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# SAME-SEX CYNICISM AND THE SELF-DEFEATING PURSUIT OF SOCIAL ACCEPTANCE THROUGH LITIGATION

James G. Dwyer\*

THE Supreme Court's grant of certiorari in *DeBoer v. Snyder*<sup>1</sup> should be cause for optimistic cheer for someone like myself who strongly supports extending legal marriage to same-sex couples. Instead it occasions grave disappointment and foreboding, because the expected result—an imperious judicial command that all states reform their marriage laws—will be both unprincipled and counter-productive.

As a legal scholar, I recognize the distinction between something being the right thing to do and its being a matter of constitutional right, and I know that at this point in time the case for the latter with respect to same-sex marriage is untenable. I say “at this point in time” because, contrary to conventional wisdom,<sup>2</sup> the gay rights movement's<sup>3</sup> extraordinary string of successes in the past dozen years—in particular, the Supreme Court's decisions in *Lawrence*<sup>4</sup> and *Windsor*,<sup>5</sup> state court victories beginning with *Goodridge*,<sup>6</sup> and voluntary adoption of same-sex marriage by many state legislatures—has fatally *undermined* (as a matter of logic and doctrine) the Movement's case for a Supreme Court ruling that same-sex couples have a federal constitutional right to legal marriage, the centerpiece of

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1. 135 S. Ct. 1040 (2015).

2. See Ariela R. Dubler, *From McLaughlin v. Florida to Lawrence v. Texas: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1187 (2006) (“Lawrence has still been understood by many as, first and foremost, a victory in the fight for a constitutional right to same-sex marriage.”).

3. There is not a single movement for gay rights, but as with other civil-rights causes, there are recognized organizational leaders who act in a somewhat-coordinated fashion and attempt to present a unified front to donors, political actors, the public, and the legal system. See Chuleenan Svetvilas, *Challenging Prop. 8: The Hidden Story*, CAL. LAWYER, Jan. 20, 2010 (“Nationally, the LGBT legal groups—ACLU, GLAD, Lambda Legal, and NCLR—have a strong tradition of sharing resources, knowledge, and strategy. . . .”). I will use “Movement” to mean the loosely connected collection of persons and efforts focused on achieving greater legal rights and privileges for gays and lesbians, while acknowledging this simplification elides meaningful distinctions among organizations and viewpoints.

4. *Lawrence v. Texas*, 539 U.S. 558 (2003).

5. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

6. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

gay-rights activism today.<sup>7</sup>

As explained in Part I.A, *Lawrence* destroyed the connection between legal marriage and freedom to engage in core aspects of family life that was the basis for the Supreme Court's characterization of legal marriage as a "fundamental liberty" decades ago. *Lawrence* transformed the right to marry from a negative liberty to a positive-right claim for gratuitous government benefits. The further fact that legal marriage has been available to same-sex couples living in every state since 2003, given that Massachusetts has no residency requirement for marriage licenses, coupled with current federal recognition of same-sex legal marriages regardless of a couple's state of residency, further diminishes the significance of any particular state's refusal to issue marriage certificates itself to same-sex couples.

In addition, as discussed in Part I.B, the legislative victories, along with a major shift in public opinion, demonstrate that the lesbian, gay, bisexual, and transgender ("LGBT") community in the United States is now harnessing political power far out of proportion to its own numbers and therefore can no longer demonstrate a need for special judicial solicitude, thus further undermining an equality-based claim to constitutional entitlement. These two transformations, one legal and the other political, have eliminated the case for heightened Fourteenth Amendment scrutiny that could plausibly have been made fifteen years ago, yet courts and academics have failed to acknowledge their significance.<sup>8</sup>

Part II, in the context of explaining why alleged "animus" is irrelevant, points up a further flaw in judicial and scholarly analysis of same-sex marriage thus far—namely, a conflating of several different types of state law provisions that actually call for different analyses. Disaggregating them makes apparent that any state statutory Defense of Marriage Act ("DOMA") was actually legally meaningless; it made no change in the law. Ironically, if the Supreme Court fails to recognize this, treats the

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7. See, e.g., *Roadmap to Victory*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/roadmap-to-victory> (last visited Nov. 10, 2014).

8. I will not address the fringe argument that opposite-sex-only marriage laws are subject to heightened scrutiny because they constitute gender discrimination, see, e.g., *Latta v. Otter*, 771 F.3d 456, 479 (9th Cir. 2014) (Berzon, J., concurring), except to note that it misunderstands the basis for the state's denial of a marriage license. People apply for a license as a couple, and the state does not refuse same-sex couples a license because of their being a male couple or a female couple, but rather because of their sex-sameness. Even looking at it from an individual's perspective, the state does not refuse any individual the right to marry the person of his or her choice because of that other person's gender *per se*, but rather because of that person's sex-sameness. Thus, if the first individual's sex were undisclosed, the exclusion could not apply regardless of the other's (disclosed) sex; it can apply only after the sex of both persons is known and found to be the same. Analogously, laws proscribing incestuous marriages do not discriminate against people based on which family they belong to *per se*, but rather based on their family-sameness. Strictly speaking, traditional marriage laws also do not discriminate based on sexual orientation; they would also preclude marriage between two heterosexual female friends together seeking legal marriage for its financial benefits. But the norm that only intimate partners get married is so pervasive that the disparate impact on gays and lesbians is stark, making it sensible to treat the situation as one of discrimination based on sexual orientation.

DOMA statutory provisions as the relevant governing law (rather than the original marriage laws enacted with no thought to same-sex couples), ascribes animus to their passage, and rests its decision on that animus, then the conservative frenzy to pass state DOMAs will turn out to have made same-sex marriage more likely rather than less.

Part III explains why traditional marriage laws should easily pass rational basis review (even if “with bite”), if only judges could grasp and accurately characterize the state interest that actually differentiates same-sex couples from opposite-sex couples. The stream of victories for the Movement principally reflects weak lawyering by defenders of state laws, systematic distortion of the state’s long-recognized responsible-procreation aim by plaintiffs’ attorneys and sympathetic judges, and widespread adoption of counter-arguments so obviously flawed it seems unlikely the advocates or judges expressing them actually believe what they are saying. Judges must fear that regardless of what reason, precepts of democratic governance, or constitutional doctrine might counsel, if they rule against same-sex marriage they will be viewed ever after as having been on “the wrong side of history.” Willful obfuscation by liberal academics posing as “friends of the court” might also have played a role.

And the parade marches on, nearly at its destination. Despite the remarkable shift in popular and elite support to their side, and even though four in ten LGBT persons preferred that they not do so,<sup>9</sup> Movement advocates and sympathizers continued the push for a federal judicial resolution,<sup>10</sup> with lawyers and plaintiffs angling to be the ones whose names go in the history books.<sup>11</sup> Now the Movement has arrived at the steps of the

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9. See *A Survey of LGBT Americans*, PEW RESEARCH CTR. 67 (June 13, 2013), [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT\\_Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT_Americans_06-2013.pdf) [hereafter “Pew Center Report”] (finding that 39% of LGBT survey respondents stated that “[t]he push for same-sex marriage has taken too much focus away from other issues important to LGBT people”).

10. After Vermont became the first state legislatively to adopt same-sex marriage, Movement leaders expressed an intention to seek similar political victories in other states. See Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 8, 2009, at A1. This reflected pessimism about federal court prospects rather than a principled commitment to federalism or democracy. See ACLU ET AL., *Make Change, Not Lawsuits*, ACLU 1-2 (2009), available at [https://www.aclu.org/sites/default/files/pdfs/lgbt/make\\_change\\_20090527.pdf](https://www.aclu.org/sites/default/files/pdfs/lgbt/make_change_20090527.pdf) (urging same-sex couples to forbear from federal court lawsuits in favor of state court suits and legislative efforts, but only until success in state judicial and legislative quarters became more widespread, so a federal court lawsuit would have greater chance of success). Now the litigation strategy is dominant, perhaps simply because it is producing unprecedented results. The principle division of opinion in the Movement recently has been concern about the pace of litigation rather than whether grass-roots efforts to change public opinion are preferable. See JO BECKER, *FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY* 3-10 (2014); DAVID BOIES & THEODORE B. OLSON, *REDEEMING THE DREAM: THE CASE FOR MARRIAGE EQUALITY* 67 (2014). This is not to say there is no political activism going on, but it is mostly confined to pursuit of other rights for sexual minorities. See, e.g., Nicholas Confessore & Jeremy W. Peters, *Gay Rights Push Shifts Its Focus South and West*, N.Y. TIMES, Apr. 27, 2014, at A1 (describing grass-roots advocacy in traditionally conservative states for a number of civil rights).

11. At a recent conference at William & Mary, a panelist who is a correspondent for a major newspaper compared the lawyers in the marriage cases now before the Supreme

Supreme Court, and everyone in legal academia fully expects that Justice Kennedy will declare victory for the Movement in a majority opinion devoid of analytical structure, careful logic, or reference to general principles, lest anything he says be used in another case for a result he does not like.

Meanwhile, in the branches of government charged with making policy judgments and effecting fairness among different constituencies, many state legislators and executive branch officials have, for the first time, expressed support for same-sex marriage, once they saw the wind blowing strongly in that direction.<sup>12</sup> But rather than actively seeking to reform state laws themselves, through the legislative process, they have stood by cheerleading as federal courts invalidated state statutes.<sup>13</sup> They let federal courts assume the responsibility and heat for doing what they themselves should have done. My state senator responded to my letter asking him to pursue legislative reform with the evasive statement, “The Senate did not consider any legislation dealing with marriage equality during the 2014 regular session,” begging the question why he does not introduce any legislation himself.<sup>14</sup> My representative to the Virginia House of Delegates, despite publicly applauding the district court ruling in Norfolk, never responded to my request and never took any steps to obviate a Supreme Court mandate by making change legislatively.

There has been, then, much of what might fairly be characterized as cynicism coursing through the veins of same-sex-marriage advocacy and decision making, with little concern for larger political principles or intellectual integrity, and with little interest—even among those with the power and responsibility—in securing legal marriage for same-sex couples by convincing fellow citizens and their representatives to fix problems in state law by majoritarian decision-making after public deliberation. The end result will be that same-sex marriage spreads throughout the United States on a tidal wave of unprincipled judicial fiat, culminating in a Supreme Court decision devoid of clear and intelligible rationale.

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Court to self-serving car salesmen intent on convincing the Court to buy their “vehicle” as the best available. Indeed, one might ask why the plaintiffs’ attorneys have not coordinated their efforts to steer the Court to the case that is actually best for the cause.

12. Cf. Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 *LAW & SOC. INQUIRY* 449, 455 (2014) (noting that most liberal legislators, along with President Clinton, supported passage of state and federal DOMAs in the 1990s); see also *id.* at 457 (“Political elites—reading the tea leaves of the polls, but also under pressure from politically astute LGBT advocates—soon began to favor legalizing same-sex marriage. Consider the ‘evolution’ of President Barack Obama. . . . Obama was soon not alone; following his victory in the November 2012 elections, a number of senators and representatives announced that they too had “evolved.”

13. See, e.g., Markus Schmidt, *Federal Judge Strikes Down Virginia’s Gay Marriage Ban*, *RICHMONDTIMES-DISPATCH* (Feb. 13, 2014) [www.richmond.com/news/virginia/government-politics/article\\_a240d8c2-9525-11e3-93ca-001a4bcf6878.html](http://www.richmond.com/news/virginia/government-politics/article_a240d8c2-9525-11e3-93ca-001a4bcf6878.html) (noting floor statements by Virginia legislators after a federal district court invalidated Virginia marriage laws).

14. Email from Virginia State Senator John Miller (May 1, 2014). (on file with author).

Why care, if one supports same-sex marriage? Apart from rule of law concerns, and without repeating all that others have said about likely backlash, there is the fundamental problem, as explained in Part IV, that courts cannot deliver what LGBT persons seem to want most—dignity. Court victories are hollow victories for the LGBT community, failing to deliver the societal respect it seeks, and in fact *removing the opportunity* for collective expression of such respect through voluntary legislative reform or popular referendum. A Supreme Court victory will be counterproductive with respect to that aim. What sexual minorities get is not acceptance by the people with whom they share a neighborhood, a political community, a state, and a nation. Rather, they get the power to force something on those people. They deserve better.

On the flipside, we in the privileged group lose the opportunity to act, to do the right thing ourselves, to be participants in the progress and the healing that marriage equality should entail. We are also left cheering the courts for having taken this decision out of our hands and made it for us and instead of us, implicitly assuming us incapable of doing it. We are politically infantilized and forever branded as the enemy of gay rights who had to be vanquished, rather than as (finally) welcoming neighbors. Perhaps we also deserve better.<sup>15</sup>

A loss at the Supreme Court, throwing the issue back into the hands of the public, whose support grows every day, forcing state legislators to take and justify a stand, triggering robust public discussion about respect and equality, thus might actually be the best thing that could happen for the LGBT community. Or better yet, what if the Movement made this choice itself? What if the leaders at the last minute called off the lawyers and let the American public know that is not how they want to “win”? What if they chose engagement rather than circumvention, reciprocal respect rather than cynicism? What then?

## I. INCREMENTAL SUCCESSES CAN FORESTALL FINAL VICTORY

Constitutional challenges to traditional marriage laws have invoked both the Due Process and Equal Protection Clauses. Under either, when the challenged law denies something that is a matter of fundamental right, it is subject to heightened judicial review, putting on the state the burden of providing substantial, evidence-based justification for infringing that right.<sup>16</sup> If what is at stake is not a matter of fundamental right, heightened scrutiny might still apply in an equal protection challenge if the court treats the challengers as members of a group in special need of

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15. Cf. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (“It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.”); *DeBoer v. Snyder*, 772 F.3d 388, 402 (2014) (“If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation.”)

16. See *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014).

judicial protection from the legislative process.<sup>17</sup> If neither is true, a court must place on private parties challenging a law the near-insurmountable burden of demonstrating that the aspect of the law denying them what they want (either a universal denial of something or a discrimination) is utterly irrational insofar as it serves no legitimate state purpose whatsoever.

It is extremely frustrating for anyone alleging a constitutional violation to have a court conclude that rational basis review applies. It always seems unfair to those who are sufficiently unhappy about a state's law that they would suffer the lost time, expense, and anguish of filing a lawsuit, when the court stacks the deck so strongly in favor of the government. But this doctrine reflects the reality that states must both prohibit some things universally and must make discriminations in conferring benefits, or else government could not function. Unless a particular legal permission or state-conferred benefit is so important that a person's fundamental welfare depends on it, or unless government discrimination in conferral of benefits appears to reflect illicit exclusion of the complaining group from the political process, courts have to let the elected branches of government act on their judgments of what is fair and efficient, so long as they can provide some rational justification. The stark reality is that the victories the Movement has already secured through Supreme Court decisions, state court mandates, and uncompelled legislative action or popular vote have eviscerated both bases for heightened review of traditional marriage laws.

#### A. LEGAL MARRIAGE IS NO LONGER A FUNDAMENTAL RIGHT

Movement lawyers, sympathetic state officials, and family law professors submitting amicus briefs in support of same-sex marriage repeatedly and simplistically assert that "marriage" is a matter of fundamental right, citing Supreme Court precedents from decades ago.<sup>18</sup> Lower federal

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17. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting courts should be more circumspect about legislative classifications when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities").

18. *See, e.g.*, *Petition for Certiorari*, at 5, *DeBoer v. Snyder* (2015) (No. 14-571) ("The right to marry is a fundamental freedom. . .") [hereinafter *DeBoer Cert. Petition*]; *id.* at 18-19; *Brief of Amici Curiae Joan Heifetz Hollinger et al. in Support of Plaintiffs-Appellees and Affirmance* at 11, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. June 16, 2014) [hereinafter *Bourke Amicus 1*]; *Brief of Amici Curiae Family Law and Conflict of Law Professors in Support of Plaintiffs-Appellees and Affirmance* at 24, *Bourke v. Beshear*, 996 F. Supp. 2d 542 (6th Cir. 2014) (No. 14-5291). [hereinafter *Bourke Amicus 2*]; *Memorandum in Support of Change in Legal Position by Defendant Janet M. Rainey*, *Bostic v. Rainey*, at 7-10 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-CV-395) [hereinafter *Rainey Memorandum*]; Ky. Office of the Attorney General, *Statement from Attorney General Conway*, available at <http://ag.ky.gov/Pages/default.aspx>; Statement of Or. Attorney General Ellen Rosenblum on Pending Litigation Challenging Same-Sex Marriage Ban (February 20, 2014), available at <http://www.doj.state.or.us/releases/Pages/2014/rel022014.aspx> [hereinafter *Rosenblum Statement*]; Virginia Office of the Attorney General, *Attorney General Herring Changes Virginia's Legal Position in Marriage Equality Case*, available at [http://www.ag.virginia.gov/Media%20and%20News%20Releases/News\\_Releases/Herring/012314\\_Bostic\\_v\\_Rainey](http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Herring/012314_Bostic_v_Rainey)

court judges have unreflectively agreed.<sup>19</sup> Remarkably, even the lawyers purportedly defending state law have unthinkingly conceded that legal marriage is a matter of fundamental right.<sup>20</sup> The only debate concerning the fundamental right basis for heightened review has focused on the level of specificity at which the plaintiffs' claim should be understood—that is, as a right to same-sex legal marriage (which flunks the 'history and tradition' test) or the broader, more generic right simply to legal marriage (which is assumed to be a fundamental right).<sup>21</sup> That debate is irrelevant, because neither characterization leads to a sound due process claim or to heightened equal protection scrutiny. This is why:

The last time the Supreme Court considered a constitutional challenge to an exclusionary state marriage law was in 1987, in *Turner v. Safley*,<sup>22</sup> and the last time the Court applied heightened scrutiny to an exclusionary marriage law on the basis of an assumption that legal marriage constitutes "a fundamental liberty" was in 1978, in *Zablocki v. Redhail*, nearly four decades ago.<sup>23</sup> Is it a fundamental "liberty" today, for anyone?

To answer, it is essential to maintain a distinction that courts, advocates, and scholars routinely elide—namely, between state conferral of legal marriage status, evidenced by a marriage certificate, versus the social practice of having a wedding and living together as a married couple to create a family. The former is what is at stake in same-sex marriage litigation, but the latter is what most matters to people.<sup>24</sup> And whereas

.html; Schmidt, *supra* note 13 (relating statement by Virginia's Lieutenant Governor: "Marriage is a fundamental and an incredibly personal right of all Virginians . . .").

19. See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (Reinhardt, J., concurring); *Kitchen*, 755 F.3d at 1209; *Bostic v. Schaefer*, 760 F.3d 352, 367, 376 (4th Cir. 2014) ("This [Fourteenth Amendment] liberty includes the fundamental right to marry."); *De Leon v. Perry*, SA-13-CA-00982-OLG, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (asserting "the importance of marriage as a fundamental right and its relation to an individual's rights to liberty, privacy, and association," without considering whether *Lawrence* had altered this relation between legal marriage and other values); *Lee v. Orr*, 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (invalidating Illinois' marriage law and stating, with no mention of *Lawrence* or other recent developments, "This Court has no repudiation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation. . ."); *Bishop v. Smith*, 760 F.3d 1070, 1079-80 (10th Cir. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 421-22 (M.D. Pa. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 991, 997-98 (W.D. Wis. 2014). The Seventh Circuit declined to "engage with the parties' 'fundamental right' debate," because it treated sexual minorities as a protected class. *Baskin v. Bogan*, 766 F.3d 648,657 (7th Cir. 2014).

20. See, e.g., *Latta*, 771 F.3d at 477 (Reinhardt, J., concurring) ("Plaintiffs and defendants agree that there is a fundamental right to marry"); *Schaefer*, 760 F.3d at 375. ("The Opponents and Proponents agree that marriage is a fundamental right."); *Lee*, 2014 WL 683680 at \*1; *Boies & Olson*, *supra* note 10, at 176 (indicating that attorneys defending Prop 8 agreed that marriage is a fundamental right).

21. See, e.g., *Kitchen*, 755 F.3d at 1209 ("Appellants contend that these precedents and others establish only that opposite-sex marriage is a fundamental right."); *Robicheaux v. Caldwell*, 2014 WL 4347099, at \*8 (E.D. La. Sept. 3, 2014) ("There is simply no fundamental right, historically or traditionally, to same-sex marriage.").

22. 482 U.S. 78 (1987).

23. 434 U.S. 374, 383 (1978) (prescribing "critical examination").

24. Examples of judges conflating these two things include *Kitchen*, 755 F.3d at 1209, 1212, ("The importance of marriage is based in great measure on 'personal aspects' includ-

the Court has treated the latter (social family formation) as a first-order right—that is, something inherently a matter of personal liberty and the pursuit of happiness, it has treated the former (state licensure) as merely a second-order right, of no inherent importance but just a precondition for the latter. Advocates for same-sex marriage get most of their rhetorical traction by conflating these two things in the minds of judges and the public.<sup>25</sup> The Certiorari Petition in *DeBoer v. Snyder*, for example, asserts that the right to marry “encompasses the right ‘to establish a home.’”<sup>26</sup> What connection is there actually between the two today?

Significantly, state licensure has never been a precondition for a non-legal wedding—that is, for two people publicly to express their love and permanent commitment to each other, to exchange vows and rings in front of family and friends, and thereby to receive “public acknowledgment of their mutual commitment.”<sup>27</sup> First Amendment rights of assembly, speech, and religious exercise preclude the state from interfering with such a gathering and public expression, which in and of itself flouts no state law.<sup>28</sup> Thus, gays and lesbians have always been legally free everywhere in the United States to have as big and romantic a wedding ceremony and celebration as they might like, so long as they did not defraud anyone by claiming that the ceremony had legal effect.<sup>29</sup> Many thousands of same-sex couples in fact did this before it became possible for such couples to get a legal marriage in this country.<sup>30</sup>

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ing the ‘expression[ ] of emotional support and public commitment.’”); *Walker*, 986 F. Supp. 2d at 987. See also Rosenblum Statement, *supra* note 18 (“Marriage is the way that loving couples become family to each other. . .”).

25. See, e.g., *BOIES & OLSON*, *supra* note 10, at 24-25, 120-21 (describing Olson dodging questions by Judge Walker aimed at establishing this distinction), 172-73, 177 (asserting that “marriage” is “essential to the enjoyment of life”); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1, 7 (2009) (contending that “marriage” predated the state, without acknowledging this could only possibly be true of social marriage, not marriage as a legal status).

26. *DeBoer Cert. Petition*, *supra* note 18, at 5, 23.

27. *Bourke Amicus 1*, *supra* note 18, at 3.

28. Clergy in North Carolina have filed a complaint in federal court alleging that state criminal statutes prohibiting persons authorized to solemnize a marriage to “perform a ceremony of marriage between a man and woman” or to “marr[y] any couple without a license” violate their First Amendment rights, by preventing them from performing weddings for same-sex couples. Complaint, *Hoffman v. Cooper*, Case 3:14-cv-00213-RJC-DCK (filed Apr. 28, 2014). The sensible reading of these statutes is that they prohibit performance of a ceremony intended to have legal effect, and the Complaint suggests that is what the clergy want to do, not merely to have a private, non-legal ceremony.

29. The Ninth Circuit’s entertaining soliloquy on the significance of the marriage label was thus misplaced. See *Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012). Gay and lesbian couples have always been free to make marriage proposals, on bended knee or by billboard, and to talk about themselves as married with family and friends. The only accurate points the court made were that same-sex couples, under California’s registered partnership law, would have had to check “registered partnership” rather than “married” on government forms and would have had to say “became registered partners” rather than “married” if they chose to publicize their commitment ceremony in the newspaper and if they worried about someone charging them with committing fraud. *Id.*

30. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 22 (2012).

Same-sex couples have also always been legally free to tell any children they have that they are “married.” Such speech would not fit any state’s definition of maltreatment, and the First Amendment would preclude the state from attempting to stifle it. Thus, public celebration and self-representation to children, two things advocates for same-sex marriage cite as reasons why legal marriage is important for them,<sup>31</sup> in fact are not at stake in the battle over same-sex legal-marriage. What messages children receive from the social world outside their home is also significant, but a separate matter.

Having a wedding but not being legally permitted to live together is, of course, unsatisfying for any couple. Legal marriage was once a legal precondition for any couple, opposite-sex or same-sex, to live together and to be physically intimate. A major omission in scholarly and judicial consideration of state interests has been the silence regarding state sex laws. Historically, throughout the United States, states made it a *crime* for anyone to have sex unless legally married. Wherever and whenever such laws were on the books one could not legally have sex or “cohabit” with anyone without the state’s permission in the form of a marriage certificate.<sup>32</sup> For heterosexuals, that in turn meant they could not legally reproduce and raise children together without getting legally married. Thus, legal marriage historically was the door through which everyone had to pass who wanted to “create a family,” a concept that traditionally has meant procreating (adoption being a relatively recent phenomenon in the United States).<sup>33</sup> Denying a marriage license to a couple was therefore in the past an infringement of a negative liberty, a right to the freedom to fulfill basic human needs and desires.

And *that*, crucially, is why the Supreme Court, in the now-distant past, characterized legal marriage as a matter of “fundamental liberty”: because it was the means by which the state controlled inter-personal intimacy. In recognizing either a substantive due process or an equal protection constitutional right to legal marriage several decades ago, the Supreme Court was really affirming a right to those underlying liberties—that is, the freedom to form intimate unions and families. A piece of paper from the state had no inherent meaning for couples or the Court; it was the ability legally to carry on an intimate relationship, produce chil-

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31. See, e.g., Brief of Amici Curiae California Professors of Family Law in Support of Respondents, *Hollingsworth v. Perry*, Sup. Ct. No. 12-144 (2013) (hereafter “Hollingsworth Amicus”), at 7-8.

32. See Dubler, *supra* note 2, at 1168 (“For most of this country’s history. . . the choice to live in an intimate relationship outside of marriage left consenting adults potentially vulnerable to criminal prosecution.”).

33. Adoption became legally possible in the U.S. only in the mid-nineteenth century, well after states first enacted marriage laws, and it became a common phenomenon only in the latter half of the twentieth century. See U.S. DEP’T OF HEALTH & HUMAN SERVS., HISTORY OF ADOPTION PRACTICES IN THE UNITED STATES, <https://www.childwelfare.gov/adoption/history.cfm> (last visited Dec. 19, 2014) (“The recent history of adoption in the United States can be tracked to the 1850s, with the passage of the first “modern” adoption law in Massachusetts that recognized adoption as a social and legal process”). Assisted reproduction is, of course, and even more recent development in family formation.

dren (if one wished), and share a household that was experientially important. The Court treated legal marriage as a constitutionally protected right *only because* states made it a precondition for enjoying those other rights to freedom in family life. States could have chosen voluntarily to remove the precondition, by eliminating laws prohibiting non-marital intimacy and cohabitation, while also abolishing legal marriage, and no one would have had a constitutional basis for complaining.

Thus, in *Zablocki*, the Court emphasized that the couple denied a marriage license could not legally have an intimate relationship and live together absent a state-issued marriage certificate. Wisconsin had an anti-fornication law making sex between unmarried people a crime. The Court clearly rested the constitutional significance of a state marriage certificate on its being a precondition for living together and procreating:

It is not surprising 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. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society . . . . [I]f appellee's right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.<sup>34</sup>

The right to marry piggybacked on the rights to cohabit and procreate; it was a second-order right, indirectly a matter of negative liberty.

The *Zablocki* Court also cited precedents involving family law issues other than restrictive marriage laws, cases in which it had likewise made statements tying legal marriage to social marriage and family formation (*i.e.*, procreation and child rearing). The Court quoted *Meyer v. Nebraska*, a decision resolving a parent-state conflict over school regulation, for the proposition that "the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."<sup>35</sup> Notice the sequence there. This was a jurisprudential translation of the "first comes love, then comes marriage, then comes baby in the baby carriage" ditty that many of us grew up hearing. More on that below.

Lastly, the *Zablocki* Court cited *Griswold v. Connecticut*, holding unconstitutional a state law prohibiting sale of contraceptives as applied to married people,<sup>36</sup> for the proposition that legal marriage serves the additional instrumental purpose of protecting a couple's privacy and reproductive autonomy—also inherently important things and also matters of

34. 434 U.S. 374, 386 (1978).

35. *Id.* at 384 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also id.* (citing *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as "the foundation of the family) and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing marriage as "fundamental to the very existence and survival of the race"))).

36. 381 U.S. 479 (1965).

negative liberty.<sup>37</sup> That connection between legal marriage and privacy entirely disappears if legal marriage is not a precondition for being legally protected against state intrusion into one's home and disruption of one's intimate and family life with the person of your choice.<sup>38</sup> In fact, state recognition per se is the opposite of privacy; its essence is public acknowledgement and recording of an intimate relationship.

The instrumental importance a marriage certificate used to have was more graphic in *Loving v. Virginia*.<sup>39</sup> The state had actually enforced background criminal prohibitions against a couple's intimate relationship, sentencing a black woman and white man to a year in jail for having gone to another state to marry in defiance of Virginia's anti-miscegenation law. To avoid serving that sentence, the couple had to move out of state. Had they simply lived together as a couple in Virginia, without seeking legal recognition of their relationship anywhere, they would have been subject to prosecution for violating Virginia's anti-fornication law.<sup>40</sup> The Court in *Loving*, as it did later in *Zablocki*, predicated the view that legal marriage is a fundamental right on its being a precondition for something else of inherent importance, stating: "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" and "marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," citing *Skinner v. Oklahoma*, which invalidated a sterilization law, as authority for that proposition.<sup>41</sup> Neither the state-issued paper nor the material benefits that attend legal marriage constituted the "happiness" to which the court referred, nor are they fundamental to a society's survival; it is rather the legal liberty to cohabit and reproduce that is such.

The Court's most recent marriage decision, *Turner v. Safley*, reinforced the connection between legal marriage and intimate relations. The Court held that prisoners have a substantive due process right to legal marriage despite their current forced separation from their intended spouses, because

Many important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . . Third, most in-

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37. 434 U.S. at 384-385 ("[A]mong the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage; procreation; contraception; family relationships; and child rearing and education.'").

38. The Court later extended this right of privacy to non-marital couples in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), announcing a "right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This makes *Zablocki's* connection between the right to marry and privacy odd, but does not change the fact that the Court relied in part on that connection to justify finding a right to marry. Also odd is that lower courts did not read *Eisenstadt* as making anti-fornication laws unconstitutional. *Lawrence* has served that purpose.

39. 388 U.S. 1 (1967).

40. See VA CODE ANN. § 18.2-344 ("Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication, punishable as a Class 4 misdemeanor.").

41. *Loving*, 388 U.S. at 12.

mates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated.<sup>42</sup>

The Court thus assumed prisoners' marrying was like deployed soldiers' marrying; intimacy is not possible at the time, but should be in the future. Further, the Court distinguished its prior decision in *Butler v. Wilson*, which had upheld a state statute denying a particular group of prisoners the possibility of legal marriage, based on two factual differences, one of which was that the statute imposed "a prohibition on marriage only for inmates sentenced to life imprisonment"—that is, prisoners who presumably would never leave prison and cohabit with the person they wanted to marry.<sup>43</sup> The Court in *Turner* also included on its list of "important attributes of marriage" a couple's "expressions of emotional support and public commitment," "exercise of religious faith," and "receipt of government benefits."<sup>44</sup> But as explained above, legal marriage actually bears no relation to the first two of those three things; it is not necessary to expressing anything or to having a clergy member visit you in prison and perform a non-legal ceremony.

What legal, political, and academic advocates for same-sex marriage, along with many judges now, have failed to acknowledge, though it should be obvious to them, is that this constitutionally-crucial connection between legal marriage and the basic freedom to live in intimacy with another person has disappeared. The Supreme Court itself eliminated the connection between legal marriage and the negative liberties that are important aspects of human experience, at least for same-sex couples. For them, *Lawrence* destroyed the legal and factual foundation of the Court's earlier treatment of legal marriage as a "fundamental liberty" and transformed legal marriage into merely a matter of positive right, a claim to gratuitous state benefits. Today legal marriage bears no legal connection whatsoever to "the right 'to establish a home'" with the intimate partner of your choice.

Justice Scalia therefore got it backwards when he suggested that the holding in *Lawrence* leads inevitably to a ruling in favor of a constitutional right to legal same-sex marriage.<sup>45</sup> In fact, what *Lawrence* did was to remove the foundation for ascribing a right to legal marriage to gays

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42. *Turner v. Safley*, 482 U.S. at 78, 95-96 (1987). Chief among the many analytical weaknesses of *Turner* is the Court's failure even to consider the possibility that the state could make prisoners wait to get married till after release. The possibility of conjugal visits might explain this.

43. *Id.* at 96. The other difference was that "importantly, denial of the right was part of the punishment for crime." *Id.*

44. *Id.*

45. *Lawrence v. Texas*, 539 U.S. at 558, 604 (2003) (Scalia, J., dissenting) (stating that the majority decision "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned."); see also *Kitchen v. Herbert*, 755 F.3d 1193, 1229 (10th Cir. 2014) (likewise misperceiving the implication of *Lawrence* for the constitutional significance of marriage).

and lesbians. It established a constitutional right for them to be intimate, live together, and create a family life without government interference, regardless of their marital status.

It seems safe to assume the Court would extend the central principle of *Lawrence* to opposite-sex couples and invalidate anti-fornication laws, but it has not had occasion to do so, nor for the most part have lower courts. One state court has held an anti-fornication law invalid based on *Lawrence*.<sup>46</sup> Such laws remain on the books of many other states,<sup>47</sup> though, and are presumptively enforceable until a court says otherwise, which technically could provide a basis for saying same-sex couples are not similarly-situated to opposite-sex couples in that state (i.e., opposite-sex couples need legal marriage in order to cohabit legally, whereas same-sex couples do not). Incidentally, thinking about how a court should analyze a Fourteenth Amendment challenge to anti-fornication laws quickly reveals the genuineness of states' concern about extramarital pregnancies. A state defending its anti-fornication law would surely strive to distinguish *Lawrence* on the ground that heterosexual sex imposes a cost on the state that gay or lesbian sex does not—namely, unintended extramarital pregnancies, which might lead either to abortion or dependency on the state.

In any event, since 2003 any same-sex partners who wished to live together in an intimate relationship, as a family, have been legally free to do so anywhere in the United States without a marriage certificate. Legal marriage became no longer a precondition for their sexual relations, cohabitation, or pursuit of happiness through family life.<sup>48</sup> Accordingly, a claim to have a fundamental right to legal marriage is today not a negative-rights claim for same-sex couples, but rather a positive-rights claim; it is not a claim to be left alone but rather a demand to receive certain gratuitous state benefits simply because other people are receiving them. For that reason, Court doctrine dictates that the claim does not rest on a fundamental right.

Before recital of that doctrine, note further that sexual minorities have secured many other practical and symbolic benefits since *Lawrence*. Massachusetts opened legal marriage to same-sex couples in 2003,<sup>49</sup> and be-

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46. See *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005). Cf. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (invalidating on free exercise of religion grounds portion of state anti-bigamy law prohibiting married persons from cohabitating with someone not their spouse).

47. See UTAH CODE ANN. § 76-7-104 (West 2014).

48. One exception is ability to raise a child by adopting in the few states where only married couples can adopt and where same-sex marriage is not legally recognized. Second-parent adoption by a same-sex partner is now possible in nearly half the states. See HUMAN RIGHTS WATCH, *Parenting Laws: Second Parent or Stepparent Adoption*, available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/second\\_parent\\_adoption\\_6-10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/second_parent_adoption_6-10-2014.pdf). Even where it is not, the partner of a legal parent can continue to live with and act as caregiver to a child without having legal parent status, like any heterosexual step-parent. In any event, if a state's adoption laws create some problem in a family, the parents can challenge the adoption laws directly.

49. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (2003).

cause it has no residency requirement for couples wishing to marry, for the past twelve years couples throughout the country have been able to travel to Massachusetts and become legally married on a wedding vacation.<sup>50</sup> Subsequently, legal marriage for same-sex couples has come to many other states, including some that also have no residency requirement.<sup>51</sup> So same-sex couples throughout the nation have increasingly been able to secure a legal marriage *per se* without traveling far.<sup>52</sup>

That change was not completely satisfying, because a) same-sex couples living in any state were not recognized as married by the federal government, and b) couples in states without legal same-sex marriage might not be recognized as married by their home state either. Thus, many practical benefits and symbolic public acknowledgement dependent on government recognition were still lacking. But then came *Windsor*, establishing that the federal government must treat as married same-sex couples whose home state grants them a marriage certificate, followed by executive and agency decisions extending that federal recognition also to couples who get legally married in a state other than their state of residence.<sup>53</sup> Now every same-sex couple living anywhere in the United States can not only get legally married and live together but can also enjoy substantial financial, practical, and symbolic benefits the federal government bestows on married couples.

What remains, then, for the same-sex marriage movement to achieve? What is actually at stake for couples in states whose laws are the subject of federal cases now before the Supreme Court? It is just the practical and symbolic benefits their home state itself bestows on legally married people.<sup>54</sup> Many of the practical benefits are ones that private parties, including same-sex couples, can secure for themselves by executing documents, like any unmarried cohabitants—for example, probate and non-probate transfers of wealth at death, a testamentary or standby guardianship to ensure any children they are co-parenting will remain in the custody of the survivor if a sole legal parent dies,<sup>55</sup> visiting privileges at hospitals, proxy decision making power in case of incapacity, and financial arrangements following relationship dissolution.<sup>56</sup> If there is any

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50. See LGBT MASSACHUSETTS, STEP BY STEP GUIDE [www.lgbtmassvacation.com/marriage/step-by-step-guide/](http://www.lgbtmassvacation.com/marriage/step-by-step-guide/) (last visited Dec. 19, 2014).

51. See, e.g., US MARRIAGE LAWS, [http://usmarriagelaws.com/search/united\\_states/maryland/](http://usmarriagelaws.com/search/united_states/maryland/) (last visited Dec. 19, 2014).

52. Cf. Brock Vergakis, Virginia Prepares for Possibility of Gay Marriage, Associated Press (Aug. 20, 2014), [abcnews.go.com/US/wireStory/virginia-prepares-possibility-gay-marriage-25048229](http://abcnews.go.com/US/wireStory/virginia-prepares-possibility-gay-marriage-25048229) (citing statement by Unitarian minister in Northern Virginia that most congregants desiring same-sex marriage had already accomplished that in D.C. or Maryland).

53. See, e.g., Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

54. See, e.g., *Bostic v. Schaefer*, 760 F.3d at 352, 369, 372 (4th Cir. 2014) (listing as all the consequences of not being married that one partner was denied access to the other in the hospital for several hours, that one could not adopt the other's child and instead had to petition for joint legal and physical custody, and that they had to pay more in taxes).

55. See, e.g., MICH. COMP. LAWS § 700.5202.

56. Cf. *Devaney v. L'Esperance*, 949 A.2d 743, 753-59 (N.J. 2008) (summarizing state court decisions nationwide that enforce contracts between unmarried cohabitants).

practical advantage of state recognition with respect to those benefits, it is really just application of a default rule sparing couples from executing documents and perhaps paying for a lawyer (though such documents are readily available on the internet and simple to complete for most people).

Other benefits or advantages only the state can generate, such as a special tax filing status (which is actually more likely to be a liability for same-sex couples, as same-sex couples are more likely to contain two full-time workers),<sup>57</sup> state-mandated benefits for spouses of employees (also valuable to a smaller percentage of same-sex couples, for the same reason), tort remedies against third parties (rarely invoked), ability to formalize an existing social relationship with a child through step-parent adoption (rarely possible when the other biological parent has legal parent status, and increasingly possible for same-sex partners even without marriage), or (in some states) to adopt jointly a child who is not the biological child of either partner (though this is not necessary in order for both to live with the child), and whatever symbolic significance there is to the state's treating one the same as heterosexuals.

These remaining benefits are significant, and many individuals view them as subjectively important. But there is no support in reason or Supreme Court doctrine for treating any of them, individually or collectively, as a matter of fundamental right. Surely states could abolish legal marriage altogether, if it is in fact no longer a precondition for any liberties for anyone, and cease providing such benefits on the basis of relationship status, as some scholars have urged.<sup>58</sup> Indeed it would be incongruous for the Court, after declining in *Lawrence* to declare that same-sex couples have a "fundamental" right to sexual freedom and undisturbed privacy in their homes,<sup>59</sup> to now say that people in such couples have a fundamental right to special state-income-tax filing status and survivor benefits. State-conferred financial benefits have never been treated in our legal system as a matter of fundamental constitutional right,<sup>60</sup> nor has been the ability to adopt a child. It is a policy choice for states whether to provide them at all. They are not the sort of things one must have in order "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>61</sup> They are, again, not

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57. See Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

58. See, e.g., Martha T. McCluskey, *Taxing the Family Work: AID FOR AFFLUENT HUSBAND CARE*, 21 COLUM. J. GENDER & L. 109 (2011) (criticizing the perverse distributional effects of tax law relating to marriage); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing more generally against family law's over-privileging of marriage and marriage-like relationships).

59. See *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) ("[N]owhere in *Lawrence* does the Court describe the right at issue in that case as a fundamental right or a fundamental liberty interest"); *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1235 (11th Cir. 2004) ("The Court has been presented with repeated opportunities to identify a fundamental right to sexual privacy—and has invariably declined.").

60. See *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

61. *Schaefer*, 760 F. 3d at 375 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851, (1992)).

matters of negative liberty but rather gratuitous benefits. Accordingly, substantive due process is today the wrong lens for anyone to claim a right to legal marriage, and courts cannot justify applying heightened equal protection scrutiny on the basis of the supposed importance of the private interest at stake.

This becomes clearer when one considers what else the Supreme Court has said is not a matter of fundamental right for due process or equal protection purposes. In *Deshaney v. Winnebago County*, based on a majority opinion to which Justice Kennedy affixed his signature, the Court held that a child in the custody of a state agency has no constitutional right whatsoever against that state agency's repeatedly placing him in the unsupervised custody of a biological father the agency knew to be brutally abusive. Justice Kennedy joined Justice Scalia and four other Justices in asserting, "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests."<sup>62</sup> Further: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom."<sup>63</sup> The *Deshaney* Court noted other types of government benefits that it had held were not matters of constitutional right, such as financial assistance in obtaining an abortion and shelter for the homeless.<sup>64</sup> In addition, sixteen years earlier, the Court had rejected the proposition that education is a matter of fundamental right for children, stating that "the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation."<sup>65</sup> After denying the most vulnerable persons in our society a right to state assistance in meeting the most basic human needs, and even a right against being forced by state actors to live in a dangerous environment, how could the Supreme Court today rationally endorse the proposition that self-sufficient adult couples have a fundamental constitutional right to receive state acknowledgement of their intimate relationship and attendant financial benefits and conveniences?

Express state recognition or validation of personhood or relationships *per se* is also not something the Constitution guarantees us.<sup>66</sup> The govern-

62. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989).

63. *Id.*

64. *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980)) (no obligation to fund abortions or other medical services); *Lindsey v. Normet*, 405 U.S. 56, 74, (1972) (no obligation to provide adequate housing). The Court also quoted from *Youngberg v. Romeo*: "As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."

65. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

66. See Michael Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meaning*, 97 VA. L. REV. 1267, 1274-75 (2011) ("Numerous Supreme Court cases, cutting across doctrinal subject matter areas, treat mere labeling as presenting no cognizable constitutional harm. . . . In addition, the government speech doctrine. . . gives the government substantial leeway to express its own messages, even about the private exercise of constitutional rights."); *id.* at 1277 ("The law typically does not provide redress for expressive

ment and its officials treat nearly everyone as less worthy in some ways at some times. It might be upsetting when it happens to us, but it is not unconstitutional simply because it might cause the disfavored to feel like second-class citizens.<sup>67</sup> Presidents invite celebrities and rich donors to the White House, but not law professors whose work arguably is of greater societal worth. Does that violate our constitutional rights? As a non-religious person, I feel like a second-class citizen when I witness or attend governmental events that have religious trappings, but the Supreme Court has told me such tradition-respecting practices violate no right of mine so long as they are non-coercive.<sup>68</sup> The state denies the driving privilege to many categories of people, defined by age, physical or mental ability, and other characteristics, but we do not view that as making them second-class citizens or infringing any fundamental right. Couples who are childless might feel denigrated by official recognition of Mothers' Day and Fathers' Day, especially given that there is no "Spouses' Day" (itself telling of the state's sensible priorities). Adoptive parents feel like second-class parents because of the state's strong protection of biological parents, financial support for expensive assisted reproduction procedures, and intense scrutiny of adoption applicants. The poor feel denigrated when the state denies them welfare benefits, housing assistance, or a decent education for their children.

Further, the government issues explicit negative statements about activities like smoking and unhealthy eating that could make people who engage in such activities feel like second-class citizens, and it explicitly encourages other behaviors like staying in school, which could stigmatize those who fail to engage in that behavior.<sup>69</sup> Michael Dorf explains: "Be-

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harm"). Dorf contends there is some doctrinal support for treating dignitary harm as constitutionally significant, but provides no support for this except statements by conservative Justices in affirmative action cases that he thinks place weight on the "social meaning" of characteristic-based discrimination, and those statements in fact make no reference to social meaning or dignity or any synonym for either. *See id.* at 1295-97. Dorf also contends several Supreme Court decisions have rested on a finding of animus; *id.* at 1297; but in fact mention of animus was analytically superfluous in all those cases. Dorf's ultimate thesis that denying same-sex marriage is constitutionally problematic because it signals that people in same-sex relationships are second-class citizens and forces them to "participate in their own oppression" by indicating that they are single when dealing with governmental or private institutions rests on an implicit assumption that single people are second-class citizens; *id.* at 1308-09; an implausible assumption which he provides no support. It also rests on an assumption that sexual minorities "reasonably understand those laws as branding them and their relationships as second-class;" *id.* at 1344; but never explains what makes a group's view or understanding of a law reasonable.

67. *See id.* at 1280 ("A citizen may be genuinely distressed about any number of actions the government takes or fails to take. . . Yet standing doctrine. . . asserts that the citizen in such circumstances is not 'injured'. . . [or] that certain sorts of real injury. . . cannot be treated as real by the courts without licensing a litigation explosion").

68. *See, e.g.,* *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014) (upholding town's practice of having volunteer chaplains open each legislative session with a prayer). *See also* Dorf, *supra* note 66, at 1290 ("Notably, the successful plaintiffs in *West Virginia State Board of Education v. Barnette* only earned a right to opt out of participating in the flag salute.").

69. *See* Dorf, *supra* note 66, at 1286, 1291, 1339 n.210 (citing complaints among smokers and the obese about feeling like second-class citizens).

ing incidentally insulted or otherwise harmed by government speech . . . is just part of the price each of us potentially pays for having an effective government.”<sup>70</sup> And, one might add, it is part of the price of living in an imperfect world with sometimes insensitive fellow human beings.

It would be foolish for courts to start viewing these everyday state discriminations and implicit slights as infringements of fundamental right, even if some group makes denial of some particular state benefit a symbolic battleground, working themselves up into the belief that unless they have victory on that front they can never feel accepted as equal citizens. It would be foolish because it would create this moral hazard, that people could secure a stronger constitutional position by fomenting feelings of inferiority, or fabricating displays of such, among group members.<sup>71</sup> Defenders of religious trappings in government accuse the secularists who bring Establishment Clause challenge of doing these very things.

It would be foolish also because it is impossible to make most laws entirely non-discriminatory and non-exclusionary. Responding to one group’s complaints of insult by adding them to a benefit program will inevitably generate fresh insult among members of some other group that remains excluded. If the Supreme Court holds that states must extend legal marriage to same-sex couples, will this not increase the subjective perception of state disparagement among polygamists, amorous siblings, and religious groups that endorse child marriage? Will the Court have to mandate legal plural marriage if polygamists claim to feel like second-class citizens because the state denigrates their relationship choices? Indeed, some scholars and advocacy groups complain that state glorification of marriage itself makes single heterosexuals feel denigrated,<sup>72</sup> especially since single people are taxed to pay for the state-provided benefits married people receive,<sup>73</sup> and the same-sex marriage movement can only have intensified singles’ feeling of social inferiority. Do single people therefore have a presumptive constitutional right to abolition of legal marriage?

Finally, to the extent any particular state benefit now tied to marriage is important to the lived experience of same-sex couples, they are free to challenge the denial of that benefit directly, arguing that it violates their rights for the state to make it dependent on a marital status they cannot obtain. That is what *Lawrence* was, a challenge not to denial of a marriage certificate that might have indirectly secured the right of intimate association for same-sex couples, but a successful challenge directly to the invasion of privacy. Likewise, some couples have directly and successfully challenged denial of the opportunity for one member of the couple to

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70. *Id.*

71. *Cf.* BOIES & OLSON, *supra* note 10, at 128 (relating *Perry* litigation plaintiff stating that not having legal “marriage,” rather than registered partnership, created feelings merely of “awkwardness” when opening a bank account or checking into a hotel).

72. *See, e.g.,* Rosenbury, *supra* note 58.

73. Motro, *supra* note 57; UNMARRIED EQUALITY, Federal Income Taxes, /www.unmarried.org/federal-income-taxes.html (last visited Dec. 19, 2014).

adopt the legal child of the other.<sup>74</sup> An irony of *DeBoer v. Snyder* is that the couple involved initially challenged only the adoption law in Michigan,<sup>75</sup> but the federal trial court judge suggested they add a challenge to the state's marriage law!<sup>76</sup> Unsurprisingly, the judge then held the state marriage law unconstitutional.<sup>77</sup>

In sum, it is wrong for gay-rights advocates, political sympathizers, judges, and family law professors to simplistically cite *Zablocki* and *Loving* for the proposition that legal marriage is a fundamental right, as they routinely do. Too much has changed in the past quarter century, such that what remains at stake is simply not the stuff of fundamental rights. And they must all know this; I assume other family law professors also draw their students' attention to it.<sup>78</sup> Yet in the stream of federal court marriage decisions since *Windsor*, no court, amicus brief filed by legal academics, or statement by attorneys general declining to defend their states' laws has acknowledged the dramatic changes *Lawrence* and *Windsor* brought about in the legal and practical situation of same-sex couples.

This has been so even though this kind of analysis—that is, as to whether prior assumptions or holdings of the Supreme Court remain authoritative—is a familiar one for courts, lawyers, and legal scholars. Indeed, it has featured in *Lawrence* and its progeny to answer two other questions: in *Lawrence*, whether certain premises of *Bowers v. Hardwick* remained true,<sup>79</sup> and in the recent marriage cases whether the Supreme Court's decision in *Baker v. Nelson*<sup>80</sup> should control the outcome. In *Baker*, the Court summarily dismissed, “for want of a substantial federal question,” an appeal from a Minnesota state court decision rejecting a constitutional challenge to that state's exclusion of same-sex couples from legal marriage. The opinion of the federal district court in Norfolk, Virginia, exemplifies lower courts' handling of that precedent:

There is no dispute that such summary dispositions are considered precedential and binding on lower courts. There is also no dispute asserted that questions presented in *Baker* are similar to the questions presented here . . . . However, summary dispositions may lose

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74. See, e.g., *In re Adoption of Doe*, 326 P.3d 347 (Idaho 2014).

75. See *DeBoer Cert. Petition*, *supra* note 18, at 8.

76. See Christine Ferretti, Judge to rule on adoption fight, *THE DETROIT NEWS*, Aug. 30, 2012 (“On January 23, 2012, a lesbian couple filed a lawsuit in U.S. District Court for the Eastern District of Michigan on behalf of themselves and three children, challenging the state's ban on adoption by same-sex couples so they can jointly adopt their children. . . . In August 2012, Judge Bernard A. Friedman invited the couple to amend their suit to challenge the state's ban on same-sex marriage, “the underlying issue”).

77. *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

78. Cf. *Abrams & Brooks*, *supra* note 25, at 19 (“*Lawrence* can be read as the nail in the coffin of *Zablocki*. . . *Lawrence* challenges the idea that marriage can be a proxy for legal sex, and strengthens the notion that constitutional privacy rights concern not the relationship of marriage but instead the sexual autonomy to enter into many kinds of relationships.”).

79. See Brief for Petitioner, *Lawrence v. Texas*, 2003 WL 152352, at 30-32; Brief Amicus Curiae of the ACLU in Support of Petitioner, *Lawrence v. Texas*, 2003 WL 164132, at 27-28.

80. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972).

their precedential value. They are no longer binding “when doctrinal developments indicate otherwise.” This Court concludes that doctrinal developments since 1971 compel the conclusion that *Baker* is no longer binding . . . . In so holding, the Second Circuit relied upon doctrinal developments from Supreme Court decisions, including cases creating the term “intermediate scrutiny”; discussing classifications based on sex and illegitimacy; and finding no rational basis for “a classification of [homosexuals] undertaken for its own sake” in *Romer v. Evans* (1996).<sup>81</sup>

Treatment of legal marriage as a “fundamental liberty” in *Zablocki* and *Loving* was not a holding but a premise. The lower federal court should have concluded that the premise is no longer true, because legal developments in the past fifteen years have erased the legal connection between marriage and personal autonomy in relation to family life that was explicit in and essential to the premise. Certainly legal scholars are free to point this out. Yet no court or amicus brief filed by legal scholars has even addressed this glaring reality. The Supreme Court, of course, is free to establish now that legal marriage is no longer a matter of fundamental right.

#### B. HOMOSEXUALS ARE, FORTUNATELY, NO LONGER A SUSPECT CLASS

That the Movement’s successes have also undermined the case for labeling sexual minorities a “suspect class” is a possibility that has received some scholarly attention. But the few judges and legal scholars who have argued in favor of heightened review on this basis have completely ignored the unprecedented political and popular ascendancy of the LGBT community, strained to minimize it, or deployed an implausible standard of powerlessness that would make every equal protection plaintiff group a suspect class.<sup>82</sup> None can plausibly be viewed as having addressed the possibility objectively, because the gaps in their analyses are glaring.

Before explaining, it is worth noting a complexity with this aspect of equal protection analysis in connection with same-sex marriage that has gone unremarked. The group of persons who seek same-sex marriage is

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81. *Bostic v. Rainey*, F.Supp. 2d 456, 469-70 (E.D. Va. 2014). See also *Kitchen v. Herbert*, 755 F.3d 1193, 1204-08 (10th Cir. 2014); *Bostic v. Schaefer* 760 F.3d. 352, 372-73 (4th Cir. 2014) (making similar analysis and citing other federal court decisions to the same effect); *Wolf v. Walker*, 986 F.Supp.2d 982, 990 (W.D. Wis. 2014).

82. See, e.g., *Love v. Beshear*, 989 F. Supp. 2d 536, 546 (W.D. Ky. 2014) (“The question is whether they have the strength to politically protect themselves from wrongful discrimination . . . . A more effective inquiry looks to the vulnerability of a class in the political process due to its size or political or cultural history. Under this inquiry, Kentucky’s laws against homosexual persons are ‘Exhibit A’ of this powerlessness.”(citations omitted)). The first sentence here is circular, insofar as wrongfulness tends to turn on level of scrutiny. I have no idea what it means to be “vulnerable. . . due to its . . . political or cultural history.” If vulnerability arises simply from small size then the much-maligned “One Percent” must deserve protected-class status. If the court were to respond with “but the One Percent is not vulnerable,” then it would be confessing that size and history do no work in its formulation.

not limited to gays and lesbians—that is, people for whom there is no reasonable alternative to pursuing a same-sex intimate relationship. Bisexuals, who constitute 40% of the LGBT population,<sup>83</sup> as well as transgendered persons, complicate the very description of the class discriminated against and the classification upon which the challenged discrimination is based.<sup>84</sup> Do traditional marriage laws discriminate against bisexuals? If so, is bisexuality an immutable characteristic? Is there a history of widespread hostility against bisexuals per se? Is same-gender attraction an immutable characteristic if one can change one's gender? Can spiritual wives of polygamists complain that same-sex marriage laws are over-inclusive with respect to the purpose of enabling everyone to marry some person to whom they can be attracted, insofar as it sweeps in people who (like them) realistically could make a more traditional choice and people who (like them) could conform to traditional marriage expectations by altering an important aspect of their personal identity (gender identity vs. religious belief)? Lawyers defending state laws might do well to problematize the plaintiffs' description of the class and the nature of the discrimination.

It is also worth noting preliminarily the enormous odds against any group seeking protected-class designation from the Supreme Court today.<sup>85</sup> The Court has a bad equal-protection hangover, as a result of combining the Warren Court's thirst for civil rights with the Burger and Rehnquist Courts' (highly selective) taste for abstraction, garnished with bad timing. The Court gave this special protection to historically-subordinated groups just as they were coming into their own politically, then transformed the predicate for heightened review from discrimination against those groups to discrimination against anyone (including the historically super-ordinate group) on the basis of the group-defining characteristic, thereby rendering presumptively invalid a large swath of state action, and it has ended up most often using heightened review *against* the historically-subordinate groups after they acquire sufficient political power to secure corrective-justice legislation.<sup>86</sup> In addition to struggling with separation of powers discomfort and the affirmative action head-

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83. See Pew Center Report, *supra* note 9, at 5.

84. See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (explaining why gays and lesbians have reason to hope bisexuals remain invisible).

85. See William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 385 (2014) ("For at least two decades, scholars have remarked on the Court's reluctance to create new suspect classes based on political process analysis. Two decades ago, however, they could point to *Cleburne* as a relatively recent example of the Court at least engaging in such analysis. From the current vantage point, what is remarkable is not so much the Court's unwillingness to create new suspect classes but its unwillingness even to consider that possibility."); *DeBoer*, 772 F.3d at 413 (noting that the Court "has not recognized a new suspect class in more than four decades").

86. See Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny Is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 307 (2013) ("[B]etween 1990 and 2003, 73% of all laws that invoked race were struck down when subjected to strict scrutiny in federal courts. The 'overwhelming majority' of laws struck

ache, the Supreme Court now realizes it is very difficult to put a cork in the suspect-class bottle after the potion sours; the Court has no procedure or test for demoting a class or classification.

The LGBT community might therefore want to think twice before insisting that the Court make sexual orientation (or should it be sexual choice, to include bisexuals?) a suspect classification and ever thereafter apply a presumption of invalidity to any law aimed at remediating this society's historical mistreatment of them. "Legitimate" children have not yet sued the government for giving special benefits to children of single parents, but whites and men have been successful in getting courts to prohibit special benefits for racial minorities and women.<sup>87</sup> If the Court adds sexual orientation to the short list of suspect or quasi-suspect classes, inevitably some heterosexuals will challenge any government affirmative action or special protections for sexual minorities they perceive as disfavoring heterosexuals. And they would likely succeed; sexual orientation-blindness seems intuitively more feasible than race-blindness or gender-blindness.

With respect to the substantive test, sexual minorities clearly satisfy some criteria. Being gay or lesbian is immutable, and the history of legal and societal prejudice and brutality toward gays, lesbians, and transgendered persons is tragic.<sup>88</sup> One of the many reasons I believe states should confer legal marriage status on same-sex couples is that we as a society should do as much as we can to demonstrate that we acknowledge this history and its vestiges in the present, that we are collectively ashamed of and regretful about it, and that we want sexual orientation minorities now universally to feel and actually be fully accepted as equal citizens, valued as good human beings, and safe at home and in public. Legal marriage has lost most of its practical significance, but the LGBT community is saying this is what it wants as validation of their equality, so it is an effective way for the rest of us to communicate to them our regret for the past and our resolve to overcome it.

Political power, though, is the factor most closely tied to the basic purpose of heightened judicial review, to protect groups so disempowered and isolated by pervasive hostility or denigration as to be unable to ensure that their interests receive proportionate consideration in the politi-

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down in that period were those that sought to ameliorate the status of racial minorities, such as affirmative action policies.").

87. See Mark S. Kende, *Is Bakke Now Super-Precedent and Does It Matter? The U.S. Supreme Court's Updated Constitutional Approach to Affirmative Action in Fisher*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 15, 18-19 (2013) (describing string of cases in which the Supreme Court applied strict scrutiny to invalidate race-based affirmative action measures, such as favoring black teachers with less seniority over white teachers during layoffs, minority set-asides in government contracting rules, and extra points for being of minority race in college admissions decision making).

88. See Brief of Constitutional Law Scholars Ash Bhagwat et al. as Amici Curiae in Support of Plaintiffs-Appellees, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178)2014 WL 897511, at \*10-14 [hereinafter *Constitutional Amicus*].

cal process, rather than being treated with indifference.<sup>89</sup> It is the one factor that would enable courts to refuse requests for heightened review by groups that might have needed it fifty or one hundred years ago but not today. Ranked by this measure, there are other groups far more deserving of suspect class status that do not receive it—for example, children, the disabled, and atheists.<sup>90</sup>

In the substantive due process context, it can actually help plaintiffs that the tide of public opinion has turned in their favor, because of the substantive rules applicable.<sup>91</sup> And so in briefing *Lawrence* a dozen years ago, those advancing gay rights maintained, even then, that “the Nation has steadily moved toward rejecting second-class-citizen status for gay and lesbian Americans”<sup>92</sup> and that “[p]ublic policy toward gay men and lesbians has changed dramatically over the past few decades.”<sup>93</sup> Yet 2003 now seems like the Dark Ages in terms of public attitudes toward gays and lesbians. The growth of public support for gay rights, including gay marriage, since then, has been simply extraordinary,<sup>94</sup> beyond what any-

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89. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (“[O]ne aspect of the judiciary’s role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference.”); Darren Lenard Hutchinson, “Not Without Political Power”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 981 (2014) (stating that the argument by proponents of same-sex marriage to downplay the political power factor “ignores a fundamental justification for the suspect class doctrine: to correct political process failures”). Attempts by scholars and judges to minimize the significance of this factor typically point to Supreme Court decisions issued well after a group was initially designated suspect or quasi-suspect, in which the Court continued to apply the classification despite changes in the political power of the group in question, including cases in which the Court applied heightened scrutiny to affirmative action laws. See, e.g., William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 11-12 (2010). But the best explanation for this phenomenon, and the only explanation in affirmative action cases, is that these designations take on a life of their own once made, the Supreme Court having failed to develop any rational way of undoing or cabining them.

90. Cf. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (applying rational basis review after declining to ascribe suspect or quasi-suspect class status to the mentally disabled); Stephen Losey, *Group: Airman Denied Reenlistment for Refusing To Say “So Help Me God”*, AIR FORCE TIMES (Sept. 4, 2014, 6:00 AM), <http://archive.airforcetimes.com/article.20140904/NEWS05/309040066/Group-Airman-denied-reenlistment-refusing-say-help-me-God>. One offensive thing that otherwise highly admirable defenders of gay rights have said is that homosexuals are the last group in our society to suffer systematic discrimination. See, e.g., BOIES & OLSON, *supra* note 10, at 8 (referring to discrimination based on sexual orientation as “this last major bastion of institutionalized discrimination in America”); *id.* at 33 (“But at the end of the twentieth century, with limited exceptions based on gender, there was only one group of American citizens that continued to suffer systematic discrimination at the hands of their own government . . .”).

91. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571-74 (2003); *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002) (discussing state law developments concerning execution of mentally disabled criminals). It also helps because of judicial reluctance to get ahead of public opinion, which is also true in the equal protection context.

92. Brief of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), WL 152352, at \*30-31.

93. Amicus Brief of Human Rights Campaign et al. in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558(2003) (No. 02-102) WL 152347, at \*21 [hereinafter *Lawrence Amicus Brief*].

94. See, e.g., BOIES & OLSON, *supra* note 10, at 218 (noting that, in 2012, “the tide of public opinion was continuing to change rapidly”); *id.* at 272 (noting a “change in attitudes

one then dreamed possible. Though it remains difficult in many places in the United States for gays and lesbians to be open about their sexuality, it is undeniable that nationally they have tremendous political power and public support for a group so small in number.<sup>95</sup> Gays and lesbians have been securing political victories on many issues in many states and at the federal level for many years now, including anti-discrimination protections in employment and housing<sup>96</sup> and eligibility to adopt children.<sup>97</sup> Ten states and the District of Columbia adopted same-sex marriage by popular will, without judicial compulsion,<sup>98</sup> and others would undoubtedly have followed if the litigation stampede had not paralyzed political efforts.<sup>99</sup> Thus, in dozens of states (when one includes anti-discrimination laws as well as same-sex marriage laws), more than fifty percent of legislators or voters have endorsed legal reform solely for the sake of a group constituting (nationally) a very small percentage of the population.<sup>100</sup> What other historically-subordinated group of similar size can claim such political influence?

Also very telling is that polls now show super-majoritarian support for

that has swept the nation"); *id.* at 293-94 ("What was a 'wedge' issue in the 2004 presidential election is now, just ten years later, becoming widely accepted by the public and politicians alike."); *id.* at 294 ("[P]rejudice toward gays and lesbians is melting away in all walks of life.").

95. *Cf. Cleburne*, 473 U.S. at 443 ("The distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.").

96. Lawrence Amicus Brief, *supra* note 93, at 9, 19-22.

97. *See id.* at 26-27; *see also* Morgan Little, *Gay Marriage Movement Wins Significant Victories in 2013*, L.A. TIMES (Dec. 9, 2013, 11:48 AM), <http://www.latimes.com/nation/nationhow/19-pn-gay-marriage-movement-gains-2013-20131206-story.html>.

98. *See Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGS. (Nov. 20, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>. The Constitutional Amicus attempts to minimize the significance of this by characterizing the legislative victories as "a modicum of success in select jurisdictions," quite an understatement. They also emphasize that "in some instances hard-fought gains in the battle for equal rights for gay men and lesbians have been rolled back by aggressive ballot initiatives," but they do not identify any instances in which that occurred after legislative victories rather than court mandates. Constitutional Amicus, *supra* note 88, at 20.

99. *See Marriage and Family on the Ballot*, BALLOTPEDIA, [http://ballotpedia.org/Marriage\\_and\\_family\\_on\\_the\\_ballot](http://ballotpedia.org/Marriage_and_family_on_the_ballot) (last visited Nov. 22, 2014).

100. What that percentage is continues to be a subject of intense debate, mostly because oppression and stigma can deter people from acknowledging their sexual orientation. A recent study found gays and lesbians make up 1.6% of the population, 0.7% for bisexuals, and 1.1% of surveyed persons considered themselves "something else." *See* Brian W. Ward et al., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey 2013*, 77 NAT'L HEALTH STAT. REP., July 15, 2014, at 3, *available at* <http://cdc.gov/nchs/data/nhsr/nhsr077.pdf>. Even if one assumes the study undercounted both groups by a third, and even if one treats the entire LGBT population as the relevant group, rather than just gays and lesbians, the group whose political power is being measured amounts to roughly five percent of the population. *See also* Brief of Amicus Curiae Gary J. Gates in Support of Plaintiffs-Appellees & Affirmance, *DeBoer v. Snyder*, No. 14-1341 (6th Cir. June 16, 2014), 2014 WL 2800888, at \*7 (stating that 8 million Americans identify as LGBT).

same-sex marriage nationwide<sup>101</sup> and for decades have shown even greater support for legal protections for sexual minorities against employment discrimination.<sup>102</sup> These are impressive public relations successes that advocates for a litigation solution, such as the Constitutional Law amici, studiously avoid mentioning.<sup>103</sup> Even in states where the Movement has not yet secured legislative reform, the percentage of residents supporting same-sex marriage far exceeds the percentage of the population that stands to benefit from it.<sup>104</sup> And even in some conservative southern states, attorneys general, who always have a keen eye on the governor's mansion and therefore on public opinion, refused to defend traditional marriage laws in litigation.<sup>105</sup> The president of the United States reversed his initial position and came out in support of same-sex marriage,<sup>106</sup> and more than half the members of both houses of Congress, along with the governors of some of the most populous states, are now on board.<sup>107</sup>

Then there is the wealth behind the movement. A large number of very rich and powerful people and organizations have supported the same-sex marriage cause,<sup>108</sup> including many prominent conservatives.<sup>109</sup> The corporate world generally opposes anti-gay measures and supports same-sex marriage in their states of operations, in part to ensure all potential employees view the state as welcoming.<sup>110</sup> Gays and lesbians themselves as a

101. See Katherine Faulders, *As Gay Marriage Turns 10, US Public Opinion Tips*, ABC News (May 16, 2014, 3:36 PM) <http://abcnews.go.com/blogs/politics/2014/05/as-gay-marriage-turns-10-us-public-opinion-tips>.

102. Scott Barclay & Daniel Chomsky, *How Do Cause Lawyers Decide When and Where to Litigate on Behalf of Their Cause?*, 48 *LAW & SOC'Y REV.* 595, 605 (2014) ("80 percent of the surveyed population supports 'equal rights in terms of job opportunities' by April 1993 and the level of support continues to climb throughout the next decade.").

103. See, e.g., Constitutional Amicus, *supra* note 88, at 17-24 (discussing legislative action but making no mention of popular support as measured by polls).

104. See, e.g., *Missouri*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/missouri> (last visited Nov. 22, 2014) (estimating "4.4 same-sex couples per 1,000 households" in Missouri, but 33% of the entire state population supporting same-sex marriage and 31% supporting civil unions); *Bostic v. Schaefer*, 760 F.3d 352, 368 (4th Cir. 2014) (stating that 43% of Virginia voters voted against the Marshall/Newman Amendment in 2006).

105. See, e.g., Trip Gabriel, *Kentucky Law Official Will Not Defend Ban on Same-Sex Marriage*, N.Y. TIMES Mar. 5, 2014, at A17; Alexander T. MacDonald, *Virginia AG's Controversial Decision Not to Defend Same-Sex Marriage Ban May Herald a New Day for Same-Sex Couples in the Commonwealth*, 30 *DOCKET CALL* 3-4 (2014), available at [http://www.vsb.org/docs/conference/young-lawyers/dc\\_spr2014.pdf](http://www.vsb.org/docs/conference/young-lawyers/dc_spr2014.pdf).

106. Cf. BOIES & OLSON, *supra* note 10, at 222 (noting the "dramatic shift" in the federal government's position on gay rights).

107. See Dorf & Tarrow, *supra* note 12, at 457 ("By the time the Supreme Court heard oral arguments on DOMA and Proposition 8, fifty-four senators, 180 members of the House of Representatives, fifteen governors, and at least 117 mayors had declared themselves in favor of marriage equality."); *id.* at 462 (noting the support of Governor Cuomo of New York).

108. BOIES & OLSON, *supra* note 10, at 47-67 (describing assemblage of support from celebrities, wealthy donors, major law firms); *id.* at 222-23 (noting over 100 large corporations signed on to amicus briefs supporting same-sex marriage).

109. *Id.* at 223.

110. See, e.g., Nick Halter, *Target Files Court Papers Supporting Same-Sex Marriage in Wisconsin and Indiana*, MINNEAPOLIS/ST. PAUL BUS. J. (Aug. 5, 2014, 3:41 PM), [www](http://www)

group, unlike racial minorities and women, have above-average incomes.<sup>111</sup> The amici support for the plaintiffs in the *Perry* litigation when it reached the Supreme Court, including conservative organizations and major American corporations, was overwhelming, perhaps unprecedented.<sup>112</sup> Undoubtedly it is again now for “the final showdown.”

Representation in government depends on how it is measured. If by the percentage of elected government officials who are “out” gays, lesbians, bisexuals, or transgender persons, then the LGBT community is still under-represented, though by much less today than a couple of decades ago and undoubtedly far less than for, for example, “out” atheists or, of course, children.<sup>113</sup> If measured in terms of elected officials “on one’s side,” rather than hostile or merely neutral, the LGBT community is today wonderfully over-represented. Arguably that has long been the case; gay rights other than marriage were on the platform of the Democratic National Committee (DNC) as early as 1980, and anti-discrimination laws passed all over the nation in the 1970s reflected the gay community’s substantial “political clout” even then.<sup>114</sup> More recently, support for same-sex marriage per se has expanded dramatically among Democrats, as illustrated by addition of same-sex marriage to the Democratic National Committee party platform in 2012.<sup>115</sup> It has also spilled over into the Republican Party, with 40% supporting same-sex marriage.<sup>116</sup> Indeed, it has become difficult for anyone operating in mainstream society, and extremely difficult for any liberals, to stand on the sidelines, let alone to oppose the Movement’s objectives or challenge the Movement’s arguments.<sup>117</sup> In the legal academy, this pressure is even more intense; no untenured law professor with an ounce of self-preservation instinct would

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.bizjournals.com/twincities/news/2014/08/05/target-amicus-same-sex-marriage-wisconsin-indiana.html.

111. See Blake Ellis, *Gay People Earn More, Owe Less*, CNN MONEY (Dec. 6, 2012, 1:37 PM), <http://money.cnn.com/2012/12/06/pf/gay-money>.

112. BOIES & OLSON, *supra* note 10, at 22-23 (“In quantity and, far more important, in quality, these briefs dwarfed the submissions supporting our opponents and left no doubt that the tide of public opinion had shifted dramatically in favor of marriage equality.”)

113. See Stephanie McNeal, *Unenforceable Ban on Atheists Holding Public Office Still on the Books in 8 States*, FOX NEWS (July 16, 2014), <http://www.foxnews.com/politics/2014/07/16/states-atheists-banned/public-office>.

114. See KLARMAN, *supra* note 30, at 23-25, 28.

115. Sam Stein, *Democratic Party Platform: Pro-Gay Marriage, Immigration Reform, Shots at Romney, Squishy on Guns*, HUFFINGTON POST (Sept. 3, 2012, 10:51 PM), [http://www.huffingtpost.com/2012/09/03/democratic-party-platform\\_n\\_1853120.html](http://www.huffingtpost.com/2012/09/03/democratic-party-platform_n_1853120.html).

116. *Polling Tracks Growing and Increasingly Diverse Support for the Freedom to Marry*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/resources/entry/marriage-polling> (last updated July 2, 2014).

117. Cf. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1008 (D. Nev. 2012) (“[The political success] the homosexual-rights lobby has achieved . . . indicates that the group has great political power. . . . In 2012 America, anti-homosexual viewpoints are widely regarded as uncouth. All in all, the political power of homosexuals has increased tremendously since 1990 when the *High Tech Gays* court ruled that the group did not, even then, sufficiently lack political power for the purposes of an equal protection analysis.”); Dorf & Tarrow, *supra* note 12, at 464 (relating a statement by a Movement leader suggesting that, even within the LGBT community, an orthodoxy stifles discussion: “No one wanted to be seen as against marriage equality and thus allied with the anti-gay-rights”).

write an article like this one, challenging the liberal orthodoxy on same-sex marriage.

Advocates for the Movement point to popular-vote reversals of past victories,<sup>118</sup> but the victories reversed were all judicial victories; changes in public opinion have been steady in a positive direction. And with one exception (North Carolina Amendment 1 in 2012, which did not reverse anything), it has been five years since any statute or constitutional amendment hostile to gay marriage has passed; all the political reversals in recent years have been in favor of gay rights.<sup>119</sup>

This should not need to be pointed out,<sup>120</sup> but simply not getting positive changes from legislators or ballot initiatives in some places at some times cannot be sufficient to warrant suspect class treatment. The relevant question is whether a group is able to ensure its interests receive proportionate consideration in the political process, not whether its interests always win out over competing interests.<sup>121</sup> We should expect groups constituting a very small percentage of the population to fail most of the time in attempting to get legislation benefiting just them passed.<sup>122</sup> It is fantastic that sexual minorities have won so much, disingenuous to deny it, and arguably insulting to those who have worked tirelessly to change public attitudes. In similar circumstances, the Supreme Court refused to accord quasi-suspect class status to the mentally disabled:

The legislative response, which could hardly have occurred without public support, negates any claim that the mentally retarded are po-

118. See Constitutional Amicus, *supra* note 88, at 5, 20.

119. See *North Carolina Same-Sex Marriage, Amendment 1 (May 2012)*, BALLOTPEDIA, [http://ballotpedia.org/North\\_Carolina\\_Same\\_Sex\\_Marriage,\\_Amendment\\_1\\_\(May\\_2012\)](http://ballotpedia.org/North_Carolina_Same_Sex_Marriage,_Amendment_1_(May_2012)) (last visited Nov. 22, 2014).

120. The Seventh Circuit tried to dismiss the political victories by suggesting they do not reflect power but rather magnanimity on the part of the American public. This suggests the voting patterns and disposition (negative as well as positive, presumably) of the majority with regard to a minority group are irrelevant to gaging the group's political power, which makes one wonder on what basis Judge Posner could find that gays and lesbians are or have ever been under-powered politically. Posner also draws a silly analogy to animals, implicitly proffering the syllogism: "Any group for which legislatures have passed protective legislation are actually politically powerless if they do not have a vote. Animals do not have a vote. Therefore, despite protective legislation, animals are politically powerless." Substituting "corporations" for "animals" in this syllogism reveals the implausibility of the major premise. And, of course, members of the LGBT community do have a vote. *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir. 2014).

121. See *Sevcik*, 911 F. Supp. 2d at 1009 ("If a plaintiff could necessarily win on the political powerlessness factor of the level-of-scrutiny analysis by the very fact that he was unable to challenge a particular law democratically, the factor would be meaningless. Political powerlessness for the purpose of an equal protection analysis does not mean that the members of a group have failed to achieve all of their goals . . . . The English suffix '-less' means 'without,' and 'powerless' means 'without power,' not 'without total power.' . . . The question of 'powerlessness' under an equal protection analysis requires that the group's chances of democratic success be virtually hopeless, not simply that its path to success is difficult or challenging because of democratic forces.").

122. Thus, it is inapt to compare sexual minorities to women. When women, constituting 50% of the population, have had great difficulty securing legal protections through the legislative process, then their political power must have been much less than their numbers should have provided.

litically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.<sup>123</sup>

Moreover, the LGBT community's political situation will clearly continue to improve, with overwhelming majority support now for all gay rights among Americans under age 30.<sup>124</sup> Even among evangelical Protestants, there is substantial support for same-sex marriage in the younger generations.<sup>125</sup> Thus, every additional year that passes, even every month, makes it even more inapt to treat them as a group in need of special judicial protection in equal protection cases. Reliable statistical analyses support a prediction that, within ten years, all states would legislatively adopt legal same-sex marriage if left to make the decision themselves.<sup>126</sup> This great and ongoing progress is something to be thankful for, and something that should make a *political* victory nationally seem to the Movement and the Supreme Court more likely and more worth waiting for, an idea I return to in part IV.

Beyond considerations of political power, the Court would also consider, if making a genuine effort to apply the established test, potential relevance of sexual orientation to legitimate public policy.<sup>127</sup> Yet advocates and those posing as objective scholarly experts generally ignore this. Space does not permit analyzing precisely when sexual orientation *should* be relevant, but a few minutes' thought brings to mind the following list of government decisions as to which many people might think sexual orientation is relevant:

- paternity and maternity presumptions
- foster care placement and adoption (could be pro or con, depending on the child)
- child custody and visitation<sup>128</sup>
- whether to require health insurance companies to pay for childbearing-related expenses or sex-reassignment surgery
- policies relating to contraceptives
- whether, how, and to whom public schools teach sex education
- design of locker rooms in schools or other public sports facilities

123. *City of Cleburne, Tex v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985).

124. See KLARMAN, *supra* note 30, at 199.

125. *Id.*

126. See *id.*, at 202; see also *id.* at 193-203 (describing the inevitability, if current trends continue, of a *political* victory for the Movement).

127. See *Cleburne*, 473 U.S. at 441-42 (“[W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.”).

128. See, e.g., *A.O.V. v. J.R.V.*, No. 0219-06-04 2007 WL 581871, at \*5-6 (Va. Ct. App. Feb. 27, 2007) (upholding visitation restrictions aimed at limiting children's exposure to father's homosexual lifestyle).

- training of school counselors
- after-school clubs
- construction of public restrooms
- assignment of police and security officers to frisking duty
- prison housing and security

Even among the large portion of the American population that now says sexual orientation should be irrelevant to the opportunity for legal marriage, it might be that most would say sexual orientation is relevant to many of these things. As to some, sexual minorities themselves might ask to be treated differently or to be accommodated in some way.

## II. SAVED BY SYMBOLIC SETBACKS?

Some suggest “animus” plays a role in equal protection analysis,<sup>129</sup> primarily because Justice Kennedy mentioned it in *Romer* and *Windsor*. Whether it actually has constitutional significance is uncertain, which helps explain why most lower federal courts have eschewed animus analysis.<sup>130</sup> A straightforward reading of cases in which the Court has mentioned it should lead to the conclusion that it is analytically superfluous, an inference the Court draws after already concluding that the law in question serves no legitimate state interest.<sup>131</sup> That the Court has never provided guidance on what exactly animus is, how to identify it, or whose feelings matter further supports an assumption that talk of animus is irrelevant finger-wagging. Kenji Yoshino argues, though, that even when the Court says it is applying rational basis review, if it perceives animus, its

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129. See, e.g., *Baskin v. Bogan*, 12 F.Supp.3d 1144, 1163-64 (S.D. Ind. 2014); Bourke Amicus 1, *supra* note 18, at 5, 28; Rainey Memorandum, *supra* note 18, at 12-13. Some present a strawman argument that “[a] desire to mark same-sex couples as less worthy of respect is an insufficient interest to sustain a law.” Brief of Amici Curiae Joan Heifetz Hollinger et al. in Support of Plaintiffs-Appellees and Affirmance, *Kitchen v. Herbert* 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178), 2014 WL 991256, at \*4 [hereinafter *Kitchen Amicus*]; see also *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.”). No government official has ever claimed a state interest in expressing hostility to gays and lesbians as justification for a marriage ban.

130. See *Bishop v. Smith*, 760 F.3d 1070, 1096-97 (10th Cir. 2014) (Holmes, J., concurring) (stating that most other courts have not relied on “animus doctrine”).

131. See, e.g., *Windsor*, 133 S. Ct. 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect . . . .”); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (inferring from the absence of any “rational relationship to legitimate state interests” that the challenged state constitutional provision was inexplicable on any grounds but animus); *Cleburne*, 473 U.S. at 448 (“Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.”); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973) (finding a discriminatory law unconstitutional only after considering all proffered state purposes and finding them devoid of connection to the challenged classification). Cf. *DeBoer*, 772 F.3d at 410 (stating that *Cleburne* and *Romer* “turn on asking whether anything but prejudice to the affected class could explain the law”).

treatment of states' arguments is actually less deferential.<sup>132</sup> If that is right and if it made a difference when the Court decides the same-sex marriage issue, the DOMA movement will prove to be a massive blunder by its promoters, but it should not make a difference.<sup>133</sup> Let me explain:

State law obstacles to legal same-sex marriage actually take many forms. They include not only 1) long-standing state statutes that explicitly or by implication limit issuance of state marriage certificates to opposite-sex couples, which this Article addresses. They also include: 2) state constitutional amendments precluding legislative decisions to extend legal marriage to same-sex couples, 3) statutory or constitutional prohibitions against recognizing same-sex marriages secured in another state, and 4) recent DOMA statutes that clarify the opposite-sex limitation of states' original marriage laws.

Courts generally lump these all together.<sup>134</sup> That is not problematic if it does not muddle the analysis and if a court ultimately decides the core issue in favor of sexual minorities—that is, that states must issue them marriage certificates. For then the other laws, a fortiori, fall as well. But if a court were to disaggregate them and address one at a time, the constitutional analysis should be different for each such type of law. In particular, the Supreme Court could conclude that same-sex couples do not have a constitutional right to legal marriage, or somehow put off that issue till another term, yet now invalidate any state constitutional provisions precluding legislative amendment to marriage statutes. The Court could do so on the grounds that the latter deprives sexual minorities of a *previously-enjoyed, political* right—that is, a right to secure benefits by ordinary legislation, in a way similar to the Colorado constitutional provision the Court invalidated in *Romer v. Evans*.<sup>135</sup> Notably, if the Court did that, it would reaffirm majoritarian, democratic decision-making as the appropriate means by which this change to marriage laws should occur, whereas invalidating *statutory* limitations on state marriage licenses sends the opposite message.

In addition, the Court could decline to order reluctant states to issue marriage certificates themselves, but invalidate state laws refusing inter-

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132. Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, SCOTUSBLOG (Sept. 23, 2011, 8:38 AM), <http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/>.

133. In addition to the explanation below of why no animus can be attributed, there is also the fact that the bite animus might trigger would not make a difference. If it entails an unwillingness to search for a state interest, that matters not, for the relevant state interest is right before the judges' noses, if only they could perceive it correctly. If the bite means requiring a somewhat important interest, preventing non-marital pregnancy fits the bill. And if it means the Court might expect the state to find alternative means of promoting that end, the Court will be hard-pressed to suggest one, especially since it would likely say states may not enforce anti-fornication laws.

134. See, e.g., *Bishop*, 760 F.3d, at 1078 (invalidating a state constitutional provision and stating that this made statutory provisions the plaintiff failed to challenge nevertheless also unenforceable). *But see id.* at 1110 (Kelly, J., dissenting in part) (stating “that cannot be right”).

135. 517 U.S. 620 (1996).

state recognition, based on the Full Faith and Credit Clause rather than the Fourteenth Amendment. Refusal to recognize another state's marriage certificate does not make a couple "unmarried," as advocates and courts contend,<sup>136</sup> any more than would be the case for a same-sex academic couple from Boston that chose to spend a sabbatical year living in Russia. They would continue to be treated as legally married by the U.S. government and by the state where they married regardless of where they reside at a given point in time, and if they return to live in the conferring state or relocate to a recognizing state they would immediately be treated as legally married without having to go through the marriage process again. However, refusal of inter-state recognition does deny a couple the opportunity, so long as they choose to reside in the non-recognizing state, to enjoy certain benefits that the non-recognizing state confers on other married couples (as would be true if they traveled to certain foreign countries). This is significant, and considerations of interstate comity and the constitutional right of travel might alter the analysis.<sup>137</sup> An interesting possibility is that the Court could, by ordering states to recognize but not confer, effect a sort of compromise, ensuring that same-sex couples throughout the country can receive recognition from their own state's government (though possibly having to take a wedding vacation in another state in order to accomplish that), but not forcing states to rewrite their own marriage laws and change their own marriage licensing practices.

The lumping together of the four types of laws has, however, sometimes distorted courts' analysis, by leading to inaccurate attributions of animus. What advocates, scholars, and judges generally fail to acknowledge is that state *statutory* DOMAs saying marriage is a union of a man and woman or that same-sex marriage is not permitted are really just clarifications of long-standing state law.<sup>138</sup> In Michigan, for example,

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136. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir. 2014) ("we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married"); Jorge Rodriguez-Jimenez, *Missouri's First Same-Sex Marriage Case In Court Today*, Advocate.com (Sept. 25 2014) (quoting ACLU lawyer challenging Missouri's denial of inter-state recognition as asserting his clients are "effectively divorced upon crossing that state line").

137. But see *DeBoer*, 772 F.3d at 418-20 (rejecting such arguments).

138. See, e.g., *Bishop*, 760 F.3d at 1105-06 (Judge Holmes, concurring) (stating that Oklahoma's constitutional prohibition on issuing marriage licenses to same-sex couples, along with "parallel enactments, have only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal history as a country: that same-sex unions cannot be sanctioned as marriages by the State. Even before the States made the rule explicit, marriage laws that lacked express gender limitations had the same force and effect as bans on same-sex marriage."); *id.* at 1107 ("The Oklahoma law effectuated no change at all to the status quo. . ."); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014) ("We do not dispute that states have refused to permit same-sex marriages for most of our country's history."), 385 (Niemeyer, J., dissenting) ("The Commonwealth of Virginia has always recognized that 'marriage' is based on the 'mutual agreement of a man and a woman to marry each other,' *Burke v. Shaver*, 92 Va. 345 (1895)."); JAMES SCHOUER, A TREATISE ON THE LAW OF HUSBAND AND WIFE § 14, at 23 (1882) (explaining that "the essentials of marriage" include that "the contracting parties should be two persons of the opposite sexes"); JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF

“state law has defined marriage as a relationship between a man and a woman since its territorial days.”<sup>139</sup> Statutory DOMAs thus do not take away anything that sexual minorities had before their enactment. They are best viewed as superfluous rhetoric, with no practical import themselves. Invalidating and enjoining enforcement of those statutory provisions because of any animus they reflect would therefore not, in and of itself, produce the desired result; the Court would also have to invalidate and order the rewriting of pre-DOMA statutes that reflect merely an unconscious presupposition that legal marriage is for opposite-sex couples.

Lower federal courts that have failed to appreciate this have actually not given plaintiffs the relief they thought they were giving. For example, in the Virginia litigation, the plaintiffs seemed to understand that they needed to do more than invalidate Virginia’s constitutional and statutory defense of marriage provisions.<sup>140</sup> And the federal district court in Norfolk seemed to have understood this as it analyzed Virginia law.<sup>141</sup> But the district court’s ultimate order does not actually require Virginia to issue marriage licenses and certificates to same-sex couples, because it says nothing about Virginia’s pre-DOMA marriage law provisions.<sup>142</sup>

More importantly, no animus can be attributed to the underlying laws that actually govern the issue. No one disputes that before states passed these reactive bills, even where statutes did not explicitly limit marriage to opposite-sex couples, legal marriage was unavailable to same-sex couples; local clerks would have interpreted state law as precluding a marriage license for any same-sex couple, and any court would have found that perfectly consistent with legislative intent (or legislative un-

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MARRIAGE & DIVORCE § 225 (1st ed. 1852) (“It has always . . . been deemed requisite to the entire validity of every marriage. . . that the parties should be of different sex.”); Joseph H. Beale et. al., *Marriage and the Domicil*, 44 HARV. L. REV. 501, 504 (1931) (“The law of every common-law state, and indeed of every European and American state, deals with marriage as a voluntary union of a man and a woman.”).

139. *DeBoer*, 772 F.3d at 396 (citing 1 Laws of the Territory of Michigan 30-32 (1805 statute using the terms “wife” and “husband” and “man” and “woman”). See also *id.* at 397 (“Early on, Kentucky defined marriage as “the union of a man and a woman.”) (citing An Act for Regulating the Solemnization of Marriages § 1, 1798 Ky. Acts 49, 49-50), 398 (“Ohio also has long adhered to the traditional definition of marriage. See An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; Carmichael v. State, 12 Ohio St. 553, 560 (1861).”), 399 (“Tennessee has always defined marriage in traditional terms. See An Act Concerning Marriages § 3 (1741), in Public Acts of the General Assembly of North-Carolina and Tennessee 46, 46 (1815).”).

140. See *Schaefer*, 760 F.3d at 368 (“Plaintiffs brought this lawsuit to challenge the constitutionality of Virginia Code sections 20-45.2 and 20-45.3, the Marshall/Newman Amendment, and ‘any other Virginia law that bars same-sex marriage. . .’ (collectively, the Virginia Marriage Laws”).

141. See *Bostic v. Rainey*, 970 F. Supp. 2d 456, 463 (E.D. Va. 2014) (“The Court finds Va. Const. Art. I, § 15-A, Va.Code §§ 20-45.2, 20-45.3, and any other Virginia law that bars same-sex marriage . . . unconstitutional.”).

142. See *id.* at 484 (“The Court ENJOINS the Commonwealth from enforcing Sections 20-45.2 and 20-45.3 of the Virginia Code and Article I, § 15-A of the Virginia Constitution to the extent these laws prohibit a person from marrying another person of the same gender.”).

conscious assumption).<sup>143</sup> And no one contends that any animus toward sexual minorities attended states' original enactment of opposite-sex-only marriage laws.<sup>144</sup> In Utah, the marriage law enacted at the inception of statehood explicitly limited marriage to one man and one woman, to make clear the impermissibility of polygamy rather than same-sex marriage.<sup>145</sup> Thus, if judges look at state marriage laws with a clear eye, they should see that in order to compel a state to issue marriage licenses and certificates to same-sex couples, they must examine states' original marriage laws on their own terms, laws reflecting merely unconscious assumption rather than animus, and must find that they cannot pass true rational basis review—that is, that these long-standing laws do not at all serve a single legitimate state purpose as to which opposite-sex couples and same-sex couples are differently situated.<sup>146</sup> That is, unfortunately, something judges cannot rationally do.<sup>147</sup>

### III. OPPOSITE-SEX MARRIAGE STATUTES CLEARLY CAN SURVIVE RATIONAL BASIS REVIEW

Because legal marriage cannot plausibly be characterized as a fundamental right today, and because homosexuals today are not a group that, from a national perspective, needs special judicial protection against ordinary democratic decision making, courts adjudicating constitutional chal-

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143. *Cf. Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (undertaking statutory interpretation exercise to establish that Hawaii law did at that time in fact authorize only opposite-sex couples to marry even though it did not explicitly say that, noting: “The non-consanguinity requisite contained in HRS § 572-1(1) precludes marriages, inter alia, between ‘brother and sister,’ ‘uncle and niece,’ and ‘aunt and nephew[.]’ The anti-bigamy requisite contained in HRS § 572-1(3) forbids a marriage between a ‘man’ or a ‘woman’ as the case may be, who, at the time, has a living and ‘lawful wife . . . [or] husband[.]’ And the requisite, set forth in HRS § 572-1(7), requiring marriage ceremonies to be performed by state-licensed persons or entities expressly speaks in terms of ‘the man and woman to be married[.]’”); Defendants’ Reply Brief, in *Deboer v. Snyder*, 2014 WL 2994206 (C.A.6), 8 (“Over 150 years ago Michigan law went to the trouble of listing separately prohibitions on men and women marrying close relatives, a step that would be unnecessary if gender did not matter to marriage”).

144. *Cf. Windsor*, 133 S. Ct. 2675, 2689 (2013) (“It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”).

145. UTAH CODE ANN. § 30-1-8 (West 2014).

146. *Rogers v. Lodge*, 458 U.S. 613 (1982) does not dictate a different analysis. In *Rogers*, the Supreme Court endorsed a district court finding of unconstitutionality as to an at-large voting system that rested on a finding of discriminatory purpose in “maintaining” the system. *Rogers* involved alleged race discrimination regarding voting rights, both of which aspects generate the most rigorous judicial analysis. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). In addition, the distinction the Court drew can be read as not between original purpose for creating and current purpose for continuing to use, but rather between facial neutrality and disparate impact, a different distinction than that between traditional marriage law and modern DOMAs or between unconscious assumption and animus.

147. If judges do not look at the statutory landscape with a clear eye, but rather treat the relatively recent statutory DOMAs as the operative law, then proponents of those DOMAs will ironically have actually made their states *more* vulnerable to same-sex marriage rather than less.

lenges to state marriage statutes cannot justify applying heightened scrutiny. They also should not be adding undefined "bite" to rational basis review, given that traditional marriage laws reflect no animus, though those laws would pass muster even so.<sup>148</sup> Courts should assume that deference to elected officials and the democratic process is appropriate, just as they must with innumerable other kinds of laws that confer benefits on some people and not others.<sup>149</sup>

But the pattern of federal litigation since *Perry* has been a model of cause lawyering, starting with federal districts where drawing sympathetic judges was most likely and the state executive was unlikely to defend state law.<sup>150</sup> Great momentum built before plaintiffs had to confront more challenging judges. By the time cases reached the court of appeals level, appellate judges would already have felt they were swimming against the tide to reject the constitutional claim. This helps explain why nearly all courts deciding these cases have been dismissive toward state justifications. In fact, the lower federal court opinions show a striking similarity to each other (Judge Posner's Seventh Circuit opinion being the clearest exception), suggesting judges inclined to decide in favor of the Movement do not wrestle a great deal with the arguments on either side but rather are in a hurry to show their support. So, too, with the liberal family law academy.

#### A. ATTENTION PLEASE: THIS IS THE JUSTIFYING STATE INTEREST

One of the most startling portions of amicus briefs filed by liberal family law professors in same-sex marriage cases is that in which they contend legal marriage has nothing to do with procreation.<sup>151</sup> These passages have the quality of a Twilight Zone episode; we family law professors have always taught our students the obvious truth that state marriage laws (coupled with criminal anti-fornication laws) have long been in important part about preventing people not in a committed relationship from accidentally conceiving a child, and that this purpose has only become more compelling with the rise of the welfare state. Yes, legal marriage has served and continues to serve many other purposes as well, but that is irrelevant under any level of scrutiny.

In support of their remarkable denial of the connection between legal marriage and procreation, these amicus briefs cite no historical authority, and instead offer attempts at deductive inference that are, as shown be-

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148. See *supra* note 135.

149. See *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

150. See BECKER, *supra* note 10, at Ch.1; BOIES & OLSON, *supra* note 10, at 68-69.

151. See, e.g., Kitchen Amicus, *supra* note 129, at 6 ("Appellants' suggestion that the right to marry is inextricably intertwined with procreation is—in a word—wrong."); Bourke Amicus 2, *supra* note 18, at 28; Bourke Amicus 1, *supra* note 18, at 3 (stating that arguments for limiting legal marriage to opposite-sex couples based on responsible procreation "lack any basis in history, law, or logic"), 12 ("There is no historical or legal justification to support Appellants' claims that marriage has 'always been linked to procreation'").

low, patently illogical.<sup>152</sup> Moreover, they entirely omit from their briefs reference to anti-fornication laws, language in Supreme Court precedents reflecting the fact that legal marriage at the time constituted a license to have sex and procreate, and the long-standing public discourse in this country about how to reinforce with young people the idea that they should avoid conceiving children until married (e.g., the ‘abstinence only’ vs. ‘safe sex’ debate surrounding sex education in schools).

This obfuscation by a significant fraction of the family law professoriate might be part of the reason why federal court judges have misunderstood, mischaracterized, or simply missed the point that legal marriage is in important part about forestalling procreation. Another part of the explanation might be the apparent inability of most lawyers defending state marriage laws (not themselves specialists in family law) to articulate the point correctly. Perhaps common use of the word “channeling” to label this state purpose misleads some people. Channeling suggests propelling some already-existing thing forward into a new location, but the responsible-procreation thesis is not about propelling anything; it is rather about preventing, stopping, or delaying something—namely, potentially procreative sex.

The most common misunderstanding of the channeling function views it as an aim of getting people who already have children, because of accidental procreation, to get married to each other. For example, the Fourth Circuit in *Bostic* wrote: “By sanctioning only opposite-sex marriages, the Virginia Marriage Laws ‘provid[e] stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children.’”<sup>153</sup> That is not encouraging responsible procreation; it sounds more like responding to irresponsible procreation that has already occurred. The Sixth Circuit made the same mistake, writing: “By creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring.”<sup>154</sup> And the court failed to see

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152. One of the signatories purported to offer historical counter-evidence to the responsible-procreation thesis in a recent article, but she completely misunderstands the thesis, believing it to be one about encouraging already married heterosexuals to produce children. See Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1476 (2013) (“Responsible procreation posits that the government’s historic interest in marriage is to single out and specially support ‘families that consist of, or potentially could consist of, children and their biological married parents.’”), 1477 (mischaracterizing the thesis as positing that “the alleged core, historic purpose of marriage [is to] foster and promote biological parenting”).

153. *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir. 2014).

154. See *DeBoer*, 772 F.3d at 405. See also *id.* at 422 (Daughtrey, J., dissenting) (presenting a similar version of “the ‘irresponsible procreation’ theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for ‘unintended offspring’ by channeling their biological procreators into the bonds of matrimony”); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (addressing “a ‘procreative channeling’ argument: that the norms of opposite-sex marriage ensure that as many children as possible are raised by their married biological mothers and fathers” because they “encourage people in opposite-sex relationships to place their children’s interests above their own and

that a purpose of keeping couples together after they already have children fails to distinguish opposite-sex couples from same-sex couples.

The Tenth Circuit in *Kitchen* mischaracterized the state interest in a different way, treating it as the proposition “that procreative couples must be channeled into committed relationships in order to promote the State’s interests in childbearing and optimal childrearing.”<sup>155</sup> That is about pushing people into marriage, which is quite different from discouraging sex before an uncoerced decision to become married, and it is about producing more children rather than less.

The Seventh Circuit’s characterization is bizarre. According to Judge Posner, the supposed state interest is “to try to channel unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility.”<sup>156</sup> What is oddest about this is that the law of parental responsibility—in particular, child support—draws no distinction between married and unmarried fathers, as Judge Posner must know. In addition, this statement is also about how to take care of children after they accidentally come into existence, which is quite different from preventing them from coming into existence in the first place.

Let me begin, then, by making clear what the responsible-procreation or “channeling” argument is not. First, it is not about encouraging the biological parents of already-existing non-marital children to get legally married to each other.<sup>157</sup> To be sure, the state has historically tried to do that as well.<sup>158</sup> It still has some reason to do so, but pushing people into marriage might be less sensible in an era when unhappy couples can so easily dissolve it. In any event, that state aim is not the responsible-procreation aim. And as courts have recognized, an aim of encouraging couples who have already created a child to get married does not clearly distinguish opposite-sex couples from same-sex couples. In fact, there is arguably more reason to facilitate marrying for same-sex couples who have *intentionally* become parents (and therefore presumably have al-

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preserve intact family units”); *id.* (suggesting that the channeling aim is to increase “the chance that accidental pregnancy will lead to marriage”). Scholarly supporters of same-sex marriage also routinely mischaracterize the responsible-procreation aim in this way. *See, e.g.,* CARLOS BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND THE LAW 5 (2014) (“The responsible procreation claim was centered around the idea that the primary social function of marriage is to encourage those who conceive children to take responsibility for them.”).

155. *Kitchen v. Herbert*, 755 F.3d 1193, 1222 (10th Cir. 2014).

156. *Baskin v. Bogan*, 766 F.3d 648, 660 (7th Cir. 2014). 2014 WL 4359059.

157. *See, e.g., Baskin*, 766 U.S. at 661 (“Encouraging marriage is . . . about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together”), 656 (“To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents”); Hollingsworth Amicus, *supra* note 31, at 3; Rainey Memorandum, *supra* note 18, at 12-13. This other aim might be what Abrams and Brooks had in mind with the peculiar formulation: “a state’s interest in marriage is in tricking heterosexuals into staying with each other.” Abrams & Brooks, *supra* note 25, at 32.

158. *See generally* Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012)

ready made a commitment to each other) than to facilitate marrying of opposite-sex couples who got pregnant accidentally (and who therefore might not have any genuine commitment to each other and indeed might hardly know each other).<sup>159</sup> So this is a bad argument for defenders of traditional marriage law to make.

The responsible-procreation aim is also not about encouraging childless heterosexual couples to get married, so that when they do procreate they will be already married.<sup>160</sup> The difference here is subtler. This articulation of the aim also points to the proper sequence of events (“first comes love, then comes marriage, then comes baby in the baby carriage”), but suggests that the state should promote proper sequencing by pushing marriage earlier, whereas the responsible-procreation aim is about pushing pregnancy later. The state is often said to prefer as a general matter that people be married rather than single, because married people are thought to be more stable and healthy and therefore more productive and less dysfunctional. But as a number of marriage laws reflect—including minimum age requirements,<sup>161</sup> waiting periods after obtaining a marriage license,<sup>162</sup> incentives for pre-marital counseling and education,<sup>163</sup> the

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159. This is one (perhaps only) sound bit of reasoning in the Seventh Circuit decision. *See Baskin*, 766 U.S. at 662 (“Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.”).

160. *See, e.g., Kitchen*, 755 F.3d at 1238 (dissent) (“The State can offer marriage and its benefits to encourage unmarried parents to marry and married parents to remain so”); *Love v. Beshear*, 989 F. Supp. 2d 536, 548 (W.D. Ky. 2014) (“Defendant’s only asserted justification for Kentucky’s laws prohibiting same-sex marriage: ‘encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate.’”); *Baskin*, 766 U.S. at 662, \*10 (“Indiana’s government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured . . . to marry”); . This misunderstanding seems to underlie Judge Posner’s drivers’ license analogy. *Id.* at 661 (“Even if possession of a driver’s license conferred benefits not available to bicyclists (discounts, or tax credits, perhaps), the state could argue that it offered these benefits only to induce drivers to obtain a license”). Posner’s analogy is more imperfect than he supposes; whereas one must have a license to engage in driving behavior, adult couples do not need a marriage license to engage in marital behavior (i.e., social marriage).

161. *See Vivian E. Hamilton, The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1832 (2012) (“The presumptive age of marital consent is now eighteen in all states but two—Nebraska, where it is nineteen, and Mississippi, where it is seventeen for males and fifteen for females. Every state permits adolescents younger than eighteen to marry with either parental or judicial consent, with most setting the minimum marital age at sixteen. Nearly forty states permit minors younger than sixteen to marry with both parental and judicial consent, or in case of pregnancy or birth of a child.”).

162. *See, e.g., MICH. COMP. LAWS ANN. § 551.103a* (2014) (three days); *WIS. STAT. ANN. § 765.08* (2014) (five days).

163. *See UTAH CODE ANN. § 30-1-31* (authorizing counties to *require* pre-marital counseling before issuing a marriage license); Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J. L. & FAM. STUD. 79 (2007) (“Five states—Florida, Maryland, Minnesota, Oklahoma, and Tennessee—have passed legislation encouraging couples to participate in formal premarital education: education or counseling to help couples explore relationship strengths and weaknesses and learn what it takes to have a successful marriage.”).

requirement of solemnization,<sup>164</sup> and limitations on who can perform wedding ceremonies<sup>165</sup>—and as advocates for more restrictive rules for getting married, such as covenant marriage laws, remind us: the state wants people to marry only after uncoerced, careful reflection and a mature decision to commit to each other. It does not want to hurry young people into it. The divorce rate among people who marry before age 18 is double that of people who marry after age 25,<sup>166</sup> and people who marry that young are likely to discontinue their education and, following divorce, end up on welfare.<sup>167</sup> So it does not ring true to someone familiar with family law to say that the state aims to hasten opposite-sex couples into marriage when they have not yet procreated. In addition, this supposed aim also would not clearly distinguish different types of couples who could one day end up with a child in their custody. This is another bad argument for the state.

Lastly, the responsible-procreation aim is certainly not about creating a status that will make people, once they are in it, want to procreate.<sup>168</sup> We do not have a population shortage in this country.

Having cleared away the bramble bushes, I will explain what the responsible-procreation aim or “channeling function” actually is. Many highly-respected legal scholars and historians have written about this state purpose, which historically has been served by state control over marriage *in combination with* sex laws, but which today must, it seems, depend almost solely on using material state support to bolster the social practice of marriage. (Just “almost” because laws criminalizing sex with minors are still in place and sometimes actually enforced.<sup>169</sup>) *The function is to deter procreation by heterosexuals who are not in committed relationships with each other.* It is to discourage such couples from having sex or, if they do have sex, then to encourage them to use contraceptives, very carefully.<sup>170</sup> If it is about “channeling” something, it is about chan-

164. See, e.g., IND. CODE ANN. § 31-11-4-13 (West 2014) (“Individuals who intend to marry each other must present a marriage license that is issued under this chapter to an individual who is authorized by IC 31-11-6 to solemnize marriages.”); WIS. STAT. ANN. § 765.16. Marriage contract, how made; officiating person.

165. IND. CODE ANN. § 31-11-6-1 (West 2014) (Persons authorized to solemnize marriages); UTAH CODE ANN. § 30-1-6 (West 2014) (Who may solemnize marriages).

166. See Hamilton, *supra* note 161, at 1820 (“Of marriages entered at age twenty-five or later, fewer than thirty percent end in divorce. Of marriages entered before age eighteen, on the other hand, nearly seventy percent end in divorce. The earliest marriers, those adolescents who enter marriage in their mid-teens, experience marital failure rates closer to a sobering eighty percent.”).

167. *Id.*

168. See, e.g., *Beshear*, 989 F. Supp. 2d at 548 (“Defendant adds a disingenuous twist to the argument: traditional marriages contribute to a stable birth rate which, in turn, ensures the state’s long-term economic stability.”); Joslin, *supra* note 152.

169. See, e.g., *State v. Pries*, 771 N.W.2d 930 (Wis. App. 2009) (upholding statutory rape law against equal protection claim that the law discriminated against unmarried minors relative to married minors).

170. See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 10 (2011); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007); LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, IN-*

neling sex and procreation (not children or couples) into marriage, in the sense of confining sex and procreation to marriage and trying to induce unmarried people not to engage in them. It is about reinforcing the long-standing moral exhortation of parents, community leaders, and clergy: “Wait until you are married.” It is about ensuring that fewer children exist, rather than about what to do with children after they do exist (though that is, of course, also a concern).

States have frequently asserted this state aim in many contexts other than same-sex marriage, and courts have not questioned its authenticity or legitimacy. For example, in *Eisenstadt v. Baird*, the state’s first asserted justification for discriminating between married and unmarried people in its law governing sale of contraceptives was that it aimed to deter premarital sex. The Court accepted that aim as authentic and legitimate, and invalidated the law on equal protection grounds solely because it concluded that prohibiting sale of contraceptives to unmarried people did not serve that aim.<sup>171</sup> In *Martin v. Zitherl*, the Virginia Supreme Court considered a constitutional challenge to the commonwealth’s anti-fornication law. The court acknowledged that the law’s purpose was to confine procreation to marriage, but concluded that *Lawrence* precluded a state from pursuing any aim by means of criminalizing consensual adult intimate conduct.<sup>172</sup>

Karl Llewellyn encapsulated this reality about state marriage policy in 1932 with the pithy statement: “Marriage, to rehearse old truth, is built on the fact that there are two sexes, and attraction between them, and that sexual union has results.”<sup>173</sup> This understanding of marriage as prerequisite to having potentially procreative sex was already centuries old when Llewellyn wrote that. Historian John Boswell’s research found in the late Middle Ages “much more critical attention to conjugal infractions, rendering parents more anxious about illegitimate and even unhealthy children as reflections on their own past acts,” and that “[t]here was no widely known method of limiting birth without forgoing conjugal relations, which . . . were adduced by the prevailing morality as the sole purpose and justification of marriage.”

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DIVIDUALS, AND THE LAW 9-10 (2014); Carl Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992). See also Murray, *supra* note 158, at 6-7 (noting that historically in the U.S. “there was little space for sex outside the rubrics of marriage and crime, and no refuge from state regulation of sex”); Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002) (explaining how legal rules other than those pertaining to marriage licensing, such as annulment based on impotence, likewise reflected the traditional connection between legal marriage and channeling of procreative sex, and why absence of infertility among bases for annulment or divorce is not inconsistent with this connection).”

171. *Eisenstadt v. Baird*, 405 U.S. 438, 448-50 (1972).

172. *Martin v. Zitherl*, 607 S.E.2d 367, 368 (Va. 2005). See also *State v. Pries*, 771 N.W.2d at \*2 (citing “potential for a minor bearing a child outside of a marital relationship” as a legitimate state concern justifying criminal law’s discrimination between those who have sex with a non-spouse minor and those who have sex with a spouse minor).

173. K.N. Llewellyn, *Behind the Law of Divorce*, 32 COLUM. L. REV. 1281, 1284 (1932). For a still much earlier recognition of this function of legal marriage, see *Milford v. Worcester*, 7 Mass. 48 (Mass. 1810).

Eminent legal historian Lawrence Friedman elaborates:

The family (or rather, the traditional family) once had a kind of state monopoly. Men and women could have sex legitimately only if they were married—that is, if they formed a family. Only “families” in the traditional sense could have babies. If you wanted sex, you were supposed to get married. If you wanted babies, you were supposed to get married. Sex and babies were otherwise (officially) off limits. Of course, not everybody played by the rules. There was sex outside of marriage, and there were babies born outside of traditional families. But official society sharply condemned illicit sex and illicit children.<sup>174</sup>

State control of marriage was a response to a need felt in society—at least a need felt by many elites. Unfettered marriage and reproduction were dangerous to society . . .<sup>175</sup> In short, for the reasons mentioned, the state developed a keen interest in controlling marriage (or, rather, the birth of children).<sup>176</sup>

Carl Schneider explains further that, to confine potentially procreative sex to marital relationships, the state has used not only a stick—that is, criminal prohibition on sex outside of marriage (which the state is less able to do after *Lawrence*), but also a carrot—that is, reinforcing the normative value society and cultural groups attach to marriage by conferring material benefits on those who do it (which the state still can do):

[I]n the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends . . . . [I]t is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them . . . . Institutions . . . by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible.<sup>177</sup>

Our legislator might see family law as setting a framework of rules, one of whose effects is to shape, sponsor, and sustain the model of marriage I described above: It writes standards for entry into marriage, standards which prohibit polygamous, incestuous, and homosexual unions . . . . [P]rohibitions against non-marital sexual activity and discouragements against quasi-marital arrangements in principle confine sexual life to marriage . . . . Laws criminalizing fornication, cohabitation, adultery, and bigamy in principle limit parenthood to married couples, and those legal disadvantages that still attach to illegitimacy make it wise to confine parenthood to marriage.<sup>178</sup>

174. FRIEDMAN, *supra* note 170, at 9-10.

175. *Id.* at 51.

176. *Id.* at 55. See also GROSSMAN & FRIEDMAN, *supra* note 170, at 10 (“Marriage was the door to sex and children (for respectable people). Controlling marriage was a way to make sure that diseased, criminal, and feeble-minded people were unable to marry and to breed.”).

177. Schneider, *supra* note 170, at 498.

178. *Id.* at 502.

[T]he law can channel by disfavoring competing institutions . . . . Bans on fornication and cohabitation mean (in principle) that to have sexual relations, one must marry. Sometimes competing institutions are merely disadvantaged. For instance, the rule making contracts for meretricious consideration unenforceable traditionally denied unmarried couples the law's help in resolving some disputes.<sup>179</sup>

[T]he law's channeling function forms and reinforces institutions which have significant social support and which, optimally, come to seem so natural that people use them almost unreflectively. It relies centrally but not exclusively on social approval of the institution, on social rewards for its use, and on social disfavor of its alternatives.<sup>180</sup>

In short, the state tries to get immature people who are physically capable of accidentally conceiving a child to hold off on, or at least be very careful about, sex until they are in a mature, committed relationship. It does this because extramarital pregnancies are an immense social problem, leading to over a million abortions every year and to many more millions of children being born to single, and mostly immature, mothers who are likely to need public assistance and forego higher education and career.<sup>181</sup> It does it by reinforcing an independently existing social practice that has powerful normative force and that is understood as the only approved site for procreation. Cultural forces and Supreme Court decisions have made it ever more difficult for the state to encourage abstinence before marriage,<sup>182</sup> but it is still trying desperately to accomplish this aim with (for the most part) only carrots. The Supreme Court has not yet invalidated states' statutory rape laws,<sup>183</sup> but otherwise, all the state can do now is to try to make more attractive than it would otherwise be a social practice and status (marriage) that has traditionally been the only

179. *Id.* at 503.

180. *Id.* at 504. *See also* McClain, *supra* note 170, at 2133 (“A significant idea at the core of contemporary debates in family law. . . is that a basic purpose of family law is to support fundamental social institutions, like marriage and parenthood, and to steer people into participating in them”), 2135 (“At the core of many contemporary debates about the state of the family—and family law—is the question of how to assess challenges to this expected sequence of love, marriage, and the baby carriage.”); E.J. GRAFF, *WHAT IS MARRIAGE FOR?* 53-54 (1999) (“Marriage has long been seen as what makes sex legitimate. . . Sex outside marriage’s white picket fence was long considered adultery or fornication—‘th’ expense of spirit in a waste of shame,’ as Shakespeare once sonnetized.”).

181. *Cf.* *State v. Fisher*, 565 N.W.2d 565, 569 (Wis. Ct. App. 1997) (upholding Wisconsin’s statutory rape law and observing that “the United States Supreme Court has itself observed that “teenage pregnancies . . . have significant social, medical, and economic consequences for both the mother and her child, and the State.” *Michael M. v. Superior Court*, 450 U.S. 464, 470 (1981). Among the consequences of teenage pregnancies are the attendant psychological, medical and sociological problems associated with a child bearing a child.”).

182. In addition to Lawrence throwing anti-fornication laws into question, decisions of the Court relating to illegitimate children disallowed (fortunately) stigmatizing non-marital births. *See Illegitimacy*, JUSTIA <http://law.justia.com/constitution/us/amendment-14/90-illegitimacy.html> (last visited Dec. 19, 2014).

183. *But see In re J.M.*, 575 S.E.2d 441 (Ga. 2003) (holding that enforcement of an anti-fornication law in delinquency proceeding against sixteen-year old violated state constitution).

approved site for sex, and that still stands for the idea that people should not conceive children until they are in a mature, committed relationship.

I am not sure how else I would explain to my students why states (and the church before the state) came to take so great an interest in adult intimate relationships that they not only created and attached costly benefits to this special legal status (subsidized by single people), but on top of that *criminalized* intimacy outside that legal status, if not to confine potentially procreative activity to approved and (presumed) permanent relationships.<sup>184</sup> Or how states expected to accomplish eugenic aims by excluding from marriage epileptics (as most once did) and sibling pairs (as all still do), if not based on a presupposition that potentially-procreative sex would take place only within a marital relationship.<sup>185</sup> Yet today, for the purpose of convincing federal judges to mandate legal reform they desire, a substantial portion of the family law academy is striving mightily to deny what we all know to be true.<sup>186</sup>

These professors, other advocates for same-sex marriage, and now a host of federal judges offer several flawed arguments for the position that discouraging irresponsible procreation is not a state purpose, or not one with any explanatory power. One begins with the premise that marriage means many things to people and that people have many reasons for getting married, not just to have children, and it ends by concluding solely from this premise that limiting procreation outside of committed relationships is not a "central" state purpose.<sup>187</sup> This is a patent non sequitur. The state's purposes for offering something to the public and the reasons private individuals have for accepting it are two entirely different things, with no necessary connection between them. Moreover, subjective judgments of centrality are irrelevant.

Another clearly flawed argument begins with the premise that the state has other interests that legal marriage serves, or that "marriage" has many "purposes," including some as to which same-sex couples are simi-

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184. Cf. Abrams & Brooks, *supra* note 25, at 11 ("Beginning with the Apostle Paul, we see the rise of the idea that sexuality is dangerous and best cabined by an institution designed to contain it ("is it better to marry than to burn"). The rise of marriage in pre-modern Europe seems to have been driven by the Church's desire to see the European peasantry clean up its act, and to get sexuality under the yoke of marriage."); Kevin MacDonald, *The Establishment and Maintenance of Socially Imposed Monogamy in Western Europe*, 14 POL. & LIVE SCI. 3, 10 (1995) (explaining that the Catholic Church regulated the social practice of marriage and promoted the norm of sex only within marriage at a time when the Church stood to collect the estates of childless decedents); Doe v. Duling, 603 F. Supp. 960, 968 (E.D. Va. 1985) (noting argument by state officials that challenged "fornication statute is designed to minimize illegitimate births").

185. See FRIEDMAN, *supra* note 170, at 49-55; *id.* at 49 ("The new study of eugenics provided the state with strong support for its movement to regulate marriage. It gave a scientific veneer to campaigns to control the supply of babies, and to encourage the birth of healthy babies in moral families.").

186. Many state courts have acknowledged the channeling-of-procreation function. See Abrams & Brooks, *supra* note 25, at 2.

187. See, e.g., Rainey Memorandum, *supra* note 18, at 13-14; Bourke Amicus 1, *supra* note 18, at 3 ("[P]rocreation is not the central purpose of or a requirement for civil marriage. Couples marry for many reasons").

larly situated, such as encouraging family stability (in particular, stability of families with children).<sup>188</sup> This premise is obviously true but it does nothing to support a conclusion that preventing pre-marital procreation has not been *one* of the state's aims in creating and maintaining a legal status of marriage with attendant material benefits. Under any level of judicial review it is irrelevant that a law serves purposes other than the one the state identifies as justifying a classification.<sup>189</sup> And under rational basis review, the state is not required to show that same-sex marriage would not serve *any* of the interests it has for maintaining the legal status of marriage, nor that its interest in preventing conception of children outside committed relationships is the most important or "central" or "core" interest it has (though it might well be).<sup>190</sup> Rather, it need only show that it has a legitimate interest that legal marriage for opposite-sex couples serves but legal marriage for same-sex couples would not. As Justice Kennedy stated in writing for the Court in *Heller*:

[R]ational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations . . . For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.<sup>191</sup>

This not a sterile doctrine designed only to discourage litigation. A key normative assumption underlying this doctrine is that, except in exceptional cases, social transformation should occur through democratic deliberation and majoritarian action.<sup>192</sup>

And as a matter of fact, the state's interest in preventing undesirable procreation, especially single parenthood among teenagers, remains exceedingly strong, because of the huge personal and societal costs this creates.<sup>193</sup> Attempting to bolster the attractiveness of marriage as something

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188. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 661 (7th Cir. 2014) ("If the state's only interest in allowing marriage is to protect children . . ."); *Bourke Amicus 1*, *supra* note 18, at 10; *Abrams & Brooks*, *supra* note 25, at 4, 5, 25, 33 (complaining repeatedly that certain judges have claimed channeling reproduction is "only" or "singular" purpose of legal marriage, without quoting a single statement by any judge that says this), 22 (conceding that the judge who is their main target actually said "marriage has served 'many important functions'").

189. *Baskin*, 2014 WL 4359059, \*9.

190. See *Bourke Amicus 1*, *supra* note 18, at 8.

191. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993) (citations omitted).

192. Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2718-19 (2013) (Alito, J., dissenting) ("[O]ur constitutional order assigns the resolution of questions of this nature to the people.").

193. See Linda C. McClain, "Irresponsible" Reproduction, 47 *HASTINGS L.J.* 339, 340-41 (1996)

("The frequent and often impassioned invocation of 'illegitimacy' as a crisis, an epidemic, and the most urgent social problem of the day suggests that

worth waiting for therefore remains a legitimate and important aim for the state. To deny this is not only disingenuous, it is a slap in the face of parents who are trying to instill this idea in their adolescent offspring, struggling against all the contrary messages that bombard youth in popular culture.

Advocates' and judges' denial of the responsible-procreation aim also makes me wonder if I am misremembering the moral instruction of parents, church leaders, popular songs, and television programs in my childhood, which I recall placing a heavy emphasis on waiting till marriage to have sex.<sup>194</sup> Why wait for marriage, rather than a lunar eclipse, before having sex? Because marriage was a profound and magical status of almost unrivaled importance, something one "enters into" once and forever, receiving thereby esteem, privileges, benefits, and opportunities that unmarried people did not enjoy, including the privilege of child bearing.<sup>195</sup> It was something worth waiting for. It was something about which we dreamed.<sup>196</sup>

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families begun and continued outside of marriage—overwhelmingly families consisting of a woman and her children—are the primary problem. . . . This public alarm and indignation about 'irresponsible' reproduction reaches a fevered pitch when such reproduction implicates the public fisc through welfare programs. In the recent debates over welfare reform, lawmakers and others made repeated appeals for legislative change that would end 'illegitimacy,' restore personal responsibility, and get people (women and adolescent females) to stop having children that they cannot afford to support without public assistance.").

194. Cf. McClain, *supra* note 170, at 2133-34

(saying of the 'First comes love . . .' ditty: "This childhood rhyme . . . illustrates the channelling function of family law because it reflects societal expectations of the proper sequence that people should follow in matters of love, sex, and procreation. Children chanting this rhyme seem to have learned this basic sequence: kissing signals or leads to love, courtship, dating, or what have you, which lead to a social institution, marriage, which leads to another social institution, parenthood, represented by the baby carriage.").

195. Cf. Schneider, *supra* note 170, at 503 (noting that two channeling techniques are "simply recognizing and endorsing institutions, thus giving them some aura of legitimacy and permanence" and "to reward participation in an institution"), 507 ("[M]arriage offers people a kind of relationship with social and legal advantages which are primarily available precisely because the law gives marriage a special status"); Llewellyn, *supra* note 173, at 1302 ("It is Law which sets a goal, contains a threat, and urges to a process – all in terms any youth can understand. To deny power to it in producing some of what is symbolizes would be to deny power to the flag or the Constitution in producing national feeling and unity."); Abrams & Brooks, *supra* note 25, at 32 ("Most people decide to marry. . . because they think that it is the 'right thing to do' if they want to have children. . . because of the long-term social meaning of marriage.").

196. Cf. Nina Totenberg, *Meet The 83-Year-Old Taking On The U.S. Over Same-Sex Marriage* NAT'L PUB. RADIO (Mar. 21, 2013), <http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-us-over-same-sex-marriage> (quoting Edith Windsor: "The fact is, marriage is this magic thing . . . I mean forget all the financial stuff—marriage . . . symbolizes commitment and love like nothing else in the world. And it's known all over the world. I mean, wherever you go, if you're married, that means something to people, and it meant a difference in feeling the next day.").

## B. MEANS-ENDS RATIONALITY

Arguments against finding a sufficient connection between opposite-sex-only marriage law and the aim of delaying potentially-procreative sex are so illogical I do not know whether it is more charitable to assume those who make them believe what they are saying or that they do not.

1. *Efficacy*

First there is the “it’s not working” argument, fairly rare because the impossibility of supporting the starting premise is evident. It begins with a premise that states are not succeeding at this aim, followed by a conclusion that there is therefore no relation between marriage law and that aim. Writing for the Seventh Circuit, for example, Judge Posner wrote:

So if the state’s policy of trying to channel procreative sex into marriage were succeeding, we would expect a drop in the percentage of children born to an unmarried woman, or at least not an increase in that percentage. Yet in fact that percentage has been rising even since Indiana in 1997 reenacted its prohibition of same-sex marriage (thus underscoring its determined opposition to such marriage) and for the first time declared that it would not recognize same-sex marriages contracted in other states or abroad . . . . In 1997, the year of the enactment, 33 percent of births in Indiana were to unmarried women; in 2012 (the latest year for which we have statistics) the percentage was 43 percent . . . . There is no indication that these states’ laws, ostensibly aimed at channeling procreation into marriage, have had any such effect.<sup>197</sup>

Law and economics scholars must cringe when seeing the analytical gaffe embedded in this reasoning. It implicitly assumes no other countervailing factors influence the extramarital birth rate, when everyone, including Posner, knows quite well that there are.<sup>198</sup> Accordingly, it adopts as a baseline a point in the past that is arbitrary (as the first parenthetical implies, Indiana law already precluded same-sex marriage in 1997), and compares rates then with rates today. Unless one can eliminate the effect of other variables, this comparison is meaningless. The change in rates Posner cites is entirely consistent with a hypothesis that traditional marriage law is very successful in reducing the non-marital pregnancy rate. The appropriate baseline is what the rate would have been in the absence

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197. *Baskin v. Bogan*, 766 F.3d 648, 665 (7th Cir. 2014).

198. See Richard A. Posner, *The Regulation of the Markets in Adoptions*, 67 B.U.L. REV. 59, 63 (1987). (“because the stigma of illegitimacy, for both parents and children, has also lessened, a smaller fraction of babies born out of wedlock is put up for adoption. The decline in that stigma is also partly responsible for the increase in premarital sex and the casual attitude of many engaged in it about contraception. And more than a change in moral attitudes is involved. The welfare system enables indigent single women and girls, who might otherwise be forced to give up their children for adoption, to keep them.”); Carmen Solomon-Fears, *Nonmarital Births: An Overview*, CONGRESSIONAL RESEARCH SERVICES 2 (2014) (noting decline in the rate of births among married couples), 3 (“Many social science analysts attribute the increase in nonmarital births to the decades-long decline of ‘shotgun marriages.’”).

of traditional marriage law; success would exist if the rate has risen less than it would have otherwise. Whether that is the case is, I imagine, impossible to prove or refute.

That partly explains why, under rational basis review, a state need not demonstrate that its law is succeeding in serving the asserted state interest. It can say “we continue to hope that this will have some positive impact, some efficacy at counteracting the many socio-cultural forces that have been pushing up the extramarital pregnancy rate.” As a parent of five children and as someone who believes it highly desirable to minimize the number of children who are either aborted or born into an economically marginal and divorce-like (birth parents having already dissolved their relationship) situation, I have that hope. The burden under rational basis review instead falls on the persons challenging the law, who must show it is irrational for the state to suppose its law could serve that purpose at all. As Justice Kennedy has written:

[A] classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record.<sup>199</sup>

The plaintiffs in these marriage cases clearly cannot meet this burden. This is in part because no scientific work has been done (or perhaps could possibly be done) isolating the effect of the “wait till marriage” message from all other possible influences on the decision making of unmarried heterosexual couples. It is also because there is plenty of anecdotal evidence to the contrary.

Certainly the “wait till marriage” moral message, from both the state and private authority figures, was highly effective in my community when I was a teenager in the 70s. Shame attached to pregnancy outside marriage, to the point of ostracism. If a high school girl got pregnant, she was never seen at school again. Boys and girls were terrified of making such a mistake. Fear attended any closeness between boy and girl, and we would stop before things went too far, or the bolder would push themselves past the painful embarrassment of buying condoms. The fear arose partly because of not wanting to be saddled with parenthood even before beginning life as independent adults, but it was also very much a product of our dividing the relational universe into marital and pre-marital and associating moral danger with intimacy in the latter universe. In our minds, it was profoundly wrong to conceive a child, or even to have sex, when one had not crossed that mystical threshold.

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199. *Heller v. Doe by Doe*, 509 U.S. 312, 319-20 (1993).

Now it is a half-century after the sexual and cultural revolution of the 60s. Attitudes toward extramarital sex have changed continually since then; in fact, remaining a virgin till marriage is downright weird in mainstream American society today. Single motherhood does not carry as great a stigma as it once did. Throwing open the divorce gates has taken some of the sparkle off marriage (showing that legal changes can impact popular perception of social institutions). These two trends, one the demoralizing of sex, the other disenchantment as to marriage, have significantly thwarted the responsible-procreation aim of marriage as a social and legal institution. A recent report to Congress states: "Many analysts attribute this [rise in rate of non-marital births] to changed attitudes over the past few decades about fertility and marriage. They find that many adult women and teenage girls no longer feel obliged to marry before, or as a consequence of, having children."

It is entirely legitimate, however, for the state to resist continued erosion of the marriage-procreation conceptual connection. In doing so, it tries to assist those of us who are parents of teenagers and who are trying to pass on the message we were given in our youth, a message both moral and pragmatic: "Slow down, be careful, do not conceive a child until you are married. It is wrong and irresponsible. And it would derail your life plan." The normative connection between marriage and childbearing does still remain in the minds of much of the population and continues to have behavioral effects.<sup>200</sup> It might be more muted and less universal than it was a half-century ago, but it has been effective for my teenage daughters, in our liberal and non-religious household, and for their friends; they have talked and fantasized about marriage since they were little (without needing any encouragement from their parents), and the image of being preceded down the aisle by a baby belly would shatter the fantasy. Any reference they make to having children is couched in a marital, co-parenting context. They talk about the few pregnant teens in their public school the same way they talk about kids who get caught using LSD or breaking into houses. It is no longer shocking, but it is still shameful and something good kids do not do.<sup>201</sup> The traditional expectation that conception will take place only within marriage is undoubtedly even more prevalent among social conservatives, for whom virginity

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200. See Pew Center Survey, Ch 4 (reporting that 49% of the general public identifies "having children" as a very important reason to get married); *Baskin*, 766 F. 3d at 658 ("Marriage confers respectability on a sexual relationship."); *Schneider*, *supra* note 170, at 518 ("Even if social behavior has changed dramatically, social norms may not have. Even if, for example, families less often consist of a married couple and their biological offspring, that grouping may still represent a powerful cultural norm. . . . Finally, even if behavior and norms are changing, society might wish to alter the direction of change."), 516 n.58 (citing study showing an increase in the late 80s in disapproval of extramarital sex); *Llewellyn*, *supra* note 173, at 1286 ("Once conceived, once accepted, the oversimple norm-concept maintains itself stubbornly, despite all changes in conditions; it becomes the socially given, right, ideal-type of 'marriage'").

201. Cf. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345 (2011) (discussing the stigma that still attaches to non-marital pregnancy).

pledges like "True Love Waits" and "Silver Ring Thing" became popular in the 1990s and remain so today, even if the pledge is not as effective as parents would like it to be. And the pledge is not virginity for life, nor virginity until age 21, but rather virginity *until marriage*.

A few thought experiments confirm the continued behavioral efficacy of marriage. First, imagine that marriage did not exist, as either a legal or a social institution. Imagine that relationships never acquired any status more special than boyfriend/. Imagine how sexual behavior might differ today among young people. Once one has a boyfriend or girlfriend, one has reached the relationship pinnacle. There is nothing beyond that to aspire to or hope for. Why wait, then, to have sex? Or why be very careful about contraception if one does decide to go forward with intercourse? There would still be the pragmatic, self-interested reasons: you want to do X later in life, and if you get pregnant you would either have to undergo an abortion (an ugly prospect) or forget about doing X (though increasingly our society is trying, at substantial taxpayer expense, to make it possible to do any X you want to do even if you do accidentally become pregnant, because it seems cruel to make girls assume the costs of their irresponsibility). But such practical considerations are of limited efficacy in altering young persons' behavior in moments of high hormone activity. What would be missing, or at least greatly diminished relative to a world in which marriage remains as a cherished institution, would be the competing irrational forces of fear, romantic fantasy, and moral compunction.

Or at least the state may reasonably suppose. The state should need only to say plausibly that it perpetuates the legal status of marriage, rather than getting out of the marriage business, because it continues to think that by doing so it can continue to bolster a cultural practice that to some indeterminable degree reduces sexual behavior outside of committed relationships by couples capable of conceiving a child through sex. Indeed, in an increasingly areligious society, the state is the only authority upholding the cultural practice of marriage for a large percentage of the population, including my daughters. Maintaining a cultural practice that induces unmarried opposite-sex couples to forego sexual activity is something the state thinks worth doing because sexual activity can result in pregnancies for those couples and the state does not want pregnancy to occur from casual encounters nor in relationships that have not matured to the point of long-term commitment, because unplanned single parenthood is enormously costly for private individuals (especially mothers and children) and for the state. Children born to an unmarried female are far less likely than children born to a married woman to have both parents present and cooperating during the crucial developmental period of infancy and to have long-term financial and emotional support from their fathers. The state prefers that those children never come into existence, so it strives to prevent their conception, with the few means still available to it.

## 2. *The infertile*

A second argument against the responsible-procreation aim, the most common one, takes the form ‘but the state must be lying about trying to reduce extramarital pregnancy through marriage law, because it does not impose a fertility test for getting a marriage license.’<sup>202</sup> An implicit major premise of this syllogism is that anything for which the state does not test in its application for a marriage license must be something that bears no relation to any purpose of marriage law.

It is inconceivable that any advocates who proffer this argument, or any judges who repeat it, actually believe that premise to be true. If they did, then they should also take the position that the state’s interest in marriage has nothing to do with long-term commitment, intimate relationships, cohabitation, sharing of a household, receiving emotional support, or financial inter-dependence,<sup>203</sup> and that the state must not care whether one member of an applicant couple is already physically abusing or cheating on the other. State marriage license applications ask for only the most basic information—names, ages, addresses.<sup>204</sup> They do not ask whether the applicants intend to live together, how long they plan to remain a couple, whether their relationship is intimate rather than platonic, or even whether they have ever met before applying. The application process also does not screen out those with a history indicating they are likely to batter a spouse or commit adultery. This “why doesn’t the state exclude the infertile?” argument should lead courts to conclude that states have no purpose for legal marriage whatsoever except to deny something inherently purposeless to children (given that age is one of the

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202. See, e.g., *Brenner v. Scott*, 999 F. Supp. 2d 1278, (N.D. Fla. 2014) (“It is the kind of argument that, in another context, might be ‘accompanied by a suspicion of mendacity.’”); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014); *id.* at 1292 (“[T]he purported justification simply ‘makes no sense’ in light of how Oklahoma treats other non-procreative couples desiring to marry”); *Kitchen v. Herbert*, 755 F.3d 1193, 1221 (10th Cir. 2014); *Baskin*, 766 F.3d at 660; *Kitchen Amicus*, *supra* note 129, at 5-10; *Bourke Amicus 1*, *supra* note 18, at 3, 7-8; *Bourke Amicus 2*, *supra* note 18, at 28; *Hollingsworth Amicus*, *supra* note 31, at 5, 24; *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Latta v. Otter*, 2014 WL 1909999 (D. Idaho), at \*23; *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 770 (E.D. Mich. 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 654 (W.D. Tex. 2014); *Rainey*, 970 F. Supp. 2d at 478–79; *Walker*, 986 F. Supp. 2d at 1021; *Schaefer*, 2014 WL 3702493, at \*14-15; *Goodridge*, 798 N.E.2d at 962; *Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012); *BOIES & OLSON*, *supra* note 10, at 180 (relating questioning by trial court judge). Even Justice Scalia has given credence to this illogical argument. See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct. . . what justification could there possibly be for denying the benefits of marriage to homosexual couples? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”).

203. Cf. *Hollingsworth Amicus*, *supra* note 31, at 25-29 (arguing that emotional support and mutual financial support are “some of the purposes of marriage recognized in California law, other than procreating and childrearing,” yet not explaining why the state does not limit marriage to couples who do these things).

204. See, e.g., STATE OF UTAH DEPARTMENT OF HEALTH APPLICATION FOR LICENSE TO MARRY, available at <http://clerk.slco.org/marriage/>; MARYLAND COURTS, *Marriage Licences*, <http://www.courts.state.md.us/clerks/queenannes/marriage.html> (last visited Dec 19, 2014).

very few things asked). An analogous argument in the parentage context would lead to the ridiculous conclusion that securing child support is not among the state's purposes for having paternity laws, because there is no financial-means test for paternity and the state routinely confers legal parent status on men with no income—indeed, even on men serving life sentences in prison.

In addition, there is an obvious and benign reason why a state would choose not to exclude from a law's ambit everyone who falls outside the law's purpose, even if there were only one purpose—namely, that the costs entailed in excluding them are not worth bearing. Requiring heterosexual couples to pass a fertility test before they can receive a marriage license would be exceedingly costly, not only in terms of the money required to conduct such tests, which can run into the thousands of dollars, but also in terms of the incursion on individuals' privacy it would entail.<sup>205</sup> Some courts and amici have stated that it would be constitutionally problematic to impose a fertility test for marriage, because of the invasion of privacy this would entail for opposite-sex couples,<sup>206</sup> yet they fail to see the implication that *this justifies the state in not doing so*. In addition, state legislators would be understandably reluctant to open the political can of worms entailed in trying to tailor legal marriage more narrowly by establishing a maximum age for marriage, given the possibility of exceptional cases, the fact that natural age-related infertility is something that happens to women but not men, and the danger of people rushing into ill-considered marriages as they approach the maximum age. A requirement that couples wishing to marry express an intention to procreate would also be highly problematic; it would be unreliable and courts would likely find it, too, an unconstitutional violation of privacy.<sup>207</sup> So in theory, states could exclude infertile couples, but it would just be too difficult and costly to do so.

Similarly, someday polygamists in Minnesota might challenge that state's marriage laws, which by voluntary legislative action now extend to same-sex couples, as violating the equal protection rights of second, third, etc. spiritual wives. Minnesota might respond by saying its purpose for having legal marriage for all and only monogamous couples, including same-sex couples, is to ensure that every competent adult is practically able to enter into a legal marriage *with someone*, which these women could do with some man who is not already married. The plaintiffs would then respond by saying if that were the case, why does Minnesota allow

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205. See, Fertility Test Cost, Cost Helper Health, <http://health.costhelper.com/fertility-testing.html> (last visited Dec. 19, 2014) (indicating cost of fertility testing for women up to \$5000).

206. See, e.g., *Baskin*, 766 F.3d at 662 (“It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile”); Bourke Amicus 1, *supra* note 18, at 7; *Kitchen*, 755 F.3d at 1222. The Tenth Circuit, immediately after expressing the view that a fertility inquiry would be unconstitutional, faults the state for not doing one on an individualized basis. *Id.*

207. See *Kitchen Amicus*, *supra* note 129, at 6 (arguing that it would be unconstitutional).

bisexuals to enter into same-sex marriages? Is the law not over-inclusive as to that purpose? To which the state could legitimately reply that it does not wish to get into the messy business of trying to differentiate “true gays and lesbians” from bisexuals when issuing marriage licenses.

At least under rational basis review, the explanations above for not attempting to exclude heterosexual couples who cannot or prefer not to conceive children are entirely sufficient. Justice Kennedy again:

[C]ourts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it ‘is not made with mathematical nicety or because in practice it results in some inequality.’ The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.<sup>208</sup>

### 3. *Serving an aim by excluding*

A third argument same-sex-marriage advocates present is so nonsensical that courts’ falling prey to it is astonishing. This is the argument that states cannot plausibly claim that laws limiting legal marriage to opposite-sex couples reflect an aim of confining procreation to marriage, because excluding same-sex couples does not serve that aim.<sup>209</sup>

#### a. The wrong question

This argument rests on an implicit major premise no thinking person would endorse—namely, that the state must give to every person every benefit it gives to any person unless it can show that by *excluding* someone it would thereby *promote* the purpose for which it confers the benefit. No state benefit program would satisfy such a requirement. Does excluding children of the rich from free-school lunch programs serve the state aim of child nutrition? Does denying me Secret Service protection promote the state aim of making governmental service safe?

Imagine a state agency office building that initially has identical bathroom facilities for men and women. But then the agency decides to accommodate female employees who have infant children they are nursing, by converting some unused space into a spa-like nursing suite, with soft

208. *Heller v. Doe by Doe*, 509 U.S. at 312, 321 (1993).

209. See *Geiger v. Kitzhaber*, (D. Or. 2014), 994 F. Supp. 2d 1128; Bourke Amicus 1, *supra* note 18, at 23; *Holder*, 962 F.Supp.2d at 1291; *DeLeon*, 975 F.Supp.2d at 654; BALL, *supra* note 154, at 6 (“The book seeks to comprehensively address and refute social conservatives’ often-repeated claims that same-sex marriage bans promote responsibility procreation and children’s welfare.”); BOIES & OLSON, *supra* note 10, at 85 (describing questioning along this line by trial court judge in Prop 8 case), 89 (describing plaintiffs’ attorney arguing along these lines in media appearance); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 785 (2012) (identifying as “the constitutional dispute’s core question: whether the government needs, and whether it has, any evidence to support the now-residual justification that banning same-sex marriage is rationally related to the purported governmental interest of ensuring responsible procreation”).

lights, calming music, reclining chairs, and staff to assist and to serve tea. The agency communicates to its employees that the facility is available to nursing mothers, and it does not create any comparable facility for men. Some men, fathers of infant children let us say, complain that they would also enjoy such a facility. It would help them relax, would make them more productive, cement their loyalty to the company, etc. In other words, giving men the same thing could serve other agency interests. If the men should sue the agency in federal court alleging a violation of the Equal Protection Clause, and if the agency says that its primary aim is to promote the physical health of employees' infant children, should it have to show that excluding men serves that aim? No. That including them would disserve that aim? No. Must it show that, as to every agency interest served by the nursing facility, giving men a comparable facility would not serve it? No. The agency might well think the nursing facility serves several purposes, including also boosting employee morale and facilitating employees' return to work after having a child, purposes it could serve also by creating a nice relaxation room for men (and non-nursing women). But under no level of scrutiny is the agency required to prove that including men in the relaxation-room program would not serve any of its aims. The agency can give a benefit only to nursing women on the grounds that only they serve the aim of promoting infant health.

Thus, what the state must show is not that *excluding* same-sex couples *does* serve the state interest in discouraging pregnancy among persons not in committed relationships, but rather that *including* same-sex couples in legal marriage would *not* serve that state interest, which it can easily do.<sup>210</sup> Similarly, the state can sufficiently justify excluding the wealthy from free-school lunch programs by pointing out that including them is unnecessary for promoting child nutrition, and it can justify denying me a security detail by pointing out that including me in the security program would not serve the aims of encouraging citizens to run for political office and ensuring continuity of elected officials. In each instance, the state can legitimately add: "And why must we incur the additional expense of including more people who want the benefit when doing so would not serve our aim, especially when we have to tax other people to pay for the benefit?" Likewise, a state can constitutionally decide that one of its purposes for having any marriage law at all is to create some incentive for potentially procreative couples to behave differently,<sup>211</sup> and that it does not want to incur the costs either of identifying opposite-sex couples who in

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210. See *Johnson v. Robison*, 415 U.S. 361, 383 (1974) (upholding exclusion of conscientious objectors from government program of educational assistance to veterans, intended to incentivize military service, stating: "When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory.").

211. Cf. *Schneider*, *supra* note 170, at 522 ("No doubt the channelling function relies on unprovable assumptions. But 'all schemes of statutory regulation are ultimately based on unprovable assumptions about human nature.' Thus the channelling function ought not be dismissed out of hand because measurement is difficult.").

fact cannot reproduce or of including couples who are obviously incapable of procreating (because its members are of the same sex).

Because the state need only explain that including same-sex couples in legal marriage would not serve the intended responsible-procreation aim, advocates' claims about same-sex marriage having no effect on opposite-sex couples are totally inapt. A state could concede that marriage law would be equally effective in inducing unmarried people to avoid conceiving a child even if the state issued marriage certificates to same-sex couples, but still constitutionally refuse to do that. Similarly, the government could concede that giving free lunches to children of the rich would not undermine the nutrition of poor children, but nevertheless continue limiting free lunches to children of the poor in order to limit the cost of the free lunch program.

b. Protesting too much?

In addition to being inapt, claims about same-sex marriage having *no* effect are implausible. Yet they typically take a categorical and pejorative form. Advocates for same-sex marriage do not modestly suggest that same-sex marriage is *unlikely* to alter *significantly* what *most* heterosexuals think of marriage. Perhaps fearing courts will apply rational basis review, so that any concession on the facts could be fatal, advocates boldly and disdainfully assert that it is impossible same-sex marriage could have any effect whatsoever on how any heterosexuals think about marriage, so anyone claiming it must be delusional.<sup>212</sup> Courts generally follow suit, treating the concern dismissively.<sup>213</sup>

So now try a second thought experiment. Imagine that instead of eliminating all marriage laws, states instead voluntarily expanded the availability of legal marriage so there were no longer *any* exclusions. Any two or more persons who want the state to treat them as legally married to each other (or if incompetent, whose guardians want them treated as such) can obtain a state marriage certificate. Legislators explain that the same-sex marriage debate has convinced them that anyone who could benefit from the practical advantages or the symbolic validation legal marital status

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212. See, e.g., Rainey Memorandum, *supra* note 18, at 13 (“it is illogical to think that allowing same-sex marriage will somehow make heterosexual couples less likely to marry”); Bourke Amicus 1, *supra* note 18, at 23-24 (“[T]here is no basis in logic or social experience to suppose that such couples [heterosexual] will lose respect for the institution if same-sex couples are permitted to marry. . . or have any influence on the marital or procreative decisions of different-sex couples. . .”); Kitchen Amicus, *supra* note 129, at 23 (same); Hollingsworth Amicus, *supra* note 31, at 3-4 (“It is not rational to assume that granting same-sex couples the right to marry will influence the behavior of opposite-sex couples. . . . Petitioners’ responsible procreation theory also has no basis in logic or social experience.”).

213. See, e.g., *Kitchen*, 755 F.3d at 1223 (“We emphatically agree with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples”); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) (“[R]ecognizing a gay individual’s fundamental right to marry can in no way influence whether other individuals will marry”).

confers should have it, and any lovers who want to make a bold public declaration of their love should receive the state's assistance in doing so. Two brothers might develop an intimate relationship with each other and feel the sting of societal disapproval, which they think legal marriage will erase. Three friends share a household, with one earning income, one maintaining the household, and the other caring for children, and they want to file a single, collective tax return as a marital unit so they collectively pay less. Middle school students are tired of adults' giggling when they say they are "going out" with someone, and getting legally married would allow them to demonstrate how real and powerful their love is. The state has decided to accommodate all these desires. Perhaps legal marriage would even extend to human-animal relationships: an elderly widow wants to execute a will leaving money for care of her cat and worries about a will contest, so she wants to legally marry the cat and thereby establish inheritance rights. Perhaps she also wants the world to know that she loves her cat, and she would feel like a second-class citizen if the state glorified people lucky enough to have a human companion but not those whose only cohabitant is a pet.

The basic idea of this thought experiment is that legislators want to make all benefits of legal marriage, brought home to them by the same-sex-marriage movement, available to all constituents who might want any of them for any reason. They could create some other legal status with a different name or amend various laws so benefits do not depend on relationship status, but that would be complicated and risk making some people feel disparaged, so they adopt the easy route of extending the institution of marriage far beyond its antiquated traditional limits.

Is there any doubt that this hypothetical, extreme expansion of legal marriage would change public perceptions of and attitudes about marriage?<sup>214</sup> Marriage clearly would lose its specialness; no one would dream about marriage in that world, no one would wait for it to occur before having sex, and no one would worry about avoiding conceiving a child without being "married." This is in part because specialness entails some exclusivity, and in part because the specialness of certain social institutions derives in large part from their connection to family history and societal culture—that is, from their being the same thing with the same meaning as was true for their grandparents and their great-grandparents and generations of couples before that.<sup>215</sup> Young people in this hypotheti-

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214. Cf. Ronald M. Dworkin, *Three Questions for America*, N.Y. REVIEW OF BOOKS, Nov. 21, 2006 (noting that marriage's "meanings depend[ ] on associations that have been attached to the institution by centuries of experience"); Schneider, *supra* note 170, at 509-10 ("[E]ven people 'who still strongly adhere to the ideal of marital permanence may be afraid to commit strongly to their marriages if they perceive a general weakening of the ideal.'").

215. See Schneider, *supra* note 170, at 511 ("The knowledge that our forebears organized their lives around the social institutions that still shape us and the belief that the lives of our progeny will be made recognizable by their participation in those same institutions add meaning to our lives and help inspire us as individuals and as members of society to cherish the past and our elders and to nurture the future and our children.").

cal world of radically diluted and redefined marriage would be more excited by the prospect of getting a driver's license than of getting a marriage license.<sup>216</sup> Being legally married would just be functional, something one does if one happens to want certain practical advantages, even less special than "civil union" status has been for same-sex couples in states that have adopted it, which the Movement has complained is not the stuff of which childhood dreams are made.<sup>217</sup>

And if an extreme expansion of legal marriage would dramatically alter perceptions and attitudes relating to marriage, how could it be *impossible* for a lesser expansion to have *any* effect whatsoever anywhere, as advocates boldly proclaim? Is there some threshold degree of expansion that must be reached before there could possibly be any effect in any state? Why would that be, and how would we know when it is exceeded? Advocates for same-sex marriage offer no explanation or social scientific evidence for their empirical claims about what can or cannot affect people's attitudes and behaviors. This thought experiment makes their view facially implausible, and it remains implausible unless and until they present a persuasive evidence-based explanation.

c. Who is higher on the slippery slope?

As a matter of fact, the reasoning of federal and state courts in ordering extension of legal marriage to same-sex couples contains no limiting principles to support rejecting the next demand for legal marriage that comes down the pike. In particular, broad statements about marriage being a fundamental right for everyone to marry the person of their choice (which the Movement promotes, perhaps to avoid abandoning bisexuals who want same-sex relationships) are certain to be cited by other groups presently excluded from legal marriage. They would support the claim of a woman who has fallen in love with an already-legally married man that she has a fundamental right to become legally married to that man (subject to his consent), and that the first wife has a fundamental right to stay married to that man if she so chooses. Each woman has a fundamental right to be married to the specific individual with whom each has fallen in love, given that he reciprocates as to each. Likewise, a brother and sister who happen to have fallen in love with each other must have a fundamental right to a legal marriage (putting a high burden on the state to justify infringing the right). The brother already has a statutory right to marry some woman, but that is not good enough; he must have a fundamental right to marry the specific person he has chosen, if she reciprocates. Similarly for the sister.

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216. There is also plausibility to the concern that the state's issuing marriage licenses to clearly non-procreative couples could confound the marriage-procreation normative association the state wants to instill in young people, even if the state's doing so would not logically entail a conflicting message. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1002 (Mass. 2003) (Cordy, J., dissenting).

217. See, e.g., BOIES & OLSON, *supra* note 10, at 134-35.

Polygamy and sibling marriage implicate some different state interests, so judicial review of states' refusal to afford legal polygamy or legal sibling marriage might lead to a different final conclusion. (Notably, however, the birth defect concern with respect to siblings disappears with same-sex sibling couples.) My point is not that legal plural marriage or sibling marriage necessarily follows from legal same-sex marriage, but that same-sex marriage advocates' (implausible) view on the fundamental right issue would also elevate the judicial scrutiny applied to anti-polygamy laws and incestuous marriage exclusions, making them presumptively unconstitutional. Certainly under heightened scrutiny some other existing marriage restrictions would fall more quickly than the opposite-sex limitation. For example, statutory provisions in roughly half of states precluding first cousins from marrying could not withstand heightened scrutiny, given that procreating with a first cousin raises the risk of birth defects just from 3–4 % to 4–6%, and given that those states have no problem with recognizing first-cousin marriages effected in other states.

In fact, all the arguments advocates for same-sex marriage make also apply to legal plural marriage, which is already shaping up to be the next marriage-expansion cause.<sup>218</sup> Some are even stronger in a polygamy context. The fundamental right claim has some plausibility with polygamists, because states still attempt to criminalize polygamists' social relationships as well as denying them legal recognition.<sup>219</sup> Polygamists are still waiting for their *Lawrence* (respect for negative liberties) and have not yet dared hope for their *Windsor*. Many polygamists (e.g., Fundamentalist Church of Jesus Christ of Latter Day Saints and Muslims) believe themselves under a religious command to practice plural marriage, so they can add a free exercise claim (and perhaps also claim to have an immutable orientation with respect to intimate relationships). Polygamists currently are far fewer in number than gays and lesbians and have few advocates outside their communities, rendering them far more "politically powerless" than gays and lesbians. Polygamists have suffered a history of persecution, and still today in some states are constantly at risk that their homes will be raided by law enforcement.<sup>220</sup> The animus behind anti-polygamy laws is clear,<sup>221</sup> whereas none toward sexual orientation minorities can be ascribed to states' original marriage laws. People in polygamous relationships love each other and form inter-dependencies, yet feel they and their

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218. See *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah, 2013).

219. See, e.g., *id.* (invalidating Utah's criminal prohibition against a married person "cohabiting" with another, but only as applied to religiously-motivated polygamists and on Free Exercise grounds); *Barlow v. Blackburn*, 798 P.2d 1360 (Ct. App. Div. 1 1990) (upholding anti-polygamy clause in Arizona Constitution against claim of religious freedom). Michigan even purports to criminalize advocacy for polygamy.

220. See, e.g., Nathan B. Oman, *The Story of A Forgotten Battle: Reviewing the Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America*, 2002 B.Y.U. L. REV. 745 (2002) (describing the bigotry underlying prohibition of polygamy in the Nineteenth Century and in the Supreme Court's 1879 decision upholding anti-polygamy laws).

221. *Id.* at 747-48; Nathan B. Oman, *Natural Law and the Rhetoric of Empire: Reynolds v. United States, Polygamy, and Imperialism*, 88 WASH. U.L. REV. 661, 667 (2011).

relationships are still denigrated by the vast majority of the American population.<sup>222</sup> They are raising children who also might benefit from their parents' relationships receiving legal and public validation. When one spouse is hospitalized, the others want to visit. They could be happier and have healthier and more stable households if the state removed the cloud of criminalization and gave them the material benefits and dignity that come with legal marriage. Legal plural marriage would serve the state's aim of confining potentially procreative sex to permanently committed relationships. If courts recognize all this, states arguably should have to make a stronger showing in support of their anti-polygamy laws than they do in support of traditional opposite-sex-only marriage.

There is no clear contender for the next movement after polygamy. No organized group of any size is challenging a marriage restriction. But it only takes one person or couple to file a lawsuit asserting a constitutional right to marry, and the possibilities are endless. What if a local clerk in charge of distributing marriage license knows that the two (or five) people in front of her, requesting a joint marriage license, are not lovers but just friends, or that they are closely related biologically (some states' marriage license applications ask whether there is a blood or family relationship) and refuses to give them a license? Platonic couples could charge the states with coercing them into sexual intimacy if denied a marriage license because they are not "true couples." As with polygamy, states still attempt to criminalize intimate relations among lovers closely related to each other, biologically or by adoption or affinity,<sup>223</sup> so "incestuous" couples have a much stronger argument (a negative-rights claim) for having a fundamental right to legal marriage (with its attendant authorization of intimacy) than do same-sex couples today (though, again, the state could assert different countervailing interests). There are innumerable underage couples, and surely there are some who decide they want to get married but who cannot get their parents' permission. They could challenge age restrictions and parental consent requirements just as pregnant minors have done with abortion restrictions.<sup>224</sup> To the extent courts reaffirm the supposed fundamentality of a right to marry, while also predicating the right on the material benefits and dignity that legal marriage entails, and are disdainful of state explanations in terms of incentivizing

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222. See, e.g., *BOIES & OLSON*, *supra* note 10, at 257 (lumping "plural marriage" together with incest and "unions of people and animals" and characterizing it as an "absurd concept"), 258 (implying that practiced polygamy is so rife with abuse it is categorically different from same-sex relationships).

223. See, e.g., *Lowe v. Swanson*, 639 F.Supp.2d 857 (N.D. Ohio 2009) (rejecting a substantive due process challenge to a state law criminalizing sex between a step-parent and step-child even as applied to a consensual relationship with an adult step-daughter).

224. Cf. *Kirkpatrick v. District Court*, 64 P.3d 1056 (Nev. 2003) (rejecting a non-custodial father's claim that court approval of his 15-year-old daughter's request to marry a 48 year old man, without giving the father even notice of the hearing, violated his procedural due process rights, based in part on a premise that the child had a constitutional right to marry).

desirable behavior, they will find it difficult rationally to deny to anyone a constitutional right to legal marriage.

And in addition to the club becoming less exclusive, there is the problem for the state that every new group of entrants to marriage increases the cost of whatever material benefits the state attaches to the status—benefits that unmarried taxpayers must subsidize. This is true both for direct state subsidies and for mandates relating to spouses that the state imposes on insurers and employers; someone must bear the added government or corporate costs of expanding the marriage category. Any expansion of marriage could therefore induce legislators to reduce those benefits and dilute the mandates, and thus incidentally to diminish the attractiveness of marriage for all.

There is therefore plausible basis for legislators realistically to believe that same-sex marriage is a step toward the end of marriage as the sort of institution that gives young people a reason to hold off on having sex or to be more careful about sex. The legislators could be wrong; reasonable people can disagree in their predictions about the future effect of expanding marriage laws, and it might well be that the worry is more plausible in some areas (e.g., the Bible Belt) than in others (e.g., New England). But the Constitution establishes a preference for majoritarian decision-making when reasonable people can disagree, and decision making at the state level with respect to domestic relations.

#### d. Club membership psychology

A final thought experiment further reinforces the point here. Now imagine that states, instead of eliminating legal marriage and instead of expanding its availability, retain the institution and *restrict* its availability. For example, they might henceforth refuse a marriage license to anyone previously married and divorced. Persons otherwise eligible for legal marriage get only one shot. Is it not possible that this *constriction* of the law could restore some of the lost sparkle to marriage, make it more special and therefore more worth aspiring to? And at the same time make it something young people do not want to be pressured into by an accidental pregnancy, knowing they only get one chance? And might this not, in turn, enhance the efficacy of marriage in reducing accidental procreation outside of committed relationships among never-married people? It should cause young people to ask themselves more often and more conscientiously when attracted to someone: “Is this person marriage worthy?” A negative answer should make that person less attractive even for dating.

Another possible constriction would be excluding people previously convicted of felony domestic violence. A state might do this as the result of lobbying by feminist organizations and advocates for victims of domestic violence, who have said that unless and until the state imposes this restriction on marriage they will refuse to participate in the legal institution. They argue that abusers do not serve one of marriage law’s other purposes—that is, encouraging permanent commitment between people

likely to provide each other loving support—and that allowing abusers to marry tarnishes marriage’s sacred image. Would it be implausible for the state in that situation to conclude that its decision whether to allow one group to marry could affect the choices of another group whether to marry? Whether the attitude underlying any group’s decision to reject marriage is commendable is irrelevant, if the state has reason to prefer that they continue to embrace marriage and the normative precepts that attach to it.

Relatedly, legislators might draw on their knowledge of human nature when it comes to belonging to clubs. Marriage is something of a club, like the priesthood, a law school faculty, or the Supreme Court bar. An “exclusive club” is generally seen as better, and those who get in feel fortunate. If particular membership requirements are dropped, the value of membership declines. Importantly, the devaluation for existing club members is likely greater if they have not opened the door wider voluntarily but rather have had it pried open from outside, by persons they previously considered unqualified for membership forcibly breaking in. In addition to the devaluation, there is likely also to be resentment if the break-in is publicly defended with illogical and disingenuous arguments. These are facts about human psychology overlooked when advocates and judges confidently assert that judicially-mandated inclusion of same-sex couples in legal marriage could not possibly have any effect on incentives for any opposite-sex couples to get legally married.

Legislators might also draw lessons from history—in particular, past instances of institutions being forced to allow new entrants. What is generally overlooked in discussions about backlash in connection with same-sex marriage is that the backlash following civil rights victories was not limited to violence and legislative rollbacks. The most enduring backlash effect, arguably, has been exit from the institutional site of cultural conflict. White conservatives’ flight from public schools following the Warren Court’s desegregation and school prayer decisions should give pause to anyone inclined to think transformation of institutions does not make anyone rethink whether they want to belong to those institutions.<sup>225</sup> So, too, should feminist and LGBT scholars’ arguments urging rejection of marriage as a life course because of what it “stands for.”<sup>226</sup> People everywhere care about who else belongs to organizations and institutions they

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225. See, e.g., Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 486 (2014) (discussing white flight and noting: “Public schools are more segregated now than they were at the time of *Brown v. Board of Education*.”).

226. See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 164, 165 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (“Marriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture and the validation of many forms of relationships.”) Murray, *supra* note 158, at 7 (“feminists and queer theorists have emphasized marriage’s role as a vehicle of state regulation and discipline, and many have been skeptical of marriage and social movements predicated on securing marriage rights for marginalized groups.”); Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 261-63 (2001).

contemplate joining, and what those organizations and institutions “stand for.” And they strongly prefer voluntarily to welcome new members into the “clubs” to which they subscribe rather than being forced to admit a new category of members. Perhaps the situation is entirely different with same-sex marriage, but what honest person could assert with unqualified confidence that it is so?

There are some reasons not to worry about a similar flight from marriage. First, schools are different; the Court’s school decisions directly and significantly altered the daily experience of dissenters’ children. Opening legal marriage to same-sex couples (in dissenters’ minds) merely changes the meaning of marriage, sending a message that parents can mediate with their children. However, reaction to secularization of the schools has been mostly concern about the message this sends children, and a large group of parents ever since has been so troubled by the godlessness of the state education system that the parents have not only exited public schools but entirely rejected the authority of the state with respect to their children’s education, retreating to church basement schools and homeschools by the millions and successfully defying efforts at government oversight.

Second, there could be countervailing effects of the same-sex marriage movement. It can enhance the perceived value of a club that others are clamoring to get in. But their actually getting in forcibly and thereby diminishing the exclusivity likely nullifies that. Some heterosexuals believe the institution of marriage is tainted by exclusion of same-sex couples, and we will value legal marriage *more* when it is also available to same-sex couples. But for how many people this is true, we have no idea. Same-sex marriage might also for some people restore to marriage some of the legitimacy it has lost to valid feminist criticisms of the traditional patriarchal model, if it inspires by example more egalitarian marital norms, but that is quite speculative.

What is certain is that predictions about the effects of court-ordered same-sex marriage (or lack thereof) are necessarily speculative. This is not a conceptual or logical question, so categorical stances are indefensible. We simply do not know. And for purposes of constitutional analysis, if rational basis review applies, as it should, legislators’ knowledge of human nature in relation to “clubs,” and of the history of Supreme Court decisions triggering an exodus of dissenters from public institutions like public schools, surely gives them adequate basis for assuming that extending legal marriage to same-sex couples could have a negative impact on the attitudes and behaviors of many people who are capable of accidental procreation, especially given that this particular extension might make it more difficult to continue excluding some other groups.

Again, though, this is *not* something the state needs to allege and support. It need not argue that *excluding* same-sex couples from legal marriage *serves* the responsible-procreation function. It need only argue that

including them would *not* serve that function (properly understood), which no one disputes.

#### 4. *Marriage and adoption of the “unwanted”*

I have saved for last the most absurd judicial response to date to the state’s argument that one of its aims is to deter extramarital pregnancy. This is Judge Posner’s adoption argument:

Unintentional offspring are the children most likely to be put up for adoption, and if not adopted, to end up in a foster home. Accidental pregnancies are the major source of unwanted children, and unwanted children are a major problem for society, which is doubtless the reason homosexuals are permitted to adopt in most states . . . If the fact that a child’s parents are married enhances the child’s prospects for a happy and successful life, as Indiana believes not without reason, this should be true whether the child’s parents are natural or adoptive . . . . Married homosexuals are more likely to want to adopt than unmarried ones if only because of the many state and federal benefits to which married people are entitled. And so same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters. Notably, same-sex couples are more likely to adopt foster children than opposite-sex couples are . . . . Also, the more willing adopters there are, not only the fewer children there will be in foster care or being raised by single mothers but also the fewer abortions there will be. Carrying a baby to term and putting the baby up for adoption is an alternative to abortion for a pregnant woman who thinks that as a single mother she could not cope with the baby . . . . Accidental pregnancies are found among married couples as well as unmarried couples, and among individuals who are not in a committed relationship and have sexual intercourse that results in an unintended pregnancy. But the state believes that married couples are less likely to abandon a child of the marriage even if the child’s birth was unintended.<sup>227</sup>

In this ramble, Posner says several patently false and illogical things, beginning with the very first sentence. The reality is that even though 41% of births in the United States today are extramarital, voluntary relinquishment and abandonment of babies by their parents are virtually nonexistent.<sup>228</sup> Unwed mothers *keep* their children and apply for welfare benefits, and *that* is the principal reason why accidental extramarital pregnancy is enormously costly to states. So unless Posner has in mind that the state should begin terminating the parental rights of unwed mothers at the time they give birth, solely because they are not married, adoption

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227. *Baskin*, 766 F.3d 648, 660-62 (7th Cir. 2014).

228. See Jo Jones, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, VITAL AND HEALTH STATISTICS SER. 16, (2008) (“[I]n 2002. . . the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent.”).

(and, secondarily, same-sex marriage) is not in any way a solution to the problem of single mothers straining the welfare system.

Further, for every one of the few babies whose birth mothers do relinquish them in a private placement adoption, leave them at a “safe haven,” or otherwise abandon them, there are thousands of married heterosexual couples competing with each other to adopt.<sup>229</sup> As Posner well knows, the pool of adults wanting to adopt and qualified to do so has long dwarfed the number of infants “unwanted” by their birth parents.<sup>230</sup> That is why international adoption became a large phenomenon in the latter part of the twentieth century. Hundreds of thousands of couples desperate to adopt an infant have traveled across the globe, spent tens of thousands of dollars, struggled with foreign language and foreign (often corrupt) bureaucracies, and weathered charges of imperialism after giving up hope of winning the infant-adoption lottery in this country. Adding more couples to an already-hopelessly long queue would do absolutely nothing to help accidentally conceived children whose mothers relinquish or abandon them. They are fine. They are not a problem for the state; eager adopters generally absorb whatever costs their existence creates.

The overwhelming percentage of children available for adoption in this country are actually “put up” by the foster care system, following involuntary termination of parental rights years after the children’s birth, during which time the children are typically permanently damaged by maltreatment or foster care drift.<sup>231</sup> Those children are not “unwanted” by their birth parents. The people who do not want them are the vast majority of adults interested in adoption, and *that* is why some states have long permitted same-sex couples to adopt. We have no idea how many of these children resulted from unintended extramarital pregnancies, so there is no basis for drawing even a highly attenuated logical connection between unintended extramarital pregnancy and adoption of children from foster care. It is certainly possible that allowing same-sex couples to marry would encourage more of them to adopt from foster care children who are unwanted by the enormous existing pool of people wanting to

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229. See *id.* at 12, 22, 25 tbl.7 (showing 900,000 women currently seeking to adopt, most of them married, including 228,000 black women and 195,000 Hispanic women); *id.* at 16, 33 tbl.15 (showing that over half of these women express indifference about the race of the child, only one-fifth of white women seeking to adopt express a preference for a white child, half express a preference for a child less than two-years old, and 89% would accept a child with a mild disability); Brian H. Bix, *Perfectionist Policies in Family Law*, 2007 U. ILL. L. REV. 1055, 1061 & n.37 (citing statistics and noting that “given the current supply and demand for children for adoption, there is every reason to believe that a baby given up immediately after birth would have no trouble finding a loving home”). Elizabeth Bartholet, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7 (1999) (“The potential pool of adoptive parents is enormous—it dwarfs the pool of waiting children. About 1.2 million women are infertile and 7.1 percent of married couples, or 2.1 million.”).

230. See Posner, *supra* note 198, at 61. Scare quotes here because “unwanted” is an overly simplistic characterization of the feelings of women who relinquish or abandon their children. The decision is traumatizing for many, perhaps most.

231. See generally, James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407 (2008).

adopt, but reducing the foster care population is a state aim quite different from that of preventing unintentional non-marital pregnancies, and the Seventh Circuit has no business telling states that they must pursue that highly-speculative improvement in the situation of already-existing children in foster care by revising their marriage laws. It is absurd to suggest that a solution to the rampant problem of extramarital pregnancy is to make it slightly more likely that an accidentally conceived child could be adopted years later out of the costly foster care system, should they happen to be removed at some point from the custody of parents who decided at their birth to keep them, and if their parents fail to secure their return after years of costly child protection agency efforts to rehabilitate them, and if the state ultimately completes a costly legal proceeding to terminate the birth parents' rights.

Posner's incoherent musings about adoption of "unwanted" children might be excused as simply terribly confused. But two other aspects of the passage above make his rejecting the state interest in preventing non-marital pregnancies appear cynically dishonest. His suggestion that increasing the pool of potential adoptive parents would reduce the number of abortions rests entirely on a supposition that the existing pool is inadequate, making pregnant girls and women fear that if they do not abort their babies then the babies will end up never having a family. As noted above, Posner is fully aware that that supposition is absolutely false. The very premise of his so-called "baby selling" thesis is that there is now a great imbalance in the adoption "market" between the huge number of highly-motivated buyers and the very small number of willing sellers, an imbalance he believes is created artificially by regulatory interference in the form of severe restrictions on transfer of money from buyers to sellers. In an article entitled *The Regulation of the Market in Adoptions*, he wrote:

On the demand side, many married couples are unable to have children and want to adopt them . . . . Childless couples who try to adopt through an adoption agency find that they must join a long queue and that even then they may be ineligible to adopt—not because they would be unfit parents but because the agencies, having a very limited supply of babies, set demanding (and sometimes arbitrary) criteria of age, income, race, and religion to limit demand to supply.<sup>232</sup>

The situation for would-be adopters of infants has only gotten worse since Posner wrote that, in large part because the option of international adoption has been disappearing, as UNICEF has coerced many "feeder countries" into shutting down their trans-national adoption programs.<sup>233</sup> Any woman contemplating abortion today, regardless of race, if she receives any counseling at all as to alternatives, will be told quite plainly and

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232. See Posner, *supra* note 198, at 61.

233. See James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189, 204 (2013).

truthfully that she could have her pick among thousands of affluent married heterosexual couples, including the full range of races, religions, and other personal characteristics that might matter to her. It is inconceivable that it would alter the decision making of such women one iota to add "and there are some gay couples who would also be interested."

In sum, the state interest in minimizing accidental extramarital pregnancies is an entirely legitimate, genuine, and long-standing one. It is arguably a compelling state interest given the impact on many individual lives (of girls and young women who become pregnant and then abort or forego education and career) that such pregnancies occasion on top of the short-term costs (various welfare benefits) and long-term costs (poorer developmental outcomes) these children occasion for the state;<sup>234</sup> and the legal system and legal scholars have long recognized the connection between that state interest and the state's attempt, by maintaining and subsidizing a legal status of "married," to bolster the social institution of solemnized marriage, traditionally *the* approved site for procreation, in the hope that the moral message of "wait till you are married" can continue to have some efficacy in altering the behavior of unmarried heterosexuals. As a family law scholar, I cannot honestly deny the validity of this constitutional defense of traditional marriage laws, even though for me personally other considerations tip the public policy and moral balance in favor of legal same-sex marriage.

#### IV. WISHING CAREFULLY

The Movement, its supporters, and judges deciding in their favor see only victory in judicially-mandated extension of legal marriage to same-sex couples. They are wrong. What is lost becomes evident when one imagines an alternative outcome. Imagine what might ensue following a Supreme Court decision *against* same-sex marriage. Or to be more precise, a Supreme Court ruling that all the modern state constitutional provisions blocking legislative adoption of same-sex marriage violate the federal constitution, but traditional state statutory marriage laws do not.

Such an outcome would throw the question clearly and definitively into the political arena. The Movement would then return its focus to trying to persuade people. Given its extraordinary success in doing that in recent years, the end result would certainly eventually be majoritarian embrace of same-sex marriage throughout the country—statisticians predict within a decade.<sup>235</sup> This result should not trigger much backlash nor slow the progress toward universal acceptance. Some would still oppose the

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234. See Solomon-Fears, *supra* note 198, at 2 (" [A] large body of research indicates that children who grow up with only one biological parent in the home are more likely to . . . have worse socioeconomic outcomes. . . 44-46% of children who lived with their mothers only, two unmarried parents, or no parents were living below the poverty level. . . children living in single-parent families are more likely to face negative outcomes (financially, socially, and emotionally). . .").

235. See KLARMAN, *supra* note 30, at 202; *id.* at 193-203 (describing the inevitability, if current trends continue, of a *political* victory for the Movement).

change, but they could not psychologically draw support from being in the majority. To the contrary, the larger group to which they belong, the people of their state, will have decided collectively to make this change, by a process all endorse. In contrast, judges, especially federal judges, are outsiders to the community, pitting themselves against the community. If “we the people” decide to authorize same-sex legal marriage, all a dissenter can say is “I still think it’s wrong, and we shouldn’t have done it,” which seems less likely to ossify animosity or provoke violence than, “We know it’s wrong and those god-forsaking elitists in the federal government have no right to force it down our throats.”

Conversely, then, a Supreme Court victory could make the LGBT community worse off in terms of what many say is the real objective—dignity. Dignity can mean at least a couple of things. Anti-sodomy laws denied one kind of dignity—namely, being spared humiliating invasions and exposures. *Lawrence* delivered that kind of dignity. Another kind of dignity is recognition-respect, and that is what is at stake in marriage litigation. Kennedy characterized the federal government’s denial of marital status to couples whose states had given them marriage certificates as an insult to that sort of dignity, and he seemed to believe the Court’s decision in *Windsor* would restore or generate dignity. But he was wrong.

Federal and state DOMAs are legislative enactments, expressions of collective societal views and values. Courts can order states to eliminate practical reminders of what LGBT persons perceive as social disrespect, such as having to file tax returns as a single person, but courts cannot order the people to change their attitude. Courts thus cannot deliver the type of dignity that comprises social respect. In fact, the message judges send to sexual minorities when they invalidate state marriage laws on constitutional grounds is precisely the opposite of the “we the people respect you” that legislative victories give LGBT persons. Judicial invalidation of laws amounts to judges speaking contrary to “we the people.” Federal judges have been saying, in effect: “We are helping you because your fellow citizens do *not* respect you enough to do it themselves.” It accentuates the lack of recognition-respect.

That discouraging message is all the more powerful when a court invalidates a law after ascribing suspect class status to a group, as the Seventh Circuit did. Judge Posner’s message to gays and lesbians (which is actually false) is that they are so despised in their state that they cannot hope to convince legislators to respond to their needs. They need a few people in a position of power insulated from popular will, people representing not their state but the federal government (*i.e.*, federal judges), to override popular will in their state. The Seventh Circuit’s decision could only *diminish* the LGBT community’s perception of social respect, not enhance it. Similarly, if a court were to order my local government agencies to eliminate all religious trappings from their offices and meetings, that would not make me feel more welcomed by the people at those places and events, and it might actually make me feel even less welcome.

Importantly, a judicial victory obviates legislative change, and therefore collective or majoritarian expression of respect. If the Supreme Court holds that all states must amend their marriage laws to authorize same-sex marriage, LGBT persons in most states will never have the opportunity to experience a welcome extended by the people of their state. They must forever view the people of their state as having been against them. Correspondingly, we who want to participate in a collective expression of recognition-respect will never have the chance; the courts will have taken away the opportunity.

Thus, celebrations following these court victories have a false air about them, in some cases a painful irony. For example, the trial court decision in *Perry* came out soon after polls showed a major shift in popular attitude toward Proposition 8, with a majority of Californians then favoring same-sex marriage and only 20% believing Prop 8 was a “good thing.”<sup>236</sup> A new referendum reversing Prop 8 would likely have succeeded. But gays and lesbians in California never got to feel the embrace of the state’s people that a vote to reverse Prop 8 could have given them. Instead, they celebrated that one man agreed with them.<sup>237</sup> Perhaps they preferred to wield power over those who had voted against them, to play the judicial trump, instead of letting those people redeem themselves. That would be understandable, but the gratification would likely be fleeting. Similarly, even before the Supreme Court decided not to accept an appeal of the Tenth Circuit decision in *Kitchen*, a poll showed Utah public opinion had tipped in favor of same-sex marriage.<sup>238</sup>

Defenders of the litigation strategy contend that court orders changing the law in states where a majority are still opposed to same-sex marriage are one step toward popular acceptance. After the law changes, same-sex couples marry and everyone sees that the sky does not fall. Over time, the new law comes to seem normal, old people get tired of complaining about it, young people grow up presupposing it.

That reasoning is far more plausible at the beginning of a movement for social change. *Goodridge* is a good illustration. The thesis makes far less sense today, when many states already have legal marriage for same-sex couples and so have shown that the sky does not fall. Today, it seems court orders are more likely to slow or completely halt the favorable shift in public opinion, by ending the public conversation and generating resentment. Seeking court victories implicitly expresses disdain for the public whose respect they hope to obtain, which cannot help. The push for a Supreme Court solution appears to have been driven more by impatience and a desire among lawyers and plaintiffs to get their names in history books, rather than by wisdom and a well-considered judgment about how

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236. See BOIES & OLSON, *supra* note 10, at 188.

237. *Id.* at 189-92.

238. See Marissa Lang, *Poll: Utahns evenly split as Supreme Court considers gay marriage—It’s 49 percent yes vs. 48 percent no.*, THE SALT LAKE TRIBUNE, Sept. 29 2014.

best to secure dignity for sexual minorities.<sup>239</sup>

What if it were possible to change course now? Imagine a counter-factual reality in which the leaders of the gay movement go on national television today and announce that they are suspending their litigation strategy permanently and plaintiffs have chosen to withdraw their suits. They have decided that they do not want to win that way. They do not want to force themselves and their desire for legal recognition on their fellow citizens, as deeply important as that recognition is to them. They respect their fellow citizens enough to let them decide for themselves: Will they extend a hand of welcome and reciprocal respect? The Movement has decided to leave it to the people and their elected representatives.

Movement leaders ask people across the nation, all riveted to their televisions, not to just forget about them now, but to have a national conversation about this important issue, and conversations in every state and community, with everyone able to express their thoughts, beliefs, values, and feelings. They begin this process by having some couples stand forward and describe what marriage means to them, their children, and their extended family and friends, just as same-sex couples have been doing for judges in courtrooms.<sup>240</sup>

And imagine the people in a state where the traditional rules still apply responding, launching that conversation in newspapers, television and radio programs, in churches and fraternal organizations, in universities, in door-to-door dissemination of information. And then they vote. A substantial majority votes yes. Millions and millions say yes to their LGBT brothers and sisters. How different the morning after would be for sexual minorities. They could walk the streets expecting smiles rather than threats. They can know that the people of their state—not just a few distant sympathizers in robes—accepted them, said to them: “You are equal, and you are one of us.”

And how different life would be for those who want to extend the collective welcome. Having that opportunity restored to us would not only be gratifying but would also give us a way to do something besides observing from the sidelines (or writing amicus briefs of dubious integrity), a way concretely to demonstrate our support, to use whatever power we

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239. A response that the lawyers are simply doing what clients want would not ring true. Much same-sex litigation has been lawyer-initiated rather than client-initiated. The lawyers are supporting Supreme Court review of their own cases even though they won at the Circuit Court level. The plaintiffs’ lawyers seem to have made no effort to coordinate in order to steer the Court toward the case that is actually best for the cause. They are all on a Path to Glory.

240. Cf. KLARMAN, *supra* note 30, at 198-99 (describing moving public statements by gay or lesbian persons, conveying their personal experience, and deeply affecting their audiences); BOIES & OLSON, *supra* note 10, at 127-29 (describing testimony of *Perry* litigation plaintiffs and saying “Jeff had succeeded in putting a human face on what the fight for marriage equality was all about, far better than any lawyer’s brief or argument could”), 136 (“We felt that if everyone in America could hear that testimony [of Sandy Stier], and the words and feelings of Kris, Jeff, and Paul, opposition to marriage equality would melt away.”).

have to give our gay brothers and lesbian sisters what they wish. I think of state legislators in my state who applauded a federal court ruling in favor of same-sex marriage. How pathetic they were as supporters. They were in a position of much greater power, with the ready ability to introduce legislation and lobby other lawmakers, but they stood by watching.

Life would also be different ever after for those who now oppose same-sex marriage (and possibly other rights for sexual minorities) but who open their minds when they hear what Movement leaders say, because the message they receive is one of respect rather than dismissiveness. They are willing then to listen carefully to what gay and lesbian couples say, rethink their position, and then autonomously revise their views, voluntarily giving something that is important to them (their support), and thereby having the valuable experience of moral growth, magnanimity, rational reflection, and solidarity. They would be changed by this experience, and their disposition toward LGBT persons would ever after be more positive.<sup>241</sup>

Societally, we would benefit from having acted like a community of caring and mutually respectful human beings. We lose the opportunity to do that every time courts short-circuit democratic decision-making by handing down constitutional mandates. Of course, sometimes it is best for society that courts do this, and sometimes individuals are entitled to courts' doing it even if it is not best for society. The Constitution exists for a reason, and courts should give it effect when appropriate. But there is a cost each time, and when the constitutional basis for a court order is so weak, to the point that even a sympathetic observer like myself finds it quite implausible, the courts are likely to disserve the community unjustifiably. If instead the Movement called off the lawyers, withdrew their lobbyists from Congress and state legislatures, and spoke directly with the people, showing respect to those who currently oppose them, displaying a nobility of character that should generate reciprocal respect, we might together experience something extraordinarily valuable, which we could replicate when other controversies arise.

The obvious response to the alternative story is a cynical one that it is fiction unlikely to become reality any time soon, if ever. But it is a story with a happy ending that the constitutional litigation strategy never can deliver. It is worth thinking, again, whether it is worth waiting for that far better ending, and whether the Movement and its supporters have done all they can to generate the kind of national conversation that could begin the alternative story.

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241. Cf. Jeremy W. Peters & Jonathan Martin, *Gay Marriage Case Offers Republicans Political Cover*, INT'L N.Y. TIMES, Jan. 20, 2015 (explaining how the Supreme Court's grant of certiorari in *DeBoer* spared conservative legislators from even having to discuss same-sex marriage, let alone take and explain a position).

## V. CONCLUSION

Today opposite-sex-only marriage laws clearly fall into the category of permissible policy choices that we supporters of same-sex marriage should be seeking to change through public persuasion and the political process, not the courts. Our doing so would demonstrate respect not only for constitutional principles and the democratic process but also for people who now disagree with us, and that in turn should minimize resentment and backlash. It would also offer a realistic possibility for achieving something courts cannot give LGBT persons—namely, the kind of dignity they seek.

My own brand of cynicism, though, is to doubt that those on my side of the issue politically will do the right thing legally. They will continue to bypass the public, who require more patience than federal judges do, and they will continue to make disingenuous arguments in their effort to secure a national judicial mandate. When the Supreme Court issues that mandate, it will do so with the narrowest and least intelligible explanation possible. But that will not dampen the victory celebrations. “The cause” is not about constitutional principles. It is not really about marriage. It is about people who are like anyone else except they happen to be attracted to others of the same sex, and who seek equal standing in our community today, after a long history of brutal subordination. For a moment, they will feel like they have achieved that. I hope they still feel that way the next day.

Yet questions like these trouble me: Am I destined for the rest of my career to have a depressing discussion about cynical lawyering and judging every time I get to same-sex marriage in my family law class? How will the Court explain to the American people that their wonderful collective (albeit not universal) change in attitude is meaningless, that they still cannot be trusted with democratic deliberation and decision-making when it comes to equality for LGBT persons? How will the Justices explain to other groups excluded from legal marriage their issuing a decision tailored to give victory only to sexual minorities, without endorsing any principles that could be used by other groups about whom the Justices do not happen to care at this time? Or to parents why the Court declared that the aim of inducing young people to avoid conceiving a child till they are married is a silly or imaginary one, not something worthy of state support? Will sexual minorities feel safer and more welcome as a result of a Court decision forcing acceptance on people presumed to be unwilling? And will there be any other way, after the Court has obviated our support for marriage equality, that we in the sexual-orientation majority can communicate collectively the welcome, the apology, and the appreciation that people who are gay, lesbian, bisexual, or transgendered are owed?