

Get the State Out of Marriage? That's a Terrible Idea

"Why don't we just get government completely out of the marriage business?" For decades, if someone asked that question it would be a safe assumption it was coming from a libertarian. Shifting marriage to private contracts that didn't require the government's imprimatur has long been an issue championed by those who lean libertarian. But the rise of same-sex marriage—and its threats to religious liberty—have caused many others, especially Christian conservatives, to ask if that's not the best solution to the problems that stem from state and federal government's redefining of marriage. The answer is no—privatizing marriage is a terrible idea. It's rooted in the flawed assumption that marriage is essentially a religious institution, and that it should therefore be left in the hands of religious organizations. The belief is that by keeping government out of what is religious by nature prevents it from being politicized. What this perspective fails to realize is that marriage belongs to neither religion or the state. Marriage is both a *pre-political* and *pre-religious* institution that was instituted by God before any formal government or religious institutions were created. Because it is separate and distinct entity, marriage has an autonomy and existence apart from both the state and religious organizations. Because the three institutions stand apart from one another, they can each decide whether to recognize the legitimacy of the other but they cannot delineate each others boundaries. In this way, the relationship is similar to nation-states. The U.S. government, for example, can decide to "recognize" the state of Israel and how it will relate to that country but it cannot redefine the country in a way that contracts its border to

exclude the Gaza Strip. The U.S. either recognizes Israel as it defines itself or it rejects its legitimacy altogether. Saying that government should get out of the marriage business is akin to saying that government should either not recognize the institution of marriage at all or that the institution of marriage can itself solely determine how it will be recognized by the government. Neither option is tenable. In fact, as Shikha Dalmia of explains, “privatizing” marriage only leads to more government interference in the institution.

At the most basic level, even if we can get government out of the business of issuing marriage licenses, it still has to register these partnerships (and/or authorize the entities that perform them) before these unions can have any legal validity, just as it registers property and issues titles and deeds. Therefore, government would need to set rules and regulations as to what counts as a legitimate marriage “deed.” It won’t—and can’t—simply accept any marriage performed in any church—or any domestic partnership written by anyone. Suppose that Osho, the Rolls Royce guru who encouraged free sex before getting chased out of Oregon, performed a group wedding uniting 19 people. Would that be acceptable? How about a church wedding—or a civil union—between a consenting mother and her adult son? And so on—there are innumerable outlandish examples that make it plain that government would have to at least set the outside parameters of marriage, even if it wasn’t directly sanctioning them. In other words, this kind of “privatization” won’t take the state out of marriage—it’ll simply push its involvement (and the concomitant culture wars) to another locus point.

Dalmia also notes that it would give religious organizations too much power over the institution of marriage:

Furthermore, true privatization would require more than just getting the government out of the marriage licensing and

registration business. It would mean giving communities the authority to write their own marriage rules and enforce them on couples. In other words, letting Mormon marriages be governed by the Church of the Latter Day Saints codebook, Muslims by Koranic sharia, Hassids by the Old Testament, and gays by their own church or non-religious equivalent. Inter-faith couples could choose one of their communities—but only if it allowed interfaith marriages. But here's what they couldn't get: a civil marriage performed by a justice of the peace. Why? Because that option would have to be nixed when state and marriage are completely separated. This would mean that couples would be subjected to community norms, many of them regressive, without any exit option. For example, a Muslim man could divorce his Muslim wife by saying "divorce" three times as per sharia's requirement and leave her high-and-dry with minimal financial support (this actually happens in India and elsewhere). Obviously, that would hardly be an advance for marriage equality. The reason calls to "abolish marriage"—to quote liberal columnist Michael Kinsley—lead to such absurd results is that they are based on a fundamental misconception about the function marriage serves in a polity.

Instead of privatizing marriage, Dalmia proposes a minimalist option:

If libertarians want to expand marital freedom, they ought to try and spread the Las Vegas model where licenses are handed out to consenting adults on demand with minimal regulations and delay.

That plan may indeed be a preferable option for libertarians. But as a Christian and conservative I think the government should simply do a better job of recognizing what marriage is as an institution rather than broadening and redefining it in a way that is ahistorical and problematic. Dalmia's solution would also sanction incestuous and polygamous marriages

(assuming they are “consenting”) and leave open the question of what “minimal regulations” would be acceptable to a nation of 320 million people. Still, Dalmia’s article helpfully and succinctly highlights many of the reasons why calls for government to “get out of the marriage business” are naïve and ineffectual. If we want to solve the problem of marriage, we shouldn’t do it by increasing government’s power over the institution. That’s what got us into this mess in the first place. *Reprinted from **Acton Institute**.*