

Reply

Martha C. Nussbaum†

I am extremely grateful to the three commentators for their care in reading my work and for the very high quality of their comments. Because Pamela Karlan and Michael Warner discuss related questions, I shall reply to their comments in one section and devote a separate section to David Novak's very different arguments.

I

RESPONSE TO PAMELA KARLAN AND MICHAEL WARNER

Professors Karlan and Warner both address my contention that the state would do better to back out of the expressive domain altogether, leaving that domain to religious and private bodies, and should instead focus on providing civil unions, that is, arrangements concerned only with the civil aspect of marriage and its relation to public benefits and entitlements.

Karlan raises a fundamental issue with her discussion of “leveling down.”¹ I wholeheartedly agree with her analysis: the state may not remove the institution of marriage if its reason for so doing is to deprive same-sex couples of access to it. As Karlan knows, my reasons for wanting the state to back out of the expressive domain are utterly different, but it is clear that the reasons she envisages are more likely to have political clout in the United States today than the reasons I favor. So we clearly have to watch out for the possibility of a removal that stigmatizes and discriminates. I have already revised my book² in response to Karlan's important point, and I didn't revise the Essay accordingly only so that she would have the opportunity of stating it.

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1. Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 701–04 (2010).

2. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* (2010).

As for her second large point about the choice of marriage partner as an exercise of liberty,³ I agree with her, and have argued that the "right to marry" is best understood as having both Due Process and Equal Protection aspects. It is not, then, a pure anti-discrimination right. We should agree that the case law is extremely unclear concerning this Due Process component, so any interpretation is somewhat conjectural. But I believe the Due Process component is best understood as a right of non-interference: the state must not impede people from forming families and celebrating marriages. Thus conceptualized, the right to marry would be similar to the right to use contraception and the right to abortion: exercising the right would not require the state to maintain any institution or perform any ceremony.

It would appear (if we stick to those analogues) that the existence of such a non-interference right does not even require the state to subsidize the exercise of the right, at least as a matter of current law. The protection of the free exercise of religion has been held to give churches certain rights of self-governance,⁴ and this indirectly protects an institutional space within which marriages occur, but not in the name of the right to marry. So far as I can see, the case law does not support an interpretation of the Due Process component of the right to marry that would impede government from backing out of offering state-run marriages—so long as it did not declare marriage illegal or stop religious and other private bodies from marrying people.

The Supreme Court's decision in *Meyer v. Nebraska*⁵, which Karlan quotes, suggests another parallel: individuals, the passage states, have a right to "acquire useful knowledge."⁶ The Supreme Court, however, has consistently denied that public education must be offered.⁷ The "right to acquire useful knowledge" means, then, simply that the state may not impede people from educating themselves, and also that, should the state set up public schools, guarantees of equal access (under the Equal Protection Clause) apply. That is how I understand the "right to marry," and it is reasonable so to understand it, since this same passage of the *Meyer* opinion is the first important source for the existence of such a right.⁸

Now I turn to the social ideas discussed by Warner and, more briefly, by Karlan. There are really two questions before us. First, insofar as the state continues to offer a privileged status, would it be better for the state to back out of the expressive domain and conceive of that privileged status in civil terms only, offering civil unions rather than marriages? Second, should there be a

3. See Karlan, *supra* note 1, at 704–07.

4. See, e.g., *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 328 (1987).

5. 262 U.S. 390 (1923).

6. Karlan, *supra* note 1, at 706 (quoting *Meyer*, 265 U.S. at 399).

7. See *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

8. *Meyer*, 262 U.S. at 399.

single privileged status, or should we rethink the entire “bundle” approach, in which marriage, a single status, gets a whole package of heterogeneous civil benefits? In reviewing Warner’s *The Trouble With Normal*, I already recorded my admiration for his lucid discussion of these questions and my support for a disaggregated approach.⁹ Let me now return to the two questions, with Warner’s new discussion in view.

The present confusion over what “marriage” currently expresses provides a very strong reason for the state to move to civil unions. There is such a confusing mixture of casualness and profundity that at no point is it clear what is being expressed. At times the state suggests that marriage is a light-hearted matter—in the ease, for example, with which marriage licenses are made available. At other times—and I agree with Warner that *Kerrigan v. Commissioner of Public Health*¹⁰ is one such instance¹¹—it is treated as something that links us to the transcendent. The latter sort of religious language is utterly inappropriate in the public sphere,¹² so that would give us yet a further reason for wanting to uncouple the state from the expressive domain. What the state has business doing is offering a group of civil benefits, and this is best done—most appropriately and clearly done—using the language of civil unions. As Warner notes, *Kerrigan* elsewhere uses much more neutral and appropriate language: the state is protecting liberty rights belonging to persons qua persons.¹³ But protecting those liberty interests does not, as I’ve just argued in reply to Karlan, require the state to perform marriages.

If at some point a state does move over to civil unions, it is important to be sure that they are not defined more restrictively than marriage is currently defined. Some states, for example, have required for civil unions a shared domicile or shared finances, whereas they don’t have such requirements for the married.¹⁴ We have to watch out for this, since we would want the privileged status to be fair to people with a wide range of lifestyle choices.

What about the bundle? What we appear to need, in order to decide this question, is a calm, public rethinking of what the bundle is trying to achieve. We’d want to begin by asking what vital interests and entitlements need state protection. Adults have associational and decisional rights that include rights of sexual choice and privacy (freedom from intrusion on key decisions).

9. Martha C. Nussbaum, *Experiments in Living*, NEW REPUBLIC, Jan. 3, 2000, at 31, 31–36 (reviewing MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999)).

10. 957 A.2d 407, 416–17 (Conn. 2008).

11. See Michael Warner, *Response to Martha Nussbaum*, 98 CALIF. L. REV. 721 (2010).

12. See, e.g., MARTHA NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* 224–72 (2008) (discussing the establishment clause, school prayer, and public displays).

13. See Warner, *supra* note 11, at 726–27. (discussing *Kerrigan*, 957 A.2d. at 412–16).

14. See, e.g., Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005) (discussing domestic partnership regimes in New Jersey and California).

Vulnerable dependents—children and elderly people, people with severe illnesses and disabilities—are entitled to support and care. The most reasonable thing for our society to do would be to survey this range of diverse interests and ask what set of institutional arrangements would best protect them all. That sort of from-the-ground-up deliberation never happens, since we are always living in one concrete situation and moving toward another, equally concrete. Nonetheless, thinking more abstractly for a moment helps us determine what direction we might want to take.

One step a decent society can take is to guarantee the safety, bodily integrity, health, and education of children and the good treatment and care of elderly people and people with disabilities. Martha Fineman has concluded that this is the state's only legitimate interest in family support: all the rest should be left to a regime of private contract.¹⁵ As I shall describe at greater length in my reply to David Novak, I am not convinced; giving special status to families (e.g., giving them tax benefits and certain decisional rights in the area of medicine and health) has been a reasonably effective way of promoting the interests of children, though perhaps not of elderly people. I am therefore less opposed to the package of benefits than is Fineman, but I do agree that it needs a thorough rethinking. To use an example of Warner's from *The Trouble With Normal*, why should a brother and a sister who share a house not have the tax benefits associated with a shared domicile, as they do in France?¹⁶ At the very least, we should rethink the bundle as the French have to some extent done, seeing what makes sense and what might well be separated from the package. In matters of social reliance, it is probably wise to move slowly and incrementally, since people make sense of their lives in terms of the existing "package deal." As the case law makes very clear, nothing in the Constitution requires the state to offer any particular package of benefits, so there is no barrier to public deliberation on this issue.

How will this rethinking begin? One valuable catalyst, in our history, has been the role of social movements. The women's movement, for example, generated public debate and rethinking in the area of rape law, in the area of divorce, and in the area of norms and laws pertaining to the workplace. I agree with Warner that the gay and lesbian civil rights movement could be doing much more to promote rethinking of the bundle of benefits.¹⁷ Instead of leaping to endorse the current account of marriage, with both its expressive baggage and its unclearly defended package of benefits, it would be good if the movement—or its intellectual leaders at any rate—could follow Warner's lead and try to move the culture toward a more thoughtful, indeed skeptical, treatment of these important questions.

15. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 122 (2004).

16. See WARNER, *supra* note 9, at 85, 119.

17. See Warner, *supra* note 11, at 727–29.

II

RESPONSE TO DAVID NOVAK

As Professor Novak mentions, he and I have exchanged arguments in public before, and I do want to thank him for his graciousness in agreeing to be the lone opponent of same-sex marriage in the symposium and for being such a good sport, as he performed the role of opponent before a largely hostile audience. His arguments, as always, are careful and respectful, not examples of the “politics of disgust” that I criticize in my forthcoming book. Indeed, I have often sought out Novak as a discussion partner, because I think that we progress as a society only when we confront one another with respect and reasoned argument. Novak has once again fulfilled this role that I assigned to him by suggesting him as a participant in the symposium.

Because I do not always understand Novak’s arguments very well, I think it important to proceed slowly and judiciously, trying to figure out how he builds his position, step by step.

In an introductory section, Novak points out, correctly, that our disagreements are moral disagreements, and he infers from that observation that neither of us could call the other “immoral” or “amoral.”¹⁸ I have two concerns about that inference. First, it confuses subject matter with quality: an argument might be “moral” in that it lies in the domain or subject matter of morality, without being morally good. For such an argument might rest on premises, and/or reach conclusions, that I would find morally bad, even though its subject matter might be the good of others, a characteristic moral topic. Utilitarianism is surely a moral theory, a theory dealing with characteristic moral subject matter. Nonetheless, I view many of the premises and conclusions of utilitarianism as highly immoral. The idea that pleasure is the sole good is an idea that slights the value of many other goods and is in that sense immoral. The idea that one should seek to produce the greatest total or average utility slights the separate value of each human life: if holding some people as slaves, or torturing them, turns out to be the policy that maximizes total or average utility, that result will be justified by the theory. One might consider that an immoral result, especially if one is committed to the idea that choice should show respect for each and every human life, treating people as ends in themselves and not as means. So the fact that Novak is arguing about clearly moral issues does not suffice to establish that his proposals are not immoral.

But I have a more fundamental problem with his formulations: my proposals are political proposals, and I view the political as a distinctive domain with its own distinctive arguments. As I have frequently written,¹⁹ I

18. David Novak, *Response to Martha Nussbaum's "A Right to Marry?,"* 98 CALIF. L. REV. 709, 710 (2010).

19. For a typical recent example, see MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE:*

agree with John Rawls that the right way to frame political principles for a pluralistic society is to present them in a way that is free from any divisive grounding in any comprehensive metaphysical, epistemological, or ethical doctrines.²⁰ Avoiding such controversial matters is a way of showing respect to one's fellow citizens, who have reasonable disagreements in these areas. Political principles do have an ethical content, but it should be independent of any particular comprehensive ethical or religious doctrine. I therefore would want to distinguish very sharply between moral arguments that I would make from the point of view of my own religion, Reform Judaism, and political arguments that I would address to all citizens of a pluralistic society.²¹ Novak does not make that distinction in his Response, and so it will be tricky to compare his proposals with mine. Some of the concepts he employs are too metaphysical and sectarian to be suitable for political argument in a pluralistic society.

Novak then says that our disagreements are not "legal," and that it would be presumptuous for us to offer opinions on legal matters, since neither of us is "a lawyer, a judge, or a legislator."²² However, I am a professor of law, and I have no hesitation in offering opinions about legal matters. My entire book is about legal matters: it was written for a series on constitutional law. I think Novak is too deferential to academic qualifications; actually, all people who study enough can offer opinions on legal matters, and certainly they ought to do so if they have such views. (For that matter, by Novak's criterion I am presumptuous in offering opinions on philosophy, since I have no philosophy degree. My Ph.D. is in Classical Philology.) Arguing over "the present definition of the law"²³—the thing Novak thinks it would be presumptuous for either of us to do—is certainly one of the things I am attempting to do in my Essay, since interpreting constitutional precedents is an important part of determining the present definition of the law.

At the end of his introduction, Novak, having correctly characterized our respective religious positions, notes that many Reform rabbis celebrate same-sex marriages. Let me pause to explain that the situation is actually more dramatic. Reform Judaism has ordained openly gay and lesbian rabbis since 1990 and has allowed same-sex commitment ceremonies since 2000.²⁴ Conservative Judaism voted in 2006 to permit both gay ordination and same-sex commitment ceremonies.²⁵ (So when he says "no Traditional or Orthodox

DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 6, 70 (2006).

20. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996).

21. For the nature of the political arguments I would make, see NUSSBAUM, *supra* note 19, at ch. 1.

22. Novak, *supra* note 18, at 710.

23. *Id.*

24. For both the Reform and the Conservative history, see Alan Cooperman, *Conservative Rabbis Allow Ordained Gays, Same-Sex Unions*, WASH. POST, Dec. 7, 2006, at A17.

25. *Id.*

rabbi could or would do so,”²⁶ he is referring only to Orthodox rabbis, not to the Conservatives, who sometimes think of themselves as traditional.) Moreover, the Union of Reform Judaism officially campaigned against the proposed federal constitutional amendment to define marriage as between one man and one woman.²⁷

I now turn to Part I of Novak’s commentary. Here, he examines the issue of equal access to marriage by investigating the parallel case of education. He argues that if a state creates public schools, they cannot refuse anyone who can profit from the education they offer, because the reason schools were set up in the first place was to create an educated citizenry, thus promoting the common good.²⁸ He asserts, however, that equal access is not a universal entitlement.²⁹ Given that producing a skilled citizenry is the goal for which schools were instituted, people with “severe physical, mental, or emotional impediments” do not have an equal access right.³⁰ According to Novak, the parallel to marriage is that, because the principal purpose for which the state creates state-sanctioned marriage is to encourage procreation and blood ties between parents and children, equal access ideas have no traction when we are dealing with couples who are unable to have their own biological children together.³¹

Unfortunately, Novak rests his case on an inadequate understanding of the history of education as it figures in U.S. constitutional law. It is true that education has never been seen as a fundamental Fourteenth Amendment right of all citizens, although an approach to that result was made in *San Antonio Independent School District v. Rodriguez*, where Justice Marshall, in his famous dissent, articulated that position very forcefully.³² (Some state constitutions, however, have taken the extra step and declared education a fundamental right.)³³ Thus, the Constitution does not require the creation of public schools. Once they exist, however, they must be open to all, on a basis of equality³⁴—and all means *all*, not only citizens who will promote the goal of having a skilful and educated citizenry.

In *Plyler v. Doe*, the Court held that equal access means that the children of illegal immigrants cannot be turned away from the public schools.³⁵ The

26. Novak, *supra* note 18, at 710 n.3.

27. *Religious Leaders Oppose Constitutional Amendment to Ban Same-Sex Marriage*, LEADERSHIP CONF. ON CIV. & HUM. RTS., June 21, 2004, <http://www.civilrights.org/lgbt/marriage/religious-leaders-oppose-constitutional-amendment-to-ban-same-sex-marriage.html>. Joining Reform Jews were the Alliance of Baptists, Disciples of Christ, the Episcopal Church USA, the Unitarian Universalists, and the United Church of Christ. *Id.*

28. Novak, *supra* note 18, at 711.

29. *Id.*

30. *Id.*

31. *Id.* at 714.

32. 411 U.S. 1, 99–101, 112–13 (1973) (Marshall, J., dissenting).

33. See, e.g., MASS. CONST. ch. V, § II.

34. See *Rodriguez*, 411 U.S. at 30.

35. *Plyler v. Doe*, 457 U.S. 202 (1982).

majority opinion does allude to the attractiveness of having an educated citizenry: education is “necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”³⁶ But it also alludes to the role of education in the life of the individual:

Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.³⁷

The Court asserts that the denial of education denies children with disabilities the opportunity “to live within the structure of our civic institutions, and foreclose[s] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”³⁸ Only the focus on the individual explains why the children of illegal immigrants have this right, for it is not at all clear that they will ever be participants in the democratic system (much depends on whether they were born in the United States, a distinction not made in the opinion), or contributors to the common good.

As for children with severe cognitive disabilities, the record is clear: they have constitutional rights under the Equal Protection Clause to inclusion in the public schools, not because of their potential for social contribution, but because of their entitlement to equal respect as persons. In *Mills v. Board of Education*,³⁹ the U.S. District Court for the District of Columbia ruled that children with mental disabilities must be admitted to the D.C. public schools. The court cited the segregation cases as precedents, and held that the exclusion involved an Equal Protection Clause violation. Its reasoning did not allude to the goal of creating a more skilled citizenry, but rather to the welfare and the entitlements of the individual. The decision prompted Congress to pass the Education for All Handicapped Children Act in 1975, retooled in 1990 as the Individuals with Disabilities Education Act (IDEA).⁴⁰ In granting certain rights to children, the Act makes no reference to communal goals, and wisely: it is even possible that the mainstreaming of children with severe disabilities retards some of those goals, though it certainly promotes understanding. The guiding focus has always been on the development and progress of the individual

36. *Id.* at 221.

37. *Id.* at 222.

38. *Id.* at 223.

39. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

40. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, amended by Individuals with Disabilities Education Act, Pub. L. No. 101-476, 104 Stat. 1142 (1990) (codified at 20 U.S.C. §§ 1400–1482 (2006)).

(signaled by the presence of the word “individuals” in the title of the law). IDEA gives each child with a disability a right to a “free appropriate” education that is guided by an “individualized education program” for that child.⁴¹ Such programs are aimed at individual development, not social utility.⁴² To cite just one example, my nephew Art, whom I use as a case study in *Frontiers of Justice*, received an extremely expensive private education from the state in which he resides (costing around \$40,000 a year), without any representation that his contribution to social goals would outweigh the expenditure. Indeed, the *Mills* court specifically stated that the fact that inclusion will be very costly for school districts cannot be permitted to count against it.⁴³ The *Mills* court invoked *Goldberg v. Kelly*, a resonant welfare rights case in which the Court remarked, “From its founding, the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”⁴⁴

What does all this mean for the topic of same-sex marriage? It means that equal access rights under the Equal Protection Clause need not be, and typically have not been, defended by appeal to social utility. Nor need they be defended by appeal to the traditional conception of the social institution under examination—for it is pretty clear that the traditional meaning of “education” in the United States does not include the maximal development of powers of mind in people with severe cognitive disabilities. The accent is, instead, on the rights of individuals to treatment that allows them to develop and express themselves. And the conclusion, both in the case of illegal aliens and in the case of children with disabilities, is that these previously excluded groups have such rights on a basis of equality with others. The source of those rights lies in the nation’s fundamental commitment to foster “dignity and well-being.”⁴⁵ Those basic constitutional values trump, in these cases, the traditional meaning of education.

Novak’s chosen parallel, then, favors my argument, not his. If we follow the parallel, we would say that despite the fact that same-sex marriage requires revising the traditional meaning of marriage, the Equal Protection Clause requires as much, in the name of more basic norms of the dignity and well-being of individual people. It is much easier to make this argument about marriage than about education, since the right to marry has been recognized as a fundamental constitutional right under the Fourteenth Amendment, and the right to education has not.

Novak argues that education and marriage are dissimilar, in that the state created public education, but it didn’t create marriage.⁴⁶ So, he concludes, in

41. 20 U.S.C. § 1400(d)(1)(A) (2006); 20 U.S.C. § 1401(9) (2006).

42. See my discussion in NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 19, at 205–08.

43. See *Mills*, 348 F. Supp. at 876.

44. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

45. *Id.* at 265.

46. Novak, *supra* note 18, at 712.

the latter case traditional meanings should prevail, whereas in the former case the state may transform what it has created. I don't agree with the asymmetry. The state created state-run education, but it did not create education. Before public schools existed, people educated their children, usually in class-divided ways, and that itself posed no constitutional problem. Once the state entered the domain of education, however, by offering state-run education, norms of equal protection had to be considered, and this, over time, pushed toward a radical redefinition of education, which had traditionally meant elite acculturation. Similarly, the state did not create marriage, but it did create state-run marriage. Once it did that, marriage entered the domain of constitutional norms and had to endure the scrutiny of constitutional equality and liberty values. This scrutiny has already led to some redefining of marriage, and it ought to lead to a good deal more.

I do not, however, agree with Novak that such redefining entails losing all continuity with traditional conceptions of marriage.⁴⁷ In the case of education, we can specify the things that education affects (people develop their cognitive and emotional powers) in such a way as to show that there is continuity rather than discontinuity when education is redefined. Similarly, my account of the substance of marriage is meant to show the large continuity between traditional and redefined conceptions of marriage: in both forms, there is a concern for friendship, sexual intimacy, conversation, emotional expression, and, often, the having and rearing of children.

This brings me to Part II of Novak's Response, where he confronts my Essay directly. He has slightly misunderstood the structure of my argument, so I shall first offer a clarification.

I propose two ways of looking at marriage. I say, "It is plural in both content and meaning."⁴⁸ I begin by discussing content, saying, "The institution of marriage houses and supports several distinct aspects of human life: sexual relations, friendship and companionship, love, conversation, procreation and child rearing, and mutual responsibility."⁴⁹ I then go on to discuss meaning: marriage, I say, can have a civil rights aspect or meaning; it can have an expressive aspect or meaning; and it can have a religious aspect or meaning.⁵⁰ I thought it was clear that those two analyses cut across one another: that is to say, for every part of the content of marriage, there are three aspects to its meaning. Thus marital friendship, just to take that part of the content of marriage, has a civil aspect: when the state marries people, it gives civil rights and benefits to that friendship. Marital friendship also can have an expressive aspect: when people get married, they typically express the depth and quality of their friendship, and so does the state in marrying them. Finally, for religious

47. See *id.* at 712–13.

48. Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 668 (2010).

49. *Id.* at 668–69.

50. *Id.* at 669.

people, marriage has a religious aspect, and they will view their marital friendship in the light of its religious significance. Each part of the content of marriage can have a civil rights aspect, an expressive aspect, and (if the parties are religious) a religious aspect. The civil rights aspect is definitely public. The expressive aspect may or may not be public. The religious aspect, as such, is not public, since we do not have an established church. But, as I note, there's a lot of intertwining between state marriage and religious marriage, so the civil and religious aspects are often difficult to distinguish. In some other nations, people getting married in a church have to have a separate state marriage. In the United States, clergy are always empowered to celebrate a state marriage, and most state marriages are performed on religious premises.

Now we arrive at the heart of Novak's argument. Novak says that procreation and child rearing are "the only truly public reason for marriage."⁵¹ I don't see the argument for this. Government has many public purposes. One of the most time-honored public purposes is that of fostering the dignity and well-being of citizens.⁵² The state does this in many ways, but one way it may try to do this is through the institution of marriage. Here both the civil rights and the expressive aspect of marriage can play a role. By giving a package of benefits to people, the state fosters their well-being. By expressing its approval (if that is what marriage does), it shows respect for them and fosters their dignity. Maybe, as I suggest, it is a mistake for the state to enter the expressive domain, but one cannot show that simply by talking about public purposes, since conferring dignity and showing respect are clear public purposes.

Now let me attempt to dissect Novak's argument about parental rights and duties. I think he is arguing that both parents and children have certain natural ("pre-political") rights and duties that the state should recognize and support.⁵³ Parents have rights to raise their own children, absent abuse and neglect, and they also have duties to support their children's welfare economically, even if they don't live with their children.⁵⁴ Children have rights to support, and they also have duties to care for their parents in their old age.⁵⁵ It is a little hard to discern how Novak arrives at the conclusion that there are natural rights and duties of this sort, but it is notoriously difficult to establish the existence of pre-political natural rights.

Sometimes Novak suggests that the issue is less "what is natural?" than "what works?"⁵⁶ He cites Aristotle's objection to the communal rearing of children in Plato's ideal city, which makes the point that people care more

51. Novak, *supra* note 18, at 714.

52. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

53. See Novak, *supra* note 18, at 715.

54. *Id.*

55. *Id.*

56. See *id.* at 715-16.

intensely for their own children than for other people's children.⁵⁷ So it would seem that Novak's central concern is with the well-being of children (if his argument is Aristotle's), and the recognition of parental rights and duties is instrumental to that goal.

If that is his point, then we are dealing not with a matter of natural right but with contingencies of human psychology. Given our desire for the well-being of children, if we find out that children do better in a given structure, we have *prima facie* reasons to support that structure. However, it is not clear that this argument supports biological parents over other sorts of parents. Repeatedly, psychological experts have shown that children do just as well when raised by same-sex parents as by other parents.⁵⁸ Nor is there any evidence I know of—and Novak certainly does not present any—that biological parents do better than adoptive parents.

I wish Novak had entered into this question more deeply. For example, I would like to know what standing he thinks the biological parent ought to have, once a child is already being raised well by adoptive parents. Take, for example, Illinois' famous "Baby Richard" Case, in which a biological father, reentering the life of his child after a long absence, during which he had been declared an "unfit parent," was able to prevent a "best interests of the child" hearing, which no doubt would have gone against him.⁵⁹ As a result of court proceedings, the child was simply removed from the only parents he had ever known, who had raised him from the age of four days to the age of four years old.⁶⁰ I would like to know whether Novak sides with the courts in such cases, giving biology preference over a determination of a child's best interests. And I'd like to know why he thinks that blood is more important than behavior, and how the claims of the two should be weighed where they conflict.

One thing that's certain, though, is that same-sex parents raise many children, and many of those children are the biological children of one parent. If biological parenthood is really so important, then these couples should be preferred, as a matter of public policy, to couples who adopt children. But I do not see Novak reaching that conclusion. Indeed, I do not see him pondering this question, so to that extent I remain unclear about his position.

One thing that should surely be clear is that opposing same-sex marriage does not well serve Novak's goal of protecting the well-being of children. Many children are being raised by same-sex couples right now, and right now they lack the security that the institution of marriage would provide. Should the partners separate, there is no secure expectation of support. There is no clarity

57. *Id.* at 716 n.19.

58. *See, e.g.*, Nussbaum, *supra* note 48, at 680 n.39 (citing the expert testimony presented in *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996)).

59. *See In re* Petition of Doe, 638 N.E.2d 181 (Ill. 1994).

60. For a decent summary of the basic facts, see generally KAREN MORIARTY, *BABY RICHARD: A FOUR-YEAR-OLD COMES HOME* (2004).

regarding a wide range of important legal issues; this insecurity is one reason why same-sex couples are so eager for the legal structure of marriage. Novak can hardly be recommending that we ignore the existence of these children, and I don't think he is recommending that we simply say to them that they have no support rights because a parent has formed a same-sex relationship. Denying same-sex couples the same clear legal structure on which opposite-sex parents can rely disserves the interests of children.

Do children have a right to know who their own biological parents are?⁶¹ I am not sure why this is so important to Novak, and I wonder whether it is wise social policy where child support is dealt with in some other way, as by adoption. Adoptive children usually can find out the identity of their birth parents now, but such discovery does not always promote the happiness of either the children or the adults. Children often romanticize their birth parents, and think that knowing their parents will solve their problems. But it usually doesn't, and the invasion of the parent's privacy can be very destructive. In any case, this problem seems to me to have nothing at all to do with same-sex marriage.

I also don't see why Novak thinks that "[m]aintaining . . . the traditional institution of marriage" is the best way to facilitate knowledge of who one's parents are.⁶² People lie about paternity all the time, and have done so for centuries. Many children, under a traditional marriage, have therefore had false beliefs about who their parents (fathers, particularly) were. It is only now, with DNA testing, that anyone is able to have actual knowledge.

Do children have duties to care for their elderly parents?⁶³ Well, one thing that is clear is that the United States prefers to push these duties off onto children, rather than providing adequately for care at the public level. Canada, Novak's country, focuses on the public provision of adequate health care for all. I think a public solution is superior: individuals should be assured of getting the care they need in their own right, and not simply because of any offspring they may have. First, a public solution is more equitable: people who don't happen to have children, or who have children who cannot meet this demand for some reason, should not lose out. Second, it is well known that pushing elder care off onto family members is a way of exploiting women, since women are just expected to do all this for free, as if it were in their nature to do so.⁶⁴ Third, a private solution is not necessarily the best arrangement for the dignity of the aging person. It seems to me better to feel that one has standing and a claim to care in one's own right, and not just at the sufferance of another.

61. See Novak, *supra* note 18, at 715.

62. See *id.*

63. See *id.*

64. See JOAN WILLIAMS, UNBENDING GENDER (2001) for a discussion of obstacles to women's equality from the assumption that women are the primary caregivers for both children and the elderly.

Novak should engage with these issues. And I don't see any connection between these issues and the question of same-sex marriage.

In Part III of his article, Novak answers some objections to his idea that the state should favor biological reproduction. He alludes to a question I pose: if the "sole public reason" for marriage is procreation, then why has marriage not been limited to people who are fertile, or of an age to be fertile?⁶⁵ Of course I have already cast doubt on his contention that the "sole public reason" for marriage is procreation, but let me address the response. Novak offers two replies. First, the inquiry into fertility would be too intrusive and demeaning; second, *de minimis non curat lex*, i.e., the exceptions are too few to matter.⁶⁶ Novak offers no data to support these assertions. Women past menopausal age can be presumed infertile—without a demeaning inquiry—absent extraordinary medical interventions. If we want to avoid all individualized inquiry, let's just choose fifty-five as our upper limit for marriage for women. But of course we see women older than that marrying all the time, and society traditionally has strongly favored rather than disfavored this. There are also other conditions that are publicly observable that we could take as grounds for refusing marriage if we cared only about procreation: paralysis, for example. But we don't do that and have never considered doing that. Finally, why don't we consider a kind of marriage that would be viewed null and void if, within a specified number of years, the parties have had no children (thus showing that they can't or don't want to)? We simply do not consider such laws. As I pointed out in my Essay, the constitutional right to marry applies to people on their deathbed, and to prisoners serving life sentences who, in the view of the Court (in *Turner v. Safley*⁶⁷) may never meet their spouse.⁶⁸ The reasoning in that case was that marriage expresses love, friendship, commitment, and religious bonds, not just procreation.⁶⁹ If we put together all the cases of non-procreative marriage, they are neither few nor trivial. Novak gives no normative argument leading to the conclusion that such marriages are not valuable and worthy of state support.

In short, support for marriage independent of any procreative intent or possibility is a part of the traditional meaning of marriage and part of our constitutional tradition—whether Novak approves or not.

Indeed, I find it strange that someone so evidently concerned with a wide range of ethical values should take such a narrow view of the public purposes marriage may serve. (I assume his view of its private purposes is far broader.) Why should it not be legitimate for the state to foster freedom (intimate choice), commitment, and personal happiness? Aren't those key aspects of our founding tradition?

65. See Novak, *supra* note 18, at 717.

66. *Id.*

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

68. Nussbaum, *supra* note 48, at 689–91.

69. See *Turner*, 482 U.S. at 95–96.

What do I myself think in this area? In my writings about the “Capabilities Approach,” I argue that a minimal condition of social justice is that all of a nation’s people have the ten basic opportunities defined by my list of the Central Human Functional Capabilities:⁷⁰

1. Life. Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. Bodily Health. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. Bodily Integrity. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. Senses, Imagination, and Thought. Being able to use the senses, to imagine, think, and reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. Emotions. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. Practical Reason. Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

7. Affiliation.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social

70. See particularly MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); see also NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 19; Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. Other Species. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. Play. Being able to laugh, to play, to enjoy recreational activities.

10. Control over One's Environment.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.⁷¹

I argue that all ten are central because they are inherent in the idea of a life in accordance with human dignity. Family policy, like other areas of policy, must be constrained by the immense importance of providing all of a nation's people with these ten capabilities.

How should this constrain family policy?⁷² Children have many entitlements, as the list shows. In at least some societies, it is reasonable to suppose that Aristotle is correct: the intimate bonds of care and affection developed in the nuclear family make it a good vehicle for promoting these concerns.⁷³ However, it is obvious that other social institutions are also crucial: the health care system, the education system, the criminal justice system, and so forth. But it does seem reasonable to encourage people to form families, and if empirical data in a given society support the instrumental value of nuclear families, then the state may be justified in favoring the nuclear couple over other associational forms. I see no reason, however, to favor biological parents over adoptive parents, and certainly not over families in which one parent is a

71. Nussbaum, *Foreword: Constitutions and Capabilities*, *supra* note 70, at 15 n.15; see also NUSSBAUM, *FRONTIERS OF JUSTICE*, *supra* note 19, at 76–78; NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 70, at 78–80.

72. I face this question, in particular, in *WOMEN AND HUMAN DEVELOPMENT*, *supra* note 70, at ch. 4.

73. See ARISTOTLE, *ETHICA NICOMACHEA* 1155a–1172a (Ingram Bywater ed., 1890).

biological parent and the other is not.

Another valuable role for the family, in connection with promoting human capabilities, is to set up a structure of responsibility for child welfare. I agree with Novak that parents should be required to support their children's welfare.⁷⁴ I also agree with him that this ought to include an absent biological parent, unless and until a new partner has adopted the child.⁷⁵ Again, though, I see no reason to suppose that the issue of responsibility militates against recognition of same-sex marriage; indeed, it seems to militate strongly in favor, since that recognition would clearly define a structure of responsibility for children in such households.

Meanwhile, adults also have entitlements, including rights of intimate association. In the other chapters of my book on sexual orientation, I argue that this right to intimate personal choice has constitutional status, and that *Lawrence v. Texas*⁷⁶ is (though obscure) best interpreted as recognizing such a right.⁷⁷ One can probably argue that this right extends to a right to certain areas of decision making on behalf of one's children, but I argue in *Women and Human Development* that this parental right is always trumped by the child's right to one of the capabilities on the list, should one of those be at issue. (Thus, a parent's choice to refuse life-saving medical treatment for a child is trumped by the child's right to life and health.) Once again, this recognition that intimate association involves an area of personal liberty extending to decisions involving the family does give the state a reason to protect the family from undue intervention; here I think I am in agreement with Novak.⁷⁸ But surely there is no reason not to extend that same right to same-sex couples, since, by my argument, they have already been recognized as having a constitutional right to intimate association.

I am sure that much more time would be required to get clear on all the issues that divide Novak's position from mine. I conclude at this point that he has not offered a sound argument against state recognition of same-sex marriage—or, if he has, I do not understand it. But I am grateful for the interaction, which has raised some vital issues and generated a very helpful clarification of my own positions.

74. See Novak, *supra* note 18, at 714–15.

75. See *id.*

76. 539 U.S. 558 (2003).

77. See NUSSBAUM, *supra* note 2, at chs. 3, 6.

78. See Novak, *supra* note 18, at 714.

