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A Right to Marry?

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The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

— U. S. Supreme Court, *Loving v. Virginia* (1967)¹

[T]here are many persons for whom it is not enough that the inequality has no just or legitimate defence; they require to be told what express advantage would be obtained by abolishing it.

To which let me first answer, the advantage of having the most universal and pervading of all human relations regulated by justice instead of injustice.

— John Stuart Mill, *The Subjection of Women*²

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1. 388 U.S. 1, 12 (1967).

2. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 86 (Susan B. Okin ed., Hackett Publ'ing Co. 1988) (1869). Mill is speaking here of making marriage equal between the sexes, but the point applies, I believe, to the case at hand.

I

WHAT IS MARRIAGE?

Marriage is both ubiquitous and central. All across our country, in every region, every social class, every race and ethnicity, every religion or non-religion, people get married. For many if not most people, moreover, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to—and keep on aspiring to, again and again, even when their experience has been far from happy. To be told, “You cannot get married” is thus to be excluded from one of the defining rituals of the American life cycle.

The keys to the kingdom of the married might have been held only by private citizens—religious bodies and their leaders, families, other parts of civil society. So it has been in many societies throughout history. In the United States, however, as in most modern nations, government currently holds those keys. Even if people have been married by their church or religious group, they are not married in the sense that really counts for social and political purposes unless they have been granted a marriage license by the state. Unlike private actors, however, the state doesn’t have complete freedom to decide who may and may not marry. The state’s involvement raises fundamental issues about equality of political and civic standing.

Same-sex marriage is currently one of the most divisive political issues in our nation. In November 2008, Californians passed Proposition 8, a referendum that removed the right to marry from same-sex couples who had been granted that right by the courts.³ That same day, California voters passed sweeping legislation protecting animals from cruelty in the factory farming industry,⁴ thus showing that they are neither rigid traditionalists nor indifferent to suffering. And yet, a majority saw fit to deny some of their fellow citizens a fundamental right, in a way that was felt by the same-sex community as deeply degrading and humiliating. In May 2009, the California Supreme Court upheld the referendum, although it did not annul the marriages that had been legally performed before its passage.⁵ The whole question is bound to come before voters again soon. Analyzing this controversy may help us understand what is happening in our country, and where we may be able to go from here.

Before we approach the issue of same-sex marriage, we must define marriage. But marriage, it soon becomes evident, is no single thing. It is plural in both content and meaning. The institution of marriage houses and supports

3. See ELECTIONS DIV., OFFICE OF SEC’Y OF STATE, STATEMENT OF VOTE: NOVEMBER 2008 GENERAL ELECTION 6 (2008), http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf (official declaration of approval of Proposition 8, eliminates right of same-sex couples to marry).

4. *Id.* (official declaration of approval of Proposition 2, Standards for Confining Farm Animals).

5. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child rearing, and mutual responsibility. Marriages can exist without each of these. (We have always granted marriage licenses to sterile people, people too old to have children, irresponsible people, and people incapable of love and friendship. Impotence, lack of interest in sex, and refusal to allow intercourse may count as grounds of divorce, but they don't preclude marriage.) Marriages can exist even in cases where none of these is present, though such marriages are probably unhappy. Each of these important aspects of human life, in turn, can exist outside of marriage, and they can even exist all together outside of marriage, as is evident from the fact that many unmarried couples live lives of intimacy, friendship, and mutual responsibility, and have and raise children (though these children, deemed illegitimate, used to suffer, and in some cases still do suffer, social and legal disadvantages). Nonetheless, when people ask themselves what the content of marriage is, they typically think of this cluster of things.

Nor is the meaning of marriage single. Marriage has, first, a civil rights aspect. Married people get a lot of government benefits that the unmarried usually do not get: favorable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; the spousal privilege exemption when giving testimony in court; and yet others.

Marriage has, second, an expressive aspect. When people get married, they typically make a statement of love and commitment in front of witnesses. Most people who get married view that statement as a very important part of their lives. Being able to make it, and to make it freely (not under duress) is considered a definitive aspect of adult human freedom. The statement made by the marrying couple is usually seen as involving an answering statement on the part of society: we declare our love and commitment, and society, in response, recognizes and dignifies that commitment.

Marriage has, finally, a religious aspect. For many people, a marriage is not valid unless it has been solemnized by the relevant authorities in their religion, according to the rules of the religion.

Government currently plays a key role in all three aspects of marriage. It confers and administers benefits. It seems, at least, to operate as an agent of recognition or the granting of dignity. And it forms alliances with religious bodies. Clergy are always among those entitled to perform legally binding marriages. Religions may refuse to marry people who are eligible for state marriage, and they may also agree to marry people who are ineligible for state marriage. But much of the officially sanctioned marrying currently done in the United States is done on religious premises by religious personnel. What they are solemnizing (when there is a license granted by the state) is, however, not only a religious ritual, but also a public rite of passage, the entry into a privileged civic status.

To get this privileged treatment under law people do not have to show that they are good people. Convicted felons, divorced parents who fail to pay child support, people with a record of domestic violence or emotional abuse, delinquent taxpayers, drug abusers, rapists, murderers, racists, antisemites, other bigots—all can marry if they choose, and indeed are held to have a fundamental constitutional right to do so,⁶ so long as they want to marry someone of the opposite sex. Although some religions urge premarital counseling and refuse to marry people who seem ill-prepared for marriage, the state does not turn such people away. The most casual whim may become a marriage with no impediment but the time it takes to get a license. Moreover, the rules about who gets to perform a marriage impose no impediment. One may become ordained over the Internet as a minister of the Universal Life Church or some other Internet-based religion.⁷ Some states encourage friends to perform marriages by permitting any person to do so a maximum of once a year.⁸

Nor do people even have to lead a sexual lifestyle of the type the majority prefers in order to get married. Pedophiles, sadists, masochists, sodomites, transsexuals—all can get married by the state, so long as they marry someone of the opposite sex.

Given this pervasive lack of scrutiny, it seems odd to suggest that in marrying people the state affirmatively expresses its approval, or confers dignity. There is indeed something odd about the mixture of casualness and solemnity with which the state behaves as a marrying agent. Nonetheless, it seems to most people that the state, by giving a marriage license, expresses approval, and, by withholding it, disapproval.

What is the same-sex marriage debate about? It is not really about whether same-sex relationships can involve the content of marriage: few would deny that gays and lesbians are capable of friendship, intimacy, “meet and happy conversation,”⁹ and mutual responsibility, or that they can have and raise children (whether their own from a previous marriage, or children created within their relationship by surrogacy or artificial insemination, or adopted children). Certainly none would deny that gays and lesbians are capable of sexual intimacy, because that is typically the focus of animus toward same-sex relationships.

Nor is the debate, at least currently, about the civil aspects of marriage: we are moving toward a consensus that same-sex couples and opposite-sex

6. As we'll see in Part V, *infra* pp. 690–94, this has been explicitly established for prison inmates and noncustodial parents who fail to pay child support, perhaps the most extreme cases, in that states actually sought to deny marriage to these classes of people.

7. Welcome to the Universal Life Church Ministry, <http://www.themonastery.org> (last visited Apr. 7, 2010).

8. Sheri & Bob Stritof, *Applying for a Marriage License in Massachusetts*, ABOUT.COM, <http://marriage.about.com/cs/mariagelicens/p/massachusetts.htm> (last visited Apr. 7, 2010).

9. JOHN MILTON, *THE DOCTRINE AND DISCIPLINE OF DIVORCE* 27 (1820); *see also infra* text accompanying note 23.

couples ought to enjoy equal civil rights. The leaders of both major political parties appeared to endorse this position during the 2008 presidential campaign,¹⁰ although not all Republicans have fully endorsed a regime of civil unions and thus far only a handful of states have legalized civil unions with material privileges equivalent to those of marriage.¹¹ (As I shall shortly discuss, however, the Defense of Marriage Act means that no unions or marriages for same-sex couples are fully equal materially to opposite-sex marriage.)

Finally, the debate is not about the religious aspects of marriage. Most of the major religions have their own internal debates, frequently heated, over the status of same-sex unions.¹² Some denominations—Unitarian Universalism and Reform and Conservative Judaism—have endorsed marriage for same-sex couples. Others, such as the Protestant Episcopal Church of the United States, have taken a friendly position toward these unions. Presbyterians, Lutherans, and Methodists are divided on the issue at present, and American Roman Catholics, both lay and clergy, are divided, although the Church hierarchy is strongly opposed. Still other religions (e.g., Southern Baptists, the Church of Jesus Christ of Latter-day Saints) seem strongly opposed as a body to the recognition of such unions. There is no single “religious” position on these unions in America today, but the heat of those debates is, typically, internal and denominational; it is not that heat that spills over into the public realm. Under any state of the law, moreover, particular religions would be free to marry or not to marry same-sex couples.

The public debate, instead, is primarily about marriage’s expressive aspects. It is here that the difference between civil unions and marriage resides, and it is this aspect that is at issue when same-sex couples reject the compromise offer of civil unions, demanding nothing less than marriage. It is because marriage is taken to confer some kind of dignity or public approval on the parties and their union that the exclusion of gays and lesbians from marriage is seen (even when they are entitled to civil unions conferring the material benefits of marriage) as stigmatizing and degrading, raising issues of equal civic standing and equal protection of the laws.

The expressive dimension of marriage raises two distinct questions. First, assuming that granting a marriage license expresses a type of public approval, should the state be in the business of expressing favor for, or dignifying, some unions rather than others? In other words, are there any good public reasons for

10. See, e.g., Ed Hornick, *Obama, McCain Talk Issues at Pastor’s Forum*, CNN, Aug. 17, 2008, <http://www.cnn.com/2008/POLITICS/08/16/warren.forum/>; Allie Martin, *Spreading Obama’s Wealth to Pro-Life Ministries*, ONENewsNow.com, Jan. 14, 2009, <http://www.onenewsnow.com/Election2008/Default.aspx?id>.

11. See, e.g., Christine Nelson, Nat’l Conference of State Legs., *Civil Unions and Domestic Partnership Statutes*, <http://www.ncsl.org/Default.aspx?TabId=4244> (last visited Apr. 7, 2010).

12. See generally PEW FORUM ON RELIGION & PUB. LIFE, *RELIGIOUS GROUPS’ OFFICIAL POSITIONS ON SAME-SEX MARRIAGE* (2010), <http://pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx>.

the state to be in the marriage business at all, rather than the civil union business? Second, if there are such good reasons, what are the arguments for and against admitting same-sex couples to marital status, and how should we think about them?

It is very important to keep these two questions distinct. It is possible to argue, and I shall argue, that, so long as the state is in the marrying business, concerns with equality require it to offer marriage to same-sex couples—but that it would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering civil unions to both same- and opposite-sex couples.

An important point about federalism must be borne in mind. No state on its own may create unions for gays and lesbians, whether called “civil unions” or “marriages,” that are fully equal to the opposite-sex marriages because the federal Defense of Marriage Act (DOMA)¹³ announces that other states are not required to recognize these unions and they will not be recognized by the federal government. This is both a material and an expressive problem. DOMA is still being defended, more than tepidly, by the Justice Department in the Obama Administration,¹⁴ despite President Obama’s campaign statement that he would seek its repeal.¹⁵

II

MARRIAGE IN HISTORY: THE MYTH OF THE GOLDEN AGE

When people talk about the institution of marriage these days, they often wax nostalgic. They think and often say that until very recently, marriage used to be a lifelong commitment by one man and one woman, sanctified by God and the state for the purposes of companionship and the rearing of children. People lived by those rules and were happy. Typical, if somewhat rhetorical, is this statement by Senator Robert Byrd of West Virginia during the debates over DOMA:

Mr. President, throughout the annals of human experience, in dozens of civilizations and cultures of varying value systems, humanity has discovered that the permanent relationship between men and women is a keystone to the stability, strength, and health of human society—a relationship worthy of legal recognition and judicial protection.¹⁶

13. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)).

14. See, e.g., Brief for Defendant United States of America, *Smelt v. United States*, No. SACV09-00286 (C.D. Cal. Aug. 24, 2009).

15. See, e.g., *Obama Writes Open Letter to America’s Gays*, WONKETTE.COM, <http://wonkette.com/362023/obama-writes-open-letter-to-americas-gays> (last visited Apr. 7, 2010) (“I support the complete repeal of the Defense of Marriage Act . . .”).

16. 142 Cong. Rec. S10109 (Sept. 10, 1996) (statement of Sen. Byrd).

We used to live in that golden age of marital purity, the story goes. Now, however, things are falling apart. Divorce is ubiquitous. Children are growing up without sufficient guidance, support, and love, while adults live for selfish pleasure alone. We need to come to our senses and return to the rules that used to make us all happy.

Like most Golden Age myths, this one contains a core of truth: commitment and responsibility are under strain in our culture, and too many children are indeed growing up without enough economic or emotional support. We can't think well about how to solve this problem, however, unless we first recognize the flaws in this mythic depiction of our own past. Like all fantasies of purity, this one masks a reality that is far more varied, complex, and, often, troubled.

To begin with, Senator Byrd's idea that lifelong monogamous marriage has been the norm throughout human history is just mistaken. Many societies have embraced various forms of polygamy, informal or common-law marriage, and sequential monogamy. People who base their ethical norms on the Bible too rarely take note of the fact that the society depicted in the Old Testament is polygamous. Numerous patriarchs are depicted as having plural wives, and many also had socially approved concubines. Even the wording of the Ten Commandments in their second occurrence in *Deuteronomy* presupposes polygamy: the commandment not to covet a neighbor's spouse is addressed only to men, whereas the commandment not to covet the neighbor's house and other property is addressed to both men and women: an unmarried woman could covet another woman's husband, because she could become that man's additional wife.¹⁷

In many other ancient societies (and some modern ones) sex outside marriage was or is a routine matter: in ancient Greece, for example, married men routinely had socially approved sexual relationships with prostitutes (male and female), and, with some restrictions, with younger male citizens.¹⁸ One reason for this custom was that women were secluded and uneducated, thus not able to share a male's political and intellectual aspirations. People in many times and places have linked erotic desire to friendship and shared pursuits.

If we turn to Republican Rome, a society more like our own in basing marriage on an ideal of love and companionship,¹⁹ we find that this very ideal gave rise to widespread divorce, as both women and men sought a partner with whom they could be happy and share a common life. We hardly find a major

17. *Deuteronomy* 5:6–21.

18. See generally DAVID HALPERIN, *The Democratic Body: Prostitution and Citizenship in Classical Athens*, in ONE HUNDRED YEARS OF HOMOSEXUALITY: AND OTHER ESSAYS ON GREEK LOVE 88 (1990).

19. See SUSAN TREGGIARI, *ROMAN MARRIAGE* (1991). Her study of grave inscriptions, *inter alia*, gives rich evidence of what people sought in marriage and thought good to say about their marriages.

Roman figure, male or female, who did not marry at least twice. Moreover, Roman marriages were typically not monogamous on the side of the male, who was expected to have sexual relations with both males and females of lower status (slaves, prostitutes); even if wives at times protested, they understood the practice as typical and ubiquitous.²⁰ These Romans are often admired (and rightly so, I think) as good citizens, people who believed in civic virtue and tried hard to run a government based on that commitment. Certainly for the founders of the United States the Roman Republic was a key source of both political norms and personal heroes.²¹ And yet these heroes did not live in a marital Eden.

In fact, there is no better antidote to the myth of marital purity than to read Cicero's account of the unhappy marriage of his brother Quintus to Pomponia Attica, the sister of his best friend Atticus. Through his narrative (however biased in his brother's favor) we get a glimpse of something so familiar that it is difficult to believe that it all happened around 50 BC. Cicero is out in the country on one of his estates, and his brother has (it seems) dragged his unwilling wife away from the city to spend a week on the farm—with a brother-in-law who doesn't like her and who, despite his undoubted greatness, is more than a little self-obsessed.

When we arrived there Quintus said in the kindest way, "Pomponia, will you ask the women in, and I'll get the boys?" Both what he said and his intention and manner were perfectly pleasant, at least it seemed so to me. Pomponia however answered in our hearing, "I am a guest here myself." . . . Quintus said to me, "There! This is the sort of thing I have to put up with every day." . . . I myself was quite shocked. Her words and manner were so gratuitously rude. [They all go in to lunch, except for Pomponia, who goes straight to her room; Quintus has some food sent up to her, which she refuses.] In a word, I felt my brother could not have been more forbearing nor your sister ruder. And I have left out a number of things that annoyed me at the time more than they did Quintus. [The following day, Quintus has a talk with his brother.] He told me that Pomponia had refused to sleep with him, and that her attitude when he left the house was just as I had seen it the day before. Well, you can tell her for me that her whole conduct was lacking in sympathy. [The marriage lasted six more unhappy years and then ended in divorce.]²²

20. See the excellent treatment of marital norms in CRAIG ARTHUR WILLIAMS, *ROMAN HOMOSEXUALITY* (1999).

21. See, e.g., GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 103 (1993).

22. Letter from Marcus Tullius Cicero to Atticus (May 5 or 6, 50 BCE), in 3 *CICERO'S LETTERS TO ATTICUS* (D.R. Shackleton Bailey ed. & trans., 1968) (numbered as letter 94). I base my version on the wonderful translation of D. R. Shackleton Bailey for the Loeb Classical Library, though with some alterations. The word I translate "sympathy" is *humanitas*, for Cicero a key virtue, involving empathetic understanding and delicacy of manner.

Often we dismiss the customs of ancient times (e.g., Biblical polygamy) as so distant from our own that no comparison makes sense. The shock of seeing our own face in the mirror of Cicero's intimate narrative reminds us that human beings always have a hard time sustaining love and even friendship, that bad temper, incompatibility, and divergent desires are no invention of the sexual revolution. Certainly they are not caused by the recognition of same-sex marriage. We've always lived in a postlapsarian world.

The rise of divorce in the modern era, moreover, was spurred not by a hatred of marriage, but, far more, by a high conception of what marriage ought to be. It's not just that people began to think that women had a right to divorce on grounds of bodily cruelty, and that divorce of that sort was a good thing. It's also that Christians began insisting—just like those ancient Romans—that marriage was about much more than procreation and sexual relations. John Milton's famous defense of divorce on grounds of incompatibility emphasizes "meet and happy conversation"²³ as the central goal of marriage, and notes that marriage ought to fulfill not simply bodily drives, but also the "intellectual and innocent desire"²⁴ that leads people to want to talk a lot to each other. People are entitled to demand this from their marriages, he argues, and entitled to divorce if they do not find it. If we adopt Milton's attractive view, we should not see divorce as expressing (necessarily) a falling away from high moral ideals, but rather as expressing an unwillingness to put up with a relationship that does not fulfill, or at least seriously pursue, high ideals.

In our own nation, as historians of marriage emphasize, a social norm of monogamous marriage was salient from colonial times onward.²⁵ The norm, however, like most norms in all times and places, was not the same as the reality. Studying the reality of marital discord and separation is very difficult, because many if not most broken marriages were not formally terminated by divorce. Given that divorce, until rather recently, was hard to obtain, and given that America offered so much space for relocation and the reinvention of self, many individuals, both male and female, simply moved away and started life somewhere else. A man who showed up with a "wife" in tow was not likely to encounter a background check to find out whether he had ever been legally divorced from a former spouse; such background checks across state lines would have been virtually impossible. Similarly, a woman who showed up calling herself "the Widow Jones" would not be asked to show her husband's death certificate before she could form a new relationship and marry. Men left for the West during the Gold Rush and didn't return. Women moved to cities and set up boarding houses, or took jobs in factories. The cases of separation

23. MILTON, *supra* note 9, at 27.

24. *Id.* at 55.

25. In this section, I draw primarily on NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000) and HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000).

and attempted remarriage that did end up in court are the tip of a vast uncharted iceberg. If, as historian Hendrik Hartog concludes about the nineteenth century, “Marital mobility marked American legal and constitutional life,”²⁶ it marked, far more, the daily lives of Americans who did not litigate their separations.

One vivid example of this daily reality is the life of Andrew Jackson’s wife, Rachel.²⁷ She and her first husband separated and moved to different states. She met Jackson and married him—but she was still legally married to someone else. Because she “married” a man soon to be famous, her story ended up in the news. If she hadn’t been with a famous man, nobody would have noticed.

Insofar as monogamy was reality, we should never forget that it rested on the disenfranchisement of women. Indeed, the rise of divorce in recent years is probably connected to women’s social, economic, and political empowerment more than to any other single factor. When women had no rights, no marketable skills, and hence no exit options, they often had to put up with bad marriages, with adultery, with neglect, even with domestic violence. When women are able to leave, they demand a better deal. This simple economic explanation for the rise of divorce—combined with Milton’s emphasis on people’s need for emotional attunement and conversation—is much more powerful than the idea of a fall from ethical purity in explaining how we’ve moved from where we were then to where we are today. But if such factors are salient, denial of marriage to same-sex couples is hardly the way to address them.

Throughout the nineteenth and early twentieth centuries, a distinctive feature of American marriage has been the strategic use of federalism. Marriage laws have always been state laws (despite recurrent attempts to legislate a national law of marriage and divorce).²⁸ But states have typically used that power to compete with one another, and marriage quickly became a scene of competition. Long before Nevada became famous as a divorce haven, with its short residency requirement, other states assumed that role.²⁹ For quite a stretch of time, Indiana (surprisingly) was the divorce haven for couples fleeing the strict requirements of states such as New York (one of the strictest until extremely recently) and Wisconsin. Other havens at various times were Connecticut and South Dakota. The reasons why a state liberalized its laws were complex, but at least some of them were economic: while couples lived out the residency requirement, they would spend money in the state.³⁰ Other states kept their laws strict to attract more religious or conservative citizens. In short, marriage laws “became public packages of goods and services that

26. HARTOG, *supra* note 25, at 19.

27. *See, e.g.*, COTT *supra* note 25, at 36–40.

28. *See id.* at 18–19.

29. *See* HARTOG, *supra* note 25, at 14 (discussing the proliferation of “divorce mill[s]” in states around the country during the nineteenth century).

30. *Id.*

competed against the public goods of other jurisdictions for the loyalty and the tax dollars of a mobile citizenry.”³¹

What we’re seeing today, as six states (Massachusetts, Connecticut, Iowa, Maine, New Hampshire, and, briefly, California) have legalized same-sex marriage, as others (Vermont, California, and Connecticut before the recent court decision) have offered civil unions with marriage-like benefits, and as yet another (New York) has announced that, although it will not perform same-sex marriages, it will recognize those legally contracted in other jurisdictions, is the same sort of competitive process with, however, one important difference. DOMA has made it clear that states need not give legal recognition to marriages legally contracted elsewhere.³² That was not the case with competing divorce regimes: once legally divorced in some other U.S. state, the parties were considered divorced in their own.

The anomalous situation of same-sex marriage—in which a couple may be legally married in one state but unmarried in another—has given rise to a host of legal quandaries. Suppose David and Larry marry in Massachusetts. Larry then goes on a business trip to Chicago and falls gravely ill there. Does David have the right to make critical medical decisions about his care? Suppose, instead, David goes to Texas and is arrested for a crime there. Larry is served a subpoena to testify to crucial information. Does Larry have the right to refuse to testify on grounds of spousal immunity? These and countless other conflict-of-laws issues await resolution.³³ Federalism encourages experimentation. In the absence of mutual recognition, however, it leaves the law with a long and difficult agenda.

Although the situation of non-recognition faced by same-sex couples does not parallel the history of our varying divorce regimes, it does have a major historical precedent. States that had laws against miscegenation refused to recognize marriages between blacks and whites legally contracted elsewhere, and even criminalized those marriages. The Supreme Court case that brought about the overturning of the anti-miscegenation laws, *Loving v. Virginia*,³⁴ was such a case. Mildred Jeter (African-American) and Richard Loving (white) got married in Washington, D.C., in 1958. Their marriage was not recognized as legal in their home state of Virginia; in fact, interracial marriage was a felony in the state. When they returned home they were arrested in the middle of the night in their own bedroom.³⁵ Their marriage certificate was hanging on the

31. *Id.*

32. 28 U.S.C. § 1738C (2006).

33. See ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006).

34. 388 U.S. 1 (1967).

35. See Mildred Loving, Remarks Prepared for the 40th Anniversary of the *Loving v. Virginia* Announcement (June 12, 2007), available at <http://lesbianlife.about.com/od/gaymarriage/information/a/Loving.htm>.

wall over their bed. The state prosecuted them, and they were convicted. The judge then told them either to leave the state for twenty-five years or to spend one year in jail. They left, but began the litigation that led to the landmark 1967 decision.

Richard Loving was killed in a car accident in 1975; Mildred survived until May 2008. Looking back at her case on its fortieth anniversary in 2007, she issued a rare public statement, saying that she saw the struggle she and Richard waged as similar to the struggle of same-sex couples today:

My generation was bitterly divided over something that should have been so clear and right. The majority believed . . . that it was God's plan to keep people apart, and that government should discriminate against people in love. But . . . [t]he older generation's fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry.³⁶

She appears to have a strong argument. Let us consider, however, the arguments on the other side.

III

THE PANIC OVER SAME-SEX MARRIAGE: ARGUMENTS, CONTAMINATION FEARS

As we examine the arguments against same-sex marriage, we must keep two questions firmly in mind. First, does each argument really justify legal restriction of same-sex marriage, or only represent some people's attitudes of moral and religious disapproval? We live in a country in which people have a wide range of different religious beliefs, and we agree in respecting the space within which people pursue those beliefs. We do not, however, agree that these beliefs, by themselves, are sufficient grounds for legal regulation.

Typically, we understand that some arguments (including some but not all moral arguments) are public arguments bearing on the lives of all citizens in a decent society, and others are intra-religious arguments. Thus, observant Jews abhor the eating of pork, but few if any would think that this religiously grounded abhorrence is a reason to make the eating of pork illegal. The prohibition rests on religious texts that not all citizens embrace, and it cannot be translated into a public argument that people of all religions can accept.

Similarly in this case, we must ask whether the arguments against same-

36. *Id.*

sex marriage are expressed in a neutral and sharable language, or only in a sectarian doctrinal language. If the arguments are moral rather than doctrinal, they fare better, but we still have to ask whether they are compatible with core values of a society dedicated to giving all citizens the equal protection of the laws. Many legal aspects of our history of racial and gender-based discrimination were defended by secular moral arguments, but that did not insulate them from constitutional scrutiny.

Second, we must ask whether each argument justifies its conclusion, or whether there is reason to see the argument as a rationalization of some deeper sort of anxiety or aversion (“animus,” to use the language of *Romer v. Evans*).³⁷

The first and most widespread objection to same-sex marriage is that it is immoral and unnatural. Similar arguments were widespread in the anti-miscegenation debate, and, in both cases, these arguments are typically made in a sectarian and doctrinal way, referring to religious texts. (Anti-miscegenation judges, for example, referred to the will of God in arguing that racial mixing is unnatural.)³⁸ It is difficult to cast such arguments in a form that could be accepted by citizens whose religion teaches something different. They look like Jewish arguments against the eating of pork: good reasons for members of some religions not to engage in same-sex marriage, but not sufficient reasons for making them illegal in a pluralistic society.

A second objection, and perhaps the one that is most often heard from thoughtful people, insists that the main purpose of state-sanctified marriage is procreation and the rearing of children. Protecting an institution that serves these purposes is a legitimate public interest, and so there is a legitimate public interest in supporting potentially procreative marriages. Does this mean there is also a public interest in restricting marriage to only those cases where there may be procreation? This is less clear. We should all agree that the procreation, protection, and safe rearing of children are important public purposes.

It is not clear, however, that we have ever thought these important purposes best served by restricting marriage to the potentially procreative. If we ever did think like this, we certainly haven’t done anything about it. We have never limited marriage to the fertile, or even to those of an age to be fertile. It is very difficult, in terms of the state’s interest in procreation, to explain why the marriage of two heterosexual seventy-year olds should be permitted and the marriage of two men or two women should be forbidden—all the more since so many same-sex couples have and raise children. If a proposal were to introduce new restrictions—e.g., marriage only for the potentially procreative—it might make sense, though we’d want to know how the restriction helps the procreators. But it’s clear that few would support such a restriction. We are all

37. *Romer v. Evans*, 517 U.S. 620, 644 (1996).

38. *See, e.g., Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (1878); *State v. Gibson*, 36 Ind. 389, 404 (1871).

more likely to agree with Milton: marriage is about more than the merely biological. It is about companionship, conversation, a shared life.

As it stands then, the procreation argument looks two-faced, approving in heterosexuals what it refuses to tolerate in same-sex couples. If the arguer should add that sterile heterosexual marriages (or marriages of fertile heterosexuals who *choose* not to procreate or otherwise rear children) somehow support the efforts of the procreative, we can reply that gay and lesbian couples who don't have or raise children may support, similarly, the work of procreative couples.

Sometimes this argument is put a little differently: marriage is about the protection of children, and we know that children do best in a home with one father and one mother, so there is a legitimate public interest in supporting an institution that fulfills this purpose. Put this way, the argument again offers a legitimate public reason to favor and support heterosexual marriage, though it is less clear why it gives a reason to restrict same-sex marriage (and marriages of those too old to have children, or not desiring children). Its main problem, however, is with the facts. Again and again, psychological studies have shown that children do best when they have love and support, and it appears that two-parent households do better at that job than single-parent households. There is no evidence, however, that opposite-sex couples do better than same-sex couples. There is a widespread *feeling* that these results can't be right, that living in an immoral atmosphere must be bad for the child. But that feeling rests on the religious judgments of the first argument; when the well-being of children is assessed in a religiously neutral way, there is no difference.³⁹ Moreover, there is surely no evidence that the recognition of same-sex marriage would diminish the number of couples who choose traditional marriage and bring children up within that institution. So even if one had reason to think the traditional marriage setting best for children, the prohibition of same-sex marriage does nothing to promote child welfare, so construed.

A third argument is that by conferring state approval on something that many people believe to be evil, same-sex marriage will force them to "bless" or approve of it, thus violating their conscience. This argument was recently made in an influential way by Charles Fried in *Modern Liberty*.⁴⁰ Fried, who supports an end to sodomy laws and expresses considerable sympathy with same-sex couples, still thinks that marriage goes too far because of this idea of enforced approval.⁴¹

39. On both of these questions, see the wide range of expert testimony summarized in *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Remarkably, even the state's own experts for the most part agreed that sexual orientation is not an important indicator of parental fitness.

40. See CHARLES FRIED, *MODERN LIBERTY AND THE LIMITATIONS OF GOVERNMENT* (2007).

41. For further discussion, see MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* ch. 2 (2010).

What, precisely, is the argument here? Fried does not suggest that the recognition of same-sex marriage would violate the Free Exercise Clause of the First Amendment—that would be an implausible position to take. Presumably, then, the position is that the state has a legitimate interest in banning same-sex marriage on the grounds that it offends many religious believers.

This argument contains many difficulties. First, it raises an Establishment Clause problem for, as we've seen, religions vary greatly in their attitude to same-sex marriage, and the state, following this argument, would be siding with one group of believers against another. More generally, there are a lot of things that a modern state does that people deeply dislike, often on religious grounds. Public education teaches things that many religious parents abhor (such as evolution and the equality of women); parents often choose home schooling for that reason. Public health regulations license butchers who cut up pigs for human consumption; Jews who observe the dietary laws don't want to be associated with this practice. But nobody believes that Jews have a right to ask the state to impose their religiously grounded preference on all citizens. The Old Order Amish don't want their children to attend public school past age fourteen, holding that such schooling is destructive of community. The state respects that choice—for Amish children—and the state even allows Amish children to be exempt from some generally applicable laws for reasons of religion.⁴² But nobody would dream of thinking that the Amish have a right to expect the state to make public schooling past age fourteen off-limits for all children.

Part of life within a pluralistic society that values the non-establishment of religion is an attitude of live and let live. Whenever we see a nation that does allow the imposition of religiously grounded preferences on all citizens—as with some Israeli laws limiting activity on the Sabbath, and as with laws in India banning cow slaughter—we see a nation with a religious establishment, *de jure* or *de facto*. We have chosen not to take that route, and for good reasons. To the extent that we choose workdays and holidays that coincide with the preferences of a religious majority, we bend over backwards to be sensitive to the difficulties this may create for minorities.⁴³

A fourth argument, again appealing to a legitimate public purpose, focuses on the difficulties that traditional marriage seems to be facing in our society. Pointing to rising divorce rates and evidence that children are being damaged by lack of parental support, people say that we need to defend traditional marriage, not to undermine it by opening the institution to those who don't have any concern for its traditional purposes. We could begin by contesting the characterization of same-sex couples. In large numbers, they do have and raise children. Marriage, for them as for others parents, provides a clear framework

42. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

43. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

of entitlements and responsibilities, as well as security, legitimacy, and social standing for their children. In fact, the states that have legalized same-sex marriage, Massachusetts and Connecticut, have among the lowest divorce rates in the nation, and the Massachusetts evidence shows that the rate has not risen as a result of the legalization.⁴⁴

We might also pause before granting that an increase in the divorce rate signals social degeneration. Often, in the past, women stayed married, enduring neglect and even abuse, because they had no marketable skills and no employment options. It is evident that one factor involved in modern divorce is the autonomy of women, and we should not lament the freedom of choice that increasing opportunities make available. We should also bear in mind the increased life span. By some calculations, marriages are not shorter today than they used to be, it's just that people live so much longer. Just as many people go through more than one career these days, so they may go through more than a single marriage. This may not always be bad. The human life span is shifting.

But let us concede, for the sake of argument, that there is a social problem. What, then, about the claim that legalizing same-sex marriage would undermine the effort to defend or protect traditional marriage? If society really wants to defend traditional marriage, as it surely is entitled to do (and probably ought to do), many policies suggest themselves: family and medical leave; drug and alcohol counseling on demand; generous support, in health policies, for marital counseling and mental health treatment; strengthening laws against domestic violence and enforcing them better; employment counseling and financial support for those under stress during the present economic crisis; and, of course, tighter enforcement of child-support laws. Such measures have a clear relationship to the stresses and strains facing traditional marriage. The prohibition of same-sex marriage does not. If we were to study all recent cases of heterosexual divorce, we would be unlikely to find even a single case in which the parties (or an objective onlooker) felt that their divorce was caused by the availability of marriage to same-sex couples. Divorce is usually an intimate personal matter bearing on the nature of the marital relationship. And it isn't even expensive to legalize same-sex marriage, so such a change wouldn't compete for resources with the others I've mentioned.

The objector at this point typically makes a further move. The very recognition of same-sex marriage on a par with traditional marriage demeans traditional marriage, makes it less valuable. What's being said, it seems, is something like this: if the Metropolitan Opera auditions started giving prizes to pop singers of the sort who sing on American Idol, this would contaminate the opera world. Similarly, including in the Hall of Fame baseball players who got their records by cheating on the drug rules would contaminate the Hall of

44. See, e.g., David Filipov, *5 Years Later, Views Shift Subtly on Gay Marriage*, BOSTON GLOBE, Nov. 17, 2008, at A1.

Fame, cheapening the real achievements of others. In general, the promiscuous recognition of low-level or non-serious contenders for an honor sullies the honor. This, I believe, is the sort of argument people are making when they assert that recognition of same-sex marriage defiles or undermines traditional marriage, when they talk about a “defense of marriage,” and so forth. During the debates over DOMA, and during the recent campaign in favor of Proposition 8 in California, many remarks in this vein were made. How should we evaluate this argument?

First of all, we may challenge it on the facts. Same-sex couples are not like B-grade singers or cheating athletes—or at least no more so than heterosexual couples. They want to get married for reasons very similar to those of heterosexuals: to express love and commitment; to gain religious sanctification for their union; to obtain a package of civil benefits; and, often, to have or raise children. Traditional marriage has its share of creeps, and there are same-sex creeps as well. But the existence of creeps among the heterosexuals has never stopped the state from marrying heterosexuals. Nor do people talk or think that way. I’ve never heard anyone say that the state’s willingness to marry Britney Spears or O. J. Simpson demeans or sullies their own marriage. But somehow, without even knowing anything about the character or intentions of the same-sex couple next door, they think their own marriages would be sullied by public recognition of that union.

If a proposal were to restrict marriage to worthy people who have passed a character test, it would at least be consistent, though few would support such an intrusive regime. What is clear is that those who argue that same-sex marriage would defile the institution of marriage don’t fret about the way in which unworthy or immoral heterosexuals could sully the institution of marriage or lower its value. Given this inconsistency, and given that they don’t want to allow marriage for gays and lesbians who have proven their good character, it is difficult to take this argument at face value. The idea that same-sex unions will sully traditional marriage therefore cannot be understood without moving to the terrain of disgust and contamination. The only distinction between unworthy heterosexuals and the class of gays and lesbians that can possibly explain the difference in people’s reaction is that the sex acts of the former do not disgust the majority, whereas the sex acts of the latter do. The thought must be that to associate traditional marriage with the sex acts of same-sex couples is to defile or contaminate it, in much the way that eating food served by a Dalit used to be taken by many people in India to contaminate the high-caste body. Nothing short of a primitive idea of stigma and taint can explain the widespread feeling that same-sex marriage defiles or contaminates straight marriage, while the marriages of immoral and sinful heterosexuals do not do so.

If the arguer should reply that marriage between two people of the same sex cannot result in the procreation of children, and so must be a kind of sham marriage, which insults or parodies, and thus demeans, the real sort of marriage—an argument often made⁴⁵—we are right back to the second argument. And we have to say, first, that marriage has never required procreation, not even in the history of the Roman Catholic Church, which has always been willing to marry sterile older couples. Those who insist so strongly on procreation do not feel sullied or demeaned or tainted by the presence next door of two opposite-sex seventy-year-olds newly married, nor by the presence of opposite-sex couples who publicly announce their intention never to have children. They do not try to get lawmakers to make such marriages illegal, and they neither say nor feel that such marriages are immoral or undermine their own. So the feeling of undermining, or demeaning, cannot honestly be explained by the point about children, and must be explained instead by other darker ideas.

If we're looking for a historical parallel to the anxieties associated with same-sex marriage, we can find it in the history of views about miscegenation. At the time of *Loving v. Virginia*, in 1967, sixteen states both prohibited and punished marriages across racial lines.⁴⁶ In Virginia, a typical example, such a marriage was a felony punishable by from one to five years in prison.⁴⁷ Like same-sex marriages, cross-racial unions were opposed with a variety of arguments, both political and theological. In hindsight, however, we can see that disgust was at work. Indeed, it did not hide its hand: the idea of racial purity was proudly proclaimed (e.g., in the Racial Integrity Act of 1924 in Virginia) and ideas of taint and contamination were ubiquitous. If people felt disgusted and contaminated by the thought that a black person had drunk from the same public drinking fountain, or gone swimming in the same public swimming pool, or used the same toilet, or dined from the same plates and glasses—all widely held Southern views—we can see that the thought of sex and marriage between black and white would have carried a powerful freight of revulsion. The Supreme Court concluded that such ideas of racial stigma were the only ideas that really supported those laws, whatever else was said: "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."⁴⁸

We should draw the same conclusion about the prohibition of same-sex marriage: irrational ideas of stigma and contamination, the sort of "animus" the

45. For example, the *New York Times* of October 14, 2008, the day I first drafted this paragraph, carried a letter from a laicized Roman Catholic priest to this effect. Frank Reardon, Letter to the Editor, *Same-Sex Marriage and the Rights of Citizenship*, N.Y. TIMES, Oct. 14, 2008, at A28.

46. 388 U.S. 1, 6 (1967).

47. *Id.* at 4.

48. *Id.* at 11.

Court recognized in *Romer*,⁴⁹ is a powerful force in its support. So thought the Supreme Court of Connecticut in October 2008, saying:

Beyond moral disapprobation, gay persons also face virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated. . . . Such visceral prejudice is reflected in the large number of hate crimes that are perpetrated against gay persons. . . . The irrational nature of the prejudice directed at gay persons, who “are ridiculed, ostracized, despised, demonized and condemned” merely for being who they are is entirely different in kind than the prejudice suffered by other groups that previously have been denied suspect or quasi-suspect class status. . . . This fact provides further reason to doubt that such prejudice soon can be eliminated and underscores the reality that gay persons face unique challenges to their political and social integration.⁵⁰

We have now seen the arguments against same-sex marriage. They do not seem particularly impressive. We have not seen any that would supply government with a “compelling” state interest, and it seems likely, given *Romer*, that these arguments, motivated by animus, fail even the rational basis test.

The argument in favor of same-sex marriage is straightforward: if two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity.

IV

WHAT IS THE “RIGHT TO MARRY”?

In our constitutional tradition, there is frequent talk of a “right to marry.”⁵¹ In *Loving v. Virginia*, the case that invalidated the laws against miscegenation, the Court calls marriage “one of the basic civil rights of man.”⁵² A later case, *Zablocki v. Redhail*, recognizes the right to marry as a fundamental right for Fourteenth Amendment purposes, apparently under the Equal Protection Clause; the Court states that “the right to marry is of fundamental importance for all individuals,” and continues with the observation that “the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.”⁵³ Before courts can sort out the issue of same-sex marriage, they have to try to figure out two

49. *Romer v. Evans*, 517 U.S. 620, 644 (1996).

50. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 445–46 (Conn. 2008) (internal citation omitted.).

51. Throughout this section I have learned a lot from the excellent examination of this question in Cass R. Sunstein, *The Right to Marry*, 26 *CARDOZO L. REV.* 2081 (2005); though I differ with its analysis in several ways, it lays out the issue with incisiveness and clarity.

52. 388 U.S. 1, 12 (1967) (internal quotations omitted).

53. *Zablocki v. Redhail*, 434 U.S. 374, 384, 386 (1978).

things. First, what does this “right to marry” mean? And second, who has it?

To answer the first challenge, defining the meaning of the “right to marry,” we start with the minimal understanding that it just means that if the state chooses to offer a particular package of expressive and/or civil benefits under the name “marriage,” it must make that package available to all who seek that status without discrimination (though here “all” will require further interpretation). *Loving* concerned Virginia’s exclusion of interracial couples from the institution; *Zablocki*, similarly, concerned Wisconsin’s exclusion of parents who could not show that they had met their child support obligations. Another pertinent early case, *Skinner v. Oklahoma*, invalidated a law mandating compulsory sterilization of the “habitual criminal,” saying that such a person, being cut off from “marriage and procreation,” would be “forever deprived of a basic liberty.”⁵⁴ A more recent case, *Turner v. Safley*, invalidated a Missouri prohibition on marriages of state prison inmates.⁵⁵ All the major cases, then, turn on the denial to a particular group of people of an institutional package already available to others.

Is the right to marry, then, merely a non-discrimination right? If so, the state is not required to offer marriages at all. It’s only that once the state does so, it must do so with an even hand. The talk of marriage as a “fundamental right,” together with the fact that most of these decisions mingle Equal Protection analysis with Due Process considerations, suggests, however, that something further is being said. What is it? Would it violate the Constitution if a state decided that it would offer only civil unions and drop the status of marriage, leaving that for religious and private bodies?

Put in terms of our three categories, then, does the “right to marry” obligate a state to offer a set of economic and civil benefits to married people? Does it obligate a state to confer the expressive benefits of dignity and status on certain unions by the use of the term “marriage”? And does it require the state to recognize or validate unions approved by religious bodies? Clearly, the answer to the third question is, and has always been, “no.” Many marriages that are approved by religious bodies are not approved by the state, as the case of same-sex marriage has long shown us, and nobody has thought it promising to contest these denials on constitutional grounds. The right to the free exercise of religion clearly does not require the state to approve whatever marriages a religious body approves.

It is also pretty clear that the “right to marry” does not obligate the state to offer any particular package of civil benefits to people who marry. This has repeatedly been said in cases dealing with the marriage right.

54. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

55. *Turner v. Safley*, 482 U.S. 78 (1987).

On the other side, however, it's pretty clear that the right in question is not simply a right to be treated like others, without group-based discrimination. Rather, the right to marry is frequently classified with fundamental personal liberties protected by the Due Process Clause of the Fourteenth Amendment. In *Meyer v. Nebraska*, for example, the Court says, that the liberty protected by that Clause

[w]ithout doubt, denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.⁵⁶

Loving similarly, states that “the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State,” grounding this conclusion in the Due Process Clause as well as the Equal Protection Clause.⁵⁷ *Zablocki* allows that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,”⁵⁸ but concludes that the Wisconsin child support law goes too far, violating the rights guaranteed by the Due Process Clause.⁵⁹ *Turner v. Safley*, similarly, determines that the restriction of prisoner marriages violates the Due Process Clause’s privacy right.⁶⁰ Significantly, in that same case the Court upheld a very tough restriction on the First Amendment right of correspondence by prisoners,⁶¹ so it was clear that the status of marriage as a fundamental liberty was being affirmed.

What does Due Process liberty mean in the context of a “right to marry”? Most of the cases concern attempts by the State to forbid a class of marriages. That sort of state interference with marriage is, apparently, unconstitutional on Due Process as well as Equal Protection grounds. So, if a state forbade everyone to marry, that would presumably be unconstitutional.

It is plausible to suggest that the denial of divorce, or excessively burdensome restrictions on divorce, could also come under constitutional scrutiny under this construction, and the Court has moved cautiously in this direction. In *Boddie v. Connecticut*, the Court held that the Due Process Clause prevents any state from denying divorce to indigents on the grounds that they cannot pay the filing fees.⁶² They supported their argument with reference to

56. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

57. 388 U.S. 1, 12 (1967).

58. 434 U.S. at 386.

59. *Id.* at 390–91.

60. *See* 482 U.S. at 98–99.

61. *Id.* at 91–93.

62. 401 U.S. 371, 374 (1971).

the “right to marry” cases and insisted that the “basic position” of marriage in our society, combined with the state’s monopoly of divorce, entailed that this financial impediment to divorce is unconstitutional. In *Sosna v. Iowa*,⁶³ however, the Court upheld Iowa’s residency requirement for divorce, challenged on both Due Process and Equal Protection grounds, as a reasonable exercise of state power.

Nowhere, however, has the Court held that a state must offer the expressive benefits of marriage. There appears to be no constitutional barrier to a decision of a state to get out of the expressive game altogether, going over to a regime of civil unions, or, even more extremely, to a regime of private contract for marriages, in which the state would play the same role it plays in any other contractual process.

Again, the issue turns on equality. What the cases consistently hold is that when the state does offer a status that has both civil benefits and expressive dignity, it must offer it with an even hand. This position, which I’ve called “minimal,” is not so minimal when one looks into it. Laws against miscegenation were in force in sixteen states at the time of *Loving*. The prison regulation in *Turner* seemed a very obvious part of the discretionary power of prison wardens.

In other words, marriage is a fundamental liberty right of individuals, and as such it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason. It’s like voting: there isn’t a constitutional right to vote, as some jobs can be filled by appointment. But the minute a state offers voting, it is unconstitutional to fence out a group of people from the exercise of the right. At this point, then, the second question arises: Who has this liberty/equality right to marry? And what reasons are strong enough to override it?

Who has the right? At one extreme, it seems clear that, under existing law, the state that offers marriage is not required to allow it to polygamous unions.⁶⁴ Whatever one thinks about the moral issues involved in polygamy, our constitutional tradition has upheld a law making polygamy criminal, so it is clear, at present, that polygamous unions do not have equal recognition. (The legal arguments against polygamy, however, are extremely weak. The primary state interest that is strong enough to justify legal restriction is an interest in the equality of the sexes, which would not tell against a regime of sex-equal polygamy.)

Regulations on incestuous unions have also typically been thought to be reasonable exercises of state power, although, here again, courts have defined the state interests very vaguely.⁶⁵ The interest in preventing child abuse would

63. 419 U.S. 393 (1975).

64. See 28 U.S.C. § 1783C (2006).

65. See, e.g., *Ohio v. Lowe*, 861 N.E.2d 512 (Ohio 2007).

justify a ban on most cases of parent-child incest, but it's unclear that there is any strong state interest that should block adult brothers and sisters from marrying. (The health risk involved is no greater than in many cases where marriage is permitted.) Nonetheless, it's clear that if a brother-sister couple challenged such a restriction today on Due Process/Equal Protection grounds, they would lose because the state's alleged (health) interest in forbidding such unions would prevail. (States vary a good deal in their definition of incest, and first cousins who want to get married may choose to move to another state, just as same-sex couples now do—with the difference that their marriage in the new state will automatically be recognized in the old.)⁶⁶

How should we think of these cases? Should we think that these individuals have a right to marry as they choose, but that the state has a countervailing interest that prevails? Or should we think that they don't have the right at all, given the nature of their choices? I incline to the former view. On this view, the state has to show that the law forbidding such unions really is supported by a strong public interest.

At the other extreme, it is also clear that the liberty and equality rights involved in the right to marry do not belong only to the potentially procreative. *Turner v. Safley* concerned marriages between inmates, most serving long terms, and outsiders—marriages that could not be consummated.⁶⁷ The case turned on the emotional support provided by marriage and its religious and spiritual significance. At one point the Court mentions, as an additional factor, that the inmate might someday be released and then the marriage might be consummated, but that is clearly not the basis of the holding.⁶⁸ Nor does any other case suggest that the elderly or the sterile do not have the right.

The best way of summarizing the tradition seems to be that all adults have a right to choose whom to marry. They have this right because of the emotional and personal significance of marriage, as well as its procreative potential. This right is fundamental for Due Process purposes, and it also has an equality dimension. No group of people may be fenced out of this right without an exceedingly strong state justification. It would seem that the best way to think about the cases of incest and polygamy is that in these cases the state can meet its burden, by showing that policy considerations outweigh the individual's right, although it is not impossible to imagine that these judgments might change over time. What, then, of people who seek to marry someone of the same sex?

66. Even in the extreme case of uncle and niece marriage, allowed for Jews in Rhode Island on religious grounds, the binding nature of the marriage outside that state has been established.

67. See 482 U.S. 78 (1987).

68. *Id.* at 96.

V

MASSACHUSETTS, CONNECTICUT, CALIFORNIA, AND IOWA: LEGAL ISSUES

This is the question with which government is currently wrestling. To date, courts in Massachusetts, California, Connecticut, and Iowa have ruled that marriage must be offered to same-sex couples,⁶⁹ although the passage of Proposition 8 in California means that same-sex marriage is no longer legal there. Meanwhile, Maine and New Hampshire have legalized same-sex marriage by legislative action. (Earlier, Hawaii's Supreme Court ruled that same-sex couples must be permitted to marry, but a constitutional amendment overturned that ruling.) Both California and Connecticut already had enacted legislatively a regime of civil unions that gave all the privileges and benefits of marriage (at least for in-state purposes), so the expressive issue was front and center.

Although the legislation in Maine and New Hampshire is of key significance, showing that democratic majorities can support same-sex marriage, let us focus on the four court decisions, since our topic is constitutional law. All four courts had to answer four questions (using not only federal constitutional law but also the text and tradition of their own state constitutions). First, will civil unions suffice, or is the status of marriage constitutionally compelled? Second, is this issue one of Due Process or Equal Protection, or a complex mixture of both? Third, in assessing the putative right against the countervailing claims of state interest, is sexual orientation a suspect classification for Equal Protection purposes? In other words, does a state forbidding such unions have to show a mere rational basis for the law, or a "compelling" state interest? Fourth, what interests might so qualify?

The four states give different answers to these questions, but there is a large measure of agreement. All agree that, as currently practiced, marriage is a status with a strong component of public dignity. Because of that unique status, it is fundamental to individual self-definition, autonomy, and the pursuit of happiness. The right to marry does not oblige states to offer any particular package of benefits, but it does oblige them to "protect the core elements of the family relationship from at least some types of improper interference by others."⁷⁰ The right does not belong only to the potentially procreative. (The Massachusetts court notes, for example, that people who cannot stir from their deathbed are still permitted to marry.)⁷¹

For all these expressive reasons, it seems that civil unions are a kind of

69. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by state constitutional amendment*, CAL. CONST., art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

70. *Marriage Cases*, 183 P.3d at 427.

71. *Goodridge*, 798 N.E. 2d at 961.

second-class status, lacking the affirmation and recognition characteristic of marriage. It is the difference of status—especially when understood against the history of discrimination against gays and lesbians—that makes the “separate-but-allegedly-equal” regimes of California and Massachusetts constitutionally problematic. As the California court put it, the right is not a right to a particular word, it is the right “to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families.”⁷² Three of the four courts draw on the miscegenation cases to make this point. (Iowa instead focuses on the history of Iowans’ strong opposition to all forms of legal inequality.)⁷³ The California court notes that if states formerly opposed to miscegenation had created a separate category called “transracial union,” while still denying interracial couples the status of “marriage,” we would easily see that it was no solution.⁷⁴

Three of the four courts invoke both Due Process and Equal Protection. (Iowa mentions liberty briefly, but the analysis dwells on equal protection alone.)⁷⁵ The Massachusetts court notes that the two guarantees frequently “overlap, as they do here.”⁷⁶ They all agree that the right to marry is an individual liberty right that also involves an equality component: a group of people can’t be fenced out of that right without a very strong governmental justification.

How strong? Here the states diverge. The Massachusetts court held that the denial of same-sex marriages fails to pass even the rational basis test.⁷⁷ In reaching that conclusion, it considers a variety of arguments against same-sex marriage, but concludes that they are so inconsistent with current practice (for example, the marriage-for-procreation argument flies in the face of the way marriage is in fact administered) or so nebulous (the argument that same-sex marriage will “trivialize or destroy” traditional marriage) that they do not meet even a minimal standard of review.

The California, Connecticut, and Iowa courts, by contrast, held that sexual orientation is a suspect classification. The Connecticut and Iowa courts, which have traditionally recognized three distinct levels of Equal Protection scrutiny, held that classifications involving sexual orientation, like classifications involving gender, require intermediate scrutiny (unlike classifications involving race, which get “strict scrutiny”).⁷⁸ The California court, which has traditionally had only two levels of review, held that sexual orientation

72. *Marriage Cases*, 183 P.3d at 400.

73. *See Varnum*, 763 N.W.2d at 876–77.

74. *Marriage Cases*, 183 P.3d at 435.

75. *See Varnum*, 763 N.W.2d at 876–77.

76. *Goodridge*, 798 N.E.2d at 953.

77. *Id.* at 960–66.

78. *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431–32 (Conn. 2008); *Varnum*, 763 N.W.2d at 895–96.

classifications require strict scrutiny, also analogizing sexual orientation to gender.⁷⁹

In the process, California and Connecticut argue explicitly against the thesis that sexual orientation discrimination is best understood as sex-based discrimination. Along with Iowa, they argue that sexual orientation itself is a suspect classification.⁸⁰ The two discussions of the criteria for suspect classification are very thorough—indeed, they mark an advance on the Supreme Court's discussions of this question. They come to the same conclusion: the central criteria for suspect classification are a *history of discrimination* and the *lack of relevance* of the characteristic to the social functions in question.⁸¹ Political powerlessness, which is significant only against a background of a history of discrimination, basically means that the group has not yet progressed far enough for us to be confident that the democratic process will treat it fairly. Immutability is relevant only as a sign that the characteristic is not germane to many functions, and, as the Iowa court usefully adds, as a proxy for the thought that the characteristic is a deep part of people's identity and sense of self, so that it would be unreasonable to ask them to change it.

A striking section of the Connecticut opinion concerns the particularly vicious and irrational form of the prejudice against gays and lesbians.⁸² Here the court recognizes the politics of disgust, in the passage I quoted at the end of section III, concluding that this revulsion is so powerful that it gives reason to think that democratic processes cannot possibly treat the claims of same-sex couples in an even-handed manner.⁸³ Only racial and religious groups, the court concludes, have ever suffered similarly violent hatred.⁸⁴

What state interests lie on the other side? The California, Connecticut, and Iowa opinions examine carefully the main contenders, concluding that none rises to the level of a compelling interest. Preserving tradition all by itself cannot be such an interest: as the Connecticut court writes, "the justification of 'tradition' does not explain the classification, it merely repeats it."⁸⁵ Nor can discrimination be justified simply on the grounds that legislators have strong convictions. None of the other proffered policy considerations (we have already identified the familiar ones, such as procreation) stand up as sufficiently strong.

These opinions will not convince everyone. Nor will all who like their conclusions, or even their reasoning, agree that it's good for courts to handle

79. *Marriage Cases*, 183 P.3d at 440.

80. I discuss these two different approaches to heightened scrutiny in my book *FROM DISGUST TO HUMANITY*, *supra* note 41, at ch. 4.

81. *Marriage Cases*, 183 P.3d at 442–43; *Kerrigan*, 957 A.2d at 426.

82. *See Kerrigan*, 957 A.2d at 446.

83. *See id.*

84. *Id.*

85. *Id.* at 478.

this issue, rather than democratic majorities. But the opinions, I believe, should convince a reasonable person that constitutional law, and therefore courts, have a legitimate role to play in this divisive area, at least sometimes. The reasoning of the opinions is respectful of opposing positions, detailed, and labored. (Indeed the extraordinary length of the opinions shows the justices bending over backward to address the opposition.) As legal reasoning it is extremely well done. In the process, the opinions, full of examples of prejudice, give good reason to think that democratic majorities cannot yet be trusted to put aside bigotry in order to confront this issue in a fair-minded way. That is exactly the sort of situation in which judges have a legitimate role to play, standing up for minorities whose fundamental rights have not been given a fair hearing in the majoritarian political process.

A significant aspect of the Iowa opinion is its sensitivity to the challenge to courts' authority.⁸⁶ The law that the court declared unconstitutional was passed rather recently, in 1998.⁸⁷ So in that sense the law had strong democratic credentials. Throughout the opinion, however, the court emphasizes more general aspects of Iowa's history that lead toward a concern for equality, even when the minority concerned is unpopular. The very first reported case of the Supreme Court of Iowa, they remind their readers, was one in which "we refused to treat a human being as property to enforce a contract for slavery"⁸⁸—seventeen years before the infamous *Dred Scott* decision,⁸⁹ in which the U.S. Supreme Court upheld the right to treat a person as mere property. "Iowa was also the first state in the [union] to admit a woman to the practice of law"—in 1869, four years before the U.S. Supreme Court upheld an Illinois law denying women the right to practice law.⁹⁰ "In each of those instances, our state approached a fork in the road toward fulfillment of our constitution's ideals and reaffirmed the 'absolute equality of all' persons before the law as 'the very foundation principle of our government.'"⁹¹ The current case is then compared to that illustrious sequence. What the court was suggesting was that Iowa's court decisions, though controversial (probably even in Iowa) at the time, now seem right, bold, and ahead of the nation. Their message clearly is: you see how these bold court decisions give you something to be proud of as Iowans—let us once again keep Iowa in the vanguard of the nation's progress toward equality.

Same-sex marriage is a good issue for federalism to handle, at least for a

86. See *Varnum v. Brien*, 763 N.W.2d 862, 876 (Iowa 2009).

87. Act of Apr. 15, 1998, 1998 Iowa Legis. Serv. 1099 (1998) (amending IOWA CODE § 595.2 (1998)).

88. *Varnum*, 763 N.W.2d at 877. (discussing *In re Ralph*, 1 Morris 1 (Iowa 1839)).

89. *Dred Scott v. Sandford*, 60 U.S. (18 How.) 393 (1856).

90. *Varnum*, 763 N.W.2d at 877 (citing *Admission of Women to the Bar*, 1 CHI. L. TIMES 76, 76 (1887)).

91. *Id.* (internal citations omitted).

while. While it raises fundamental issues of personal liberty and dignity, and thus is in principle suited for a sweeping Supreme Court judgment such as *Loving*, none can doubt that at the present time such a decision would further politicize the Court and further polarize public opinion. The existence of same-sex marriage, over time, is showing and will continue to show that the main objections are in error: nothing new and terrible will happen to heterosexuals, who will no doubt continue to face the same marital problems they had before. Children will continue to be at risk, but it will become clear that the risk comes from inadequate health care and economic support, among other factors, not from the same-sex couple living next door. As some states experiment with same-sex marriage, some others try civil unions, and some others recognize same-sex marriages legally contracted elsewhere, people will learn more about the institution, and democratic preferences are highly likely to change. None of that would have started, however, had at least some state courts not had the daring to read their constitutions with a courageous and unbiased eye.

VI

THE FUTURE OF MARRIAGE

What ought we to hope and work for, as a just future for families in our society? Should government continue to marry people at all? Should it drop the expressive dimension and simply offer civil-union packages? Should it back away from package deals entirely, in favor of a regime of disaggregated benefits and private contract? Such questions, the penumbra of any constitutional debate, require us to identify the vital rights and interests that need state protection and to think how to protect them without impermissibly infringing either equality or individual liberty. Our analysis of the constitutional issues does not dictate specific answers to these questions, but it does constrain the options we ought to consider.

Many structures demand serious consideration, ranging from a more inclusive version of marriage as we now know it to a regime of private contract with governmental protections for children and elderly dependents. If constructed in such a way as to protect equal access and the Due Process liberty rights that we have identified, both of these solutions would seem to pass constitutional muster. The choice of whether to adopt either of these structures, or both, or some mixed or intermediate option, will flow from policy considerations rather than from constitutional law.

A key question must be whether government should continue to offer a package of benefits similar to those offered in today's institution of marriage, or whether those benefits ought to be disaggregated and attached to a variety of distinct relationships. (For example, people who share a household might not be sexual partners, and committed sexual partners might have separate

finances.) In *The Trouble With Normal*,⁹² Michael Warner argues powerfully that it is important to rethink the bundle of benefits, asking whether a more disaggregated system makes more sense. He argues further that the current focus on marriage as a goal for same-sex couples distracts attention from this rethinking. I agree. Our analysis suggests that constitutional law does not require the state to offer any particular package of benefits. The disaggregated approach would pass constitutional muster if both equal access and Due Process liberty were sufficiently protected. There are many reasons to favor such disaggregated rethinking, both about the interests that need protection and about the different groups that might receive entitlements. The arguments for this conclusion, however, would carry us well beyond our present topic.

And what about the name “marriage”? It is so divisive today, and it is also so capricious in its meaning. (If it means dignity, why do we give it so easily to heterosexuals? If it doesn’t mean dignity, why are people so upset about the idea that it might be given to same-sex couples?) Might a good solution be for the state to back out of the expressive domain altogether, offering civil unions for both same-sex and opposite-sex couples? Our analysis suggests that the Constitution does not require the state to use this particular name rather than some other, although it does require the state to protect people’s (equal) liberty in setting up households. I personally favor the solution of leaving civil unions to the state and leaving marriage to religions and other private entities, but arguing for this position would carry me well beyond our legal topic.

These important policy questions lie beyond the boundaries of the book from which this Essay is drawn. To address them well, however, we need to understand the constraints the Constitution imposes, and it does impose strong constraints that have not yet been sufficiently acknowledged. We also need the same type of fearless scrutiny of history, values, and purposes that we find in the best examples of constitutional thought in this area.

The future of marriage looks, in one way, a lot like its past. People will continue to unite, form families, have children, and, sometimes, split up. What the Constitution dictates, however, is that whatever the state decides to do in this area will be done on a basis of equality. Government cannot exclude any group of citizens from the civil benefits or the expressive dignities of marriage without a compelling public interest. The full inclusion of same-sex couples is in one sense a large change, just as official recognition of interracial marriage was a large change, and just as the full inclusion of women and African-Americans as voters and citizens was a large change. On the other hand, those changes are best seen as a true realization of the promise contained in our constitutional guarantees. We should view this change in the same way. The politics of humanity asks us to stop viewing same-sex marriage as a source of

92. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–148 (1999).

taint or defilement to traditional marriage, but, instead, to understand the human purposes of those who seek single-sex marriage and the similarity of what they seek to that which straight people seek. When we think this way, the issue ought to look like the miscegenation issue: an exclusion we can no longer tolerate in a society pursuing equal respect and justice for all.