NOTE

REVIEWING PREMARITAL AGREEMENTS TO PROTECT THE STATE'S INTEREST IN MARRIAGE

Karen Servidea[*]

INTRODUCTION

COURTS and commentators have debated whether, and on what basis, the substantive review of premarital agreements ought to take place. Those who eschew substantive review generally equate it with legal paternalism. According to these critics, courts engaging in substantive review mistakenly believe that they know what is best for the parties involved and that it is the courts' role to protect parties from irrational decisionmaking. To the extent that the justification for substantive review of premarital contracts rests on notions of cognitive limitations and bounded rationality, it is subject to these criticisms of legal paternalism in general.

This Note will argue that the substantive review of premarital agreements can be more effectively defended on grounds of the public interest in marriage. Not only is this a superior justification for examining the terms of premarital contracts, but it is also an approach that would enable lawmakers to tailor more narrowly the scope of substantive review so as to avoid unnecessarily infringing upon freedom of contract. The question of whether a party made a rational decision in entering into an agreement does not lend itself to prospective rules, for it requires a case-by-case analysis of what the party gave up, received, and could have reasonably foreseen. In contrast, the question of the state's interest in marriage can be defined prospectively in more concrete terms.

This Note will begin by reviewing historical developments in the way courts have treated premarital agreements concerning the division of property and provision of support following death or di-

[*] Law Clerk to the Honorable Paul V. Niemeyer, United States Court of Appeals for the Fourth Circuit; J.D., University of Virginia School of Law, 2004.

vorce. Part II will explore an argument in favor of paternalism in the premarital context by considering recent scholarship on behavioral decision theory. In particular, this Part will develop the claim that parties to a premarital contract often lack the capacity to make rational decisions, justifying a court's review of the agreement's substantive terms. After laying out the theory and examining how the rationality-based justification manifests itself in current case law, Part II will go on to identify the weaknesses of such an approach. Part III will assert that a more convincing justification for substantively reviewing premarital contracts is the state's interest in marriage. Specifically, premarital agreements implicate valid state interests served by the institution of marriage, such as child rearing, the enhancement of civic virtues, and the assurance of welfare. In Part IV, this Note will argue that a court's choice of justification for substantive review is not only worthy of consideration on a theoretical level, but also significant on a practical level because of its three attendant consequences. First, where the rationality-based justification is the sole rationale proffered or considered, courts that are not persuaded by it to depart from ordinary principles of freedom of contract may enforce premarital agreements even when they undermine important state interests. Second, assuming arguendo that courts accept the rationality justification for substantive review, they will tailor the scope of their review solely to correct for the parties' cognitive limits, again leaving state interests unprotected. Third, courts' adoption of the limited cognition approach promotes a regime that is unpredictable and vague for parties seeking to enter into a binding premarital agreement. Adherence to the state-interest approach to substantive review, however, would enable courts to develop more predictable rules of enforcement without detracting from the beneficial role such agreements play in the divorce context.

I. HISTORICAL BACKGROUND

A premarital agreement (also known as an antenuptial or prenuptial agreement) is any agreement entered into by prospective spouses that attempts to govern some aspect of the parties' future

relationship.[1] Most commonly, premarital agreements specify the future spouses' rights with respect to property distribution and alimony upon separation or divorce. Many agreements also govern each party's right to take from the other's estate upon his or her death.

The enforceability of prenuptial contracts made in contemplation of divorce is a relatively recent phenomenon in American legal history. Until the 1970s, courts routinely invalidated such agreements on the grounds that they (1) encouraged divorce and (2) altered the essential elements of marriage.[2] The first rationale for refusing to enforce premarital agreements resulted in the disparate treatment of contracts in contemplation of death and those in contemplation of divorce. In general, courts enforced the former[3] and invalidated the latter.[4] Contracts in contemplation of divorce were thought to give one party, usually the husband, incentive to exit the marriage by limiting that party's financial obligation upon divorce. As the Supreme Court of Appeals of Virginia declared in voiding an antenuptial agreement, "'[a] contract which incites the hope of financial profit from the separation of married people should not be enforced.'"[5]

In addition to invalidating premarital contracts on the basis that they encouraged divorce, courts voided such agreements because they altered what the 1932 Restatement of Contracts deemed the "essential incidents of marriage."[6] Although the Restatement failed to explain in detail which "incidents of marriage" were "essential,"[7] courts most commonly used the essential-incidents rationale to void contracts attempting to alter the husband's duty to support his

[1] See Unif. Premarital Agreement Act § 1(1), 9C U.L.A. 39 (2001) (defining "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage").

[2] Lenore J. Weitzman, The Marriage Contract: Spouses, Lovers, and the Law 338 (1981).

[3] See, e.g., Stratton v. Wilson, 185 S.W. 522, 525–26 (Ky. 1916) (upholding a term in a premarital contract relating to the widow's death benefit while striking down a provision in the same agreement providing for alimony payments upon divorce).

[4] See, e.g., Cumming v. Cumming, 102 S.E. 572, 576 (Va. 1920).

[5] Id. (quoting Neddo v. Neddo, 44 P. 1, 2 (Kan. 1896)).

[6] Restatement of Contracts § 587 (1932).

[7] Id. illus. 1–2.

wife and children,[8] and the wife's duty to provide domestic services to her husband.[9] Occasionally courts counted other state-imposed incidents of marriage among those essential to marriage. For example, the Supreme Court of Nebraska voided a contract in which the parties, by agreeing that the wife would choose the marital domicile, attempted to deviate from the common law rule that the domicile of the wife followed that of her husband.[10] Quoting a domestic relations treatise, the court explained that spouses "'cannot vary the terms of the conjugal relation itself'" or "'add to or take away from the personal rights and duties of husband and wife.'"[11] Because the state's interest in defining the terms of marriage went beyond the public policy against divorce, courts invoked this justification to void premarital contracts even if they did not contemplate divorce.[12] Indeed, as one court reasoned, enforcing such agreements "would be to allow parties by private agreement to establish such marriage status as they wish," while "[t]here is but one marriage status known to the law."[13]

Beginning in 1970, courts increasingly warmed to the idea of enforcing premarital contracts made in contemplation of divorce.[14]

[8] See, e.g., Corcoran v. Corcoran, 21 N.E. 468, 468 (Ind. 1889) (invalidating agreement in which the husband conveyed a house to the wife in exchange for her promise to support him).

[9] See, e.g., Youngberg v. Holstrom, 108 N.W.2d 498, 502 (Iowa 1961) (finding that an otherwise binding promise to pay for household services would be invalid between a husband and wife because such services are "within the scope of the marital relation").

[10] See Isaacs v. Isaacs, 99 N.W. 268, 270 (Neb. 1904) (rejecting the wife's claim of desertion based on the husband's breach of contract to live in Ohio).

[11] Id. (quoting James Schouler, A Treatise on the Law of Domestic Relations: Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant § 171 (1870)).

[12] See, e.g., *Corcoran*, 21 N.E. at 468 (voiding agreement in which the husband transferred certain real property to his wife in exchange for her promise to support him); *Isaacs*, 99 N.W. at 270 (holding that premarital contract cannot take away the husband's prerogative to choose the marital domicile).

[13] Cumming v. Cumming, 102 S.E. 572, 577 (Va. 1920).

[14] According to commentators, the 1970 case of *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970), represents a turning point in the enforceability of premarital contracts in contemplation of divorce. See Brian Bix, Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think about Marriage, 40 Wm. & Mary L. Rev 145, 151 n.20 (1998). In the earlier case of *Hudson v. Hudson*, 350 P.2d 596, 597 (Okla. 1960), the Supreme Court of Oklahoma enforced a premarital agreement in which the wife waived her right to alimony, but the general trend toward enforceability did not begin until *Posner*. See Bix, supra, at 151 n.20.

The Supreme Court of Florida explained its decision to uphold such agreements in *Posner v. Posner* by emphasizing that contracts in contemplation of death provide equally strong incentives to seek divorce as contracts in contemplation of divorce.[15] Furthermore, noting the trend towards no-fault divorce laws, the court found that the state no longer had a strong policy of discouraging divorce, and in turn concluded that the state's interest in preserving marriages was no longer a legitimate reason to hold such contracts void.[16] The court did not expressly address the second basis upon which courts had previously invalidated premarital agreements—the state's interest in defining the essential incidents of marriage. Significantly, while holding that contracts in contemplation of divorce can be enforced, the *Posner* court explicitly directed lower Florida courts to review premarital agreements settling the alimony and/or property rights of parties at the time of divorce for changes in circumstances that would render the agreement inequitable.[17]

Other state courts soon followed Florida's lead. In line with the court's analysis in *Posner*, the first cases to uphold premarital agreements upon divorce generally focused on the shift in public policy away from discouraging divorce, as reflected in no-fault divorce laws, without addressing the essential-incidents objection.[18] As Professors Lindey and Parley explain,

> [t]he development of 'no fault' divorce . . . lessened the concerns about the advantaged spouse unduly imposing on the other party

[15] 233 So. 2d at 383 ("[A] dissatisfied wife—secure in the knowledge that the provisions for alimony contained in the antenuptial agreement could not be enforced against her, but that she would be bound by the provisions limiting or waiving her property rights in the estate of her husband—might provoke her husband into divorcing her in order to collect a large alimony check every month . . . .").

[16] Id. at 384.

[17] Id. at 385–86.

[18] See, e.g., Unander v. Unander, 506 P.2d 719, 720–21 (Or. 1973) ("The adoption of the 'no fault' concept of divorce is indicative of the state's policy, as exhibited by legislation, that marriage between spouses who 'can't get along' is not worth preserving."); see also Katharine B. Silbaugh, Marriage Contracts and the Family Economy, 93 Nw. U. L. Rev. 65, 85 (1998) ("[C]uriously, the modern opinions justifying enforcement don't discuss whether financial support is an essential incident. Instead, these courts address whether contracts over alimony tend to promote divorce or not. Courts simply stopped talking about financial support as an essential legal incident and started talking about whether alimony agreements are compatible with the public policy of discouraging divorce, making a shift in reasoning.").

> to force him or her to start a divorce case in order to take advantage of the agreement, as the advantaged spouse could commence an action whenever he or she chose.[19]

After the initial move towards the enforceability of contracts made in contemplation of divorce, courts began to develop more specific standards for upholding some agreements while striking down others. Generally speaking, they simply adopted the standards used for enforcing agreements made in contemplation of death. For example, courts had long recognized that the confidential nature of the relationship between future spouses posed the risk that one spouse would overreach during the negotiation stage.[20] Thus, in addition to recognizing the normal contract defenses of fraud, coercion, and undue influence, many courts began to impose heightened procedural constraints. Those requirements, which courts still impose today, range from mere disclosure of financial assets[21] to more protective measures, such as the opportunity to consult with independent counsel.[22]

Courts also began to treat premarital agreements differently from commercial contracts with respect to substantive review. While courts policed the substantive terms of commercial contracts under the limited doctrine of unconscionability, which was measured at the time of contracting, they more actively monitored the substantive provisions of premarital agreements. Particularly with respect to contracts modifying alimony payments, courts departed from the standard unconscionability doctrine by reviewing the

[19] Alexander Lindey & Louis I. Parley, 2 Lindey and Parley on Separation Agreements and Antenuptial Contracts § 110.70(2)(c) (2d ed. 2002).

[20] See, e.g., Fisher v. Koontz, 80 N.W. 551, 551 (Iowa 1899) ("After engagement, . . . the parties stood in a relation of confidence, and each had the right to expect the utmost fairness in all their dealings."); Richard v. Detroit Trust Co., 257 N.W. 725, 727 (Mich. 1934) (recognizing "the existence of a confidential relationship requiring good faith, fair dealings, and open disclosure"); Jones v. McGonigle, 37 S.W.2d 892, 894 (Mo. 1931) (requiring a man to disclose to his fiancée the nature and extent of his estate because of the confidential nature of the relationship between future spouses); see also Harry D. Krause, Family Law Cases, Comments, and Questions 93 (3d ed. 1990) ("[T]he courts have been concerned with the parties' so-called 'fiduciary' relationship involving a broad duty to disclose and to deal fairly . . . .").

[21] See, e.g., Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990).

[22] See, e.g., Gant v. Gant, 329 S.E.2d 106, 116 (W. Va. 1985); see also Cal. Fam. Code § 1615(c)(1) (West 2004) (requiring either consultation with independent counsel or an express waiver of such consultation).

fairness of the agreement at the time of divorce.[23] The next Part explores one possible explanation for the heightened substantive review of premarital agreements: the limits of cognition.

II. THE LIMITS OF COGNITION

A. Behavioral Decision Theory

The substantive review of premarital agreements often focuses on whether the parties made a rational or "fair" deal—that is, whether each party received consideration of equivalent value to that given. That approach differs markedly from the method employed in the commercial contract context, where courts rarely inquire into the adequacy of consideration because they assume that the parties are the best judges of their subjective values of the exchange.[24] Underlying that assumption is the premise that the parties have knowledge of their wants and desires, the feasible outcomes of their decisions, and the probability of each of those outcomes. With such knowledge, a rational party can calculate whether a particular contractual decision will maximize his or her utility.[25] Various characteristics of prenuptial agreements, however, have caused some courts and commentators to question this underlying premise of contract law. Those characteristics generally involve the limits of human cognition, such as the tendency of individuals to underestimate the likelihood of certain future events. If parties underestimate the probability of divorce and the likelihood of changes in their financial needs and resources, their calculations will not always lead them to utility-maximizing decisions.

The notion that parties may not be able to calculate their own utility-maximizing position is central to the school of thought known as behavioral economics. Over the past few years, legal commentators have increasingly used behavioral economics to explain legal doctrines that depart from the recommendations of law

[23] See Lindey & Parley, supra note 19, § 110.70(2)(d) (explaining that a number of courts evaluate the fairness of a premarital agreement altering the provision of alimony, not only at the time of contracting, but also "in light of the parties' circumstances at the time of the divorce").

[24] Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 Stan. L. Rev. 211, 211 (1995).

[25] See id. at 211–12.

and economics and to propose further departures from those recommendations.[26] Behavioral economics relies on empirical findings from behavioral decision theory—the study of the way people make decisions—to challenge the rational-actor premise of law and economics.[27] According to some scholars, those findings demonstrate that people systematically act irrationally in certain situations. One of the first attempts to apply the lessons from this body of knowledge to the law of premarital contracts was Professor Melvin Eisenberg's article, "The Limits of Cognition and the Limits of Contract."[28]

The first lesson from behavioral decision theory that Professor Eisenberg identifies as relevant to prenuptial agreements and a justification for substantive review is the notion of "disposition" or "optimism"—the premise that people are naturally disposed towards optimism and systematically underestimate the chances of bad results.[29] In support of this hypothesis, Professor Eisenberg points to studies that show that ninety-seven percent of consumers believe they are either average or above-average in their ability to avoid accidents involving power-mowers and bicycles,[30] and that six times more college students believe their chances of experiencing

[26] See, e.g., James A. Fanto, Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making, 62 Ohio St. L.J. 1333 (2001); Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420 (1999); Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998).

[27] See Gregory Mitchell, Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law, 43 Wm. & Mary L. Rev. 1907, 1909–10 (2002).

[28] Eisenberg, supra note 24, at 254–58; see also Bix, supra note 14, at 195 ("The premarital agreement . . . calls into question the 'rationality,' 'consent,' or 'voluntariness,' in the full senses of those concepts, of a party to the agreement."); Rebecca Glass, Comment, Trading Up: Postnuptial Agreements, Fairness, and a Principled New Suitor for California, 92 Cal. L. Rev. 215, 241–43, 251–52 (2004) (urging California to adopt the America Law Institute's Principles of the Law of Family Dissolution partly because of its handling of cognitive limitations); Developments in the Law—The Law of Marriage and Family, 116 Harv. L. Rev. 1996, 2096 (2003) ("[C]ognitive distortion is a significant problem for parties executing antenuptial agreements.").

[29] Eisenberg, supra note 24, at 216–18.

[30] Id. at 216; see also W. Kip Viscusi & Wesley A. Magat, Learning About Risk: Consumer and Worker Responses to Hazard Information 95 (1987).

favorable life circumstances are above average than believe their chances are below average.[31]

More pertinent to the premarital context, one study demonstrated that although most people accurately estimated the country's overall divorce rate at fifty percent, they assessed their own chances of divorce at zero.[32] A recent survey conducted among Harvard Law School students showed a slightly more realistic disposition—the average expected probability of divorce among that population was almost seventeen percent.[33] Because of this dispositional bias, Professor Eisenberg concludes that parties will likely underestimate the probability that they will ever need to rely on their premarital agreement.[34] In turn, this underestimation will often cause parties to neglect the terms of the agreement at the time of bargaining.

The second lesson from behavioral decision theory that tends to justify substantive review of premarital contracts is known as the "framing" or "availability" heuristic. "Framing" refers to the effects of presenting the same substantive decisional factors to a party in different ways.[35] A rational individual should reach the same result regardless of the presentation. Behavioral decision theorists have found evidence, however, that certain presentations systematically alter a person's responses.[36] An example of this effect involves giving a respondent the choice between two trays of jellybeans, with the goal of randomly selecting a red jellybean. The first tray includes nine white jellybeans and one red jellybean,

[31] Eisenberg, supra note 24, at 217; see also Neil D. Weinstein, Unrealistic Optimism About Future Life Events, 39 J. Personality & Soc. Psychol. 806, 809–14 (1980).

[32] Eisenberg, supra note 24, at 217; see also Lynn A. Baker & Robert E. Emery, When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 Law & Hum. Behav. 439, 443 (1993).

[33] Heather Mahar, Why Are There So Few Prenuptial Agreements? 14–15 (John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 436, 2003), available at http://www.law.harvard.edu/programs/olincenter/papers/pdf/436.pdf (on file with the Virginia Law Review Association).

[34] Eisenberg, supra note 24, at 254.

[35] Id. at 218–20.

[36] Id.; see, e.g., Colin F. Camerer & Howard Kunreuther, Decision Processes for Low Probability Events: Policy Implications, 8 J. Pol'y Analysis & Mgmt. 565, 572–74 (1989); Daniel Kahneman & Amos Tversky, Choices, Values, and Frames, 39 Am. Psychologist 341, 343–44 (1984); Roger G. Noll & James E. Krier, Some Implications of Cognitive Psychology for Risk Regulation, 19 J. Legal Stud. 747, 753–54 (1990).

while the second tray contains ninety white jellybeans and nine red jellybeans. Even though the chances of drawing a red jellybean from the first tray are higher, many respondents choose the second tray.[37]

One of the specific framing effects identified by behavioral theorists relevant in the premarital context is the "availability" heuristic. As Professor Eisenberg explains, "[w]hen an actor must make a decision that requires a judgment about the probability of an event, he commonly judges that probability on the basis of comparable data and scenarios that are readily available to his memory or imagination."[38] Because data that is readily available is not necessarily statistically representative of future scenarios, the availability heuristic results in decisions that depart from statistical rationality. One characteristic of data that increases its accessibility is temporal proximity. The data most likely to be available to parties entering into a premarital contract—their present feelings of love and trust—causes them to further discount the possibility that they will ever need to rely on their agreement. In turn, parties will often underestimate the amount of attention they should devote to the contract's terms.

A third cognitive limit relevant in the context of premarital agreements and further justifying substantive review is what Professor Eisenberg deems "faulty telescopic faculties," which refers to parties' tendency to give too little weight to future costs and benefits.[39] According to behavioral decision theorists, when comparing a present cost to a future benefit, a decisionmaker is likely to weigh the present cost too heavily and the future benefit too lightly. For example, if a proposed antenuptial contract gives one party a disproportionately small share of the marital property, that individual will weigh the present costs of rejecting the agreement's terms against the future benefit of having negotiated a larger share of the property. If the party operates with a faulty telescopic lens, he or she might underestimate the extent to which the larger share will increase his or her future utility, especially compared to the

[37] Seymour Epstein, Integration of the Cognitive and the Psychodynamic Unconscious, 49 Am. Psychologist 709, 717–18 (1994).

[38] Eisenberg, supra note 24, at 220.

[39] Id. at 222.

additional strain that further negotiations will place on the relationship in the present.

A court that is concerned about the cognitive limits of parties entering into a premarital contract might try to correct for "irrational" decisions in one of two ways. First, it may refuse to enforce an agreement if it has reason to think that the parties, at the time of contracting, did not contemplate the circumstances existing at the time of enforcement. This method, which this Note will call the "foreseeability" approach, does not directly reassess the value of the parties' consideration. It instead asks whether the situation upon divorce seems to have been one the parties could have expected. Second, a court might independently assess the values the parties gave and received under a contract. This method, which this Note will call the "adequacy-of-consideration" approach, corrects for the parties' inability to accurately assess the probability of future events because, at the time of the court's analysis, the relevant events will have already transpired.

One of the earliest cases to adopt the foreseeability method of substantive review was *Gant v. Gant*.[40] There, the parties had entered into a premarital agreement in which the wife had waived all of her rights to alimony. In upholding the contract, the Supreme Court of West Virginia broke from its prior practice of striking down agreements in contemplation of divorce, but at the same time imposed a fairness standard on such agreements. Defining "fairness" in terms of foreseeability, the court emphasized that the agreement would be upheld if, at the time of negotiation, the parties could have foreseen the circumstances existing at the time of enforcement.[41] If circumstances had changed in unexpected ways between the time of execution and the time of enforcement, then the contract would be unenforceable. As an example, the court suggested that the birth of three children during the marriage would have been an unforeseeable change in circumstances.[42] Because the parties in *Gant* had been married for a mere five years, during which no significant changes had occurred, the court upheld the waiver of alimony.[43]

[40] 329 S.E.2d 106, 114–16 (W. Va. 1985).
[41] Id. at 114–15.
[42] Id. at 115.
[43] Id.

Gant's emphasis on the foreseeability of changes occurring during the marriage reveals the court's concern with the ability of parties to enter into agreements in their best interests. The court suggested that it would undo an agreement when limitations on the parties' cognition at the time of execution appeared to have caused them to agree to terms they would not have agreed to had they foreseen the future more clearly. Several other cases decided in different states reflect this same concern.[44]

In the more recent case of *Hardee v. Hardee*, the Supreme Court of South Carolina relied on both the foreseeability approach and the adequacy-of-consideration approach, applying a three-part test to uphold an agreement in which the wife waived her rights to alimony.[45] Although the first part of the test involved the regular contract defenses of duress, fraud, and mistake, the court departed from standard contract law in parts two and three by examining the substance of the agreement.[46] Under the second prong of the test, the court asked whether the agreement was unconscionable. In evaluating the facts of *Hardee* under this prong, the court focused on the parties' ability to make wise decisions for themselves, demonstrating its reliance on the adequacy-of-consideration method of review. Although the court paid lip-service to the standard contract doctrine of conscionability, which asks whether the contract was unreasonably one-sided at the time of *contracting*,[47] the court went on to examine the conscionability of the agreement at the time of *performance* (that is, at the time of divorce).[48] In other words, the court took advantage of its ability to see how the circumstances of the marriage had unfolded between the date of contracting and the date of divorce by including in its analysis the value of the benefits the wife received over the course of the marriage in exchange for

[44] See, e.g., McKee-Johnson v. Johnson, 444 N.W.2d 259, 267 (Minn. 1989) (reviewing agreement for fairness at time of enforcement "if the premises upon which [it was] originally based have so drastically changed that enforcement would not comport with the reasonable expectations of the parties at the inception"); Button v. Button, 388 N.W.2d 546, 552 (Wis. 1986) ("If, however, there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce.").

[45] 585 S.E.2d 501, 504–05 (S.C. 2003).

[46] Id.

[47] Restatement (Second) of Contracts § 208 (1981).

[48] *Hardee*, 585 S.E.2d at 505.

her waiver of alimony. Finding that she received "substantial benefits from being married to [the] [h]usband for the five-year duration of their marriage, such as a heightened standard of living, owning several homes, and driving luxury cars," the court determined that the original bargain was fair.[49]

Similar to the *Gant* court's foreseeability test, prong three of the *Hardee* test was an inquiry into whether the "facts and circumstances" had changed since the execution of the premarital agreement to such an extent that enforcement would be unfair or unreasonable.[50] Applying this third prong to the facts, the *Hardee* court noted that at the time of execution the wife suffered from serious health problems such as diabetes and sponge kidney disease. Although the wife's condition had worsened during the course of the couple's five-year marriage, the agreement specifically referred to the wife's health problems, and the court found that the parties had contemplated such a change in circumstances at the time of execution.[51] This express acknowledgment of the risk that the wife's health would deteriorate indicated that the parties had intentionally allocated the risk of that occurrence. As a result, the court felt relieved of its obligation to ensure that both parties were financially secure at the time of divorce.

In addition to court decisions relying on the bounded-rationality justification for substantive review, the recently released *Principles of the Law of Family Dissolution* ("*Principles*") expresses concern about the abilities of parties to enter into agreements in their best interests.[52] The *Principles* not only spells out detailed procedural requirements, but also requires courts to undertake substantive review of contracts at the time of enforcement if one of three "threshold triggering event[s]" has occurred during the marriage:[53] (1) more than a certain number of years have passed between execution and enforcement; (2) the parties were childless at the time of entering into the agreement and subsequently gave birth to or adopted a child; or (3) a substantial and unanticipated change of

[49] Id.
[50] Id. at 504–05.
[51] Id. at 505.
[52] Principles of the Law of Family Dissolution: Analysis and Recommendations § 7.05 cmt. b (2002) [hereinafter Principles].
[53] Id. §§ 704, 7.05(2)(a)–(c), 7.05 cmt. b.

circumstances having a substantial impact on the parties or their children has occurred.[54] The *Principles* instructs that where one of these events has transpired, a court should invalidate the agreement if its enforcement would work a "substantial injustice."[55] A court is to weigh four factors in determining whether a substantial injustice would occur: (1) the size of the disparity between the outcome under the agreement and the outcome otherwise; (2) for short marriages, the difference between the challenger's circumstances if the marriage had not occurred and his or her circumstances if the agreement is enforced; (3) whether the agreement was intended to benefit or protect third parties, and whether that purpose remains relevant; and (4) the effect of enforcement on the parties' children.[56]

The reporter's comments explain that the three triggering events represent the drafters' conception of those situations that contracting parties will likely discount in weighing the costs and benefits of an agreement:

> [N]early all premarital agreements involve special difficulties arising from unrealistic optimism about marital success, the human tendency to treat low probabilities as zero probabilities, the excessive discounting of future benefits, and the inclination to overweigh the importance of the immediate and certain consequences of agreement—the marriage—as against its contingent and future consequences. [The *Principles*], however, does not call for the court's examination at divorce of all premarital agreements, but only a subset in which these difficulties are particularly likely.[57]

Unlike the *Hardee* court, however, courts adhering to the *Principles* would not care whether the parties provided evidence that they had actually contemplated the enforcement of the agreement

[54] Id. § 7.05(2)(a)–(c).
[55] Id. § 7.05(1)–(3).
[56] Id. § 7.05(3)(a)–(d).
[57] Id. § 7.05 cmt. b. Although the *Principles* also recognizes the state's interest in marriage by, for example, calling for a substantial-injustice inquiry should the couple have children during the marriage, the fact that the *Principles* does not call for substantive review if the children were born *before* the marriage demonstrates that the *Principles*' concern for the state's interest is secondary to its concern for the limits of cognition. See infra Part IV.

in a particular set of changed circumstances. Regardless of an express indication of intent, the changed circumstances would trigger a "substantial injustice" inquiry.

While the *Principles* and the case law demonstrate a reliance on the bounded-rationality justification for the substantive review of premarital agreements, the question remains whether bounded-rationality theory provides persuasive justification for departing from the standard freedom-of-contract principle to review the terms of antenuptial contracts. The following Section addresses that concern.

B. Theoretical Weaknesses of the Rationality Justification

Relying on theories of cognitive limits to justify substantive review of premarital contracts presents several problems. First, although the heuristics discussed in Section II.A support imposing limits on parties' freedom to enter into binding premarital agreements, other lessons from behavioral decision theory illustrate that parties may act purposefully and rationally, suggesting that courts should refrain from substantive review. One such premise, called the "endowment effect," refers to an individual's tendency to value his or her own goods more highly than he or she values another's identical goods.[58] This behavior is exemplified by a person who is unwilling to part with tickets to a game for a certain price, but would not pay that same price to acquire the tickets.[59] Within the context of premarital contracts, parties entering into agreements might consider their default rights to marital property and spousal support as endowments and therefore refuse to part with them unless afforded adequate consideration. This lesson from behavioral decision theory, therefore, challenges the cognitive-limits rationale for substantive review.

A second lesson from behavioral decision theory, sometimes referred to as "fairness orientation,"[60] demonstrates that people seek to act fairly and cooperate, and that people are averse to windfalls

[58] Robert A. Hillman, The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages, 85 Cornell L. Rev. 717, 722 (2000).

[59] Id.

[60] See id. at 724–25.

and undeserved penalties.[61] Scholars speculate that fairness orientation is based partly on a desire to *appear* fair, and in turn asserts itself most prominently in dealings between nonstrangers.[62] The best known example of fairness orientation is the so-called "ultimatum game" involving two players.[63] The first player ("P1") starts with a sum of money and is told to offer an unspecified portion of that sum to the second player ("P2"). The moderator instructs P1 that he or she may retain the residual, but only if P2 accepts the amount offered. If P2 rejects the sum, then neither player retains any of the money. Rationally, P1 should give P2 as little as one cent, and P2 ought to accept this nominal amount. Studies show, however, that on average, P1 will offer P2 between 30% and 40% of the total sum.[64] Moreover, offers below 20% of the total figure are frequently rejected by P2.[65]

Because prenuptial agreements allocate the gains from the joint venture of marriage, they implicate fairness concerns. To the extent that fairness orientation is based on a person's desire to appear fair especially among nonstrangers, that tendency would seem particularly pronounced within the context of premarital negotiations. It is likely that neither party will want to extend or accept an offer that departs from his or her sense of fairness. Accordingly, where an agreement makes disproportionate provisions for the parties, thereby implicating the natural inclination towards fairness, parties have an increased incentive to closely scrutinize the contract's terms.[66] This heightened review may compensate for any decrease in the parties' attention caused by overly optimistic predictions as to the longevity of the marriage.

A third heuristic, known as "ambiguity aversion," teaches that people prefer certainty to ambiguity and suggests that courts should be reticent to overturn premarital agreements on the basis of the parties' purported irrationality.[67] Ambiguity aversion is

[61] Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175, 1186 (1997).
[62] Id.
[63] See Colin Camerer & Richard H. Thaler, Anomalies: Ultimatums, Dictators and Manners, 9 J. Econ. Persp. 209, 209–18 (1995).
[64] Id. at 210.
[65] Id.
[66] Hillman, supra note 58, at 733.
[67] Id. at 724.

demonstrated by the general preference for a certain gain of $3000 over an 80% chance of a $4000 gain even though the expected value of the latter choice is higher.[68] Because most states base their property distribution and alimony awards following divorce on multi-factored tests, the results are often unpredictable, especially at the time parties negotiate a premarital contract. Where one party to the agreement has a greater aversion to ambiguity than the other party, an objectively one-sided provision might actually be the product of the more averse party's deliberate choice. That spouse may have intentionally traded a possible future award of property or alimony for a certain future award with a lower expected value because he or she values the certainty itself. Courts conducting rationality review at the time of divorce will likely overlook the utility that this party gained from the trade-off.[69]

In addition to these conflicting heuristics, a second problem with relying on the theory of bounded rationality to justify substantive review is a concern expressed by several scholars—the methodology behind behavioral decision research yields results that are not necessarily applicable to real-world settings.[70] As noted by Professor Gregory Mitchell, many economists have argued that the consequences of real-world decisions might induce individuals to act more rationally than they would otherwise behave in the laboratory, where consequences are "hypothetical" and "small."[71] It follows that even if laboratory studies indicate that parties to a pre-

[68] See Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decision Under Risk, 47 Econometrica 263, 268 (1979).

[69] See Hillman, supra note 58, at 732 ("Because judges will believe that the parties' . . . situation at the time of contracting was not ambiguous, judges will undervalue the importance the parties attach to their agreed . . . provision.").

[70] See, e.g., Richard Posner, Rational Choice, Behavioral Economics, and the Law, 50 Stan. L. Rev. 1551, 1570 (1998) ("One would like to know the theoretical or empirical basis for supposing that the experimental environment is relevantly similar to the real world."); Robert E. Scott, Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices, 59 S. Cal. L. Rev. 329, 338 n.25 (1986) ("These experimental results are based on laboratory observations only. Thus, the general implications of the findings remain uncertain.").

[71] Gregory Mitchell, Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence, 91 Geo. L.J. 67, 114 (2002).

marital contract may act irrationally, such data is of questionable value in predicting real-world behavior.

Responding to this criticism of early behavioral studies, some researchers have begun to provide incentives, such as monetary rewards, for test-takers to carefully reason through their responses. The evidence from those studies suggests that attaching real-world consequences to decisions improves parties' decisionmaking processes in some, but not all, situations.[72] As Professor Mitchell concludes, although the effects of financial incentives on decisionmaking are not yet completely known, "financial incentives seem to cause subjects to take their tasks more seriously, at times causing behavior to move closer to the rational choice norm."[73]

Assuming that study participants continue to make cognitive errors even when afforded financial incentives to reason through their choices, experimental findings still have limited applicability in the context of premarital negotiations. Indeed, with respect to antenuptial agreements, it is likely that parties will confront not simply the prospect of earning or forfeiting a *nominal* sum, but the more grave consequence of losing a significant amount of money to which they would otherwise be entitled. In addition to providing more significant financial incentives, the real world offers nonpecuniary incentives for parties entering into premarital agreements to carefully consider their terms. For example, a party might take into consideration any embarrassment he or she would feel among the couple's family and friends at the time of divorce if he or she had entered into an unreasonable prenuptial agreement. Although such "accountability" incentives affect people's cognitive processes, laboratory experiments fail to adequately account for them.[74]

Because the real world provides significant financial and nonfinancial incentives for parties entering into a premarital agreement to carefully consider its terms, the laboratory findings of behavioral decision theory might not hold as well in the premarital

[72] See, e.g., Dan N. Stone & David A. Ziebart, A Model of Financial Incentive Effects in Decision Making, 61 Organizational Behav. & Hum. Decision Processes 250, 250 (1995) ("[E]vidence suggests that extrinsic incentives sometimes increase, sometimes decrease, and sometimes have no effect on decision quality.").

[73] Mitchell, supra note 71, at 117.

[74] Id. at 110–12.

context. For example, much of the data about marital optimism—the belief that the respondent's marriage will not end in divorce—is based on simple surveys that carry no real-world implications.[75] In contrast to a survey participant, a party entering into a premarital agreement who is compelled to confront the contract's real-world consequences may assess the chances of divorce more realistically or seek help in making that evaluation.

Beyond questioning the applicability of laboratory findings to real-world situations, critics of behavioral decision theory have argued that researchers design tests with the purpose of highlighting fallibility.[76] For example, Daniel Kahneman and Amos Tversky, two prominent behavioral decision theorists, admit that they design their word problems in ways that are likely to elicit error.[77] This aspect of their methodology enables researchers to isolate and identify different cognitive processes, but limits the extent to which their findings are representative of errors in real-world decision-making.[78] For instance, to identify the availability heuristic, researchers must pose a choice with an outcome that will hinge solely on that heuristic: If the subject overestimates the relevance of an experience in recent memory, then he or she will choose incorrectly; if the participant does not commit the availability error, then he or she will choose correctly. In the real world, however, decisions are less likely to hinge exclusively on the availability heuristic. For example, a party might overweigh the relevance of his or her present feelings of love and trust when entering into a premarital agreement, but that error on its own may not be outcome-determinative. Even had the party more carefully examined the possibility that present feelings do not predict future results, he or she may have arrived at the same decision. It would therefore be incorrect to assume that all premarital agreements that lead to disproportionate results are a function of cognitive errors.

The foregoing Section has laid out some of the weaknesses of basing substantive review of premarital agreements on a limited-cognition rationale. This Note does not argue, however, that courts

[75] Baker & Emery, supra note 32, at 443–44; Mahar, supra note 33, at 12.

[76] Mitchell, supra note 27, at 1971–72.

[77] Amos Tversky & Daniel Kahneman, Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment, 90 Psychol. Rev. 293, 311 (1983).

[78] Mitchell, supra note 27, at 1973.

should refrain from examining the substantive content of premarital agreements. Instead, the following Part explains why the state's interest in marriage provides a stronger justification for such review.

III. THE STATE'S INTEREST IN MARRIAGE AND PREMARITAL CONTRACTS

The argument that the state's interest in marriage justifies substantive review of prenuptial contracts rests on two premises: (1) the state has a legitimate interest in marriage, and (2) premarital agreements implicate that interest.

A. The State's Interest in Marriage

The proposition that states have a legitimate interest in marriage is controversial, and recent developments in family law provide fodder for those on both sides of the debate. On the one hand, legal reforms, such as the adoption of no-fault divorce laws and the abandonment of the tender-years presumption in custody battles, suggest that states have retreated from their attempts to mold the marital relationship. On the other hand, continuing bans on polygamous marriages and the movement towards amending state constitutions to outlaw same-sex marriages[79] suggest that states and their citizens still recognize the public interest served by marriage. Those advocating further retreat by the states view the marriage relationship as primarily involving individual interests, with state interests subordinate or nonexistent. Although marriage—as a relationship between two private individuals—necessarily implicates individual interests, a predominant emphasis on individual rights obscures the role of marriage in accomplishing goals of public policy.[80] States recognize marriage and provide marital protections and privileges to encourage people to produce certain social benefits.

[79] See, e.g., Alan Cooperman, Same-Sex Bans Fuel Conservative Agenda, Wash. Post, Nov. 4, 2004, at A39 (noting that during the 2004 elections, voters in eleven states voted to amend their state constitutions to define marriage as a union between a man and a woman); Carolyn Lochhead, Big fights rage in state capitols, S.F. Chron., Mar. 11, 2004, at A1.

[80] See Roscoe Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 177 (1916) ("It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions.").

Among the privileges afforded by the state are the symbolic recognition of the relationship, inheritance rights, standing in wrongful death actions, and the protection of communications between spouses. As consideration for those state-granted benefits and to protect the public function of marriage, states impose certain regulations on marriage.

Throughout history, American society has relied on the institution of marriage to perform three important functions: (1) child rearing, (2) fostering civic virtues, and (3) providing welfare. Because premarital agreements implicate each of those functions, the state is justified in reviewing the contracts' substantive terms.

The first societal interest served by the institution of marriage is the rearing of children. The state's interest in the welfare of children is based partly on its position as *parens patriae*, or "parent of his or her country": If a child's parents are unable or unwilling to raise the child, the state assumes that responsibility.[81] When parents rear their own children, therefore, they relieve the state of having to do so, but the state retains a duty to protect the best interests of the children.[82] The state also has an interest in the *product* of child rearing: Children eventually become adults who are capable of imposing both positive and negative externalities on the rest of society.[83] The quality of child rearing affects the extent to which children will become well-adjusted, productive members of the community.

Closely related to the state's interest in child rearing is its desire to foster values foundational to a democratic society, another interest served by the institution of marriage. Family relationships teach people the virtues of authority, responsibility, and duty. As Professor Bruce Hafen explains,

> [a] sense of voluntary duty is the lifeblood of a free society, for "only with a public-spirited, self-sacrificing people could the authority of a popularly elected ruler be obeyed, but more by the virtue of the people than by the terror of his power." Those who formulated our constitutional system understood the importance

[81] See Black's Law Dictionary 1137 (7th ed. 1999).

[82] For example, the state protects children from abusive and neglectful parents and makes custody determinations upon divorce based on the child's best interest.

[83] Silbaugh, supra note 18, at 140.

> of "public virtue," but they knew it could not be coerced by the State without doing violence to the inalienable individual rights on which the system was premised.[84]

Although it might be easier to see how *children* learn civic virtues in the familial context—through obedience to their parents' authority—*spouses* can acquire those virtues through the marital relationship as well. Most people entering marriage probably do not recognize the precise legal duties accompanying that status, but they understand that marriage imposes certain moral duties on them towards their spouses. Through acceptance and performance of those responsibilities, married people become more "public-spirited" and "self-sacrificing"—virtues vital to the smooth functioning of a democratic society. As Professor Gilder has noted, marriage is an "uncoercive way to transform individuals . . . into voluntary participants in the nurture of society" and is "effective because it is steeped in the blood, sexuality, flesh, and flow of our unconscious lives, where true changes in character and commitment can take root."[85] The state honors and bestows benefits upon married couples, not to promote "intimacy and companionship," but to "ensure civilized society."[86]

Finally, marriage serves an important social welfare function. Through their duties to support each other and share property, parties to a marriage reduce the likelihood that either will have to rely on the state to fulfill his or her basic needs. In addition to these obvious economic benefits, significant democratic purposes are served by the welfare function of marriage. The less people need to depend on the state to provide for their necessities, the less "economic leverage and political power" the state will have over the lives of its citizens.[87]

---

[84] Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 476–77 (1983) (quoting Robert Horwitz, John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education, *in* The Moral Foundations of the American Republic 129, 131 (Robert H. Horwitz ed., 1979) (quoting Gordon S. Wood, The Creation of the American Republic 1776–1787, 68 (1969))).

[85] George F. Gilder, Sexual Suicide 73 (1973).

[86] Id. at 74.

[87] Hafen, supra note 84, at 481.

B. The State's Interest in the Terms of Premarital Agreements

Assuming that the state has a legitimate interest in marriage—because of its child rearing, civic virtue, and welfare functions—the next question becomes how premarital agreements that alter property division and support obligations affect that interest. Although the ways that premarital agreements implicate the state's interest in marriage are numerous, this Note will examine just four.

First, terms in premarital agreements that limit the support or property entitlements of one party might force that individual to become a public charge upon divorce. This possibility implicates the state's interest in the welfare function of marriage. From the perspective of the public purse, it is preferable that the spousal duty of support continue after a marriage, at least to the extent that one party requires it to avoid public assistance. This interest has worked its way into several state laws and court decisions concerning the enforcement of prenuptial agreements.

For instance, in *Bassler v. Bassler*, the Supreme Court of Vermont voided a prenuptial agreement in which the wife waived her right to any property acquired by her husband after marriage, without analyzing the rationality of the deal.[88] Finding that the wife required public assistance as a result of the divorce, the court held that enforcement of the contract would violate public policy.[89]

A second way that premarital contracts affect the state's interest in marriage is by altering the living standard of the couple's children upon divorce, which in turn implicates the state's interest in marriage's child-rearing function. More specifically, prior to divorce, the couple's children benefit from both of their parents' incomes. After divorce, the children benefit from the noncustodial parent's income only to the extent of that parent's child and spousal support obligations. Any restriction on the custodial parent's spousal support entitlements decreases the percentage of the other parent's income that inures to the children's benefit. Though the children will receive child support from the noncustodial parent, the child-support guidelines of most states do not seek to maintain the child in the same standard of living provided by the

[88] 593 A.2d 82, 87–88 (Vt. 1991).
[89] Id. at 88.

intact marriage.[90] From the standpoint of the children's welfare, a gross disparity between the children's pre- and post-divorce standard of living might make their adjustment to divorce more difficult and unsettling than it otherwise would be. Any detrimental effects that the children suffer are likely to impose negative externalities on society as the children become adults.[91]

A third way that premarital agreements implicate the state's interest in marriage is by altering the incentives that spouses have to invest in their union, which in turn undermines marriage's role in fostering civic virtues and promoting high-quality child rearing. As explained by Professor Ira Ellman, spousal investment during marriage takes different forms.[92] In particular, a party to a marriage might pursue a career outside the home, thus making a professional investment that is not relationship-specific. A spouse who devotes time and energy to his or her career does not risk losing that investment if the marriage ends, for the resulting increase in human capital has value apart from the marriage. In contrast, investments in the home such as rearing children and performing domestic services do not produce financial returns that the homemaking spouse can capture beyond the duration of the marriage.[93] As such, to the extent that parties take into account the possibility of divorce, they may choose to invest less in relationship-specific activities and more in career-related pursuits. Equitable division and alimony laws can reform this incentive structure by reallocating losses upon divorce.[94] An individual who has pursued relationship-specific activities during the marriage can offset the loss from those investments upon divorce by sharing in the earnings accumulated by the bread-winning spouse during marriage and after divorce.

Where premarital contracts alter equitable division and alimony laws, however, the incentive to favor career-type investments over relationship-specific activities remains unchecked. It follows that in

[90] Marsha Garrison, Child Support Policy: Guidelines and Goals, 33 Fam. L.Q. 157, 161 (1999). Professor Garrison explains that, rather than seeking to maintain a child's pre-divorce living standard, most states aim to "replicate typical child-related outlay in an intact two-parent family." Id.

[91] Silbaugh, supra note 18, at 140.

[92] Ira Mark Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1, 42 (1989).

[93] See id.

[94] See id. at 50–51.

eliminating or drastically reducing property and alimony awards provided by state default laws, premarital agreements limit the extent to which marriages foster civic virtues such as sharing, cooperation, and voluntary responsibility.

Beyond undermining the state's interest in the civic virtue function of marriage, the incentive structure created by premarital contracts during marriage might also implicate the state's interest in marriage's child-rearing role. Specifically, where antenuptial agreements limiting property and alimony awards create incentives for spouses to invest in activities outside of the home, such agreements may reduce the degree to which parties invest in the upbringing of their children. As a result, the quality of child rearing may suffer, imposing negative externalities on society as a whole.[95]

A final way that premarital agreements affect the state's interest in marriage is by altering the incentives to seek divorce, which implicates all three functions served by the institution of marriage. Under a premarital contract, where a spouse is awarded a greater share of property or post-divorce income rights than otherwise afforded under the default rule, he or she will face an increased incentive to divorce. This concern is reflected in the early cases that voided entire premarital agreements in contemplation of divorce[96] and more recent cases invalidating specific terms of such contracts because of the incentives they allegedly foster.[97]

Professor Lloyd Cohen uses the concept of quasi-rents—"a return to one party to a contract above what the party could receive if the contract could be dissolved at will at that moment"—to explain how a limitation on spousal support payments encourages a breadwinning spouse to seek divorce.[98] For a couple that divides responsibilities such that the wife takes care of the couple's children

[95] See John Ermisch & Marco Francesconi, The Effect of Parents' Employment on Children's Lives (Family Policy Studies Centre, Family and Work Series Ref. 321, 2001), available at http://www.jrf.org.uk/knowledge/findings/socialpolicy/321.asp (March 2001) (finding strong evidence that a mother's full-time employment outside the home when her children are under the age of five decreases the children's future educational and economic attainment).

[96] See, e.g., Cumming v. Cumming, 102 S.E. 572, 576 (Va. 1920).

[97] See, e.g., In re Marriage of Noghrey, 215 Cal. Rptr. 153, 155–56 (Cal. Ct. App. 1985) (refusing to enforce a provision in a Jewish marriage contract that required the husband to pay the wife $500,000 upon divorce).

[98] Lloyd Cohen, Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life," 16 J. Legal Stud. 267, 287 (1987).

and the husband earns income for the family, the spouses' gains from the marriage relationship will be asymmetrical as time progresses.[99] The breadwinning spouse will enjoy quasi-rents early in the marriage when he does not earn as much money as he will in the future, yet enjoys the fruits of his wife's most productive childbearing years. Conversely, the child-rearing spouse will not enjoy quasi-rents until the later stages of the marriage when her most productive childbearing years are over and she gets to share in the breadwinning spouse's increased income.[100] The order in which the spouses experience quasi-rents provides an incentive for the breadwinning spouse to breach the marriage agreement by seeking a divorce before the later stages of the marriage.

In most cases, default property division and alimony rules will hamper the breadwinning spouse's ability to appropriate the child-rearing spouse's quasi-rents by giving the child-rearing spouse a claim on the breaching spouse's property.[101] Premarital agreements that reduce or eliminate that claim, however, take away that disincentive by enabling the breadwinning spouse to enjoy his quasi-rents from the early years of the marriage and to dissolve the marriage without cost before it is his turn to provide quasi-rents to the child-rearing spouse.[102]

Incentives to divorce implicate the state's interest by undermining all three of the functions served by marriage. First, divorce has significant effects on child rearing and child-welfare. Studies demonstrate that divorce affects a child's psychological and economic well-being:[103] Children from divorced families are likely to receive

[99] Id.

[100] Id. at 287, 289.

[101] See Ellman, supra note 92, at 67.

[102] Of course, to the extent that a premarital agreement decreases the provision for the nonbreadwinning spouse as compared to the default alimony and property division rules, one could argue that the default rules create more of an incentive for the nonbreadwinning spouse to seek a divorce. A state might reasonably conclude, though, that the nonbreadwinning spouse is unlikely to be better-off financially for leaving the marriage because she shares fully in her spouse's income during the marriage. Under a one-sided premarital agreement, however, the breadwinning spouse might be better-off financially after a divorce because he would no longer have to share his earnings as he did during the marriage.

[103] See Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9, 31–32 (1990).

less education than children from intact families,[104] more likely to require mental health services,[105] and more likely to engage in anti-social behavior.[106] Many children experience a post-divorce decline in family income.[107] Second, incentives to divorce hinder the civic virtue function of marriage. Rather than seeking to solve marital problems in a cooperative and community-oriented manner, a spouse with the upper-hand in a one-sided premarital agreement will see divorce as an easier and relatively costless solution. Finally, divorce threatens the welfare function of marriage because maintaining separate households is more expensive than preserving one marital home. Although the spouses' incomes might have been sufficient to maintain one home, the additional expense of keeping separate households after divorce might force one of them onto the public dole.

Before 1970, courts routinely invoked the state's public policy against divorce to strike down premarital contracts in contemplation of divorce.[108] Even following the general move toward the enforceability of premarital contracts, however, some courts continue to employ that rationale to justify the substantive review of specific contractual terms.[109] For example, in *Ranney v. Ranney*, the Supreme Court of Kansas struck down an agreement in which the parties waived all rights to alimony and equitable distribution of

[104] Id. (citing David L. Featherman & Robert M. Hauser, Opportunity and Change 242–46 (1978) (finding that men raised in single parent households averaged almost one year less education than those raised in households with two parents)).

[105] Id. at 31 (citing Neil Kalter, Children of Divorce in an Outpatient Psychiatric Population, 47 Am. J. Orthopsychiatry 40, 50 (1977) (finding that children from divorced families are disproportionately represented in outpatient mental health clinics)).

[106] Id. (citing Robert Emery, Marriage, Divorce, and Children's Adjustment 52–53 (1988) (referencing studies that show that children of divorced parents exhibit more aggression than children from intact families)).

[107] See Frank F. Furstenberg, Jr. & Andrew J. Cherlin, Divided Families: What Happens to Children When Parents Part 45–56 (1991) (noting that it is "hardly ever disputed" that "[d]ivorce often results in a sharp drop in the standard of living of children and their custodial parents" and citing studies reaching that conclusion).

[108] Lindey & Parley, supra note 19, § 110.70(2)(b) ("[A]lmost any clause addressing the possibility of divorce was invalid, and could invalidate a whole agreement.").

[109] Id. ("More recent cases . . . have at least examined the factual elements more closely before applying the rule."); see also, e.g., In re Marriage of Noghrey, 215 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985) (invalidating agreement providing that upon divorce, the husband would give the wife a house and $500,000 (or one-half of the family assets) on the basis that the agreement encouraged the wife to seek a divorce).

property acquired before and after marriage on the grounds that it encouraged the husband to exit the marriage.[110] The court found that pursuant to the terms of the contract, the husband "tended to gain by bringing about a separation" because "he would be relieved of all obligation to support [his wife]; he would retain all property acquired during the marriage; and [she] could make no claim against him."[111] In other words, during the marriage, the husband had a duty to support his wife by sharing his earnings and property with her. By virtue of the couple's premarital agreement, however, the husband could terminate his obligation to support his wife through divorce. If the husband's duty of support had continued notwithstanding the divorce, then the husband's calculus in deciding to seek a divorce would have been significantly different. The court therefore found the contract to be "against public policy, tending to invite and encourage a separation, unreasonable, inequitable and void."[112]

Not all agreements alter the spouses' divorce incentives to such a significant degree. In *Matlock v. Matlock*, a case decided within a few years of *Ranney*, the same court upheld an antenuptial agreement against the wife's argument that it encouraged divorce.[113] In rejecting the wife's claim, the court noted that the contract applied only to the spouses' separate property, so it did not wholly eliminate the husband's obligation to support his wife following dissolution of the marriage.[114] Stated differently, the agreement did not deviate from the state's default property distribution and alimony laws to such an extent that it would have affected either spouse's decision to seek a divorce.

While the courts in *Matlock*, *Ranney*, and *Bassler* explicitly acknowledged the state's interest in the substantive terms of premarital agreements, some courts stretch other doctrines in an effort to protect the state's interest without expressly acknowledging that interest. An example of that tendency can be seen by comparing two recent New Hampshire cases, *In re Estate of Hollett*[115] and *In re*

[110] 548 P.2d 736, 738 (Kan. 1976).
[111] Id. at 738.
[112] Id.
[113] 576 P.2d 629, 633–34 (Kan. 1978).
[114] Id. at 634.
[115] 834 A.2d 348 (N.H. 2003).

Yannalfo.[116] Both cases involved premarital agreements signed on the eve of the wedding. The *Yannalfo* court upheld the contract, while the *Hollett* court voided the agreement. The *Hollett* court invalidated the agreement under the doctrine of voluntariness, even though the wife had been represented by an independent counsel who had successfully negotiated for her a larger share of the estate.[117] In contrast, the wife in *Yannalfo* did not have a lawyer, and there was no evidence of active negotiations, yet the court found that the contract had been entered into voluntarily.[118]

Given the presence of independent counsel in *Hollett* and the absence of independent counsel in *Yannalfo*, the court's classification of the former case as involuntary and the latter as voluntary seems strained. Similarly, concerns about the parties' rationality cannot account for the disparate results as between *Yannalfo* and *Hollett*. When parties represented by independent counsel carefully consider the terms of the agreement and accurately foresee the enforcement circumstances, as was the case in *Hollett*,[119] even proponents of rationality-based review would suggest that courts should enforce the agreement.[120] Although the court might have found the *Yannalfo* contract less one-sided, the active negotiations in *Hollett* suggest that the wife was sufficiently aware of the deal she was making. If anything, it would appear that the wife in *Hollett* was in a better position to make a rational decision and deliberately traded off the risk of future loss against the present value of the marriage.

One might better account for the disparity in outcomes on the basis that the *Yannalfo* and *Hollett* courts were imposing a type of state-interest review without explicit acknowledgement. The most salient factual difference that may explain the disparate results is that the agreement in *Yannalfo* merely cut off the wife's interest in

[116] 794 A.2d 795 (N.H. 2002).
[117] 834 A.2d at 350, 354.
[118] 794 A.2d at 796–98.
[119] 834 A.2d at 350.
[120] As explained by Professor Eisenberg, one of the leading scholars on the subject of cognitive limitations, courts should enforce one-sided agreements if "it is established that the parties had a specific and well-thought-through intention that the provision apply in a scenario like the one that actually occurred." Eisenberg, supra note 24, at 235.

the first $70,000 of equity in the marital home,[121] while the *Hollett* agreement entirely eliminated the wife's alimony and drastically reduced her rights to her husband's estate upon his death.[122] On the facts of *Yannalfo*, the enforcement of the contested agreement did not implicate the state's interest in avoiding public charges because the distribution scheme did not render the wife destitute. Similarly, the *Yannalfo* contract did not significantly undermine the state's interest in discouraging divorce because the contract did not alter either spouse's support obligations following dissolution. Finally, the *Yannalfo* agreement was so limited in its terms that any effect it would have had on the parties' incentives to invest in their marriage would have been so slight as to not implicate the state's interests in civic virtue and child rearing.

As distinguished from the contract in *Yannalfo*, the *Hollett* agreement substantially altered the wife's rights to alimony and her husband's property. Upon divorce or the death of her spouse, the wife would fail to realize the full value of her contributions to her husband's prosperity. By restricting her right to share in her partner's estate, the contract created a financial incentive for the husband to exit the marriage, undermining the state's interest in discouraging divorce. Additionally, the agreement likely deterred the wife from investing in the joint prosperity of the marriage at the expense of her own financial solvency, implicating the state's interest in preserving traditional marital incentives such as sharing and cooperation.

Highlighting relevant case examples, the foregoing Part argued that the state's interest in marriage provides persuasive justification for courts to review the terms of premarital agreements. In this capacity, the state-interest rationale can be contrasted with the more debatable theory of bounded rationality critiqued in Part II. Although determining which justification is more persuasive might be of academic interest, one might reasonably wonder what practical difference such a determination makes. After all, if both theories lead to the same result—namely, the substantive review of premarital contracts—why does it matter how we arrive at that outcome? The next Part answers that question by examining the

[121] *Yannalfo*, 794 A.2d at 796.
[122] *Hollett*, 834 A.2d at 352.

practical consequences of adhering to one justification rather than the other.

IV. PRACTICAL CONSEQUENCES OF CHOOSING A JUSTIFICATION

How we justify the substantive review of premarital agreements matters for three reasons. First, assuming that the rationality-based justification controls, where this rationale does not persuade courts to deviate from their normal practice of ignoring the substance of contracts, they may bypass substantive review altogether, failing to defend important state interests. Intuitively, state-interest review is not subject to this limitation. Second, even where courts *are* persuaded by the bounded-rationality theory and analyze premarital contracts to determine whether the parties made a rational decision, the limited scope of their inquiry effectively leaves the independent state interest in marriage unprotected. Again, by its very definition, state-interest review safeguards the state's interest in the various functions served by the institution of marriage. Finally, adoption of a rationality-based justification creates a regime marked by a lack of predictability and certainty. In contrast, adherence to a state-interest rationale enables courts and lawmakers to craft bright-line, prospective rules for enforcing premarital contracts.

A. The Rationality Justification Leads to the Wholesale Rejection of Substantive Review

Several courts have completely or virtually eliminated the substantive review of premarital agreements.[123] Most of these courts

[123] The elimination of substantive review usually does not include the elimination of the standard contract doctrine of unconscionability, which typically asks whether, at the time of contracting, one party lacked a meaningful choice and the terms unreasonably favored the other party. Rather, "substantive review" indicates some kind of rationality or state-interest review *beyond* the standard doctrine of unconscionability. See, e.g., Baker v. Baker, 622 So. 2d 541, 543–44 (Fl. Dist. Ct. App. 1993) (judging the conscionability of a premarital agreement at the time of contracting). But see Banks v. Evans, 64 S.W.3d 746, 751–52 (Ark. 2002) (refusing to address the wife's claim of unconscionability because she had waived her right to disclosure of her husband's assets); Unif. Premarital Agreement Act § 6(a), 9C U.L.A. 39 (2001) (mandating review of voluntary premarital agreements for unconscionability at time of contracting only if the party challenging the agreement did not receive or waive disclosure, or have independent knowledge, of the other party's financial assets).

have done so because they reject the cognitive-limits rationale for substantive review without fully addressing the state-interest theory as an independent justification.

The most notable case to completely abandon substantive review of premarital agreements is the Pennsylvania case of *Simeone v. Simeone*.[124] There, the court enforced a contract that capped the wife's support payments at $25,000. Responding to the wife's argument that the agreement was unreasonable, the court held that courts should not evaluate the substantive terms of premarital agreements.[125] In denying the request for substantive review, the court assumed the rationality of contracting parties, thus rejecting the bounded-rationality justification for examining content:

> [E]veryone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their prenuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.[126]

The refusal by courts to substantively review premarital contracts would not be problematic if there were no other reason to examine substantive content. As discussed in Part III, however, the argument in favor of substantive review based on the limits of parties' cognition obscures a more fundamental concern underlying premarital agreements—the state's interest in marriage.

The recent case of *Mabus v. Mabus*[127] illustrates how the rejection of the limited-cognition rationale can compromise important state interests. In *Mabus*, the Supreme Court of Mississippi upheld a contract limiting the wife's spousal support after eleven years of

[124] 581 A.2d 162, 165–67 (Pa. 1990).
[125] Id. at 166.
[126] Id.
[127] 890 So. 2d 806 (Miss. 2003).

marriage and the birth of two children.[128] Notwithstanding the wife's abandonment of her career to raise the children, the court declined to review the substantive terms of the agreement.[129] Although the court did not explain its rationale as thoroughly as the *Simeone* court, it implicitly rejected the bounded-rationality justification for substantive review by echoing the *Simeone* court's assertion that by entering into premarital contracts, parties voluntarily assume certain risks: "'[I]t is not now and never has been the function of this Court to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated.'"[130] The court continued, "All contracts involve some type of risk; this agreement was no different."[131] In its eagerness to endorse that freedom-of-contract principle, the court failed to address how the premarital agreement would affect the state's interest in the welfare of the couple's children.

While the *Simeone* and *Mabus* courts completely bypassed substantive review because they rejected the bounded-rationality justification, other courts have engaged in a limited state-interest review based on the state's interest in preventing spouses from becoming public charges upon divorce, but have declined to perform any further substantive review. The most prevalent example of this type of treatment is found in the Uniform Premarital Agreement Act ("UPAA"), which authorizes courts to invalidate an agreement limiting alimony to the extent that the limitation would cause one spouse to become eligible for public support.[132] Where the contract in question does not render either spouse a public charge, though, these courts refrain from reviewing the agreement's terms, leaving vulnerable the state's other interests in marriage. Similar to the *Simeone* and *Mabus* courts, courts applying a limited state-interest review tend to justify their rejection of further substantive review by refuting the underlying premises of a rationality-based analysis.

[128] Id. at 823.
[129] Id. at 819, 823.
[130] Id. at 819 (quoting Estate of Hensley v. Estate of Hensley, 524 So. 2d 325, 328 (Miss. 1998)).
[131] Id. at 821.
[132] Unif. Premarital Agreement Act § 6(b), 9C U.L.A. 39 (2001).

For instance, in the case of *Newman v. Newman*, the Supreme Court of Colorado limited its substantive review of the challenged antenuptial contract to ensuring that neither spouse would require public support.[133] The court based its decision to bypass further substantive review on its rejection of the premise that the parties' limited cognition would impede their decisionmaking abilities:

> Although their relation is confidential and fiduciary at the time of the execution of the antenuptial agreement, compelling full disclosure and good faith, there is an assumption in the law that the parties are essentially able to act independently and rationally concerning their present and future property interests in relation to their prospective marriage.
>
> . . . .
>
> Thus, although the agreement might after the fact be considered imprudent, this court will not undo what the parties to the antenuptial agreement have freely agreed to.[134]

The Indiana case of *Justus v. Justus*[135] similarly demonstrates the tendency of courts that reject the limited-cognition justification for substantive review to ignore valid state interests. In *Justus*, the premarital agreement at issue required the husband to pay a predetermined amount of alimony based on the number of years of marriage.[136] At the time of contracting, the husband had a net worth of over $31 million, but subsequently suffered severe financial setbacks and declared bankruptcy. The husband sought to avoid his obligation to pay the agreed-upon amount of alimony on the basis that it was no longer "fair" due to the circumstances at the time of divorce.[137]

Although the *Justus* court acknowledged that the agreement would be void if it had the effect of forcing the husband onto public support, the court did not address the argument that the state might have an interest in the terms of premarital contracts beyond

[133] 653 P.2d 728, 735 (Colo. 1982).
[134] Id. at 733–34.
[135] 581 N.E.2d 1265 (Ind. Ct. App. 1992).
[136] Id. at 1267.
[137] Id. at 1272.

its desire to avoid public charges. For example, by predetermining the amount of the wife's alimony, the agreement may have implicated traditional marital incentives to the extent that it discouraged the wife from contributing to her husband's prosperity during the marriage. After all, pursuant to the agreement, her entitlement would neither increase nor decrease with her husband's fortune. Instead of acknowledging this state interest, however, the court justified its decision rejecting the husband's challenge by attacking bounded-rationality theory as the underlying basis for substantive review:

> By setting out a specific amount of "alimony," Husband accepted the risk that the stated amount might represent a larger share of his net worth at the time for performance than was the case at the time of execution. The drastic financial reversal that Husband suffered was a foreseeable event. Even if it were not foreseeable, Husband would not be relieved from his obligations.[138]

Thus, the first practical drawback to the rationality justification for the substantive review of premarital agreements is that a number of courts simply reject it. In consequently bypassing substantive review, these courts compromise valid state interests. As the following Section demonstrates, however, even courts that accept the rationality justification, and therefore engage in substantive review, tend to enforce prenuptial agreements that compromise the state's interest in marriage.

B. Substantive Review Based on the Rationality Justification Fails to Protect Important State Interests

A court that reviews an antenuptial agreement to protect against irrationality will examine different facts and often reach a different result than a court that reviews the contract to protect the state's interest in marriage. On the one hand, concern for the parties' ability to make rational decisions will inspire a court to look for signs that the parties carefully considered the contract's terms and accurately foresaw any changed circumstances. On the other hand, concern for the state's interest in marriage will compel a court to analyze how the contract affects the parties' abilities to provide for

[138] Id. at 1275.

their basic needs following divorce, their willingness to invest in their relationship during the marriage, and their incentives to dissolve the union. As a consequence, a rationality-focused court allows parties to "contract away" valid state interests, provided, of course, that the contract resulted from a rational decisionmaking process. Conversely, a state-interest-minded court limits the legal capacity of parties to contract with respect to their relationships.

The aforementioned case of *Hardee v. Hardee* demonstrates the potential for rationality-based review to leave state marital interests unprotected.[139] Revealing its concern that parties to premarital agreements are unable to make rational decisions for themselves, the *Hardee* court examined the facts and circumstances existing at the time of the couple's divorce to ensure that they had not changed in an unforeseeable way.[140] Although the wife suffered from diabetes and sponge kidney disease at the time of divorce, the court enforced the wife's waiver of alimony because the contract expressly contemplated the wife's deteriorating health condition.[141] In so holding, the court overturned the trial court, which voided the contract in an attempt to protect the state's interest in not having to support the wife. The lower court found that the wife would become a public charge in the absence of a substantial award of alimony and therefore awarded the wife permanent alimony notwithstanding the agreement.[142] In contrast, by focusing on the fairness and rationality of the deal between the husband and wife, the state supreme court empowered the couple to bargain away the state's interest in the marriage.

The 2001 case of *Blue v. Blue* similarly demonstrates courts' willingness to subordinate the state's interest in marriage to the presumptively rational decisionmaking of spouses.[143] There, the Court of Appeals of Kentucky upheld the couple's premarital agreement providing that property acquired by either spouse after marriage would not be subject to distribution upon divorce.[144] The court arrived at its holding notwithstanding the fact that the value of the

[139] 585 S.E.2d 501 (S.C. 2003).
[140] Id. at 504–05.
[141] Id. at 505.
[142] See id. at 502.
[143] 60 S.W.3d 585 (Ky. Ct. App. 2001).
[144] Id. at 586.

husband's interest in a scrap material company had increased from approximately five million to seventy-seven million dollars during the course of the eleven-year marriage.[145] Recognizing the bounded rationality of parties entering into premarital contracts, the court adopted a foreseeability approach to analyze the substantive fairness of the agreement at the time of divorce:

> [P]arties entering into a prenuptial agreement at the beginning of a marriage are sometimes not as likely to exercise the fullest degree of vigilance in protecting their respective interests. Often there will be many years between the execution of a prenuptial agreement and the time of its enforcement. It is, therefore, appropriate that the court review such agreements at the time of termination of the marriage . . . to ensure that facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable.
>
> . . . .
>
> . . . [T]he emphasis of this inquiry relates to the reasonable expectations of the parties as contemplated by the agreement.[146]

With respect to the Blues, the court found that the increase in the husband's wealth was not beyond the contemplation of the parties. In particular, the agreement specifically stated that neither spouse would have the right to share in the appreciation of the other's separate property. Consequently, the wife "took the risk that [her husband's] assets could appreciate substantially."[147]

The *Blue* court's analysis demonstrates how the rationality approach tends to ignore important state interests. Although an increase in the husband's wealth might not have been beyond the parties' contemplation at the time of contracting, the court failed to recognize that an agreement waiving the right to an equitable distribution of marital property alters the incentives spouses face during a marriage. In particular, such a contract might compel a rational spouse to invest in his or her own financial security at the expense of the joint prosperity of the marriage. As discussed in

[145] Id. at 586–87.
[146] Id. at 589–90 (citation omitted).
[147] Id. at 591.

Section III.B, this shift in incentives implicates the state's interest in child rearing and fostering civic virtues.[148]

Like the approaches taken by the *Hardee* and *Blue* courts, the method of substantive review recommended by the *Principles* demonstrates how the rationality-based justification may leave the state's interest in marriage unprotected. Although the *Principles* recommends a type of substantive review that would include an assessment of the agreement's effect on the couple's children, under the *Principles*' approach, a court would engage in the substantive review of a premarital contract only if a triggering event had occurred during the course of the marriage.[149] For example, the terms of a premarital agreement presumably implicate the state's interest in the welfare of children regardless of whether those children were born before or after execution of the agreement,[150] but the *Principles* requires substantive review only in the latter scenario.[151] Accordingly, it would appear that the drafters were concerned primarily with the limitations on parties' ability to assess accurately the benefits and costs of entering into a premarital contract. The reporter's comments, which emphasize the susceptibility of marital partners to "cognitive flaws" and elaborate on the particular decisionmaking errors that are relevant to the premarital context, support this reading.[152] The comments note:

> [A] contract that alters or abrogates a legal duty that one person otherwise has to another is differently situated than an agreement between persons who, absent an agreement, have no claims on one another's property or income. The first agreement sets aside an otherwise applicable public policy while the second does not. Even when the law allows parties to contract out of the otherwise applicable rules, it may reasonably impose a more demanding test of contractual integrity on agreements that do so, as compared to those that do not. The purpose is to ensure that an agreement that replaces the standard of justice that the law

[148] See supra text accompanying notes 92–95.
[149] Principles, supra note 52, § 7.05(2)(a)–(c).
[150] See discussion supra Section III.B.
[151] Principles, supra note 52, § 7.05(2)(b).
[152] Id. § 7.05 cmt. b.

> would otherwise apply to the parties' situation in fact reflects the mature and considered judgment of both parties.[153]

The reporter's comments recognize the public policy interest in marriage, but subordinate that interest to the parties' rational decisionmaking.

C. The Rationality Justification Leads to Unpredictability

Beyond leaving important state interests unprotected, another shortcoming inherent in a model of substantive review based on the notion of cognitive limits is the lack of certainty and predictability such a model generates in the administration of the law. Even assuming that behavioral decision theory justifies rationality review, it provides courts with little direction as to how to conduct the rationality review. Indeed, Professor Eisenberg urges courts to adopt a "full-blooded second-look approach" to reviewing the terms of premarital agreements,[154] stating that "the court must decide whether, in light of all relevant factors, the parties were likely to have had a mature understanding that the agreement would apply even in the kind of marriage scenario that actually occurred."[155] Although this standard leaves room for parties to indicate expressly in their contract the various contingencies over which they bargained, most individuals entering into premarital agreements will not know that they have to be so specific. If they are familiar with general contract principles, they will assume that the court will enforce the agreement even if it does not expressly list all foreseeable possibilities.

Assuming arguendo that the parties know that a court might overturn an agreement that does not specify possible contingencies, they will nevertheless be uncertain at the time of contracting as to what changed circumstances the court may consider as grounds for invalidation. The most certainty the parties can hope for is in listing a number of common changed circumstances such as the birth of children or the illness of one of the spouses. Though the parties may intend for the contract to allocate all future risks, however, it will be impossible for them to articulate *all* of those

[153] Id. § 7.05 cmt. c.
[154] Eisenberg, supra note 24, at 256.
[155] Id. at 258.

risks in their agreement. And, even if the parties do include a list of the most common changed circumstances and happen to experience one of those changes, a court might find that the parties did not have a "mature understanding" of how the change would affect them.[156]

As compared to the foreseeability approach adopted by some courts to correct for cognitive limitations, the adequacy-of-consideration method detailed in Section II.A even more drastically undermines predictability. Under that approach, the court will review the agreement's terms even if no change in circumstances has occurred. Indeed, even if the parties accurately predict their future circumstances and draft their contract accordingly, the court will void the agreement if it appears too one-sided at the time of enforcement. In determining whether they can rely on their contract, the parties essentially have to venture a guess as to the amount of consideration a court will deem adequate to support their waivers of marital rights.

One could imagine a more prospective, bright-line rule designed to protect parties to premarital agreements from the possibility of irrational decisions. The *Principles*, which requires substantive review after marriages of a certain length regardless of the presence of changed circumstances, comes close to this approach.[157] To further increase predictability, though, a state would have to categorically deny enforcement of any prenuptial agreement after a specified number of years of marriage. Such a method is difficult to justify based on behavioral decision theory as that theory does not posit that *every* decision will be irrational. Some parties have realistic assumptions about the future and deliberately allocate the risk of uncertainty according to their agreement. A bright-line approach, therefore, would have to be justified by the further premise that the efficiency gain from increasing predictability and voiding irrational long-term agreements outweighs the efficiency loss from

[156] For example, the *Principles* lays out a scenario in which the parties' agreement expressly states that it will govern in the event that one of them becomes seriously ill. Principles, supra note 52, § 7.05 cmt. b, illus. 3. When a court is asked to enforce the agreement after one of the spouses becomes sick, however, the *Principles* suggests that the court may deem it invalid because the parties' consent to such a provision might have been the result of their bounded rationality. Id.

[157] Id. § 7.05(2)(a).

voiding rational long-term contracts. Given the general weaknesses of behavioral decision theory and the well-established belief in freedom of contract, a state likely would not accept such a premise.[158]

As distinguished from the bounded-rationality model, adherence to the state-interest approach creates a predictable, rules-based regime. The various concerns implicated under the broad heading of the state's interest in marriage—child rearing, civic virtues, and family welfare—are all capable of definition before parties enter into an agreement. To illustrate, suppose a state has a strong public policy against divorce and in favor of marital investment because the state believes that children raised in two-parent homes with substantial parental attention become more productive and better-functioning adults. That state might adopt a rule that parties may not deviate from a fifty-fifty allocation of marital property by more than five percentage points.[159]

Even a state's interest in spousal welfare and children's standard of living, which might depend on events that unfold during the marriage, could be formulated in terms that would enable parties to know the boundaries of their contractual freedom. For example, a UPAA-type rule that modifies limitations on spousal support as necessary to keep a spouse off of public support gives the parties warning that their premarital agreement will be unenforceable to that extent. Although this rule depends on the parties' future financial circumstances and is therefore not fully prospective, it gives parties more certainty about the enforcement of their agreement than a rationality-based inquiry. At any given moment in their marriage, the parties should be able to calculate their financial situations, look up their state's welfare guidelines, and determine whether a court would enforce their antenuptial contract. In con-

[158] This analysis might also explain why courts have not adopted bright-line rules regarding the enforceability of liquidated damages. Professor Eisenberg argues that courts' refusal to enforce some liquidated damages clauses can be explained by the limits of cognition. See Eisenberg, supra note 24, at 225. Although that explanation might be accurate, the fact that courts do not void all liquidated damages clauses indicates that they do not think that the efficiency gain from adopting such a bright-line rule would outweigh the efficiency loss from voiding rational allocations of risk.

[159] See Developments in the Law—The Law of Marriage and Family, supra note 28, at 2097 (advocating "a presumption of unenforceability for antenuptial agreements that deviate materially from a fifty-fifty division of marital property").

trast, under a rationality-based approach, the parties would have no way of knowing whether a court would find their exchange fair or their current circumstances foreseeable until those questions are actually litigated.

In sum, advocates of the substantive review of premarital contracts should premise their argument on the state's interest in marriage, not only because that theory provides stronger support for their position, but also because the choice of justifications has significant practical consequences. When confronted with the limited-cognition theory as the only justification for substantive review, several courts have demonstrated a reluctance to abandon standard freedom-of-contract principles. Moreover, the rationality-based justification results in a type of substantive review that both fails to protect important state interests and creates uncertainty and unpredictability for contracting parties.

CONCLUSION

This Note has argued that courts should base their substantive review of premarital agreements on the state's interest in marriage rather than perceived cognitive limitations. The controversial evidence that would tend to support substantive review to protect parties from irrational decisionmaking points in conflicting directions. Moreover, to the extent that courts are concerned about the bounded rationality of parties, they can protect individuals by imposing heightened procedural requirements on premarital agreements, such as waiting periods, mandatory counseling, and independent legal advice. Such safeguards would ensure that parties rationally analyze the risks inherit in their contracts without unnecessarily infringing on their freedom to contract.

Courts, however, should continue to monitor the terms of premarital contracts to protect the state's interest in marriage. The state's interest in marriage stems from the public purposes marriage serves—child rearing, inculcating civic virtues, and providing welfare services. Antenuptial agreements governing alimony and property division implicate the state's interest because such agreements might leave one spouse a public charge, reduce the standard of living of children, and alter incentives to invest in and exit from marriage.

As is the case with any matter of public policy, a single, correct policy point does not exist. Rather, each state is likely to have its own policy preferences—as is currently reflected in the wide variation in default rules for property division upon divorce.[160] This Note, therefore, does not contend that courts should impose any particular set of substantive restrictions on premarital agreements. Instead, the argument is that state legislatures should adopt prospective rules setting the outer boundaries within which parties can alter default divorce rules. In the absence of such legislatively adopted rules, courts should develop standards for substantive review based on the state's policy preferences as expressed in its default rules governing property division and alimony following divorce.

This shift in focus would counter two recent trends: (1) the movement towards rationality review of premarital agreements and (2) the movement away from any kind of substantive review. With respect to the first trend, as demonstrated by the *Principles* and recent decisions like *Hardee*,[161] the cognitive limitations argument for substantive review has gained adherents among legislatures and courts. Practically, a shift to a state-interest approach would mean that courts would focus less on what the parties to the agreement gave and received as consideration and what circumstances the parties could have foreseen. Instead, courts would examine whether the contract altered the legal consequences of marriage and divorce to such a degree and in such a way that it compromised the state's interest in marriage.

As to the second trend, state-interest substantive review would also stem the tide towards not reviewing the substantive terms of premarital agreements. This Note has argued that courts should

[160] Compare Mo. Rev. Stat. § 452.330(1) (2000) (allowing courts to consider the "conduct of the parties during the marriage" when dividing marital property), with Del. Code Ann. tit. 13, § 1513 (1999) (prohibiting courts from considering fault when dividing marital property); compare Del. Code. Ann. tit. 13, § 1513 (1999) (instructing courts to also consider the divorcing spouses' financial needs), with Or. Rev. Stat. § 107.105 (2003 & Supp. 2004) (instructing courts to consider the respective contributions of the divorcing spouses); compare Mass. Gen. Laws Ann. ch. 208, § 34 (West 1998) (allowing courts to divide all property owned by the spouses regardless of when or how it was acquired), with Md. Code Ann., Fam. Law §§ 8-201(e), 8-205 (1999 & Supp. 2004) (giving courts power to divide only the property accumulated by the spouses during marriage).

[161] 585 S.E.2d 501.

substantively review a premarital agreement even if the parties entered into the agreement voluntarily and with full disclosure of each other's assets. Even the most knowing and voluntary waiver of a spouse's marital rights cannot adequately protect the state's interest.

Reviewing premarital agreements to protect the state's interest in marriage is not a novel idea. The recognition that such contracts implicate the state's interest harks back to the pre-1970 cases in which courts refused to enforce premarital agreements contemplating divorce.[162] Those decisions were based on two rationales: first, that prenuptial agreements encouraged divorce; and second, that such contracts altered the state-imposed incidents of marriage. In the rush toward no-fault divorce, many courts and legislatures prematurely dismissed the first rationale while completely neglecting the second, and courts began enforcing premarital agreements without regard to the state's interest. The ensuing move towards rationality review introduced an unwarranted and unpredictable element of judicial scrutiny while continuing to ignore the state's interest in marriage. Inserting the state's interest into the substantive review of premarital agreements would return the focus of judicial scrutiny to where it belongs.

[162] See, e.g., Reynolds v. Reynolds, 123 S.E.2d 115, 132–33 (Ga. 1961); French v. McAnarney, 195 N.E. 714, 715–16 (Mass. 1935); Cumming v. Cumming, 102 S.E. at 574–76.