What's In a Name? The Case for the Disestablishment of Marriage

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**Abstract**

The most remarkable social change of the past two decades has been the movement for gay rights focused on the right to marry. The movement for gay marriage has made urgent (and indeed is bringing to the Supreme Court) the question of what the right to marry might be and what marriage is. Marriage is, among other things, a sacred and expressive institution imbued with robust notions of the good life, but it is also a state license. That is, in our society, marriage is established as religion is not.

This paper addresses the question begged by centuries of American jurisprudence: Is marriage after all, as the Supreme Court in *Reynolds v. United States* presumed, an institution with “which government is necessarily required to deal”? To demonstrate the costs that come with state establishment of marriage and to make marriage visible as a system of state intervention rather than a natural fact, I look at marriage through the lens of a largely forgotten piece of American legal history: the Mormon polygamy cases, which vividly demonstrate the contradictions and injustices inherent in the liberal state’s involvement in marriage. I also examine the more recent cases involving challenges to the legality of marriages performed by ministers of the internet-based Universal Life Church, in which courts have found themselves forced to assess religious bona fides in order to police the validity of state licenses. Finally, I examine the 20th- and 21st-century right-to-marry cases.

This paper’s claims are that, first, excluding same-sex couples from state-established marriage cannot be defended and violates the Constitution. However, second, this exclusion is specifically a violation of the Equal Protection Clause, not the Due Process Clause, and therefore disestablishment of marriage is constitutionally permissible. Third, establishment of marriage leads to violations of our liberal ideals without corresponding benefit. The state can and should get out of the marriage business.
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What’s in a Name?
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Introduction

The most remarkable social change of the past two decades has been the movement for gay rights focused on the right to marry. With gay and lesbian people increasingly raising children and entering into publicly acknowledged long-term unions, they seem “similarly situated” to straight couples. The previously unthinkable has become the mundane. In the last decade, public opinion has rapidly shifted from widespread revulsion at same-sex coupling to majority support for granting same-sex couples something functionally equivalent to marriage, and now even to majority support for allowing same-sex couples to marry. It can look as if extension of marriage to gays is inevitable, one relatively smooth transition in the triumphal American march to civil rights.

But a second look complicates the picture. The Gallup poll that found “For First Time, Majority of Americans Favor Legal Gay Marriage” was subtitled “Republicans and older Americans remain opposed.” The dramatic shift in opinion has occurred solely among Democrats, independents, and the young. There was zero shift in opinion among Republicans. It is true that the shift among the young would seem to confirm the inevitability of the opposition’s demise, yet the intransigence of a significant sector of the population at least suggests the transition will not be easy. Furthermore, 13 states filed an amicus brief in opposition to gay marriage and since 2004 eight states have amended their constitutions to bar gay marriage, all of

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1 Please note that in this draft I have avoided using the “id.” citation form, because these cross-references can become a mess upon revision.
which suggests the opposition cannot be dismissed.\(^4\)

Some advocates have framed the problem as a simple demand to extend marriage to gays without changing the underlying institution. Indeed, advocates of extending marriage to same-sex couples have argued that doing so will “strengthen the institution of marriage.”\(^5\) Opponents and advocates of gay marriage share the same assumption: that the state should be in the marriage business. Yet by calling into question traditional assumptions about marriage, the movement for gay marriage provides an opportunity to look more deeply and freshly at marriage. This opportunity should not be squandered.

This paper addresses the question begged by centuries of American jurisprudence: Is marriage after all an institution with “which government is necessarily required to deal”? To answer this question requires first investigating what marriage is; we must get clear what we mean when we say “marry” and “marriage.” It turns out that marriage has multiple meanings that have been conflated in the law. These meanings include marriage as a sacred and expressive institution imbued with robust notions of the good life. State establishment of marriage is therefore in deep tension with liberal ideals.

In speaking of marriage as “established,” I use the word in the sense the Founders did in the First Amendment’s Establishment Clause. Tamara Metz puts it this way:

Just as the ‘establishment of religion’ refers to the state’s active involvement in defining,
inculcating, and supporting particular religious worldviews and institutional arrangements, so
the ‘establishment of marriage’ highlights the state’s integral role in reproducing and relying
on belief in a particular, comprehensive account and institutional form of intimate life.6

In the United States, marriage is established, as religion is not. Can this be defended?

Because marriage is taken for granted by most of us most of the time, my argument requires
bringing readers to the prior point of seeing that state-established marriage requires defending. If
our particular institution of marriage is simply inevitable, a natural fact, it requires no defense.
This paper strives to make marriage visible as “a system of aggressive government
intervention,”7 rather than a natural fact. It seeks to throw into relief the conflict between
liberalism and marriage and the violence we do to liberalism as a cost of establishing marriage.
To do so, I look at marriage through the lens of a largely forgotten piece of American legal
history: the Mormon polygamy cases, which vividly demonstrate the contradictions and
injustices inherent in the liberal state’s involvement in marriage. By taking this tack, I do not
mean to suggest an equivalence between polygamy and gay marriage, although I do believe that
the history of revulsion against gays should make a person committed to gay rights think
carefully before ascribing universal truth to condemnation of polygamy or legitimacy to
government bans on it.8

Suggesting that marriage should be disestablished begs a further question: If liberalism
requires a divorce between the state and marriage, what state institutions, if any, should marriage

6 METZ, supra note 7 at 11.
8 Polygamous relationships between consenting adults are a different matter from polygamy involving children,
which is clearly abusive. Yet opponents of polygamy have typically tried to tar the former with the taint of the latter.
Indeed, much the same tactic has been used against gays, painting all gays as pedophiles. See, e.g., the brochure
issued by Coloradans for Family Values in support of the anti-gay Amendment 2 (overturned by Romer v. Evans,
(1997) (saying pedophilia “is actually an accepted part of the homosexual community” and “homosexuals” are
responsible for a disproportionate number of child molestations).

Shayna Sigman cites studies finding that polygynous families have no higher rate of abuse than other families.
(citing JANET BENNION, WOMEN OF PRINCIPLE: FEMALE NETWORKING IN CONTEMPORARY MORMON POLYGyny 8-
12 (1998); IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 44 (1996)).
be replaced by? This paper does not answer that question, but by analyzing the basic human needs underlying marriage, I suggest what functions the state would need institutions to fill after marriage is disestablished.

This paper’s claims are that, first, excluding same-sex couples from state-established marriage cannot be defended and violates the Constitution. However, second, this exclusion is specifically a violation of the Equal Protection Clause, not the Due Process Clause, and therefore disestablishment of marriage is constitutionally permissible. Third, establishment of marriage leads to violations of our liberal ideals without corresponding benefit.9

I. What Are the Limits of the State Under Liberalism?

The United States is a liberal state, which is to say among other things that it is a limited state. Under the Constitution, all government power is derivative from the people, who retain all power they have not granted to the government.10 This notion owes much to John Locke, who posited society as prior to the government, which is created by consent.11 In the state of nature, according to Locke, humans are naturally free but vulnerable.12 People therefore consent to form governments in order to secure their lives, liberty, and property,13 or as the Declaration of Independence puts it, “life, liberty, and the pursuit of happiness.” Government comes into being to allow people freely to pursue their particular notions of the good life, and so must be neutral

9 Therefore, much as the Founders argued that disestablishment of religion was good for religion as well as for the state, I would argue that disestablishment of marriage would be good for marriage and for religions in which marriage plays a key theological role. See, e.g., James Madison, Memorial and Remonstrance §§ 7–8 (“Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.”)
10 See, e.g., U.S. CONST. pmbl, amend. IX, X.
12 LOCKE, supra note 13 at 109.
13 LOCKE, supra note 13 at 109.
between these notions, limiting people’s freedom only to prevent them from harming others. A liberal state can regulate actions, but not belief, and furthermore it may not regulate actions that do not cause harm. While this harm principle is usually attributed to John Stuart Mill, some version of it is implied by the Founders’ concept of government as coming into existence through consent and as limited by the purposes for which that consent was granted. Furthermore, remarks of the Founders suggest that they embraced a version of the harm principle.

Liberalism’s moral commitments are limited to thin, procedural constraints and proscriptions on injury to other persons, rather than robust, positive commands or prohibitions on forms of living. Tamara Metz describes liberalism as “a commitment to liberty, equality, and stability amidst deep diversity.” Thus, for example, in the United States, the government is barred from establishing religion and from interfering with freedom of speech. This is not because religion and speech are thought not to matter. Quite the contrary. They matter so much in such different ways to different citizens that the state properly stays neutral between them. Liberalism requires a distinction between the public realm, where universal but thin norms of justice apply, and the

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15 See Virginia Declaration of Religious Freedom of 1785, prml, ch 34, 12 Hening’s Stat. 84 (cited in Reynolds v. United States, 98 U.S. 145, 164 (1878) (“it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.”)
16 See Calder v. Bull, 3 U.S. 366, 388 (1798) (“The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it”).
17 See, e.g., Virginia Declaration of Religious Freedom of 1785, prml, ch 34, 12 Hening’s Stat. 84. See also the provision on free exercise of religion in the Virginia Declaration of Rights as originally proposed by George Mason (in 1 Papers of James Madison, William T. Hutchinson and William M. E. Rachal, eds., U Chic. 1962, at 172): “…all men should enjoy the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion any man disturb the peace, the happiness, or safety of society, or of individuals.” Jefferson seems to have embraced a robust version of the harm principle: “But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg.” Jefferson, Notes on the State of Virginia 292 (1782).
18 Metz, supra note 7 at 5–6.
private realm, where people pursue their notions of the good life.\textsuperscript{19} It also requires a distinction between the material realm, where the state can intervene to protect persons from physical harm, and the expressive realm (“the profession or propagation of principles,” as Jefferson put it\textsuperscript{20}), where the state has no business.

The public forum doctrine, under which the government is required to leave the streets and parks open for expressive activity, seems at first glance an exception.\textsuperscript{21} The doctrine is unusual, within the American negative rights framework, in seeming to require the government affirmatively to provide something. However, it is in fact consistent with liberalism, in that the government must provide the forum, but remain neutral as to what gets expressed. Whether state-established marriage is consistent with liberalism, therefore, turns on whether marriage is a neutral forum.\textsuperscript{22} In establishing marriage, is the state doing something equivalent to merely providing a neutral forum for expressions of the good life or is it doing something more like establishing religion, stamping some beliefs and indeed some ways of living better than others? Can the state license be disassociated from its other meanings and the material benefits the license confers disentangled from the expressive benefits the label bestows? I believe not.

\textbf{II. What Is Marriage?}

\textsuperscript{19} The public-private distinction has been much critiqued at least since Marx. It is a central, perhaps the central, theme of feminism. See, e.g., Carole Pateman, \textit{Feminist Critiques of the Public/Private Dichotomy}, in \textit{PUBLIC AND PRIVATE IN SOCIAL LIFE} 281, 281 (S.I. Benn \& G.F. Gaus eds., 1983); Ruth Gavison, \textit{Feminism and the Public/Private Distinction}, 45 \textit{STAN. L. REV.} 1, 1-2 (1992) (surveying feminist critiques of the distinction). While I think a reconstructed version of this distinction is both tenable and useful, such a reconstruction goes beyond the scope of this paper.

\textsuperscript{20} Virginia Declaration of Religious Freedom, Preamble, 8 \textit{JEFF. WORKS} 113 (cited in \textit{Reynolds v. United States}, 98 U.S. 145, 164 (1878)).


\textsuperscript{22} Sunstein, in comparing the public forum with a right to marriage’s expressive goods, fails to note this question. See Sunstein, \textit{supra} note 9 at 2096.
To decide whether state-established marriage is consistent with liberalism requires defining what marriage is, a step too many commentators have glossed over because they take marriage for granted. Professor Sunstein states that “marriage is no more and no less than a government-run licensing system.” But even as a claim about marriage as “an official matter,” the statement cannot be squared with case or statutory law. At any rate, what the government is licensing is something odd. Marriage is, at least, a contract, a religious sacrament, a private bond, a community status, and a license from the state that confers certain benefits, both material and expressive. This is not to say that every person who enters the institution intends each of these meanings; plenty of atheists marry. But none of us can opt out of the profound historical and cultural weight of the term. As Ludwig Wittgenstein said, there is no private language.

A. What Do We Mean When We Say “Marry”?  
The diverse meanings of marriage can be arranged under two heads: state license and private expression. But what we place under each head has shifted dramatically in recent times. What many now consider a form of private expression—sexual intimacy—was once part of the state license, because sex (and procreation) were legal only within marriage. What was once permission from the state to engage in intimate association has now become only recognition by the state of intimate associations. In part because of these shifts, the law, and indeed our very language, exhibits a deep confusion between these senses of “to marry.”

Take, for example, bigamy law. The typical bigamy statute provides that “a person who,

23 Sunstein, supra note 9 at 2082.
24 Sunstein, supra note 9 at 2082.
25 This shift is evident in Black’s Law Dictionary. The 1979 edition defined marriage as “permission granted by public authority to persons who intend to intermarry…,” while the 2004 edition defined it more blandly and opaquely as “the legal union of a couple as husband and wife,” and the 2009 edition shifts to the gender-neutral “the legal union of a couple as spouses.” Black’s Law Dictionary 877 (5th ed. 1979); Black’s Law Dictionary 992 (8th ed. 2004); Black’s Law Dictionary 1059 (9th ed. 2009).
having a husband or wife living, marries another person, is guilty of bigamy.” If “to marry” refers to acquisition of a state license providing recognition of an intimate association, then “bigamy” should mean possessing two such state licenses at once. Bigamy would be a species of fraud committed by gaining a second marriage license from the state under the false pretense that the first license does not exist. Anyone who has only a single state marriage license, regardless of what additional private “marriage” ceremonies she might have engaged in, would not be guilty of bigamy. But this is not how bigamy law works. One can be prosecuted for bigamy in many states if one goes through any sort of “marriage” ceremony while already married. Thus, bigamy law is a holdover from the older notion of marriage as state permission to engage in intimate association, including permission to call the association “marriage.”

One may also be liable for other crimes for which bigamy is a predicate without having received more than one marriage license. For example, in 1956, the First Circuit reviewed the conviction of a man for knowingly making a false statement under oath. To the question on an application for U.S. citizenship, “Have you ever ... been married to more than one person at the same time?” he had answered “no,” but in fact he had “gone through a ceremony of marriage” when he was already married. The court rejected his defense that, because the second marriage was a legal nullity, it was true that he was never married to more than one woman at a time. The court noted that the term “married” refers both to the ceremony and the state of wedlock, yet failed to note that “married” also refers both to private solemnization and state licensing. The court did not make clear whether the man had received a second state marriage license or not.

“… [A] second marriage ceremony, though a nullity, could give rise to certain legal

27 See, e.g., State v. Green, 99 P.3d 820, 833 (Utah 2004); see also 4 Am. & Eng. Enc. L. 39 (2d ed.). (“It is now held by all the courts that the word ‘marries,’ when applied to a subsequent marriage, means going through a form of marriage.”)
28 Boufford v. United States, 239 F.2d 841 (1st Cir. 1956). The defendant had previously been convicted of bigamy.
responsibilities,” the court said without apparent irony.\textsuperscript{29} However, in an implicit acknowledgment of the confusing nature of bigamy law, the court remanded, finding it an open question for the jury whether he had \textit{knowingly} made a false statement.\textsuperscript{30} In a nearly identical case in the Sixth Circuit in 2009, the court applied the same reasoning.\textsuperscript{31} While it is difficult to have much sympathy for a defendant who most likely conned women and tried to have it both ways, gaining the benefits of the marriage label while avoiding its constraints,\textsuperscript{32} the law itself has it both ways. For marriage law it refuses to recognize a second marriage and for bigamy and perjury law it insists on recognizing it, and muddles together two meanings of marriage. Thus, marriage is not only a state system of licensing the material benefits of marriage, but a state system for licensing permission to engage in expressive conduct, and even to use the word “marry.” How did this state of affairs come to pass?

\textbf{B. Anglo-American Marriage Tradition Intertwines the State and Church}

Contrary to Henry Sumner Maine, the history of marriage in Anglo-American law is most accurately described as a shift from contract to status and partway back.\textsuperscript{33} But in the (partial) return to contract the parties to it have altered. Nowadays we understand the marriage contract as an agreement between husband and wife, but the earliest English laws treated marriage as a private contract for the purchase of a wife, or, as Mary Ann Case puts it, a license for a husband to “control his wife, her body, and the products of her labor, from the children she bore to her

\textsuperscript{29} Bouffard, 239 F.2d at 844.
\textsuperscript{30} Bouffard, 239 F.2d at 845–846.
\textsuperscript{31} United States v. Ali, 557 F.3d 715, 722 (6th Cir. 2009).
\textsuperscript{32} In the first case, it is not clear but seems likely that the defendant behaved fraudulently in entering his second “marriage.” In the second case, only mistake was at issue, apparently. The defendant had received what he thought was a judgment of divorce, written in a language he did not read. He married a second woman. Later when he received the actual divorce decree, he realized the mistake and on advice of counsel married the second wife again. Ali, 557 F.3d at 717.
\textsuperscript{33} Mary Ann Case, Marriage Licenses, 89 Minn. L. Rev. 1758, 1765 (2005).
earnings and property.”\textsuperscript{34} The contract was \textit{about} her, but not \textit{with} her.

At the same time, marriage was a religious institution. Marriage was regulated by church canon law, not by the state. Yet canon law treated marriage as a private, contractual matter; in the twelfth century, Pope Alexander III announced that all that was required to form a valid marriage was “a contract by words of present consent.” The church required no public ceremony of any kind to form a valid marriage.\textsuperscript{35}

The state, as Professor Case notes, is a relative newcomer to the institution of marriage.\textsuperscript{36} More precisely, states have long enforced the collateral effects of marriage, for example in criminal and property law, but they did not define marriage itself or police its terms of entry and exit. In Europe, states gained control over marriage with the Protestant reformation.\textsuperscript{37} A number of rulers converted to Protestantism in order to free themselves of the pope’s power and exert their unfettered power over their societies, including through the regulation of marriage.\textsuperscript{38} This occurred most dramatically in England, where Henry VIII, in part to secure his own divorce, created a new church under his control. The English state asserted monopoly control over marriage, by requiring that marriages be solemnized by the church that he headed.\textsuperscript{39}

It is this peculiarity of English history that explains the special conflation of civil and religious marriage in American law. In some European countries, by contrast, civil and religious marriage are entirely separate.\textsuperscript{40} The British conflation of the state and the Protestant church also underlies the fact that within America the most virulent opposition to gay marriage comes from

\textsuperscript{34} Case, \textit{supra} note 35 at 1765.
\textsuperscript{35} Case, \textit{supra} note 35 at 1766.
\textsuperscript{36} Case, \textit{supra} note 35 at 1765.
\textsuperscript{37} \textsc{Stephanie Coontz}, \textit{Marriage, A History: From Obedience to Intimacy or How Love Conquered Marriage} 132 (2005).
\textsuperscript{38} Coontz, \textit{supra} note 39 at 133.
\textsuperscript{39} Case, \textit{supra} note 35 at 1767.
\textsuperscript{40} Case, \textit{supra} note 35 at 1793–94.
fundamentalist Protestants. Whereas Catholicism and Judaism themselves regulate and define marriage, “Protestant denominations in the United States have essentially abdicated the definition, creation and, above all the dissolution of marriage to the state.” When opponents of gay marriage express themselves in religious terms and describe it as an existential threat to America and to their religion, Mary Ann Case argues, their views should be taken seriously, because they reveal a truth about the nature of marriage in America.

While Protestantism has a special tendency to conflate civil and religious marriage, marriage is important in most theologies. In Judaism, marriage is a mitzvah (a Hebrew word that means both a commandment from God and a blessing) and the Talmud treats an unmarried man as unhappy and incomplete. In Hinduism, spiritual completion requires marriage. In Catholicism, marriage is one of the seven sacraments. Protestantism defines marriage as the fundamental building block of society. Mormonism, for a portion of its history made polygamy, or “celestial marriages,” a central part of its theology, and marriage still plays a crucial role in Mormonism. All of this is to say both that marriage has a profound theological

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42 Case, supra note 35 at 1795.
43 The Rev. Jerry Fallwell associated gay marriage with Sodom and Gomorrah and predicted America would share their fate if gay marriage were legalized, while President Bush said, “Marriage is a sacred institution between a man and a woman,” and vowed to do whatever was “legally necessary to defend the sanctity of marriage.” Cited in Scott, supra note 43 at 552–53.
44 Case, supra note 35 at 1795.
45 "Any man who has no wife lives without joy, blessing and goodness." Yevamot 62b. See also Midrash Bereshit Rabbah 22:4 (“No man without a woman, no woman without a man, and neither without God”).
46 COONTZ, supra note 39 at 86.
47 Catechism of the Catholic Church § 1210 (2d ed. 1997).
48 COONTZ, supra note 39 at 134.
meaning for many believers and the very word marriage is freighted with the power of this cultural and theological history.

C. A Halting Path Toward Contract

This history helps make sense of the tensions in U.S. case law. The theological meaning of marriage and its civil meaning remained entangled as U.S. marriage law developed. By the 19th century, married women achieved advances in their existence as legal persons, including the ability to contract. Yet into the 20th century, marriage retained elements that could not be squared with conceiving of it as a contract. These included a lack of exit from marriage and ban on contractual alteration of the terms of marriage. Even as states began to provide for judicial dissolution of marriage, unlike in an ordinary contract that depends on agreement, exit from marriage could be had only on a showing of fault on one side and blamelessness on the other.

The question of whether marriage was a contract was pressed in Maynard v. Hill. The Supreme Court faced a conundrum: A state legislature had dissolved Lydia and D.S. Maynard’s marriage without her consent and without even providing her with notice, seemingly in violation of the Constitution’s ban on legislative impairment of contracts. If marriage was a contract, it was a “peculiar” one. The Court found marriage to be “more than a contract.” Much more, indeed: It derives its rights and duties from “a source higher than any contract.” Unlike a normal

50 See, e.g., Graham v. Graham, 33 F.Supp. 936 (1940) (finding contract for payments from wife to husband contrary to the prohibition on altering by private agreement the obligations of marriage); Lester v. Lester, 195 Misc. 1094 (Dom. Rel. Ct. of NY, 1949) (holding that contract stating the marriage was a sham was unenforceable and that the wife was entitled to support).

51 See, e.g., Richardson v. Richardson, 524 S.W.2d 149, 152 (Mo. Ct. App. 1975) (plaintiff seeking divorce must show both injury by husband and her own innocence of any offense giving grounds for divorce); Shapiro v. Shapiro, 59 Misc. 2d 412, 415, 298 N.Y.S.2d 785, 788-89 (Sup. Ct. 1969) (only innocent spouse may initiate divorce proceedings); Brewies v. Brewies, 27 Tenn.App. 68, 178 S.W.2d 84 (1943) (divorce is “a remedy for the innocent against the guilty”).

52 125 U.S. 190 (1888).

53 125 U.S. at 213.
contract, once formed, marriage creates relationships that the parties cannot change.\textsuperscript{54} “When formed, this relation is no more a contract than ‘fatherhood’ or ‘sonship’ is a contract.”\textsuperscript{55} And at the same time the state’s power over it is unfettered: It can be “abrogated by the sovereign will whenever the public good” requires it. The court gave no explanation why the state has this remarkable power over marriage, except to say that marriage has “more to do with the morals and civilization of a people than any other institution.”\textsuperscript{56} The history of the English state’s monopolization of marriage as a religious institution goes some way toward explaining this grant of unfettered power to the state and state sanctification of marriages. Neither of these moves is consistent with liberalism.

Beginning in the mid-20\textsuperscript{th} century, courts began to accept as enforceable contractual alteration of the terms of marriage and property distribution at the end of marriage.\textsuperscript{57} Yet courts have struggled with the question of “the extent to which the special incidents of the premarital relationship should alter traditional contract analysis.”\textsuperscript{58} Some courts have seen refusal to enforce them as reflecting “[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times…a paternalistic approach that is now insupportable.”\textsuperscript{59} And yet many jurisdictions still subject these agreements to special scrutiny distinct from standard contract analysis.\textsuperscript{60} As well, most jurisdictions treat the marriage itself as the consideration for an antenuptial agreement,\textsuperscript{61} a position that makes little sense unless one assumes, first, that marriage is a status separate from

\textsuperscript{54} 125 U.S. at 211.
\textsuperscript{55} 125 U.S. at 212.
\textsuperscript{56} 125 U.S. at 205.
\textsuperscript{58} 5 WILLISTON ON CONTRACTS § 11:8 (4th ed.).
\textsuperscript{60} 5 WILLISTON ON CONTRACTS § 11:8 (4th ed.).
\textsuperscript{61} 5 WILLISTON ON CONTRACTS § 11:8 (4th ed.).
and in addition to the contract, and, second, one party gains from marrying and the other loses something—that is, the ongoing relevance of the fact that it was traditionally an imperative for women, but not for men, to marry. As the chapter in Williston’s contracts treatise notes, the cases in this area exhibit unresolved and frequently unconsidered tensions. These difficulties reflect societal confusion about what marriage is and what it is for. I have, so far, sketched what marriage is. I will address the deeper question what marriage is for at the end of this paper. But first we must examine the difficulties state-establishment of marriage causes.

III. The Polygamy Cases

In the 19th century, the U.S. government engaged in what amounted to a war against the Church of Jesus Christ of Latter Day Saints, popularly known as Mormonism. Justice Antonin Scalia and William Eskridge have called it a Kulturkampf. At the heart of this war was an attack on the Mormon practice of polygamy. Mainstream America reacted to Mormonism with intense revulsion and a sense of existential threat similar to the opposition to gay marriage. Congress passed a succession of statutes that progressively sanctioned Mormonism and Mormons’ practice of polygamy. Under the Morrill, Edmunds, Poland and Edmunds-Tucker Acts, polygamy was criminalized and anyone who had ever practiced or even advocated it was disenfranchised and excluded from juries.

These statutes and their applications violated liberal ideals by criminalizing belief and its

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62 5 WILLISTON ON CONTRACTS § 11:8 (4th ed.).
63 Both Scalia and Eskridge have drawn a comparison between nineteenth century attacks on polygamy and twentieth century attacks on gays and lesbians, labeling both “Kulturkampfs” (but drawing opposite morals from the comparison). Eskridge picked up on Scalia’s use of the term and then developed extensive analysis using it. Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting); William N. Eskridge, Jr., Democracy, Kulturkampf, and the Apartheid of the Closet, 50 VAND. L. REV. 419 (1997); Eskridge, A Jurisprudence of Coming Out: Religion, Homosexuality, and Collisions of Liberty and Equality, 106 YALE L.J. 2411 (1997).
expression and proscribing whole ways of life. They implicated, and arguably violated, the First, Fifth, and Sixth Amendments and Article I’s ban on *ex post facto* laws and bills of attainder. They did something else very odd: Congress did not bar state recognition of plural marriages, but rather “explicitly recognized plural relationships in order to criminalize them.” This seems totalitarian; the state is seeking out dissent in order to supress it and attempting to control the very minds of its citizens (don’t even *think* of yourself as married). Yet the Supreme Court upheld each of these laws.

As Justice Scalia has noted, these laws were expressions of moral disapproval of certain sexual practices and familial forms. Like exclusion of gays from marriage, these never-overturned anti-polygamy laws “communicate a consistent message to its citizens that [monogamous] marriage is … (normatively) necessary.” Therefore, how can laws expressing disapproval of gay families and enforcing a heterosexual norm be constitutionally impermissible? Anyone arguing for gay marriage or for the broader position that the state should

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66 In *Reynolds*, remarks of the judge as to the harm of polygamy arguably violated due process, as did the dismissal of jurors who expressed any sympathy for polygamy, especially given that all of the defendant’s juror challenges were overruled. *Reynolds v. United States*, 98 U.S. 145, 147–148 (1878).

67 Edmunds Act by barring anyone who had ever practiced or advocated polygamy effectively denied Mormons a trial by a jury of their peers. 22 Stat. 30, 30-31. Furthermore, in *Reynolds*, the statements of Reynolds’s (alleged) second wife in a previous proceeding were admitted to prove the crucial fact of his second marriage—even though she never testified in court in this proceeding. This arguably violated the Confrontation Clause. 98 U.S. at 158.

68 See *Murphy v. Ramsey*, 114 U.S. 145 (1885) (disenfranchising persons for actions committed before passage of the anti-bigamy statutes); *United States v. Peay*, 14 P. 342 (Utah 1887) (upholding conviction for maintaining relationships formed before passage of anti-cohabitation statute).


71 See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding disincorporation of Mormon Church); *Davis v. Beason*, 133 U.S. 333 (1890) (upholding disenfranchisement of those who advocate polygamy); *Murphy*, 114 U.S. 15 (upholding purging of polygamists from voting rolls); *Reynolds*, 98 U.S. 145 (upholding conviction for polygamy).


be neutral toward family form must reckon with the Mormon polygamy cases. It is not the case that if the Constitution requires permitting gays to marry then the Constitution requires states to sanction polygamous unions. Limiting each marriage to two persons raises different questions from limiting marriage to opposite-sex couples. But the Kulturkampfs against Mormonism and against gays are analogous, and what was done to the Mormons was a more extensive intrusion into their liberty than what is being done to gays now.\textsuperscript{74} If enforcing the monogamous familial norm through criminal, voting, and property laws is constitutionally acceptable, enforcing the heterosexual familial norm by merely refusing to recognize gay marriages certainly is.

The first effort to suppress Mormon polygamy was the 1862 Morrill Act,\textsuperscript{75} which criminalized bigamy in the territories. But the law proved largely unenforceable, given that no witnesses would come forward to provide the necessary evidence of polygamy, nor would juries in Utah indict anyone under the act. It did not, on its own, ever generate a single case.\textsuperscript{76} In 1874, Congress remedied the Morrill Act’s deficiencies by passing the Poland Act, which transferred jurisdiction over most cases from the Utah county courts to the federal courts.\textsuperscript{77} As soon as the law took effect, mass arrests of Mormon leaders by federal agents began.\textsuperscript{78}

\textbf{A. Reynolds v. United States}

With the Poland Act giving jurisdictional teeth to the Morrill Act, the stage was set for what would be the most important of the Supreme Court cases testing anti-polygamy legislation,

\footnotesize{\textsuperscript{74} I am speaking only of present-day treatment of gay and lesbian people, after \textit{Romer} and \textit{Lawrence}. In the 20\textsuperscript{th} century, gay and lesbian people were subject to a severe Kulturkampf that included criminal prosecution and widespread employment discrimination (and that discrimination is still not barred by federal law). \textit{See, e.g.}, Eskridge, \textit{Gaylaw: Challenging the Apartheid of the Closet} chs. 1–3 (1998).


\textsuperscript{76} Sigman, \textit{supra} note 10 at 119–20.

\textsuperscript{77} Ch. 469, 18 Stat. 253 (1874).

\textsuperscript{78} SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA 113 (2002).}
Reynolds v. United States. The case was the first occasion on which the Court construed the Free Exercise Clause. It is usually cited for the propositions that the Clause protects only belief, not overt acts and that it does not require religious exemptions from generally applicable laws. These are the terms in which the Court framed the case, but this framing papers over the Kulturkampf the laws embodied, rendering invisible the problem the case poses for modern marriage law. It makes little sense to speak of the laws under which Mr. Reynolds was prosecuted as “neutral” and “generally applicable,”—they were squarely aimed at Mormonism. Furthermore, they criminalized ways of living, rather than discrete acts.

The Court famously said, in what is usually taken as its holding, “Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices.” Problem is, this restrains the government only from doing the impossible. It is impossible to compel pure belief; try making yourself believe something, let alone compelling anyone else to believe anything. What can be compelled is action, and while belief is a component of religion, religion is crucially a matter of expressive actions (swallowing a wafer, davening, praying a certain number of times a day in the company of fellow believers, etc.). This notion is expressed in the First Amendment, which protects not belief but speech and

79 98 U.S. 145, 165 (1878). George Reynolds was no ordinary Mormon but the personal secretary to Brigham Young, chosen by the church to bring the test case because he was young and handsome and so would counter the public image of polygamists as old men marrying girls. Sigman, supra note 10 at 122.
82 Reynolds, 98 U.S. at 166.
83 Smith, 494 U.S. at 878–80.
84 Reynolds, 98 U.S. at 166.
85 Clark Lombardi has noted that this same point was made by Francis Lieber, the very scholar cited by the Reynolds court for the claim that polygamy is incompatible with democracy. Lieber, Lombardi says, argued that “governments were not capable of policing belief” and “asserted that ‘liberty of conscience’ was a misnomer and the debate should be about ‘liberty of worship.’” Clark B. Lombardi, Nineteenth-Century Free Exercise Jurisprudence
“exercise” of religion, both of which are types of expressive action. It is hard to credit the belief-action distinction as the Court’s holding, given that it does no work.

Even within the Court’s citations of the Founders, there are suggestions of another principle at work. The Court cited James Madison and Thomas Jefferson for the proposition that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”\(^8\) Furthermore, the Court cited Jefferson’s statement that the state may interfere “when principles break out into overt acts against peace and good order.”\(^8\) Jefferson contrasted such harmful acts with “profession or propagation of principles on supposition of their ill tendency,” with which the state may not interfere.\(^8\) These passages suggest that only harmful acts may be interfered with and, furthermore, expressive acts with the mere potential to create social harm do not count.

What acts did Mr. Reynolds commit? There is no evidence in the case that Mr. Reynolds attempted to receive more than one marriage license from the government. Presumably, he engaged only in a private religious ceremony sanctifying a second marriage and lived as husband to two women.\(^8\) Thus, he practiced no fraud upon the state or any women. The brief for Mr. Reynolds attempted to make this argument. It distinguished between the traditional crime of bigamy and Mormon polygamy. “This crime ordinarily involves deception … No man in most of the United States could commit it without concealing a prior marriage. But here … [t]he woman, to whom a man already married is again married, is not deceived nor injured against her own

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\(^8\) Reynolds, 98 U.S. at 164 [emphasis added].
\(^8\) Reynolds, 98 U.S. at 163 (quoting Preamble to Virginia Declaration of Religious Freedom).
\(^8\) Reynolds, 98 U.S. at 163 (quoting Preamble to Virginia Declaration of Religious Freedom).
\(^8\) That is, among other things, he had sexual relationships with two women. But since the having of mistresses was a tolerated masculine behavior, it was not so much the having sex with multiple women as the treatment of both as his wives that was obscene and deviant in the eyes of the court.
will, or without her own knowledge.”90 This characterization of bigamy as a species of fraud is logical. But as described above, that is not the way bigamy law works. The Court dismissed Reynolds’s argument: Polygamy historically has always been understood as “an offence against society.”91 Thus, deceit of or injury to individual women was irrelevant. Marriage was not a license for state recognition, but a “social relation” regulated by the state.92 It is the having of an improper form of this social relation that constitutes the crime of polygamy.93

What the Court framed as the central issue was the last of Reynolds’s arguments: “… whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land.”94 The Court recognized his claims as a demand for a special religious exemption from an otherwise unexceptionable law. But allowing religious believers to exempt themselves from criminal laws would bring anarchy.95 Nor was regulation of marriage any old law. The state always had regulated this relation, the Court said, and it must do so, because “upon [marriage] society may be said to be built.”96

The Court went on to describe the harms of polygamy. It compared polygamy to human sacrifice and widow burning.97 The court found two types of harm: individualized harm to “pure-

90 Brief for Plaintiff at 57, Reynolds, 98 U.S. 145. Deceit did play a role in early Mormon polygamy. Founding prophet Joseph Smith lied to both the public and his Mormon flock about it, and his first wife Emma never agreed to his practice of it (he may have lied to her). See Todd Compton, In Sacred Loneliness: The Plural Wives of Joseph Smith 12, 34–38 (1998); B. Carmon Hardy, Solemn Covenant: The Mormon Polygamous Passage 8–9 (1992).
91 Reynolds, 98 U.S. at 165.
92 Reynolds, 98 U.S. at 165.
93 By way of demonstrating the properness of state regulation of marriage, the Court described marriage as a “civil contract.” Reynolds, 98 U.S. at 165. But ordinarily contracts that the state refuses to recognize are only invalid. The state does not ordinarily punish criminally the attempt to make an invalid contract. This is to say that marriage is no ordinary contract.
94 Reynolds, 98 U.S. at 162.
95 Reynolds, 98 U.S. at 166.
96 Reynolds, 98 U.S. at 165.
97 Reynolds, 98 U.S. at 166. Locating the harm in polygamy was problematic, given that there was no evidence that Reynolds’s wives had entered the marriage unwillingly nor was any evidence of a pattern of coercion or other harm in polygamous marriages introduced. Deceit did play a role in early Mormon polygamy. Founding prophet Joseph Smith lied to the public about it, and his first wife Emma never agreed to his practice of it (he may have lied to her). See Compton, supra note 92 at 34–38.
minded women and innocent children\textsuperscript{98} and societal harm.\textsuperscript{99} The Court did not spell out what this individual harm is, but one has to assume it means moral harm (presumably by participating in or being exposed to sexual deviance). The Court said that the form of marriage determines the principles of government\textsuperscript{100}—polygamy leads to despotism.

It does not seem to me that the discussion of harm can be treated as mere dicta, as it frequently is.\textsuperscript{101} It is doing all the work. But the real question is this: Regardless whether this 19\textsuperscript{th}-century court was content to let stand unadorned the illiberal claim that the state may intrude against harmless intimate conduct between consenting adults, will we, now? Furthermore, will we treat presumed moral or social harm as sufficient grounds for prohibiting consensual intimate conduct? At the time of the opinion, it was reasonable to take for granted the state’s power over consensual intimate conduct, as well as the social harm of unregulated intimate conduct. Sex and procreation were legal only within marriage and seemed to have always been so. It was simply not up for debate whether the state would regulate this conduct. But that is no longer the case.

**B. The War on Mormonism Intensifies**

As problematic as the Morrill and Poland Acts were, they were modest compared to what came next. Polygamy convictions were still difficult to achieve, so in 1882 Congress passed the Edmunds Act. It criminalized mere polygamous “cohabitation,” which prevented the need to prove the existence of a marriage, and indeed was without definition.\textsuperscript{102} It also allowed for

\textsuperscript{98} Reynolds, 98 U.S. at 151 (quoting the trial court’s instructions to the jury).

\textsuperscript{99} A difficulty with the widespread criticism of polygamy as oppressive to women was that under Mormon rule women in the Utah territory had the vote. They were stripped of that right in 1887 by the Edmunds-Tucker statute, as part of the effort to disempower Mormonism. Ch. 397, 24 Stat. 635 (1887)

\textsuperscript{100} Reynolds, 98 U.S. at 165–66 (citing Francis Lieber).

\textsuperscript{101} That is to say, commentators discussing the case as the foundational Free Exercise case do not even mention its discussion of harm. See, e.g., Chemerinsky at 1250. Professor Lombardi appears to be nearly alone in taking that discussion seriously. See Lombardi, supra note 87 at 424–42.

\textsuperscript{102} Ch. 47, 22 Stat. 30 (codified at 48 U.S.C. § 1461)
removal from a jury of any person who practiced polygamy or accepted it, disenfranchised polygamists, and barred them from holding office.\textsuperscript{103}

In 1885, the U.S. Supreme Court rejected a challenge to the Edmunds Act’s disenfranchisement of polygamists, including those who had entered polygamous unions before they had been criminalized.\textsuperscript{104} The Court stated that the plaintiffs were being disenfranchised for their “status” as polygamists rather than any particular act they had committed.\textsuperscript{105} This status consisted in having “more than one woman whom he recognizes as a wife, of whose children he is the acknowledged father, and whom with their children he maintains as a family…”\textsuperscript{106} Their political rights were withdrawn because of their identity as defined by their relationships (to paraphrase Maynard, husbandhood and fatherhood itself).\textsuperscript{107}

Two years later, the Utah territorial court decided \textit{United States v. Peay},\textsuperscript{108} a case that again undermined the Court’s claims in \textit{Reynolds} that the anti-polygamy laws were legitimately “prescribing a rule of action” that preserved democracy.\textsuperscript{109} Mr. Peay had three wives and many children. He tried to comply with the Edmunds Act by living and sleeping with his first wife exclusively, yet supporting the rest. This did not satisfy the government, which convicted him based on his having been seen heading in the direction of the home of one of his other wives.\textsuperscript{110} As Mr. Peay’s brief said, “[H]e is now incarcerated in the penitentiary, not for any act or acts he has done in violation of law, but because he has not dissolved the relation in which this law

\textsuperscript{103} This law proved effective: In the next 20 years, about 2,300 people were indicted for polygamy, and sex crimes made up 95 percent of the criminal cases in the Utah courts. GORDON, supra note 80 at 155.
\textsuperscript{104} \textit{Murphy v. Ramsey}, 114 U.S. 145, 38–41 (1885).
\textsuperscript{105} \textit{Murphy v. Ramsey}, 114 U.S. 145, 41–42 (1885).
\textsuperscript{106} \textit{Murphy v. Ramsey}, 114 U.S. 145, 41 (1885).
\textsuperscript{107} \textit{Murphy v. Ramsey}, 114 U.S. 145, 41–42 (1885).
\textsuperscript{108} 14 P. 342 (Utah 1887).
\textsuperscript{110} \textit{Peay}, 14. P. at 345.
found him, and which he knows no legal way of dissolving." What the court saw as discrete acts, Mr. Peay understood as his very identity.

Soon after Mr. Peay’s fate was decided, the Supreme Court upheld Samuel Davis’s conviction for attempting to register to vote in Idaho despite being Mormon. Although Mr. Davis sought to challenge the entirety of the Idaho statute, the issue before the Court on the facts of the case was whether disenfranchisement on the basis of membership in a religion was constitutional. The Court described the statute disingenuously as simply disenfranchising convicts and those who aid and abet lawbreaking. But Mr. Davis was not actually convicted of a crime or even of aiding and abetting any crime through advocacy of polygamy. He was simply a member of the Mormon Church.

After being largely ignored for a hundred years, the Mormon polygamy cases re-emerged in *Romer v. Evans*, in which the Court struck down a Colorado citizen initiative barring protection against discrimination on the basis of sexual orientation. In his dissent, Justice Scalia cited the Mormon polygamy cases, and *Beason* in particular, as proof that laws animated by “effort[s] by the majority of citizens to preserve its view of sexual morality statewide” are constitutionally permissible. Scalia quoted Justice Kennedy’s apparently approving citation of *Beason* in an earlier Free Exercise case for the proposition that “a social harm” is a legitimate state rationale for a statute that adversely affects a religion. Scalia saw that Kennedy assumed that the supposed social harm of polygamy was a legitimate concern of government, while that of homosexuality was not. Scalia was right to demand justification for this distinction. He seemed

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111 *Peay*, 14 P. at 346.
113 *Beason*, 133 U.S. at 341.
115 *Romer*, 517 U.S. at 648 (Scalia, J., dissenting).
116 *Romer*, 517 U.S. at 651 (Scalia, J., dissenting) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).
to suggest that line-drawing according to a harm principle is illegitimate. Yet Scalia himself, in a landmark Free Exercise opinion, assumed a harm principle: The government has the power “to enforce generally applicable prohibitions of *socially harmful conduct*” and individuals’ obligation to obey “such a law” is not contingent on their religious beliefs.\(^{117}\)

Scalia’s statement that “the proposition that polygamy may be criminalized, and those convicted of that crime deprived of the vote, remains good law”\(^{118}\) is correct in one, narrowly doctrinal sense: This was done to the Mormons and never overturned. But it is inaccurate in several senses: This was not what was at issue in *Beason*; Mr. Davis had not been convicted of polygamy. He was simply a member of a church. Scalia tries to cabin sexual moralism from religious discrimination, but the Mormon cases do not support such a distinction. If we seek to suppress consensual, expressive, intimate conduct, we will find ourselves committing wide intrusions on individual freedoms. The Mormon cases are not *good* law in the normative sense; they betrayed our liberal ideals.

### C. Modern-Day Polygamy Prosecutions

These embarrassments do not end with the 19th century. While the Edmunds Act was finally repealed in 1983, the state constitutional provisions barring polygamy\(^{119}\) and the statutes criminalizing both polygamy and cohabitation remain on the books. Under Utah’s current anti-polygamy statute, “A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person *purports* to marry another person or

\(^{117}\) *Employment Div., Dep’t. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 885 (1990) (emphasis added). Thus, if Scalia is taken at his word, the disagreement between him and his liberal critics is not over the harm principle, but what counts as harm—how robust the harm principle must be and whether only material harm, and not moral or “social” harm, counts.

\(^{118}\) *Romer*, 517 U.S. at 650 (Scalia, J., dissenting).

\(^{119}\) See *Romer*, 517 U.S. at 648-51 (Scalia, J., dissenting) (noting that admission of Arizona, New Mexico, Oklahoma, and Utah into the union was conditioned on including perpetual bars on polygamy in their constitutions).
cohabits with another person.” This statute regulates not only action but speech, treating “marry” as a magical word whose use the state licenses.

This is precisely how the statute has been enforced. The state of Utah prosecuted cases in 2004 and 2006 involving polygamists who had avoided seeking state recognition of their multiple marriages, and officially divorced each prior spouse before marrying the next, while marrying the multiple women in private religious ceremonies. Although the men (as usual, it was only the husbands who were prosecuted) protested that they had no notice that the state would consider them legally married, the courts held that the state had exclusive power over use of the words “marry,” “marriage,” and “wife.” “We hold that the term “marry,” as used in the bigamy statute, includes both legally recognized marriages and those that are not state-sanctioned…” The men were guilty of thinking of themselves as married to multiple women and engaging in ceremonies “purporting” to sanctify their multiple unions.

The courts in Reynolds and the other marriage cases were quite right that marriage is a central institution in our society, fraught with profound meaning, and understood by many to have been ordained by god. More recently, the court in Holm was correct to note that “to marry” means to “unite in law or custom.” But this is just to say that in a liberal society state-established marriage is a deeply problematic institution.

IV. Modern Statutory and Case Law of Marriage Entangles State and Religion

The conflation of the civil and the religious in marriage remains inscribed in modern state law. In all states, clergy are authorized to perform marriages, and clergy are the only persons besides state officials who may do so. In most states, a marriage must be “solemnized” in order

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120 Utah Code § 76-7-101 (emphasis added).
to be valid.\footnote{55 C.J.S. MARRIAGE § 31; see also, e.g., the Uniform Marriage and Divorce Act § 206(a). Pennsylvania is an interesting anomaly. In that state, although a marriage must be solemnized, this can be done without clergy or other official presiding. See Pa. C.S.A. § 1502. No doubt this is because of the strong Quaker (Society of Friends) presence in Pennsylvania; there are no clergy in the Quaker faith, and Quaker marriages are solemnized by the congregation itself.} This means that a clergy person performing a marriage is in that act at once a minister of his or her church and an officer of the state.\footnote{See, e.g., Ladd v. Com., 313 Ky. 754, 759, 233 S.W.2d 517, 520 (1950) (citing 45 AM.JUR. 742, Religious Societies § 30).} The Uniform Marriage and Divorce Act provides that a marriage may be solemnized “in accordance with any mode of solemnization recognized by any religious denomination,” “but fails to define “religious denomination.” As Robert Rains notes, the UMDA does include an obscurely written savings clause that (despite a triple negative) appears to provide that if either of the parties to a marriage thinks the person performing the marriage is an ordained minister of a religion, the marriage is valid.\footnote{The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it, if either party to the marriage believed him to be so qualified. UMDA § 206(d) (cited in Robert E. Rains, Marriage in the Time of Internet Ministers: I Now Pronounce You Married, but Who Am I to Do So?, 64 U. MIAMI L. REV. 809, 813 (2010).} A number of courts have found themselves adjudicating what counts as a religious denomination and who is a recognized clergy of a religion able to confer the power to perform marriages. To assess the validity of a marriage, a court may have to consult “[t]he tenets of the particular religion to determine whether a particular person is a regular minister having the care of souls.”\footnote{Aghili v. Saadatnejadi, 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997).} The case in which the preceding quotation appears involved, according to the court, the validity of an “Islamic marriage,” a phrase that suggests the strangeness into which marriage pulls courts.\footnote{Aghili, 958 S.W. at 785.} The Islamicness of the marriage would determine whether the marriage was a state-sanctioned marriage. But what is a court in a secular state doing assessing the Islamic character of a state license?

The internet-based Universal Life Church has frequently been the subject of cases testing the validity of marriages solemnized by its ministers. The ULC, founded in 1959, provides both
ministerial licenses and Honorary Doctor of Divinity titles to anyone who places a request on the organization’s website. Members engage in no form of congregation. According to the church’s websites and the records in cases testing the group’s tax-exempt status, the organization requires of the ministers it ordains no adherence to any doctrine or observance of any practices. It seems likely that bypassing the state requirement of religious “solemnization” was an impetus for the group, indeed perhaps its raison d’etre.

In spite of or because of this, the ULC has, according to its websites, ordained more than 20 million ministers. Although I have found no data on the number of marriages officiated by ULC ministers, it is likely large. Yet because of the group’s lack of religious doctrine or practice, the validity of its ordination of ministers with the power to conduct marriages has been contested. Robert Rains has surveyed these cases, finding that ULC minister-officiated marriages have been found invalid in New York and Virginia, valid in Mississippi and Utah, and invalid in North Carolina for purposes of criminal prosecution for bigamy, otherwise valid if entered into before 1981, unless already invalidated by a court. In Pennslyvania, these marriages are valid in one

128 See www.ulc.net or www.themonastery.org (last visited 10/14/11). The first website bills itself as the Universal Life Church, with an address in Modesto, Cal., while the second calls itself Universal Life Church Monastery, based out of Seattle. There appears to have been some sort of nondoctrinal schism. For the purposes of this paper I will treat these as one organization, the Universal Life Church or ULC.
130 “The Universal Life Church wants you to pursue your spiritual beliefs without interference from any outside agency, including ... church authority.” www.themonastery.org (last visited 10/14/11)
131 Rains, supra note 127 at 834. In many of the cases, all parties wished to invalid the marriages, so they were not true adversarial processes and there was no one to bring these questions before the courts. See, e.g., Ravenal v. Ravenal, 72 Misc. 2d 100, 101-02, 338 N.Y.S.2d 324, 326-27 (Sup. Ct. 1972); Heyer v. Hollerbush, 2008 Pa. Dist. & Cnty. Dec. LEXIS 135 (2008), No. 2007-50-002132-Y08 (C.P. York, 2007). Only in Virginia and Utah did the litigants place the constitutional issues before the courts.

In the Utah case, the court found no violation of freedom of religion in a state statute that invalidated marriages by Internet-ordained ministers and criminalized such unauthorized performance of a marriage. Being ordained by mail or over the Internet is not a religious practice, the court said, and the statute did not forbid the ULC from engaging in the practice, but only made marriages performed by such ministers invalid. Universal Life Church v. Utah, 189 F. Supp.2d 1302, 1307–13 (D. Utah 2002).

In the Virginia case, the court decided that the section of the Virginia code requiring those who wish to be licensed to perform marriages to provide proof of ordination and “regular communion” with a religious society was not a religious test. The state authorized only ministers to perform marriages because of the “necessity that the
county, invalid in three other counties, and unclear in the rest.\footnote{Rains, supra note 127 at 834.} The courts in these cases did not wrestle seriously with the question of why entry into a state institution would be licensed by a religious official.

On first glance, this scrutiny of religious credentials seems similar to that done in religious accommodation cases in the employment,\footnote{See Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(j) (requiring religious accommodation in the workplace); see also, e.g., Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981).} conscientious objector,\footnote{See, e.g., Sicurella v. United States, 348 U.S. 385 (1955).} and prisoner rights\footnote{See Religious Land Use and Institutionalized Persons Act of 2000, section 3(a), 42 U.S.C. § 2000cc–1(a); see also, e.g., Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).} arenas. In those cases, courts have similarly found themselves embroiled in assessing whether a set of beliefs and practices count as a bona fide religion, which courts have acknowledged being ill-suited to answer. However, those cases are properly distinguished from the marriage cases. The accommodation and conscientious objector cases involve restraints on state or employer action, whereas marriage involves the terms for entry into a state-licensed institution. In the former case, religion is invoked to define a boundary of private belief that the state or employer may not cross (without good reason), while in the latter religion is invoked to define the extent of a state function. As awkward as the cases are in which courts have found themselves assessing whether, for example, the Church of Body Modification is a real religion,\footnote{See, e.g., Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 131 (1st Cir. 2004); E.E.O.C. v. Red Robin Gourmet Burgers, Inc., C04-1291JLR, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005).} the endeavor to locate proper limits to state and private power is an entirely appropriate function of a court in a liberal state. Requiring religious credentials for a gatekeeper of a state institution is not.
V. The Right to Marry?

Having analyzed what the word marriage means, the harm enforcement of the monogamous familial norm has done to liberal ideals, and the constitutional difficulties in which state establishment of marriage entangles our law, I have laid the groundwork for answering the marriage question heading to the Supreme Court.\textsuperscript{137} Is there a right to marriage, and if so, what sort of right is it?

Marriage is not mentioned in the Constitution. Therefore, if it is a constitutional right, it is an unenumerated right. There are two constitutional frameworks for enforcing unenumerated rights: the Equal Protection and Due Process Clauses of the 14\textsuperscript{th} Amendment. Courts addressing gay marriage have been divided as to whether the state may legitimately enforce a gendered family norm, whether there is a right to the expressive label “marriage” or only a right to its material benefits, and, if there is some sort of marriage right, whether it derives from the Equal Protection or Due Process Clause.

A. Equal Protection

Equal protection is the idea that where government provides some privilege or burden it must do so on equal terms. Typically, social institutions are analyzed under this framework; the state is under no obligation to create a particular institution at all, but if it does so, it must offer it to all equally. Even as important an equal protection right as voting, “a fundamental political right, . . . preservative of all rights,” is not absolute.\textsuperscript{138} The state may allow no one to vote at all for a given office, filling it, say, by appointment instead, and it may impose voter qualifications

\textsuperscript{137} See Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010) (holding California constitutional amendment limiting marriage to one man and one woman violated due process and equal protection), aff’d sub nom. Perry v. Brown, No. 11-16577, 2012 WL 372713 (9\textsuperscript{th} Cir. Feb. 7, 2012) (finding amendment’s stripping of same-sex couples’ right to marry to be an equal protection violation).

and otherwise regulate access to the vote.\textsuperscript{139} The Equal Protection Clause does not forbid such line drawing, but demands that lines be drawn fairly.

Statutes ordinarily are presumed not to be in violation of equal protection and are upheld if there is some conceivable rational basis for them.\textsuperscript{140} There are two grounds for reversing that presumption and subjecting a statute to higher scrutiny: if the statute operates by way of a suspect classification or if it burdens a fundamental right. Among the suspect classifications are race,\textsuperscript{141} sex,\textsuperscript{142} out-of-wedlock birth,\textsuperscript{143} and perhaps alienage.\textsuperscript{144} Statutes making distinctions along these lines must have a tight fit between their means and ends.

The other branch of equal protection, the fundamental rights branch, is epitomized by the right to vote, as described above. State actions that burden the right to vote are, like statutes that classify by race, subject to strict scrutiny.\textsuperscript{145} The Court seems also to have recognized some sort of equal protection rights to travel\textsuperscript{146} and to education.\textsuperscript{147} Because fundamental rights can also be understood under substantive due process, fundamental rights analysis under equal protection

\textsuperscript{139} Dunn, 405 U.S. at 336.
\textsuperscript{141} Korematsu v. United States, 323 U.S. 214, 216 (1944).
\textsuperscript{146} See, e.g., Saenz v. Roe, 526 U.S. 489 (1999).
\textsuperscript{147} See, e.g., Brown v. Board of Education, 347 U.S. 483, 492–93 (1954); Plyler, 457 U.S. at 221; but compare San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (upholding public school funding system that provided dramatically unequal school funding to wealthy and poor neighborhoods). The Court’s right to travel jurisprudence is thin and confused and its education jurisprudence suggests that the education right is derivative of the right to vote and participate in democracy—given that illiterate persons cannot meaningfully exercise their right to vote or function as equal citizens. Plyler, 457 U.S. at 221. It has also linked it to suspect classification jurisprudence, finding that exclusion of persons from education altogether would create a permanent underclass. Id. In short, even before turning to marriage, we can see that equal protection’s fundamental rights branch is ambiguous, ambivalent, and muddy.
risks confusion, the more so where the fundamental (equal protection) right is marriage, because marriage is so closely related to other rights protected by the substantive dimension of the Due Process Clause, such as a right to procreate, to raise children, and (possibly) to sexual intimacy. These confusions are evident in *Skinner v. Oklahoma*, the seminal case establishing a procreation right, and in the three pre-gay-marriage cases that established a right to marry. *Loving v. Virginia* dealt with racial restrictions on marriage as a violation of the suspect classification branch of equal protection and of substantive due process. *Zablocki v. Redhail* treated a restriction on the marriage right as violating the fundamental rights branch of equal protection. *Turner v. Safley* did not make clear whether the right to marry derives from substantive due process or equal protection.

In *Skinner*, the Court struck down a law allowing the state to sterilize persons convicted of some, but not all, crimes of moral turpitude. The Court subjected the law to strict scrutiny under equal protection, because it burdened “one of the basic civil rights of man,” the right to procreate. The Court gave three reasons why the right is basic, each blurring the distinction between equal protection and due process or between the fundamental rights and suspect class branches of equal protection. First, “Marriage and procreation are fundamental to the very existence and survival of the race.” It is easy to see why procreation is fundamental to the survival of the species, and thus to the existence of society. It is less obvious that marriage is.

Whereas procreation is biologically connected to the survival of the species, marriage is only socially linked to procreation. Procreation exists prior to the state and indeed prior to any social

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149 For once, this term is entirely appropriate.
150 388 U.S. 1 (1967).
153 *Skinner*, 316 U.S. at 536
154 *Skinner*, 316 U.S. at 541.
155 *Skinner*, 316 U.S. at 541.
order, and will happen as long as the state does not interfere—just the sort of negative right ordinarily placed in the domain of due process. Marriage on the other hand is a social and legal institution that requires affirmative creation by the state—the sort of thing whose terms equal protection polices. But the Court was analyzing procreation under equal protection. Thus, perhaps the Court introduced marriage in an attempt to make the right appear more like an equal protection issue. Furthermore, as the court in Zablocki would later note, in that era sex and procreation were legally permissible only within marriage.\textsuperscript{156} So sliding marriage into the equation bolstered the argument for protecting a right to procreate. \textit{Skinner} is full of ambiguities, and later decisions frequently have cited it in support of treating the procreation right as a due process right and in support of treating marriage as a fundamental right (of some sort), even though the case did not involve marriage.

\textit{Loving} is also ambiguous. The bulk of the discussion in \textit{Loving} treats the marriage right under the suspect classification branch of equal protection. At issue in \textit{Loving} was the prosecution under a Virginia anti-miscegenation statute of a black woman and a white man who travelled to the District of Columbia to marry and then returned to Virginia.\textsuperscript{157} The statute performed a familiar move: The statute did not just refuse to recognize marriages between whites and non-whites; it insisted on recognizing them in order to criminalize them. Like bigamy statutes, it on the one hand voided any marriage between “a white person and a colored person” and on the other criminalized such (legally non-existent) marriages.\textsuperscript{158} The statute cannot be understood as simple sexual-racial moralism, given that cross-racial sex, at least between white men and non-white women, had long been tolerated. Rather, as with the anti-polygamy statutes, the law sought to enforce a certain family norm, in this case the illegitimacy of cross-racial

\begin{footnotes}
\item[156] Zablocki, 434 U.S. at 386.
\item[157] Loving \textit{v. Virginia}, 388 U.S. 1, 2 (1967).
\item[158] Loving, 388 U.S. at 2.
\end{footnotes}
couplings and their offspring. The Supreme Court rejected the state’s argument that because the statute equally punished white and non-white perpetrators of miscegenation the statute should not be treated as employing a suspect classification.\textsuperscript{159} Instead, the Court found that whether conduct was proscribed by the statute depended on the races of those who engaged in it and therefore that the statute rested on racial classification, subject to strict scrutiny.\textsuperscript{160}

Because \textit{Loving} involved racial classification, its equal protection analysis did not turn on the nature of the marriage right. For that, \textit{Zablocki} is key. In \textit{Zablocki}, the court struck down a statute that forbade anyone with outstanding child support obligations to remarry without a judicial determination that they had met the obligations and their children were not likely to become “public charges.”\textsuperscript{161} The plaintiff, Mr. Redhail, was subject to child support obligations, but had been indigent, and his daughter and her mother received Aid to Families with Dependent Children. At the time the case was filed, he and his fiancée were expecting a child. Thus, part of his claim was that he wanted the child to be born in wedlock.\textsuperscript{162}

The court first found that marriage was a fundamental right, or at least, that it is of “fundamental importance.”\textsuperscript{163} It cited the due process analysis of \textit{Loving} and the statement in \textit{Maynard} that “marriage is the most important relation in life.”\textsuperscript{164} It also quoted \textit{Skinner} for the proposition that “Marriage is one of the ‘basic civil rights of man,’” although as noted above \textit{Skinner} did not involve marriage. The court justified this slide by arguing that if the procreation right is to be meaningful, it must imply the right to enter the only relationship in which the state

\begin{quote}
\textsuperscript{159} \textit{Loving}, 388 U.S. at 8–9.
\textsuperscript{160} \textit{Loving}, 388 U.S. at 11.
\textsuperscript{161} \textit{Zablocki}, 434 U.S. at 376. There is much in \textit{Zablocki} that is offensive, including the notion that a child whose caregiver receives the modest support of AFDC is a “public charge.” If a child whose family receives some form of public support is a “public charge,” every child is (consider public schools, the Earned Income Tax Credit, dependency deductions from income taxes, not to mention driving the child around on public roads). Indeed, it is likely that welfare recipients receive less money value in public benefits than wealthier members of society.
\textsuperscript{162} \textit{Zablocki}, 434 U.S. at 378.
\textsuperscript{163} \textit{Zablocki}, 434 U.S. at 383.
\textsuperscript{164} \textit{Maynard v. Hill}, 125 U.S. 190, 205 (1888).
\end{quote}
“allows sexual relations legally to take place.” 165 This was true at the time of the case, but has since lost its force, given that our society no longer (morally or legally) prohibits extra-marital sex and the Constitution is now even understood to protect the right to engage in it. 166 Similarly, Redhail’s demand to legitimate his unborn child has lost most of its force—birth within wedlock hardly matters anymore, when it has almost zero legal implication and nearly half of all U.S. births occur outside of wedlock. 167

Perhaps because the Court intuitively recognized the thinness of its analysis, it did not find marriage fundamental in its own right. Instead, the Court linked marriage to a pre-state, non-institutional right in order to bolster its claim that marriage is a fundamental right. 168 That is, it linked marriage to a due process right in order to bolster marriage’s bona fides as an equal protection right. In part, this seems to be due to the Court’s taking of marriage as a social institution for granted, a position that forecloses closer analysis.

In Turner, the Court extended the marriage right established in Zablocki, holding that the right may not be abrogated even in the prison setting. 169 It struck down a prison regulation barring inmates from marrying absent a showing of “compelling reasons” for them to marry. 170 The Court here provided a more substantial analysis of the marriage right than it did in Zablocki, describing marriages as “expressions of emotional support and public commitment” that are seen as having spiritual significance. 171 It noted that marriage is a prerequisite for a number of important material benefits. Turner took another crucial step: it decoupled marriage from

165 Zablocki, 434 U.S. at 386.
168 Zablocki, 434 U.S. at 385–86.
170 Turner, 482 U.S. at 8.
171 Turner, 482 U.S. at 95–96.
procreation, finding that marital benefits are present even where the couple does not procreate or even have sex.\textsuperscript{172} Yet the decision did not make clear whether the right to marry derives from substantive due process or the fundamental rights branch of equal protection. Together, the decisions pre-dating the gay marriage cases established some sort of marriage right, but left the contours of the right to marriage unclear.

\section*{B. Substantive Due Process}

The 5\textsuperscript{th} and 14\textsuperscript{th} Amendments bar the federal government and the states, respectively, from depriving a person of “life, liberty, or property without due process of law.” Intuitively, due process refers to government’s obligation to provide a fair procedure before it kills you, locks you up, or takes away your stuff. But courts have also found a substantive component to due process. Not only must the state refrain from bodily restraint of persons (without due process), but because some activities are essential to human happiness and freedom, persons have a right to engage in them.\textsuperscript{173} These activities include the right to contract, to engage in an occupation, to educate oneself, to bring up children as one sees fit, to practice a religion, and, according to some decisions, to marry.\textsuperscript{174} Setting marriage aside, these rights are negative rights against government interference, rather than positive rights to have anything provided by government.\textsuperscript{175} If the paradigmatic fundamental right under equal protection is the essentially social act of voting, due process rights are those of privacy—rights to be let alone.

The foundational case for substantive due process is \textit{Meyer v. Nebraska}, in which the

\begin{itemize}
\item \textsuperscript{172} \textit{Turner}, 482 U.S. at 82 and 96–97.
\item \textsuperscript{173} See, e.g., \textit{Meyer v. Nebraska}, 262 U.S. 390, 399 (1923).
\item \textsuperscript{174} \textit{Meyer}, 262 U.S. at 399.
\item \textsuperscript{175} Professor Sunstein notes that this claim must be qualified, in that private property and contract both require affirmative government action. Sunstein, \textit{supra} note 9 at 2094 n. 55. Still, both these rights are understood within liberal theory to pre-exist government, but to be vulnerable without effective government. Under this theory and under American legal doctrine, government by protecting property and contract protects liberty against coercion. Whether this theory has it right is another matter.
\end{itemize}
Court struck down a law forbidding the teaching of children in any language other than English. Rights count as fundamental under due process, the Court said, if they have been "long recognized at common law as essential to the orderly pursuit of happiness by free men." This suggests that due process rights pre-date the Constitution and perhaps government altogether. It also suggests that a right counts as fundamental for reasons less of logic than of tradition. In both these ways, due process is essentially conservative, in contrast to equal protection. Courts have construed the Due Process Clause as "found on tradition," whereas the Equal Protection Clause "calls traditions into sharp doubt."

After Meyer came Skinner, in which the Court ostensibly derived a right to procreation under the Equal Protection Clause and slid in a marriage right. Later due process cases have cited Skinner for the proposition that there is a due process right to procreation and marriage and relied on Skinner to find a due process right not to procreate. This line of privacy cases, reversing Skinner's rhetorical move, used the marriage right to argue for rights of privacy within marriage and then kicked away the ladder, finding rights of privacy independent of marriage.

The various opinions in Griswold v. Connecticut, which struck down a state law making it a crime to use any drug or device for preventing conception, relied on Skinner and on a dissent in an earlier birth control case. The Court strictly scrutinized the law intimate relation of husband and wife," because there is a fundamental right of privacy in that relationship. Again

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176 Meyer, 262 U.S. at 403.
177 Meyer, 262 U.S. at 399.
178 Sunstein, supra note 9 at 2085 (quoted in Watkins v. United States Army, 875 F.2d 699, 718 (1989) (Norris, J., concurring)).
181 381 U.S. at 481 (citing Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting). Harlan’s opinion expressed the essential conservatism of due process doctrine. While Harlan would have struck down the Connecticut statute at issue, which criminalized use of birth control, he conceded that the state had every right to forbid consensual private sexual conduct such as adultery and homosexuality, and to determine who may marry. But once the state has admitted a couple to the institution, it may not police the “details of that intimacy.” This is so because marriage is
the Court saw the right as primeval: “We deal with a right of privacy older than the bill of Rights... Marriage is...intimate to the degree of being sacred,” Justice Douglas wrote for the Court.182 Justice Goldberg in concurrence found “the traditional relation of the family” to be “a relation as old and fundamental as our entire civilization...,” treating family and marriage as synonyms, and both as fundamental rights because of their venerability.183 Goldberg noted that this protection of marital privacy “in no way interferes with a State’s proper regulation of sexual promiscuity or misconduct.”184

Just as in the equal protection cases, these opinions naturalized marriage and so blurred the distinction between privacy rights and a right to the robust social institution of marriage. They did not distinguish between a right to intimate association—the right to be left alone in such association—and a right to enter into the state institution of marriage and enjoy its benefits on equal terms. They blurred the distinction between equal protection and due process rights.

That same difficulty appears in the puzzling due process section of Loving. Having already found Virginia’s anti-miscegenation law invalid under equal protection analysis, the court nevertheless proceeded, in two short paragraphs, to find it a violation of due process. It did so by simply repeating Skinner’s line that marriage is “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”185 a fact that is, as noted above, hardly of universal truth. The court also said, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.” This expresses due process traditionalism. But in the next sentence the court seemed to backtrack from

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182 381 U.S. at 486.
183 381 U.S. at 496.
184 381 U.S. at 498–99 (citing Ullman, 367 U.S. at 553 (Harlan, J., dissenting)).
185 388 U.S. at 12 (citing Skinner, 316 U.S. at 541).
according fundamental rights status to marriage, returning to the language of invidious racial classification.\textsuperscript{186} Although Zablocki would later establish marriage as a fundamental right under the Equal Protection Clause, Loving left marriage’s status as a due process right unclear, and later cases involving privacy rights would soon abandon the link to marriage.

In the next case in the privacy line, Eisenstadt v. Baird, Justice Brennan exploited the confusion between equal protection and due process rights.\textsuperscript{187} The Court struck down a ban on provision of contraceptives to unmarried persons. If banning contraceptives is impermissible because there is a fundamental right to privacy (as Griswold found), this right cannot inhere in a fictive legal entity called the marital couple, but rather can be located only in the individuals who constitute marital couples.\textsuperscript{188} Therefore, the law is invalid—and there is a right to contraception without regard to marriage.

After this case, marriage disappeared from the substantive due process case law. Justice O’Connor, in her 1992 decision eroding but not eliminating the right to abortion, declined to resurrect marital rights.\textsuperscript{189} Lawrence v. Texas further called into question due process marital rights, by denying that tradition alone could be decisive in deciding the existence or contours of a due process right and taking the next step begun in Turner toward decoupling procreation from marriage.\textsuperscript{190} Marriage is a due process right, under Loving, Zablocki, and Griswold, because it is a deeply rooted tradition and because it is closely tied to sex and procreation. But especially after Lawrence, which suggested that there is a right to sexual privacy or intimate association independent of marriage, the link between marriage and rights of intimacy is tenuous.\textsuperscript{191}

\begin{footnotesize}
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\item\textsuperscript{186} 388 U.S. at 12.
\item\textsuperscript{187} 405 U.S. 438 (1972).
\item\textsuperscript{188} 405 U.S. at 453.
\item\textsuperscript{189} Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 887–898 (1992) (striking down statutory provision requiring notification of husband before a woman may obtain an abortion).
\item\textsuperscript{190} 539 U.S. at 571.
\item\textsuperscript{191} 539 U.S. at 571.
\end{itemize}
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Marriage rights under the Due Process Clause are left supported only by a swiftly eroding tradition.

C. There is an Equal Protection Right to Marriage

What, then, of exclusion of gays from the institution of marriage? Does this exclusion violate, first, the right to equal protection? As described above, there is substantial precedent, under both the suspect classification and the fundamental rights branches of equal protection doctrine, for striking down regulations that bar persons from marrying. In addition, exclusion of gays might even fail deferential rational basis scrutiny.

In Goodridge v. Dept. of Public Health, the Massachusetts Supreme Court concluded that excluding same-sex couples from marriage did fail rational basis scrutiny.\(^{192}\) The court found three supposed purposes for the law, but rejected them all.\(^{193}\) Justice Cordy in dissent, however, noted that the burden of proof under rational basis is on the one challenging a law to rebut the state’s rationale. Because gay coupling has not been proved “beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm,” the legislature could rationally conclude that married opposite-sex parents is the optimal setting raising children and the plaintiffs had failed to disprove the conclusion.\(^{194}\) There is much that is dubious in this logic, starting with the difficulty of proving a negative, the question of whether optimality of parenting.

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\(^{192}\) 798 N.E.2d 941 (Mass. 2003)
\(^{193}\) 798 N.E.2d at 963–64. First, marriage’s primary purpose is procreation, and since a same-sex couple cannot procreate together, they should be excluded from marrying. But, the court said, not all married couples in fact can or do procreate. Second, the state claimed, “confining marriage to opposite-sex couples ensures that children are raised in the ‘optimal’ setting” and therefore promotes child welfare.\(^{193}\) However, the state provided no evidence that excluding same-sex couples from marriage increased the number of people who enter into opposite-sex marriage to have and raise children, nor any evidence that same-sex couples could not be good parents. Finally, the state argued that limiting marriage to opposite-sex couples helped the state conserve scarce resources, because same-sex persons are less needy of the material benefits of marriage because they are more financially independent of their partners.\(^{193}\) However, the court noted, many same-sex couples have dependents, and the state does not condition the benefits of marriage on a demonstration of financial dependence of the members of the couple on each other.
\(^{194}\) 798 N.E.2d at 983.
is scientifically provable, and whether the marriage norm is “biologically based.” Nevertheless, this is precisely the highly deferential reasoning that rational basis scrutiny mandates.

The New York State Supreme Court in *Hernandez v. Robles* used this type of deference to uphold a gay marriage ban.\(^{195}\) The court made clear just how much work is being done by the rational basis standard when it dismissed studies from plaintiffs that found no differences in outcomes between children of gay couples and straight couples. The court stated that these studies did not meet the burden of providing “conclusive evidence” of the absence of any support for the legislative assumption that children do best in same-sex households.\(^{196}\) The plaintiffs must prove a negative, a tall order.

To get a less deferential level of scrutiny means identifying a suspect classification in the law or a fundamental right that it burdens. Although the court in *Goodridge* stated that it was applying rational basis analysis, it seemed to be applying some less deferential scrutiny based on the importance of the right to marry. But given the confusions in the fundamental rights branch of equal protection doctrine, suspect class analysis is a more reliable route for attacking gay marriage bans. Commonsensically, exclusion of gays from marriage seems to facially discriminate against gays—but that is not literally what the statutes say. Instead they allow only opposite-sex couples to marry. As Justice Cordy argued in dissent in *Goodridge*, these laws discriminate not against individuals due to their identity as gay or straight, but against same-sex couples and opposite-sex couples.\(^{197}\) But this reasoning is flawed, as the California Supreme Court in *In re Marriage Cases* pointed out.\(^{198}\) For one thing, as Justice Brennan said in *Eisenstadt*, couples are made up of individuals and it is individuals in whom rights inhere.  

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\(^{195}\) 855 N.E.2d 1 (2006).  
\(^{196}\) 855 N.E.2d at 7–8.  
\(^{197}\) 798 N.E.2d at 984.  
\(^{198}\) 183 P.3d 384 (Cal. 2008).
Couples do not have equal protection rights; individuals do. This suggests that there is something wrong with the description of the right. The fallacy is in defining the right so narrowly as to make it vanish. The right found in Loving and in the parallel California anti-miscegenation case, 
Perez v. Sharp, was not a right to interracial marriage, but rather “the freedom to join in marriage with the person of one’s choice.” Similarly, the Supreme Court in Lawrence found the decision in Bowers v. Hardwick had erred in narrowly characterizing the right at issue there as a “right to homosexual sodomy.” Instead of analyzing whether as a historical fact this conduct was protected, the court should consider the substance of the right, characterized neutrally, in order to understand whether that right extends to the conduct or persons at issue. The right at issue in Lawrence was, properly framed, a right of intimate association or of sexual intimacy, and the Court found this right extends to gay persons. Similarly, the In re Marriage court described the right at issue as the right to marry the person of one’s choice. This characterization of the right gets us a long way. As the Goodridge and Lawrence cases show, the decline in hostility toward gays and the rise in gay parenting have begun to make denial of intimate association rights to gays seem irrational. Yet a court applying traditional rational basis analysis may well reach a different result, as in Hernandez.

To ensure a less deferential level of scrutiny requires finding that exclusionary marriage uses a suspect classification. Limiting marriage to opposite-sex couples seems to implicate sex (or gender). This is an important route, given that under federal law, sexual orientation is not recognized as a suspect classification. The court in In re Marriage Cases found the statute did

199 In re Marriage Cases, 183 P.3d at 420.
201 In re Marriage Cases, 183 P.3d at 421.
202 In re Marriage Cases 183 P.3d at 420.
203 See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir.1989), cert. denied, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989), cert. denied, 494 U.S. 1003 (1990); Padula v. Webster, 822 F.2d 97, 103
not categorize by sex\textsuperscript{204} and instead applied strict scrutiny based on classification by sexual orientation.\textsuperscript{205} The court applied two criteria for suspectness: first, a lack of a relationship between the classification and ability to perform and, second, a history of stigma against the class. It found both present in the case of sexual orientation.\textsuperscript{206}

Having found a reason to apply heightened scrutiny, whether on the basis of sex or sexual orientation, the next step is to apply it to exclusionary marriage. Because the court in \textit{In re Marriage Cases} was addressing a statutory scheme that granted same-sex couples all the material benefits of marriage (at least all those the state, as opposed to the federal government, could give), its arguments as to why the law failed heightened scrutiny addressed only the distinction between marriage and a materially equivalent civil union status. I will address those arguments below. The California court did not address the prior question why gays may not be excluded from any recognition of their unions. The courts in \textit{Goodridge} and \textit{Hernandez}, as described above, did. As the \textit{Goodridge} court noted, the supposed purposes of straights-only

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\textsuperscript{204} I do not find the court’s arguments convincing. It made an argument very similar to that made by the state of Virginia and rejected by the Supreme Court in \textit{Loving}: The statute does not discriminate on the basis of sex, because persons of either sex are equally forbidden from marrying someone of their same sex. But, as the plaintiffs in \textit{In re Marriage Cases} contended, whether a person is permitted to marry the person of his or her choice depends on gender. However, the California court located in \textit{Loving} an additional requirement beyond simple classification: animus. The court distinguished \textit{Loving} by claiming that what made the anti-miscegenation statute impermissible was its motivation by white supremacy. \textit{In re Marriage Cases}, 183 P.3d at 436–440

It is not obvious that the decision in \textit{Loving} depended on the presence of animus. See \textit{Loving}, 388 U.S. at 11 n.11. For reasons similar to the need to characterize the right at issue neutrally and substantively or risk defining away the question, we should characterize the purposes of a law neutrally. Whether you characterized the motivation behind the anti-miscegenation law as white supremacy or simply maintaining the integrity of the races, it was animated by an ideology of racial distinction. That ideology naturalized race and justified social distinctions and roles on the basis of racial categorization. The limitation of marriage to opposite-sex couples similarly is animated by an ideology of sexual distinction that naturalizes sexual roles and seeks to maintain those roles through categorization by sex. Most such explicit assignments of social role by sex have faded away or been struck down by courts. What remains is marriage limited to one man and one woman.

\textsuperscript{205} \textit{In re Marriage Cases}, 183 P.3d at 441–43.

\textsuperscript{206} \textit{In re Marriage Cases}, 183 P.3d at 443. The court also found that it crucial that the quality is constitutive of identity. “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is inappropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.” \textit{In re Marriage Cases}, 183 P.3d at 442.
\end{footnotesize}
marriage identified in those cases have a very dubious fit with the exclusionary means.  

Heightened scrutiny requires a tight fit and shifts the burden to the state to defend exclusionary marriage. It cannot do so, especially given the daily-increasing evidence that gay couples are similarly situated to straight couples. 

There remains the additional problem faced by the California court: If the state cannot legitimately deny gay couples the material benefits of marriage, may it nevertheless deny them the label marriage, offering instead some materially equivalent other status? The court gives three reasons why it may not. First, it cites “the long and celebrated history of the term ‘marriage’ and the widespread understanding that this term describes a union unreservedly approved and favored by the community.” As I have described above, marriage is a tremendously potent term, deeply entangled with religion, which sanctifies relationships and renders those within it and produced by it legitimate in myriad ways. It may not be as self-evident now as when Maynard was decided that it is the “most important relationship in life,” nor is it any longer the only relationship in life in which sex may legally take place. Yet it retains “intangible symbolic differences” from the newer and less redolent term civil union. The California high court compared offering a separate status to gays to separate but equal arrangements long rejected in other arenas by the Supreme Court.

Second, creating a new status for a class that historically has been subject to stigma likely

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207 There is no evidence that gay people are less good parents, no evidence gay couples are less financially dependent on each other, no requirement that straight persons demonstrate ability or intent to procreate in the old-fashioned way in order to marry, no limitation of marriage to persons who get accidentally pregnant, etc.  
208 The above analysis does not apply to polygamous unions (nor to incestuous unions, etc.). Numerosity is not a protected classification. Therefore, restrictions of marriage to two persons would be subjected to mere rational basis scrutiny, which it likely would pass. It is more likely to pass it than same-sex unions are because we lack evidence provided by significant numbers of families openly raising children in these unions, as we have with gay coupling.  
209 In re Marriage Cases, 183 P.3d at 445.  
211 In re Marriage Cases, 183 P.3d at 445.  
212 In re Marriage Cases, 183 P.3d at 445 (citing United States v. Virginia, 518 U.S. 515 (1996); Sweatt v. Painter, 339 U.S. 629 (1950)).
will cause this new status to be viewed as lesser than marriage. Further differential treatment of a traditionally stigmatized class is likely to have to the “effect of demeaning the … dignity” of gays and will perpetuate their stigma.\textsuperscript{213} As Karen Loewy, attorney for a gay rights organization in Rhode Island, put it, “civil unions tell gay people and their kids that they are second-class citizens and that their families matter less than other families.”\textsuperscript{214}

Finally, the court noted that marriage is familiar and well understood by the public, while the newfangled status of civil union or domestic partnership is not. Leaving aside what I regard as the dubious claim that marriage is well understood, marriage is certainly familiar and taken for granted, one of the chief advantages it confers. You say you are married and rarely are you asked for proof or explanation before gaining a host of benefits. On the other hand, a friend of mine who is a member of a domestic partnership carries around a card issued by the state of Washington attesting to her domestic partnership, providing some badge of officialness to those confused or doubtful, as well as her registration number, which can be verified on a state website. Because domestic partnership in Washington is in general open only to same-sex couples,\textsuperscript{215} to gain the material benefits of her union, she must effectively announce her sexual orientation. It is a badge of inferiority, as well as a materially useful status. Under the Equal Protection Clause as we now understand it, for entry into any important state institution, separate cannot be equal. If the state is involved in the marriage business, it must grant marriage on equal terms.

C. There Is No Due Process Right to Marriage

\textsuperscript{213} \textit{In re Marriage Cases}, 183 P.3d at 445.
\textsuperscript{215} WASH. REV. CODE § 26.60.030. Persons of the opposite sex over 62 may also become domestic partners. WASH. REV. CODE § 26.60.030(6)(b).
There remain two related questions. First, if one concedes my argument above that if the state grants marriage it must grant it to same-sex couples, there is still the question whether the state is obligated to offer this institution at all, to anybody. That is, is there a due process right to marriage (at all)? Second, if one rejects my contention that there is an equal protection right of same-sex couples to marry and characterizes marriage instead as a due process right, what sort of right is it? The answer to both questions is the same—marriage cannot successfully be described as a due process right.

The Hawaii Supreme Court in *Baehr v. Lewin* concluded there is a due process right to marriage but not to gay marriage.\(^{216}\) It based its rejection on *Zablocki, Skinner, and Maynard*. The court looked to the “traditions and [collective] conscience of our people” to locate a right to gay marriage, and not surprisingly, did not find it.\(^{217}\) On the other hand, the opinion in *In re Marriage Cases* also followed the linking of marriage to rights of procreation, establishing a home and raising of children, and therefore found a due process right to marry.\(^{218}\) But as I have explained above, these links are not logical but only contingent upon a now-altering social order.

The opinion in *In re Marriage Cases* seems at first to have a response: The Hawaii court has defined the right too narrowly. The right is not a right to gay marriage, but rather a right to marry the person of one’s choice. The moralism that once limited marriage to opposite sex couples might have altered, but the more general purpose for marriage remains: The California court found the marriage right “rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities in organized society.”\(^{219}\)

But this argument does not work under due process as it did under equal protection. If we re-

\(^{216}\) 852 P.2d 44 (Haw. 1993).
\(^{217}\) *Baehr*, 852 P.2d at 57.
\(^{218}\) *In re Marriage Cases*, 183 P.3d at 421–22.
\(^{219}\) *In re Marriage Cases*, 183 P.3d at 422.
characterize the right in substantive terms, as the California court advocates, what are those terms? Just as Skinner slid from marriage to procreation, and Zablocki from procreation to marriage, the California court slid from the institution of marriage to “the right to enter into such a relationship.” But what relationship are we talking about? It appears to be a right of intimate association. As the court said, such a right does not depend on whether “the Legislature chooses to establish and retain it” (but what is “it” here?). But we are talking not about a right to intimate association (“a right to enter into such a relationship”) but a right to marriage—the right to have the state dole out a license. Marriage is a robust and particular state institution. Since a system of state licensing depends for its existence entirely on the state, why should a right to it not depend on the legislature’s choosing to establish and retain it?

While an equal protection right is a right of state-granted entry to an institution, a due process right is a right to have the state let you alone. There cannot be a right to have the state let you alone in the very act of providing entry into a state institution. Marriage is simply the wrong sort of thing to be analyzed under due process. In the past, marriage has been naturalized, but as Professor Sunstein says, marriage does not stem from nature. “[W]e are speaking here of a system of aggressive government intervention.” By definition marriage, like sexual intercourse, is not something one can engage in by oneself. But unlike sex, it requires, indeed consists in, the recognition of a community of others. Contrary to In re Marriage Cases, the state could simply stop offering this license. The Baehr court was correct in finding no due process right to gay marriage, but only because there is no due process right to marriage at all.

Furthermore, as my discussion of the polygamy and Universal Life Church cases shows, the state’s involvement in endorsing and licensing this particular type of relationship interferes with

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220 In re Marriage Cases, 183 P.3d at 425.  
221 Sunstein, supra note 9 at 2086.
Marriage entangles the state in religion. “Marriage” has thick meanings connected to robust notions of the good life that we cannot extract from it. And why should we? A liberal state comes into existence to allow us to freely pursue our notions of the good life. If we want to retain marriage’s profound power to confer meaning and protect liberty and equality, we must disentangle the state from marriage and marriage from the state. We cannot both remain true to marriage and true to liberalism while involving the state in marriage.

VI. What Should the Regime of State-Established Marriage Be Replaced By?

If the state gets out of the marriage business, there remain a number of alternatives. First, the state could abolish marriage. Perhaps that means forbidding people from entering anything called “marriage.” This would be the flip side of what it does now; the state would shift from licensing use of the word to forbidding it altogether. Even more draconian, the state could forbid entering into anything that looks like marriage. These two alternatives would have many of the same problems as the system of state licensing of marriage, and then some. They would interfere with a multitude of genuine due process rights: rights of intimate association, of establishing a home and raising children, the free speech right, and freedom of religion. These are non-starters.

Alternatively, the state could just abandon the field to contracts and religions. People would be free to make whatever arrangements they liked, sanctifying them or not in whatever way they liked. The answer to why this is likely an inadequate solution requires answering the question begged by centuries of jurisprudence and by this paper so far: what, after all, is

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marriage for?

Because of the triumph of the romantic idea of marriage over the earlier contractual and authoritarian concept of marriage, and perhaps heightened by the decline in marriage’s cultural centrality, the question what marriage is for is an uncomfortable one in our culture. People now often conceive of marriage as something they enter to seek individual happiness, so it can seem crass to look for an extrinsic purpose to marriage. But marriage as an institution long preceded this romantic ideal (nor is it clear that a uniform societal institution is well-suited to satisfying individuals’ myriad desires). We should look deeper. It is reasonable to presume that such a central fixture of human life, practiced in some form by almost all human cultures, is a response to some feature of the human condition. What is that feature?

Essential to the human condition are our long periods of dependency, on both ends of life. We are not, contrary to Hobbes, mushrooms sprung from the earth, and autonomy, though an ideal, is far from the default. I believe, following Martha Fineman, that marriage is a response to the human condition of dependency. As a species, because of our long infancies and childhood and our potentially long periods of old age, we are characterized by dependency. All of us reached adulthood only after a long stretch of dependency, and many of us will experience dependency later in life due to disability, illness, or old age.

Fineman characterizes this as inevitable dependency, and she identifies a second type of dependency generated by the first type: Those who provide caregiving require resources that they themselves cannot generate because of their caregiving responsibilities. Therefore

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223 The 2000 Census found that marital units now make up a minority of U.S. households. See Eric Schmitt, For First Time, Nuclear Families Drop Below 25% of Households, N.Y. TIMES, Late Edition, May 15, 2001, at A1 (reporting on 2000 U.S. Census data). Furthermore, in the U.S., 40 percent of children (and rising) are now born outside of wedlock (in most European countries a majority are born out of wedlock). See Harris, supra note 169.
caregivers are dependent on resources with which to sustain themselves and those they care for. Fineman calls this derivative dependency. Marriage is a response to these two types of dependency. As Fineman puts it, marriage is a “repository for dependencies.” Specifically, it is a way of privatizing dependency, rather than assigning responsibility for both types of dependency more broadly across society. Marriage was once the framework for “protecting and providing for the legal and structurally devised dependency of wives.” Because of that structural dependency, it was nearly impossible for women to care for children outside of marriage. Nowadays, as women’s structural dependency has receded, the barriers to caring for children outside of marriage have receded, as demonstrated in the rates of out-of-wedlock births. Thus, much of dependency has vacated our primary social institution for dealing with it.

Shifting our focus from romantic love to dependency allows us to sort intimate associations into those relationships that can justly be left to contract from those that cannot and in which there is a proper role for the state in creating institutions. Failing to distinguish these categories is where, for example, the Law Commission of Canada, in its otherwise thoughtful and groundbreaking 2001 report on marriage law reform, did not quite get it right. “Recognizing and supporting personal adult relationships that involve caring and interdependence is an important state objective.” Why this focus solely on adult relationships? Romance does not need the state. Contract doctrine presumes relationships between equals who freely consent to agreements that thereby embody and advance their freedom. Intimate associations between able-bodied adults without responsibility for children or disabled or elderly relatives meet these

225 Fineman, Why Marriage?, supra note 225 at 270.
226 Fineman, Why Marriage?, supra note 225 at 246.
227 Fineman, Why Marriage?, supra note 225 at 246.
requirements.\textsuperscript{229} Current family law implicitly recognizes this, in enforcing premarital contracts for property and spousal support purposes—but not child support.\textsuperscript{230}

Relationships between autonomous adults are a small minority of intimate relationships. Other relationships—those involving dependents and caregivers—cannot be conceptualized as relationships between freely consenting equals. Therefore for these relationships, justice requires some other framework besides contract. Furthermore, it is these relationships with which the state is properly concerned because it is through the provision of care that society is reproduced. Caregiving, as the \textit{Skinner} court did not quite see, is “fundamental to the very existence and survival of the race.” Only some persons are derivatively dependent due to providing caregiving, but the entire society depends upon and benefits from their caregiving.\textsuperscript{231} Justice therefore requires that the state support and reward the provision of care.

What might an institutional framework for this look like? How would responsibility for caregiving be allocated between state and family? The least revolutionary solution would be to stick close to marriage: civil unions for all. This would look a lot like marriage without the involvement of religion, gender roles, and all the historical freight of the term marriage. It would retain the current allocation of responsibilities for caregiving between state and families and would likely perpetuate nuclear families with a sexual pair at its heart as the default family form.

Perhaps the assumption of a sexual relationship at the heart of our state-recognized unions should be jettisoned. Martha Fineman argues that a focus on dependency and caregiving would shift the focus from the sexual couple dyad to that of mother and child, or more broadly

\textsuperscript{229} However, even these persons are vulnerable to loss of autonomy through illness, injury, childbirth, and aging.
\textsuperscript{230} 7 WILLISTON ON CONTRACTS § 16:21.
\textsuperscript{231} For more on the political theory of dependency, see, e.g., FINEMAN, \textsc{The Autonomy Myth}, \textit{supra} note 225; JOAN WILLIAMS, \textsc{Unbending Gender} (2011). For economic theorizing of dependency see, e.g., NANCY FOLBRE, \textsc{The Invisible Heart: Economics and Family Values} (2001).
caregiver and dependent.\textsuperscript{232} This would suggest that many of the traditional limitations on marriage are irrelevant. If the relationship is not about sex but about caregiving, why shouldn’t two sisters enter the relationship, or four people or five?

Would the institution necessarily even involve more than one adult? That is, if the relevant relationship is between caregiver and dependent, should we jettison the last resemblance to contract and cease thinking of it as a license between adults? Perhaps a single adult might acquire a license recognizing her relationship to her dependents—and therefore, perhaps, her claim to societal support, calling into question the allocation of responsibility for dependency between state and family. I do not presume to have the answer to these questions, but no longer taking marriage for granted opens up our thinking to shape institutions to our real human needs.

**Conclusion**

The jurisprudence I have sketched shows the violence state establishment of marriage does to liberal principles. The very word marriage mires the state in intractable difficulties without corresponding benefit. The gay marriage cases have brought the problem to a head: Can the state continue to be involved in marriage while remaining true to its liberal principles and allowing marriage to be true to all its citizens’ richly constituted sacred and often religious understandings of it? The answer is no. Getting the state out of marriage allows us to respect the liberal values of freedom, stability, and equality. Getting the state out of marriage also frees us to reconsider our institutions, reinventing them to promote human flourishing.

\textsuperscript{232} Fineman, *Motherhood and Entitlement*, supra note 225 at 4.