

MARRIAGE, THE COURT, AND THE FUTURE

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INTRODUCTION

The Supreme Court's ruling in *Obergefell v. Hodges*¹ is a serious setback for Americans who believe in the Constitution, the rule of law, self-government, and marriage as the union of husband and wife. The Supreme Court has not simply decided a case incorrectly, it has damaged the common good and harmed our republic. The ruling is as clear of an example of judicial usurpation as we have had in a generation. Nothing in the Constitution justifies the redefinition of marriage by judges. In imposing on the American people its judgment about a policy matter that the Constitution leaves to citizens and their elected representatives, the Court has inflicted serious damage on the institution of marriage and the Constitution.

In the majority opinion, written by Justice Anthony Kennedy, the Court declares: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."² Manifest to five unelected and unaccountable judges, that is. Not to the American citizens who, in state after state, voted to uphold the true definition of marriage,³ and certainly not to the Americans who ratified the Fourteenth Amendment, on which the Court relies. The majority of the Court has simply replaced the people's opinion about what marriage is with its own, without any constitutional basis whatsoever.

Almost everyone was and is in favor of marriage equality because almost everyone wants the law to treat all marriages equally—that is, in the same way. The debate in the United States in the decade and a half before *Obergefell* was not about equality. It was about marriage. We disagreed about *what marriage is*.

Of course, "marriage equality" was a great slogan for the Left. It fits on a bumper sticker. You can make a red equal sign your Facebook profile picture. It is a wonderful piece of advertising. And yet it's completely vacuous. It doesn't say a thing

1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2602.

3. *See, e.g.*, Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html> [<https://perma.cc/2YHL-MPUD>] (discussing passage of three such measures in 2008).

about *what marriage is*. Only if you know what marriage is can you then decide whether any given marriage *policy* violates marriage *equality*. Before you can get to considerations of equal protection of the law, you have to know what it is that the law is trying to protect equally.

Sloganeering aside, appeals to “marriage equality” betray sloppy reasoning. Every law makes distinctions. Equality before the law protects citizens from *arbitrary* distinctions, from laws that treat them differently *for no good reason*. To know whether a law makes the right distinctions, whether the lines it draws are justified, one has to know the public purpose of the law and the nature of the good it advances or protects.

After all, even those who want to redefine marriage to include same-sex couples will draw lines defining what sorts of relationships are a marriage and what sorts are not. If we are going to draw lines that are based on principle, if we are going to draw lines that reflect the truth, we have to know what sort of a relationship marriage is.⁴ You have to answer *that* question before you talk about recognizing marriage equally.

And yet implicit throughout the Court’s argument in *Obergefell* is the assumption that marriage is a genderless institution. But as Justice Samuel Alito pointed out two years earlier in his dissenting opinion in the Defense of Marriage Act case, the United States Constitution is silent about what marriage is. Justice Alito framed the debate as a contest between two visions of marriage⁵: what he calls the “conjugal” and “consent-based” views.⁵

Justice Alito cited a book I coauthored as an example of the conjugal view of marriage (also called the “comprehensive” view): a “comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life.”⁶ On the other side, he cited Jonathan Rauch as a proponent of the consent-based idea that marriage is a commitment marked by emotional un-

4. See generally SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2011).

5. See *United States v. Windsor*, 133 S. Ct. 2675, 2711 (2013) (Alito, J., dissenting).

6. *Id.* at 2718 (citing GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 23–28).

ion.⁷ The Constitution, he explained, is silent on which of these substantive visions of marriage is correct.⁸ Justice Alito, of course, was right about the Constitution. And yet Justice Kennedy's majority opinion contained no serious consideration, let alone refutation, of arguments that marriage is a conjugal union of husband and wife thus that states thus had constitutional authority to so define it.

In this Article, I first dissect the argument of the majority opinion striking down conjugal marriage laws. Then I turn to the dissenting opinions, which expose the utter failure of the majority opinion as a work of constitutional law. I then consider two harms that follow from the judicial usurpation of politics on this question before turning to the substantive issues. While the Constitution is silent on which view of marriage is correct, some people simply assert that there is no rational basis, no public reason, for viewing marriage as the union of husband and wife. So after discussing the *Obergefell* decision itself, I turn to the question at the heart of the debate: the nature of marriage. I sketch a philosophical defense of marriage as the union of husband and wife, I explain why this matters for public policy, and I close the Article by showing three likely harms of the redefinition of marriage, whether it be accomplished democratically or, as in the United States, judicially.

I. WHAT THE COURT SAID (AND HOW IT GOT IT WRONG)

The question before the Supreme Court in *Obergefell* was not whether government recognition of same-sex marriages is a good policy but whether anything in the Constitution removes from the people their authority to decide their marriage policy. Yet the Court's majority speaks almost exclusively about its "new insights" into marriage⁹ and says almost nothing about the Constitution. It could not have done otherwise, because our Constitution is silent on what marriage is. It protects specific fundamental rights and provides the structure of deliberative democracy by which we the people, retaining our authority as

7. *Id.* at 2716 (citing JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 94 (2004)).

8. *Id.*

9. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

full citizens and not subjects of oligarchic rule, decide important questions of public policy, such as the proper understanding of marriage and the structure of laws defining and supporting it. The Court purports to explain why the marriage policy that the United States has followed for all its history is now prohibited by the Constitution. But what it actually does is to *assume* that marriage is an essentially genderless institution and then announce that the Constitution requires states to adopt that same vision of marriage in their laws.

This assumption is all the more remarkable given Justice Kennedy's observation in oral arguments that the definition of marriage as the union of man and woman "has been with us for millennia. And it—it's very difficult for the Court to say, oh, well, we—we know better."¹⁰ Suggesting that he was reluctant to redefine marriage from the bench, he noted that same-sex marriage had been around for only ten years. And he added, "Ten years is—I don't even know how to count the decimals when we talk about millennia."¹¹

Even the liberal Justice Stephen Breyer acknowledged that marriage understood as the union of man and woman "has been the law everywhere for thousands of years among people who were not discriminating even against gay people, and suddenly you want nine people outside the ballot box to require states that don't want to do it to change . . . what marriage is."¹² He asked the Solicitor General, "Why cannot those states at least wait and see whether in fact doing so in the other states is or is not harmful to marriage?"¹³ And yet he joined Justice Kennedy's majority opinion redefining marriage everywhere.

The incoherence of the majority opinion is evident in its first paragraph:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their iden-

10. Transcript of Oral Argument at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf [<https://perma.cc/AGT8-LJ7L>] [hereinafter *Obergefell* Argument Transcript].

11. *Id.*

12. *Id.* at 16.

13. *Id.*

tity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.¹⁴

As Justice Clarence Thomas makes clear in his dissenting opinion, though, constitutional protections of liberty can hardly require government *recognition*.¹⁵ The liberty that the Constitution protects is a freedom *from* government interference. Gays and lesbians enjoyed full liberty “to define and express their identity” and to exercise their “liberty by marrying someone of the same sex” in the house of worship or wedding hall of their choice.¹⁶ Yet Justice Kennedy writes as if governmental recognition of any consensual relationship is a guaranteed form of *liberty*.

What support does he offer for such a conclusion? He starts with a paean to “the transcendent importance of marriage”: the “lifelong union of a man and a woman always has promised nobility and dignity to all persons,” and the “centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.”¹⁷ Citing theological, philosophical, literary, and artistic treatments of marriage, he admits that it “is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.”¹⁸ Indeed, he points out that for the states defending their marriage laws, marriage “is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”¹⁹

So why, exactly, does the U.S. Constitution require a redefinition of marriage? Justice Kennedy turns to the Due Process Clause of the Fourteenth Amendment, which says that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁰ And why does that clause require states to recog-

14. *Obergefell*, 135 S. Ct. at 2593.

15. *See id.* at 2634 (Thomas, J., dissenting).

16. *Id.* at 2593 (majority opinion).

17. *Id.* at 2594.

18. *Id.*

19. *Id.*

20. *Id.* at 2597 (citing U.S. CONST. amend. XIV).

nize same-sex relationships as marriages? Because the fundamental liberties that the Due Process Clause protects extend to “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”²¹ And these choices, Justice Kennedy asserts, now require not merely the absence of government coercion but affirmative recognition by the government. Who decides which “intimate choices” require such recognition, and when, and how much? The Supreme Court, of course.

Here is the central thesis of Justice Kennedy’s argument:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.²²

Yes, such claims must be addressed, and yes, one generation may detect an injustice to which an earlier generation was blind. But when a policy considered unjust by some nonetheless has *some* reasonable basis, and when the Constitution is silent about this particular policy, judges should not strike down the policy merely because of their own “new insights.”²³ For they, too, could be wrong. Far from rectifying an injustice, they may be committing one. And in purporting to vindicate a newly discovered constitutional right, they may be violating the Constitution by usurping the authority of the people and their elected representatives in Congress and the state legislatures. In the case of marriage, the Constitution empowers the people of future generations to make the necessary judgment calls through the political process. In *Obergefell*, the Court usurped that role by imposing a decision in a contest between two reasonable policy views on which the Constitution is silent.

21. *Id.*

22. *Id.* at 2598.

23. *Id.* at 2596.

Justice Kennedy acknowledges that all the Supreme Court's previous decisions about the right to marry "presumed a relationship involving opposite-sex partners."²⁴ But now, he writes, the Court sees that this presumption was wrong, and the majority opinion identifies four principles that "demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."²⁵ Let us examine those four principles.

First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."²⁶ This is because "two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation."²⁷ We might ask why this is not also true for all persons, whatever their *number*. Justice Kennedy does not explain why two but not three or four "persons together can find other freedoms." We might also wonder how "autonomy" gives rise to a right to government recognition.

Second, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals."²⁸ (Again, why just two?) Here Justice Kennedy is describing, nearly verbatim, the view of marriage as an intense emotional union that I will discuss later in this Article. "Marriage," he writes, "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 other."²⁹ It is all about consenting adult romance and care. Marriage is merely, on Justice Kennedy's account, legally recognized companionship. The principle that marriage is the only relationship that ultimately matters is particularly harmful because it implies that other relationships are necessarily less important. It would condemn the unmarried, whatever their sexual orientation, "to live in loneliness."³⁰ The idea

24. *Id.* at 2598.

25. *Id.* at 2599.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 2600.

30. *Id.* at 2608.

that people are condemned to live in loneliness unless marriage is redefined is outrageous.

Third, marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”³¹ Same-sex couples, then, have “rights of childrearing, procreation, and education.”³² These rights entail a right to marriage since, as a prior decision held, “the right to ‘marry, establish a home and bring up children’ is a central part of the liberty protected by the Due Process Clause.”³³ Here Justice Kennedy discusses children reared by same-sex couples without once acknowledging that some might want a mother and a father.³⁴ He asserts an adult’s right to have children but says nothing about a child’s right to a mother and a father.

“Fourth and finally, this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”³⁵ Well, yes, marriage, a union of man and woman, husband and wife, father and mother, is a keystone of our social order *precisely because* of its procreative character, which same-sex couples lack. So this is actually a point *against* Justice Kennedy’s view. He asserts without argument that “[t]here is no difference between same- and opposite-sex couples with respect to this principle.”³⁶ As he writes, “[s]ame-sex couples, too,

31. *Id.* at 2600.

32. *Id.*

33. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

34. *See, e.g.*, Brief of Robert Oscar Lopez and B. N. Klein as Amici Curiae in Support of Respondents at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); Robert Oscar Lopez, *Growing Up with Two Moms: The Untold Children’s View*, PUB. DISCOURSE (Aug. 2012), <http://www.thepublicdiscourse.com/2012/08/6065> [<https://perma.cc/WFY3-L8Q5>]; Katy Faust, *Dear Justice Kennedy: An Open Letter from the Child of a Loving Gay Parent*, PUB. DISCOURSE (Feb. 2, 2015), <http://www.thepublicdiscourse.com/2015/02/14370> [<https://perma.cc/J8TZ-SBXL>]; Heather Barwick, *Dear Gay Community: Your Kids Are Hurting*, FEDERALIST (Mar. 17, 2015), <http://www.thefederalist.com/2015/03/17/dear-gay-community-your-kids-are-hurting> [<https://perma.cc/JAA3-UBEL>]; Doug Mainwaring, *I’m Gay and I Oppose Same-Sex Marriage*, PUB. DISCOURSE (Mar. 8, 2013), <http://www.thepublicdiscourse.com/2013/03/9432> [<https://perma.cc/F6EF-528U>]; Doug Mainwaring, *Nature vs. Synthetics: What’s at Stake in the Dolce and Gabbana Controversy*, PUB. DISCOURSE (Mar. 19, 2015), <http://www.thepublicdiscourse.com/2015/03/14663> [<https://perma.cc/5R9X-TTHQ>].

35. *Obergefell*, 135 S. Ct. at 2601.

36. *Id.*

may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."³⁷ Unless, of course, those purposes and that meaning have something to do with uniting as one flesh, comprehensively, in the sort of bond apt for generating new human beings and binding them to their mothers and fathers. Remarkably, Justice Kennedy not once seriously engages with *that* argument. I develop it later in this Article.

The opinion concludes, almost as an afterthought, that the right to government recognition of same-sex marriages is derived not only from the Fourteenth Amendment's Due Process Clause but from its Equal Protection Clause as well. The reasoning here is even cloudier. "The Due Process Clause and the Equal Protection Clause are connected in a profound way," writes Justice Kennedy, and in "any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right."³⁸ He concludes that "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become. The Court's cases touching upon the right to marry reflect this dynamic."³⁹ This passage, devoid of any legal argument, is as clear an instance of the Court's legislating from the bench as you will find.

Apparently to buttress his opinion, Justice Kennedy cites ways in which the social practice and legal regulation of marriage have changed over time. He mentions the doctrine of coverture, which treated "a married man and woman . . . as a single, male-dominated legal entity,"⁴⁰ bans on interracial marriage, and legal barriers to marriage for persons who owed child support or were in prison.⁴¹ What he fails to acknowledge is that none of these practices or regulations redefined *what marriage is*: a comprehensive union of sexually complementary spouses. The Court's majority never addresses arguments of the sort presented in *What Is Marriage?*,⁴² even though many

37. *Id.* at 2602.

38. *Id.* at 2603.

39. *Id.*

40. *Id.* at 2596.

41. *Id.* at 2598–99.

42. See GIRGIS, ANDERSON, & GEORGE, *supra* note 4.

amici curiae presented such arguments and some dissenting Justices deployed them.⁴³

The only argument of the states that Justice Kennedy addresses—quite briefly—is that redefining marriage will change the institution for everyone in ways that could lead to a decrease in the marriage rate. He first misstates this argument (“an opposite-sex couple [might] choose not to marry simply because same-sex couples may do so”) and then dismisses it as resting on a “counterintuitive view of opposite-sex couple’s decisionmaking processes regarding marriage and parenthood.”⁴⁴

The *actual* argument (as opposed to the straw man that Justice Kennedy sets up) is that legally redefining marriage changes its social meaning for everyone in a way that will shape people’s behavior over time. The recognition of same-sex marriage, the Court says, involves “only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.”⁴⁵ But that is *precisely* what the debate is all about: whether redefining marriage causes harm. Justice Kennedy merely assumes his answer to the question and declares victory, offering no evidence or argument.

II. THE DISSENTS

The Court’s most basic error is its failure to interpret and apply the Constitution to the case at hand. It simply offers philosophizing about what marriage should be and what freedom “must become.”⁴⁶ Chief Justice John Roberts opens his dissenting opinion by noting that the Supreme Court “is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.”⁴⁷ As Chief Justice Roberts notes later in his opinion, “There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’

43. Justice Thomas, for example, cited my amicus brief in his dissent. See *Obergefell*, 135 S.Ct. at 2636 n.5 (Thomas, J., dissenting).

44. *Id.* at 2607 (majority opinion).

45. *Id.*

46. *Id.* at 2603.

47. *Id.* at 2611 (Roberts, C.J., dissenting).

Clause in the Constitution."⁴⁸ How did the Court get it so wrong? The Chief Justice explains:

Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage. And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational. In short, our Constitution does not enact any one theory of marriage. The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.⁴⁹

He continues, "The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent."⁵⁰ Assuming the powers of a legislature, the majority has acted "on its desire to remake society according to its own 'new insight' into the 'nature of injustice.'"⁵¹ Chief Justice Roberts criticizes the majority for its lack of judicial humility:

[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?⁵²

Justice Antonin Scalia makes a similar point:

Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a

48. *Id.* at 2616.

49. *Id.* at 2611.

50. *Id.* at 2612.

51. *Id.*

52. *Id.*

bare majority of this Court—we move one step closer to being reminded of our impotence.⁵³

Chief Justice Roberts also faults the majority for its sloppy use of history. Justice Kennedy's opinion, as we have seen, recites a list of marriage laws that have changed with the times. These changes did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured.⁵⁴ The Chief Justice continues:

In *Loving* [*v. Virginia*, 388 U.S. 1 (1967)], the Court held that racial restrictions on the right to marry lacked a compelling justification. In *Zablocki* [*v. Redhail*, 434 U.S. 374 (1978)], restrictions based on child support debts did not suffice. In *Turner* [*v. Safley*, 482 U.S. 78 (1987)], restrictions based on status as a prisoner were deemed impermissible.

None of the laws at issue in those cases purported to change the core definition of marriage as the union of a man and a woman. The laws challenged in *Zablocki* and *Turner* did not define marriage as "the union of a man and a woman, where neither party owes child support or is in prison." Nor did the interracial marriage ban at issue in *Loving* define marriage as "the union of a man and a woman of the same race." . . . Removing racial barriers to marriage therefore did not change what a marriage was any more than integrating schools changed what a school was. As the majority admits, the institution of "marriage" discussed in every one of these cases "presumed a relationship involving opposite-sex partners."⁵⁵

The problem with the analogy to interracial marriage is that it assumes what is in dispute: that sex is as irrelevant to marriage as race is. It is clear by any reasonable standard, and so, the Court was right to hold, that race has nothing to do with marriage. Racist laws kept the races apart to keep whites at the top. As I argue

53. *Id.* at 2631 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 78, at 522, 523 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961)) (citation omitted).

54. *Id.* at 2614–15 (Roberts, C.J., dissenting).

55. *Id.* at 2619.

later in this Article, marriage has everything to do with men and women, husbands and wives, mothers, fathers, and their children, and that is why principle-based policy has defined marriage as the union of one man and one woman.

Marriage can and should be color-blind, but it cannot be blind with regard to the two sexes. The color of two people's skin has nothing to do with whether they can unite in the sort of comprehensive union naturally oriented to family life, in which the lovemaking act is also a life-giving act—the kind of union that demands permanence and exclusivity. Race has nothing to do with whether they can give any children born of their union the love and knowledge of their own mother and father. Race has nothing to do with society's orderly reproduction, which the Court's preceding cases recognize as central to the fundamental right to marry. The sexual difference between a man and a woman, however, is central to each of these concerns. Men and women, regardless of their race, can unite in marriage, and children, regardless of their race, need their mom and dad.⁵⁶ Chief Justice Roberts was therefore right to conclude:

In short, the “right to marry” cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process. These precedents say nothing at all about a right to make a State change its definition of marriage, which is the right petitioners actually seek here.⁵⁷

Justice Kennedy's “four principles of due process” jurisprudence, then, is nonsense:

Stripped of its shiny rhetorical gloss, the majority's argument is that the Due Process Clause gives same-sex couples a fundamental right to marry because it will be good for them and for society. If I were a legislator, I would certainly consider that view as a matter of social policy. But as a judge, I find the majority's position indefensible as a matter of constitutional law.⁵⁸

Indeed, this freewheeling due process jurisprudence, the chief justice points out, was first deployed by the Supreme

56. *Cf. supra* note 34.

57. *Id.*

58. *Id.* at 2616.

Court in *Dred Scott v. Sandford*,⁵⁹ in which “the Court invalidated the Missouri Compromise on the ground that legislation restricting the institution of slavery violated the implied rights of slaveholders. The Court relied on its own conception of liberty and property in doing so.”⁶⁰ Fifty years later the Court again gave free rein to its own conception of liberty and property in *Lochner v. New York*,⁶¹ in which it “struck down a New York law setting maximum hours for bakery employees, because there was ‘in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law.’”⁶² Chief Justice Roberts quotes Justice Oliver Wendell Holmes Jr.’s dissent: “‘The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,’ a leading work on the philosophy of Social Darwinism.”⁶³ Nor does the Fourteenth Amendment enact Andrew Sullivan’s vision of marriage.⁶⁴

After a few decades of legislating from the bench, Chief Justice Roberts explains, the Court eventually recognized its error and vowed not to repeat it. “‘The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,’ we later explained, ‘has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.’”⁶⁵ Until *Obergefell*, that is.

As for the supposed “synergy” between the Due Process Clause and the Equal Protection Clause to which the majority appeals, Chief Justice Roberts simply observes that “the majority fails to provide even a single sentence explaining how the Equal Protection Clause supplies independent weight for its position.”⁶⁶ Think of a student who cannot find good support

59. 60 U.S. 393 (1857).

60. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

61. 198 U.S. 45 (1905).

62. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Lochner*, 198 U.S. at 72).

63. *Id.* (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

64. See, e.g., ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1996).

65. *Obergefell*, 135 S. Ct. at 2617 (Roberts, C.J., dissenting) (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

66. *Id.* at 2623.

for a claim in a term paper and so adds dozens of tangential references, as if many weak arguments somehow combine to yield a strong one. "In any event," the Chief Justice writes, "the marriage laws at issue here do not violate the Equal Protection Clause, because," and here he quotes Justice Sandra Day O'Connor, "distinguishing between opposite-sex and same-sex couples is rationally related to the States' 'legitimate state interest' in 'preserving the traditional institution of marriage.'"⁶⁷

So nothing in the Fourteenth Amendment, nothing in the Due Process Clause or the Equal Protection Clause, authorized five unelected judges to redefine marriage for the nation. As Justice Scalia puts it: "We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification."⁶⁸ Yet the majority somehow "discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since."⁶⁹

III. WHAT THE DISSENTING JUSTICES HAD TO SAY ABOUT THE HARMS THIS RULING WOULD CAUSE

The dissenting Justices in *Obergefell* point out four ways in which *Obergefell* will likely harm the body politic: it will harm constitutional democratic self-government, it will harm civil harmony, it will harm marriage itself, and it will harm religious liberty. I discuss the harm to marriage and religious liberty later in this Article, so here I focus on the first two.

A. Harm to Constitutional Democratic Self-Government

The ruling has already harmed constitutional democratic self-government and will continue to do so. In his dissent Justice Scalia says that it is not important to him what marriage policy a state adopts. "It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Rul-

67. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring in judgment)).

68. *Id.* at 2628 (Scalia, J., dissenting).

69. *Id.* at 2629.

er, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."⁷⁰ Constitutional democratic self-government is vitally important; indeed it is our first political right. Scalia continues: "This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."⁷¹

Of course, democratic self-government is not unlimited. That is why I have referred to *constitutional* democratic self-government. For we the people placed limits on the authority we delegated to the political branches of government. That is what a constitution is all about. Justice Scalia therefore notes that the "Constitution places some constraints on self-rule—constraints adopted *by the People themselves* when they ratified the Constitution and its Amendments."⁷² But apart from the limits we the people placed on ourselves, "those powers 'reserved to the States respectively, or to the people' can be exercised as the States or the People desire."⁷³ So the question before the Court was "whether the Fourteenth Amendment contains a limitation that requires the States to license and recognize marriages between two people of the same sex. Does it remove *that* issue from the political process?"⁷⁴ Justice Scalia's response: "Of course not."⁷⁵ And that is why this decision involved judicial activism, a harm to self-government.

He concludes, "This is a naked judicial claim to legislative—indeed, *super*-legislative—power; a claim fundamentally at odds with our system of government A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."⁷⁶ Chief Justice Roberts is likewise dismayed by the Court's arrogance:

70. *Id.* at 2627.

71. *Id.*

72. *Id.* (emphasis in original).

73. *Id.* (quoting U.S. CONST. amend. X).

74. *Id.*

75. *Id.*

76. *Id.* at 2629.

The role of the Court envisioned by the majority today, however, is anything but humble or restrained. Over and over, the majority exalts the role of the judiciary in delivering social change. In the majority's telling, it is the courts, not the people, who are responsible for making "new dimensions of freedom . . . apparent to new generations," for providing "formal discourse" on social issues, and for ensuring "neutral discussions, without scornful or disparaging commentary."⁷⁷

The Court's super-legislative power should trouble anyone concerned with *representative* government, because it is not representative of the American people. Justice Scalia notes that the Supreme Court "consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School."⁷⁸ Besides their elite professional training, he observes:

Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*. And to allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation.⁷⁹

No social transformation without representation: our constitutional democracy in a nutshell.

77. *Id.* at 2624 (Roberts, C.J., dissenting) (quoting *id.* at 2596–97 (majority opinion)).

78. *Id.* at 2629 (Scalia, J., dissenting) (citation omitted).

79. *Id.* (citation omitted).

B. *Harm to Civil Harmony*

The ruling will also undermine civil harmony. Fundamental policy changes imposed by judicial rulings with no basis in the Constitution are harder for people to accept. Justice Scalia notes that American self-government was working:

Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best. Individuals on both sides of the issue passionately, but respectfully, attempted to persuade their fellow citizens to accept their views. Americans considered the arguments and put the question to a vote. The electorates of 11 States, either directly or through their representatives, chose to expand the traditional definition of marriage. Many more decided not to. Win or lose, advocates for both sides continued pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win. That is exactly how our system of government is supposed to work.⁸⁰

But the Court, observes Chief Justice Roberts, has now put an end to all of that:

Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.⁸¹

The Court, writes the Chief Justice:

[S]eizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.”⁸²

This will make the redefinition of marriage more contested in the United States. He elaborates:

80. *Id.* at 2627 (citation omitted).

81. *Id.* at 2611–2 (Roberts, C.J., dissenting).

82. *Id.* at 2612 (quoting *id.* at 2603 (majority opinion)).

The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people. And they know it. Here and abroad, people are in the midst of a serious and thoughtful public debate on the issue of same-sex marriage This deliberative process is making people take seriously questions that they may not have even regarded as questions before.

When decisions are reached through democratic means, some people will inevitably be disappointed with the results. But those whose views do not prevail at least know that they have had their say, and accordingly are—in the tradition of our political culture—reconciled to the result of a fair and honest debate. . . .

But today the Court puts a stop to all that.⁸³

The Court had no reason or basis in the Constitution to short-circuit the democratic process, no reason to end the national discussion we were having about the future of marriage. Chief Justice Roberts continues:

There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.⁸⁴

The Chief Justice quotes from a law review article by Justice Ruth Bader Ginsburg, who joined the majority opinion, in which she assesses the damage *Roe v. Wade*⁸⁵ did to civil harmony: "The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."⁸⁶ *Obergefell* has now provoked conflict rather than resolved it.

83. *Id.* at 2625 (Roberts, C.J., dissenting).

84. *Id.*

85. 410 U.S. 113 (1973).

86. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (quoting Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

C. *Two Views of Marriage*

But were there ever any reasonable grounds for this debate in the first place? Harms to constitutional democratic self-government and civil harmony may be worth the cost if the opposing side was simply entrenched in bigotry. Indeed, if there simply was no rational basis to conjugal marriage laws at all, the way there was no rational basis to bans in interracial marriage, then a good argument could be made that courts striking them down would not even inflict any harms, for it does not harm constitutional self-government to strike down unconstitutional laws. All of this turns on the nature of the marriage debate, which, as we saw earlier, turns not on “equality” but on the nature of marriage.

Justice Kennedy’s working theory of the nature of marriage has been called the “consent-based” view of marriage.⁸⁷ The consent-based view of marriage is primarily about an intense emotional union: a romantic, caregiving union of consenting adults. It is what the John Corvino and Maggie Gallagher describes as the relationship that establishes your “number one person.”⁸⁸ What sets marriage apart from other relationships is the priority of the relationship. It is your most important relationship; the most intense emotional, romantic union; the caregiving relationship that takes priority over all others. Andrew Sullivan says that marriage has become “primarily a way in which two adults affirm their emotional commitment to one another.”⁸⁹ This vision of what marriage is does all of the work in Justice Kennedy’s majority opinion in *Obergefell*.

In *What Is Marriage?*, my coauthors and I argue that this view collapses marriage into companionship in general.⁹⁰ Rather than understanding marriage correctly as *different in kind* from other relationships, the consent-based view sees in it only a *difference of degree*: marriage has what all other relationships have, but more of it. This, we argue, gets marriage wrong. It cannot explain or justify any of the distinctive commitments that mar-

87. See, e.g., GIRGIS, ANDERSON, & GEORGE, *supra* note 4, at 15.

88. JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* 15 (2012).

89. Andrew Sullivan, *Introduction*, in *SAME-SEX MARRIAGE: PRO AND CON: A READER*, at xvii, xix (Andrew Sullivan ed., 1997).

90. GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 15.

riage requires—monogamy, exclusivity, and permanence—nor can it explain what interest the government has in it.

If marriage is simply about consenting adult romance and caregiving, why should it be permanent? Emotions come and go; love waxes and wanes. Why would such a bond require a pledge of permanency? Might not someone find that the romance and caregiving of marriage are enhanced by a temporary commitment, in which no one is under a life sentence?

In fact, if marriage is simply about consenting adult romance and caregiving, why should it be a sexually exclusive union? Sure, some people might prefer to sleep only with their spouse, but others might think that agreeing to have extramarital sexual outlets would actually *enhance* their marriage. Why impose the expectation of sexual fidelity?

Lastly, if marriage is simply about consenting adult romance and caregiving, why can't three, four, or more people form a marriage? There is nothing about intense emotional unions that limits them to two and only two people. Threesomes and four-somes can form an intense emotional, romantic, caregiving relationship as easily as a couple. Nothing in principle requires monogamy. Polyamory seems perfectly compatible with the consent-based view of marriage.

The consent-based view of *what marriage is* fails as a theory of marriage because it cannot explain any of the historical marital norms. A couple informed by the consent-based view might live out these norms if temperament or taste so moved them, but there would be no reason of principle for them to do so and no basis for the law to encourage them to do so. Marriage can come in as many different sizes and shapes as consenting adults can dream up. Love equals love, after all. And why, in any case, should the government have any involvement in this kind of marriage? If marriage is just about the love lives of consenting adults, let us get the state out of their bedrooms. And yet those who would redefine marriage want to put the government into more bedrooms.

There is nothing “homosexual,” “gay,” or “lesbian,” of course, about the consent-based view of marriage. Many heterosexuals have bought into it over the past fifty years. This is the vision of marriage that came out of the sexual revolution. Long before there was a debate about same-sex anything, heterosexuals bought into a liberal ideology about sexuality that makes a mess of marriage.

Cohabitation, no-fault divorce, extramarital sex, non-marital childbearing, pornography, and the hook-up culture all contributed to the breakdown of the marriage culture. The push for the legal redefinition of marriage did not cause these problems. It is, rather, their logical conclusion. The problem is that it is the logical conclusion of a bad train of logic.

If the sexual habits of the past fifty years have been good for society, good for women, good for children, then by all means it's reasonable to enshrine the consent-based view of marriage in law. But if the past fifty years have not been so good for society, for women, for children, indeed, if they have been, for many people, a disaster, then why would we lock in a view of marriage that will make it more difficult to recover a more humane vision of human sexuality and family life?

The law cannot be neutral between the consent-based and conjugal views of marriage. It will enshrine one view or the other. It will either teach that marriage is about consenting adult love of whatever size or shape the adults choose, or it will teach that marriage is a comprehensive union of sexually complementary spouses who live by the norms of monogamy, exclusivity, and permanency, so that children can be raised by their mom and dad. There is no third option. There is no neutral position. The law will embrace one or the other.

IV. THE COMPREHENSIVE VIEW OF MARRIAGE

So, is there a rational basis to the conjugal view of marriage? My analysis of marriage utilizes a generally Aristotelian methodology that can be used to analyze any type of community.⁹¹ We can understand any community by analyzing three factors: the actions that the community engages in, the goods that the community seeks, and the norms of commitment that shape that community's common life. To illustrate how this method of analysis works, consider an uncontroversial example: the academic community of a university.

91. Cf. Aristotle, *The Politics* §§ 1254a1–1254a7, at 54 (T.A. Sinclair, trans., Penguin Books 1992) (350 B.C.E.).

A. *An Academic Community*

What makes a university an *academic* community rather than a big business or a sports franchise, even though most universities engage in both business and athletics on a large scale? Following the Aristotelian methodology, I argue that a university is an academic community because of the academic actions in which it engages, the academic goods it seeks, and the academic norms by which it lives.

Members of an academic community engage in academic action. What sorts of things are academic actions? Professors research and write academic articles and books and assign students to read them. They deliver lectures, which students attend and on which they take notes. Students take exams and write papers, and professors grade and discuss them with students. These are the sorts of activities that constitute an academic community *as* an academic community. Annual giving campaigns and football games are nice additions, but they don't go to the heart of what makes a university a university. These academic activities are the heart of a university (or at least they should be).

Now what are these academic activities ultimately seeking? What are the goods toward which they are oriented? They are oriented toward the goods of truth and knowledge. All of the exercises that professors make students perform, the homework, the term papers, the research projects, and all of the work that they themselves do, writing those books and papers and delivering those lectures, are all about eliminating ignorance from our lives and coming to a better appropriation of the truth. Academic actions are not supposed to be exercises in propaganda or defenses of prejudices. They are about discovering the truth so we do not live in ignorance or as slaves to prejudice. Academic actions are oriented toward academic goods, the goods of knowledge and of the truth.

So what norms do such actions in pursuit of such goods require of an academic community? This is where all the commitment to academic integrity, academic freedom, and academic honor codes comes into play. Students should not plagiarize, researchers should cite all of their sources, scientists should assess all of the data, not just those that support their hypothesis. If one researcher finds weaknesses in another's study, the latter should not view it as an attack but as assistance in the common pursuit of truth. When a professor cri-

tiques a student's paper, the student should not view it as an insult but as help in his understanding the truth.

There are three easy steps. Academic actions (research, reading, writing, discussion) are ordered toward academic goods (knowledge of the truth and elimination of ignorance) and thus demand academic norms (academic honesty, academic freedom, academic honor codes) so the community can fulfill its purpose: the discovery of truth.

B. *The Marital Community*

We can understand the marital relationship in the same way. What makes marriage different from other forms of community, like a football team, say, or a university? In every aspect, marriage is a *comprehensive* relationship. It is comprehensive in the act that uniquely unites the spouses, in the goods that the spouses are ordered toward, and in the norms of commitment that it requires from them.

Marriage unites spouses in a comprehensive act: marital sexual intercourse is a union of hearts, minds, and bodies. Marriage, like the marital act that seals it, is inherently ordered toward a comprehensive good, the creation and rearing of entirely new human organisms, who are to be raised to participate in every kind of human good. And finally, marriage demands comprehensive norms: spouses make the comprehensive commitments of permanency and exclusivity, comprehensive throughout time (permanent) and at every moment in time (exclusive).

If that sounds abstract, let us move in for a closer look. First, the comprehensive act. How can two persons unite comprehensively? To unite comprehensively, they must unite at all levels of their personhood. But what is a person? Human beings are mind-body unities. We are not ghosts in machines or souls that are somehow inhabiting flesh and bones. Rather, we are en fleshed souls or ensouled bodies: a mind-body unity.⁹² Thus, to unite with someone in a comprehensive way, one must unite with him at all levels of his personhood: a union of hearts, minds, and bodies.

92. See generally PATRICK LEE & ROBERT P. GEORGE, BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS (2009).

Ordinary friendships are unions of hearts and minds. Uniting bodily is not a part of the typical understanding of friendship. But bodily union is part of what it means to be in a spousal relationship. This, of course, raises the question: How can two human beings unite bodily? To answer this, we need to understand what makes any *individual* one body.

What is it that makes each one of us a unified organism? Why are we not just clumps of cells? The answer is that all of our various bodily systems and parts work together for the common good of our biological lives. Your heart, lungs, kidneys, and muscles and all the other organs and tissues coordinate to keep you alive. Coordination toward a common end explains unity, in this case bodily unity of an individual.

And in most respects you are complete as an individual. With respect to locomotion, you can set this Article down, get up, and walk into the kitchen for a bite to eat. With respect to digestion, you can digest that bite all by yourself. With respect to circulation and respiration, you can breathe and pump oxygenated blood throughout your body as an individual. In all of these functions, you are complete.

Yet with respect to one biological function, you are radically incomplete. In the marital act, a man's body and a woman's body do not just make contact as in a kiss or interlock as when holding hands. The Hebrew Bible reveals something true about our humanity when it says that a man and a woman in the marital act become "one flesh."⁹³ This is not merely a figure of speech. The Bible does not say the husband and wife are so much in love it is *as if* the two become one. The Scriptures rightly suggest that at the physical and metaphysical level, a man and a woman truly become two in one *flesh*. The sexual complementarity of a man and a woman allows them to unite in this comprehensive way.

In the marital act, the husband and wife engage in a single act with a single function: coordination toward a common end unites them. They form a single organism as a mated pair with a single biological purpose, which the couple performs together as a unity. Note the parallel. The muscles, heart, lungs, stomach, and intestines of an individual human body cooper-

93. *Genesis*, 2:24 (NIV).

ate with each other toward a single biological end: the continued life of that body. In the same way, a man and a woman, when they unite in the marital act, cooperate toward a single biological end: procreation. This is true regardless of whether any particular marital act results in the fusion of a sperm with an egg. What matters is the voluntary behavior in which the spouses engage. That is what unites them.

And the union that this act brings about is so complete that frequently, nine months later, it requires a name. The lovemaking act is also the life-giving act. The act that unites a man and a woman as husband and wife is the same act that can make them mother and father. This begins to tell us something about toward what the marital relationship is ordered.

In the same way that academic communities engage in academic actions that are ordered toward the academic goods of the pursuit of truth and knowledge, the marital relationship is (like the act that embodies it) ordered toward the marital good of procreation and rearing and education of children. The good toward which the marital act is ordered is not a one-time good like winning the next football game or passing the next test. The marital act is comprehensive. It unites the spouses in heart, mind, and body, and is thus oriented toward a comprehensive good, the procreation and education of new persons who can appreciate human goodness in all its dimensions. Marriage is unlike any other community in being comprehensive.

Now it should be clear why marriage requires the comprehensive commitments of both exclusivity and permanency. Let us start with exclusivity. What sort of exclusivity does marriage call for? *Sexual* exclusivity. You do not cheat on your spouse by attending a lecture with someone else. You do not cheat on your spouse by playing football with someone else. But you do cheat on your spouse if you sleep with someone else. It is the sexual act that transforms an ordinary friendship, a union of hearts and minds, into the comprehensive community of marriage, and so the marital norm of exclusivity focuses on sexual fidelity. The act that is distinctive to marriage, which we therefore call the "marital act," must be reserved exclusively for the spouses. To unite comprehensively with your spouse requires that you pledge not to unite sexually with others. It requires you, in the words of the traditional marriage vow, to forsake all others.

Something similar is true for the other comprehensive commitment of marriage. Because marriage is a comprehensive union, it requires the comprehensive commitment of permanency. To unite comprehensively, spouses cannot hold anything back. If they have a sunset clause, if they have an escape date, if they have a way out, then they are not really uniting comprehensively. Comprehensive union requires an open-ended commitment. So marriage requires “forsaking all others” not only for the time being but also into the future: “till death do us part.” Ordered toward the comprehensive good of procreation, marriage must be permanent. The families that marriage produces—not only parents and children but also grandparents, nieces and nephews, aunts, uncles, and cousins—will be stable only if the marital union itself is stable. Again, the comprehensive nature of marriage explains its comprehensive act, good, and norms.

C. *The Comprehensive View of Marriage Is Based on Human Nature, Not Anti-Gay Animosity*

Many diverse political, philosophical, and theological traditions, each with its own vocabulary and with differences around the margins, have articulated something like the comprehensive view of marriage. They have arrived at this truth by grappling with basic human realities, not out of animosity toward same-sex relationships. Indeed, cultures that had no concept of “sexual orientation” and cultures that took homoeroticism for granted have understood that the union of husband and wife is a distinct and uniquely important relationship. Citing the historical consensus, Justice Alito asked during oral arguments:

[H]ow do you account for the fact that, as far as I’m aware, until the end of the twentieth century, there never was a nation or a culture that recognized marriage between two people of the same sex? Now, can we infer from that that those nations and those cultures all thought that there was some rational, practical purpose for defining marriage in that way, or is it your argument that they were all operating independently based solely on irrational stereotypes and prejudice?⁹⁴

Support for marriage as the union of a man and a woman cannot simply be the result of anti-gay animus, Justice Alito

94. Obergefell Argument Transcript, *supra* note 10, at 9.

pointed out, because “there have been cultures that did not frown on homosexuality. . . . Ancient Greece is an example. It was well accepted within certain bounds.”⁹⁵ The Justice added that “people like Plato wrote in favor of that.”⁹⁶ And yet, the ancient Greeks, including Plato, never thought a same-sex relationship was a marriage.

As Chief Justice John Roberts explained in his dissenting opinion in *Obergefell*, marriage as the union of husband and wife is about serving the common good, not excluding anyone:

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.⁹⁷

Defying the universal consensus about marriage requires breathtaking presumption. Whatever arguments there may be in favor of doing so, that consensus cannot be dismissed as a relic of irrational animus against men and women attracted to members of their own sex.

V. WHY MARRIAGE MATTERS FOR PUBLIC POLICY

I have argued so far that marriage, properly understood, is a comprehensive union, that it unites a man and a woman in a comprehensive act, ordered toward the comprehensive good of procreating and raising new life in a family, and requiring of them a comprehensive—that is, exclusive and permanent—bond. But even if this is the philosophical truth about marriage, why does it matter? Why should anyone care? More specifically, why should the *state* care?

Virtually every political community has regulated male-female sexual relationships. This is not because government is a sucker for romance. If marriage were just about consenting

95. *Id.* at 14.

96. *Id.*

97. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting).

adult love, the state would not be in the marriage business. Government recognizes male-female sexual relationships because these alone produce new human beings. For highly dependent infants, there is no path to physical, moral, and cultural maturity, no path to personal responsibility, without a long and delicate process of ongoing care and supervision to which mothers and fathers bring unique gifts. Unless children mature, they never will become healthy, upright, productive members of society. Marriage exists to make men and women responsible to each other and to any children that they might have.

Marriage is society's least restrictive means of ensuring the well-being of children. Government recognition of marriage protects children by encouraging men and women to commit themselves to each other and to take responsibility for their children. From a public policy perspective, marriage is about uniting a man and a woman with each other as husband and wife to be father and mother to any children their sexual union produces. Marriage is based on the anthropological truth that men and women are complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children deserve a mother and a father.

Whenever a baby is born, there is always a mother nearby. That is a fact of biology. The question is whether a father will be close by and, if so, for how long. Marriage increases the odds that the father of a child will be committed to the child's mother and that the two of them, committed to each other, will be committed to their child. It connects persons and goods that otherwise tend to fragment. As the late sociologist James Q. Wilson put it: "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."⁹⁸

Connecting sex, babies, and moms and dads is the irreplaceable social function of marriage. Laws and social expectations can strengthen or weaken marriage in this role, and that is why the government is rightly involved in this aspect of our lives. Maggie Gallagher develops this idea:

98. JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 41 (2002).

The critical public or “civil” task of marriage is to regulate sexual relationships between men and women in order to reduce the likelihood that children (and their mothers, and society) will face the burdens of fatherlessness, and increase the likelihood that there will be a next generation that will be raised by their mothers and fathers in one family, where both parents are committed to each other and to their children.⁹⁹

As strong as the government’s interest is in the marriages of its citizens, however, it is important to remember that the government does not *create* marriage, it *recognizes* marriage. Marriage is a natural institution that predates government.¹⁰⁰ Society as a whole, not merely any given set of spouses, benefits from marriage. This is because marriage helps to channel procreative love into a stable institution that provides for the orderly bearing and rearing of the next generation.

The complementarity that defines marriage as the union of a man and a woman is crucial as well for the raising of children. There is no such thing as “parenting.” There is mothering, and there is fathering,¹⁰¹ and children do best with both.¹⁰² It does not detract from the many mothers and fathers who have of necessity raised children alone, and done so successfully, to insist that mothers and fathers bring distinct strengths to the task.

In a summary of the “best psychological, sociological, and biological research to date,” W. Bradford Wilcox, a sociologist at the University of Virginia, finds that “men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family breakdown poses a serious threat to children and to the societies in which they live.”¹⁰³ Wilcox finds that “most fathers and mothers possess sex-specific talents related to parenting, and societies should organize parenting and work roles to take

99. CORVINO & GALLAGHER, *supra* note 88, at 96.

100. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting); *cf. id.* at 2594 (majority opinion) (“[T]he institution has existed for millennia . . .”).

101. W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, TOUCHSTONE, Nov. 2005, at 32, 36.

102. DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 146 (1996).

103. Wilcox, *supra* note 101, at 36.

advantage of the way in which these talents tend to be distributed in sex-specific ways.”¹⁰⁴

Dads play important roles in the formation of both their sons and their daughters. As the sociologist David Popenoe of Rutgers University explains, “The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable.”¹⁰⁵ Popenoe concludes:

We should disavow the notion that “mommies can make good daddies,” just as we should disavow the popular notion . . . that “daddies can make good mommies.” . . . The two sexes are different to the core, and each is necessary—culturally and biologically—for the optimal development of a human being.¹⁰⁶

I discuss at great length the sociology of parenting in general, the unique contributions of mothers and fathers, and the recent literature on same-sex parenting in particular in my recent book *Truth Overruled*.¹⁰⁷ The social scientific evidence of the importance of fathers is so compelling that even President Barack Obama refers to it as a truism:

We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.¹⁰⁸

Fathers matter, and marriage helps to connect fathers to mothers and children. Citing President Obama is an opportunity to point out that a child who grows up without a married mom and dad can defy the odds. President Obama is a tre-

104. *Id.*

105. POPENOE, *supra* note 102, at 146.

106. *Id.* at 197; *see also* Wilcox, *supra* note 101, at 36.

107. RYAN T. ANDERSON, *TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM* 26–31, 147–62 (2015).

108. Barack Obama, Speech on Fatherhood at the Apostolic Church of God, Chicago (June 15, 2008), http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html [<https://perma.cc/Y5XJ-QEX2>].

mendous example of that.¹⁰⁹ But he would be the first to acknowledge that, on average and for the most part, children who grow up without their married mother and father have a more difficult road to travel. To the all-male graduating class of the historically black Morehouse College, the president said:

I was raised by a heroic single mom But I sure wish I had had a father who was not only present, but involved. Didn't know my dad. And so my whole life, I've tried to be for Michelle and my girls what my father was not for my mother and me. I want to break that cycle.¹¹⁰

Marriage benefits everyone because separating childbearing and childrearing from marriage burdens innocent bystanders—not just children, but the whole community. When parents are unable to care for their children, someone has to step in, and that “someone” is often the state. By encouraging the marriage norms of monogamy, sexual exclusivity, and permanence, the state strengthens civil society and reduces its own role.

Marriage protects children from poverty. It increases the likelihood that they will enjoy social mobility. It steers them away from crime and relieves the state of having to pick up the pieces of their families. If you care about social justice or limited government, if you care about the poor or about freedom, you should care about a strong marriage culture. Civil recognition and support of the marriage union of a man and a woman is the most effective and least intrusive way to pursue freedom and prosperity. In *Truth Overruled*, I discuss countless studies that show how the breakdown of marriage causes harms.¹¹¹ Scholars from the Right and Left—Charles Murray's *Coming Apart*¹¹² and Robert Putnam's *Our Kids*¹¹³—agree at least on this much. The question is whether the *definition* of marriage has any role in these policy outcomes and whether the *redefinition* of marriage will exacerbate our problems.

109. See generally BARACK OBAMA, DREAMS FROM MY FATHER (1995).

110. President Barack Obama, Commencement Speech at Morehouse College (May 19, 2013), <http://blogs.wsj.com/washwire/2013/05/20/transcript-obamas-commencement-speech-at-morehouse-college> [<https://perma.cc/JGU7-B4GX>].

111. ANDERSON, *supra* note 107, at 24–32.

112. CHARLES MURRAY, COMING APART (2012).

113. ROBERT PUTNAM, OUR KIDS (2015).

But one thing to note before turning to the consequences of marriage's redefinition: Defining marriage as the union of a husband and a wife does not violate anyone's liberty. If the government rightly recognizes, protects, and promotes marriage as the ideal institution for childbearing and childrearing, adults remain perfectly free to make choices about their relationships. A redefinition by the state of the unique institution of marriage is not necessary for citizens to live in another relationship of their choosing. Justice Thomas devotes his entire dissenting opinion in *Obergefell* to making this point.

Justice Thomas argues that "the majority invokes our Constitution in the name of a 'liberty' that the Framers would not have recognized, to the detriment of the liberty they sought to protect."¹¹⁴ In "the American legal tradition," he writes, "liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement."¹¹⁵ And the liberty of people in same-sex relationships was not being infringed:

[T]hey have been able to cohabit and raise their children in peace. They have been able to hold civil marriage ceremonies in States that recognize same-sex marriages and private religious ceremonies in all States. They have been able to travel freely around the country, making their homes where they please. Far from being incarcerated or physically restrained, petitioners have been left alone to order their lives as they see fit.¹¹⁶

Even in states that had not redefined marriage, persons were free "to enter same-sex relationships, to engage in intimate behavior, to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, to hold themselves out as married, or to raise children."¹¹⁷ The government was restricting no one's liberty. But some people had a desire *for* government recognition:

Petitioners claim that as a matter of "liberty," they are entitled to access privileges and benefits that exist solely *because*

114. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting).

115. *Id.* at 2634.

116. *Id.* at 2635.

117. *Id.*

of the government. They want, for example, to receive the State's *imprimatur* on their marriages—on state issued marriage licenses, death certificates, or other official forms.¹¹⁸

This cannot be a “liberty” claim. As Justice Thomas argues, “[R]eceiving governmental recognition and benefits has nothing to do with any understanding of ‘liberty’ that the Framers would have recognized.”¹¹⁹

Despite the increasingly heated rhetoric from the advocates of “marriage equality,” there was no ban on same-sex marriage in the decade before *Obergefell* anywhere in the United States. In all fifty states, two persons of the same sex could live together, join a religious community that would bless their relationship, and choose from a multitude of employers that offered them the same benefits available to married couples. Chief Justice Roberts highlighted this in his dissent: “[T]he marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit.”¹²⁰ No government license or sanction was necessary for any of this.

But is not the government’s refusal to bestow the name of “marriage” on same-sex relationships demeaning to the persons in those relationships? In the *Obergefell* oral arguments, Justice Kennedy, dismissing the comprehensive view of marriage, declared that “the whole purpose of marriage” is to bestow “dignity” on a couple.¹²¹ If he were right, then withholding that “dignity” from same-sex couples would indeed be demeaning. But John Bursch, the lawyer defending the State of Michigan’s marriage laws, explained that the institution of marriage “did not develop to deny dignity or to give second class status to anyone. It developed to serve purposes that, by their nature, arise from biology.”¹²²

Perhaps the most common objection to this basic argument involves infertility. If infertile couples can marry—and no one has

118. *Id.* at 2635–36.

119. *Id.* at 2636.

120. *Id.* at 2620 (Roberts, C.J., dissenting).

121. *Obergefell* Argument Transcript, *supra* note 10, at 72.

122. *Id.* at 43.

ever denied that they can—how can the definition of marriage be linked to procreation? There are four responses to this argument.

First, as a policy matter, the state is in the business of recognizing marriage not because every marriage will produce a child but because every child has a mother and a father. Through its marriage policy, the state respects the natural bonds that unite the parents who brought a child into the world and encourages them to commit to each other permanently and exclusively. Public policy must consider the big picture, not individual cases. It is the procreative *nature* of marriage rather than the actual procreative results of individual marriages that explains government policy in this area. (And would anyone really want the government to require fertility tests or to ask couples if they intend to have children?)

Second, as a practical matter, many couples who think they are infertile end up conceiving or adopting children. Many who say they never want children change their minds. It is important to keep these men and women united with each other. Marital fidelity ensures that the fertile spouse does not procreate children with someone else, children who will be deprived of a fully committed mother and father. The fifty-year-old husband whose wife has gone through menopause will never beget children with another woman if he is faithful to his marriage vows. The state has a general interest in channeling spouses' sexual desire into marriage.

Third, as a philosophical matter, an infertile marriage is fully a marriage. A marriage is a comprehensive union marked by one-flesh union, the coordination of the spouses' two bodies toward the single biological end of reproduction. That coordination, and thus the one-flesh union, takes place *whether or not* it achieves its biological end in the fertilization of an egg by a sperm some hours later. The union, like the act that seals it, is still oriented toward family life. This explains why in common, civil, and canon law, infertility has never nullified a marriage. Impotence, by contrast, which prevents a couple from consummating their union in the one-flesh marital act, *has* been grounds for declaring that a marriage was never completed.¹²³

123. See *Latta v. Otter*, 771 F.3d 456, 494 (9th Cir. 2014) ("Nor was infertility generally recognized as a ground for divorce or annulment under the old fault-

Fourth, as a pedagogical matter, recognizing marriages in spite of infertility teaches that marriage is a comprehensive union, not merely an instrument for baby making. That teaching benefits society by encouraging genuine devotion, and hence stability, in all opposite-sex marriages. By contrast, redefining marriage to include same-sex relationships will teach that marriage (gay or straight) is an instrument for gratifying the emotions of adults. The stability that guarantees children a mom and a dad is not a component of such a union.

In sum, then, public policy is about the rule, not the exception; marital norms benefit society even when lived out by infertile couples; infertile marriages are still marriages, and state recognition of infertile marriages has the benefit of reinforcing the truth about marriage without any disadvantages.

VI. CONSEQUENCES OF REDEFINING MARRIAGE

How does same-sex marriage affect the public purpose of marriage? The first step in answering that question is to understand that the Supreme Court's ruling did not *expand* marriage; it *redefined* marriage. As Chief Justice Roberts remarked during oral arguments, "Every definition that I looked up, prior to about a dozen years ago, defined marriage as unity between a man and a woman as husband and wife."¹²⁴ So, he continued, "you're not seeking to join the institution, you're seeking to change what the institution is. The fundamental core of the institution is the opposite-sex relationship and you want to introduce into it a same-sex relationship."¹²⁵

This is not simply an opinion held by opponents of same-sex marriage. Consider these candid remarks of the writer and gay rights activist Masha Gessen from 2012:

It's a no-brainer that [same-sex couples] should have the right to marry, but I also think equally that it's a no-brainer that the institution of marriage should not exist Fighting for gay marriage generally involves lying about what we are going to do with marriage when we get there—because we

based regime, even though sexual impotence was."); Kaufman v. Kaufman, 164 F.2d 519, 519–20 (D.C. Cir. 1947).

124. Obergefell Argument Transcript, *supra* note 10, at 5.

125. *Id.* at 5–6.

lie that the institution of marriage is not going to change, and that is a lie.

The institution of marriage is going to change, and it should change. And again, I don't think it should exist. And I don't like taking part in creating fictions about my life. That's sort of not what I had in mind when I came out thirty years ago.

I have three kids who have five parents, more or less, and I don't see why they shouldn't have five parents legally . . . I met my new partner, and she had just had a baby, and that baby's biological father is my brother, and my daughter's biological father is a man who lives in Russia, and my adopted son also considers him his father. So the five parents break down into two groups of three . . . And really, I would like to live in a legal system that is capable of reflecting that reality, and I don't think that's compatible with the institution of marriage.¹²⁶

Whatever you call this series of relationships, it is not "marriage" as we have understood it until recently.

Law teaches. It shapes ideas, which shape what people do. A radical change in the law of marriage will have at least three harmful consequences that we can foresee. The needs and rights of children will be subordinated to the desires of adults. The marital norms of monogamy, exclusivity, and permanence will be weakened. And religious liberty will be threatened.

A. *Serving the Desires of Adults, Not the Needs or Rights of Children*

Now that the Court has redefined marriage to eliminate the norm of sexual complementarity, no institution in our legal and political system upholds the principle that every child deserves both a mother and a father. Redefining marriage as a genderless institution sends the signal that men and women, mothers and fathers, are interchangeable. That is a lie, but as people absorb these lies from the law, more children will be denied the benefit of their own parents' committed love for life.

126. Masha Gessen, Address at the Sydney Writers' Festival (May 18, 2012), quoted in Robert P. George, *What Few Deny Gay Marriage Will Do*, FIRST THINGS (Apr. 16, 2013), <http://www.firstthings.com/blogs/firstthoughts/2013/04/what-few-deny-gay-marriage-will-do> [<https://perma.cc/G7EZ-CLZ7>].

The consent-based view of marriage now enshrined in law teaches that marriage is more about the desires of adults than about the needs—or rights—of children. It re-centers the marital relationship on the intense emotional union of adults—their romance—rather than on the procreation of new lives and the durability of the union on which those lives depend. When fathers who have absorbed the law’s new lessons about marriage face the ordinary temptations to leave, they will be likelier to leave. That means more kids growing up without their own mother and father in a committed bond for life.

Justice Alito was the most sensitive of the dissenters to *how* the Court was presenting marriage. The Court’s argument, he observes, “is that the fundamental purpose of marriage is to promote the well-being of those who choose to marry. Marriage provides emotional fulfillment and the promise of support in times of need.”¹²⁷ As Justice Alito explains, “This understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one. For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.”¹²⁸

But obscuring the truth about marriage has consequences. Summarizing the argument of the states in defense of their historical marriage laws, Justice Alito writes that “States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children.”¹²⁹ But as the expectations associated with marriage were weakened, so were the benefits that marriage provides.

Think back fifty years, to when Daniel Patrick Moynihan wrote his famous report for President Lyndon Johnson on the state of the black family.¹³⁰ Back then, Moynihan was concerned that the rate of births to single mothers was approaching 25 percent among blacks, which he warned would spell disaster

127. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2641 (2015) (Alito, J., dissenting).

128. *Id.*

129. *Id.*

130. See DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965).

for that population.¹³¹ Today, 40 percent of all births in America are out of wedlock; the rate is 50 percent among Hispanics and 70 percent among blacks.¹³² These children have done nothing wrong, but their prospects in life are much bleaker than those of children born to married parents. They will bear the social costs of the breakdown of the family.

Many scholars and policymakers have concluded, unsurprisingly, that America's most pressing social problem is absentee fathers. Before he "evolved" to his present position on marriage,¹³³ President Obama was among them. But how will we insist that fathers are essential when the law has redefined marriage to make fathers optional? If the law tells a man that his presence in his child's life is entirely optional, when the going gets tough his motive for sticking around will be weaker. Laws that reflected the truth about marriage reinforced the idea that the home of a married mother and father is the most appropriate environment for rearing children. That ideal has not only been abolished but condemned as bigotry.

B. *Weakening Marital Norms*

The problem with redefining marriage is not that a few thousand additional households will get additional economic and other benefits. It is that giving them those benefits will require changing the public meaning of marriage, which will weaken its stabilizing norms. Now that the law has changed to teach that marriage is whatever consensual relationship you find most emotionally fulfilling, people will start to believe it, and then they will start to live accordingly. They will be more receptive to sexually open relationships, or temporary ones, or multiple-partner ones, as their appetites and fancies dictate. You do not have to take my word for it. Many *proponents* of

131. *See id.* at 8. By way of comparison, the percentage of births to unwed mothers in the general population was in the single digits. *Id.*

132. *See* Roger Clegg, *Latest Statistics on Out-of-Wedlock Births*, NAT'L REV.: THE CORNER (Oct. 11, 2013), <http://www.nationalreview.com/corner/360990/latest-statistics-out-wedlock-births-roger-clegg> [<https://perma.cc/N4EJ-RD5A>].

133. Zeke J. Miller, *Obama Says He Didn't Mislead on Gay Marriage*, TIME (Feb. 11, 2015), <http://time.com/3704760/barack-obama-gay-marriage-david-axelrod> [<https://perma.cc/8JP9-JJBW>].

same-sex marriage are gleefully predicting just that.¹³⁴ The result will be less family stability, which hurts children and women and especially the poor.

Leading LGBT advocates admit that redefining marriage changes its meaning. E. J. Graff acknowledges that redefining marriage changes the “institution’s message,” which will “ever after stand for sexual choice, for cutting the link between sex and diapers.”¹³⁵ Same-sex marriage, she argues, “does more than just fit; it announces that marriage has changed shape.”¹³⁶ Andrew Sullivan says that marriage has become “primarily a way in which two adults affirm their emotional commitment to one another.”¹³⁷

Some advocates of redefining marriage embrace the goal of weakening the institution of marriage *in these very terms*. “[Former President George W.] Bush is correct,” says Victoria Brownworth, “when he states that allowing same-sex couples to marry will weaken the institution of marriage It most certainly will do so, and that will make marriage a far better concept than it previously has been.”¹³⁸ Professor Ellen Willis is delighted that “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.”¹³⁹

Michelangelo Signorile urges same-sex couples to “demand the right to marry not as a way of adhering to society’s moral codes but rather to debunk a myth and radically alter an archaic institution.”¹⁴⁰ Same-sex couples should “fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely,” because “[t]he most sub-

134. See, e.g., Gessen, Address, *supra* note 126.

135. E. J. Graff, *Retying the Knot*, in SAME-SEX MARRIAGE: PRO AND CON: A READER, note 89, at 134, 136.

136. *Id.* at 137.

137. Andrew Sullivan, *Introduction*, in SAME-SEX MARRIAGE: PRO AND CON: A READER, *supra* note 89, at 17, 19.

138. Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?*, in I DO/I DON’T: QUEERS ON MARRIAGE 53, 58–59 (Greg Wharton & Ian Philips eds., 2004).

139. Ellen Willis, *Can Marriage Be Saved?*, NATION (June 17, 2004), <https://www.thenation.com/article/can-marriage-be-saved-0> [<https://perma.cc/DR38-KREN>].

140. Michelangelo Signorile, *Bridal Wave*, OUT, Dec. 1991/Jan. 1994, at 68, 161.

versive action lesbians and gay men can undertake . . . is to transform the notion of 'family' entirely."¹⁴¹

Government needs to get marriage policy right because it shapes the norms associated with this most fundamental relationship. The Supreme Court's redefinition of marriage abandoned the norm of male-female sexual complementarity as an essential characteristic of marriage. As a logical matter, making that essential characteristic optional makes others, such as monogamy, exclusivity, and permanence, optional as well.¹⁴²

As the law now teaches a falsehood about marriage, it will be harder for people to live out the norms of marriage, because they make no sense, in principle, if marriage is merely a matter of intense emotional feeling. No reason of principle requires an emotional union to be permanent or even limited to two persons, much less sexually exclusive. There is no reason it must be oriented to family life and shaped by its demands. A couple might choose to live out these norms for their own reasons, but there is no reason of principle to demand that they do so. Legally enshrining a radical consent-based view of marriage undermines the norms whose link to the common good is the basis for state recognition of marriage in the first place. As society weakens the rational foundation for the norms of marriage, fewer people will observe them, and fewer people, therefore, will reap the benefits of the marital institution. That weakening will affect not only same-sex households raising children but all marriages and all children.

The state, then, cannot achieve the purpose that is the only reason for its recognition of marriage, the responsible procreation and care of children, if it obscures *what marriage is*. And yet weakening marital norms and severing the connection of marriage to responsible procreation are the admitted goals of many prominent advocates of redefining marriage.

C. *The Norm of Monogamy*

Professor Judith Stacey of New York University has expressed hope that redefining marriage will give marriage "varied, creative, and adaptive contours," leading some to "ques-

141. *Id.*

142. See GIRGIS, ANDERSON & GEORGE, *supra* note 4, at 18–21, 32–34.

tion the dyadic limitations of Western marriage and seek . . . small group marriages.”¹⁴³ In their statement “Beyond Same-Sex Marriage,” more than three hundred LGBT and “al-
lied” scholars and advocates call for legally recognizing sexual relationships involving more than two partners.¹⁴⁴

Professor Elizabeth Brake of Arizona State University thinks that justice requires using legal recognition to “denormalize[] heterosexual monogamy as a way of life”¹⁴⁵ and “rectify[] past discrimination against homosexuals, bisexuals, polygamists, and care networks.”¹⁴⁶ She supports “minimal marriage,” in which “individuals can have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each.”¹⁴⁷

In 2009, *Newsweek* reported that the United States already had over five hundred thousand polyamorous households, concluding that:

[P]erhaps the practice is more natural than we think: a response to the challenges of monogamous relationships, whose shortcomings . . . are clear. Everyone in a relationship wrestles at some point with an eternal question: can one person really satisfy every need? Polyamorists think the answer is obvious—and that it’s only a matter of time before the monogamous world sees there’s more than one way to live and love.¹⁴⁸

Justice Samuel Alito voiced concerns about the norm of monogamy during oral arguments in *Obergefell*. If “equality” re-

143. Judith Stacey, *Gay and Lesbian Families: Queer Like Us*, in ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 117, 129 (Mary Ann Mason et al. eds., 1998).

144. See *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006), https://web.archive.org/web/20060920234800/http://www.beyondmarriage.org/full_statement.html [<https://perma.cc/S5LU-MGG7>]; *Signatories*, BEYONDMARRIAGE.ORG, <https://web.archive.org/web/20060922075259/http://www.beyondmarriage.org/signatories.html> [<https://perma.cc/S27N-ZH46>].

145. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 336 (2010).

146. *Id.* at 323.

147. *Id.* at 303.

148. Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, NEWSWEEK (July 28, 2009, 8:00 PM), <http://www.newsweek.com/polyamory-next-sexual-revolution-82053> [<https://perma.cc/M3EV-SU8U>].

quires redefining marriage to include same-sex couples, what else does “equality” require? If the fundamental right to marry is simply about consenting adult romance and caregiving, what limits could the state ever place on it? Justice Alito posed the hypothetical of “a group consisting of two men and two women apply[ing] for a marriage license” and asked, “Would there be any ground for denying them a license?”¹⁴⁹ Pursuing this line of thought further, he asked about other types of couples. How about siblings?:

They’ve lived together for twenty-five years. Their financial relationship is the same as the same-sex couple. They share household expenses and household chores in the same way. They care for each other in the same way. Is there any reason why the law should treat the two groups differently?¹⁵⁰

It was a good question, and one that the lawyers to whom it was directed could not answer.¹⁵¹ Nor could the Court. Chief Justice Roberts points out that every argument the Court made to redefine marriage to include same-sex couples could be used to redefine it to include multi-person relationships: “Although the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.”¹⁵² Roberts continues: “It is striking how much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”¹⁵³ Not once did the Court explain why marriage was limited to twosomes once they got rid of male-female complementarity.

The same week as oral arguments, the London *Telegraph* reported that the British “Green Party is ‘open’ to the idea of three-person marriages.”¹⁵⁴ Indeed, a party leader said “she was ‘open to further conversation and consultation’ about the

149. Obergefell Argument Transcript, *supra* note 10, at 17.

150. *Id.* at 33.

151. *See id.* at 33–34.

152. Obergefell v. Hodges, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

153. *Id.*

154. Matthew Holehouse, *Greens “open” to three-person marriage, says Natalie Bennett*, TELEGRAPH (May 1, 2015, 12:28 PM), <http://www.telegraph.co.uk/news/general-election-2015/11576818/Greens-open-to-three-personmarriage-says-Natalie-Bennett.html> [<https://perma.cc/TKC4-BGMV>].

prospect of the state recognising polyamorous relationships.”¹⁵⁵ The issue came up precisely because a constituent had asked about “marriage equality” for threesomes:

At present those in a “trio” (a three-way relationship) are denied marriage equality, and as a result face a considerable amount of legal discrimination.

As someone living with his two boyfriends in a stable long-term relationship, I would like to know what your stance is on polyamory rights. Is there room for Green support on group civil partnerships or marriages?¹⁵⁶

Will there be room for such support in America’s political parties? In the month leading up to the *Obergefell* ruling, the *Emory Law Journal* published a symposium exploring the constitutional right to polygamy.¹⁵⁷ And in the spring of 2015, Ronald C. Den Otter, a political scientist in California, published *In Defense of Plural Marriage*, in which he purports to show “why the constitutional arguments that support the option of plural marriage are stronger than the constitutional arguments against it.”¹⁵⁸ The day that the Supreme Court redefined marriage everywhere, *Politico* ran an essay titled: “It’s Time to Legalize Polygamy: Why group marriage is the next horizon of social liberalism.”¹⁵⁹

But if you suspect that all this talk about polygamy and polyamory is just conservative scaremongering, consider that the advocates of same-sex marriage have been enthusiastically exploring new family forms. The liberal online magazine *Salon* in August 2013 posted a woman’s account of her shared life with a husband, boyfriend, and daughter under the headline “My

155. *Id.*

156. *Id.*

157. Symposium, *Polygamous Unions? Charting the Contours of Marriage Law’s Frontier*, 64 EMORY L.J. 1669, 1669–70 (2015); see also Eugene Volokh, *Emory Law Journal on a Constitutional Right to Polygamy*, VOLOKH CONSPIRACY (June 9, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/emory-law-journal-symposium-on-a-constitutional-right-to-polygamy> [<https://perma.cc/L9FG-U2Y9>].

158. Ronald C. Den Otter, *IN DEFENSE OF PLURAL MARRIAGE 1* (2015).

159. Fredrik DeBoer, *It’s Time to Legalize Polygamy: Why group marriage is the next horizon of social liberalism*, POLITICO (June 16, 2015), <http://www.politico.com/magazine/story/2015/06/gay-marriage-decision-polygamy-119469> [<https://perma.cc/P8FJ-3LRJ>].

Two Husbands.” The subhead: “Everyone wants to know how my polyamorous family works. You’d be surprised how normal we really are.”¹⁶⁰

These adventurers have even coined a new word to denote one of the new domestic arrangements: “throuple.” *New York* magazine profiled one such group: “Their throuplehood is more or less a permanent domestic arrangement. The three men work together, raise dogs together, sleep together, miss one another, collect art together, travel together, bring each other glasses of water, and, in general, exemplify a modern, adult relationship. Except that there are three of them.”¹⁶¹ Are those inclined to such relationships being treated unjustly when their consensual romantic bonds go unrecognized? Are their children unconscionably “stigmatized?” We have just witnessed a successful lawsuit demanding “marriage equality” for same-sex couples. But on what basis could the Court deny marriage equality to same-sex throuples? Or mixed-sex quartets?¹⁶² Monogamy’s privileged place in Western law and culture, after all, was based on the belief that the one man and the one woman who unite in the comprehensive act that produces a child should form a stable family. But if the male-female nature of marriage is utterly arbitrary, what is so special about the number two? What is the principled reason for denying “marriage equality” to threes and fours and more?

D. *The Norm of Exclusivity*

The journalist Andrew Sullivan, who has extolled the “spirituality” of “anonymous sex,”¹⁶³ also thinks that the “openness” of same-sex unions could enhance the bonds of husbands and wives:

160. Angi Becker Stevens, *My Two Husbands*, SALON (Aug. 3, 2013, 8:00 PM), http://www.salon.com/2013/08/05/my_two_husbands [https://perma.cc/FR8E-FTAP]; see also Brooke Lea Foster, *Married, but Not Exclusive*, WASHINGTONIAN (July 30, 2013), <http://www.washingtonian.com/articles/people/married-but-not-exclusive> [https://perma.cc/744Z-U2L6].

161. Molly Young, *He & He & He*, NEW YORK (June 29, 2012), <http://nymag.com/news/features/benny-morecock-throuple> [https://perma.cc/7CM5-58ZK].

162. See Obergefell Argument Transcript, *supra* note 10, at 33.

163. Andrew Sullivan, Letter to the Editor, SALON (Dec. 8, 1999), <http://www.salon.com/1999/12/15/sullivan> [https://perma.cc/K33X-KEMQ].

Same-sex unions often incorporate the virtues of friendship more effectively than traditional marriages; and at times, among gay male relationships, the openness of the contract makes it more likely to survive than many heterosexual bonds . . . [T]here is more likely to be greater understanding of the need for extramarital outlets between two men than between a man and a woman . . . [S]omething of the gay relationship's necessary honesty, its flexibility, and its equality could undoubtedly help strengthen and inform many heterosexual bonds.¹⁶⁴

"Openness" and "flexibility" are Sullivan's euphemisms for sexual infidelity. *The New York Times* recently reported on a study finding that exclusivity was not the norm among gay partners: "'With straight people, it's called affairs or cheating' . . . 'but with gay people it does not have such negative connotations.'"¹⁶⁵

A writer in the *Advocate* candidly admits where the logic of redefining marriage to include same-sex relationships leads: "We often protest when homophobes insist that same sex marriage will change marriage for straight people too. But in some ways, they're right."¹⁶⁶ The article continues:

Anti-equality right-wingers have long insisted that allowing gays to marry will destroy the sanctity of "traditional marriage," and, of course, the logical, liberal party-line response has long been "No, it won't." But what if—for once—the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?¹⁶⁷

A 2011 *New York Times Magazine* profile of Dan Savage, headlined "Married, with Infidelities," introduced Americans to the term "monogamish," referring to relationships in which the partners allow sexual infidelity provided they are honest about

164. ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 202–03 (1996).

165. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES (Jan. 28, 2010), <http://www.nytimes.com/2010/01/29/us/29sfmetro.html> [<https://perma.cc/DVG4-8XPQ>].

166. Ari Karpel, *Monogamish*, ADVOCATE (July 7, 2011, 4:00 A.M.) <http://www.advocate.com/arts-entertainment/features/2011/07/07/monogamish> [<https://perma.cc/P5CJ-D8WB>].

167. *Id.*

it.¹⁶⁸ The article explained, “Savage says a more flexible attitude within marriage may be just what the straight community needs.”¹⁶⁹ After all, sexual exclusivity “gives people unrealistic expectations of themselves and their partners.”¹⁷⁰ Savage seems inclined to keep monogamy, but he wants to get rid of the requirement of sexual exclusivity, which he finds outdated and inhumane. No one can have all his sexual needs fulfilled by one person for the rest of his life. This is what is wrong with marriage. Spouses who discuss their sexual relationships openly and honestly, says Savage, with no coercion and no deceit, should be free to have a sexually open relationship.¹⁷¹

For Savage, a monogamish relationship may actually enhance the emotional bond of spouses. One of the reasons that spouses get divorced, Savage argues, is that their sexual needs are not being fulfilled inside of marriage. Because Americans have this outdated and unrealistic expectation of sexual exclusivity, when the other spouse finds out about an affair his or her heart is broken. Marriage would work much better, Savage says, if spouses could focus their marriage on their romantic caregiving relationship while being free to fulfill sexual needs outside of it.¹⁷² If marriage is really just about deep romantic feeling and personal fulfillment, it is hard to fault his logic.

E. *The Norm of Permanence*

The activists who are questioning the norms of monogamy and exclusivity do not have much use for permanence either. Going far beyond no-fault divorce, which simply weakened this norm, some would eliminate it all together. And they have come up with a name for the new arrangement: “wedlease,” which Paul Rampell introduced in an August 2013 op-ed in the *Washington Post*.¹⁷³ Why, he wondered, should marriage be permanent when

168. Mark Oppenheimer, *Married, with Infidelities*, N.Y. TIMES MAG. (June 30, 2011), <http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html> [<https://perma.cc/4WUS-ZC8G>].

169. *Id.*

170. *Id.*

171. *See id.*

172. *See id.*

173. Paul Rampell, *A High Divorce Rate Means It's Time to Try "Wedleases"*, WASH. POST (Aug. 4, 2013), <http://www.washingtonpost.com/opinions/a-high->

so little else in life is? Why not have temporary marriage licenses, as with other contracts? “Why don’t we borrow from real estate and create a marital lease?” Rampell proposed. Just as you can lease a house, you should be able to lease a spouse. “Instead of wedlock, a ‘wedlease.’”¹⁷⁴ He continues:

Here’s how a marital lease could work: Two people commit themselves to marriage for a period of years—one year, five years, 10 years, whatever term suits them. The marital lease could be renewed at the end of the term however many times a couple likes The messiness of divorce is avoided and the end can be as simple as vacating a rental unit.¹⁷⁵

Apparently, the expectation of a permanent commitment in marriage is unrealistic and inhumane. The reason that divorce causes so much heartbreak and disruption is that spouses have unrealistically expected to live with and love one other person for the rest of their lives. The trouble starts when this proves impossible. But if they only signed up for a “wedlease” in the first place, they would avoid the trauma of shattered expectations. Their five- or ten-year “wedlease” could be renewed if they wished, but if it were not going well, the sunset clause would bring the relationship to a peaceful end.

F. *What’s in a Name?*

The state is interested in marriage and marital norms because they protect children, strengthen civil society, and make limited government possible. Good marriage laws embody and promote a true vision of marriage, which makes sense of those norms as a coherent whole. There is nothing magical about the word “marriage.” Applying the title to a relationship that is not in fact a marriage will not produce adherence to marital norms.

Whatever you think about the morality of “throuples,” “monogamish” relationships, and “wedleases,” the social costs of sexually open marriages, multi-partner marriages, and intentionally temporary marriages will be high. And yet the radical change represented by each of these new words follows logi-

[divorce-rate-means-its-time-to-try-wedleases/2013/08/04/f2221c1c-f89e-11e2-b018-5b8251f0c56e_story.html](https://perma.cc/Q6DV-BSQ2) [https://perma.cc/Q6DV-BSQ2].

174. *Id.*

175. *Id.*

cally once we abandon the notion that marriage requires a man and a woman. If marriage is just about consenting adult romance, then consenting adults will have it on whatever terms they like. Love equals love, after all.

The evidence is simply overwhelming that the marital norms of monogamy, sexual exclusivity, and permanence make a difference for society—and those norms are based on sexual complementarity. If a man does not commit to a woman in a permanent and exclusive relationship, the likelihood of his begetting fatherless children and leaving fragmented families in his wake increases. The more sexual partners a man has and the shorter those relationships are, the more likely he is to have children with multiple women to whom he is not committed. His attention and resources thus divided, the predictable consequences unfold for the mothers, the children, and society.

Government promotes marriage to make men and women responsible to each other and to any children they might have. The marital norms of monogamy and sexual exclusivity serve the same purpose, because they encourage childbearing within a context that makes it most likely that children will be raised by their mother and father. These norms also encourage shared responsibility and commitment between spouses, ensure that children receive sufficient attention from both their mothers and their fathers, and exclude sexual and kinship jealousy from the family. The norm of permanence ensures that children will be cared for by their mother and father until they reach maturity. It also promotes interaction across the generations as elderly parents are cared for by their adult children and as grandparents help to care for their grandchildren without the complications of fragmented stepfamilies.

Someone might object that it hardly matters if a small percentage of marriages are open, group, or temporary. The same argument was made during the no-fault divorce debate. No-fault divorce was for the relatively small number of people suffering in unhappy marriages and would be irrelevant for everyone else. But the change in the law changed everyone's expectations of

marital permanence.¹⁷⁶ The breakdown of the marriage culture that followed made it possible in our generation to consider removing sexual complementarity from the legal definition of marriage. And that redefinition may lead to further redefinition.

Pretending as a matter of law that men and women are interchangeable, that “monogamish” relationships work just as well as monogamous relationships, that “throuples” are the same as couples, and that “wedlease” is preferable to wedlock will only lead to more broken homes, more broken hearts, and more intrusive government. Americans should reject such revisionism and work to restore the essentials that make marriage so important for societal welfare: sexual complementarity, monogamy, exclusivity, and permanence.

G. *Threatening Religious Liberty*

With marriage now redefined, we can expect to see the marginalization of those with traditional views and the erosion of religious liberty. The law and culture will seek to eradicate such views through economic, social, and legal pressure. With marriage redefined, believing what virtually every human society once believed about marriage will increasingly be deemed a malicious prejudice to be driven to the margins of culture. The consequences for religious believers are becoming apparent.

Some of the Justices pointed to this threat during the oral arguments before the Supreme Court in *Obergefell*. When pressed by Justice Alito, the solicitor general, Donald Verrilli, admitted that religious schools that affirm marriage as the union of a man and a woman might lose their nonprofit tax status if marriage were redefined: “[I]t’s certainly going to be an issue. I—I don’t deny that. I don’t deny that, Justice Alito. It is—it is going to be an issue.”¹⁷⁷

And all four dissenting justices noted the religious liberty concerns in their dissents. The ruling, Chief Justice Roberts

176. See Maggie Gallagher & Barbara Dafoe Whitehead, Symposium, *End No-Fault Divorce?*, FIRST THINGS (Aug. 1997), <https://www.firstthings.com/article/1997/08/end-no-fault-divorce> [<https://perma.cc/5HJA-2AMP>].

177. *Obergefell* Argument Transcript, *supra* note 10, at 38; see also Johnny Rex Buckles, *The Sexual Integrity of Religions Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL’Y 254 (2017).

warns, “creates serious questions about religious liberty.”¹⁷⁸ He observes that “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.”¹⁷⁹

Justice Alito points out that activists will use the decision’s rhetoric to attack religious liberty:

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.¹⁸⁰

Justice Alito sees dark days ahead: “I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”¹⁸¹ And we have the Court to blame: “By imposing its own views on the entire country, the majority facilitates the marginalization of the many Americans who have traditional ideas.”¹⁸²

Most alarmingly, the majority opinion never discusses the free exercise of religion. Chief Justice Roberts wryly notes, “The majority graciously suggests that religious believers may continue to ‘advocate’ and ‘teach’ their views of marriage.”¹⁸³ But the First Amendment, he says, “guarantees . . . the freedom to ‘exercise’ religion. Ominously, that is not a word the majority uses.”¹⁸⁴

Justice Thomas picks up on this as well, noting that the majority opinion indicates a misunderstanding of religious liberty in our Nation’s tradition:

Religious liberty is about more than just the protection for “religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to

178. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

179. *Id.*

180. *Id.* at 2642 (Alito, J., dissenting) (citation omitted).

181. *Id.* at 2642–43.

182. *Id.* at 2643.

183. *Id.* at 2625 (Roberts, C.J., dissenting).

184. *Id.*

their lives and faiths.” Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

Although our Constitution provides some protection against such governmental restrictions on religious practices, the People have long elected to afford broader protections than this Court’s constitutional precedents mandate. Had the majority allowed the definition of marriage to be left to the political process—as the Constitution requires—the People could have considered the religious liberty implications of deviating from the traditional definition as part of their deliberative process. Instead, the majority’s decision short-circuits that process, with potentially ruinous consequences for religious liberty.¹⁸⁵

And protect religious liberty we must, for as Chief Justice Roberts notes, “Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.”¹⁸⁶ Why not? Because “the most discouraging aspect of today’s decision is the extent to which the majority feels compelled to sully those on the other side of the debate.”¹⁸⁷ As the Chief Justice writes, “These apparent assaults on the character of fair minded people will have an effect, in society and in court. Moreover, they are entirely gratuitous.”¹⁸⁸ Indeed, “It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.”¹⁸⁹

Here is what we can expect. The administrative state may require those who contract with the government, receive governmental money, or work directly for the state to embrace and promote same-sex marriage even if doing so violates their religious beliefs. Nondiscrimination laws may make even private actors with no legal or financial ties to the government—including businesses and religious organizations—liable to civil suits for refusing to treat same-sex relationships as marriages.

185. *Id.* at 2638–39 (Thomas, J., dissenting) (quoting *id.* at 2607 (majority opinion)) (citations omitted).

186. *Id.* at 2626 (Roberts, C.J., dissenting).

187. *Id.*

188. *Id.* (citation omitted).

189. *Id.* at 2626.

Finally, private actors in a culture that is now hostile to traditional views of marriage may discipline, fire, or deny professional certification to those who express support for traditional marriage.¹⁹⁰ The Becket Fund for Religious Liberty reports that “over 350 separate state anti-discrimination provisions would likely be triggered by recognition of same-sex marriage.”¹⁹¹

The attack on religious liberty has in fact already begun, as I describe in more detail in *Truth Overruled*.¹⁹² It is important to understand the conceptual framework for this attack. In 2013 a bill was proposed in the Illinois legislature to redefine marriage while supposedly protecting religious liberty. The Catholic bishop of Springfield explained why the protections of the statute were meaningless:

[The bill] would not stop the state from obligating the Knights of Columbus to make their halls available for same-sex “weddings.” It would not stop the state from requiring Catholic grade schools to hire teachers who are legally “married” to someone of the same sex. This bill would not protect Catholic hospitals, charities, or colleges, which exclude those so “married” from senior leadership positions This “religious freedom” law does nothing at all to protect the consciences of people in business, or who work for the government. We saw the harmful consequences of deceptive titles all too painfully last year when the so-called “Religious Freedom Protection and Civil Union Act” forced Catholic Charities out of foster care and adoption services in Illinois.¹⁹³

In fact, the lack of religious liberty protection seems to be a feature, not a bug, of such bills:

190. For more on this, see Thomas M. Messner, *Same-Sex Marriage and the Threat to Religious Liberty*, (Heritage Found., Backgrounder No. 2201, Oct. 30, 2008), <http://www.heritage.org/research/reports/2008/10/same-sex-marriage-and-the-threat-to-religious-liberty> [https://perma.cc/Q34N-4WYW].

191. BECKET FUND FOR RELIGIOUS LIBERTY, *SAME-SEX MARRIAGE AND STATE ANTI-DISCRIMINATION LAWS 2* (Jan. 2009), <http://www.becketfund.org/wp-content/uploads/2011/04/Same-Sex-Marriage-and-State-Anti-Discrimination-Laws-with-Appendices.pdf> [https://perma.cc/6D99-BJ4T]; see also Messner, *supra* note 190, at 4.

192. ANDERSON, *supra* note 107, at 85–104.

193. Letter from Thomas John Paprocki, Bishop of Springfield, to Priests, Deacons, and Pastoral Facilitators of the Diocese of Springfield (Jan. 3, 2013), <http://www.dio.org/blog/item/326-bishop-paprockis-letter-on-same-sex-marriage.html> [https://perma.cc/5TK2-YF7P].

There is no possible way—none whatsoever—for those who believe that marriage is exclusively the union of husband and wife to avoid legal penalties and harsh discriminatory treatment if the bill becomes law. Why should we expect it [to] be otherwise? After all, we would be people who, according to the thinking behind the bill, hold onto an “unfair” view of marriage. The state would have equated our view with bigotry—which it uses the law to marginalize in every way short of criminal punishment.¹⁹⁴

Georgetown University law professor Chai Feldblum, a member of the U.S. Equal Employment Opportunity Commission, argues that “equality” in sexual matters must trump religious liberty:

[F]or all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the “zero-sum” nature of the game inevitably comes into play. And, in making that decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people.¹⁹⁵

Indeed, for many supporters of redefining marriage, such infringements on religious liberty are not flaws but virtues of the movement.

In 2013 the Supreme Court struck down the federal Defense of Marriage Act¹⁹⁶ in an opinion, written by Justice Kennedy, notable for its intemperate rhetoric.¹⁹⁷ Justice Scalia, in dissent, warned of the dangers lurking in the majority opinion:

[T]o defend traditional marriage is not to condemn, demean, or humiliate those who would prefer other arrangements To hurl such accusations so casually demeans *this institution*. In the majority’s judgment, any resistance to its holding is beyond the pale of reasoned disagreement All that, simply for supporting an Act that did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually

194. *Id.*

195. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOKLYN L. REV. 61, 119 (2006).

196. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

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

all of human history. It is one thing for a society to elect change; it is another for a court of law to impose change by adjudging those who oppose it *hostes humani generis*, enemies of the human race.¹⁹⁸

Those dangers have been amplified by the Court in *Obergefell*.

198. *Id.* at 2708–09 (Scalia, J., dissenting).