

An Illiberal Union

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AN ILLIBERAL UNION

Sonu Bedi*

ABSTRACT

This Article breaks new ground by applying the philosophical framework of liberal neutrality (most famously articulated by John Rawls) to the United States Supreme Court’s jurisprudence on marriage. At first blush, the Court’s decision in *Obergefell v. Hodges*—the culmination of marriage rights—seems to affirm a central principle of liberalism, namely equal access to marriage regardless of sexual orientation. Gays and lesbians can finally take part in an institution that celebrates the union of two committed individuals. But perversely, in its attempt to expand access to marriage, the Court has simultaneously entrenched values that are antithetical to the basic tenants of liberal neutrality. Working at the nexus of political theory and constitutional law, this Article provides the first critique of marriage as an illiberal union. It focuses on three problems with the current state of marriage: one, marriage is problematically a spiritual—not secular—status, affirming an intangible quality that threatens the separation of church and state; two, in marrying couples, the state stigmatizes those who choose not to marry; and three, by promoting monogamy, marriage unreasonably excludes alternative adult relationships and even permits the state to criminalize certain kinds of sexual activity. By questioning the legitimacy of the institution itself, this Article breaks from the usual focus on the issue of access. It ultimately suggests a radical rethinking of the relationship between marriage and the state’s role in regulating it, where marriage becomes a private contract rather than a state-sanctioned, civil institution.

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INTRODUCTION

The United States Supreme Court's decision in *Obergefell v. Hodges*¹ importantly expanded the institution of civil marriage to gays and lesbians, affirming the significance of marriage and its central and enduring role in society as a union of two committed individuals.² Justice Anthony Kennedy, writing for the majority, provided a powerful objection to bans on gay marriage.³ This Article, the first to do so, argues that the very considerations that invalidate these bans perversely reveal why marriage itself as a state-sanctioned institution is illiberal. We should contest marriage, not celebrate it.

This Article draws from liberal neutrality, a political theory famously defended by John Rawls, to support this claim. Liberal neutrality contends the state must not justify its exercise of power by simply appealing to controversial religious or moral conceptions of the good.⁴ A conception of the good is a belief about what kind of

¹ 135 S. Ct. 2584 (2015).

² *Id.* at 2608. Unless noted otherwise, by “marriage,” I mean civil marriage where the state confers and regulates the status of being married.

³ *See generally id.* This Article uses “same-sex marriage” and “gay marriage” interchangeably, recognizing that the state bans struck down in *Obergefell* formally track gender or sex, not sexuality. *See infra* note 261.

⁴ JOHN RAWLS, *POLITICAL LIBERALISM* 19 (expanded ed. 2005) (“[A] conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake”). *See generally* BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD C. DEN OTTER, *JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM* (2009); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* (1987); Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 *SAN DIEGO L. REV.* 729 (1993).

life has “intrinsic or inherent value.”⁵ This framework holds that a liberal state ought not to favor one way of living over another when it comes to our personal and intimate lives simply because it finds that way of life intrinsically superior.⁶ We live in a pluralist society where adults have differing, even idiosyncratic, ideas about how to arrange their intimate lives. Laws and policies ought not to favor one such conception of the good over another. To do so is not to treat individuals as moral equals. According to Ronald Dworkin, liberalism’s commitment to treating “citizens as equals” requires that “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”⁷ Recent work in liberal neutrality suggests that a state unravel and get out of the marriage “business” precisely because marriage laws rest on contested moral or religious conceptions of the good.⁸ They improperly favor the married over the unmarried.

This Article breaks new ground by applying this philosophical argument to the Court’s jurisprudence on marriage. Working at the nexus of political theory and constitutional law,⁹ this Article provides a novel analysis of *Obergefell* and the legal

⁵ JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 12 (2011) (emphasis removed); see also GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 9 (1997) (discussing how those who seek perfectionism look for the “good life” through intrinsic or inherent value).

⁶ QUONG, *supra* note 5, at 5–6 (differentiating the diverse concepts of perfectionism for different individuals).

⁷ Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113, 127 (Stuart Hampshire ed., 1978).

⁸ See, e.g., ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW (2012); TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 284 (2004); David M. Estlund, *Shaping and Sex: Commentary on Parts I and II*, in SEX, PREFERENCE, AND FAMILY: ESSAYS ON LAW AND NATURE 148 (David M. Estlund & Martha C. Nussbaum eds., 1997) [hereinafter SEX, PREFERENCE, AND FAMILY]; Tamara Metz, *The Liberal Case for Disestablishing Marriage*, 6 CONTEMP. POL. THEORY 196 (2007).

Recent liberal theory also questions limitations on plural marriage or consanguinity. See, e.g., RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE (2015); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 977 (2015); Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, 8 J. MORAL PHIL. 246 (2011). March describes his argument as “[t]he Slippery Slope and the Slide from Same-Sex Marriage to Polygamy.” March, *supra*, at 246.

⁹ John Rawls famously proposes that “the limits imposed by public reason” apply to “‘constitutional essentials’ and questions of basic justice.” RAWLS, *supra* note 4, at 214. The Supreme Court, according to Rawls, is an “exemplar of public reason.” *Id.* at 216. As he puts it: “[O]ur exercise of political power is proper . . . only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.” *Id.* at 217.

debate over gay marriage to inform and expand a liberal critique of marriage. It draws from the Court's own understanding of marriage to demonstrate that this civil institution is riddled with at least three hitherto unnoticed illiberal qualities.

First, at its core, marriage is problematically a spiritual—not secular—status. It is not based on tangible benefits, but an intangible quality that threatens the separation of church and state. Kennedy in *Obergefell* even refers to marriage as a “sacred”¹⁰ and “transcendent”¹¹ union. The distinction between civil unions and marriage, which has been so important to the debate over gay marriage, problematically reveals that there is an ethical dimension to marriage, one that even triggers Establishment Clause concerns.

Second, in marrying couples, the state also stigmatizes the unmarried. The idea that marriage is a normative and ethical ideal explains why bans on same-sex marriage demean gays and lesbians, depriving them of access to a revered institution. But it is precisely the reverence that attaches to marriage that demeans those who choose not to marry, whether they are gay or straight. This is because, in sanctioning marriage, the state takes a side in what ought to be each individual's personal choice about how to structure and organize intimate life. The state essentializes gay identity by advocating a heteronormative view of intimacy. This marginalizes those sexualities that do not fit the marriage mold. Marriage reinforces the idea that a life with a committed romantic partner is superior to a life without one.

Third, the Court makes clear, going back to *Reynolds v. United States*¹² and reaffirming in *Obergefell*, that monogamy is central to the meaning of marriage, and that laws in all fifty states inform this feature of marriage.¹³ This Article argues that by promoting monogamy, marriage unjustifiably excludes alternative adult relationships, including polyamory and platonic unions devoted to caregiving. In fact, if marriage is legitimate, so too are current criminal laws that prohibit adultery, laws that seek to protect what Kennedy calls a “keystone of our social order” and a “building block of our national community.”¹⁴ Marriage perversely allows the state to criminalize what adults do in their intimate lives, thereby threatening a sphere of sexual liberty.

Part of the reason these implications go unnoticed is that the constitutional debate over marriage is about the legitimacy of restrictions on marriage.¹⁵ For instance, the central issue in *Obergefell* was whether the state acts constitutionally in limiting marriage to opposite-sex couples.¹⁶ By invalidating such limitations, the Court expands

¹⁰ 135 S. Ct. 2584, 2594 (2015).

¹¹ *Id.*

¹² 98 U.S. 145 (1878).

¹³ *See generally Obergefell*, 135 S. Ct. 2584.

¹⁴ *Id.* at 2601.

¹⁵ *Cf.* *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating limitations on marriage based on status as a prisoner); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating limitations on marriage based on race).

¹⁶ *See generally Obergefell*, 135 S. Ct. 2584.

access to the institution of marriage, making clear that it is illiberal for a state to privilege a heterosexual view of marriage over its gay counterpart.¹⁷ *Obergefell* undoubtedly affirms the liberal principle of equality that underlies the Equal Protection Clause of the Fourteenth Amendment. In one sense, this decision comports with a theory of liberal neutrality.

But if we take liberal neutrality seriously, as this Article does, it also means that marriage itself violates such liberal precepts, privileging a married lifestyle, regardless of sexual orientation, over an unmarried one. *Obergefell*'s equal access reasoning perversely entrenches values that are antithetical to liberal neutrality. Underlying *Obergefell*'s commitment to marriage, whether gay or straight, is a commitment to an illiberal union: one that threatens the separation of church and state; stigmatizes those who choose not to marry; and permits the state to criminalize certain kinds of sexual activity. This Article, in turn, breaks from the usual focus on the issue of access to marriage to focus our attention on the legitimacy of the institution itself. Drawing from a normative framework of liberal neutrality, this Article criticizes marriage, arguing that this kind of union is actually illiberal.¹⁸

Given these problems with the institution of marriage itself, what ought we to do? This Article concludes by suggesting that the state should get out of the marriage business, where marriage becomes a private contract rather than a state-sanctioned, civil institution. Although this may seem like a radical conclusion, this Article considers some of the implications for taking seriously the commitment to liberal neutrality. Even though this may appear unfair to those gay and lesbian couples who are only now able to marry, perhaps the state can support the equal status of gays and lesbians without resorting to marriage. Providing a curative step to liberal neutrality, this Article briefly suggests one such option.

This Article proceeds in five parts. Part I, a brief primer on liberal neutrality, explicates the key claims of this philosophical framework.¹⁹ The remaining parts of this Article examine marriage in light of it. Part II argues that marriage is a spiritual—not secular—status.²⁰ Distinguishing civil unions from marriage, this Article explains why the label of marriage triggers Establishment Clause concerns. Part III posits that marriage stigmatizes the unmarried by treating the unmarried lifestyle as inferior.²¹ Part IV reveals that marriage as a two-person, monogamous union both unjustifiably excludes other living arrangements adults may choose to pursue and even permits

¹⁷ See *id.* at 2601.

¹⁸ Some of this Article draws from and builds upon parts of Chapters 2 and 6 of my book *Beyond Race, Sex, and Sexual Orientation: Legal Equality Without Identity*. Most notably, in drawing on *Obergefell*, which the Court decided after publication of the book, this Article goes beyond the arguments of those chapters. SONU BEDI, *BEYOND RACE, SEX, AND SEXUAL ORIENTATION: LEGAL EQUALITY WITHOUT IDENTITY* (2013).

¹⁹ See discussion *infra* Part I.

²⁰ See discussion *infra* Part II.

²¹ See discussion *infra* Part III.

the state to criminalize certain kinds of sexual activity.²² Part V answers the question, “if not marriage, what?”—reconciling this Article’s argument in light of a fundamental right to marry and a concern with ensuring equal citizenship for gays and lesbians.²³

I. A BRIEF PRIMER ON LIBERAL NEUTRALITY

The principle of public reason or justification is a familiar one.²⁴ This principle seeks to subject state action to some kind of justificatory constraint.²⁵ One variant of this principle of public justification is a commitment to liberal neutrality: a commitment that requires democratic citizens to proffer reasons that their fellow listeners could ideally accept.²⁶ This kind of justificatory constraint rules out those reasons from the realm of law making that do not meet this principle.²⁷ This version of public reason contends that conceptions of the good life are illegitimate justificatory grounds for state legislation, because these conceptions cannot in principle be shared by all.²⁸ Individuals disagree about how to structure their personal and intimate lives, so the state ought to remain neutral among these conceptions—hence, the label “liberal neutrality.”²⁹

The principle of liberal neutrality is the more familiar interpretation of justificatory liberalism. Theorists such as Bruce Ackerman, Ronald Dworkin, Charles Larmore, John Rawls, and Lawrence Solum endorse this approach.³⁰ Lawrence Solum calls this approach an “exclusionary” account of public reason or public justification.³¹ It is “exclusionary” because it does not permit all justifications to count as legitimate.³²

²² See discussion *infra* Part IV.

²³ See discussion *infra* Part V.

²⁴ See generally, e.g., ACKERMAN, *supra* note 4; RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (John M. M. Farrell trans., 2002); GREENAWALT, *supra* note 4; JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990); LARMORE, *supra* note 4; RAWLS, *supra* note 4; HOWARD H. SCHWEBER, DEMOCRACY AND AUTHENTICITY: TOWARD A THEORY OF PUBLIC JUSTIFICATION (2012); JÜRGEN HABERMAS, *Remarks on Legitimation Through Human Rights*, in THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 113 (Max Pensky trans. & ed., 2001).

²⁵ See Solum, *supra* note 4, at 732–35 (discussing the role and justification for public reason).

²⁶ See generally ACKERMAN, *supra* note 4.

²⁷ See generally DEN OTTER, *supra* note 4; Solum, *supra* note 4.

²⁸ See Solum, *supra* note 4, at 732–35.

²⁹ See, e.g., *id.* (discussing public reason and the necessity that ideas must generate support among significant groups); see also BEDI, *supra* note 18, at 8–9.

³⁰ See, e.g., ACKERMAN, *supra* note 4; LARMORE, *supra* note 4; RAWLS, *supra* note 4; Solum, *supra* note 4. See generally RONALD DWORKIN, A MATTER OF PRINCIPLE 181–237 (1985) (specifically examining the intersection of liberalism and justice).

³¹ See Solum, *supra* note 4, at 743–44.

³² *Id.* at 743.

It deems those reasons that invoke a conception of the good non-public.³³ Ronald Den Otter powerfully expounds upon this “exclusionary” approach by arguing that it is “the best interpretation of an ideal of public justification.”³⁴ In fact, Cass Sunstein argues that American constitutional law is indeed about a “republic of reasons” where “[t]he required reason must count as a public-regarding one. Government cannot appeal to private interest alone.”³⁵ Though Sunstein does not explicitly deploy this argument in light of liberal neutrality, his theory importantly highlights the centrality of justification. If a state enacts laws and policies based on these illegitimate reasons, it fails to treat individuals as moral equals.³⁶ According to Ronald Dworkin, liberalism’s commitment to treating “citizens as equals” requires that “political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life.”³⁷

John Rawls famously defines “the good” as “a conception of what is valuable in human life.”³⁸ This is a belief about what counts as a good, appropriate, or worthwhile life: “Thus, a conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake”³⁹ A conception of the good is a belief about privileging a certain way of living over another for its own sake. It is about what kind of life has “*intrinsic* or *inherent* value.”⁴⁰ Often, these conceptions of the good are based on religious or moral doctrines. Liberal neutrality contends that these conceptions are illegitimate grounds for state legislation.⁴¹

³³ *Id.* at 746 (defining non-public reasons to include “deep beliefs about the nature of the good that form part of various comprehensive religious and moral doctrines”).

³⁴ DEN OTTER, *supra* note 4, at 139.

³⁵ CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 17 (1993); *see also* BEDI, *supra* note 18, at 9 (“This book suggests that at its best, equality under the law is about ruling out laws and policies that are based on constitutionally inadmissible reasons or rationales, rationales that liberal neutrality may also consider illegitimate.”).

³⁶ *See* SUNSTEIN, *supra* note 35, at 17 (“If [the government distributes] something to one group rather than another, . . . it must explain itself.”); *see also* BEDI, *supra* note 18, at 9 (arguing that the state may not pass laws which privilege one way of life over another).

³⁷ Dworkin, *supra* note 7, at 127.

³⁸ RAWLS, *supra* note 4, at 19.

³⁹ *Id.*

⁴⁰ QUONG, *supra* note 5, at 12; *see also* SHER, *supra* note 5, at 9.

⁴¹ But anti-perfectionism is controversial and challenged by liberals and non-liberals alike. *See generally, e.g.*, CHRISTOPHER J. EBERLE, *RELIGIOUS CONVICTION IN LIBERAL POLITICS* (2002); WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991); ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); MICHAEL J. PERRY, *UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY* (2003); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); SHER, *supra* note 5; STEVEN WALL, *LIBERALISM, PERFECTIONISM AND RESTRAINT* (1998); Robert P. George, “*Same-Sex Marriage*” and “*Moral Neutrality*,” in *HOMOSEXUALITY AND AMERICAN PUBLIC LIFE* 141 (Christopher Wolfe ed., 1999).

This does not mean that the state should be “neutral regarding its effect on various conceptions of the good.”⁴² Laws and policies may very well adversely affect a particular way of life. For instance, the criminal law no doubt makes it difficult for someone to live believing that committing such wrongful acts is a worthwhile way to live. But liberal neutrality is about the justification of laws and policies, not their impact on individuals.⁴³ As Jonathan Quong puts it:

So long as the *reasons* underlying the central principles of the state are acceptable to all reasonable citizens, then the liberal principle of legitimacy is realized. Again, because reasonable

For instance, there is an interpretation of this justificatory enterprise that endorses a commitment to perfectionism. Theorists such as Joseph Raz, George Sher, and Steven Wall argue that a liberal state may indeed appeal to particular conceptions of the good life to justify laws and policies. *See generally* RAZ, *supra*; SHER, *supra* note 5; WALL, *supra*. Although these accounts vary in the degree to which a state may invoke perfectionist beliefs, they generally point to the permissibility of legislation that rests on the idea that certain ways of living are intrinsically more valuable than others. One salient strand of this kind of perfectionism is Christopher Eberle’s argument that religious rationales ought indeed to suffice as a legitimate basis for lawmaking. *See* EBERLE, *supra*, at 137 (arguing that there is a “legitimate expectation” that religiously motivated laws will not be coercive and therefore can be considered a rational basis for lawmaking); *see also* PERRY, *supra*, at xiii (“[R]eliance on religiously grounded morality is neither illegitimate . . . nor unconstitutional . . .”). Eberle argues that forcing those who are religious to bracket their perfectionist reasons is unfair. Doing so fails to treat them as equal citizens. *See* EBERLE, *supra*, at 137.

But recent scholarly work seeks to defend liberal neutrality from these and other criticisms. *See generally, e.g.*, MATTHEW CLAYTON, JUSTICE AND LEGITIMACY IN UPBRINGING (2006); STEVEN LECCE, AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY (2008); QUONG, *supra* note 5; SCHWEBER, *supra* note 24, at 12–13; LUCAS SWAINE, THE LIBERAL CONSCIENCE: POLITICS AND PRINCIPLE IN A WORLD OF RELIGIOUS PLURALISM (2006). Swaine makes a powerful argument that even theocrats—those who favor a very strong role for religion in politics—should opt for a conception of public justification that largely avoids appealing to religious rationales. SWAINE, *supra*, at xvi (arguing that liberals should “provid[e] theocrats with a principled, well-reasoned, and conscientious political settlement that liberals and theocrats can jointly affirm”). So, if the most hardcore of religious observers should prefer a kind of commitment to liberal neutrality from their own moral position, it ought to be the choice of those who hold a more watered-down version of the role of religion in politics.

⁴² Jonathan Quong, *The Scope of Public Reason*, 52 POL. STUD. 233, 233 (2004).

⁴³ Similarly, constitutional law does not generally look at the effects of a law in determining whether, for instance, there is an equal protection violation. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a police officer recruitment test on equal protection grounds, even though a disproportionate number of black applicants failed the test). The Court has “not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.” *Id.* at 239. Rather, the standard for imposing strict scrutiny requires that “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law that automatically preferred veterans over nonveterans, even though it had a disproportionate impact on women).

people disagree about the good life, the state will have to eschew any appeals to conceptions of the good in justifying its core principles. Put another way, only *public reasons*—reasons that are acceptable to all reasonable citizens—can legitimate the coercive use of state power over its citizens.⁴⁴

So, the criminal law would be legitimate as long as it was based on reasons that could genuinely be shared by all, such as preventing harm to others.⁴⁵

Given that, one criticism worth noting of liberal neutrality is that such a principle may seem self-defeating. That is, the idea that the state ought to remain neutral among competing moral values in justifying laws and policies is itself a moral value. So how can liberal neutrality ever be truly impartial?⁴⁶ One way to thwart this objection is to realize that liberal neutrality does not require that the state be neutral to any and all moral values in justifying laws and policies.⁴⁷ Rather, it requires that the state only be neutral to conceptions of the good.⁴⁸ For instance, deciding that a particular way of life benefits others (e.g., a life where one does not steal) is no doubt a moral value. But liberal neutrality would not rule out laws and policies such as the criminal law that are based on it. The moral values that are problematic are those that deem a particular way of life worthwhile or valuable *for its own sake*.⁴⁹ It is the “for its own sake” qualification that is crucial.

Hence, the criminal law, as a paradigmatic example, is not based on a belief about the inherent goodness of a particular way of life. Rather, the criminal law rests on the idea that not engaging in certain acts, such as stealing, assaulting, or defrauding, have extrinsic or public benefits—benefits that accrue to others. Put simply, the criminal law seeks to prevent harm to others, not to impose a way of life because that way of life is intrinsically good or valuable. As I elucidate in *Beyond Race, Sex, and Sexual Orientation*:

Liberal neutrality only rules out those laws and policies based on the idea that a particular orthodoxy is inherently good. Or consider that laws relating to drug abuse or environmental protection do not seem to rest on the idea that certain ways of living are intrinsically

⁴⁴ Quong, *supra* note 42, at 233; *see also* LARMORE, *supra* note 4, at 44 (“But any goals for whose pursuit there exists a neutral justification are ones that a liberal state may pursue.”).

⁴⁵ *See* SONU BEDI, *REJECTING RIGHTS* 64–65 (2009) (arguing that, properly understood, John Stuart Mill’s harm principle represents a justificatory constraint that accords with liberal neutrality and the Court’s jurisprudence in the areas of property, religion, and privacy).

⁴⁶ *See, e.g.*, GALSTON, *supra* note 41, at 3 (stating that liberal purposes often “define what the members of a liberal community must have in common”). For other criticisms of liberal neutrality, *see supra* note 41.

⁴⁷ *See* Quong, *supra* note 42, at 233–34.

⁴⁸ *See id.*

⁴⁹ *See id.*

better for the individual who undertakes them. Rather, these laws are about benefitting or protecting *others*: Environmental protections ensure that future generations are not saddled with a less habitable world. Drug abuse laws seek to protect others from anti-social behavior. The point is that these laws are qualitatively different from a law that prohibits a kind of consensual sexual activity on the idea that such activity is inherently better than another or that a certain way of life is sinful or contrary to some religious doctrine.⁵⁰

The state violates liberal neutrality when it passes legislation on the idea that certain ways of life are good “for its own sake,” and such laws are often based on particular moral or religious precepts.⁵¹

In applying this justificatory constraint, the state must proffer its reasons in good faith. Though this constitutes an important—even obvious—part of the requirement of liberal neutrality, it has gone unnoticed by political and legal theorists. If a reason appears legitimate, but is put forth disingenuously or in bad faith, this cannot accord with liberal neutrality.⁵² Deploying such reasons arbitrarily or strategically to avoid a requirement of justification would undo the justificatory constraint itself. Micah Schwartzman makes a robust defense of what he calls a requirement of “public sincerity”:

Citizens and public officials cannot know whether their reasons are shared or otherwise sufficient to support their views unless they subject those reasons to public scrutiny. But if everyone expects others to act strategically by offering insincere reasons, then the epistemic value of deliberation is diminished, if not altogether extinguished. To preserve the significance of deliberation, then, citizens ought to conform with a principle of public sincerity.⁵³

This means that a state cannot proffer an otherwise legitimate rationale in bad faith.⁵⁴ If it were able to do so, the justificatory constraint of liberal neutrality would be easily undone.

II. MARRIAGE AS A SPIRITUAL—NOT SECULAR—STATUS

The remaining parts of this Article apply this framework to analyze and criticize marriage in light of the Court’s jurisprudence. In *Loving v. Virginia*,⁵⁵ the Court

⁵⁰ BEDI, *supra* note 18, at 10–11.

⁵¹ *See id.* at 10.

⁵² Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 376 (2011) (discussing insincerity objections to otherwise apparently legitimate rationales).

⁵³ *Id.* at 378.

⁵⁴ *See id.* at 397–98.

⁵⁵ 388 U.S. 1 (1967) (invalidating anti-miscegenation laws).

affirmed that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁵⁶ In *Loving* and other cases culminating in *Obergefell*, the Court held that there is a fundamental right to marry the person of one’s choice.⁵⁷ In discussing the nature of marriage, courts have made clear that marriage is a spiritual union.⁵⁸ *Obergefell* even says that marriage is “sacred”⁵⁹ and “transcendent.”⁶⁰ No other civil status invokes this kind of religious and ethical underpinning, and it is precisely this underpinning that problematically justifies bans on gay marriage. Part II draws from the Establishment Clause in elaborating upon these claims—claims that reveal that marriage itself violates a principle of separation of church and state.

A. Establishment Clause: A Secular Purpose

The Supreme Court has interpreted the Establishment Clause⁶¹ of the First Amendment to embody a commitment to religious neutrality. Edward Rubin suggests that the idea of neutrality “probably remains the leading interpretation of the Establishment Clause.”⁶² The Court’s jurisprudence on neutrality looks to three tests in determining

⁵⁶ *Id.* at 12.

⁵⁷ *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923). These cases locate the fundamental right to marry in the Due Process Clause of the Fourteenth Amendment. *But see* Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2085 (2005) (“I suggest that for courts, the best way to carry out that task is by reference not to the Due Process Clause, which is founded on tradition, but the Equal Protection Clause, which calls traditions into sharp doubt. The question is whether a state has an adequate justification, under the appropriate standard of review, to deny certain people access to the expressive and material benefits of marriage.”). *Obergefell* looks both to the Due Process Clause and Equal Protection Clause in affirming a fundamental right to marry:

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment’s guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.

135 S. Ct. 2584, 2602–03 (2015); *see* Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015) (“*Obergefell* . . . invokes both values—due process and equal protection—rather than relying solely on due process.”).

⁵⁸ *See, e.g.*, *Obergefell*, 135 S. Ct. at 2594; *Griswold*, 381 U.S. at 486.

⁵⁹ 135 S. Ct. at 2594.

⁶⁰ *Id.*

⁶¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

⁶² Edward Rubin, *Assisted Suicide, Morality, and Law: Why Prohibiting Assisted Suicide Violates the Establishment Clause*, 63 VAND. L. REV. 763, 785 (2010) (arguing that bans on assisted suicide violate the Establishment Clause). According to Rubin:

whether a law violates the Establishment Clause: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁶³ This Article primarily focuses on the first test—the requirement that the law have a secular purpose. After all, if the law fails this test, it clearly violates the Establishment Clause.⁶⁴ Michael Perry argues that this principle of non-establishment means that “laws for which the only discernible rationale is an offending religious rationale” are constitutionally illegitimate.⁶⁵

In my book *Beyond Race, Sex, and Sexual Orientation*, I defend the idea that neutrality is central to the Court’s Establishment jurisprudence:

In *Epperson v. Arkansas* (1968) (invalidating an Arkansas law that forbade the teaching of evolution in public schools), the Court affirm[ed] this core principle arguing that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” In *McCreary County v. ACLU* (2005), the Court held that a Ten Commandments display in a courthouse violated the Establishment Clause. The Court made clear that this standard of neutrality is one of purpose or justification:

Establishment Clause doctrine in general centers around three basic principles, which can be described—moving from most to least restrictive on governmental action—as strict separation, neutrality, and accommodation. Strict separation . . . sees the First Amendment as having erected a “high and impregnable” wall between church and state and as creating an essentially secular government. Its stringency has led to its decline in recent years and to its displacement by the principle of neutrality. Neutrality forbids government from favoring one religion over another, but is distinguishable from strict separation, at least in theory, because it also forbids the government from favoring secularism over religion. . . . The third principle, frequently described as accommodation, reflects the Court’s more sympathetic treatment of religion in recent years. It permits the government to acknowledge and accommodate the religious character of the American people and only invalidates laws that coerce religious activity or fail to treat different religions equally.

Id. at 784–86 (footnotes omitted).

⁶³ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (internal citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

⁶⁴ *Id.* at 612.

⁶⁵ See Michael J. Perry, *Religion as a Basis of Law-Making?: Herein of the Non-Establishment of Religion*, 35 PHIL. & SOC. CRITICISM 105, 114 (2009). Even if liberal political theorists may disagree over the legitimacy of invoking religious justifications for laws and policies, see *supra* note 4 and accompanying text, it is hardly controversial that such justifications are generally unconstitutional in the United States.

When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.⁶⁶

Laws or policies based on the idea that a particular religious way of life is superior to another, or that religion is superior to a non-religious way of life are unconstitutional.⁶⁷ This is why Justice Sandra Day O'Connor famously suggested that by favoring such a religious way of life, the state "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of

⁶⁶ BEDI, *supra* note 18, at 81–82 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *McCreary County v. Am. Civil Liberties Union*, 545 U.S. 844, 860 (2005)).

⁶⁷ *See, e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The Court struck down on establishment grounds a Texas sales tax exemption for religious periodicals and a Connecticut statute that provided Sabbath observers an absolute and unqualified right not to work on their day of Sabbath, respectively. In these two cases, religion was so advantaged as to run afoul of the Establishment Clause. In *Thornton*, the Court held that the Connecticut statute did not have a secular purpose. By imposing on employers "an absolute duty to conform their business practices to the particular religious practices of the employee," the statute advanced religion. *Thornton*, 472 U.S. at 709. In smoking out this illegitimate purpose, the concurring opinion realized that the exempting statute did not afford non-religious practices similar accommodation. *Id.* at 711 (O'Connor, J., concurring).

Similarly, in *Texas Monthly*, the Court invalidated a Texas law that gave a sales tax exemption only to religious periodicals. The exclusive nature of the tax, like its counterpart in *Thornton*, suggested that an illegitimate purpose was afoot; the rationale was not secular. *Texas Monthly*, 489 U.S. at 15. As the Court reasoned, Texas could not claim that it sought to subsidize, by an exemption, the community's cultural and intellectual character—an otherwise legitimate rationale. *Id.* Since the exemption applied only to religious and no other cultural or intellectual groups, this could not have been the purpose. *Id.* at 16–17. Consequently, these kinds of laws fail constitutional muster. But see *Walz v. Tax Commission of the City of New York*, where the Court upheld a New York law under the Establishment Clause that granted a tax exemption for "religious, educational or charitable purposes." 397 U.S. at 666–67 (citation omitted). Here, unlike in *Thornton* and *Texas Monthly*, the legislation did not seek to advance religion. The Court reasoned that the New York law did not

single[] out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.

Id. at 673. Because the law exempted other non-profit groups including religion, the "legislative purpose of the property tax exemption [was] neither the advancement nor the inhibition of religion." *Id.* at 672.

the political community.”⁶⁸ Rather than finding reasons that all—both adherents and non-adherents—can share, the state endorses a particular religious view.

There is an underlying logic⁶⁹ that connects the cases decided under the Establishment Clause to cases like *Lawrence v. Texas*.⁷⁰ In *Lawrence*, the Court struck down sodomy laws, holding that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”⁷¹ *Lawrence* rejects morals legislation, legislation based simply on the idea that a particular way of life is wrong or immoral.⁷²

⁶⁸ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (upholding a city’s display of a nativity scene under the Establishment Clause); *see also* *Lee v. Weisman*, 505 U.S. 577, 603–04 (1992) (Blackmun, J., concurring) (holding that school prayer delivered by a religious figure violated the Establishment Clause).

⁶⁹ *See, e.g.*, Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 *FORDHAM L. REV.* 605 (2010) (reasoning that adultery bans are unconstitutional under *Lawrence v. Texas* and the Establishment Clause).

⁷⁰ 539 U.S. 558 (2003) (invalidating sodomy laws).

⁷¹ *Id.* at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

⁷² *See* Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 *CLEV. ST. L. REV.* 447 (2005); Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 *MINN. L. REV.* 1233, 1234–36 (2004) (footnote omitted):

Rather than representing a break with tradition, *Lawrence* reflected the Court’s long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking. Notwithstanding its ubiquitous rhetorical endorsements of government’s police power to promote morality, it turns out that the Court has almost never relied exclusively and overtly on morality to justify government action. Indeed, since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.

For example, in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court partially appealed to non-morality-based (neutral) language in failing to provide constitutional protection for bigamy and obscenity, respectively. Goldberg, *supra*, at 1261–81 (exploring “[t]he Non-Moral Foundations of the Cornerstone Morality Cases”). The *Reynolds* decision, as Goldberg interestingly points out, “never once mentioned the word ‘morality.’” *Id.* at 1265. In that decision, the Court argues that “polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.” *Id.* (quoting *Reynolds*, 98 U.S. at 166). Similarly, in *Paris Adult Theatre I*, the Court noted that this case “goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful.’” *Id.* at 1269 (quoting *Paris Adult Theatre I*, 413 U.S. at 69).

This was not the language of *Bowers*, where the majority’s moral disapproval was deemed sufficient *on its own* to uphold sodomy laws. *See Bowers v. Hardwick*, 478 U.S. 186 (1986). Instead, the *Paris Adult Theatre I* decision reasoned that “States have the power to make a

This is why *Lawrence* makes clear that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime . . . are central to the liberty protected by the Fourteenth Amendment.”⁷³ This liberty entails the freedom “to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁷⁴

In this way, laws and policies based on only moral reasons are unconstitutional for exactly the same principle as laws based on religious considerations. Religious neutrality constitutes a specific commitment to the more general principle of liberal neutrality explicated above. After all, as a philosophical matter, religious reasons are an improper basis for legislation precisely because religion plays such a deep, personal, and intimate role in an individual’s life. And individuals disagree about the role such beliefs should play in their lives. The state ought to remain neutral among them. Similarly, intimate decisions about whom to date, love, and be sexually intimate with are just as deep and personal.⁷⁵ A constitutional ban on morals legislation and the principle of non-establishment share an often-overlooked underlying logic.⁷⁶ Put simply, both point to a doctrinal commitment that legislation must have, in the language of a pivotal case concerning public funds and religious schools, a “secular legislative purpose.”⁷⁷ Just as individuals may disagree about what kind of sexual or intimate life is worthwhile “for its own sake,” so too may individuals disagree about the importance and relevance of faith in their own lives.⁷⁸ After all, *Lawrence* describes this freedom as the liberty to define one’s own concept “of meaning, of the universe, and of the mystery of human life.”⁷⁹ In turn, the constitutional requirement of a secular purpose shares synergy with liberal neutrality.⁸⁰

morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States’ right . . . to maintain a decent society.” Goldberg, *supra*, at 1270 (alterations in original) (quoting *Paris Adult Theatre I*, 413 U.S. at 69). See generally BEDI, *supra* note 18.

⁷³ 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

⁷⁴ *Id.* (quoting *Casey*, 505 U.S. at 851).

⁷⁵ See generally DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 4–5 (1999) (highlighting that “structural injustice” dehumanizes individuals whose identities fall outside the social norm).

⁷⁶ See generally *id.*

⁷⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (invalidating Pennsylvania law that provided supplemental compensation to nonpublic school teachers). See generally Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87 (2002) (cautioning against abandoning the secular purpose doctrine).

⁷⁸ *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring in the judgment) (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)); see, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

⁷⁹ 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

⁸⁰ See Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 963–64 (1993) (“The Establishment Clause, properly construed,

The Court has rejected Establishment Clause challenges in those cases where the law may have had its origin in religion but no longer does. In such cases, the law has shed its religious character, leaving only a secular purpose. This was the circumstance in a series of cases upholding Sunday Closing Laws, which required businesses to close on Sunday.⁸¹ In *Two Guys from Harrison-Allentown v. McGinley*,⁸² the Court conceded Pennsylvania's closing laws under Section 4651

still contain some traces of the early religious influence. The 1939 statute refers to Sunday as "the Lord's day"; but it is included in the general section entitled, "Offenses Against Public Policy, Economy and Health." [Section] 4651 uses the term "Sabbath Day" and refers to the other days of the week as "secular days." But almost every other statutory section simply uses the word "Sunday" and contains no language with religious connotation. It would seem that those traces that have remained are simply the result of legislative oversight in failing to remove them. Section 4651 was re-enacted in 1959 and happened to retain the religious language; many other statutory sections, passed both before and after this date, omit it.

....

... [W]e find that the 1939 statute was recently amended to permit all healthful and recreational exercises and activities on Sunday. This is not consistent with aiding church attendance; in fact, it might be deemed inconsistent. And the statutory section, ... the constitutionality of which is immediately before us, was promoted principally by the representatives of labor and business interests. Those Pennsylvania legislators who favored the bill specifically disavowed any religious purpose for its enactment but stated instead that economics required its passage.⁸³

is the Constitution's textual embodiment of this idea of political liberalism: the basic purpose of including the Establishment Clause within the Bill of Rights was to prohibit the new federal government from developing an allegiance to any of the various religious belief-systems that then existed, or that might come to exist, within American culture."); *see also* GREENAWALT, *supra* note 4, at 62–71 (chapter entitled "Restraint as to Religious Grounds: Separation of Church and State"); SCHWEBER, *supra* note 24, at 184; SUNSTEIN, *supra* note 35, at 17. Sunstein argues that American constitutional law is indeed about a "republic of reasons." Importantly, the "required reason must count as a public regarding one. Government cannot appeal to private interest alone." *Id.* *See generally* BEDI, *supra* note 18.

⁸¹ *See, e.g., Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

⁸² 366 U.S. 582 (1961).

⁸³ *Id.* at 594–95 (footnotes omitted).

The Court held that these Sunday Closing Laws no longer had a religious character, but sought to offer the weekly laborer a day of rest and repose to improve overall productivity.⁸⁴

B. Bans on Gay Marriage

Bans on gay marriage are inapposite and are not similar to Sunday Closing Laws. They, in fact, rest on explicit religious beliefs about the nature and meaning of marriage. This provides an under-theorized framework by which to analyze bans on gay marriage and, in turn, marriage itself. No court has analyzed such bans in light of the Establishment Clause, let alone struck them down on the basis of it.⁸⁵ But if we take this approach seriously in challenging bans on gay marriage, this reveals problems with marriage itself.

Consider that *Perry v. Schwarzenegger*,⁸⁶ the first federal decision to strike down a ban on gay marriage, recognized the relationship between morals legislation and religious neutrality⁸⁷:

A state's interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose. Perhaps recognizing that Proposition 8 must advance a secular purpose to be constitutional, proponents abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples.⁸⁸

⁸⁴ See *Braunfeld*, 366 U.S. at 607 (“[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.”).

⁸⁵ The Superior Court of the District of Columbia in 1992 dismissed the Establishment Clause challenge to a ban on same-sex marriage. See *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364, at *4–8 (D.C. Super. Ct. June 2, 1992) (holding that such a claim was totally frivolous), *aff'd*, 653 A.2d 307 (D.C. Cir. 1995). There seems to be only one federal case that even indirectly referenced the Establishment Clause, at least in part, in analyzing the constitutionality of bans on gay marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930–31 (N.D. Cal. 2010) (striking down state amendment banning gay marriage), *vacated and remanded by* *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

⁸⁶ 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁸⁷ See generally *id.*

⁸⁸ *Id.* at 930–31 (citing *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

Schwarzenegger cites *Lawrence* and an Establishment Clause case in invalidating Proposition 8, the California initiative that amended the state constitution to prohibit gay marriage.⁸⁹ *Schwarzenegger* recognizes that such a ban was not initially advanced on secular or temporal grounds—like the current justification for Sunday Closing Laws—but on religious grounds regarding the meaning of marriage.⁹⁰

According to the Pew Research Center, many religious groups object to same-sex marriage on precisely such grounds.⁹¹ For instance, the United States Conference of Catholic Bishops justifies its position on grounds that “marriage is a faithful, exclusive, and lifelong union between one man and one woman. . . . Moreover, we believe the natural institution of marriage has been blessed and elevated by Christ Jesus to the dignity of a sacrament.”⁹² Stephen Macedo argues that “moral and political thinkers fail to provide a reasoned defense for discrimination against” same-sex marriage.⁹³ This is why Gordon Babst characterizes a prohibition on same-sex marriage as a “shadow establishment” drawing from the constitutional ban on establishing religion.⁹⁴ Legal scholars who challenge prohibitions on same-sex marriage rarely invoke the Establishment Clause.⁹⁵ Gary J. Simson is one of the few scholars who, argues that “[l]aws prohibiting same-sex marriage are extremely difficult to understand in secular terms and extremely easy to understand in religious terms.”⁹⁶

The problem, of course, is that those states that do ban same-sex marriage will not admit that religious reasons are doing the underlying work.⁹⁷ In fact, this is why

⁸⁹ *Id.* at 931. For an argument about the novel nature of this argument that draws from *Lawrence* and the Establishment Clause, see generally Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011).

⁹⁰ See *Schwarzenegger*, 704 F. Supp. 2d at 931 (mentioning the “asserted . . . moral superiority of opposite-sex couples” that were proponents of Proposition 8).

⁹¹ David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RES. CTR. (Dec. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage> [<https://perma.cc/8JES-LY68>] (“Many of the largest U.S. religious institutions have remained firmly against allowing same-sex marriage . . .”).

⁹² News Release, U.S. Conference of Catholic Bishops, U.S. Catholic Bishops’ Administrative Committee Calls for Protection of Marriage (Sept. 10, 2003), <http://www.usccb.org/news/2003/03-179.cfm> [<http://perma.cc/K3BA-VV4B>].

⁹³ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 264 (1995).

⁹⁴ See GORDON ALBERT BABST, *LIBERAL CONSTITUTIONALISM, MARRIAGE, AND SEXUAL ORIENTATION: A CONTEMPORARY CASE FOR DIS-ESTABLISHMENT 2* (2002) (defining “shadow establishment” as “an impermissible expression of sectarian preference in the law that is unreasonable in the light of the nation’s constitutional commitments to all its citizens” (emphasis omitted)).

⁹⁵ See Gary J. Simson, *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132, 147–48 (2012).

⁹⁶ *Id.* at 147.

⁹⁷ See generally Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617 (2009).

the proponents of Proposition 8 specifically refused to invoke such reasons in justifying such a ban in *Schwarzenegger*.⁹⁸ Rather, proponents have unsurprisingly sought to justify such bans by appealing to arguments of responsible procreation⁹⁹ and preserving the “traditional” institution of marriage.¹⁰⁰ It is relatively easy to see that these reasons fail as legal justifications. They are justifications made in bad faith, revealing that bans on gay marriage rest on religious rationales.

Consider the possible reason that the state would limit marriage only to opposite-sex couples: to promote a stable environment for the procreation or the raising of children. As I suggest in *Beyond Race, Sex, and Sexual Orientation*:

If these concerns are indeed relevant to marriage, why does the state not at all regulate marriage licenses in light of them? After all, the state does not ascertain whether an opposite-sex couple is fit to raise a child before issuing a license. Those who profess no desire to raise a child or even to procreate are not denied a marriage license. Two elderly individuals past their child-rearing age may just as easily obtain such a license as two younger individuals ready to start a family. Marriage and the begetting and raising of children are distinct issues even for those who currently protest same-sex marriage.¹⁰¹

⁹⁸ See 704 F. Supp. 2d 921, 997–1002 (N.D. Cal. 2010). The Defense of Marriage Act (DOMA), struck down by *Windsor v. United States*, 133 S. Ct. 2675 (2013), explicitly justifies limiting marriage to opposite-sex couples on religious grounds. The House Report on DOMA contained language justifying the legislation on religious grounds:

For many Americans, there is to this issue of marriage an overtly moral or religious aspect that cannot be divorced from the practicalities. It is true, of course, that the civil act of marriage is separate from the recognition and blessing of that act by a religious institution. But the fact that there are distinct religious and civil components of marriage does not mean that the two do not intersect. Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality. This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.

H.R. REP. NO. 104-664, at 2919–20 (1996) (footnote omitted).

⁹⁹ See DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 3 (2007) (“What a child wants and needs more than anything else are the mother and father who together made the child, who love the child, and who love each other.”).

¹⁰⁰ See generally WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? (Lynn D. Wardle ed., 2008).

¹⁰¹ BEDI, *supra* note 18, at 212. See generally Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81 (2011).

In clarifying the nature of this union with regards to procreation, *Obergefell* states:

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.¹⁰²

Simply put, marriage is not just a “meaningful” union for those who seek to procreate.¹⁰³

Obergefell also repeatedly cites *Turner v. Safley*,¹⁰⁴ a decision that specifically considers the relationship between procreation and marriage.¹⁰⁵ *Safley* informs the bad faith charge of the procreative objection to same-sex marriage.¹⁰⁶ In *Safley*, the Missouri Division of Corrections promulgated various penal regulations.¹⁰⁷ One of these regulations prohibited inmates from marrying unless they first received approval from the superintendent—approval that should be given only “when there are

¹⁰² 135 S. Ct. 2584, 2601 (2015).

¹⁰³ The California Supreme Court also rejected this kind of justification when it invalidated that state’s prohibition on same-sex marriage:

[T]he constitutional right to marry never has been viewed as the sole preserve of individuals who are physically capable of having children. Men and women who desire to raise children with a loved one in a recognized family but who are physically unable to conceive a child with their loved one never have been excluded from the right to marry. . . . A person who is physically incapable of bearing children still has the potential to become a parent and raise a child through adoption or through means of assisted reproduction, and the constitutional right to marry ensures the individual the opportunity to raise children in an officially recognized family with the person with whom the individual has chosen to share his or her life. Thus, although an important purpose underlying marriage may be to channel procreation into a stable family relationship, that purpose cannot be viewed as limiting the constitutional right to marry to couples who are capable of biologically producing a child together.

In re Marriage Cases, 183 P.3d 384, 431 (Cal. 2008); see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (invalidating Massachusetts’s ban on same-sex marriage under a rational review analysis).

¹⁰⁴ 482 U.S. 78 (1987).

¹⁰⁵ See generally *id.* (holding that an inmate marriage regulation was facially invalid).

¹⁰⁶ See, e.g., *Obergefell*, 135 S. Ct. at 2589, 2598.

¹⁰⁷ See 482 U.S. at 81–82.

compelling reasons to do so.”¹⁰⁸ The Division of Corrections stated: “only a pregnancy or the birth of an illegitimate child would be considered a compelling reason.”¹⁰⁹ Why does pregnancy or birth constitute a compelling reason but not love, commitment, or the wide variety of benefits attached to marriage?¹¹⁰ Marriage is primarily about procreation and about raising children, or so the prison regulation here implies.¹¹¹

By invalidating this prison regulation, the Court makes clear that procreation is not necessary to justify the state’s role in conferring the status of marriage.¹¹² As I argue in *Beyond Race, Sex, and Sexual Orientation*:

The Court invalidate[d] this regulation concluding that “[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including the] expressions of emotional support and public commitment [that] are an important and significant aspect of the marital relationship.” . . . In fact, *Safley* rehearse[d] the legal benefits that arise from marriage including “the receipt of government benefits” such as Social Security and “property rights.” An inmate may very well seek to marry for these reasons, reasons that have nothing to do with procreation. Procreation is not necessary to avail oneself of the institution of marriage. . . . So as a constitutional matter, concerns of procreation and hence the raising of children cannot underlie a prohibition on same-sex marriage just as they could not underlie limiting an inmate’s ability to marry.¹¹³

That means that there is no necessary connection between the fundamental right to marry and raising children.

Along with the argument for responsible procreation is the concern about preserving traditional, opposite-sex marriages. This explains why those who defend prohibitions on same-sex marriage are sometimes willing to permit gays and lesbians to gain civil union status but not full-blown marriage. In *Baker v. State*,¹¹⁴ the Vermont Supreme Court gave the legislature the option of granting same-sex couples marriage or civil union status.¹¹⁵ At that time, the Vermont legislature chose the latter

¹⁰⁸ *Id.* at 82 (citation omitted).

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 95–96.

¹¹¹ *See id.* at 96.

¹¹² *See id.* at 82.

¹¹³ BEDI, *supra* note 18, at 213–14 (quoting *Safley*, 482 U.S. at 95–96).

¹¹⁴ 744 A.2d 864 (Vt. 1999).

¹¹⁵ *See id.* at 887 (allowing the statutory scheme to stay in place for a reasonable time to implement equalizing legislation).

(it ultimately passed legislation to grant marriage in 2009).¹¹⁶ The civil union law said in part:

While a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause. Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved.¹¹⁷

But to what does this concern for the “respect for the community” and its “cultural institutions” amount?¹¹⁸ There are, as I conclude in *Beyond Race, Sex, and Sexual Orientation*, two possible answers, one that is circular and the other—like its pro-creative counterpart—proffered in bad faith:

First, it seems circular to justify a prohibition on same-sex marriage on grounds of tradition or culture. This is exactly what is often done. For instance, the official website for Proposition 8 says that “The [California] Supreme Court’s decision to legalize same-sex marriage did not just overturn the will of California voters; it also redefined marriage for the rest of society. . . . This decision has far-reaching consequences.” In explaining what these far-reaching consequences” actually are, the Proposition 8 supporters go on to say that by “saying that a marriage is between ‘any two persons’ rather than between a man and a woman, the Court decision has opened the door to any kind of ‘marriage.’ This undermines the value of marriage altogether at a time when we should be restoring marriage, not undermining it.” Thus, the alleged bad consequence of redefining marriage is that marriage will now be undermined because the definition will have changed. This is patently circular. Of course, changing the definition of marriage will undoubtedly undermine the traditional meaning of marriage.¹¹⁹

¹¹⁶ See Act of Apr. 26, 2000, No. 91, 2000 Vt. Acts & Resolves 72 [hereinafter An Act Relating to Civil Unions] (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2018)) (providing for civil unions in Vermont); see also An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, No. 3, 2009 Vt. Acts & Resolves 33 (codified at VT. STAT. ANN. tit. 15, § 8 (2018)) (providing legal equality to all civil marriage).

¹¹⁷ An Act Relating to Civil Unions, *supra* note 116, §1(10).

¹¹⁸ See *id.*; see also BEDI, *supra* note 18, at 214.

¹¹⁹ BEDI, *supra* note 18, at 214–15 (footnote omitted).

Simply suggesting that the state has always done something a particular way is not a constitutionally sufficient reason, on its own, to maintain the practice. Again, in *Lawrence*, the Court invalidated sodomy laws, rejecting mere tradition as a legitimate reason for affirming such legislation.¹²⁰ The Court held that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹²¹ *Lawrence* goes on to make clear that “neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”¹²²

Obergefell explicitly rejects mere appeal to history in interpreting “constitutional provisions that set forth broad principles” like “due process” and “equal protection.”¹²³ Citing *Lawrence*, Kennedy proclaims that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries.”¹²⁴ This “respects our history and learns from it without allowing the past alone to rule the present.”¹²⁵

In addition to the tradition or cultural argument to justify bans on gay marriage:

[P]erhaps the concern for detractors is that same-sex marriage will destroy the institution of marriage for opposite-sex couples or lead to more divorces among them. . . . As William Eskridge notes, in European countries such as Denmark and Sweden where same-sex unions have been legally recognized in some fashion

¹²⁰ See 539 U.S. 558, 577–78 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

¹²¹ *Id.* at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹²² *Id.* at 577–78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹²³ 135 S. Ct. 2584, 2598 (2015).

¹²⁴ *Id.* at 2598 (citing *Lawrence*, 539 U.S. at 572).

¹²⁵ *Id.* Kenji Yoshino argues that *Obergefell* undermined the principle in *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that there was no substantive due process right to assisted suicide), that a due process right be “‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’” *id.* at 720–21 (internal citations omitted) (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)), with a “‘careful description’ of the asserted fundamental liberty interest,” *id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Yoshino, *supra* note 57, at 162–69 (“*Obergefell* transformed the role *Glucksberg* assigned to tradition.”); see also Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (stating that it is implausible to say that the Equal Protection Clause is nothing other than a “sober second thought to legislation or the defense of tradition against pent-up majorities”). But see Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 309 (2011) (arguing that tradition may be sufficient to pass the most deferential rational review standard). Forde-Mazrui concludes that benefits that may accrue to preserving tradition are “maintaining predictability and settled expectations, reinforcing the community identity of those who define themselves based in part on the tradition, and avoiding unintended consequences of change.” *Id.*

since 1989, there has been no adverse effect on the institution of marriage for heterosexuals. If anything, the effect has been positive. This trend is borne out in recent numbers from the Division of Vital Statistics at the Centers for Disease Control. Massachusetts began issuing same-sex marriage licenses in 2004. The divorce rate in 2007 for the state was 2.3 per 1000 people, which was less than the average rate for the rest of the country. In fact, all the states that permit[ted] same-sex marriage ha[d] a lower rate of divorce than the average of the others.¹²⁶

Obergefell also questions the causal nature of this objection, saying that it rests on “a counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood.”¹²⁷ *Obergefell* goes on to state: “Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”¹²⁸ *Obergefell* concludes:

The respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.¹²⁹

More importantly, this kind of justification for a prohibition on same-sex marriage cannot be made in good faith. Those who support such a prohibition on these grounds do not seek to prevent divorce or even the number of times an individual may marry. It is revealing that those who supported referenda like as Proposition 8 did not also seek to place a ballot measure that would have made divorce more difficult or would have prevented individuals from marrying more than twice.¹³⁰ If the

¹²⁶ BEDI, *supra* note 18, at 215–16. These rates have stayed consistent since the publication of *Beyond Race, Sex, and Sexual Orientation*. The divorce rate in 2014 for Massachusetts was 2.7 per 1,000 people, which was less than the 3.2 average rate for the rest of the country. NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999–2014, https://www.cdc.gov/nchs/data/dvs/state_divorce_rates_90_95_and_99-14.pdf [<https://perma.cc/B9ZA-VBK8>] (last visited Apr. 12, 2018); National Marriage and Divorce Trends, NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm [<https://perma.cc/EA4L-Q78S>] (last visited Apr. 12, 2018).

¹²⁷ 135 S. Ct. at 2607.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See, e.g., Frederick Liu & Stephen Macedo, *The Federal Marriage Amendment and*

concern is with preserving marriage, the ability to procure a divorce is the most glaring destructive force threatening the institution.

In fact, James Q. Wilson suggests that the adoption by states of a regime of no-fault divorce has undermined marriages.¹³¹ No-fault divorce laws permit a spouse to procure a divorce for any reason or no reason at all.¹³² As I suggest in *Beyond Race, Sex, and Sexual Orientation*:

All fifty states have incorporated some provision for no fault divorce. So even states that prohibit[ed] same-sex marriage permit no fault divorce. How [could] these states simultaneously proffer the protection of marriage as a justification for limiting marriage if they do not limit the number of times an individual may marry or restrict their ability to procure a divorce? This . . . means that reasons related to procreation, divorce, or preserving opposite sex marriages are made in bad faith. If the concern is with undermining opposite-sex marriage or increasing the frequency of children born out of wedlock, states should aim to repeal no fault divorce or [limit] the number of times an individual may marry. These policies straightforwardly damage the institution of marriage, making it perhaps less likely that individuals will desire to marry.¹³³

Once these other justifications are seen as inapplicable, it is difficult to deny the religious rationale underlying gay marriage bans. In fact, in his *Obergefell* dissent, Chief Justice Roberts recognizes the religious nature of such bans: “Today’s decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.”¹³⁴ Concerns about religious liberty that have arisen after *Obergefell*—where, for instance, individuals may be forced to partake in a gay marriage in violation of their religious conscience¹³⁵—reveal that the bans on such marriage invariably rest

the Strange Evolution of the Conservative Case Against Gay Marriage, 38 PS: POL. SCI. & POL. 211, 212 (2005).

¹³¹ See JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 161–63 (2002).

¹³² *No-Fault Divorce*, LEGALINFO. INST., https://www.law.cornell.edu/wex/no-fault_divorce [<http://perma.cc/4CJK-MEYN>] (last visited Apr. 12, 2018).

¹³³ BEDI, *supra* note 18, at 216–17 (citing KARLA B. HACKSTAFF, *MARRIAGE IN A CULTURE OF DIVORCE* 28 (1999)).

¹³⁴ 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

¹³⁵ See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (holding a Christian baker cannot refuse service to gay couples seeking to marry as required by the Colorado Anti-Discrimination Act), *cert. granted*, 137 S. Ct. 2290 (June 26, 2017)

on religious reasons. Justice Scalia, dissenting in *Obergefell*, goes out of his way to say that there is not a “single evangelical Christian” on the Court, even though as a group they “comprise[] about one quarter of Americans.”¹³⁶ The implication being: it is precisely those religious beliefs that underlie gay marriage bans. Once we realize this, the Establishment Clause carries serious constitutional weight as an important way to invalidate such bans.

C. Marriage Versus Civil Union

If the Establishment Clause invalidates bans on gay marriage, this suggests that marriage itself may be a spiritual rather than secular union. Central to this claim is the difference between marriage and civil unions. The distinction between a marriage and civil union became important as a result of *Baker v. State*,¹³⁷ one of the first decisions striking down prohibitions on same-sex marriage. The Vermont Supreme Court invalidated such prohibitions under the Vermont Constitution.¹³⁸ The court held that by refusing to provide legal recognition to same-sex couples, the state violated the Common Benefits Clause of the Vermont Constitution—the state’s equal protection analogue to the Equal Protection Clause of the Fourteenth Amendment.¹³⁹ Finding a constitutional violation, the court gave the legislature two options to remedy it—either permit same-sex couples to marry, or provide them civil unions or domestic partnerships:

We hold only that plaintiffs are entitled under . . . the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.¹⁴⁰

(No. 16-111); *In re Klein*, Nos. 44-14 & 45-14, 2015 WL 4868796 (OR BOLI July 2, 2015) (fining Christian-run bakery \$135,000 for refusing to serve gay couples seeking to marry).

¹³⁶ 135 S. Ct. at 2629 (Scalia, J., dissenting).

¹³⁷ 744 A.2d 864 (Vt. 1999).

¹³⁸ *Id.* at 867.

¹³⁹ *See id.*

¹⁴⁰ *Id.* at 886.

The legislature opted for civil unions or domestic partnerships.¹⁴¹ This was seen as a less controversial move, precisely because it withheld the all-important status of marriage.¹⁴² In explaining its decision to pass the Vermont Civil Union Statute of 2000, the legislature acknowledged that

[w]hile a system of civil unions does not bestow the status of civil marriage, it does satisfy the requirements of the Common Benefits Clause. Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved.¹⁴³

One journalist covering the Vermont decision summed up the reaction of an unnamed minister as follows: “‘I don’t care what people do,’ [the minister] insisted. ‘Just don’t call it marriage. It can’t be marriage.’”¹⁴⁴ Even though gay couples would receive the same benefits, responsibilities, and privileges that come with marriage, they would not receive the label of “marriage.”¹⁴⁵ Vermont granted all couples the status of “marriage” in 2009.¹⁴⁶ The label of “marriage” is important because it adds something to the relevant union, something above and beyond the material benefits accompanying civil unions. In *Goodridge v. Department of Public Health*,¹⁴⁷ the Supreme Judicial Court of Massachusetts invalidated the state’s prohibition on same-sex marriage, making clear that “[t]angible as well as intangible benefits flow from marriage.”¹⁴⁸

This “intangible benefit” illuminates the fact that marriage is not just a contract where the two parties receive a set of material benefits.¹⁴⁹ Marriage places two individuals in a legal relationship or status that is not simply a private issue because the state defines and regulates that status.¹⁵⁰ In *Maynard v. Hill*,¹⁵¹ the Court held that a

¹⁴¹ See Liz Halloran, *How Vermont’s ‘Civil’ War Fueled the Gay Marriage Movement*, NPR (Mar. 23, 2013, 2:24 PM), <https://www.npr.org/2013/03/27/174651233/how-vermonts-civil-war-fueled-the-gay-marriage-movement/> [<https://web.archive.org/web/20170316154819/http://www.npr.org/2013/03/27/174651233/how-vermonts-civil-war-fueled-the-gay-marriage-movement/>] (describing Governor Howard Dean’s pledge to veto any legislation giving full marriage).

¹⁴² See *id.*

¹⁴³ An Act Relating to Civil Unions, *supra* note 116, §1(10).

¹⁴⁴ Adrian Walker, *Give Partners the Right to Marry*, BOS. GLOBE, Mar. 9, 2000, at B1.

¹⁴⁵ *With Veto Overrides, Vermont Legalizes Same-Sex Marriage*, CNN (Apr. 7, 2009, 12:59 PM), <http://www.cnn.com/2009/POLITICS/04/07/same.sex.marriage/> [<http://perma.cc/Y9CB-P4YB>].

¹⁴⁶ *Id.*

¹⁴⁷ 798 N.E.2d 941 (Mass. 2003).

¹⁴⁸ *Id.* at 955.

¹⁴⁹ See *id.* at 995 (Cordy, J., dissenting).

¹⁵⁰ Cf. David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 980 n.288 (2001).

¹⁵¹ 125 U.S. 190 (1888).

state legislature may dissolve the bonds of marriage.¹⁵² Justice Stephen Field, writing for the Court, famously reasoned that marriage is a kind of status.¹⁵³ Marriage is

declared a civil contract for certain purposes, but it is not thereby made synonymous with the word contract employed in the common law or statutes. . . . The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community.¹⁵⁴

A run-of-the-mill contract, like an employment contract, in contrast, is generally not subject to heavy regulation.¹⁵⁵ The common law certainly permits individuals to enforce contractual obligations through state courts, but an employment contract itself does not create the same kind of status.¹⁵⁶ Consider that parties to such a contract may terminate the agreement without involving the state.¹⁵⁷ This is not the case with marriage. Marriage is a civil status precisely because the state regulates it. Before states permitted same-sex marriage, gay couples often availed themselves of the common law of contract to formalize issues such as inheritance and property.¹⁵⁸

In turn, the distinction between status and contract has been crucial in the debate over same-sex marriage. As Janet Halley points out, “advocates and opponents [of

¹⁵² See generally *id.*

¹⁵³ See *id.* at 212–13.

¹⁵⁴ *Id.* Alongside this view of marriage as a status is a conflicting one that considers it like any other contract—a view that was also present in the nineteenth century. See generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

¹⁵⁵ See generally Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1 (2015) (discussing the enforceability of certain types of employment contracts).

¹⁵⁶ See, e.g., *id.* at 48 (discussing the inability to have noncompete clauses enforced in California state courts).

¹⁵⁷ See *id.* at 33 (“[A]t-will contracts . . . have [an] effective length[] of zero.”).

¹⁵⁸ See, e.g., Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a “Simulacrum of Marriage,”* 66 FORDHAM L. REV. 1699, 1712 (1998) (answering the question of to “what extent can the legitimate family values of gay people be protected by means other than marriage?”); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. L. REV. 1107, 1137–44 (1996) (listing valid contracts permitted before same-sex marriages, such as (1) estate planning tools; (2) cohabitation contracts; and (3) quasi-marriage contracts through domestic partnership legislation); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511 (1990) (analyzing private, contractual options for lesbian couples).

same-sex marriage have] converge[d] on an image of marriage as status.”¹⁵⁹ The debate over gay marriage is not about whether marriage ought to have this status, only which kinds of couples may avail themselves of it.¹⁶⁰ On one side, are proponents of same-sex marriage who sought to permit gays and lesbians affirmation of their relationships with this status.¹⁶¹ On the other side are the detractors who sought to protect traditional marriage from alteration.¹⁶² Joseph Singer, writing positively in light of the decision in *Goodridge*, makes clear: “After all, marriage is not just an ordinary contract; it is a status conferred by state officials who issue a license and conduct a ceremony in which they state: ‘By the authority invested in me by the [state], I hereby declare you to be married.’”¹⁶³ Citing *Maynard*, Kennedy in *Obergefell* affirmed the nature of marriage as a status, explaining that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”¹⁶⁴ Marriage, as Kennedy goes on to say, has long been “a great public institution, giving character to our whole civil polity.”¹⁶⁵ Marriage, for Kennedy, is “transcendent.”¹⁶⁶ Although marriage importantly entails material benefits, it is also a “significant status,”¹⁶⁷ conferring “nobility and dignity.”¹⁶⁸ This is the intangible feature that comes with the label of “marriage.” Kennedy concludes that “[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”¹⁶⁹

“Civil marriage,” according to David Cruz, “is a unique symbolic or expressive resource, usable to communicate a variety of messages to one’s spouse and others, and thereby to facilitate people’s constitution of personal identity.”¹⁷⁰ Cruz criticizes civil unions, like the one first proposed in Vermont, for denying “same-sex couples the expressive potential of civil *marriage*.”¹⁷¹ This is why Tamara Metz contends that marriage “functions as a special symbolic resource that individuals can use to say

¹⁵⁹ Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 4 (2010).

¹⁶⁰ *Id.* at 4–11 (explaining “a new convergence” of same-sex marriage advocates who seek to attain the status of marriage).

¹⁶¹ *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁶² *See, e.g.*, *supra* note 144 and accompanying text.

¹⁶³ Joseph William Singer, *Same-Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 5 (2005). In Singer’s article the phrase “Commonwealth of Massachusetts” is used in lieu of the word “state,” but this has been changed here for purposes of allowing the phrase to apply to all states.

¹⁶⁴ *Obergefell*, 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

¹⁶⁵ *Id.* (quoting *Maynard*, 125 U.S. at 213).

¹⁶⁶ *Id.* at 2594.

¹⁶⁷ *Id.* at 2601.

¹⁶⁸ *Id.* at 2594.

¹⁶⁹ *Id.* at 2602.

¹⁷⁰ Cruz, *supra* note 150, at 928.

¹⁷¹ *Id.*

something about who they are to themselves, their partners, and their communities.”¹⁷² It functions as an affirmation of the moral worthiness of this kind of union.¹⁷³ This is why gays and lesbians do not merely seek to be civilly unionized.

The status of being married does something more. Marriage, as Metz says, is “a unique kind of expressive good, the value of which exceeds the sum of the delineable benefits and burdens that attach to it.”¹⁷⁴ It is an ethical union, one that treats the whole as greater than the parts.¹⁷⁵ But it is precisely this kind of union, according to Metz, that exceeds the traditional regulatory bounds of the liberal state¹⁷⁶:

Traditionally, liberals have treated the commands of the state as limiting action (not belief) for the narrow purpose of ensuring social order, protecting citizens from harm, and guaranteeing political fairness. Generally, the state confers legal status for instrumental convenience, not to alter self-understanding in any deep and enduring way. The familiar idea behind the limited state is that freedom consists, in large part, in individuals being free from interference to live according to their own design.¹⁷⁷

Given this view of the liberal state, conferring the status of marriage seems to confound it. In declaring individuals married, the state, as Metz argues, alters self-understanding.¹⁷⁸ She calls this the “expressive” or “constitutive” part of marriage.¹⁷⁹ This informs Justice Kennedy’s description of marriage, as a “dynamic” union that “becomes greater than just the two persons.”¹⁸⁰

Drawing on *Goodridge*, Michael Sandel draws such a comparison between bans on gay marriage and marriage itself¹⁸¹:

As if to avoid entering into the moral and religious controversy over homosexuality, [*Goodridge*] describes the moral issue before the court in liberal terms—as a matter of autonomy and freedom of choice. The exclusion of same-sex couples from marriage is

¹⁷² METZ, *supra* note 8, at 89.

¹⁷³ *See id.* (describing the status as a “publicly created good that can be deployed by its recipients”).

¹⁷⁴ *Id.* at 36.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at 119 (arguing that a true liberal state should be “more distant and uninvolved with the beliefs of its citizens”).

¹⁷⁷ *Id.* at 115 (footnote omitted).

¹⁷⁸ *See id.* at 89.

¹⁷⁹ *Id.* at 89–94.

¹⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

¹⁸¹ MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 257 (2009).

incompatible with “respect for individual autonomy and equality under law,” [Goodridge proclaims]. . . . But autonomy and freedom of choice are insufficient to justify a right to same-sex marriage. If government were truly neutral on the moral worth of all voluntary intimate relationships, then the state would have no grounds for limiting marriage to two persons; consensual polygamous partnerships would also qualify. In fact, if the state really wanted to be neutral, and respect whatever choices individuals wished to make, it would have to . . . get out of the business of conferring recognition on any marriages.¹⁸²

This is the tension that the distinction between civil union and marriage reveals. For if it is problematic for the state to privilege heterosexuality over homosexuality in its conferring of marriage licenses, the state would be hard pressed to privilege being married over being unmarried as this label itself also rests on such premises.

D. Defining Religion Broadly

The foregoing analysis reveals that marriage may violate the Establishment Clause. Admittedly, although it is relatively easy to see that bans on gay marriage are based on religious beliefs—even a particular Judeo-Christian definition of marriage—the religious nature of marriage itself may not be so obvious.¹⁸³ Because marriage entails an intangible ethical quality that a mere civil union does not, it illuminates its religious character. Important to this argument is adopting a broad rather than narrow definition of religion. Now there is an ongoing constitutional debate about the meaning of religion.¹⁸⁴ This Article does not seek to resolve this

¹⁸² *Id.* (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003)). See also BRAKE, *supra* note 8, at 133: “Same-sex marriage advocates have argued that it is unjust to define marriage legally on the basis of contested moral views regarding same-sex activity.” Brake agrees, but argues that such advocates have “failed to follow the implications of such neutral or political liberal reasoning to the extreme conclusion” where we question marriage itself. *Id.*

¹⁸³ *Cf.* Simson, *supra* note 95, at 152 n.72 (“[H]eterosexuality better comports with traditional (especially Judeo-Christian) morality.” (citations omitted)).

¹⁸⁴ See, e.g., George C. Freeman, III, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519 (1983) (pondering how “religion” should be defined); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 753 (1984) (suggesting “that in both free exercise and establishment cases, courts should decide whether something is religious by comparison with the indisputably religious, in light of the particular legal problem involved”); Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 794 (1997) (advocating to construe “‘religion’ under the First Amendment in its evolving, everyday sense”); Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other*

debate in any definitive way; it only suggests one way marriage could indeed be understood as based on religious precepts.

In *United States v. Seeger*,¹⁸⁵ the Court extensively analyzed the definition of religion. Even though that case concerned the interpretation of the federal conscientious objector statute and not the Constitution, it provides ample evidence of a broad view of religion.¹⁸⁶ In that case, Seeger sought to qualify for a conscientious objector status under the Universal Military Training and Service Act, which “exempts from combatant training and service in the armed forces of the United States those persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form.”¹⁸⁷

Seeger maintained “that his ‘skepticism or disbelief in the existence of God’ did ‘not necessarily mean lack of faith in anything whatsoever’; that his was a ‘belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.’”¹⁸⁸ The Court accepted Seeger’s argument, concluding that his belief was indeed a religious one.¹⁸⁹ The Court, accordingly, defined religious belief broadly:

Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.¹⁹⁰

A belief that functions as a “parallel to that filled by . . . God” is therefore religious.¹⁹¹ The Court approvingly cites a leader in the “Ethical Culture Movement,”¹⁹² who states:

Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion,

Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology, 83 N.D. L. REV. 123, 126 (2007) (exploring from many vantage points “the word ‘religion’ in the First Amendment of the United States Constitution”).

¹⁸⁵ 380 U.S. 163 (1965).

¹⁸⁶ *See id.* at 166–72.

¹⁸⁷ *Id.* at 164–65.

¹⁸⁸ *Id.* at 166 (citations omitted).

¹⁸⁹ *Id.* at 165–66.

¹⁹⁰ *Id.* at 176.

¹⁹¹ *Id.*

¹⁹² *Id.* at 182.

for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive.¹⁹³

This means that beliefs corresponding to such ideals are religious ones. In *Welsh v. United States*,¹⁹⁴ another exemption case, the Court went so far as to say that “opposition to war stem[ming] from . . . moral, ethical, or religious beliefs about what is right and wrong” ultimately constitutes a religious belief against war.¹⁹⁵

If we adopt such a comprehensive definition of religion, marriage itself turns out to rest on religious beliefs and triggers Establishment Clause concerns. The underlying constitutional issue in *Obergefell* is not simply about the denial of the material benefits that come with marriage. Kennedy’s concern is that marriage also comes with intangible advantages including dignity and nobility, advantages that inform the ethical nature of the union.¹⁹⁶ By denying this kind of status to same-sex couples, Kennedy asserts that the state demeans gays and lesbians by “lock[ing] them out of a central institution of the Nation’s society.”¹⁹⁷ It leaves such couples without the ability to “aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”¹⁹⁸

This language of “transcendent” points to the religious, à la *Seeger* and *Welsh*, nature of marriage. *Obergefell* says that “[m]arriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm.”¹⁹⁹ This notion of “unique fulfillment” corresponds to a broad view of religion.²⁰⁰ That is, in making clear that marriage “embodies the highest ideals of love, fidelity, devotion, sacrifice, and family,” Kennedy captures the ethical ideal embodied in *Seeger*’s successful religious exemption claim.²⁰¹

Marriage is an ethical—even metaphysical union—precisely because it, as Metz contends, “alter[s] self-understanding in any deep and enduring way.”²⁰² This is why Metz concludes that the state goes beyond its “limited” role of providing mere instrumental benefits in marrying individuals.²⁰³ In doing so, Metz argues the state “assumes [through marriage laws] the role of *ethical authority*, . . . violating the type

¹⁹³ *Id.* at 183 (quoting DAVID SAVILLE MUZZEY, *ETHICS AS A RELIGION* 95 (1951)).

¹⁹⁴ 398 U.S. 333 (1970).

¹⁹⁵ *Id.* at 340.

¹⁹⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (stating that marriage “allows two people to find a life that could not be found alone”).

¹⁹⁷ *Id.* at 2602.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2594.

²⁰⁰ *See id.*

²⁰¹ *See id.* at 2608.

²⁰² METZ, *supra* note 8, at 115.

²⁰³ *See id.* at 130.

of neutrality necessary for the state to secure liberty and equality in a diverse polity such as ours.”²⁰⁴

The emphasis on how the very act of excluding gay couples demeans them makes sense because Kennedy ascribes so much moral significance to marriage. Marriage, unlike a civil union consecrates a relationship with mystical overtones—it is, after all, “transcendent.”²⁰⁵ Denying gays and lesbians entry into this status rightly violates their dignity. This informs the ethical nature of marriage, revealing that the civil institution is indeed based on religious beliefs, broadly construed. This revelation, in turn, poses a possible violation under the Establishment Clause, which requires that laws and policies have a secular purpose.²⁰⁶ Whereas Sunday Closing Laws have lost their religious character,²⁰⁷ marriage has not.

One scholar of marriage law even characterizes the Vermont Civil Union Statute of 2000 as a “secular alternative to marriage for same-sex couples.”²⁰⁸ This implies that unlike a civil union, marriage is not simply based on a secular purpose of providing certain material benefits to those who undertake it. Perry Dane argues that the “‘secular’ and ‘religious’ meanings . . . of marriage are so intermeshed in our history, legal and religious imagination” that we cannot “wall off” civil marriage from its “religious considerations.”²⁰⁹ In a 2003 poll, conducted after *Goodridge*, “53 percent of respondents viewed marriage as principally a religious matter, while 33 percent viewed it principally as a legal matter.”²¹⁰ Again, *Obergefell* explicitly describes marriage as a coming together “to the degree of being sacred.”²¹¹ The language of

²⁰⁴ *Id.* at 115.

²⁰⁵ *Obergefell*, 135 S. Ct. at 2593–94.

²⁰⁶ See Koppelman, *supra* note 77, at 95 (beginning the section entitled “The [Secular Purpose] Doctrine and Its Difficulties”).

²⁰⁷ See *supra* notes 81–84 and accompanying text (discussing the history of Sunday Closing Laws).

²⁰⁸ SANFORD N. KATZ, FAMILY LAW IN AMERICA 21 (2003).

²⁰⁹ Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1129 (2009); see also JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND THE LAW IN THE WESTERN TRADITION (1997); Cohen, *supra* note 69, at 610 (“With the advent and rise of Christianity, religious thought began to shape the institution of marriage. . . . Although marriage as sacrament later was abandoned in the Anglo tradition during the English Reformation, the ‘divine origin of marriage’ nevertheless remained central to legal thought, as evidenced by the ‘English ecclesiastical courts retain[ing] jurisdiction over marriage and its incidents’ until 1857.” (footnotes omitted)); Charles J. Reid, Jr., *Marriage: Its Relationship to Religion, Law, and the State*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 157, 157 (Douglas Laycock et al. eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY] (explaining Reid’s purpose “to demonstrate the ultimate unworkability of a radical separation of religion and law on the subject of marriage”).

²¹⁰ Douglas Laycock, *Afterword* to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 209, at 189, 205.

²¹¹ 135 S. Ct. 2584, 2599 (2015) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

“transcendent” and “sacred” underscores the religious nature of marriage.²¹² Again, civil unions are a “secular alternative to marriage.”²¹³ They provide material benefits, but not the sacred and transcendental imprimatur of marriage.²¹⁴

As a comparison, consider Metz’s examples of a baptism or bar mitzvah.²¹⁵ If the state were to establish or confer such practices (imagine a state sanctioned “coming of age” ceremony or a legal status that is tied to baptism), they would clearly have a religious underpinning.²¹⁶ These ceremonies may have important benefits for those who undertake them.²¹⁷ For instance, studies suggest that religious individuals are less likely than their non-religious counterparts to abuse drugs and alcohol, to be stressed, and to suffer from low self-esteem than individuals that do not participate in such practices.²¹⁸ Even if this may be evidence that individuals ought to consider becoming religious, it would be problematic for the state to sanction such religious acts like a “coming of age” ceremony or a baptism. A state sanctioned “coming of age” ceremony, for instance—like marriage—is based on religious beliefs, broadly construed. For a state to enact such a ceremony or provide a legal status based on it stands to violate the Establishment Clause.

It is not just the ethical status of marriage that triggers concern over the separation of church and state. The very practice of issuing marriage licenses, as Dane points out, also reveals a significant role for religious authorities: “[Any] casual observer would, of course, notice that the laws of all the states recognize religious clergy or religious communities, in addition to various civil officials, as officiants in civil marriages. No other civil institution is structured quite this way.”²¹⁹ Or as Martha Nussbaum puts it:

Clergy are always among those entitled to perform legally binding marriages. Religions may refuse to marry people who are eligible for state marriage, and they may also agree to marry people who are ineligible for state marriage. But much of the officially sanctioned marrying currently done in the United States is done

²¹² *Id.* at 2593–94.

²¹³ KATZ, *supra* note 208, at 21.

²¹⁴ See *Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [<https://perma.cc/U8RK-V8LZ>] (last updated Nov. 18, 2014) (providing data on states that permitted civil unions in 2014 and what benefits those states afford those in civil unions).

²¹⁵ METZ, *supra* note 8, at 114–15.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See, e.g., Patrick Fagan, *Why Religion Matters Even More: The Impact of Religious Practice on Social Stability*, HERITAGE FOUND. (Dec. 18, 2006), <http://www.heritage.org/research/reports/2006/12/why-religion-matters-even-more-the-impact-of-religious-practice-on-social-stability> [<http://perma.cc/7QSQ-2QGK>].

²¹⁹ Dane, *supra* note 209, at 1137 (footnote omitted).

on religious premises by religious personnel. What they are solemnizing (when there is a license granted by the state) is, however, not only a religious ritual, but also a public rite of passage—the entry into a privileged civic status.²²⁰

This power of a minister to confer the legal status of marriage is not some idiosyncratic feature of marriage law. In every state, some kind of ordained minister or clergy person has the power to solemnize a marriage.²²¹ Other individuals who may do so include judges and justices of the peace.²²² No other civil institution permits clergy such a role. A minister may not confer upon an individual a driver's license, a permit, or a zoning board approval. By continuing to deploy the label of marriage, states run the risk of violating the Establishment Clause.

III. STIGMATIZING THE UNMARRIED

Not everyone will marry. Those who refuse to do so decide not to partake in what Kennedy calls “a great public institution, giving character to our whole civil polity.”²²³ Marriage in this way provides an ideal. According to a Pew Research Poll in 2012, seventy five percent of adults over the age of 25 have been married.²²⁴ Marriage is still the norm for the vast majority of adults in the United States.²²⁵ Part III argues that this proliferation of marriage not only stigmatizes the unmarried, but also essentializes gay identity, privileging a married lifestyle over an unmarried one.

A. *Marriage as an Intrinsic Good*

It is not just that marriage is a status, irreducible to the material benefits that come with it. Marriage also explicitly privileges a certain intimate way of life as superior to others. In articulating the importance of marriage in *Obergefell*, Kennedy proclaims that “[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the

²²⁰ MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 129 (2010).

²²¹ *US Marriage Laws*, AM. MARRIAGE MINISTRIES, <https://theamm.org/marriage-laws/> [<http://perma.cc/3MBW-KKL9>] (last visited Apr. 12, 2018).

²²² *Id.*

²²³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (quoting *Maynard v. Hill*, 125 U.S. 190, 213 (1888)).

²²⁴ Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> [<http://perma.cc/C2WY-4M43>].

²²⁵ *See id.*

other.”²²⁶ In privileging marriage in this way, Kennedy turns out to demean those who are unmarried—the “lonely person.”²²⁷ This is all the more arresting, because someone may be unmarried but far from alone.²²⁸ He or she may have a romantic partner or partners, a caretaker, friends, family, or a range of other relationships that he or she may find fulfilling.²²⁹

After all, in arguing that bans on gay marriage are unconstitutional, Kennedy makes clear that marriage is a “keystone of our social order” and a “building block of our national community.”²³⁰ For him, marriage is “a two-person union unlike any other in its importance to the committed individuals.”²³¹ Brake, in line with Metz, argues that marriage laws are ultimately based on “[t]he belief that marriage and companionate romantic love have special value.”²³² Brake states:

[I]n the assumptions that a central, exclusive, amorous relationship is normal for humans, in that it is a universally shared goal, and that such a relationship is normative, in that it *should* be aimed at in preference to other relationship types. The assumption that valuable relationships must be marital or amorous devalues friendships and other caring relationships, as recent manifestos by urban tribalists, quirkyalones, polyamorists, and asexuals have insisted.²³³

If marriage is based on the belief that this kind of companionship is morally superior to other kinds of personal relationships, a legal status based on this belief plainly violates liberal neutrality. In fact, David Estlund argues that a “more neutral, more liberal, liberalism” must reject marriage laws.²³⁴

Consider that there are other relationships—being a best friend, a member of a religious community, or a caretaker for someone you love—that may be just as stable or significant, or central to human contentment and fulfillment as marriage.²³⁵ The state does not recognize these relationships, relationships that may also have their own set of public and shared meanings. Why does the state single out marriage but not these other associations for recognition? What explains the state’s refusal to grant them any kind of legal status and the myriad benefits that come with that status? For

²²⁶ 135 S. Ct. at 2600.

²²⁷ *See id.*

²²⁸ *See* BRAKE, *supra* note 8, at 90–91 (lamenting that some amorous relationships are privileged over other types of companionship).

²²⁹ *See id.*

²³⁰ *Obergefell*, 135 S. Ct. at 2601.

²³¹ *Id.* at 2589.

²³² BRAKE, *supra* note 8, at 88.

²³³ *Id.* at 88–89 (footnote omitted).

²³⁴ Estlund, *supra* note 8, at 164.

²³⁵ *See* BRAKE, *supra* note 8, at 90–91.

instance, whereas all fifty states provide a marriage license,²³⁶ no state provides a best friend license. Once we focus on that fact, it becomes clear that the state singles out marriage because it finds that conception of “the good life” intrinsically superior to others. This conclusion is problematic from a perspective of liberal neutrality.

The perspective of recent natural law theory is instructive in elucidating the special status of marriage.²³⁷ Robert George, one of key figures in this tradition, argues that marriage has “intrinsic, and not merely instrumental value.”²³⁸ It is the “one flesh union” that arises from procreative sex within marriage that constitutes this good:

The central and justifying point of sex is not pleasure, or even the sharing of pleasure, *per se*, however much sexual pleasure is rightly sought as an aspect of the perfection of marital union. The point of sex, rather, is *marriage itself*, considered as a bodily union of persons consummated and actualized by acts which are reproductive in type.²³⁹

Under this view, as I suggest in *Beyond Race, Sex, and Sexual Orientation*:

[T]he sex act within an opposite-sex marriage is morally superior to sex acts that occur outside of it. George explicitly privileges this conception of the good, this way of living. He does not argue that this way of life is superior because it provides benefits to others. Marriage is an intrinsic good. It is worthwhile for its own sake, providing a kind of good that other ways of living including being unmarried, having “flings” or multiple partners, or being with platonic friends cannot.²⁴⁰

Given this morally special status of marriage, George’s argument for marriage explicitly excludes same-sex couples.²⁴¹ That is his purpose for making it. He would withhold the state’s conferral of marriage to gays and lesbians.²⁴² Gays and lesbians

²³⁶ See *Marriage Laws of the Fifty States, District of Columbia and Puerto Rico*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/table_marriage [<https://perma.cc/SG83-5S83>] (last visited Apr. 12, 2018). This source provides a chart demonstrating details of marriage licenses in the states and territories.

²³⁷ See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 527–31 (1985) (discussing “natural law” that “predate[s] the creation of the state”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (recalling the “centrality of marriage to the human condition” that has existed for millennia).

²³⁸ George, *supra* note 41, at 146.

²³⁹ *Id.* at 145.

²⁴⁰ BEDI, *supra* note 18, at 227.

²⁴¹ See generally George, *supra* note 41, at 146.

²⁴² See *id.* at 146–47 (asserting that traditional marriage is under assault from people who have no desire to produce children).

do not fulfill the procreative part of his definition of marriage.²⁴³ But Kennedy rightly rejects this procreative argument in *Obergefell*, concluding that states have not “conditioned the right to marry on the capacity or commitment to procreate.”²⁴⁴ This informs the conclusion above that the objection from procreation is made in bad faith by same-sex marriage opponents.

Although *Obergefell* rejects the procreative meaning of marriage, holding that the fundamental right to marry is not contingent on raising children, it still adopts the natural law idea that marriage provides an intrinsic good that other ways of living do not:

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . [The hope of those who seek to marry] is not to be condemned to live in loneliness, excluded from one of civilization’s oldest institutions.²⁴⁵

Kennedy places marriage as the “highest” type of relationship,²⁴⁶ thereby devaluing, in the language of Brake, “friendships and other caring relationships.”²⁴⁷ In fact, for Kennedy, if one is not married, one is relegated to mere loneliness.²⁴⁸ It is precisely the superior nature of this kind of legal status that requires the state to permit gay couples to marry. They, too, must be able to avail themselves of this “profound” kind of intimate relationship. But in making this argument, Kennedy privileges a certain way of life as superior, plainly violating liberal neutrality.²⁴⁹ This is natural law, but with a gay spin.

Now perhaps this conclusion is too quick. Stephen Macedo thoughtfully suggests that marriage promotes public welfare.²⁵⁰ For instance, “[m]arried men (much evidence suggests) live longer, have lower rates of homicide, suicide, accidents, and mental illness than unmarried ones.”²⁵¹ But, as I point out in *Beyond Race, Sex, and Sexual Orientation*:

²⁴³ See *id.*

²⁴⁴ 135 S. Ct. 2584, 2601 (2015).

²⁴⁵ *Id.* at 2608.

²⁴⁶ See *id.*

²⁴⁷ BRAKE, *supra* note 8, at 89.

²⁴⁸ See *Obergefell*, 135 S. Ct. at 2608.

²⁴⁹ See *id.*

²⁵⁰ Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition?*, in SEX, PREFERENCE, AND FAMILY, *supra* note 8, at 86, 94 (“The argument for marriage claims that more stable commitments promote public as well as private welfare.”). See generally STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY & THE FUTURE OF MARRIAGE (2015) (assiduously defending same-sex marriage).

²⁵¹ Macedo, *supra* note 250, at 94.

[E]ven if we assume the accuracy of the public welfare claim (and this itself may be a controversial empirical assumption), it hardly proves that the state should stay in the marriage business. This is for two reasons. First, the state could accomplish such public welfare goals by simply making available a civil union status to everyone. For instance, if the purpose were to facilitate economic stability facilitating issues such as inheritance or child support, civil unions would be sufficient to accomplish this. Why deploy the label of “marriage”? It is not at all clear that downgrading marriage in this way would undermine any such benefits, assuming such benefits exist.

Second, it is entirely possible—even likely—that the reason unmarried individuals may have higher rates of mental illness, suicide, and the like is because their way of living is not privileged by the state. The state stigmatizes unmarried individuals by conferring the status of marriage only to those who choose this as . . . their conception of the good. This is a self-fulfilling prophecy. By valuing one way of living for its own sake, the state marks another as socially undesirable. This, in turn, makes it more likely that those who undertake the “socially undesirable” option will suffer more than those who do not.²⁵²

Moreover, this kind of self-fulfilling public welfare argument could perversely justify laws and policies that target gays and lesbians.²⁵³ It is understandable that fifty years ago and even today, gays and lesbians had and have higher rates of suicide and mental distress than their straight counterparts.²⁵⁴ Gays were (and of course, sometimes still are) forced to hide their sexuality by remaining in the “closet.”²⁵⁵ But we would reject the conclusion that this entails that “being straight” somehow promotes the “public welfare,” even if it is true that gays may have more mental distress than their straight counterparts.²⁵⁶ It would be absurd, not to mention unjust, to use

²⁵² BEDI, *supra* note 18, at 230.

²⁵³ *See id.*

²⁵⁴ *See id.* Potential contributing factors—present both today and fifty years ago—to explain these higher suicide rates could be the rejection, discrimination, victimization, and violence associated with being gay. *See also infra* notes 256, 457 and accompanying text.

²⁵⁵ BEDI, *supra* note 18, at 230.

²⁵⁶ *Id.*; *see, e.g.*, Jane Collingwood, *Higher Risk of Mental Health Problems for Homosexuals*, PSYCHCENTRAL, <https://psychcentral.com/lib/higher-risk-of-mental-health-problems-for-homosexuals/> [http://perma.cc/3DPB-Q4AK] (last visited Apr. 12, 2018) (citing a study that found twice the rate of suicide attempts among lesbian, gay, and bisexual people); ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL

this as an argument to uphold anti-gay restrictions. Rather, the conclusion to draw from these facts about emotional well-being is not that heterosexuality is the answer, but that the state ought to stop privileging such a lifestyle. By stigmatizing gays and lesbians with anti-gay laws and policies, the state creates the reality where sexual minorities are subject to stigma and, in turn, more pronounced mental distress. The solution is not to continue with such policies but to reject them and stop marginalizing those individuals who do not fit the “normal” heterosexual mold. In the same way, the state ought to stop conferring the morally special status of marriage. Doing so stands to stigmatize those who are not married, just as those anti-gay laws and policies that banned gay sex and privileged heterosexuality stigmatize individuals for being gay.

B. Essentializing Gay Identity

By affirming the importance of monogamous marriage in the context of the constitutional challenge to bans on gay marriage, *Obergefell* turns out to essentialize gay identity. Consider that in his dissenting opinion, Roberts raises the objection of plural marriage (an issue this Article revisits in Part IV).²⁵⁷ “If not having the opportunity to marry ‘serves to disrespect and subordinate’ gay and lesbian couples, why wouldn’t the same ‘imposition of this disability’ serve to disrespect and subordinate people who find fulfillment in polyamorous relationships?”²⁵⁸ Roberts poses the question of what distinguishes plural or polyamorous relationships from their gay counterparts?²⁵⁹ One difficulty in drawing such a distinction is that prohibitions on same-sex marriage, as written, do not explicitly discriminate against gays and lesbians as a class.²⁶⁰ After all, a gay man may marry a lesbian. The law tracks sex, not sexual orientation.²⁶¹

TRANSGENDER DISCRIMINATION SURVEY 2 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> [<https://perma.cc/9476-PWBZ>] (“[H]arassment, discrimination, violence and rejection may interact to produce a marked vulnerability to suicidal behavior in transgender and gender non-conforming individuals.”).

²⁵⁷ 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting).

²⁵⁸ *Id.* (internal citation omitted). For a serious defense of a constitutional right to engage in plural marriage or polyamorous marriage, see Den Otter, *supra* note 8, at 1983 (“This Article [contains] some thoughts on why ordinary Americans may begin to discuss plural marriage with the kind of care that the topic deserves sooner rather than later.”).

²⁵⁹ This slippery slope argument is a powerful one. It means that if the Court bases its decision on a particular principle, that principle may suggest that other laws and policies are unconstitutional. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (analyzing how to evaluate the risk of slippery slopes).

²⁶⁰ See, e.g., 10 U.S.C. § 654 (repealed 2010) (establishing Don’t Ask Don’t Tell policy concerning homosexuality in the armed forces); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado amendment discriminating against gays and lesbians was unconstitutional). For a survey of the different kinds of anti-gay legislation, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

²⁶¹ Certainly, as scholarly work suggests, we could argue that this kind of law is problematic because it discriminates on the basis of sex or gender. See, e.g., ANDREW KOPPELMAN, *THE*

Given that bans on both plural marriage and gay marriage seek to regulate behavior or desire²⁶²—in one case the desire to marry more than one person and in the other the desire to marry someone of the same sex—how do we differentiate between the two? Although Roberts seems to believe that there is no difference (bans on gay marriage and plural marriage fall or stand together), this Article argues that any possible difference, if taken seriously, treats the desire of gays and lesbians to marry as immutable, thereby imposing a heteronormative framework on gay identity.

Andrew Sullivan, for instance, seeks to differentiate the desire to marry a person of the same sex from the desire to marry more than one person in the following way:

Almost everyone seems to accept, even if they find homosexual-ity morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse. Even the Catholic Church, which believes that homosexuality is an “objective disorder,” concedes that it is a profound element of human identity. It speaks of “homosexual persons,” for example, in a way it would never speak of “polygamous persons.” And almost all of us tacitly assume this, even in the very use of the term “homosexuals.” We accept also that multiple partners can be desired by gays and straights alike: that polygamy is an activity, whereas both homosexuality and heterosexuality are states.²⁶³

GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 60 (2002) (“Sexual-orientation discrimination is distinct from sex discrimination; they aren’t the same thing.” (emphasis removed)); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 103 (2005) (“This Article sketches out the sex- and gender-based arguments that have emerged in the scholarly literature and judicial opinions about same-sex marriage . . .”); Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605, 609 (2004) (discussing specific legal prohibitions against discrimination based on sex); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (dealing only with sex discrimination and not sexual orientation); Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462 (2007) (pointing out the rarity of successfully argued sexual orientation cases that allege sex discrimination). In that way, whereas a ban on plural marriage discriminates on the basis of numbers, a ban on gay marriage discriminates on the basis of sex or gender. *But see* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 500 (2001).

²⁶² Andrew Sullivan, *Three’s a Crowd*, in SAME-SEX MARRIAGE: PRO AND CON: A READER 278, 279 (Andrew Sullivan ed., 1997) [hereinafter SAME-SEX MARRIAGE: PRO AND CON] (contemplating potential differences in gay, lesbian, polygamous, and traditional heterosexual marriages).

²⁶³ *Id.*

Even if a prohibition on same-sex marriage does not explicitly discriminate on the basis of sex or gender, it regulates desire that is, according to Sullivan, central to how gays and lesbians identify themselves.²⁶⁴ Bans on plural marriage, in contrast, regulate behavior that is not central to who someone is. As Jonathan Rauch posits: “Do homosexuals actually exist? I think so By contrast, no serious person claims there are people constitutively attracted only to relatives, or only to groups rather than individuals.”²⁶⁵ Whereas the desire for someone of the same sex marks out an actual identity—it is central to what it means to be gay or lesbian—the desire for more than one person or one’s sibling does not.²⁶⁶

This means that prohibitions on same-sex marriage strike at who gays and lesbians are, not simply what they may want to do. Although the Court may not do enough to respond to Roberts’s rejoinder of plural marriage, Kennedy does say: “Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”²⁶⁷

Whereas the desire to be in a plural marriage is not immutable, the desire to be in a same-sex marriage is.²⁶⁸ Kennedy realizes that “psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”²⁶⁹ Those who seek to marry more than one person may be straight or gay. Sexual orientation is more basic than the desire to be in a plural marriage.²⁷⁰ Kennedy further says: “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.”²⁷¹

This language of immutability points to an important claim by proponents of gay marriage that being gay is often central to one’s sexual identity.²⁷² As David Richards argues, claims by gays and lesbians “are in their nature claims to a self-respecting personal and moral identity in public and private life through which they may reasonably express and realize their ethical convictions of the moral powers of friendship

²⁶⁴ *Id.* (highlighting that even the Catholic Church concedes that homosexuality “is a profound element of human identity”).

²⁶⁵ Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON, *supra* note 262, at 285, 286.

²⁶⁶ *See id.* at 287–88 (criticizing concerns that permitting same-sex marriage will open the door to polygamy because the two are fundamentally different).

²⁶⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

²⁶⁸ *See id.* at 2622 (Roberts, C.J., dissenting).

²⁶⁹ *Id.* at 2596 (majority opinion).

²⁷⁰ *See id.* (stating that sexual orientation is a “normal expression of human sexuality”).

²⁷¹ *Id.* at 2599.

²⁷² *See* RICHARDS, *supra* note 75, at 92–93; Emily R. Gill, *Beyond Immutability: Sexuality and Constitutive Choice*, 76 REV. POL. 93, 102 (2014) (“Sexual/emotional desires, feelings, aspirations, and behavior . . . are of central importance for human beings” (citation omitted)).

and love in a good, fulfilled, and responsible life.”²⁷³ This is why gay and lesbian organizations often deploy the locution of “sexual orientation” rather than “sexual preference.”²⁷⁴ Constitutive of gay and lesbian identity is the desire for those of the same sex.²⁷⁵ Bans on gay marriage therefore discriminate against a bona fide identity group or class. Limitations on numerosity do not strike at who plural marriage enthusiasts are. These limitations only regulate behavior. This may suggest that although bans on gay marriage are wrong, bans on plural marriage are not.

This emphasis on immutability suggests that gays and lesbians, unlike plural marriage enthusiasts, ought to be a suspect class for purposes of the Equal Protection Clause.²⁷⁶ Although the Court has not gone this far,²⁷⁷ scholarly work has argued that gays and lesbians ought to count as one.²⁷⁸ This would mean that whereas laws

²⁷³ RICHARDS, *supra* note 75, at 93.

²⁷⁴ See e.g., *Employment: Demanding Workplace Equality*, LAMBDA LEGAL, <http://www.lambdalegal.org/issues/employment-and-rights-in-the-workplace/> [<http://perma.cc/D5P5-Q3W7>] (last visited Apr. 12, 2018); see also *Legal Discrimination*, OUTRIGHT ACTION INT’L, <https://www.outrightinternational.org/theme/legal-discrimination> [<http://perma.cc/BX9H-DUSY>] (last visited Apr. 12, 2018); *Know Your Rights*, GLAD, <http://www.glad.org/know-your-rights/> [<http://perma.cc/5XGV-HBZE>] (last visited Apr. 12, 2018).

²⁷⁵ See Rauch, *supra* note 265, at 286.

²⁷⁶ The Supreme Court’s equal protection doctrine triggers heightened scrutiny when a law invokes a suspect classification. Under current case law, laws discriminating on the basis of race (e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967)), alienage (e.g., *Graham v. Richardson*, 403 U.S. 365, 371–76 (1971)), or national origin (e.g., *Oyama v. California*, 332 U.S. 633, 646–47 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944)), get strict scrutiny; that is, where the Court asks if the law is narrowly tailored to serve a compelling state purpose (e.g., *Graham*, 403 U.S. at 375–76). Laws discriminating against sex get intermediate scrutiny; that is, where the Court asks if the law is substantially related to an important governmental purpose (e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

²⁷⁷ Some federal courts of appeals have held that sexual orientation is a suspect classification, focusing in particular on immutability. See *Watkins v. U.S. Army*, 847 F.2d 1329, 1347–49 (9th Cir. 1988) (“We have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine.”), *vacated and aff’d on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); see also *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (applying heightened scrutiny); *Baskin v. Bogan*, 766 F.3d 648, 657 (7th Cir. 2014) (“And there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic”); *Windsor v. United States*, 699 F.3d 169, 183–84, 183 n.4 (2d Cir. 2012) (subjecting sexual-orientation discrimination to heightened scrutiny in part because it is sufficiently immutable), *aff’d*, 133 S. Ct. 2675 (2013) (invalidating the Defense of Marriage Act without holding that sexual orientation is a suspect classification).

²⁷⁸ For authors who answer in the affirmative, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 162–64 (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1985); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 264 (1996); Sunstein, *supra* note 125, at 1168; Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1756 (1996); Note, *The*

discriminating against gays and lesbians ought to receive higher scrutiny, laws discriminating against plural marriage enthusiasts would not.²⁷⁹ Whereas this would doom bans on gay marriage, it would make it easier for the state to justify their plural marriage counterparts.

But this argument comes at a cost of violating liberal neutrality; it privileges certain kinds of gay lives, those that value monogamy, for instance, over others. Sullivan and Rauch, as well as Kennedy, imply that the desire to marry someone of the same sex is crucial to being gay, just as marrying someone of the opposite sex may be crucial to being straight—“[t]his is true for all persons, whatever their sexual orientation.”²⁸⁰ In order for the conventional argument for gay marriage to succeed, it is insufficient simply to assume that desiring someone of the same sex is central to gay identity. That assumption would not pose a fundamental objection to bans on same-sex marriage. After all, if individuals have the option to have sex with and live with individuals of the same sex, even setting up domestic partnerships or civil unions to that effect, a ban on same-sex marriage would not interfere with the core of gay desire.

Roberts explains in his dissent that, even with a ban on gay marriage, “[s]ame-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit.”²⁸¹ In contrast, according to Roberts, sodomy laws (like the one the Court invalidated in *Lawrence*), involve “government intrusions,” even going so far as making gay sex a “crime.”²⁸² These latter laws do interfere with who gays and lesbians are and prevent them from acting on their desire or love for someone of the same sex, whereas prohibitions on same-sex marriage do not.²⁸³ Put differently, Roberts suggests that such a prohibition does not thwart a gay person’s ability to love someone of the same sex. It merely thwarts their desire to *marry* the person they desire or love. In order for such a prohibition to discriminate against an identity group rather than behavior, as in the case of plural marriage, this desire must be central to what it means to be gay or lesbian. Only then do limitations on same-sex *marriage* become different from bans on plural marriage by discriminating against gays and lesbians rather than simply prohibiting mere desire or behavior.

Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285, 1287 (1985). For an argument that the presumption against sex discrimination is sufficient to invalidate sexual-orientation discrimination, see Koppelman, *supra* note 262, at 220. *But see* Stein, *supra* note 261, at 474 (arguing against a sex-discrimination approach to sexual-orientation discrimination).

²⁷⁹ This Article largely avoids applying the strict versus rational review standards, focusing instead on the justificatory implications for treating laws banning gay marriage differently from laws banning their plural counterparts.

²⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015); *see supra* notes 263–66 and accompanying text.

²⁸¹ *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting).

²⁸² *Id.*

²⁸³ *See id.*

This is the problem: there are many gays and lesbians, including this author (as well as many heterosexuals, to be sure), who do not desire to marry—who may even despise the idea, let alone view the desire to marry as central to who they are. They may prefer nonmonogamous, anonymous, or multi-partner sex—or choose to remain unmarried. To suggest that the desire to marry is fundamental to what it means to be gay essentializes the notion of gay identity.²⁸⁴ It binds individuals to what Kwame Anthony Appiah calls identity “scripts,” scripts that outline what it means to be a member of a particular group; in this case, what it means to be gay.²⁸⁵

In particular, this kind of argument turns out to affirm a surprisingly traditional, heteronormative depiction of human desire—one that privileges monogamy and commitment over being unmarried and sexually active with multiple partners. Those who choose to be unmarried are, under the terms of this argument, defective and “condemned to live in loneliness,” as Kennedy opines.²⁸⁶ They are failing to live up to their essential nature as human beings (whether gay or straight) to marry someone they love. Making the desire to marry fundamental, as Kennedy does, straightforwardly downgrades those—gay or straight—who choose to remain unmarried. It treats them as less than, as inferior to their marriage-seeking counterparts. This strategy to distinguish same-sex marriage from its plural counterpart violates liberal neutrality by blatantly treating the unmarried life as inferior to a two-person, married, monogamous union.

This irony within the gay marriage movement has not gone unnoticed. Self-described “queer theory” criticizes mainstream gay and lesbian identity for reaffirming traditional heteronormative values.²⁸⁷ Darren Rosenblum argues that many self-proclaimed “queers” explore and celebrate other kinds of sexuality: “public sex (parks, tearooms, ‘adult bookstores,’ backrooms), anonymous sex, group sex, promiscuity, sado-masochism, and role-playing.”²⁸⁸ Treating the desire to marry as central to who gays and lesbians are essentializes gay identity and marginalizes these non-heteronormative desires and behaviors.²⁸⁹ Ultimately, this argument (once again) privileges

²⁸⁴ Cf. KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 22–23 (2005) (explaining how collective identity formation affects self-narratives).

²⁸⁵ *See id.*

²⁸⁶ *Obergefell*, 135 S. Ct. at 2608.

²⁸⁷ *See generally* ANNAMARIE JAGOSE, *QUEER THEORY: AN INTRODUCTION* (1996); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* viii (1999) (pointing to “a number of ways that the politics of sexual shame makes the ideal impossible for variant sexualities”); Andrew Sullivan, *The Conservative Case for Gay Marriage*, *TIME* (June 22, 2003) <http://content.time.com/time/magazine/article/0,9171,460232,00.html> [<https://web.archive.org/web/20171017160827/http://content.time.com/time/magazine/article/0,9171,460232,00.html>] (worrying that the expansion of the right to marry “will surely change the gay subculture in subtle but profoundly conservative ways”).

²⁸⁸ Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay “Victories,”* 4 *LAW & SEXUALITY* 83, 108 (1994).

²⁸⁹ *See id.* at 85.

a conception of the good that values marriage over one that does not. It reinforces the idea that a life with a committed romantic partner is superior to a life without one.

IV. PROMOTING MONOGAMY

According to *Obergefell*, marriage represents the “highest ideals of love, fidelity, devotion, sacrifice, and family.”²⁹⁰ In rejecting procreation and the raising of children, *Obergefell* adopts a “companionate” model of marriage that makes monogamy central to this civil institution.²⁹¹ Part IV argues that the emphasis on monogamy raises perhaps the most illiberal feature of marriage, one that both refuses to recognize other kinds of adult living arrangements and stands to infringe our sexual liberty.²⁹²

A. Companionate Model

Marriage may include the raising of children, but this is not a necessary feature of the institution, as shown above.²⁹³ Marriage is about companionship. Richard Posner defines marriage as a union

between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management, and other activities, rather than merely the occasional copulation [of the procreative model].²⁹⁴

Or as Evan Wolfson puts it: “[M]arriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment

²⁹⁰ 135 S. Ct. at 2608.

²⁹¹ *See id.*

²⁹² It is worth pointing out that state-sanctioned monogamy is not limited just to marriage. *See* Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 284 (2004) (“Norms strongly urge people toward monogamy, and law contributes to that pressure in the various ways listed above, namely criminal adultery laws, bigamy laws, marriage laws, custody cases, workplace discrimination, and zoning laws. To the extent that at least some people may be happier in non-monogamous arrangements, and others are not harmed by these arrangements, it would seem that laws should be changed to allow people to find their own path among monogamy and its alternatives.”); *see also* Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1259 (2010) (analyzing criminal sanctions invoked by the state to regulate families: “Against this model, families that resist, rebel, or simply fail to conform may be perceived as threats to the political order. Historically, the state has responded to such threats in many ways. Of particular interest here are responses that involve criminal sanctions.”).

²⁹³ *See supra* notes 97–113, 237–44 and accompanying text.

²⁹⁴ RICHARD A. POSNER, SEX AND REASON 45 (1992); *see also* Ruth K. Khalsa, Note, *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 DUKE L.J. 1665, 1669–70 (2005) (commenting on Posner’s “economic theory of sexuality”).

and interdependence.”²⁹⁵ Marriage is the status that demonstrates to others their commitment to this kind of union. Marriage is about spending one’s life with another individual in a reciprocal relationship. *Goodridge* also adopts the companionate model of marriage: “While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”²⁹⁶ This model of marriage is, as William Eskridge suggests, “most similar to those that are typically valorized by most modern Western perspectives.”²⁹⁷

Informing this companionate model, *Reynolds v. United States*²⁹⁸ and *Obergefell* serve as bookend cases that affirm the definition of marriage as a monogamous union of two committed individuals.²⁹⁹ *Reynolds* entailed a challenge to a federal law that criminalized the practice of polygamy.³⁰⁰ Not only did the Court uphold such a law, it connected the two-person nature of marriage to monogamy.³⁰¹ *Reynolds* held: “[T]here cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”³⁰² The state could decide to recognize polygamy, in this case the marriage of one man to more than one woman. Yet, the Court reasons that the government may conclude that, whereas “polygamy leads to the patriarchal principle,” that principle “cannot long exist in connection with monogamy.”³⁰³ This means that marriage, as understood in the United States, is a companionate model entailing a monogamous (two-person) union.

Although at the time of *Reynolds*, marriage was understood as a monogamous union between a man and a woman, *Obergefell* defines its nature as a union of two committed individuals, irrespective of sex:

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their

²⁹⁵ Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 579 (1994).

²⁹⁶ 798 N.E.2d 941, 961 (Mass. 2003).

²⁹⁷ William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1436 (1993).

²⁹⁸ 98 U.S. 145, 165 (1878) (upholding a criminal prohibition on polygamy).

²⁹⁹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (providing a brief history of marriage rights case law).

³⁰⁰ See 98 U.S. at 161–67 (contemplating “the defence of religious belief or duty”).

³⁰¹ *Id.* at 165–66 (“So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed.”).

³⁰² *Id.* at 166.

³⁰³ *Id.*

sexual orientation. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.³⁰⁴

In fact, *Obergefell* approvingly cites the description of marriage in *Griswold v. Connecticut*³⁰⁵:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.³⁰⁶

We must acknowledge that this commitment is a commitment to lifetime monogamy. This means that married individuals will be intimate only with each other until one partner dies (or they procure a divorce).³⁰⁷ The status of marriage is not a five-, ten-, or even twenty-year commitment that automatically dissolves after the specified number of years. The commitment to share a life together, including the possibility of intimacy, is one that is importantly indefinite (“till death do us part”).³⁰⁸ Such is the nature of marriage.

This is why *Obergefell* contends that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”³⁰⁹ This language of “commitment,” “harmony,” and “loyalty” speaks to the importance of monogamy.

B. Excluding Alternatives: Plural and Caregiving Unions

This Article considers two possible alternatives to monogamous marriage: plural marriage and an adult caregiving union.³¹⁰ No state currently recognizes these

³⁰⁴ 135 S. Ct. at 2599 (internal citation omitted).

³⁰⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965) (affirming a substantive due process right to privacy for married couples to use contraception).

³⁰⁶ *Obergefell*, 135 S. Ct. at 2599–600 (quoting *Griswold*, 381 U.S. at 486).

³⁰⁷ *See id.* at 2589 (discussing the intimacy of marital association to the two committed individuals).

³⁰⁸ *See* Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 241 (2011).

³⁰⁹ *Obergefell*, 135 S. Ct. at 2589.

³¹⁰ For other marriage alternatives that draw from literature, see Emens, *supra* note 308, at 239 (discussing “counter-marriage” or “the vast range of alternative ways we might regulate intimate relationships”).

arrangements.³¹¹ Those who opt to do so are simply treated as unmarried,³¹² living in the shadow of those who the state will marry. At the outset, as in the case of same-sex marriage, we cannot look to concerns of tradition or preserving the current two person marriages to exclude these kinds of arrangements from state recognition.³¹³ Again, emphasis on tradition as argued above turns out to be either circular or proffered in bad faith.³¹⁴ For instance, simply suggesting that marriage has always been about *two, non-blood-related* individuals instead of three or four individuals or one sibling taking care of his brother is circular. Just because that specification has been the positive law's definition of marriage in the past does not mean it ought to remain that way. Simply suggesting that the state has always done something a particular way is not a constitutionally sufficient reason, on its own, to maintain the practice.³¹⁵ That very argument failed in justifying bans on gay marriage.³¹⁶ So, to deploy it now is to engage in what Den Otter, a defender of plural marriage, calls a blatant constitutional "double standard."³¹⁷ It is worth noting that Roberts cites Den Otter's article in his *Obergefell* dissent to proclaim as much.³¹⁸ Challenging the nature of marriage as only a monogamous union, this Article takes seriously the possible alternatives to such a union.

³¹¹ See Metz, *supra* note 8, at 208–10 (suggesting that traditional marriage should be abandoned in favor of intimate caregiving union status (ICGU)).

³¹² See *id.* (arguing that conferral of special rights to married couples does not promote fairness or equality).

³¹³ Emens, *supra* note 308, at 257 (recalling extreme laws that invalidated contracts between same-sex partners in addition to preventing same-sex marriage).

³¹⁴ See *supra* notes 100–36 and accompanying text.

³¹⁵ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (overruling state bans on gay marriage).

³¹⁶ *Id.* at 2589 (noting that "new insight" can inspire re-evaluation of history and tradition in constitutional interpretation).

³¹⁷ Den Otter, *supra* note 8, at 1981 ("As the debate over the meaning of marriage continues, those who oppose plural marriage can be expected to draw upon some of the arguments that traditionalists have deployed against marriage between people of the same gender. In articulating their normative constitutional view, they will have to do more than consult a dictionary, refer to religious understandings, conduct survey research, embrace 'tradition,' investigate how most people happen to use the 'm' word, put forth empirically unfounded claims, or generalize from outliers. In the face of this double standard, progressives could (1) change their minds and reject a constitutional right to same-sex marriage (or its equivalent on equal protection grounds) or (2) attempt to defend the constitutionality of unequal legal treatment of polygamists and polyamorists who would marry if they could."); see also Gregory E. Lines, Note, *Polymmigration: Immigration Implications and Possibilities Post Brown v. Buhman*, 58 ARIZ. L. REV. 477, 500 (2016) ("Th[e] broader recognition of rights for same-sex couples indicates a favorable view toward protecting once-forbidden relationships among minority groups. There are notable—although not exact—similarities between the LGBTQ and polygamy movements, including the desire to protect extramarital relationships and the expanding view of the family." (footnotes omitted)).

³¹⁸ 135 S. Ct. at 2622 (Roberts, C.J., dissenting).

This Article defines “plural marriage” as a marriage among three or more adults, often referred to as “polygamy.”³¹⁹ It includes polygynous marriage (one man and two or more women),³²⁰ polyandrous ones (one woman and two or more men)³²¹ or marriages composed of more than two individuals of the same sex.³²² One man and many women may be the more popular instance of plural marriage, but certainly not the only kind.³²³ This is why this Article adopts the neutral language of “plural marriage.” Den Otter makes the most sustained argument that bans on plural marriage are, in fact, unconstitutional, violating a substantive due process right³²⁴ to autonomy and the Equal Protection Clause.³²⁵ Elizabeth F. Emens critiques the numerosity requirement, arguing that scholars have not done enough in challenging the underlying value of monogamy and the prevalence of polyamory.³²⁶ Without engaging the full range of normative and constitutional issues that arise with plural marriage, this Article focuses on concerns of gender inequality and harm to women that often underlie the objection to plural marriage. This Article argues that such concerns fail to justify a categorical ban on such marriages for two reasons.

First, problems of gender and inequality and harm to women have historically been associated with heterosexual marriage.³²⁷ As *Obergefell* explains in outlining the development of marriage law: “[U]nder the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated

³¹⁹ *Polygamy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/polygamy> [https://perma.cc/7BFH-MMF2] (last updated Apr. 15, 2018).

³²⁰ *Polygyny*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/polygyny> [https://perma.cc/P4PJ-263K] (last visited Apr. 12, 2018).

³²¹ *Polyandry*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/polyandry> [https://perma.cc/9S5D-L76U] (last visited Apr. 12, 2018).

³²² *Plural Marriage*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/plural%20marriage> [https://perma.cc/M24X-DZ5Y] (last visited Apr. 12, 2018).

³²³ See *supra* notes 319–22 and accompanying text.

³²⁴ On Substantive Due Process:

From the standpoint of substantive due process, the significance of being able to select multiple marital partners cannot be overestimated. . . . [A] competent adult should be able to marry however many people she wants for just about whatever personal reasons she happens to have, unless a marriage is so large and complex that it becomes administratively unmanageable.

Den Otter, *supra* note 8, at 2001.

³²⁵ “[The] equal protection analysis leads to the conclusion that laws that fail to allow plural marriage enthusiasts to have the kind of intimate relationship that they want violate the Constitution.” *Id.* at 2015.

³²⁶ Emens, *supra* note 8, at 284 (describing what she calls the “paradox of prevalence”).

³²⁷ See, e.g., Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 110 (2000) (highlighting the fact that Congress passed the Violence Against Women Act specifically to redress inequality of violence against women).

legal entity.”³²⁸ Until recently, the common law of many states saw husband and wife as one person.³²⁹ Spouses “could not be on opposite sides of any lawsuit for either personal injury or property damage.”³³⁰ Consequently, a husband could physically abuse his wife with no threat of legal sanction.³³¹ It is precisely during this era of coverture when the Court upholds a prohibition of bigamy in *Reynolds*, citing concerns of patriarchy.³³² It is telling that women could not vote at that time.³³³

So two-person couplings have historically posed concerns of exit and domination for women. This does not, however, justify prohibiting heterosexual marriage! After all, as Andrew March argues, if the concern is genuinely about inequality or a woman’s ability to exit, the state can regulate “multiple-member” unions just as the state regulates two person ones, “with special concern for the autonomy, property rights, and freedom of exit for vulnerable women.”³³⁴ And as *Obergefell* makes clear, “[a]s women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was

³²⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765)).

³²⁹ *Id.* (“Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.”).

³³⁰ RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 1332 (7th ed. 2000). For arguments challenging marriage on feminist grounds, see MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY xiii (2004) (arguing, in part, that the desirability “of autonomy for individuals and families has seriously limited the ways in which we think about equality”); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 1 (1995) [hereinafter FINEMAN, NEUTERED MOTHER] (examining “the cultural and legal processes in which the sexual-intimate connection has been designated as dominant in the construction of the family”); Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 1, 1 (1996) (criticizing “marriage and motherhood as they are currently practiced and structured by Northern legal institutions”); Clare Chambers, *The Marriage-Free State*, 113 PROC. OF THE ARISTOTELIAN SOC’Y 123, 123 (2013) (arguing that “feminist critiques can best be reconciled and answered by the abolition of state-recognized marriage”); Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29 (Anita Bernstein ed., 2006) [hereinafter Fineman, *Meaning of Marriage*].

³³¹ See EPSTEIN, *supra* note 330, at 1332.

³³² See *Reynolds v. United States*, 98 U.S. 145, 165–66 (1878).

³³³ *19th Amendment to the U.S. Constitution: Women’s Right to Vote (1920)*, OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=true&doc=63> [http://perma.cc/F5FB-HEZX] (last visited Apr. 12, 2018) (noting that the Nineteenth Amendment was not passed until 1920).

³³⁴ March, *supra* note 8, at 260. In Martha Nussbaum’s words: “[T]o rule that [opposite-sex] marriage as such should be illegal on the grounds that it reinforces male dominance would be an excessive intrusion upon liberty, even if one should believe marriage irredeemably unequal.” MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 295 (1999); see also Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1038 (2005) (discussing instances in which plural marriage was meant to empower or protect women).

abandoned.”³³⁵ Just as extant problems of harm and gender inequality in heterosexual marriage³³⁶ do not rule it out as a legitimate union recognized by the state, so too with plural marriage. According to Den Otter, “[a]n individual cannot simply play the gender-equality card as if the mere fact that some plural marriages would be inegalitarian warrants denying legal recognition to all of its conceivable forms.”³³⁷

Second, even on its merits, this kind of objection to plural marriage may be proffered in bad faith.³³⁸ For instance, a marriage of three gay men would not raise concerns of gender inequality and harm to women. Often, the specter of plural marriage involves a polygynous union, between one man and more than one woman. A state could simply prohibit such unions given the above-mentioned concerns. Until *Obergefell*, states routinely limited marriage on the basis of sex or gender.³³⁹ Although they may no longer do so with two person unions (this stands to demean gays and lesbians), they could certainly do so with multiple-member unions.³⁴⁰ Under this situation, whereas one man and two women could not marry (given the possible concern of gender inequality and harm), three men could. And a state could permit such a marriage and simultaneously prohibit such a union from adopting or raising children, if there is a concern about numerosity and parenting. After all, as demonstrated above, the issue of raising children is distinct from the issue of marriage.

Yet, every state currently prohibits marriages among three individuals, even those of the same sex.³⁴¹ This prohibition is telling. It reveals that at least *some*

³³⁵ 135 S. Ct. 2584, 2595 (2015).

³³⁶ See, e.g., Goldscheid, *supra* note 327, at 138; Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Louis J. Virelli III & David S. Leibowitz, “Federalism Whether They Want It or Not”: *The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation After United States v. Morrison*, 3 U. PA. J. CONST. L. 926 (2001).

³³⁷ Den Otter, *supra* note 8, at 1990.

Unless one dogmatically subscribes to the view that all monogamous marriages are better along all dimensions than all multi-person intimate relationships, little imagination is required to appreciate how a plural marriage could be happier, healthier, and more conducive to human flourishing. Not only is that view demonstrably false, it fails to account for the fact that different people have different ideas about intimacy and what is most important to them more generally.

Id. at 1986.

³³⁸ March, *supra* note 8, at 262–68. This section of March’s article discusses “Fairness in the Market for Partners.”

³³⁹ 135 S. Ct. at 2596–97.

³⁴⁰ See, e.g., Yanan Wang, *Utah’s Polygamy Ban Restored in Big Defeat for ‘Sister Wives,’* WASH. POST (Apr. 12, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/04/12/utahs-polygamy-ban-restored-as-sister-wives-lawsuit-declared-moot/> [<http://perma.cc/99C2-NFAV>] (discussing a ruling which “prohibit[s] married people from living with additional partners”).

³⁴¹ Sharon Bernstein, *Appeals Court Restores Utah’s Polygamy Law in ‘Sister Wives’ Case,* HUFFPOST (Apr. 11, 2016, 3:19 PM), <http://www.huffingtonpost.com/entry/sister-wives>

limitations on plural marriage cannot be justified on grounds of gender equality or preventing harm to women. This means that a categorical ban on plural marriage simply rests on the idea that a monogamous union is morally superior to a three-or-more person one violating liberal neutrality. That argument did not suffice in justifying bans on gay marriage, so it should not justify their plural marriage counterparts. If anything, it is precisely the claim about moral superiority that stigmatizes those who may be living in a multiple person union, just as bans on gay marriage stigmatized those same-sex couples living without access to marriage.

In addition to categorical bans on plural marriage, no state recognizes adult unions devoted to caregiving.³⁴² These kinds of unions are not about sexual monogamy, rather they are about domestic and economic cooperation or caring for the physical and emotional needs of a loved one.³⁴³ Drawing from a framework of liberal neutrality, Metz rejects monogamous marriage, arguing that we should remove its sexual or intimate aspect entirely.³⁴⁴ In its place, she argues for an “intimate caregiving union” (ICGU).³⁴⁵ She justifies this kind of union to promote, protect, and regulate intimate caregiving:

Justice and prudence recommend that the state recognize and regulate unions within which intimate care is given and received: families, functional families, and networks of intimate care. Contemporary scholars describe myriad relationships that fall into this category. These include parents and children (biological and de facto); husband and wife; long-term, cohabitating hetero- and homosexual lovers and partners; “lesbigay” units; nonsexually intimate adult units or groups; adult siblings; adult children; and aging parents.³⁴⁶

This kind of ICGU would be open to “sexually intimate unions” and “nonsexually intimate” ones.³⁴⁷ An ailing grandmother could form an ICGU with her granddaughter, for instance, providing a legal status that would support her caregiving.

Consider a platonic, caregiving union between adult siblings of the same sex. No state would permit such individuals to marry.³⁴⁸ Generally, prohibitions on adult

-case-utah_US_570bF74ae4b0885fb50dc415 [http://perma.cc/B59R-Y5XC] (“Polygamy is illegal in all 50 states.”).

³⁴² See *Legal Issues for LGBT Caregivers*, FAM. CAREGIVER ALLIANCE, <https://www.caregiver.org/legal-issues-lgbt-caregivers> [http://perma.cc/R4NV-Y5DV] (last visited Apr. 12, 2018) (discussing the value of caregiver relationships and the legal implications associated therewith).

³⁴³ See Metz, *supra* note 8, at 197, 210 (stating that ICGUs achieve “[l]egitimate public welfare goals traditionally treated through marriage”).

³⁴⁴ METZ, *supra* note 8, at 114 (contending that “[t]he existing relationship between marriage and the state threatens liberty and equality”).

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 120–21 (footnotes omitted).

³⁴⁷ *Id.* at 135.

³⁴⁸ *Incest Laws in the United States*, UCSB, <http://www.soc.ucsb.edu/sexinfo/article/incest>

incestuous relationships hinge on, borrowing Andrew March's language, "the creation of bad lives,"³⁴⁹ namely children with severe birth defects. It is worth noting that March argues that this concern may be too weak to justify such a limitation.³⁵⁰ But even more telling is that this kind of reason cannot be offered in good faith. It would only prohibit two blood-related opposite-sex siblings from marrying.³⁵¹ Two adult brothers (or two sisters) who seek to marry in order to take care of each other or to avail themselves of the other material benefits of marriage do not trigger any possible concerns of procreation or the "creation of bad lives." Yet, no state currently recognizes this kind of platonic relationship. Marriage law refuses to recognize such alternative unions that may be important to a range of families and personal relationships.

This means every state's *categorical* ban on consanguinity, one that includes the case of two sisters or two brothers, must be based on the idea that a sexually monogamous union of non-blood-related individuals is simply morally superior to a platonic union of two blood-related ones.³⁵² This categorical prohibition on non-sexually intimate unions suggests that such unions are inferior, just as the categorical ban on gay marriage suggested that those unions were inferior. Even with *Obergefell*, marriage law refuses to recognize alternative unions that may be important to a range of families and personal relationships.

C. The Problem of the Crime of Adultery

The state may decide to protect this monogamous union not just by restricting who may marry. It may even infringe our sexual liberty by criminalizing adultery, defined as a married individual having sex with someone other than his or her spouse.³⁵³ The Commonwealth of Virginia prosecuted John R. Bushey, Jr., a former town attorney, for adultery in 2004.³⁵⁴ Bushey, who was married for eighteen years, had consensual sex with a woman who was not his wife.³⁵⁵ He violated a Virginia criminal law that defined adultery as voluntarily having "sexual intercourse with any person

-laws-united-states [https://perma.cc/M397-HGZY] (last updated Mar. 10, 2016) ("In all states, incestuous marriages are illegal." (footnote omitted)).

³⁴⁹ Andrew F. March, *What Lies Beyond Same-Sex Marriage? Marriage, Reproductive Freedom and Future Persons in Liberal Public Justification*, 27 J. APPLIED PHIL. 39, 49 (2010).

³⁵⁰ *Id.* at 49–54. This section of March's article deals extensively with the "Creation of Bad Lives" idea.

³⁵¹ *Id.* at 53 (discussing punishments designed to deter siblings from marrying).

³⁵² See generally Will Baude, *When Is Ignorance of Consanguinity Bliss?*, VOLOKH CONSPIRACY (Aug. 20, 2013, 4:43 PM), <http://volokh.com/2013/08/20/when-is-ignorance-of-consanguinity-bliss/> [http://perma.cc/U6D3-JKAT] (discussing a situation where a man unwittingly married his cousin).

³⁵³ *Adultery*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/adultery> [http://perma.cc/9JVC-A6YA] (last updated Apr. 4, 2018).

³⁵⁴ Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1.

³⁵⁵ *Id.*

not his or her spouse.”³⁵⁶ The statute classifies adultery as a Class 4 misdemeanor.³⁵⁷ Bushey ultimately plead guilty, accepting twenty hours of community service.³⁵⁸

Twenty states in the United States currently criminalize adultery,³⁵⁹ sometimes with a possible punishment that can include jail time.³⁶⁰ Although these laws are rarely enforced,³⁶¹ states may decide to bring prosecutions based on them, as did Virginia. The mere existence of these laws means that the threat of enforcement is always possible. In fact, in a 2015 Gallup Poll, 92 percent of Americans consider adultery morally unacceptable.³⁶² It is worth noting that adultery prosecutions are more common in the military.³⁶³ This invites us to evaluate the reach of a putative liberal state in our personal affairs in light of marriage. Consider that until 2003 when the Court

³⁵⁶ VA. CODE ANN. § 18.2-365 (2018) (defining the crime and penalty for committing adultery).

³⁵⁷ *Id.*

³⁵⁸ Turley, *supra* note 354.

³⁵⁹ See ALA. CODE § 13A-13-2 (2018); ARIZ. REV. STAT. ANN. § 13-1408 (2017); FLA. STAT. § 798.01 (2017); GA. CODE ANN. § 16-6-19 (2017); IDAHO CODE § 18-6601 (2018); 720 ILL. COMP. STAT. 5/11-35 (2018); MD. CODE ANN., CRIM. LAW § 10-501 (West 2018); MASS. GEN. LAWS ch. 272, § 14 (2018); MICH. COMP. LAWS § 750.30 (2018); MINN. STAT. § 609.36 (2017); MISS. CODE ANN. § 97-29-1 (2017); N.Y. PENAL LAW § 255.17 (McKinney 2018); N.C. GEN. STAT. § 14-184 (2018); N.D. CENT. CODE § 12.1-20-09 (2017); OKLA. STAT. tit. 21, § 871 (2018); 11 R.I. GEN. LAWS § 11-6-2 (2017); S.C. CODE ANN. § 16-15-60 (2018); UTAH CODE ANN. § 76-7-103 (West 2017); VA. CODE ANN. § 18.2-365 (2018); WIS. STAT. § 944.16 (2018).

³⁶⁰ See Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SUFFOLK U.L. REV. 837, 840 (2006) (exploring the impact of *Lawrence* and discussing the continuing viability of adultery statutes); see also DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 71 (2009) (stating that most states do not actively prosecute adultery even though twenty-three states (at the time of this book's publication) have laws that criminalize the conduct).

³⁶¹ Ethan Bronner, *Mass. Among 23 States Where Adultery Is a Crime, but Rarely Prosecuted*, BOS. GLOBE (Nov. 15, 2012), <https://www.bostonglobe.com/news/nation/2012/11/15/adultery-still-crime-states-including-mass/KiIPGRcFnAeT4CGmenFTKM/story.html> [<https://web.archive.org/web/20171002062925/https://www.bostonglobe.com/news/nation/2012/11/15/adultery-still-crime-states-including-mass/KiIPGRcFnAeT4CGmenFTKM/story.html>].

³⁶² See Andrew Dugan, *Once Taboo, Some Behaviors Now More Acceptable in U.S.*, GALLUP (June 1, 2015), <http://news.gallup.com/poll/183455/once-taboo-behaviors-acceptable.aspx> [<https://web.archive.org/web/20180122082644/http://news.gallup.com/poll/183455/once-taboo-behaviors-acceptable.aspx>].

³⁶³ See Melissa Ash Haggard, *Adultery: A Comparison of Military Law and State Law and the Controversy This Causes Under Our Constitution and Criminal Justice System*, 37 BRANDEIS L.J. 469, 470, 476–77 (1998) (emphasizing nonetheless the difficulty of prosecuting adultery in the Armed Forces); see also James M. Winner, *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073 (1998) (assessing the constitutionality of the military's adultery law).

struck down sodomy laws, 13 states prohibited that sexual practice.³⁶⁴ Even though these laws were also often not enforced, we would consider their very presence as infringements on our sexual liberty. The mere existence of sodomy laws was significant. Such laws revealed principled limits on the power of a liberal state in regulating our intimate lives.³⁶⁵

The case of laws criminalizing adultery invites us to do the same, bringing into sharper focus the illiberal implications of marriage as a monogamous union. Those few scholars who have analyzed the constitutionality of laws prohibiting adultery suggest that such laws are unconstitutional given the Court's decision in *Lawrence*, where the Court held that mere moral interests were insufficient to uphold laws criminalizing gay sex.³⁶⁶ This Article argues, in contrast, that as long as monogamy is central to marriage, adultery is not based on mere moral considerations, even in the case of an "open" marriage. This suggests a state may constitutionally criminalize adultery not on the basis of mere moral considerations, but to protect governmental interests that arise from marriage as a monogamous union.

Lawrence makes clear that the Constitution secures a sphere of sexual liberty for everyone, married and unmarried alike.³⁶⁷ In his dissent, Scalia states that the majority opinion renders suspect laws "against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."³⁶⁸ Without analyzing each of these types of activities, it is relatively easy to see that *Lawrence* invalidates laws that criminalize fornication, gay sex or sex among three or more individuals.³⁶⁹ Ultimately, and this Article assumes

³⁶⁴ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

³⁶⁵ *See generally id.*

³⁶⁶ *See id.* at 577–78 ("Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). *See generally* Cohen, *supra* note 69 (finding that the Supreme Court's decision in *Lawrence* casts doubts on adultery bans); JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127 (2014) (finding that adultery bans continue in America despite their uncertain constitutionality); Viator, *supra* note 360 (discussing *Lawrence*'s impact on the viability of adultery statutes).

³⁶⁷ 539 U.S. at 578 ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

³⁶⁸ *Id.* at 599 (Scalia, J., dissenting).

³⁶⁹ *See* *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005) ("The liberty interest the Court recognized in *Lawrence* was for adults engaging in consensual sexual relations in private . . ."); *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1222–23 (D. Utah 2013) ("The court finds that the cohabitation prong does not survive rational basis review under the substantive due process analysis.").

as much, attempts to criminalize these kinds of non-commercial, “consensual sexual activity”³⁷⁰ would raise constitutional problems under *Lawrence*.³⁷¹ This is because such laws rest only on contested moral premises that some, but certainly not all, Americans share. In these cases, the state problematically seeks to prohibit mere moral wrongs. The rejection of legal moralism is a familiar feature of much liberal theory, one that goes back to the Devlin-Hart debate over morals legislation³⁷² and Mill’s argument about self-regarding actions.³⁷³ *Lawrence*, and cases like it, inform this feature.³⁷⁴

Adultery, however, poses a more difficult problem given that it often involves an innocent spouse who may be harmed by the infidelity. This is why Richard Wasserstrom argues that in such cases, adultery can be immoral on one or both of two distinct grounds:

The first is that things like promise-breaking and deception are just wrong. The second is that adultery involving promise-breaking

³⁷⁰ See, e.g., *Seegmiller v. Laverkin City*, 528 F.3d 762, 769 (10th Cir. 2008) (“Broadly speaking, no one disputes a right to be free from government interference in matters of consensual sexual privacy.”); *Anderson v. Morrow*, 371 F.3d 1027, 1032–33 (9th Cir. 2004) (“The *Lawrence* Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct.”); *Buhman*, 947 F. Supp. 2d at 1223 (“Consensual sexual privacy is the touchstone of the rational basis review analysis in this case, as in *Lawrence*.”); *United States v. Goings*, 72 M.J. 202, 206 (C.A.A.F. 2013) (“No one disagrees that wholly private and consensual sexual activity, without more, falls within *Lawrence*.”); *Toghill v. Commonwealth*, 768 S.E.2d 674, 679 (Va. 2015) (“[T]he *Lawrence* opinion clearly states that individuals are entitled to respect for their private lives such that adults are entitled to engage in private, consensual, noncommercial sexual conduct without intervention of the government.”); *In re Williams*, 253 P.3d 327, 337 (Kan. 2011) (citing *Lawrence* for the proposition that “a state may not prohibit two adults from engaging in private, consensual sexual practices”); *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002) (“[T]he fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults.”); *State v. Pope*, 608 S.E.3d 114, 116 (N.C. Ct. App. 2005) (“Therefore, the *Lawrence* Court held that the Due Process Clause of the Fourteenth Amendment protects the right of two individuals to engage in fully and mutually consensual private sexual conduct.”).

³⁷¹ This Article leaves the issue of prostitution to one side, realizing that liberals may disagree over whether commercial sexual intimacy is part of this sphere of protected liberty. See generally PETER DE MARNEFFE, *LIBERALISM AND PROSTITUTION* (2010) (evaluating paternalism, prostitution, and government moralism).

³⁷² See Lord Patrick Devlin, *Morals and the Criminal Law*, in *MORALITY AND THE LAW* 24 (Richard A. Wasserstrom ed., 1971); H. L. A. Hart, *Immorality and Treason*, in *MORALITY AND THE LAW*, *supra*, at 49; see also 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988) (discussing legal moralism).

³⁷³ See generally JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* (Stefan Collini ed., 1989).

³⁷⁴ See *Lawrence v. Texas*, 539 U.S. 558, 590, 599 (Scalia, J., dissenting) (stating that the Court’s decision “effectively decrees the end of all morals legislation”).

or deception is wrong because it involves the straightforward infliction of harm upon another human being—typically the non-adulterous spouse—who has a strong claim not to have that harm so inflicted.³⁷⁵

But even this argument does not automatically make adultery subject to state criminalization. After all, there are many situations where individuals break promises or deceive that do not warrant state interference. Two individuals may be unmarried but dating and one partner decides to cheat. This may invite the same kind of harm to the non-cheating partner as the harm felt by the non-cheating spouse. Or consider two individuals who are best friends where one friend intentionally betrays the other by disclosing a personal secret. Here, too, there is promise breaking and the infliction of harm. But, in neither of these cases, would we say that this is a wrong inviting state coercion.³⁷⁶ We may consider these immoral or wrong acts but not acts that warrant state action, let alone the imposition of the criminal law. After all, the state does not recognize friendships or other kinds of non-married relationships.³⁷⁷

As long as the state recognizes and regulates marriage, adultery invites criminalization. It is unlike betrayal by a friend, precisely because, other than marriage, the state does not recognize friendship or any other kind of intimate union or relationship with a legal status. By singling out the commitment to lifetime monogamy as part of the civil institution of marriage, a married individual's decision to be intimate with someone other than his or her spouse is now very much an issue of public or state concern. This is why Michael J. Wreen explains that “the concept of adultery is logically parasitic on that of marriage; it is defined in terms of marriage, and adulterous behavior [is] logically impossible in the absence of marriage.”³⁷⁸ Some legal cases have even viewed adultery as “an offense against the marriage relation” itself,³⁷⁹ viewing adultery as detrimental to this civil institution.

³⁷⁵ Richard Wasserstrom, *Is Adultery Immoral?*, 5 PHIL. F. 513, 527 (1974); see also Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 CRIM. L. & PHIL. 5, 8 (2007) (discussing the harm principle).

³⁷⁶ See, e.g., Jeremy Waldron, *A Right to Do Wrong*, 92 ETHICS 21 (1981). After all, the Model Penal Code, proposed by the American Law Institute in 1962, recommends the decriminalization of adultery, because adultery is a kind of “private immorality” that “should be beyond the reach of the penal law.” MODEL PENAL CODE § 213.6 note on adultery and fornication, at 439 (AM. LAW INST., Official Draft and Revised Comments 1980).

³⁷⁷ See *supra* notes 298–352 and accompanying text.

³⁷⁸ Michael J. Wreen, *What's Really Wrong with Adultery*, 3 INT'L J. APPLIED PHIL. 45, 46 (1986).

³⁷⁹ *S. Sur. Co. v. Oklahoma*, 241 U.S. 582, 586 (1916); see also *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1474 (D. Utah 1995) (discussing the history of prosecuting adultery as a crime against marriage); *Commonwealth v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983) (holding that adultery is an offense against the institution of marriage); *State v. Brooks*, 254 N.W. 374, 375 (Wis. 1934) (holding that adultery is a “transgression against the marriage relation”).

It is important to realize that this conclusion is unavoidable, even in the case of an “open” marriage, where the spouses agree to be sexually intimate with others. Here, it is difficult to say that sex with your unmarried partner is immoral. There is no cheating or lying involved, and both parties have agreed to it.

However, and this is the underlying sting of this part of the Article, this could still be subject to criminalization. Those states that criminalize adultery do not provide a defense for being in an “open” marriage.³⁸⁰ Bushey, for instance, could not have invoked the consent of his wife to thwart a possible prosecution of adultery based on the Virginia statute.³⁸¹ Monogamy is central to marriage. This explains why all fifty states adopt state prohibitions on numerosity and consanguinity as discussed above.³⁸² If a state refuses to permit plural marriage in order to enforce the monogamous nature of marriage, so too may a state decide to deter an “open” marriage.³⁸³ That is, the state may seek to prevent those who do not make a lifetime commitment to monogamy to avail themselves of the legal benefits of marriage. Now it may be difficult for the state to stop two individuals from marrying who later decide not to be monogamous. Imposing a numerosity or relational requirement to marriage is far easier to enforce. However, this does not mean that the state may not deter such adulterous behavior by, for instance, passing laws that criminalize this kind of sexual activity even in the case of an “open” marriage. Contra Scalia, laws criminalizing adultery do not simply rest on moral sentiments like laws that would ban gay sex or sex among three individuals.³⁸⁴

Admittedly, the criminal law is obviously the most powerful mechanism by which to prohibit or deter certain behavior. It no doubt represents a serious infringement of liberty and in precisely that area which involves the most personal and intimate of decisions. But it is hardly problematic for the state to deploy the criminal law to protect governmental or state interests. Joel Feinberg, for instance, interprets Mill’s classic Harm Principle as permitting the state to prevent this type of harm:

Governmental interests are “those generated in the very activities of governing,” such as collecting taxes, registering aliens, conscripting an army, customs-inspecting, conducting trials and court hearings, operating prisons, etc. These are the interests violated in such “impersonal crimes” as tax fraud, failure to register, perjury, bribing a governmental official, and escaping from prison.³⁸⁵

³⁸⁰ See, e.g., VA. CODE ANN. § 18.2-365 (2018).

³⁸¹ See generally Turley, *supra* note 354 (recalling the details and results from the Bushey case).

³⁸² Laura A. Rosenbury, *Marital Status and Privilege*, 16 J. GENDER RACE & JUST. 769, 771 (2013) (“All states mandate that members of couples . . . are [not] within a certain degree of consanguinity or legal relation.”).

³⁸³ See *id.* at 771–72 (arguing that the state serves as the “exclusive gatekeeper of legal marriage”).

³⁸⁴ See *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting).

³⁸⁵ 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 63 (1984) (footnote omitted). In fact, Roberts concludes that Kennedy’s opinion operates at least

These kinds of infringements on liberty are justifiable given the interests they secure. In criminalizing adultery, the state also seeks to protect certain important governmental interests, in this case the institution of marriage. To be clear, this Article is not suggesting that a state must deter adulterous behavior, even in the case of an “open” marriage, by passing criminal legislation. Rather, *if* a state decides to protect marriage by outlawing adultery, such laws do not rest on the kind of moral reasons that are otherwise constitutionally inadmissible.

Consider that federal law provides a penalty of five years’ imprisonment and a \$250,000 fine for “[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws.”³⁸⁶ One of the benefits marriage provides is a privileged immigration status.³⁸⁷ To ensure that this benefit is only available to couples that have made a genuine lifetime commitment, the government deploys the criminal law to deter fraudulent marriage, even imposing a penalty of jail time.³⁸⁸ Without civil marriage, the government would have no occasion to pass such legislation. It is precisely because the state recognizes marriage, providing crucial benefits, responsibilities, and privileges that accompany this legal status, that the state has an interest in protecting that “transcendent” status.³⁸⁹ The crime of marriage fraud is parasitic on the state’s recognition of marriage.

If there is no constitutional problem with deploying the criminal law to deter fraudulent marriages for purposes of immigration, why may the state not deter individuals from violating their commitment to lifetime monogamy? This commitment is not an easy or flippant commitment. According to *Obergefell*, “[no] union is more profound than marriage.”³⁹⁰ The Court goes on to say that “[i]n forming a marital union, two people become something greater than once they were,” as marriage is “one of civilization’s oldest institutions.”³⁹¹ Adultery poses a problem that goes to the core of this institution. So if we care about preserving a sphere of sexual liberty, we ought to contest, not celebrate or support, marriage.

For, it is precisely in securing or supporting this commitment that a state may decide to pass and then enforce criminal laws in order to deter adultery, including deterring individuals from being in an “open” marriage. The Model Penal Code considers the criminal law to be an “exceedingly blunt instrument with which to attempt

in part on the acceptance of this principle. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting) (“Then and now, this assertion of the ‘harm principle’ sounds more in philosophy than law.”).

³⁸⁶ 8 U.S.C. § 1325(c) (2012).

³⁸⁷ Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1634 (2007) (noting the federal immigration system passes judgment on these cases, not traditional family law courts).

³⁸⁸ See 8 U.S.C. § 1325(c).

³⁸⁹ See *Lawrence*, 539 U.S. at 562.

³⁹⁰ 135 S. Ct. at 2608.

³⁹¹ *Id.*

to monitor such [marital] relationships.”³⁹² There are, of course, other ways to do so that may not involve the criminal law. Instead, a state could reform the no-fault divorce regime, where, as it stands now, individuals may procure a divorce for any reason or no reason at all.³⁹³ Making divorce more difficult may be one way to strengthen or protect the institution of marriage.³⁹⁴ Eric Rasmusen considers civil, as well as criminal penalties for adultery, from a perspective of efficiency, ultimately concluding that the best penalty will depend on empirical judgments.³⁹⁵ Such judgments will also include what type of punishment should attach to a crime of adultery.³⁹⁶ It may very well be appropriate to consider adultery a misdemeanor on par with loitering or public intoxication.

The point is that, given the state’s recognition of marriage, laws criminalizing adultery are not constitutionally equivalent to laws that would criminalize gay sex, premarital sex, or sex among three or more individuals. Given the nature of marriage as a monogamous union, the state has an interest, perhaps even a compelling one,³⁹⁷

³⁹² MODEL PENAL CODE § 213.6 note on adultery and fornication, at 438 (AM. LAW INST., Official Draft and Revised Comments 1980).

³⁹³ See Elizabeth S. Scott, *Marital Commitment and the Legal Regulation of Divorce*, in *THE LAW AND ECONOMICS OF MARRIAGE & DIVORCE* 35 (Antony W. Dnes & Robert Rowthorn eds., 2002).

³⁹⁴ *Id.* at 36 (arguing that the no-fault divorce regime “has destabilized marriage and undermined the ability of couples to achieve their goals for their relationship”).

³⁹⁵ See Eric Rasmusen, *An Economic Approach to Adultery Law*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE*, *supra* note 393, at 70, 89 (“Civil damages, criminal law, and self-help all have their advantages and disadvantages. The law need not restrict itself to one of these Which laws are best depends heavily on empirical magnitudes such as the strength of public offense, the amount of damage to injured spouses, and the assets available for paying judgments.”).

³⁹⁶ See *id.*

³⁹⁷ Conventional constitutional wisdom contends that the Court subjects laws that violate fundamental rights, such as the right to privacy, to strict scrutiny, where the law must have a compelling purpose and be narrowly tailored to that purpose. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that “when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments” or when it discriminates against “discrete and insular minorities,” a stricter standard than rational review is merited). But see JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 238–39 (2013) (revealing the “myth of strict scrutiny for fundamental rights”: “[D]ue process cases protecting liberty and autonomy—from *Meyer v. Nebraska* (1923) through *Casey* (1992) and *Lawrence* (2003) . . . show that due process jurisprudence is not absolutist nor does it reflect an impoverishment of judgment. None of these cases applies the framework [of strict scrutiny]. To the contrary, these cases reflect what *Casey* and Justice Harlan called ‘reasoned judgment’ concerning our ‘rational continuum’ of ‘ordered liberty.’”). For an argument that strict scrutiny is problematic and unnecessary in the case of individual fundamental rights, see generally BEDI, *supra* note 45. This Article largely avoids applying the strict versus rational review standards, focusing instead on the justificatory implications for laws criminalizing adultery given the existence of marriage as a monogamous union.

to protect what Kennedy calls a “central institution of the Nation’s society.”³⁹⁸ Hence, it is difficult to claim that laws against adultery, even in the case of an “open” marriage, are based only on moral considerations. These laws may very well be constitutional. Given the fact that marriage is a monogamous union, the state may now seek to protect it by enacting and enforcing these laws, as Virginia did.³⁹⁹

If individuals such as John Bushey do not desire to be subject to laws against adultery,⁴⁰⁰ and hence maintain the private nature of their intimate relationships, they need simply not get married. The state does not require an individual to marry. If Bushey desires to live in a polyamorous relationship, he could refrain from marriage. An investigation into marriage fraud requires that the married couple answer personal, intimate questions about their relationship.⁴⁰¹ Imagine if this couple invoked the protection of privacy to thwart such an investigation, arguing that these kinds of questions are illegitimately intrusive. We would rightly dismiss their objection. By availing themselves of a legal status that comes with certain governmental benefits and privileges, including a favored immigration status, the couple has invited the state into their relationship.

Put differently, once they chose to marry, they have forfeited in certain respects the private nature of their relationship because the state seeks to protect the institution of marriage. The state has an interest in ensuring that marriage benefits are not being taken advantage of by a relationship (such as an “open” one) where the individuals do not seek a genuine commitment to lifetime monogamy.⁴⁰² The legal status of marriage invites the state to subject what would otherwise be an intimate relationship to regulation.

Laws that seek to prohibit the private, intimate relations of consenting adults are often seen as paradigmatically illiberal, resting on contested moral or religious premises on what constitute the good life.⁴⁰³ Martha Nussbaum, in her argument against sodomy laws, suggests that “[i]n addition to same-sex sexual acts, adultery, fornication, and masturbation” involve “consensual conduct in seclusion” that the state ought not

³⁹⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

³⁹⁹ See Turley, *supra* note 354 (discussing the 2004 prosecution of John Bushey for the charge of adultery in Virginia).

⁴⁰⁰ See *id.*

⁴⁰¹ See Nina Bernstein, *Could Your Marriage Pass the Test?*, N.Y. TIMES (June 11, 2010, 8:45 PM), <http://cityroom.blogs.nytimes.com/2010/06/11/marriage-test/?ref=nyregion>; (describing questions reported by attorneys present during such marriage fraud interviews, including “If you are lying in bed, which side does your spouse sleep on?” and “Do you and your spouse use birth control? What kind?”).

⁴⁰² Cf. *Open Marriage*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/open%20marriage> [<https://perma.cc/CWN5-P7WK>] (last visited Apr. 12, 2018) (defining open marriage as “a marriage in which the partners agree to let each other have sexual partners outside the marriage”).

⁴⁰³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (describing how historical condemnation of homosexual conduct “has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family”).

to prohibit.⁴⁰⁴ But we undermine this liberty if we permit states to recognize marriage. Marriage opens the way for the state to protect the institution by prohibiting certain kinds of consensual sex. This represents a crucial illiberal implication of marriage. It invites states to criminalize what consenting adults do in their intimate lives. Marriage, in turn, permits states to infringe upon sexual liberty.

V. IF NOT MARRIAGE, WHAT? CURATIVE STEPS TO LIBERAL NEUTRALITY

This Article has argued that marriage is an illiberal union. In recognizing marriage as a legal status, the state violates liberal neutrality by taking sides in what ought to be each adult's individual decision about how to live their personal life. Part V of this Article reconciles this argument with the Court's affirmation of a fundamental right to marry. It then briefly considers what a state without marriage would look like, especially in light of ensuring equal citizenship for gays and lesbians.

A. State Action and the Fundamental Right to Marry

At first glance, the argument of this Article may seem in tension with the fact that the Court has affirmed a constitutional right to marry.⁴⁰⁵ In some sense this is true: the Court's interpretation of the Constitution is in opposition to a commitment to liberal neutrality. But the right to marry, like other constitutional rights, applies only to actions by the state.⁴⁰⁶

A cornerstone of American constitutional law is the state action doctrine. The Bill of Rights, along with various other constitutional rights, applies only to actions by government actors.⁴⁰⁷ The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."⁴⁰⁸ These first ten amendments and the constitutional rights they contain apply to Congress and (for most) by incorporation to the states.⁴⁰⁹ The Fourteenth Amendment reads in part that "nor shall any State deprive

⁴⁰⁴ NUSSBAUM, *supra* note 220, at 59, 61 ("[T]he time seems to have come when we can all agree that some intimately personal matters are simply not matters for the police to control . . .").

⁴⁰⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (recognizing a fundamental right to marriage and extending said right to same-sex couples).

⁴⁰⁶ As per the "state action doctrine," "absent some action on the part of a state entity . . . there can be no constitutional violation." *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255 (2010).

⁴⁰⁷ See *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883) ("The first section of the Fourteenth Amendment . . . is prohibitory in its character . . . It is State action of a particular character that is prohibited. Individual invasion of individual rights [by private actors] is not the subject-matter of the amendment.").

⁴⁰⁸ U.S. CONST. amend. I.

⁴⁰⁹ In different words, these amendments place no direct limitations on private entities. See U.S. CONST. amends. I–X.

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁴¹⁰ These constitutional rights apply only to governmental actors.⁴¹¹ *The Civil Rights Cases*,⁴¹² for instance, make clear that the Fourteenth Amendment reaches only actions by the state, not actions by private or non-state actors.⁴¹³

This state action requirement means with no such state action, there is no constitutional violation.⁴¹⁴ Put simply, the Constitution generally only limits what a state may do. In fact, in two important cases, the Court has rejected the argument that the Constitution even requires the state to protect one’s life. In *DeShaney v. Winnebago*,⁴¹⁵ the Court held that a Wisconsin County Department of Social Services (DSS) did not violate the Constitution by failing to protect a child who was beaten and placed in a coma by his father.⁴¹⁶ Over a four-year period, Joshua DeShaney was in the custody of his father and was beaten on numerous occasions.⁴¹⁷ During that period, DSS made numerous visits to the father’s house, documenting the abuse.⁴¹⁸ But DSS did not remove the child from the home.⁴¹⁹ Ultimately, the father inflicted such severe injuries on Joshua DeShaney that he placed the boy in a coma.⁴²⁰ Randy DeShaney, the boy’s father, was tried and convicted for child abuse.⁴²¹ He committed a crime under Wisconsin law.⁴²²

⁴¹⁰ U.S. CONST. amend. XIV, § 1.

⁴¹¹ *Id.* (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”); *see also supra* note 407 and accompanying text.

⁴¹² 109 U.S. 3 (1883).

⁴¹³ *Id.* at 10–11; *see also* Chemerinsky, *supra* note 237, at 519–35 (arguing that the state action doctrine does not comport with modern jurisprudence); Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 BUFF. L. REV. 455, 486–505 (2011) (discussing an alternative interpretation based on “penumbras and emanations” in which state values permeate into corporate activity); Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 143 (1991) (arguing that state action, “as presently understood,” is “drastically misconceived” and positing an “abolitionist” interpretation that constitutes a state action when the state fails in its affirmative duty to protect citizens from discrimination, even by private actors). *But see* *Shelley v. Kraemer*, 334 U.S. 1, 4–5, 23 (1948) (holding that the enforcement of private agreements among property owners that required subsequent owners of the pertinent parcels to be white violated the Equal Protection Clause).

⁴¹⁴ In different words, a state action is required in order for there to be a constitutional violation.

⁴¹⁵ 489 U.S. 189 (1989).

⁴¹⁶ *Id.* at 191–93.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 192–93.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 193.

⁴²¹ *Id.*

⁴²² To wit, the crime of child abuse. *Id.*

The question faced by the Court was whether DSS violated the Due Process Clause by depriving the child of his rights to life or liberty.⁴²³ The Court held there was no presumptive constitutional violation, because there was no state action⁴²⁴:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.⁴²⁵

In rejecting the claim that there was a constitutional violation, the Court makes clear that the Due Process Clause's purpose "was to protect the people from the State, not to ensure that the State protected them from each other."⁴²⁶ "The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes."⁴²⁷ And more recently, in *Castle Rock v. Gonzales*,⁴²⁸ the Court held that a Colorado police department did not violate the Constitution by failing to enforce a restraining order, a failure that led to the murder of three girls by their father.⁴²⁹ Jessica Gonzales secured a restraining order against Simon Gonzales, her estranged husband and father of their three children.⁴³⁰ Gonzales notified the police that her husband had unexpectedly taken the children.⁴³¹ The police failed to investigate and later that night he killed the children, only to be killed by the police in a shoot-out later.⁴³² Citing *DeShaney*, the Court held that this did not violate the Constitution and in particular the Due Process Clause:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations.⁴³³

⁴²³ See *id.* at 194–95, 197 n.4 (stated differently, "whether the Due Process Clause imposed upon the State an affirmative duty to protect").

⁴²⁴ See *id.* at 195.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 196.

⁴²⁷ *Id.*

⁴²⁸ 545 U.S. 748 (2005).

⁴²⁹ *Id.* at 751–54.

⁴³⁰ *Id.* at 751–53. For mention of Simon's name, see *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1134 (10th Cir. 2004) (O'Brien, J., dissenting).

⁴³¹ *Castle Rock*, 545 U.S. at 753.

⁴³² *Id.* at 753–54.

⁴³³ *Id.* at 768.

With no state action—the Colorado police department failed to act—there is no constitutional violation.⁴³⁴ Even the dissenting opinion in *Castle Rock*, like its counterpart in *DeShaney*, does not affirm a requirement that the state act under the Constitution to protect the life or liberty of its citizens.⁴³⁵ “It is perfectly clear [that the] Federal Constitution itself [does not grant] respondent or her children any individual entitlement to police protection.”⁴³⁶ Both *DeShaney* and *Castle Rock* held that there was no violation of a constitutional right to life, liberty, or due process.⁴³⁷

This means that with no state action, there is no constitutional violation, as the Constitution generally only limits what a state may do, not dictate what it must do.⁴³⁸ Under that framework, a state that simply refuses to marry individuals does not violate the right to marry. Consider that in all the instances where the Court has declared that the state has violated a right to marry, the constitutional question concerned state action that limited marriage in some way: on the basis of race (*Loving*⁴³⁹), on the basis of prison status (*Safley*⁴⁴⁰), or on the basis of sexuality (*Obergefell*⁴⁴¹). These cases contemplated access to marriage. That is, in these cases, the state treated individuals unequally in granting marriage licenses. None of these cases concerned an instance where the state simply failed to issue marriage licenses altogether. As Cass Sunstein rightly points out: a right to marry is “an individual right of access to the official institution of marriage *so long as the state provides that institution*.”⁴⁴²

With no state action, with no such “official institution,” there is no presumptive constitutional infraction. This is because constitutional rights are negative in character. Rights like the rights to privacy,⁴⁴³ free speech,⁴⁴⁴ religion,⁴⁴⁵ or the right to bear

⁴³⁴ For discussion on the state action requirement, see *supra* notes 406–14 and accompanying text.

⁴³⁵ *Castle Rock*, 545 U.S. at 773 (Stevens, J., dissenting); *DeShaney v. Winnebago*, 489 U.S. 189, 203–04 (1989) (Brennan, J., dissenting).

⁴³⁶ *Castle Rock*, 545 U.S. at 773 (Stevens, J., dissenting).

⁴³⁷ *Id.* at 768 (majority opinion); *DeShaney*, 489 U.S. at 194–95.

⁴³⁸ See *DeShaney*, 489 U.S. at 195 (“The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”).

⁴³⁹ See 388 U.S. 1 (1967).

⁴⁴⁰ See 482 U.S. 78 (1987).

⁴⁴¹ See 135 S. Ct. 2584 (2015).

⁴⁴² Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2096 (2005) (emphasis removed); see also *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012) (upholding district court’s invalidation of Proposition 8, a California amendment banning gay marriage), *vacated*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (dismissing appeal for lack of standing). The Ninth Circuit reiterated: “[T]he Constitution [does] not compel the state to confer [marriage] in the first place.” *Perry*, 671 F.3d at 1081.

⁴⁴³ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .”).

⁴⁴⁴ See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

⁴⁴⁵ See *id.* (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

arms⁴⁴⁶ all constrain state action. That is, a state violates them when it acts in a particular way, when it passes certain laws and policies. The right to privacy, for instance, does not require that the state do anything. It only limits the kinds of laws the state may pass, laws that for instance ban the use of contraception⁴⁴⁷ or restrict a woman's liberty to procure an abortion.⁴⁴⁸ The Constitution does not contain positive rights, rights that require the state to provide a certain good or benefit. Only when the state acts do constitutional rights become relevant. So if a state banned marriages, passing a law that no private group could "marry" its members, this may very well violate a fundamental right to marry. But refusing to recognize a private or religious marriage means the state simply refuses to do something. With no state action, the Constitution does not seem to apply.

B. Consequences of Abolishing Marriage: Private Contract and the State's Expressive Power

But if the state gets out of the marriage "business," and current marriage laws are abolished, what do we replace marriage with? This is an important question, one that this Article does not seek to explicate fully. Rather, it discusses some of the consequences of disestablishing marriage. One facet of this argument is the status of dependents, and in particular children, who may benefit from a legal status. This is why Metz, in part, argues for an intimate caregiving status, as outlined above.⁴⁴⁹ This Article largely leaves the question of children and the state's power to ensure their protection in familial or organization units to one side. This is because as a matter of constitutional law, the fundamental right to marry is not tied to procreation or the raising of children.⁴⁵⁰ The Court, as noted above, rejects that assertion in both *Safley* and *Obergefell*.⁴⁵¹ Consequently, this Article focuses only on those relationships that arise among adults. This Article has argued that as a matter of liberal neutrality, the state's recognition of marriage as a union between two adults is illiberal. The motivating question of this section is what to replace that status with.

In unraveling marriage, the state could leave adults to deploy the regime of property and contract law to manage their personal and intimate affairs. Martha Fineman, a prominent proponent of this view, argues:

[W]e should abolish marriage as a legal category and with it any privilege based on sexual affiliation. . . . There would be no

⁴⁴⁶ See U.S. CONST. amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed.").

⁴⁴⁷ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁴⁴⁸ See *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁴⁹ See *supra* notes 343–47 and accompanying text (discussing Metz's proposal to remove the sexual, intimate aspect entirely).

⁴⁵⁰ See *supra* notes 101–13, 238–39, 286–309 and accompanying text.

⁴⁵¹ See *supra* notes 101–13, 238–39, 286–309 and accompanying text.

special legal rules governing the relationships between husband and wife or defining the consequences of the status of marriage as now exist in family law. In fact, these categories would no longer have any legal meaning at all. Instead, the interactions of . . . sexual affiliates would be governed by the same rules that regulate other interactions in our society—specifically those of contract and property, as well as tort and criminal law. . . . Of course, people would be free to engage in “ceremonious” marriage; such an event would, however, have no *legal* (enforceable in court) consequences. If they didn’t execute a separate contract, there would be no imposed terms as now operate in the context of marriage. Any legal consequences would have to be the result of a separate negotiation.⁴⁵²

If the state were no longer in the business of marriage, this would leave marriage as a private good to be contracted for like other goods in the marketplace. It would permit the most expansive view of liberty. The state would not privilege any kind of relationship—sexual or otherwise—over any other. This has the upshot of ensuring that the state does not take sides in our personal lives. If adults seek to join a plural union, for instance, they need to simply draw up a contract or arrange property to effectuate their plans. In this way, the state is not sanctioning or declaring a particular union as ethically superior over another.⁴⁵³ The state would be neutral among conceptions of how adults ought to arrange their personal and intimate lives. Some individuals may choose not to so contract. Some may decide to have their own religious groups “marry” them. But these ceremonies would have no public or civil status, thereby maintaining a separation of church and state.

Simultaneously, the state would have no interest, under a regime where marriage is a private contract, in regulating the sexual activity of those adults who undertake such contracts. Although she does not discuss the problem of adultery, Fineman realizes: “[T]he end of marriage as a state-regulated and state-defined institution would undermine, perhaps entirely erode, the state interest in controlling and regulating sexual affiliations. If no form of sexual affiliation were preferred, subsidized, and

⁴⁵² FINEMAN, NEUTERED MOTHER, *supra* note 330, at 228–29 (footnote omitted); *see also* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 208 (1982) (arguing that contractual tools and processes can “lend dignity and legitimacy to today’s diverse forms of intimate commitment”). *See generally* Fineman, *Meaning of Marriage*, *supra* note 330, at 57–62.

⁴⁵³ *See* Michael Kinsley, *Abolish Marriage*, SLATE (July 2, 2003, 11:25 AM), http://www.slate.com/articles/news_and_politics/readme/2003/07/abolish_marriage.html [<http://perma.cc/6HCA-98X9>] (arguing, before the legalization of gay marriage: “If marriage were an entirely private affair . . . [g]ay marriage would not have the official sanction of government, but neither would straight marriage. There would be official equality between the two . . .”).

protected by the state, none should be prohibited.”⁴⁵⁴ Adulterous behavior under a regime of contract would be like any other form of private consensual sexual behavior or affiliation. The state would have no reason to prohibit it, because the state would no longer have the civil institution of marriage to protect.⁴⁵⁵

Admittedly, the fate of gays and lesbians are at the cross hairs of the argument of this Article. After all, it is undeniable that as a sexual minority they have suffered from the lack of recognition that comes with the state’s illiberal stamp of marriage.⁴⁵⁶ Heterosexual relationships are not seen as inferior. Straight individuals are not routinely harassed, beaten, bullied or even killed for being straight. But gay relationships are seen as inferior; gay individuals are beaten and bullied for desiring someone of the same sex.⁴⁵⁷ It is precisely the morally and ethically special status of marriage that seeks to challenge this inferiority. Christie Hartley and Lori Watson argue that if there were no state sanctioned marriage, marriage would simply be a private affair, one that would be undertaken primarily by religious institutions.⁴⁵⁸ Under such a regime:

If the dominant religious institutions refuse to recognize same-sex marriage and if, in a society with privatized marriage, these religious institutions are the primary institutions from which citizens (even not very religious ones) seek legitimacy and affirmation of their marital commitments, then these institutions will effectively have a monopoly on the affirmation of marital commitment.⁴⁵⁹

Privatizing marriage has the potential to leave gays and lesbians as second-class citizens, because their relationships would not have the legitimacy that comes with being married. Currently, many major religious groups do not marry same-sex couples within their own religious tradition.⁴⁶⁰ If the state were to suddenly get out of the marriage business today, gays and lesbians would effectively be unable to get married by mainstream religious groups. Gay and lesbian relationships, unlike their straight counterparts, would be unable to have their desire to be in a committed relationship socially recognized. This would further stigmatize gays and lesbians as deviant,

⁴⁵⁴ Fineman, *Meaning of Marriage*, *supra* note 330, at 59.

⁴⁵⁵ See *supra* notes 452–53 and accompanying text (suggesting that having the state get out of the marriage business would “permit the most expansive view of liberty”).

⁴⁵⁶ See Sullivan, *supra* note 287 (describing, from his own experience as a homosexual man, “how deep a psychic and social wound the exclusion from marriage and family can be”).

⁴⁵⁷ See, e.g., *The Lesson of Matthew Shepard*, Opinion, N.Y. TIMES (Oct. 17, 1998), <https://nyti.ms/2mBtg3r> (recounting the brutal murder of a twenty-one-year-old gay man, “singled out . . . because he was gay”).

⁴⁵⁸ See Christie Hartley & Lori Watson, *Political Liberalism, Marriage and the Family*, 31 LAW & PHIL. 185, 203–05 (2012).

⁴⁵⁹ *Id.* at 204.

⁴⁶⁰ See Masci & Lipka, *supra* note 91. This list includes Islam, Catholicism, Mormonism, and Orthodox Judaism.

abnormal, and, often in the case of gay men, sexually promiscuous. Civil marriage, then, provides a way to counteract this kind of private discrimination by conferring the legitimacy that comes with marriage and its commitment to lifetime monogamy.⁴⁶¹ The very reason that marriage is problematic from a perspective of liberal neutrality may explain why it is so important to gays and lesbians. The label of marriage provides the necessary ethical imprimatur to gay relationships.

If this discussion of abolition took place one hundred years from now, the concern about leaving gay relationships in the lurch would be far less relevant. Perhaps in that case, gays and lesbians themselves would largely favor abolishing marriage in line with the queer theorists noted above.⁴⁶² They would have had one hundred years where the state has affirmed their relationships as morally special via the institution of marriage. To unwind the institution of marriage now seems unfair. This may be the underlying concern for those who seek to invalidate prohibitions on same-sex marriage while still maintaining the institution of marriage. That is, the problem is not with abolishing marriage *per se*, but doing so at a time when gays and lesbians have been unable to avail themselves of it.

Conceding that there is some appeal to this claim, perhaps there is another way to challenge homophobia, if marriage is not an option consistent with liberal neutrality. Again, the Constitution only limits state action, but does not generally require the state to pass any particular law or policy.⁴⁶³ Nevertheless, this Article suggests a possible way that the state may challenge homophobia without maintaining marriage. This involves the state's spending or expressive power. Corey Brettschneider deploys it in the problem over hate speech.⁴⁶⁴ Brettschneider's concern is that liberals are often

⁴⁶¹ See ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 182 (1995) ("Marriage provides an anchor, if an arbitrary and often weak one, in the maelstrom of sex and relationships to which we are all prone. . . . We rig the law in its favor . . . because we recognize that not to promote marriage would be to ask too much of human virtue."); see also WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 10 (1996) ("[S]exual variety has not been liberating to gay men. In addition to the disease costs, promiscuity has . . . contributed to the stereotype of homosexuals as people who lack a serious approach to life. . . . [The] gay community ought to embrace marriage for its potentially civilizing effect on young and old alike."); Sullivan, *supra* note 287 ("For today's generation of gay kids . . . they will be able to see their future as part of family life—not in conflict with it"); Andrew Sullivan, *Here Comes the Groom*, *NEW REPUBLIC* (Aug. 28, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom> [<http://perma.cc/J24Y-Z6BH>] ("Gay marriage . . . says for the first time that gay relationships are not better or worse than straight relationships, and that the same is expected of them. And it's clear and dignified.").

⁴⁶² See *supra* notes 287–89 and accompanying text.

⁴⁶³ See *supra* notes 414–38 and accompanying text (discussing the difference between state action that might infringe on constitutional rights and a state's decision not to act).

⁴⁶⁴ See COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 3–4, 109 (2012) ("[T]he state can avoid complicity with hateful expression if it engages in democratic persuasion. By

stuck with only two options with regards to hate speech, defined here as speech that contradicts liberal values by expressing the idea that some groups are intrinsically inferior: either deploy the coercive power of the state to censor this kind of speech, or tolerate this speech, leaving victimized groups vulnerable to such verbal attacks.⁴⁶⁵ Brettschneider provides a provocative third alternative that draws not from the state's coercive power but rather from its "expressive power, or its ability to influence beliefs and behavior by 'speaking.'"⁴⁶⁶ The state does not need to censor hate speech, but may very well have an obligation to "speak" in favor of liberal values.⁴⁶⁷ It can do this "in a variety of ways, ranging from the direct statements of politicians to the establishment of monuments and public holidays."⁴⁶⁸ Also, the state can express and promote the value of equality "through [its] action as educator."⁴⁶⁹ Brettschneider includes as part of this expressive capacity the state's use of public "funds for [such] democratic persuasion."⁴⁷⁰

This turn from coercion to expression provides a framework other than marriage to challenge homophobia. As outlined in this Article, the state's conferral of the status of marriage violates liberal neutrality.⁴⁷¹ This is in part because current marriage laws rest on the idea that there is something intrinsically special about living in a monogamous union with another individual.⁴⁷² To deploy this legal status to do the equality work turns out to affirm an illiberal union. Yet, as an educator, the state could make use of its expressive powers to buttress and validate the equality of gay and lesbian relationships. For instance, public schools could include gays and lesbians in textbooks that discuss the struggle for equality in this country. Specifically, in sex education classes, the state could ensure that students are taught that being gay or "coming out" is an acceptable and legitimate option for individuals. In fact, the state could even fund a print and media campaign that celebrates same-sex desires and relationships. In doing so, and this is the crucial point, the state would not be saying that being gay is intrinsically special or better than being straight. These kinds of expressive laws

criticizing hate groups and promoting the ideal of free and equal citizenship, the state can clarify that its protection of groups from coercive intervention is not tantamount to approval of their message. . . . [D]emocratic persuasion should not involve the coercive banning of any viewpoint, but democratic persuasion rightly includes the state's use of financial means to promote the values of free and equal citizenship.").

⁴⁶⁵ *Id.* at 1.

⁴⁶⁶ *Id.* at 3–4.

⁴⁶⁷ *Id.* at 95.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 110.

⁴⁷¹ *See supra* Part I.

⁴⁷² *See, e.g.,* Joslin, *supra* note 101, at 99 n.96 (stating that evidence presented by Proposition 8 supporters showed that the bill's passage was prompted by "a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples" (quoting *Perry v. Schwarzenegger*, 704 F. Supp. 2d 291, 1002 (N.D. Cal. 2010))).

and policies do not seek to privilege one way of living over another and thereby do not violate liberal neutrality. In fact, they seek to challenge the idea that straight relationships are somehow better or more worthwhile than their gay counterparts. This may be one way the state could both get out of the marriage “business” and simultaneously ensure the equal status of gays and lesbians.

CONCLUSION

Perhaps it is time to consider abolishing marriage. Marriage may seem like a “great public institution” but this grandiosity reveals why it is also an illiberal one. Importantly, this Article’s objection to marriage is not motivated by the fact that gay marriage is now the law of the land. That anti-gay argument for leveling down—for abolishing marriage for all—is not based on principles of liberalism. Rather, that kind of illiberal argument seeks to exclude couples from marriage so as to ensure that their gay counterparts may not marry.⁴⁷³ This Article, in contrast, objects to marriage on the “principled view”⁴⁷⁴ that the state ought to remain neutral among conceptions of the good in our personal and intimate lives. The Court’s jurisprudence on marriage reveals why this kind of union violates liberal neutrality.

⁴⁷³ This is why Kenji Yoshino, *supra* note 57, argues that:

An individual could take the principled view that the state should not be in the business of running recreational facilities. Yet even that individual should have qualms if the reason a municipality closes a public pool is to avoid integrating it on racial lines (the occurrence that triggered *Palmer v. Thompson*). Similarly, an individual could hold the principled view that the state should be out of the marriage business. Yet even that individual should have qualms if the reason for shutting down civil marriage is the threat of same-sex couples entering the institution.

Id. at 174 (footnote omitted).

⁴⁷⁴ *See id.*