society is marriage; next, children; and then the family.” There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners’ claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the
petitioners’ contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Choices about marriage shape an individual’s destiny. As the Supreme Judicial Court of Massachusetts has explained, because “it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.” Goodridge, 440 Mass., at 322, 798 N.E.2d, at 955.

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. Loving, supra, at 12 (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

A second principle in this Court’s jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to Griswold v. Connecticut, which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485. Suggesting that marriage is a right “older than the Bill of Rights,” Griswold described marriage this way:

“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” Id., at 486.

And in Turner, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. The right to marry thus dignifies couples who “wish to define themselves by their commitment to each other.” Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

[A first premise of the Court’s relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy…Like choices concerning contraception, family relationships, procreation, and childrearing, all of which
are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer, 262 U.S., at 399. The Court has recognized these connections by describing the varied rights as a unified whole: “[T]he right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.” Zablocki, 434 U.S., at 384 (quoting Meyer, supra, at 399). Under the laws of the several States, some of marriage’s protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents’ relationship, marriage allows children “to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.” Marriage also affords the permanency and stability important to children’s best interests.…

Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

“There is certainly no country in the world where the tie of marriage is so much respected as in America…. [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace…. [H]e afterwards carries [that image] with him into public affairs.” 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In Maynard v. Hill, 125 U.S. 190, 211 (1888), the Court echoed de Tocqueville, explaining that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” Marriage, the Maynard Court said, has long been “a great public institution, giving character to our whole civil polity.” Id., at 213, 8 S. Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential.…

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.…

NOTES AND QUESTIONS
1. Marriage has long been regarded as part of the foundation of society. Indeed, the idea goes back to the first European settlers in New England. John Demos, A Little Commonwealth: Family Life in Plymouth Colony (1999). But is relationship recognized by a marriage license and ceremony the only thing that counts as a marriage for these purposes?

2. In the not-too-distant past, sexual relationships outside marriage were criminal (fornication and adultery). While this is no longer true today in many states, in all states unmarried cohabitation is tolerated but does not give rise to all the legal advantages (and disadvantages) of marriage. Does this amount to treating nonmarriage as lesser than marriage? If so, is the solution to treat at least some unmarried cohabitants as if they were married?

3. Some legal scholars have reacted negatively to Justice Kennedy’s praise of marriage, interpreting it as denigrating people who choose not to marry, even though they may form informal families. They argue that the law must recognize and protect at least some familial rights for those who choose not to marry. Others believe it makes sense to keep some legal distinctions between married and unmarried couples, though they differ about what such distinctions should be. See, e.g., June Carbone & Naomi Cahn, Nonmarriage, 76 Md. L. Rev. 55 (2016); Clare Huntington, Obergefell’s Conservatism: Reifying Familial Fronts, 84 Fordham L. Rev. 23 (2015); Courtney G. Joslin, The Gay Rights Canon and the Right to Nonmarriage, 97 B.U. L. Rev. 425 (2017); Melissa Murray, Obergefell v. Hodges and Nonmarriage Inequality, 104 Calif. L. Rev. 1207 (2016). See also Deborah Widiss, Non-Marital Families and (or After?) Marriage Equality, 42 Fla. St. U. L. Rev. 547, 552 (2015) (expressing similar concerns about United States v. Windsor, 133 S. Ct. 2675 (2013)). What might it mean to protect the right to nonmarriage?

**BLUMENTHAL V. BREWER**  
69 N.E.3d 834 (ILL. 2016)

Karmeier, J. In this case we are called on to consider the continued viability and applicability of our decision in Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979), which held that Illinois public policy, as set forth in this State’s statutory prohibition against common-law marriage, precludes unmarried cohabitants from bringing claims against one another to enforce mutual property rights where the rights asserted are rooted in a marriage-like relationship between the parties.

The issue has arisen here in the context of an action brought by Dr. Jane E. Blumenthal for partition of the family home she shared and jointly owned with Judge Eileen M. Brewer. The couple had maintained a long-term, domestic relationship and raised a family together but had never married. Blumenthal sought partition of the residence when the relationship ended and she moved out.
The partition action itself presented no question under Hewitt. The problem arose when Brewer counterclaimed for various common-law remedies, including sole title to the home as well as an interest in Blumenthal’s ownership share in a medical group so that the couple’s overall assets would be equalized now that the couple had ended their relationship. Blumenthal moved to dismiss…. The…counterclaim was dismissed in full.

…Brewer pursued an appeal of the dismissal of her counterclaim…, arguing that Hewitt should be rejected and should not bar any of the relief she sought.

The appellate court agreed with Brewer’s position…. 

This court allowed Blumenthal’s petition for leave to appeal…. 

…According to [Brewer’s counterclaim,] “[t]hroughout the course of their relationship, Brewer and Blumenthal commingled their savings and investments.” It was the funds from this joint account that went toward the purchase of Blumenthal’s ownership interest in her medical practice group, Gynecologic Specialists of Northwestern, S.C. (GSN). Brewer contends that she allowed Blumenthal to use their joint account for this investment with the reasonable understanding and expectation that she, Brewer, would continue to benefit from the earnings derived from GSN. Once the couple ended their relationship in 2008, these financial benefits ceased, and Blumenthal retained the entire interest in the medical group, thereby keeping all of the earnings from the medical practice. Based on these allegations, Brewer claims that Blumenthal is unjustly enriched…. 

…Brewer requests the common-law remedy of restitution for an undisclosed amount of funds she deposited into the couple’s joint account since the year 2000, which was used to purchase Blumenthal’s ownership interest in GSN. Brewer raises the same arguments she made before the appellate court, which ruled in her favor, permitting her to bring common-law remedies against Blumenthal. Therefore, Brewer requests this court uphold the appellate court’s review of the longstanding public policy in Illinois barring unmarried, cohabiting partners from seeking common-law property rights if the claims are not independent from the parties’ relationship.

…One thing is certain as argued in the briefs: Illinois’s statutory prohibition of common-law marriage and this court’s prior decision in Hewitt are imperative to resolving the issue before this court. We therefore turn to that matter…. 

At issue in Hewitt was whether public policy barred the granting of common-law relief to plaintiff Victoria Hewitt, who was in a cohabiting, marriage-like relationship with the defendant, Robert Hewitt. Victoria and Robert commenced their relationship in 1960, while they were attending college in Iowa. After Victoria became pregnant, Robert proclaimed to Victoria “that they were husband and wife and would live as such, no formal ceremony being necessary, and that he would ‘share his life, his future, his
earnings and his property’ with her.” The parties immediately began holding themselves out as a married couple. Relying on Robert’s promises, Victoria began to assist in paying for Robert’s education and establishing a dental practice, helping him earn more than $80,000 annually and accumulate large amounts of property, owned either jointly with Victoria or separately.

After several years together, the relationship became sour, and Victoria filed for divorce, which the circuit court dismissed because the parties were never married. Victoria filed an amended complaint that sought an equitable one-half share of the parties’ assets, based upon theories of implied contract, constructive trust, and unjust enrichment, which resulted from their “family relationship.” The circuit court dismissed the amended complaint, “finding that Illinois law and public policy require such claims to be based on a valid marriage.”

The appellate court reversed, giving considerable weight to the fact that the parties had held themselves out as a couple for over 15 years and lived “a most conventional, respectable and ordinary family life.” The appellate court noted that the “single flaw” of Robert’s and Victoria’s relationship was the lack of a valid marriage. The appellate court concluded that Victoria should not be denied relief based on public policy grounds.…

On appeal to this court, we unanimously reversed the appellate court’s decision. Addressing the issue of whether the granting of common-law relief to the plaintiff, an unmarried cohabitant, was barred by public policy, we began by acknowledging that:

“The issue of unmarried cohabitants’ mutual property rights…cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties to such relationships. There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage.”

In our view, the legislature intended marriage to be the only legally protected family relationship under Illinois law, and permitting unmarried partners to enforce mutual property rights might “encourage formation of such relationships and weaken marriage as the foundation of our family-based society.” This court was concerned that permitting such claims might raise questions about support, inheritance rights, and custody of nonmarital children.2

We noted that the situation between the unmarried couple was “not the kind of arm’s length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind.” Because the question concerned changing the law
governing the rights of parties in the delicate area of marriage-like relationships, which involves evaluations of sociological data and alternatives, this court decided that the underlying issue was best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field. Accordingly, this court held that Victoria’s claims were “unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.” We reasoned that an opposite outcome of judicially recognizing mutual property rights between knowingly unmarried cohabitants—where the claim is based upon or intimately related to the cohabitation of the parties—would effectively reinstate common-law marriage and violate the public policy of this state since 1905, when the legislature abolished common-law marriage,…

…In rejecting Victoria’s public policy arguments, this court recognized that cohabitation by the unmarried parties may not prevent them from forming valid contracts about independent matters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages. However, that was not the type of claim Victoria brought; thus, her claim failed.

The facts of the present case are almost indistinguishable from Hewitt, except, in this case, the parties were in a same-sex relationship. During the course of their long-term, domestic relationship, Brewer alleges that she and Blumenthal had a relationship that was “identical in every essential way to that of a married couple.” Although the parties were not legally married, they acted like a married couple and held themselves out as such. For example, the former domestic partners exchanged rings as a symbol of their commitment to each other, executed wills and trusts, each naming the other as the sole beneficiary of her assets, and appointed each other as fiduciary for financial and medical decision making. Blumenthal and Brewer also began to commingle their personal and financial assets, which allowed them to purchase investment property as well as the Chicago home where they raised their three children. Much like in Hewitt, Brewer alleges that she contributed to Blumenthal’s purchase of an ownership interest in the medical group GSN, helping Blumenthal earn the majority of income for the parties and “thereby guaranteeing the family’s financial security.” Because Blumenthal was able to earn a high income, Brewer was able to devote more time to raising the couple’s children and to attend to other domestic duties. Once Blumenthal’s and Brewer’s relationship ended, Brewer, like Victoria Hewitt, brought suit seeking various common-law remedies to equalize their assets and receive an interest in Blumenthal’s business,…

When considering the property rights of unmarried cohabitants, our view of Hewitt’s holding has not changed. As in Hewitt, the issue before this court cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties in such marriage-like relationships. These questions
undoubtedly involve some of the most fundamental policy concerns in our society. Permitting such claims, as sought by Brewer, would not only impact the institution of marriage but also raise questions pertaining to other family-related issues. Moreover, Brewer’s argument that her relationship with Blumenthal should not be viewed differently from others who cohabit, like roommates or siblings living together, ignores the fact that their relationship—which lasted almost three decades and involved raising three children—was different from other forms of cohabitation. Brewer herself identified in her counterclaim that her relationship with Blumenthal was not that of roommates or siblings living together but was “identical in every essential way to that of a married couple.”

…According to Brewer’s counterclaim, one of the ways Blumenthal and Brewer’s domestic relationship was identical to that of a married couple was, among other things, their decision to “commingle[ ] their personal property and their finances.” Beginning around the year 2000, Blumenthal and Brewer…pooled their assets and finances, which were used to make purchases including the arrangement to purchase an ownership interest in GSN. According to Brewer, these purchases were made for the benefit of providing the “family’s financial security” and to allow Brewer to devote a substantial amount of her time raising the couple’s children. The decision between Blumenthal and Brewer to commingle their finances and use those joint funds to make property and financial investments demonstrates that the funds were economically dependent on the parties’ marriage-like relationship.

For about eight years, Brewer never objected to the arrangement, nor does the counterclaim allege that she tried to earmark or record which funds of hers were going specifically toward the purchase of GSN, as if she were a business partner. This was unquestionably because Blumenthal and Brewer wanted to live like a married couple. Both parties voluntarily contributed to the joint account because that is typical of a married couple. The parties’ arrangement was made possible because Brewer…agreed to forgo advancing her own legal career in order for Blumenthal to pursue entrepreneurial endeavors including the purchase of an ownership interest in GSN. Indeed, Brewer is correct in labeling Blumenthal’s and her purchase of GSN as an investment. But it was an investment for the family, which included Blumenthal, Brewer, and their children. It was not an investment between business partners. Nor was it the kind of arm’s-length bargain envisioned by traditional contract principles. Rather, the arrangement to use the parties’ commingled funds was an arrangement of a fundamentally different kind, which…is intimately related and dependent on Brewer’s marriage-like relationship with Blumenthal….

While we acknowledge that restitution may be a remedy available to a party who has cohabited with another, that is not the circumstance concerning Brewer’s restitution claim in count III of her counterclaim. We find that Brewer failed to make a showing that count
III of her counterclaim has an independent economic basis apart from the parties’ relationship.…

Brewer respectfully asks this court to affirm the appellate court’s decision, which held in her favor that former cohabitants who live outside the bonds of marriage, but live in a marriage-like relationship, may bring common-law property claims. Central to Brewer’s argument are various post-Hewitt legislative enactments in Illinois, which she claims indicate that the state’s public policy has shifted dramatically in regards to unmarried couples and their children. According to Brewer, the following legislative enactments reveal that the application of Hewitt is no longer justified and that the state’s evolving public policy now contradicts Hewitt’s rule. We disagree.

Since this court’s decision in Hewitt, the General Assembly has enacted, repealed, and amended numerous family-related statutes. In 1984, the legislature adopted a no-fault ground of divorce based on irreconcilable differences to the Illinois Marriage and Dissolution of Marriage Act. Then in 1985, the Illinois Parentage Act of 1984 provided that “[t]he parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents.” Additionally, since Hewitt, there has been an amendment to the Probate Act of 1975 extending intestate inheritance rights to children of unmarried parents, and a similar amendment to the Illinois Pension Code, which indicates that children born to unmarried parents are entitled to the same survivor’s benefits as other children. Further, Illinois also recognizes the rights of unmarried couples (and individuals) to adopt children. In 2011, the legislature enacted the Illinois Religious Freedom and Civil Union Act, gave legal status to civil unions, and made such status available to both opposite-sex and same-sex couples. As of 2014, under the Religious Freedom and Marriage Fairness Act, same-sex couples are now able to marry in Illinois. More recently, the Parentage Act of 1984 was repealed (in its entirety) by the 2015 enactment of Pub. Act 99-85, which replaced it with the Illinois Parentage Act of 2015. In addition, the Marriage and Dissolution Act, which incorporates the statute prohibiting common-law marriages, underwent a major overhaul this year.

These post-Hewitt amendments demonstrate that the legislature knows how to alter family-related statutes and does not hesitate to do so when and if it believes public policy so requires. Nothing in these post-Hewitt changes, however, can be interpreted as evincing an intention by the legislature to change the public policy concerning the situation presently before this court. To the contrary, the claim that our legislature is moving toward granting additional property rights to unmarried cohabitants in derogation of the prohibition against common-law marriage is flatly contradicted by the undeniable fact that for almost four decades since Hewitt, and despite all of these numerous changes to other family-related statutes, the statutory prohibition against common-law marriage set forth in section 214 of the Marriage and Dissolution Act has remained completely
untouched and unqualified. That is so even though this court in Hewitt explicitly deferred any policy change to the legislature.

It is well-understood that when the legislature chooses not to amend a statute to reverse a judicial construction, it is presumed that the legislature has acquiesced in the court’s statement of the legislative intent. Based on this principle, we can presume that the legislature has acquiesced in Hewitt’s judicial interpretation of the statute prohibiting marriage-like rights to those outside of marriage. If this court were to recognize the legal status desired by Brewer, we would infringe on the duty of the legislature to set policy in the area of domestic relations. As mentioned in Hewitt, the legislative branch is far better suited to declare public policy in the domestic relations field due to its superior investigative and fact-finding facilities, as declaring public policy requires evaluation of sociological data and alternatives. Therefore, we do not find a compelling reason to reverse course now and depart from our earlier legislative interpretation, especially in light of almost two score years of legislative inaction on the matter….

We also reject Brewer’s argument that changes in law since Hewitt demonstrate that the “legislature no longer considers withholding protection from nonmarital families to be a legitimate means of advancing the state’s interest in marriage.” To the contrary, this court finds that the current legislative and judicial trend is to uphold the institution of marriage. Most notably, within the past year, the United States Supreme Court in Obergefell v. Hodges, 576 U.S. ___, ___, 135 S. Ct. 2584, 2604-05 (2015), held that same-sex couples cannot be denied the right to marry. In doing so, the Court found that “new insights [from the developments in the institution of marriage over the past centuries] have strengthened, not weakened, the institution of marriage.” For the institution of marriage has been a keystone of our social order and “remains a building block of our national community.” Accordingly, the Court invalidated any state legislation prohibiting same-sex marriage because excluding same-sex couples from marriage would be excluding them “from one of civilization’s oldest institutions.”

It is well settled that the policy of the Marriage and Dissolution Act gives the state a strong continuing interest in the institution of marriage and the ability to prevent marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. As explained in Hewitt, such policy was set forth by the enactment of section 214 of the Marriage and Dissolution Act. Until the legislature sees fit to change our interpretation of the public policy in Illinois, under the circumstances of this case, Brewer’s claim for restitution is prohibited, as it contravenes the public policy implicit in the Marriage and Dissolution Act….

[The concurring and dissenting opinion of Justice Theis is omitted.]

NOTES AND QUESTIONS
1. Blumenthal and Brewer did not marry because same-sex couples were excluded from marriage when they established their relationship. If they had married, the court would have had authority to divide some or all of the property of both parties “equitably,” without regard to title. Why might a couple like Blumenthal and Brewer still choose to live together without marrying today?

2. In 1960 marriage was widely accepted as necessary to provide support for children and their caregiving mothers. A man who impregnated a woman was expected to marry her, and she needed to be married if she were to raise the child and remain “respectable.” Marriages prompted by an unplanned pregnancy increased during the 1950s, and at the time that the Hewitts had their first child, 30 percent of brides gave birth within eight and a half months of the nuptials. The Hewitts, in almost every respect except their failure to formalize their relationship, were very much like many other couples of their era.

Had the Hewitts been married, when they broke up Victoria could have asserted claims against Robert for a share of the property acquired during the marriage, for spousal support, or both. Since they were not married, their relationship was essentially that of long-term roommates. Each owned the property in his or her name, and she had no basis on which to claim support. Why would Victoria have agreed to live in a relationship that left her so economically vulnerable? Does the reason that she agreed matter now that she is seeking legal relief?

Why do many women today make the same decision Victoria made—to live with a man and raise a child with him with little or no protection in the event of family dissolution?

3. The Hewitt and Blumenthal courts say that allowing the claims to go forward would undermine marriage. Professor Garrison makes the same argument. Why does Professor Bowman disagree? In what ways would allowing a cohabitant to make a claim make living together more desirable than marriage? Are there ways in which marriage would still be more desirable to the individuals involved?

4. Brewer pointed to the many changes in family law that have occurred since Hewitt was decided in support of her argument to overrule Hewitt. How do these changes support the argument? Does the legislature’s failure to enact a statute providing a remedy for unmarried cohabitants who do not marry or enter a civil union show that the legislature does not want the court to make common law remedies available to them?

5. Professor Garrison argues against treating cohabitation and marriage similarly based on objective factors in part because it may result in some people having obligations imposed on them that they did not intend. Perhaps Mr. Hewitt and Dr. Blumenthal would
think themselves to be in that category. What did Ms. Hewitt and Judge Brewer intend? If
the intentions of a couple differ, whose should the law protect and why?

6. Professor Sanger contrasts marriage, which involves traditions, expectations, and
default terms imposed from without, with contract as a legal arrangement that couples
negotiate for themselves. If the Hewitts had negotiated a contract at the time they began
to live together, what terms do you think it would have included? Would those terms
differ if they were to enter into a contract in similar circumstances today? Is such a
contract likely to address the realistic needs of a full-time homemaker adequately? Is the
negotiation process likely to bring them closer together or drive them further apart?

Like many other gay and lesbian couples at the time, Brewer and Blumenthal took some
formal legal steps to give each other family-like rights, including executing wills, trusts,
and powers of attorney. Apparently they did not execute a cohabitation contract though.
Does that decision bear on whether the court should have accepted Brewer’s arguments?

7. Professor Fineman favors the deregulation of adult relationships, effectively replacing
marriage with contract, but continuing state recognition of the parent-child tie and
support to alleviate the dependency that accompanies the assumption of caretaking
responsibilities. As a practical matter, what would this have meant for Victoria Hewitt?
Would Fineman grant a remedy to Victoria if she and Robert had not had children but
still lived a role-divided life in which Victoria maintained the home and Robert worked
as a children’s dentist?

One of the important legal effects of marriage is that both spouses are recognized as
parents of children born during the marriage, and the parents generally have equal legal
rights to custody and responsibility for child support. The picture is much more
complicated when children are born to unmarried parents. These issues are considered at
length in Chapters 13 and 14.

8. As we will see in Chapter 4, in most states today Victoria would either be able to state
a claim against Robert for common law marriage or, where common law marriage is not
permitted, based upon the contract or equity theories that the Illinois court in Hewitt
rejected.

**Braschi v. Stahl Associates Company**

543 N.E.2d 49 (N.Y. 1989)

Titone, J. Appellant, Miguel Braschi, was living with Leslie Blanchard in a rent-
controlled apartment located at 405 East 54th Street from the summer of 1975 until
Associates Company, the owner of the apartment building,
served a notice to cure on appellant contending that he was a mere licensee with no right to occupy the apartment since only Blanchard was the tenant of record. In December of 1986 respondent served appellant with a notice to terminate informing appellant that he had one month to vacate the apartment and that, if the apartment was not vacated, respondent would commence summary proceedings to evict him.

Appellant then initiated an action seeking a permanent injunction and a declaration of entitlement to occupy the apartment. By order to show cause appellant then moved for a preliminary injunction, pendente lite, enjoining respondent from evicting him until a court could determine whether he was a member of Blanchard’s family within the meaning of 9 NYCRR 2204.6(d). After examining the nature of the relationship between the two men, Supreme Court concluded that appellant was a “family member” within the meaning of the regulation and, accordingly, that a preliminary injunction should be issued. …

The Appellate Division reversed, concluding that section 2204.6(d) provides noneviction protection only to “family members within traditional, legally recognized familial relationships.” … We now reverse.

The present dispute arises because the term “family” is not defined in the rent-control code and the legislative history is devoid of any specific reference to the noneviction provision. All that is known is the legislative purpose underlying the enactment of the rent-control laws as a whole. Rent control was enacted to address a “serious public emergency” created by “an acute shortage in dwellings,” which resulted in “speculative, unwarranted and abnormal increases in rents.” These measures were designed to regulate and control the housing market so as to “prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health…[and] to prevent uncertainty, hardship and dislocation.” …

To accomplish its goals, the Legislature recognized that not only would rents have to be controlled, but that evictions would have to be regulated and controlled as well. Hence, section 2204.6 of the New York City Rent and Eviction Regulations (9 NYCRR 2204.6), which authorizes the issuance of a certificate for the eviction of persons occupying a rent-controlled apartment after the death of the named tenant, provides, in subdivision (d), noneviction protection to those occupants who are either the “surviving spouse of the deceased tenant or some other member of the deceased tenant’s family who has been living with the tenant [of record].” The manifest intent of this section is to restrict the landowners’ ability to evict a narrow class of occupants other than the tenant of record. The question presented here concerns the scope of the protections provided. Juxtaposed against this intent favoring the protection of tenants is the over-all objective of a gradual “transition from regulation to a normal market of free bargaining between landlord and tenant.” One way in which this goal is to be achieved is “vacancy decontrol,” which automatically makes rent-control units subject to the less rigorous provisions of rent stabilization upon the termination of the rent-control tenancy.
Emphasizing the latter objective, respondent argues that the term “family member” as used in 9 NYCRR 2204.6(d) should be construed, consistent with this State’s intestacy laws, to mean relationships of blood, consanguinity and adoption in order to effectuate the over-all goal of orderly succession to real property. Under this interpretation, only those entitled to inherit under the laws of intestacy would be afforded noneviction protection.

Contrary to all of these arguments, we conclude that the term “family,” as used in 9 NYCRR 2204.6(d), should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of “family” and with the expectations of individuals who live in such nuclear units. In fact, Webster’s Dictionary defines “family” first as “a group of people united by certain convictions or common affiliation.” Hence, it is reasonable to conclude that, in using the term “family,” the Legislature intended to extend protection to those who reside in households having all of the normal familial characteristics. Appellant Braschi should therefore be afforded the opportunity to prove that he and Blanchard had such a household.

This definition of “family” is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system. Family members, whether or not related by blood or law, who have always treated the apartment as their family home will be protected against the hardship of eviction following the death of the named tenant, thereby furthering the Legislature’s goals of preventing dislocation and preserving family units which might otherwise be broken apart upon eviction. This approach will foster the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates or newly discovered relatives hoping to inherit the rent-controlled apartment after the existing tenant’s death.

The determination as to whether an individual is entitled to noneviction protection should be based upon an objective examination of the relationship of the parties. In making this assessment, the lower courts of this State have looked to a number of factors, including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the
relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control. Appellant’s situation provides an example of how the rule should be applied.

Appellant and Blanchard lived together as permanent life partners for more than 10 years. They regarded one another, and were regarded by friends and family, as spouses. The two men’s families were aware of the nature of the relationship, and they regularly visited each other’s families and attended family functions together, as a couple. Even today, appellant continues to maintain a

relationship with Blanchard’s niece, who considers him an uncle. In addition to their interwoven social lives, appellant clearly considered the apartment his home. He lists the apartment as his address on his driver’s license and passport, and receives all his mail at the apartment address. Moreover, appellant’s tenancy was known to the building’s superintendent and doormen, who viewed the two men as a couple. Financially, the two men shared all obligations including a household budget. The two were authorized signatories of three safe-deposit boxes, they maintained joint checking and savings accounts, and joint credit cards. In fact, rent was often paid with a check from their joint checking account. Additionally, Blanchard executed a power of attorney in appellant’s favor so that appellant could make necessary decisions—financial, medical and personal—for him during his illness. Finally, appellant was the named beneficiary of Blanchard’s life insurance policy, as well as the primary legatee and coexecutor of Blanchard’s estate. Hence, a court examining these facts could reasonably conclude that these men were much more than mere roommates.

…Accordingly, the order of the Appellate Division should be reversed and the case remitted to that court for a consideration of undetermined questions. The certified question should be answered in the negative.

Simons, J. (dissenting). I would affirm. The plurality has adopted a definition of family which extends the language of the regulation well beyond the implication of the words used in it. In doing so, it has expanded the class indefinitely to include anyone who can satisfy an administrator that he or she had an emotional and financial “commitment” to the statutory tenant. Its interpretation is inconsistent with the legislative scheme underlying rent regulation, goes well beyond the intended purposes of 9 NYCRR 2204.6(d), and produces an unworkable test that is subject to abuse….

…[T]here are serious practical problems in adopting the plurality’s interpretation of the statute. Any determination of rights under it would require first a determination of whether protection should be accorded the relationship (i.e., unmarrieds, nonadopted occupants, etc.) and then a subjective determination in each case of whether the relationship was genuine, and entitled to the protection of the law, or expedient, and an attempt to take advantage of the law. Plaintiff maintains that the machinery for such decisions is in place and that appropriate guidelines can be constructed. He refers
particularly to a formulation outlined by the court in 2-4 Realty Assocs. v. Pittman, 137 Misc. 2d 898, 902, 523 N.Y.S.2d 7, which sets forth six different factors to be weighed. The plurality has essentially adopted his formulation. The enumeration of such factors, and the determination that they are controlling, is a matter best left to Legislatures because it involves the type of policy making the courts should avoid, but even if these considerations are appropriate and exclusive, the application of them cannot be made objectively and creates serious difficulties in determining who is entitled to the statutory benefit. Anyone is potentially eligible to succeed to the tenant’s premises and thus, in each case, the agency will be required to make a determination of eligibility based solely on subjective factors such as the “level of emotional and financial commitment” and “the manner in which the parties have conducted their everyday lives and held themselves out to society.”

[The concurring opinion of Bellacosa, J., is omitted.]

NOTES AND QUESTIONS

1. The governing statute in this case provides protections to members of a decedent’s “family.” Upon what theory does the majority find that Miguel Braschi and Leslie Blanchard were a family?

2. How does the majority determine whether a relationship constitutes a family? How would the dissent determine this question? What role do stereotypes and cultural norms play in these definitions? If Miguel and Leslie had been a married heterosexual couple who lived apart for half the year, maintained separate finances, and kept their marriage secret from family and friends, would Miguel have been a surviving family member for purposes of the statute as interpreted by the majority? The dissent?

3. What values are promoted by the majority’s test for “family”-ness? By the dissent’s? The dissent says that this value choice should be made by the legislature, not the court. Do you agree? Why or why not? On facts such as this, is it possible for a court not to make a value choice?

4. Today, Miguel Braschi and Leslie Blanchard could marry in New York. If they had exactly the same relationship described in the case, but chose not to marry, would that change the outcome of the case?

5. The New York City Rent Stabilization Code definition of “family” was amended to incorporate the holding of Braschi after the decision. Most of the cases decided under the code involve claims by long-term romantic partners. See, e.g., WSC Riverside Drive Owners LLC v. Williams, 3 N.Y.S.3d 342 (App. Div. 2015) (tenant’s opposite-sex partner of eight years); see also RHM Estates v. Hampshire, 795 N.Y.S.2d 214 (App. Div. 2005) (male “roommate” of female tenant who did not commingle finances with the tenant but who celebrated holidays and birthdays with her, traveled with her and ate
breakfast with her, and who cared for the tenant through her “lengthy” cancer battle). The statute has not been limited to such circumstances, though. For example, In re Davidson, 903 N.Y.S.2d 685 (Sup. Ct. 2010), held that the niece of the tenant who was unable to live alone and who had lived with the tenant for 38 years and “did everything” with the tenant was a “non-traditional family member” entitled to remain in the apartment after the death of the tenant concerned.

6. Braschi was not broadly applied by the New York courts. For example, the Court of Appeals refused to apply Braschi’s analytical approach to a custody dispute between a biological mother and her former mate, even though the two women had agreed to have the child and had functioned as parents together for the first two years of the child’s life. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991). Four years later, the court affirmed Alison D. and held that the lesbian partner of a biological mother may adopt and so become a legal parent under the statute. Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995). The court explained, “Alison D., in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of ‘disruptive…battle[s].’” 660 N.E.2d at 397. In 2010 the court confirmed that usually parenthood should be based on legal forms, not function, in Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010), which held that a child born during a Vermont civil union was the legal child of both women, not just the biological mother, because Vermont law regards both partners in a civil union as a child’s parents, and New York would grant comity to that rule. However, in Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016), the New York Court of Appeals overruled Alison D. and abrogated Debra H. It held that where clear and convincing evidence showed that the biological mother of a child and her partner agreed to conceive and raise a child together, the partner had standing as a parent to seek custody and visitation. Brooke S.B. is considered further in Chapter 13.

7. Whether cohabitants are entitled to public benefits dependent on family relationships has arisen in a number of other situations, with mixed results. See, e.g., MacGregor v. Unemployment Insurance Appeals Board, 689 P.2d 453 (Cal. 1984) (allowing unemployment compensation benefits to a woman who quit work to follow fiancé); Norman v. Unemployment Insurance Appeals Board, 663 P.2d 904 (Cal. 1983) (denying unemployment benefits to a woman who quit work to follow cohabitant because this was not “good cause”). Some jurisdictions have statutes that provide relief in specific instances. See, e.g., Or. Rev. Stat. §656.226 (2017):

In case two unmarried individuals have cohabited in this state as spouses for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter [workers’ compensation] the same as if the individuals had been legally married.
Crandall, Judge. Defendants, Joan Horn and E. Terrence Jones, appeal from the judgment of the trial court in favor of plaintiff, City of Ladue (Ladue), which enjoined defendants from occupying their home in violation of Ladue’s zoning ordinance and which dismissed defendants’ counterclaim. We affirm.

The case was submitted to the trial court on stipulated facts. Ladue’s Zoning Ordinance No. 1175 was in effect at all times pertinent to the present action. Certain zones were designated as one-family residential. The zoning ordinance defined family as: “One or more persons related by blood, marriage or adoption, occupying a dwelling unit as an individual housekeeping organization.” The only authorized accessory use in residential districts was for “[a]ccommodations for domestic persons employed and living on the premises and home occupations.” The purpose of Ladue’s zoning ordinance was broadly stated as to promote “the health, safety, morals and general welfare” of Ladue.

In July, 1981, defendants purchased a seven-bedroom, four-bathroom house which was located in a single-family residential zone in Ladue. Residing in defendants’ home were Horn’s two children (aged 16 and 19) and Jones’s one child (age 18). The two older children attended out-of-state universities and lived in the house only on a part-time basis. Although defendants were not married, they shared a common bedroom, maintained a joint checking account for the household expenses, ate their meals together, entertained together, and disciplined each other’s children. Ladue made demands upon defendants to vacate their home because their household did not comprise a family, as defined by Ladue’s zoning ordinance, and therefore they could not live in an area zoned for single-family dwellings. When defendants refused to vacate, Ladue sought to enjoin defendants’ continued violation of the zoning ordinance. Defendants counterclaimed, seeking a declaration that the zoning ordinance was constitutionally void. They also sought attorneys’ fees and costs. The trial court entered a permanent injunction in favor of Ladue and dismissed defendants’ counterclaim. Enforcement of the injunction was stayed pending this appeal.…

…Defendants allege that the United States and Missouri Constitutions grant each of them the right to share his or her residence with whomever he or she chooses. They assert that Ladue has not demonstrated a compelling, much less rational, justification for the overly proscriptive blood or legal relationship requirement in its zoning ordinance.

Defendants posit that the term “family” is susceptible to several meanings. They contend that, since their household is the “functional and factual equivalent of a natural family,” the ordinance may not preclude them from living in a single-family residential Ladue neighborhood. Defendants argue in their brief as follows:
The record amply demonstrates that the private, intimate interests of Horn and Jones are substantial. Horn, Jones, and their respective children have historically lived together as a single family unit. They use and occupy their home for the identical purposes and in the identical manners as families which are biologically or maritally related.

To bolster this contention, defendants elaborate on their shared duties, as set forth earlier in this opinion. Defendants acknowledge the importance of viewing themselves as a family unit, albeit a “conceptual family” as opposed to a “true non-family,” in order to prevent the application of the ordinance.

The fallacy in defendants’ syllogism is that the stipulated facts do not compel the conclusion that defendants are living as a family. A man and woman living together, sharing pleasures and certain responsibilities, does not per se constitute a family in even the conceptual sense. To approximate a family relationship, there must exist a commitment to a permanent relationship and a perceived reciprocal obligation to support and to care for each other. Only when these characteristics are present can the conceptual family, perhaps, equate with the traditional family. In a traditional family, certain of its inherent attributes arise from the legal relationship of the family members. In a non-traditional family, those same qualities arise in fact, either by explicit agreement or by tacit understanding among the parties.

While the stipulated facts could arguably support an inference by the trial court that defendants and their children comprised a non-traditional family, they do not compel that inference. Absent findings of fact and conclusions of law, we cannot assume that the trial court’s perception of defendants’ familial status comported with defendants’ characterization of themselves as a conceptual family. In fact, if a finding by the trial court that defendants’ living arrangement constituted a conceptual family is critical to a determination in defendants’ favor, we can assume that the court’s finding was adverse to defendants’ position. Ordinarily, given our deference to the decision of the trial court, that would dispose of this appeal. We decline, however, to restrict our ruling to such a narrow basis. We therefore consider the broader issues presented by the parties. We assume, arguendo, that the sole basis for the judgment entered by the trial court was that defendants were not related by blood, marriage or adoption, as required by Ladue’s ordinance.

We first consider whether the ordinance violates any federally protected rights of the defendants. Generally, federal court decisions hold that a zoning classification based upon a biological or a legal relationship among household members is justifiable under constitutional police powers to protect the public health, safety, morals or welfare of the community.
More specifically, the United States Supreme Court has developed a two-tiered approach by which to examine legislation challenged as violative of the equal protection clause. If the personal interest affected by the ordinance is fundamental, “strict scrutiny” is applied and the ordinance is sustained only upon a showing that the burden imposed is necessary to protect a compelling governmental interest. If the ordinance does not contain a suspect class or impinge upon a fundamental interest, the more relaxed “rational basis” test is applied and the classification imposed by the ordinance is upheld if any facts can reasonably justify it. Defendants urge this court to recognize that their interest in choosing their own living arrangement inexorably involves their fundamental rights of freedom of association and of privacy.…

In the Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the court addressed a zoning regulation of the type at issue in this case. The court held that the Village of Belle Terre ordinance involved no fundamental right, but was typical of economic and social legislation which is upheld if it is reasonably related to a permissible governmental objective. The challenged zoning ordinance of the Village of Belle Terre defined family as:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] a number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage…. The court upheld the ordinance, reasoning that the ordinance constituted valid land use legislation reasonably designed to maintain traditional family values and patterns.

The importance of the family was reaffirmed in Moore v. City of East Cleveland, 431 U.S. 494 (1977), wherein the United States Supreme Court was confronted with a housing ordinance which defined a “family” as only certain closely related individuals. Consequently, a grandmother who lived with her son and two grandsons was convicted of violating the ordinance because her two grandsons were first cousins rather than brothers. The United States Supreme Court struck down the East Cleveland ordinance for violating the freedom of personal choice in matters of marriage and family life. The court distinguished Belle Terre by stating that the ordinance in that case allowed all individuals related by blood, marriage or adoption to live together; whereas East Cleveland, by restricting the number of related persons who could live together, sought “to regulate the occupancy of its housing by slicing deeply into the family itself.” The court pointed out that the institution of the family is protected by the Constitution precisely because it is so deeply rooted in the American tradition and that “[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family.”

Here, because we are dealing with economic and social legislation and not with a fundamental interest or a suspect classification, the test of constitutionality is whether the
ordinance is reasonable and not arbitrary and bears a rational relationship to a permissible state objective.

Ladue has a legitimate concern with laying out guidelines for land use addressed to family needs. “It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.” The question of whether Ladue could have chosen more precise means to effectuate its legislative goals is immaterial. Ladue’s zoning ordinance is rationally related to its expressed purposes and violates no provisions of the Constitution of the United States. Further, defendants’ assertion that they have a constitutional right to share their residence with whomever they please amounts to the same argument that was made and found unpersuasive by the court in Belle Terre.…

For purposes of its zoning code, Ladue has in precise language defined the term “family.” It chose the definition which comports with the historical and traditional notions of family; namely, those people related by blood, marriage or adoption. That definition of family has been upheld in numerous Missouri decisions. See, e.g., London v. Handicapped Facilities Board of St. Charles County, 637 S.W.2d 212 (Mo. App. 1982) (group home not a “family” as used in restrictive covenant); Feely v. Birenbaum, 554 S.W.2d 432 (Mo. App. 1977) (two unrelated males not a “family” as used in restrictive covenant); Cash v. Catholic Diocese, 414 S.W.2d 346 (Mo. App. 1967) (nuns not a “family” as used in a restrictive covenant).

Decisions from other state jurisdictions have addressed identical constitutional challenges to zoning ordinances similar to the ordinance in the instant case. The reviewing courts have upheld their respective ordinances on the ground that maintenance of a traditional family environment constitutes a reasonable basis for excluding uses that may impair the stability of that environment and erode the values associated with traditional family life.3

The essence of zoning is selection; and, if it is not invidious or discriminatory against those not selected, it is proper. There is no doubt that there is a governmental interest in marriage and in preserving the integrity of the biological or legal family. There is no concomitant governmental interest in keeping together a group of unrelated persons, no matter how closely they simulate a family. Further, there is no state policy which commands that groups of people may live under the same roof in any section of a municipality they choose.

The stated purpose of Ladue’s zoning ordinance is the promotion of the health, safety, morals, and general welfare in the city. Whether Ladue could have adopted less restrictive means to achieve these same goals is not a controlling factor in considering the constitutionality of the zoning ordinance. Rather, our focus is on whether there exists some reasonable basis for the means actually employed. In making such a determination, if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, we must defer to the legislative judgment. We find that Ladue
has not acted arbitrarily in enacting its zoning ordinance which defines family as those related by blood, marriage or adoption. Given the fact that Ladue has so defined family, we defer to its legislative judgment.

The judgment of the trial court is affirmed.

NOTES AND QUESTIONS

1. Why did the City of Ladue limit buildings in this part of town to “single family dwellings”? How does the Ladue zoning ordinance define “single family”? What assumptions about the meaning of “family” does this definition make? Is this definition of “family” consistent with the goal of the ordinance? If Horn and Jones had lived together without their children, would they be able to meet the requirements of the single-family ordinance? If they had married, but not adopted each other’s children, would this have changed the result? Which arrangement—two unmarried adults or a married couple with adult children from different, prior relationships—better fits the idea of family in the Ladue ordinance and in the readings above? How does marriage without children or the presence of children from different relationships affect Horn and Jones’s suitability as residents of this neighborhood?

2. The court in City of Ladue relies on the Supreme Court decision in Belle Terre v. Boraas, rejecting the Horns’ claim that their right to live together was protected under Moore v. City of East Cleveland. What is the extent of the right recognized in Moore? Some lower courts and many advocates have relied on Moore as a basis for legal protection for functional families, as we will see later in this book.

3. A few state courts have held that zoning ordinances based on traditional definitions of “family” required a heightened level of scrutiny of the ordinances under the state constitution. City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980); Charter Township of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984); State v. Baker, 405 A.2d 368 (N.J. 1979); Baer v. Town of Brookhaven, 537 N.E.2d 819 (N.Y. 1989). However, most state courts have followed Belle Terre and upheld single-family dwelling unit ordinances with restrictive definitions of “family” against constitutional challenges, using rational basis scrutiny. See, e.g., Schwartz v. Philadelphia Zoning Bd. of Adjustment, 126 A.3d 1032 (Pa. Commw. Ct. 2015); City of Baton Rouge v. Myers, 145 So. 3d 320 (La. 2014); McMaster v. Columbia Bd. of Zoning Appeals, 719 S.E.2d 660 (S.C. 2011). Consider this comment on such ordinances:

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Zoning urban, suburban, and rural areas has proven a useful tool for local and state governments to control population, traffic, pollution, and other social problems. Unfortunately, zoning has also been used to control the identity of the population, and with some success. The ordinance at issue in Belle Terre was a common instance of this kind of control; it limited the number of unrelated people that could live in a home, but put no such limit on the number of related people that may live together. Using this type
of zoning ordinance, many municipalities have successfully kept out or forced out unrelated people living communally and other non-traditional families. This sort of discrimination, although purportedly for the lawful purpose of protecting traditional family values, effectively imposes the municipality’s social preferences on the individuals in the community. Not only does this seem contrary to the most basic and often quoted American themes of plurality and individuality, it summarily dismisses the value of the voluntary family….

No doubt the law-abiding citizens of Belle Terre believed that the Supreme Court had saved their neighborhood. After all, if those students were allowed to live there, others could follow, until the streets were lined with traffic and empty beer bottles. Once the “weirdos” got in, they might never be able to get rid of them, and the quiet of their waterfront enclave would be forever lost.

Those students were not the weirdos the villagers thought, however. In fact, they were probably making better use of the six-bedroom house than anyone else had ever made of it. They shared responsibilities and intellectual conversations, and lived as efficiently as they could on their limited means. During the summer, they, like everyone else in town, looked forward to relaxing on the beach with their family. This family was simply a little bit different in character than the others: there were no noisy children and no wedding rings. Instead there was friendship, camaraderie, and a well-run household.


4. Twenty-one states have statutes prohibiting discrimination on the basis of marital status in housing, employment, or both. A few of the statutes explicitly provide that they do not protect unmarried cohabiting couples; in most of the remaining states, courts have interpreted the statutes to achieve the same result. Courtney G. Joslin, Marital Status Discrimination 2.0, 95 B.U. L. Rev. 805, 808 (2015). In some states, however, the statutes have been construed to provide protection. E.g., Richardson v. Northwest Christian University, 242 F. Supp. 3d 1132, (D. Or. 2017) (policy prohibiting extramarital sex or cohabitation is marital status discrimination).

The federal Fair Housing Act prohibits discrimination on the basis of “familial status.” 42 U.S.C. §3602(k) (2017). However, the statute is generally interpreted as prohibiting only

ARMSTRONG V. MAYOR
979 A.2d 98 (Md. 2009)

Harrell, Judge. The land use dispute engendering the present case (and its predecessors, contemporaries, and what may come yet) represents Baltimore City’s version of the Hundred Years’ War. The present skirmish involves the interpretation and application of the term “family” as defined by the Baltimore City Zoning Code (“the Code” or “BCZC”).

The Code provides that a “dwelling unit” may be occupied by no more than one “family.” Four unrelated individuals (and no more) who live together comprise a “family,” if they form a “single housekeeping unit.”

Cresmont Properties Ltd. (“Cresmont”) owns a 28,132 square-foot parcel of land (the “Property”) located at 2807-35 Cresmont Avenue in Baltimore City. Petitioners, a group of neighborhood residents opposed to Cresmont’s development of and particular use established on the Property, challenge here the last of three construction permits, as well as an occupancy permit, issued to Cresmont by the Baltimore City Department of Housing and Community Development (“DHCD”) for a multi-unit residential building known as Cresmont Loft.

…Petitioners argued that the Property was not going to house the twenty-six dwelling units for which the construction permit was issued. Although there were twenty-six four-bedroom suites, Petitioners urged that the suites were not dwelling units. They claimed that the developer intended to lease separately each of the four bedrooms in each of the suites. Thus, as this argument proceeded, the Property actually housed 104 individual “rooming units.”

Cresmont countered that each of the twenty-six suites satisfied the Code definition of a “dwelling unit.” A “dwelling unit,” Cresmont observed, is a rental unit that contains a bathroom, kitchen facilities, and is occupied by a “family.”

Cresmont proffered that the tenants of each suite would constitute a “family,” despite having separate leases, because they would be “living together as a single housekeeping unit,” as required by the Code definition of “family.” Thus, according to Cresmont, the project complied with the construction permit’s allowance of twenty-six dwelling units.

At the hearing, Petitioners introduced several of Cresmont Loft’s promotional materials which made clear that Cresmont intended to rent the twenty-six suites to a total of 104 individual tenants. One advertisement listed a total of 104 “units” available for rent. A
website provided that “[e]ach unrelated resident will sign a separate lease.” Petitioners also introduced the affidavit of a “potential tenant” who inquired about renting at Cresmont Loft. She stated that “[t]he woman who answered the phone said, ‘You have to understand that [you] would only be renting the bedroom.’”...

On 2 November 2006, the Board issued its third (and final) written decision affirming the issuance of the April 2004 construction permit. In pertinent part, the Board concluded:…that the use of each of the dwelling units by four unrelated people who live together as a single housekeeping unit in a dwelling unit complies with the definition of “Family” in Section 1-142 of the Zoning Code….

On 9 May 2007, the Circuit Court affirmed the decisions of the Board. Petitioners timely noted an appeal to the Court of Special Appeals, which, in an unreported decision, affirmed in part and reversed in part….

We granted Petitioners’ petition for a writ of certiorari….

The Code defines a “dwelling unit” as “1 or more rooms in a dwelling that: (1) are used as living quarters for occupancy by 1 family; and (2) contain permanently installed bathroom and kitchen facilities reserved for the occupants of the room or rooms.” BCZC §1-137. Thus, for the City to prevail in its assertion that the suites are “dwelling units,” the tenants of each suite must meet the Code’s land use definition of a “family.” The definition of “family,” therefore, is the focal point of this case. It provides:

(a) In general.

“Family” means one of the following, together with usual household helpers:

(1) an individual;

(2) or more people related by blood, marriage, or adoption, living together as a single housekeeping unit in a dwelling unit; or

(3) a group of not more than 4 people, who need not be related by blood, marriage, or adoption, living together as a single housekeeping unit in a dwelling unit….

The Code does not define the phrase “single housekeeping unit”; however, it is the pivotal term in our assessment of whether the Board concluded properly that the tenants of a suite at Cresmont Loft constitute a “family,” and, in turn, that each suite is a “dwelling unit” for purposes of the Code’s Bulk Regulations,…[T]he phrase “single housekeeping unit” is found with some frequency in the zoning codes of other municipalities and local governments across the country, and the attendant judicial opinions interpreting those codes help us to triangulate on a common and ordinary sense of the phrase as used in comparable land use settings….
...In those cases interpreting zoning ordinances wherein the “family” limitation had been defined as a “single housekeeping unit,” many extended family groups were deemed to fall within that category. The use of this test was viewed as extending beyond the occupancy by a one-family unit to a determination as to whether it was a one-housekeeping unit. The focus was on whether the unit functioned as a family unit, rather than on the respective relationships that existed between the members of the unit. See, e.g., City of Syracuse v. Snow, 123 Misc. 568, 205 N.Y.S. 785 (Sup. Ct. 1924) (“single housekeeping unit” held not to exclude a college sorority); Robertson v. Western Baptist Hospital, 267 S.W.2d 395 (Ct. of Appeals of Ky. 1954) (use of a residence as a home for about 20 nurses constituted a permitted use under a “single housekeeping unit” test); Boston-Edison Protective Ass’n v. Paulist Fathers, 306 Mich. 253, 10 N.W.2d 847 (1943), 306 Mich. 253, 10 N.W.2d 847, 148 A.L.R. 364 (approved the use of a dwelling house in a highly restricted district as a residence for Roman Catholic priests).

As noted in Rathkopf’s treatise on zoning, “[i]n the past, courts have interpreted [the phrase 'single housekeeping unit'] in a rather elastic way, generally ruling that any living arrangement which makes use of unified house-keeping facilities satisfies such an ordinance.” 3 Edward H. Ziegler, Jr. et al., Rathkopf’s The Law of Zoning and Planning 23-33 (Thompson Reuters 2009). A survey of relevant case law from other jurisdictions confirms this.

In Miller, the Pennsylvania Supreme Court held that a homeowner, who allowed unrelated elderly and handicapped persons to live with her, did not violate a local ordinance limiting the occupation of a home in her zoning district to one “family,” where “family” was defined by the ordinance as “any number of persons living and cooking together as a single house-keeping unit.” That court opined, based on the extensive history of the term, that “the 'single housekeeping unit’ evolved as a term limiting the use [of a property] to a unit that functions in the manner of a family residence.” The court reasoned that the unrelated individuals living with the homeowner constituted a single housekeeping unit because the evidence established that they lived and cooked together, shared meals together, and had shared access to all areas of the premises....In another case, Linn County v. City of Hiawatha, 311 N.W.2d 95 (Iowa 1981), the Supreme Court of Iowa held that a foster home in which a married couple cared for six unrelated, developmentally-disabled children constituted a “single housekeeping unit.” There, the court rejected the argument that, because the children’s Social Security benefits covered the cost of maintaining them in the home, the setting was akin to a boarding house. The court reasoned that, in effect, “the duties and responsibilities of the occupants [of the foster home] in...maintaining a household...cannot be distinguished from those performed by other home dwellers in the community.”

In Borough of Glassboro v. Vallorosi, 117 N.J. 421, 568 A.2d 888 (1990), the Supreme Court of New Jersey affirmed a trial court’s finding that ten unrelated college students were a “single housekeeping unit.” There, the parents of a college student purchased a house near campus in which they allowed their son and nine of his friends to live while attending school. The student roommates shared the common areas of the house, as well...
as a telephone line; they “often ate meals together in small groups, cooked for each other, and generally shared the household chores, grocery shopping, and yard work.” Like the tenants of

Cresmont Loft, the roommates in Vallorosi had separate lease agreements with the landlord. Each lease was for a term of four months (the length of a semester) and was renewable at the term’s end.

The Vallorosi court framed the “narrow issue before [it]” as “whether there [wa]s sufficient credible evidence in th[e] record to sustain the trial court’s factual finding that the occupancy of the defendants’ dwelling by these ten college students constituted a single house-keeping unit as defined by the Glassboro ordinance.” Answering in the affirmative, the court highlighted that

The students ate together, shared household chores, and paid expenses from a common fund. Although the students signed four-month leases, the leases were renewable if the house was “in order” at the end of the term. Moreover, the students testified to their own intention to remain in the house throughout college, and there was no significant evidence of defections up to the time of trial.

The “narrow issue” before this Court is whether the Board’s decisions affirming the issuance of the April 2004 construction permit and the August 2004 occupancy permit were supported by substantial evidence. Viewing the evidence of record in a light most favorable to the Board, we hold that they were. The Cresmont Loft form lease agreement provides that a tenant has the sole use of her or his bedroom and the “shared use and occupancy of the bathroom(s), kitchen and living/dining areas” of the apartment in which she or he resides. It further establishes that the tenant is “liable for a pro-rata share of any damages to the common areas of the apartment unit…unless the party solely responsible for any such damage can be reasonably ascertained.” Moreover, according to the undisputed testimony of the property manager, Brian Swift, Cresmont Loft leases are for a term of one year. Mr. Swift also echoed that a tenant has “the exclusive right to th[e] entire four bedroom unit” and that she or he is equally “responsible for the care and maintenance of the apartment unit.” As observed in the cases discussed herein, shared access to the premises and joint responsibility for the care thereof are significant considerations.

Petitioners’ flagship argument in opposition to the Board’s conclusion lies in the Cresmont Loft lease agreement. Petitioners maintain that the tenants of a suite may not be a “single housekeeping unit” because each has a separate lease agreement “tied to” an individual bedroom, and, under those agreements, Cresmont reserves the right to move any of them to another suite at any time. We are not persuaded that these considerations compel a different conclusion than that reached by the Board. In Vallorosi, the ten college students residing together had separate lease agreements with their landlord.
In addition, the fact that the Cresmont Loft leases are “tied to” individual bedrooms, with Cresmont reserving the right to move a tenant to another suite, is not inconsistent with the rights and obligations of the tenants with respect to one another (namely the right to shared use of the common areas of the apartment and the joint obligation to maintain the apartment). Petitioners do not offer any reason for concluding that four unrelated individuals whose leases are “tied to” individual bedrooms are in a living arrangement that, for purposes of the “single housekeeping unit” analysis, differs materially from an arrangement in which four unrelated individuals, in similar circumstances, collectively sign a lease for a four-bedroom apartment. Furthermore, by signing a Cresmont Loft lease agreement, a tenant ordinarily may expect to share an apartment with the same three suitemates for the one-year duration of the lease. The mere possibility that one (or more) of the suitemates may be removed from the housekeeping unit in less than one year’s time does not undermine the unit’s stability or permanence to such a degree as to warrant reversal of the Board’s decision.…

…[T]he “single housekeeping unit” standard ordinarily does not embrace circumstances in which one or more of the members of the purported unit are transient. See Open Door Alcoholism Program, Inc. v. Bd. of Adjustment, 200 N.J. Super. 191, 491 A.2d 17, 19, 22 (App. Div. 1985) (holding that eleven people staying in a group home for alcoholics did not qualify as a “family” under the “single housekeeping unit” standard because they “could leave at any time” and the average length of stay was only six months). The Board’s decisions do not deviate from that general proposition, as the testimony of the property manager established that each of Cresmont Loft’s tenants signs a one-year lease.…

Petitioners also direct our attention to Prospect Gardens Convalescent Home, Inc. v. City of Norwalk, 32 Conn. Supp. 214, 347 A.2d 637 (1975), as support for the proposition that the tenants of a Cresmont Loft apartment are not a “single housekeeping unit.” In that case, the owner of a convalescent home leased three houses near the convalescent home to as many as thirty of its employees. After the local health department notified the owner that the employee housing facilities constituted rooming houses, the owner filed suit against the city seeking declaratory and injunctive relief. The owner alleged that the employee-occupants of the houses were “families” under an ordinance defining the term as “any number of individuals living and cooking together as a single housekeeping unit.” The Superior Court rejected the owner’s argument, reasoning that the employee-occupants were not families because they each paid rent individually to their employer, there was no showing that they cooked and/or ate together, and they rarely were together as a group due to the fact that they worked different shifts at the convalescent home.

We reject Petitioners’ favored comparison of Prospect Gardens to the present case. In Prospect Gardens, the three houses at issue housed, respectively, seven, ten, and eleven employees. Because controlling population density is one of the objectives of limiting
what constitutes a “family,” the court observed that the high number of people comprising each purported housekeeping unit mitigated against finding that they constitute a family. In the instant case, however, there are only four tenants comprising the “single housekeeping unit.” It is not apparent whether the Prospect Gardens court would have resolved that case in the same way if the houses at issue housed only four employees each.…

For the reasons discussed, we affirm the judgment of the Court of Special Appeals.…

NOTES AND QUESTIONS

1. How does the Baltimore “single family” zoning ordinance differ from the City of Ladue ordinance? What explains the difference?

2. Consider the definition of family in the Baltimore ordinance. What is a “single housekeeping unit”? Do the cases discussed in Armstrong make the meaning clear? Under these definitions, what is the role of the court in defining “family”?

3. Does the “single housekeeping unit” test of Armstrong adequately protect a community’s interests in restricting some areas to single-family dwellings? Under the Baltimore ordinance, the inhabitants of an apartment could easily change every school term or even more often. What does this suggest about the utility of this definition? On the other hand, would there be any question that a married couple who divorced after a few months was still, while they were married, a “single housekeeping unit”?

FOOTNOTES:


2 The Hewitt court also questioned and considered the history of whether granting legal rights to cohabiting adults would encourage “what have heretofore been commonly referred to as ‘illicit’ or ‘meretricious’ relationships” which could weaken the institution of marriage. Today, this court does not share the same concern or characterization of domestic partners who cohabit, nor do we condone such comparisons. Nonetheless, as explained herein, a thorough reading of Hewitt makes clear that the core reasoning and ultimate holding of the case did not rely nor was dependent on the morality of cohabiting adults.

3 See, e.g., City of White Plains v. Ferraioli, 34 N.Y.2d 300, 357 N.Y.S.2d 449, 313 N.E.2d 756 (1974) (married couple, their two children and 10 foster children not a family under city’s ordinance); Rademan v. City and County of Denver, 186 Colo. 250, 526 P.2d

4 The Hundred Years’ War (1337-1453) was a prolonged series of conflicts between the royal Houses of Valois and Plantagenet, each vying to rule France after the extinction of the Capetian line of French kings. The House of Valois (the ultimate victors) were native French. The Plantagenets were French-English and ruled England at the time. The Hundred Years’ War gave history Joan of Arc. The instant case also has a central figure named Joan (one of the Petitioners), who, like her saintly antecedent, faithfully presses her cause, having battled the Mayor and City Council of Baltimore numerous times. Although Joan of Arc suffered an unfortunate fate, her principals, the House of Valois, ultimately succeeded. As this case probably will not be the last combat between these litigants, time will tell whether the modern Joan ultimately will hoist the banner of victory in the war over the Cresmont Loft apartment building.