Civil Marriage: Threat to Democracy

Jessica Knouse

University of Toledo College of Law

Follow this and additional works at: http://repository.law.umich.edu/mjgl

Part of the Family Law Commons, Fourteenth Amendment Commons, Law and Gender Commons, Law and Society Commons, and the Religion Law Commons

Recommended Citation


Available at: http://repository.law.umich.edu/mjgl/vol18/iss2/3

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlawrepository@umich.edu.
Introduction • 362

I. Civil Marriage is Incompatible with Democracy • 363
   A. Civil Marriage—Longevity, Sexuality, Partnership • 363
   B. Democracy—Liberty, Equality • 365
   C. Civil Marriage Is Incompatible with Democracy • 368
      1. Civil Marriage Deprives Individuals of Liberty and Equality • 369
      2. Civil Marriage’s Deprivations Are Unjustified • 370

II. American Civil Marriage Is Incompatible with American Democracy • 375
   A. American Civil Marriage • 375
      1. Longevity, Sexuality, Partnership • 376
      2. Religiously Motivated Permanence, Heterosexuality, Patriarchy • 378
   B. American Civil Marriage Violates Due Process Rights • 382
      1. American Civil Marriage Manipulates Identity • 382
      2. American Civil Marriage Violates Liberty Rights • 386
      3. The “Right to Marry” Should Be Abrogated • 390
   C. American Civil Marriage Violates Equal Protection Rights • 394
      1. American Civil Marriage Creates Hierarchy • 395
      2. American Civil Marriage Violates Equality Rights • 396
   D. American Civil Marriage Violates First Amendment Rights • 407
      1. American Civil Marriage Establishes Religion • 407
      2. American Civil Marriage Violates Free Speech • 415

III. American Civil Marriage Should Be Abolished • 417
   A. Abolishing American Civil Marriage • 418
   B. The Post-Marriage Landscape • 419

Conclusion • 420

Jessica Knouse is an Associate Professor at the University of Toledo College of Law. She would like to thank everyone who offered comments on her presentations of this paper at the 2010 Annual Meeting of the Law & Society Association, the University of Toledo College of Law Faculty Roundtable, the Case Western Reserve University School of Law Faculty Workshop, the Loyola University Chicago School of Law 2010 Constitutional Law Colloquium and the Michigan State University College of Law’s Midwest Family Law Consortium. She would especially like to thank Professors Rebecca Zietlow, Maxwell Stearns, Jacqueline Lipton, and Garrick Pursley. She would also like to thank the editors of the Michigan Journal of Gender & Law for their excellent editing and suggestions. She would, as always, like to thank the University of Toledo College of Law for its generous financial support, and Mike Loegering for his enduring encouragement, wisdom, and love.
This Article argues that civil marriage and democracy are inherently incompatible, whether assessed from a transcultural perspective that reduces them to their most universal aspects or a culturally situated perspective that accounts for their uniquely American elaborations. Across virtually all cultures, civil marriage privileges sexual partners by offering them exclusive access to highly desirable government benefits, while democracy presupposes liberty and equality. When governments privilege sexual partners, they effectively deprive their citizens of liberty by encouraging them to enter sexual partnerships rather than self-determining based on their own preferences; they effectively deprive their citizens of equality by establishing insidious status hierarchies. While some deprivations of liberty and equality are justified—for example, those offset by substantial benefits to social welfare—this Article argues that deprivations of liberty and equality resulting from civil marriage are emphatically unjustified. The incompatibility that exists on a transcultural level is magnified when one considers civil marriage and democracy in their American elaborations. American civil marriage privileges not only sexual partners but also religious, patriarchal, and heterosexist ideologies, whereas American democracy presupposes respect for the Due Process, Equal Protection, Establishment, and Free Speech Clauses.

Even if American civil marriage could be stripped of its religious, patriarchal, and heterosexist aspects, it would remain an essentially undemocratic institution due to its inherent privileging of sexual partners. Inasmuch as American civil marriage cannot be democratized, this Article argues that it should be abolished. It does not, however, propose (as some have) that the institution be replaced by a relatively analogous "civil union" regime. It instead proposes that states remove themselves entirely from the business of affirming sexual partnerships. It explains that abolishing civil marriage would not only enhance American democracy, it would also enable states to allocate governmental benefits more appropriately. It should be emphasized that this Article applies only to civil marriage and does not propose to prevent sexual partners from celebrating their commitments through private ceremonies or dissolving their relationships according to the terms of private contracts.

This Article proceeds in three parts: Part I argues that when civil marriage and democracy are assessed according to their most universal aspects, they are incompatible. Part II argues that when civil marriage and democracy are assessed according to their uniquely American elaborations, their incompatibility is protracted. Part III argues that since civil
marriage cannot realistically be converted into a democratic institution, it ought to be abolished.

I. Civil Marriage is Incompatible with Democracy

Civil marriage and democracy, when assessed according to their most universal aspects, are incompatible. Across virtually all cultures, civil marriage privileges long-term sexual partners by affording them exclusive access to a unique set of highly desirable benefits. Antithetically, democracy is understood to require both liberty and equality. Because civil marriage unjustifiably deprives individuals of liberty and equality by failing to promote social welfare, the institution should be abolished.

A. Civil Marriage—Longevity, Sexuality, Partnership

Reduced to its most universal aspects, civil marriage is an institution that privileges long-term sexual partners. Longevity, sexuality, and partnership are so central to marriage that they are indeed definitional. Sociologist Edvard Westermarck recognized the definitional nature of longevity, sexuality, and partnership in his 1921 treatise, The History of Human Marriage. He defined marriage as long-term in the sense that it creates a “durable connection;” as sexual in the sense that it “always implies the right of sexual intercourse;” and as entailing partnership in the sense that “[i]t is the husband’s duty . . . to support his wife and children, [and] it may also be their duty to work for him.” Anthropologist George Peter Murdock similarly recognized the definitional nature of longevity, sexuality, and partnership in his 1949 treatise, Social Structure. He described marriage as a union involving cohabitation (which suggests at least some longevity), sexual conduct, and economic partnership.

The definitional nature of these three aspects is easily illustrated: marriage entails longevity in the sense that non-committal relationships,

2. Id. at 71.
3. Id. at 26.
4. Id.
6. Id.
such as one-night stands, are not considered "marriages;" marriage entails sexuality in the sense that non-sexual relationships, such as long-term friendships, are not considered "marriages;" and marriage entails partnership in the sense that non-collaborative relationships—that is, those that do not involve living together, sharing resources, or dividing labor—are not considered "marriages." While one might propose additions to the list of definitional aspects (e.g., marriage is procreative), only longevity, sexuality, and partnership are accepted widely enough to be truly definitional. Similarly, while one might propose subtractions from the list of definitional aspects, longevity, sexuality, and partnership are each so deeply ingrained that eliminating any one would likely prevent a modern society from referring to the resulting institution as "marriage." It should be emphasized that because marriage's definitional aspects are the product of both law and society, they cannot be altered without altering both legal and social norms. Because governments do not exercise unilateral control over the definition of marriage, they cannot unilaterally alter the definition of marriage such that it no longer includes all three definitional aspects.

Civil marriage privileges long-term sexual partners by affording them exclusive access to a broad array of tangible and intangible benefits. Its tangible benefits typically relate to matters such as taxation, pensions, inheritance, property ownership, and surrogate decision-making. Its intangible benefits typically relate to status and accrue

7. Edward Westermarck characterized marriage as "a more or less durable connection between male and female lasting beyond the mere act of propagation till after the birth of the offspring." Westermarck, supra note 1, at 71. While we hear media accounts of very short marriages that last only days or weeks, the vast majority of first and second marriages last at least five years. U.S. Census Bureau, Number, Timing, and Duration of Marriages and Divorces: 2001 (2005), http://www.census.gov/prod/2005pubs/p70-97.pdf.


9. Stephanie Coontz notes, "[T]hrough most of history marriage has generally involved a societally approved division of labor between the partners, with each sex doing different tasks." Coontz, supra note 5, at 30.

10. Coontz, supra note 5, at 26. Stephanie Coontz observes that "[o]ver the millennia the preferred form of marriage in many cultures was that between a man and several women." Id. at 27.

11. See Martha C. Nussbaum, A Right to Marry?, 98 CALIF. L. REV. 667, 669 (2010) (listing "favorable treatment in tax, inheritance, and insurance status; immigration rights; rights in adoption and custody; decisional and visitation rights in health care and burial; [and] the spousal privilege exemption when giving testimony" as among the rights that are relatively unique to married couples); Cass R. Sunstein, The Right
from the fact that government recognition of one’s relationship inherently confers an elevated legal and social status. Civil marriage’s tangible and intangible benefits are so desirable that most governments carefully police entry into the institution to ensure that only those committed to being long-term sexual partners have access.

B. Democracy—Liberty, Equality

Although democracy has many potential definitions, most would agree that at a fundamental level, it is self-government by free and equal individuals. Liberty and equality are thus prerequisites to democracy. Political theorists from Aristotle to Rawls have recognized that citizens who lack liberty and equality cannot effectively participate in political debate. Without liberty, citizens cannot develop the diverse identities necessary to engage in robust political debate; without equality, they cannot effectively express their diverse identities in the political
12. See, e.g., Joshua Cohen & Charles Sabel, Directly-Deliberative Polyarchy, 3 Eur. L.J. 313, 327 (1997) (“At the heart of the deliberative conception of democracy is the view that collective decision-making is to proceed deliberatively—by citizens advancing proposals and defending them with considerations that others, who are themselves free and equal, can acknowledge as reasons.”). See also José Luis Martí, The Epistemic Conception of Deliberative Democracy Defended: Reasons, Rightness and Equal Political Autonomy, in DELIBERATIVE DEMOCRACY AND ITS DISCONTENTS 27, 27 (Samantha Besson & José Luis Martí eds., 2006) (citations omitted) (quoting James Bohman, Survey Article: The Coming Age of Deliberative Democracy, 6 J. Pol. Phil. 400, 401 (1998)) (defining democracy as “a family of views according to which the public deliberation of free and equal citizens is the core of legitimate political decision making and self-government”).
13. Aristotle wrote, “For if liberty and equality, as is thought by some, are chiefly to be found in a democracy, they will be attained when all persons alike share in the government to the utmost.” ARISTOTLE, ARISTOTLE’S POLITICS 156 (Benjamin Jowett trans., 1908).
forum. While liberty and equality, like democracy, have many potential definitions, a broad definition of each is necessary to produce true democracy.

Liberty, broadly defined, refers to the ability to determine every aspect of one's identity, from the most concretely physical to the most abstractly ideological. Individuals with liberty control their bodies free from restrictions on their movement or invasions of their privacy; they control their associations free from constraints imposed by categories such as race, sex, sexual orientation, religion, political affiliation, and (most relevant for present purposes) marital status; and they control their ideologies free from the influence of dominant religious, political, or other viewpoints (e.g., "marriage is a sacrament," "husbands are breadwinners," "wives are homemakers," "heterosexuality is preferable"). Without liberty, individuals cannot self-determine according to their own preferences and thus cannot develop (much less express) the diverse range of ideas that is crucial to successful democratic policy-making.

Equality, broadly defined, builds upon the diverse set of identities that liberty enables and refers to interpersonal interaction irrespective of identity-based hierarchies. Individuals interact irrespective of identity-based hierarchies when their identities—as, for example, African-Americans, women, gays, atheists, Democrats, or (most relevant for present purposes) married persons—are unrelated to the extent of


17. These three aspects of liberty might be viewed as a modern elaboration of John Stuart Mill's famous precept that "[o]ver himself, over his own body and mind, the individual is sovereign." John Stuart Mill, On Liberty 81 (David Bromwich & George Kateb eds., 2003) (1859).

18. McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)) ("Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens ...'.").

19. I resist the dominant understanding that identity can only be constructed around traits that are perceived as "immutable." I would therefore categorize not only African-Americans and women, but also atheists or unmarried persons, as comprising identity groups.

their political power. Without equality, diverse ideas cannot be heard, and the vigorous debate that is crucial to democratic policymaking cannot occur.

There are many ways of fostering liberty and equality, and each democratic government must determine for itself which will best serve its own citizenry. Many human rights treaties, however, suggest that fostering liberty and equality requires government recognition of positive as well as negative rights. Recognizing positive rights involves promises of government involvement, and recognizing negative rights involves protection against government involvement. While most rights have both negative and positive aspects, some rights have traditionally been viewed as predominantly negative while others have been viewed as predominantly positive. Rights against government involvement in one's thoughts, expressions, and associations have traditionally been viewed as negative; rights to government involvement in one's healthcare, education, social security, and employment have traditionally been viewed as positive. Negative rights traditionally require government inaction, whereas positive rights traditionally require government action.

To effectuate the broad definition of liberty discussed above, a government must recognize both negative and positive rights. In order to recognize negative rights, a government must refrain from passing laws

21. In The Constitution of Status, Professor Balkin explains that an economic class is comprised of individuals who "share a common economic interest because of their common position in the structure of economic relations[,]" whereas a status group is comprised of individuals who share "common styles of life and common senses of honor, prestige, or moral rectitude"—generally speaking, individuals with common identities. Id. at 2322.


23. It is in some sense a fallacy to label rights as positive or negative. See Fatma E. Marouf & Deborah Anker, Socioeconomic Rights and Refugee Status, 103 AM. J. INT'L L. 784, 787 (2009) ("[I]t is now widely understood that all rights contain both positive and negative components and that many civil and political rights require expenditure."). See also CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222–24 (Oxford Univ. Press 2001).


25. See id. (categorizing the above-listed rights as "positive" and cataloging their appearance in human rights treaties).
that prevent individuals from controlling their own identities. These would include laws banning abortion, reifying racial categories, and (this Article will contend) establishing civil marriage. Recognizing positive rights means passing laws that affirmatively enable individuals to control their own identities. These would include laws guaranteeing access to the food, clothing, housing, and healthcare necessary to control one’s body, and to the education necessary to control one’s ideology. To foster liberty, then, the government must both refrain from passing laws that prevent self-determination, and pass laws that affirmatively enable self-determination.

To effectuate the broad definition of equality discussed above, the government must also recognize both negative and positive rights. In order to recognize negative rights, a government must refrain from passing laws establishing identity-based hierarchies. These would include laws privileging individuals with a certain sex, race, or marital status. Recognizing positive rights requires passing laws that affirmatively enable individuals to interact without reference to identity-based hierarchies. These would include laws preventing private employers and businesses from discriminating based on sex, race, or marital status. To foster equality, then, the government must not pass laws that establish identity-based hierarchies, and must pass laws that affirmatively prohibit discrimination based on traits that anchor identity-based hierarchies.

It should be noted that there is some tension between the definition of an ideal democracy that is set forth here and the definition of American democracy that will be set forth in Part II. The United States Constitution has been interpreted by the Supreme Court to protect only some of the negative—and none of the positive—rights that have been described as necessary to democracy.\(^{26}\) It has further been interpreted to protect a positive “right to marry,” which this Article argues is in conflict with both liberty and equality.\(^{27}\) While it is beyond the scope of this Article to assess the extent of the disconnect between our American democracy and an ideal democracy, the lack of complete equivalence should be noted.

**C. Civil Marriage Is Incompatible with Democracy**

If civil marriage offers long-term sexual partners exclusive access to unique benefits, and if democracy requires liberty and equality for all,

---

26. The United States Constitution will be discussed in greater detail below. See infra Part II.
27. See infra Part II.
the two institutions are inherently incompatible. Civil marriage deprives individuals of liberty and equality. While some might think these deprivations are justified on the basis that civil marriage ultimately promotes social welfare, this argument fails because civil marriage is not rationally related to the state’s legitimate interest in promoting social welfare.

1. Civil Marriage Deprives Individuals of Liberty and Equality

Governments that establish civil marriage and offer long-term sexual partners exclusive access to a unique set of benefits effectively deprive their citizens of both liberty and equality; they deprive their citizens of liberty by encouraging them to organize their lives around long-term sexual partnerships rather than allowing them to self-define according to their own preferences; they deprive their citizens of equality by encouraging them to interact within hierarchies based on their “married” or “unmarried” identities. This section elaborates on the nature and scope of both deprivations.

Governments that establish civil marriage deprive their citizens of liberty by encouraging them to define their identities through marriage rather than according to their own preferences. While entering civil marriage may appear to be voluntary on its face, it is the only means of accessing a unique set of highly desirable benefits. As Professor Ruthann Robson has explained, “Because of [marriage’s] tangible economic and legal benefits, as well as the rhetoric promoting marriage in the law and social realms, . . . we presently exist under a regime of compulsory matrimony that coerces individuals, especially women, to enter into the institution of marriage.”28 Professor Kerry Abrams has similarly explained (though not without caveat), “Some of the rights and privileges of marriage could indeed be construed as a bribe[.]”29 By creating these incentives, governments actively encourage entry into marriage.

28. Ruthann Robson, Assimilation, Marriage, and Lesbian Liberation, 75 Temp. L. Rev. 709, 734 (2002). Professor Robson develops this argument by saying:

In addition to tangible benefits, the social value of marriage sustains the arguments by some same-sex marriage theorists that anything other than marriage is less than marriage and thus unacceptable. Obviously, legally sanctioned benefits and social approval for marriage entails corresponding legal disadvantages and social disapproval for the unmarried. In this way, marriage is coercive.

Id. at 778 (internal citations omitted).

29. Kerry Abrams & Peter Brooks, Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation, 21 Yale J.L. & Human. 1, 31 (2009). Professor Abrams, however, cautions that it is “far from clear that [someone] contemplating
Marriage manipulates identity in both concretely physical and abstractly ideological ways. On the physical level, marriage encourages individuals to organize their lives around long-term sexual partnerships, instead of focusing on short-term relationships, non-sexual relationships, or remaining single. On the ideological level, marriage encourages individuals to value long-term sexual partnerships over short-term relationships, non-sexual relationships, or remaining single. This results in many individuals viewing long-term sexual partnerships as central to their identities, crucial to their success, and integral to their sense of self-worth. While some would self-define through long-term sexual partnerships even without any governmental encouragement, others would not. Governments that truly respect liberty must allow all of their citizens to self-define according to their own preferences unless they can justify actively manipulating their preferences.

Governments that establish civil marriage deprive their citizens not only of liberty but also of equality by establishing a hierarchy based on “married” or “unmarried” identities. The legal privileges that married individuals enjoy by virtue of the unique benefits they are awarded are social and economic in nature. Some individuals would interact as if being married were preferable even without any governmental encouragement, but others would not. Governments that truly respect equality must not use their power and prestige to create identity-based hierarchies—unless they can justify those hierarchies.

2. Civil Marriage's Deprivations Are Unjustified

Democratic governments should not create or maintain institutions that deprive their citizens of liberty and equality unless they can illustrate that those institutions substantially promote social welfare. Civil marriage deprives individuals of liberty and equality, but does not substantially promote social welfare. Part II(c)(ii) considers—and ultimately rejects—three arguments that civil marriage promotes social welfare, each of which corresponds with one of civil marriage’s three definitional aspects: longevity, sexuality, and partnership.

30. While other interests may also motivate marriage, these three (privileging longevity, sexuality, and partnership) appear to be the primary interests that are potentially capable of justifying the institution—yet, as will be illustrated, none is ultimately sufficient.
The first argument is that civil marriage promotes social welfare by promoting longevity.\textsuperscript{31} This argument fails because, while civil marriage does promote long-term partnerships,\textsuperscript{32} such partnerships do not necessarily promote social welfare. Long-term partnerships can be as unhealthy as—and, in some cases, more unhealthy than—short-term partnerships. While it may appear that long-term partnerships provide many health and economic benefits,\textsuperscript{33} longevity is not reliably correlated with health or economic well-being.\textsuperscript{34} As sociologist Kathleen Mullan Harris observes, some marriages are neither healthy nor economically beneficial, despite their longevity.\textsuperscript{35} According to Professor Harris, “high-conflict marriage is unhealthy for both children and adults,”\textsuperscript{36} “divorce is preferable to continuation of high-conflict marriage for children’s well-being,”\textsuperscript{37} and “unhappy marriages have negative physical-health consequences.”\textsuperscript{38} Longevity, therefore, does not necessarily promote social welfare. It is not long-term relationships, but “stable, long-term relationships” that

\textsuperscript{31} See, e.g., Lois A. Weithorn, Can A Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California’s Existing Same-Sex Marriages, 60 Hastings L.J. 1063, 1098 (2009) (describing the social value placed on longevity within marriage). As Professor Weithorn has recognized, all of the parties to a marriage—the spouses and the state—hope that it will be permanent. She explains, “[b]ecause these aspirations toward permanence are so important to society at large, marital law is structured to reinforce these expectations and to promote the durability of the relationship.” Id.

\textsuperscript{32} This is clearly true of civil marriage, which is ideally “enduring[,]” Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”), and often quite difficult to exit, given many states’ barriers to divorce. Additional evidence that civil marriage promotes long-term relationships lies in the fact that, to date, all of the successful same-sex marriage plaintiffs have been involved in long-term relationships. See Nancy Levit, Theorizing and Litigating the Rights of Sexual Minorities, 19 Colum. J. Gender & L. 21, 33 (2010) (“[T]he successful same-sex marriage cases were carefully orchestrated to select plaintiffs in long term, committed, marriage-like relationships, whose personal narratives appealed to middle America.”). This suggests that civil marriage promotes—and, indeed, requires—a long-term relationship.

\textsuperscript{33} See Kathleen Mullan Harris, Family Structure, Poverty, and Family Well-Being: An Overview of Panel 2, 10 Emp. Rts. & Emp. Pol’y J. 45, 55 (2006) (“[T]here is simply no doubt that stable, long-term relationships offer health, wealth, and happiness benefits to adults and children. There is a vast body of research showing these benefits, both in the United States and in other nations.”).

\textsuperscript{34} Id. at 55 n.29, 57 (noting that “high-conflict marriage is unhealthy for both children and adults” and that “[m]arriage is associated with higher incomes for men in first marriages, but not in subsequent marriages”).

\textsuperscript{35} See generally id.

\textsuperscript{36} Id. at 55 n.29.

\textsuperscript{37} Id.

\textsuperscript{38} Id.
promote social welfare. While one might think that longevity is sufficiently correlated with stability to promote social welfare by proxy, there is insufficient evidence to establish this correlation. Professor Harris notes that “marriage, by itself, is inadequate to significantly improve family functioning and stability.” The argument from longevity thus fails on two grounds: longevity does not necessarily promote social welfare, and even though stability may promote social welfare, longevity is not a reliable proxy for stability.

The second argument is that civil marriage promotes social welfare by promoting sexuality. This argument fails because, while civil marriage does promote sexual activity, sexual activity does not promote social welfare. Few would argue that engaging in sexual activity should automatically result in governmental benefits. While one might think that sexual activity is sufficiently correlated with child-rearing to promote social welfare by proxy (few, if any, would dispute that child-rearing generally promotes social welfare), there is insufficient evidence to establish this correlation. The historically strong correlation between sexual activity and child-rearing has been substantially weakened over the past half-century as a result of increased access to safe and legal contraception. Recent reports indicate that in the United States alone there are forty-three million “fertile, sexually active women who do not want to become pregnant,” and that 62% of women in their childbearing years are using some form of contraception.

39. Id. at 55 (emphasis added).
40. Id. But Professor Harris also says, “Cohabitational and visiting relationships are much less stable than married relationships, and stability is associated with significant economic, psychosocial, and educational benefits to children.” Id.
41. Few would argue that sexuality directly promotes social welfare; sexuality is typically viewed as significant by virtue of its correlation with child-rearing, which quite clearly promotes social welfare.
42. Some evidence of this lies in the fact that entry into marriage has always been limited to those who could, according to the social mores of their time, appropriately engage in sexual intercourse. See Ohio Rev. Code Ann. § 3101.01(A) (West 2004) (limiting marriage to unrelated, unmarried, opposite-sex adults). Additional evidence lies in the fact that exit from marriage has traditionally been allowed when a spouse is either unwilling or unable to engage in sexual intercourse.
43. Guttmacher Inst., Facts on Contraceptive Use in the United States (June 2010), available at http://www.guttmacher.org/pubs/fb_contr_use.pdf (“62% of the 62 million women aged 15–44 are currently using [some] method of contraception.”). But note that “[a]lmost one-third (31%) of these 62 million women do not need a method because they are infertile; are pregnant, postpartum or trying to become pregnant; have never had intercourse; or are not sexually active.” Id. Also, “Female sterilization is most commonly relied on by women . . . who are currently or have previously been married.” Id.
The historically strong correlation between marital sexuality and marital child-rearing has also been substantially weakened over the past half-century due to the increased acceptability of non-marital child-rearing. Recent reports indicate that over twenty million married women are using contraception and that 39.7% of all births are to unmarried women. The percentage of births to unmarried women has increased by over five points since 2002, when it was 34%, and by over twenty points since 1980, when it was only 18.4%. Also, recent U.S. Census Bureau statistics show that many American children are currently living with unmarried parents. The argument from sexuality, thus, fails on two grounds: sexual activity does not promote social welfare, and even though child-rearing promotes social welfare, sexual activity is not a reliable proxy for child-rearing. As Part III will illustrate, the government could more effectively promote child-rearing if it abolished civil marriage altogether.

The third argument is that civil marriage promotes social welfare by promoting partnership, which facilitates the sharing of resources and the division of labor. This is by far the strongest of the three arguments, yet


45. Stephanie J. Ventura, Changing Patterns of Non-Marital Childbearing in the United States, CTRS. FOR DISEASE CONTROL AND PREVENTION, 1 (May 2009), available at http://www.cdc.gov/nchs/data/databriefs/db18.pdf. It is questionable whether there is any interest in promoting procreation. Our population is growing at an annual rate of approximately 0.96%, which is higher than many nations. The World Factbook: Population Growth Rate (Country Comparison to the World), CENTRAL INTELLIGENCE AGENCY, available at https://www.cia.gov/library/publications/the-world-factbook/rankorder/2002rank.html (last visited Oct. 31, 2011). Procreation is, therefore, only worthy of state benefits to the extent that it is correlated with child-rearing. Yet, as current child-support collection statistics (and other indices) indicate, many individuals who procreate do not participate to any significant degree in child-rearing. See, e.g., Constance M. Chesnik & Lisa A. Petersen, The Child Support Lien Docket, 74 Wis. Law. 14, 16 (2001) ("Wisconsin has long been a leader nationwide in both establishing and enforcing child support orders. In 1999, Wisconsin collected nearly $1 billion in child support. However, Wisconsin still has almost $1.9 billion in uncollected child support.").

46. U.S. CENSUS BUREAU, Living Arrangements of Children Under 18 Years and Marital Status of Parents, by Age, Gender, Race, and Hispanic Origin of the Child for All Children: 2007 (2008), http://www.census.gov/population/socdemo/hh-fam/cps2007/tabC3-all.xls (reporting that, of the 73,746 children studied, a significant portion—at least 16,571—were living with unmarried parents).

47. The Massachusetts Supreme Judicial Court, in holding that the Massachusetts Constitution requires same-sex marriage, seemed to presume that the government had a legitimate interest in promoting partnership through marriage. See Goodridge v.
it is still problematic. While civil marriage does promote partnership and partnership does promote social welfare, civil marriage includes so many partnerships that are not socially desirable and excludes so many that are socially desirable that it is not a rational means of promoting social welfare. A government might be justified in promoting all socially desirable partnerships, for example, all partnerships that conserve resources, increase efficiency, and promote health and well-being.

Dep’t of Pub. Health, 798 N.E.2d 941, 964–65. The state had argued that excluding same-sex couples from marriage was rationally related to its legitimate interest in promoting partnership, based on its assumption that same-sex couples are generally less financially inter-dependent than opposite-sex couples. Id. (reporting that the state argued “[t]he marriage restriction [was] rational . . . because the General Court logically could assume that same-sex couples [were] more financially independent than married couples and thus less needy of public marital benefits”). Without seriously questioning that the state would be justified in promoting partnership, the Court rejected the state’s argument on the basis that same-sex couples were not demonstrably less financially inter-dependent than opposite-sex couples, id. (characterizing the state’s argument that same-sex couples were less financially inter-dependent than opposite-sex couples as a “conclusory generalization”)—and were, indeed, likely to have dependents. Id. (noting that the state’s argument “ignore[d] that many same-sex couples . . . have children and other dependents (here, aged parents) in their care”). The court did, however, observe that the state had not actually reserved marriage for financially inter-dependent couples, inasmuch as it did not require opposite-sex couples to illustrate financial inter-dependence. Id. (“Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.”).


49. Marriage, for example, includes emotionally abusive relationships.

50. One could argue that most relationships that conserve resources and increase efficiency, even if they are short-term or non-sexual, promote social welfare. While there is disagreement as to what form of partnership is most efficient (e.g., gendered versus non-gendered), there is general agreement that partnering is more efficient than not partnering. See Vicki Schultz, Life’s Work, 100 COLUM. L. REV. 1881, 1896–97 (2000) (noting that, while “human capital theory . . . centers around the claim that a gender-based division of labor is more efficient than one in which household partners share both roles . . . the theory says nothing about why it should be women rather than men who specialize in housework.”). Professor Schultz provides an overview of the debate. Id. at 1896 n.49. Economist Gary Becker reports that “[s]pecialization in the allocation of time and in the accumulation of human capital would be extensive in an efficient family even if all members were biologically identical.” He goes on to say, “[I]ndeed, this chapter argues that biological differences probably have weakened the degree of specialization.” GARY S. BECKER, A TREATISE ON THE FAMILY 30 (1991).
However, it is not justified in promoting only long-term sexual partnerships because longevity and sexuality are not independently valuable.

A government that establishes civil marriage ought to make the institution equally accessible to all of its citizens, but a truly democratic government would not create civil marriage in the first place. Civil marriage prevents individuals from developing and valuing a diverse array of relationships and thus prevents them from voicing the diverse array of viewpoints that is necessary to any successful democracy. Because civil marriage deprives individuals of liberty and equality without any demonstrable increase in social welfare, the institution is unjustified.

II. American Civil Marriage Is Incompatible with American Democracy

While tension exists between the abstract concepts of civil marriage and democracy, an even greater tension exists between American civil marriage and American democracy. American civil marriage privileges not only long-term sexual partnerships but also religious, patriarchal, and heterosexist ideologies. American democracy, in contrast, requires adherence to the Constitution’s Due Process, Equal Protection, Establishment, and Free Speech Clauses.

A. American Civil Marriage

While American civil marriage is defined by the three universal criteria of longevity, sexuality, and partnership, its definition is glossed by three culturally specific (and religiously motivated) criteria: permanence, heterosexism, and patriarchy. Part II(A)(i) illustrates how American civil marriage exhibits the three universal criteria of longevity, sexuality, and partnership; Part II(A)(ii) explores how the institution has been influenced by religion to embrace an extreme view of longevity, a heterosexist view of sexuality, and a patriarchal view of partnership.

51. As Professor William Eskridge asserts, “A civilized polity assures equality for all its citizens.” WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 10 (1996). As Professor Martha Nussbaum similarly asserts (within the context of a very different argument that favors replacing civil marriages with civil unions), “[S]o long as the state is in the marrying business, concerns with equality require it to offer marriage to same-sex couples[.]” Nussbaum, supra note 11, at 672.

52. See supra Part I(A).
1. Longevity, Sexuality, Partnership

American civil marriage (hereinafter simply “civil marriage”) exhibits longevity through lifetime commitments; sexuality, through heterosexual relationships; and partnership, through patriarchal collaboration.

The importance of longevity is evident from the fact that civil marriage has traditionally been understood as a lifelong commitment. Many American couples choose to solemnize their marriages by reciting wedding vows that refer to marriage as enduring “until death” or even “forevermore.” From a legal perspective, there have historically been, and continue to be, many obstacles to obtaining a divorce. Until the early 1970s, divorce was not possible absent proof that one of the spouses was at fault. Yet, even in the era of “no-fault” divorce, many states retain fault-based grounds and some structure their no-fault provisions such that exit from marriage remains relatively difficult—by, for example, imposing requirements that couples live “separate and apart” for a certain period of time (often at least six months) before a divorce decree can be entered.

The importance of sexuality is evident from the fact that civil marriage has traditionally been limited to couples who could “appropriately” (according to the social mores of their time) engage in sexual inter-


54. Susan M. Buckholz, Two Views on Collaborative Law, 30 VT. B.J. 37, 37 (2004) (“Until the 1970s, courts in all fifty states were required to make findings of fault before a decree of divorce could be entered and the parties freed from their legal relationship to each other.”).

course. This has effectively limited our American institution to individuals involved in opposite-sex, non-consanguineous, monogamous, consensual, adult relationships. Furthermore, statutory provisions historically allowed exit from marriage upon the failure of a spouse to engage in sexual intercourse. Exit from marriage was allowed by “divorce” when one spouse refused to engage in sexual intercourse, and by “annulment” when one spouse misrepresented his or her capacity or willingness to engage in sexual intercourse.

The importance of partnership is evident from the fact that married couples have traditionally been encouraged to pool their resources and divide their labor—often along gender lines, with husbands acting as providers and wives, as homemakers. Professor Reva Siegel writes about a Kentucky judge who, in 1922, explained, “At common law the husband and wife are under obligation to each other to perform certain duties. The husband is to bring home the bacon, so to speak, and to furnish a home, while the wife [is] to keep said home in a habitable condition.”

56. Often, those excluded from marriage were also prohibited from engaging in sexual intercourse. Indeed, for much of our nation’s history, interracial and same-sex couples were both excluded from marriage and prohibited from engaging in sexual intercourse. Similar exclusions and prohibitions still apply to incestuous couples.

57. See, e.g., Ohio Rev. Code Ann. § 3101.01(A) (West 2004) (limiting marriage to opposite-sex, unrelated, monogamous, and adult couples).

58. See, e.g., Ricketts v. Ricketts, 903 A.2d 857, 863 (2006) (stating that “the statutory term ‘desertion,’ as applied to husband and wife, means a cessation of the marital relation” and is a ground for divorce).

59. Kerry Abrams, Immigration Law and the Regulation of Marriage, 91 Minn. L. Rev. 1625, 1680 (2007) (“Most state courts have restricted annulment for fraud to cases involving misrepresentations that go to the ‘essentials’ of the marriage, defined as the capacity or willingness to procreate or have sexual intercourse.”) (citing, inter alia, Tompkins v. Tompkins, 111 A. 599, 601 (N.J. Ch. 1920) (advising an annulment, because the husband had not overcome the presumption of impotency that arose after three years of cohabitation with his wife without sexual intercourse)).


61. Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 82 Geo. L.J. 2127, 2129 (1994) (“As a Kentucky court explained . . . . in 1922, a husband had a duty to perform market labor (‘bring home the bacon’), while a wife had a duty to perform household labor (‘keep . . . . home’).”) (citing Lewis v. Lewis, 245 S.W. 509, 511 (Ky. 1922)).
2. Religiously Motivated Permanence,
Heterosexuality, Patriarchy

As evidenced by the above discussion, our American elaborations of longevity, sexuality, and partnership are deeply informed by religion. Religious (and specifically Judeo-Christian) precepts have caused our American institution to privilege not only longevity but lifetime commitments, not only sexuality but heterosexuality, and not only partnership but patriarchy. Although these religiously motivated aspects of marriage are not entirely intractable, they cannot be readily eradicated. Tracing how religion has influenced our American institution to privilege lifelong, heterosexual, patriarchal unions will help illustrate the impossibility of quick redefinition.

While American marriage is often described as a secular institution, its deep roots in English ecclesiastical marriage reveal its religious nature. In England until as recently as the 1850s, marriage was within the jurisdiction of the ecclesiastical courts, which were very closely affiliated with the Church of England.62 English marriages were “not valid unless [they were] solemnized according to the rites of the Church of England, in church, in the presence of a clergyman and witnesses.”63 While American marriage statutes do not formally place marriage within the jurisdiction of religious officials—except, of course, insofar as they authorize religious officials to solemnize civil marriages64—their implicit privileging of lifelong, heterosexual, patriarchal relationships belies their secular nature. These three de facto requirements of lifetime commitment, heterosexuality, and patriarchy are each largely motivated by religion.

Religion motivates the American understanding of marriage as not only a long-term commitment, but a lifetime commitment. The wedding vows prescribed by the Anglican Book of Common Prayer require each spouse to pledge that he or she will remain married “until death.”65 And while the Canons of the Anglican Church in North America do allow for divorce,66 they make clear that marriage is ideally a “permanent” and

63. Id. at 478–79.
64. See, e.g., N.Y. DOM. REL. LAW § 11-c (McKinney 2011) (authorizing both civil and religious officials to solemnize civil marriages).
“lifelong” union. Similarly, the Catholic Code of Canon Law provides that a marriage, once consummated, is “perpetual” and “can be dissolved by no human power and by no cause, except death.” Inasmuch as most Americans choose to have religious officials solemnize their marriages, most ceremonies involve the recitation of religious vows that speak of marriage as a lifetime commitment. Even Americans who have secular ceremonies often choose vows that are derived from the Anglican or Catholic ceremonies and thus speak of marriage as a lifetime commitment.

Religion motivates the American understanding of marriage as not only a sexual union, but a heterosexual union, most often characterized by non-consanguineous, monogamous, consensual, adult intercourse. The Canons of the Anglican Church in North America define marriage as the union of “one man and one woman.” The Catholic Code of Canon Law similarly provides that persons who marry “must at least not be ignorant that marriage is a permanent consortium between a man and a woman which is ordered toward the procreation of offspring by means of some sexual cooperation.” American marriage statutes have traditionally embraced these religious definitions. Evidence of this lies in the fact that they have generally limited entry into marriage to opposite-sex, unrelated, monogamous, consenting, adult couples, required consummation for a marriage to be valid, and allowed exit from marriage a marriage may be declared a nullity or dissolved and allows the possibility of a subsequent marriage in certain circumstances (Matthew 19 and 1 Corinthians 7).

---

67. Id. at tit. II, c.7, § 1 (“[T]he Sacrament of Holy Matrimony is in its nature a union permanent and lifelong of one man and one woman.”).
68. 1983 Code c.1141 (explaining that marriage “cannot be dissolved by any human power or for any reason other than death”). See also id. c.1134 (“From a valid marriage arises a bond between the spouses which by its nature is perpetual and exclusive[.]”).
71. Canons of the Anglican Church, supra note 66, at tit. II, c.7, § 1.
73. See, e.g., Ohio Rev. Code Ann. § 3101.01(A) (West 2004) (limiting marriage to opposite-sex, unrelated, monogamous, and adult couples).
74. See, e.g., B v. B, 78 Misc.2d 112 (1974) (stating that “the law [provides] that physical incapacity for sexual relationship is ground for annulling a marriage” and annulling the parties’ marriage because “defendant [could not] function as a husband by assuming male duties and obligations inherent in the marriage relationship inasmuch as he did
based on a failure to engage in sexual intercourse. 75 While American marriage statutes no longer universally retain all of these requirements (some states now allow same-sex marriage, and virtually all now recognize marriages as valid regardless of the couple’s sexual practices), 76 even those requirements that have been formally abolished remain central to our understanding of marriage.

Religion also motivates the American understanding of marriage as not only partnership-based, but also patriarchal, meaning that husbands are privileged and wives are subordinated. Professors Eric Rasmusen and Jeffrey Evans Stake report that “[r]eligious and social norms [have long] defined . . . the gender roles within a marriage.” 77 English ecclesiastical marriage was a deeply patriarchal institution in which husbands and wives had dramatically different rights and obligations. 78 As the Anglican Book of Common Prayer succinctly explained, “[T]he husband is the head of the wife.” 80 Within English marriage, husbands were both dominant over and answerable for their wives. 81 They entered contracts and

not “have male sexual organs[,]” but see Franklin v. Franklin, 154 Mass. 515 (1891) (stating that “[t]he consummation of a marriage by coition is not necessary to its validity.”).

75. See, e.g., Martin v. Otis, 233 Mass. 491 (1919) (explaining that “impotency . . . render[s] a marriage . . . voidable at the suit of the party conceiving himself or herself to be wronged.”).


81. See BLACKSTONE, supra note 78, at 444–45 (1765) (“The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children[,]”).
held property on behalf of their entire families. Wives, in contrast, had no legal identity apart from their husbands, and could neither enter contracts nor own property. The division of labor within English marriage was gendered in the sense that husbands were expected to be providers, and wives, homemakers. Many of the patriarchal aspects of English marriage were imported into American marriage. Elizabeth Cady Stanton expressed her frustration with this fact when she declared in 1854, "[The] laws relating to marriage—founded as they are on the old common law of England, a compound of barbarous uses [—] are in open violation of our ideas of justice." She went on to criticize American marriage vigorously for the patriarchal aspects it had inherited from its English predecessor.

While early Americans could have given content to the transcultural criteria of longevity, sexuality, and partnership in a variety of ways, they chose to draw primarily on religious precepts and, therefore, to define American marriage as a lifelong, heterosexual, patriarchal union. Some might argue that American marriage is flexible enough that it could be redefined as a more transient, less heterosexist, and less gendered institution; however, such redefinition seems unlikely in the foreseeable future. Permanence, heterosexuality, and gender roles have become so central to our American understanding of marriage that they

82. Siegel, supra note 61, at 2127 ("For centuries the common law of coverture gave husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.").

83. Siegel, supra note 61, at 2127. See also BLACKSTONE, supra note 78, at 442 ("By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband[.]"). See also Kindregan, supra note 78, at 430-31 ("In ecclesiastical law, the disability of a married woman was based on the biblical concept that husband and wife are 'one flesh.'").

84. The "doctrine of necessaries," indeed, required husbands to provide adequate food, clothing, and shelter for their wives. As Blackstone reported, "The husband is bound to provide his wife with necessities by law . . . and if she contracts debts for them, he is obliged to pay them; but for any thing besides necessaries, he is not chargeable." BLACKSTONE, supra note 78, at 443.

85. Siegel, supra note 61, at 2129.

86. Modern American marriage is gendered in both legal and practical ways. Since Part II focuses on the ways in which it is legally gendered, Part I focuses exclusively on the ways in which it is practically gendered.

87. Elizabeth Cady Stanton, in 1854, criticized American marriage statutes for their roots in English common law, saying "[y]our laws relating to marriage—founded as they are on the old common law of England [are] a compound of barbarous usages." Elizabeth Cady Stanton, Address to the Legislature of the State of New York, reprinted in 1 HISTORY OF WOMAN SUFFRAGE (Elizabeth Cady Stanton et al. eds. 1985) (1848-1861) 595-605.

88. Id.
have, for all practical purposes, become definitional. Absent the highly problematic erasure of large portions of our nation’s history, American marriage cannot be successfully redefined to exclude these three de facto requirements.

B. American Civil Marriage Violates Due Process Rights

Civil marriage, as defined in Part II(A), violates the Due Process Clause of the Fourteenth Amendment, which provides that no state shall deprive any person “of life, liberty, or property, without due process of law.” This argument proceeds in two parts—Part II(B)(i) illustrates that civil marriage prevents fully autonomous self-definition, and Part II(B)(ii) illustrates how this translates into a deprivation of liberty under the Due Process Clause. Part II(B)(iii) raises—and rebuts—the obvious counter-argument that, because the Supreme Court has recognized a fundamental “right to marry” as part of its substantive due process doctrine, civil marriage could not possibly violate the Due Process Clause.

1. American Civil Marriage Manipulates Identity

Civil marriage prevents individuals from fully autonomous self-definition by encouraging them to abandon their own preferences and adopt religious, heterosexual, and gendered identities. This section begins by illustrating that civil marriage encourages the adoption of religious identities; proceeds by illustrating that it encourages the adoption of heterosexual identities; and concludes by illustrating that it encourages the adoption of gendered identities.

Americans who marry are encouraged to adopt religious identities. Because civil marriage is defined largely by reference to religious doctrine, those who enter the institution are implicitly expected to subscribe to that doctrine. Social science data reveals that married Americans generally meet this expectation. While it is unclear whether being married leads to being religious or being religious leads to being married, the correlation between marriage and religion is statistically significant.

89. U.S. CONST. amend. XIV, § 1.
91. One Gallup report that found a connection between marriage and religiosity cautioned that it is “uncertain whether religion . . . lead[s] to choice of marital status, or whether marital status leads Americans to different . . . religious . . . choices.” Id.
Recent studies indicate both that married Americans are more likely to be religious, and that "[r]eligious people are more likely to marry." Despite the fact that American marriage statutes do not expressly condition marriage on religiosity, they define marriage by reference to religious doctrine and authorize religious officials to solemnize civil marriages. And even though American marriage statutes do not expressly require religious ceremonies, most Americans voluntarily elect religious ceremonies. According to one report, "[r]eligious authorities perform an estimated sixty to eighty percent of the marriages in the United States." Civil marriage, then, encourages—or is at the very least highly correlated with—the adoption of religious identities.

Americans who marry are also encouraged to adopt heterosexual identities. Entry into civil marriage has long been—and, in the vast majority of states, continues to be—limited to opposite-sex, unrelated, monogamous, consenting adults. Most American marriage statutes contain provisions similar to the following Ohio statute:

92. Id. ("Marriage is . . . associated with religious intensity, including church attendance and importance of religion in one's life."). Interestingly, among Americans whose religious views have changed during their lifetimes, 22% report that their views changed at least in part because they married someone from another religion. Frank Newport, A Look at Religious Switching in America Today, GALLUP (June 23, 2006), http://www.gallup.com/poll/23467/Look-Religious-Switching-America-Today.aspx.

93. Nigel Barber, Are Religious People More Ethical III? Sexual Behavior, PSYCHOLOGY TODAY (May 15, 2009), http://www.psychologytoday.com/blog/the-human-beast/200905/are-religious-people-more-ethical-iii-sexual-behavior (last visited July 10, 2010). See also THE BARN A GRP., New Marriage and Divorce Statistics Released (Mar. 31, 2008), http://www.barna.org/barna-update/article/15-familykids/42-new-marriage-and-divorce-statistics-released ("In addition to finding that four out of every five adults (78%) have been married at least once, the Barna study revealed that an even higher proportion of born again Christians (84%) tie the knot. That eclipses the proportion among people aligned with non-Christian faiths (74%) and among atheists and agnostics (65%).").

94. See, e.g., N.Y. DOM. REL. LAW § 11 (McKinney 2011) (authorizing both civil and religious officials to solemnize civil marriages).

95. Estin, supra note 69, at 457 n.26. Grossman & Yoo, supra note 69, at 1A.

96. Estin, supra note 69, at 457 n.26. Grossman & Yoo, supra note 69, at 1A.

97. For an insightful discussion of "compulsory heterosexuality," "compulsory matrimony," and their inter-relationship, see Ruthann Robson's article, Assimilation, Marriage, and Lesbian Liberation. Robson, supra note 28, at 780 (observing, among other things, that "[w]hile some same-sex marriage advocates have theorized same-sex marriage as an antidote to compulsory heterosexuality, the compulsory nature of matrimony itself remains disputed or unacknowledged") (internal citations omitted).

98. See Sarah C. Courtman, Sweet Land of Liberty: The Case Against the Federal Marriage Amendment, 24 PACE L. REV. 301, 341 (2003) ("In most states, couples wishing to get married must meet only three simple criteria; they must be of the opposite sex, of the age of majority, and unrelated to one another within a certain degree of consanguinity.").
Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman.\footnote{99}{Ohio Rev. Code § 3101.01(A)(West 2004).}

The adoption of these requirements was presumably driven by convictions that only such persons could appropriately engage in sexual intercourse. Such requirements clearly manipulate identity because meeting them is the only means of accessing highly desirable governmental benefits. Civil marriage thereby encourages the adoption of heterosexual identities.

Americans who marry are also encouraged to adopt specific gender identities. American marriage statutes have historically limited (and, in most states, still limit) marriage to opposite-sex couples.\footnote{100}{See Rasmusen, supra note 77.} They have also historically required married couples to divide their labor along gendered lines, with husbands acting as providers and wives, as caretakers.\footnote{101}{Siegel, supra note 61, at 2129.} While American marriage statutes no longer formally require married persons to adopt gendered roles,\footnote{102}{Orr v. Orr, 440 U.S. 268, 279–80 (1979) (invalidating a gendered alimony statute because it rested on the archaic ideas that “generally it is the man’s primary responsibility to provide a home and its essentials” and “the female destined solely for the home and the rearing of the family”) (quoting Stanton v. Stanton, 421 U.S. 7, 10, 14–15, 95 (1975)).} most husbands continue to function as providers and most wives, as caretakers—particularly when there are children involved.\footnote{103}{Bureau of Labor Statistics, Married Parents, supra note 60, at 1 (“Forty-three percent of married mothers and 88 percent of married fathers were employed full time. . . . Among full-time workers who are parents of children under 18, married mothers were more likely to provide childcare to household children than were married fathers. On an average day, 71 percent of these mothers and 54 percent of these fathers spent time caring for and helping household children.”). See Steven L. Nock, Marriage in Men’s Lives 62 (1998) (noting that the husband has assumed the role of “primary provider of the family [and] has committed himself to instrumental tasks that contribute to his gender identity as a man”).} Recent Bureau of Labor Statistics reports reveal that 88% of married fathers but only 43% of married mothers have full-time employment,\footnote{104}{Bureau of Labor Statistics, Married Parents, supra note 60, at 1.} and that “[a]mong full-time workers who are parents of children under 18, married fathers worked about 1.0 hour more per day than did married mothers.”\footnote{105}{Id.} The same reports reveal that “[a]mong full-time workers who are parents of children under 18, married
mothers were more likely to provide childcare to household children than were married fathers.” Entry into marriage, thus, continues to be correlated with the adoption of gendered identities and ideologies. Professor Katharine Baker summarizes marriage’s impact on gender by stating that married persons “are not free to choose their own gender identity.” Marriage, she explains, “creates the ‘social identities’ of husband and wife,” and is ultimately “much more about the absence of choice than the exercise of it.”

In sum, civil marriage encourages individuals to adopt religious, heterosexual, and gendered identities, and this encouragement has become so entrenched in the institution that it cannot realistically be eradicated in the foreseeable future. Professor Coontz has observed as much with respect to marriage’s impact on gender identity, and her observation might be extrapolated to apply equally to all three components of marital identity. She writes:

> For thousands of years marriage was organized in ways that reinforced female subservience. Today, even though most of the legal and economic basis for a husband’s authority over his wife and her deference to his needs is gone, we all have inherited unconscious habits and emotional expectations that perpetuate female disadvantage in marriage. For example, it is

---

106. *Id.* at 2 (“On an average day, 71 percent of these mothers and 54 percent of these fathers spent time caring for and helping household children. Mothers spent more time providing this care than did fathers[,]”).

107. Even the recent advent of same-sex marriage, which at least has the potential to degender marriage partially, appears to be transforming our perception of same-sex couples more than it is transforming our perception of the institution as a whole. The couples who marry mimic opposite-sex marriages.

108. Katharine K. Baker, *The Stories of Marriage*, 12 J. L. & FAM. STUD. 1, 40 (2010) (cataloging the many ways in which marriage shapes gender identity). Professor Baker has asserted that “marriage serves as a critical source of identity for both men and women.” *Id.* at 18. Empirically, she says, marriage “increases the amount of domestic work that women do and decreases the amount that men do.” *Id.* at 23. Furthermore, she says, “Marriages with children [are particularly gendered, in that they tend to] decrease women’s commitment to paid work and increase their commitment to unpaid work.” *Id.*

109. *Id.* at 19, 40. Marriage also continues to influence ideology in deeply gendered ways. As Professor Katherine Franke has asserted, “those who fall within marriage’s shadow find themselves locked into a social field in which the attachments we take up have meaning already determined by the state.” Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2697 (2008). She explains that, within marriage, the state rather than the couple determines “the meaning and implications of sexual or emotional intimacy, cohabitation, monogamy, intermingling of finances, the joint purchase of property, or the naming of the other party on one’s health or life insurance policy[.]” *Id.* at 2697–98.
still true that when women marry, they typically do more housework than they did before marriage. When men marry, they do less.\textsuperscript{110}

In other words, civil marriage’s religious, heterosexist, and patriarchal aspects have become so entrenched that they necessarily shape our “habits” and “expectations.” Consequently, when Americans marry, they almost invariably adopt religious, heterosexual, and gendered identities. As a result, they are almost invariably prevented from engaging in fully autonomous self-definition.

2. American Civil Marriage Violates Liberty Rights

By preventing fully autonomous self-definition, civil marriage constitutes a “deprivation” of “liberty” within the meaning of the Due Process Clause. Illustrating this requires proving, first, that monetary incentives (like monetary penalties) should in some cases constitute “deprivations;” and, second, that the right to self-define is among our “liberties.” Taken together, these two points illustrate that when civil marriage deprives individuals of the liberty to self-define, the institution violates the Due Process Clause.

While “deprivations” have traditionally been limited to criminal sanctions such as imprisonment or monetary penalties,\textsuperscript{111} one could argue that they should be extended to include monetary incentives. This argument operates by analogy to the free speech context, where the Court has held that limitations on speech can exist not only in cases of monetary penalties but also in cases of monetary incentives.\textsuperscript{112} In Speiser \textit{v. Randall},\textsuperscript{113} for example, the Court explained that a monetary incentive—a tax exemption that was conditioned on its recipient agreeing to refrain from engaging in certain speech—constituted a limitation on free speech. While \textit{Speiser} rested primarily on procedural due process

---

\textsuperscript{110} Coontz, \textit{supra} note 5, at 311–12.

\textsuperscript{111} See, e.g., Lawrence \textit{v. Texas}, 539 U.S. 558 (2003) (deeming the $200 monetary penalty imposed on Lawrence and Garner for their act of sodomy a deprivation of liberty within the meaning of the Due Process Clause). \textit{Lawrence} is discussed further at the end of this section.


\textsuperscript{113} \textit{Speiser}, 357 U.S. at 518 (stating that “speech [was being] effectively limited by the exercise of the taxing power.”) (citing Grosjean \textit{v. American Press Co.}, 297 U.S. 233 (1936).
grounds, the Court emphasized that ordinary procedures were inadequate because the right of free speech was so important. It further emphasized that the denial of the tax exemption should be treated the same as the imposition of a criminal fine, since both would have the same “deterrent effect” on speech.

It is unclear why this logic should not be extended such that the denial of a tax exemption for refusing to marry (and, thus, to give up the liberty to define one’s own identity) would be deemed a deprivation of liberty. Because many of the goals that motivate the protection of free speech also motivate the protection of other liberties, concepts from the Court’s free speech doctrine should arguably be applicable to other liberty doctrines. All liberty doctrines serve the common goal of enabling individual self-determination. That free speech doctrine serves this goal is evident from Justice Brandeis’s famous statement in his *Whitney v. California* concurrence that free speech is protected because “[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties”—or, in other words, to self-determine. That other liberty doctrines can also serve this goal is evident from the Court’s statement in *Lawrence v. Texas* that “[a]t the heart of liberty is the right to define one’s own concept of existence, of

114. *Speiser*, 357 U.S. at 529. The Court explicitly stated that the appellants argued both that the law “denied them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment” and “inva[ded] the liberty of speech protected by the Due Process Clause of the Fourteenth Amendment[,]” *id.* at 517, n.3. It proceeded to state that it was deciding the case on the former ground, without reaching the latter. *Id. See also Cammarano v. United States*, 358 U.S. 498, 513 (1959) (characterizing *Speiser* as a procedural due process case); *but see Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) (discussing the unconstitutional conditions doctrine and referring to the “Speiser-Perry model”).

115. *Speiser*, 357 U.S. at 520, 525.

116. *Speiser*, 357 U.S. at 518 (“To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”).


118. This idea has been developed by Professor Martin Redish, who asserts that free speech “ultimately serves only one true value”: ‘individual self-realization.’” Martin Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982) (explaining that self-realization encompasses “development of the individual’s powers and abilities—an individual ‘realizes’ his or her full potential—and the individual’s control of his or her own destiny through making life-affecting decisions—an individual ‘realizes’ the goals in life that he or she has set”). See also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 994 (1978) (arguing that the “self-expressive use of speech” is important “independent of any effective communication to others, for self-fulfillment or self-realization”); Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 Utah L. Rev. 749, 790–91 (2009).
meaning, of the universe, and of the mystery of human life." Since all liberty doctrines serve the common goal of enabling self-determination, one could argue that they should all recognize monetary incentives impeding self-determination as potential deprivations.

Yet the Court has not always been willing to recognize such incentives as deprivations, as evidenced by at least two cases involving the right to marry. In Califano v. Jobst and Bowen v. Owens, the Court found no deprivation of liberty where the government had created monetary disincentives to marriage. In both cases, the Court upheld laws under which certain groups of people (individuals with disabilities in Califano, and divorced widows in Bowen) had their governmental benefits terminated upon marriage (or remarriage, in Bowen). Inasmuch as all liberty doctrines are meant to promote self-determination, the Court should recognize that monetary incentives may constitute "deprivations" across all liberty doctrines.

Assuming that monetary incentives can constitute "deprivations," it remains to be shown that the "liberty" protected by the Due Process Clauses actually encompasses the right to define one's own identity. One of the Court's broadest descriptions of liberty appeared in Lawrence v. Texas, where it invalidated Texas's criminal ban on same-sex sodomy as unduly burdening individual liberty. Justice Kennedy, writing for the majority, stated, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." He further stated that “[b]eliefs about [concepts of existence, meaning, the universe, and the mystery of human life] could not define the attributes of personhood were they formed under compulsion of the State.” While there are many possible readings of Lawrence, these passages strongly suggest that "liberty" encompasses a broad right to define one's own identity.

119. Lawrence, 539 U.S. at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
122. Lawrence, 539 U.S. 558.
123. Lawrence, 539 U.S. at 562.
124. Lawrence, 529 U.S. at 574 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
125. Katherine M. Franke, The Domesticated Liberty of Lawrence v. Texas, 104 COLUM. L. REV. 1399 (2004). Professor Franke makes the insightful observation that Justice Kennedy's opinion can be read as protecting only those who self-define as members of long-term relationships and not those who self-define in other ways (e.g., as individuals engaged in anonymous or non-monogamous sexual conduct). Id. at 1410–11. Since the Court has not spoken since Lawrence, the scope of the liberty protected remains uncertain.
If "deprivations" can encompass monetary incentives, and if "liberty" can encompass the right to define one's own identity, then civil marriage arguably constitutes a deprivation of liberty. Thus, when states provide monetary incentives for civil marriage—which entails the adoption of religious, heterosexual, and gendered identities—they prevent self-definition and deprive their citizens of liberty. This assertion is not as radical a departure from existing doctrine as it may initially appear. In Lawrence, for example, the Court held that a monetary penalty (the $200 fine imposed for the act of sodomy) that prevented Lawrence and Garner from defining their own identities constituted a deprivation of liberty. From a practical perspective, such a monetary penalty is quite similar to the monetary benefits associated with civil marriage. Both are in danger of chilling the ability to define one's own identity.

Assuming that civil marriage does deprive individuals of liberty, the Court would have to determine whether the deprivation was justified. While the Court's substantive due process jurisprudence is not entirely settled, Lawrence is instructive because it is relatively recent. In Lawrence, when the Court found a deprivation of liberty, it applied rational basis review (or, perhaps, rational basis "with bite"), and asked whether Texas's sodomy ban was rationally related to a legitimate governmental interest. It follows that, if civil marriage deprives individuals of liberty, the Court would be required to ask (at the least) whether the institution is rationally related to any legitimate governmental interest. For the

---

126. See supra text accompanying footnotes 118 and 125.
127. Lawrence and Garner were each fined $200 for their violation of Texas law. Lawrence, 529 U.S. at 563.
128. Substantive due process doctrine is unsettled in many senses, including that it is no longer clear whether the Court still asks if given rights are "fundamental" or applies the traditional "tiered scrutiny" analysis. See Lawrence, 529 U.S. at 586 (Scalia, J., dissenting) (observing that the Court's approach to fundamental rights has changed, in the sense that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause"); Calvin Massey, The New Formalism: Requiem for Tiered Scrutiny?, 6 U. PA. J. CONST. L. 945, 946 (2004) (surmising that "the neat compartments of tiered scrutiny are beginning to collapse").
129. Lawrence, decided in 2003, is one of the Court's most recent statements on substantive due process. Lawrence, 539 U.S. at 558.
130. The Lawrence Court appears to apply rational basis review based on its statement that "[the Texas statute furthers no legitimate state interest]." Lawrence, 539 U.S. at 578. Some have, however, argued that Lawrence actually applies a slightly higher level of review, referred to as "rational basis with bite." See Jeremy B. Smith, Note, The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation, 73 FORDHAM L. REV. 2769, 2770 (2005) (arguing that the Court should acknowledge its application of "a more searching form of rational basis review" in cases such as Lawrence).
reasons illustrated above, civil marriage cannot survive even rational basis review.

3. The “Right to Marry” Should Be Abrogated

Some might raise the argument that civil marriage cannot possibly violate the Due Process Clause because the Supreme Court has recognized a “right to marry” as among the fundamental rights protected by that clause. This section, however, argues that the Court should never have recognized a right to marry and that the existing right could be eliminated without unsettling prior decisions.

In assessing whether a given right should be protected by the Due Process Clauses, the Supreme Court has traditionally defined the right “careful[ly]” and asked whether it is “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ such that ‘neither liberty nor justice would exist if [it] were sacrificed.’” The Court has repeatedly found that the right to marry is among the rights protected by the Due Process Clauses. However, the right to marry is doctirnally unnecessary and inappropriate. Removing the right to marry from the list of rights protected by the Due Process Clauses would enhance, rather than diminish, individual liberty.

The Supreme Court first recognized the existence of a right to marry in dicta in the 1923 case of Meyer v. Nebraska, where the right was included in a lengthy list of substantive rights that were protected by the Due Process Clauses during the Lochner Era. While the right’s exist-

131. The Supreme Court has recognized a right to marry in cases. See, e.g., Turner v. Safley, 482 U.S. 78 (1987) (invalidating a regulation preventing prisoners from marrying except under certain narrowly defined circumstances); Bowen v. Owens, 476 U.S. 340 (1986) (upholding a law that terminated government benefits to divorced widows who remarried, but not to non-divorced widows who remarried); Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating a law excluding certain persons with child support obligations from marriage); Califano v. Jobst, 434 U.S. 47 (1977) (upholding a law that terminated government benefits to certain disabled persons when they married persons who were not also receiving government benefits); Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating filing fees for divorce as applied to indigents); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia’s anti-miscegenation ban on substantive due process and equal protection grounds); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating Nebraska’s ban on teaching foreign languages to children who had not yet completed the eighth grade).


133. See supra note 131.

134. Meyer, 262 U.S. at 399 (“[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring
ence was mere dicta in *Meyer*, it was directly relevant to (though not independently dispositive of) the outcome of the 1967 case of *Loving v. Virginia*, where the Court invalidated Virginia's anti-miscegenation ban on the dual grounds that it violated the substantive due process right to marry and the equal protection right to be free from invidious racial discrimination. Since most of the Court's opinion in *Loving* focused on equal protection rather than substantive due process, many have speculated as to why the Court included the substantive due process analysis. The Court could, all would concede, have reached the same outcome by relying solely on the equal protection analysis.

While the Court has, in several post-*Loving* decisions, invoked the right to marry, each of those decisions could have been written without reference to the right and founded solely on equal protection grounds. Professor Martha Nussbaum recently observed that court cases regarding the right to marry consistently turn on equality principles, stating "that when the state offer[s] a status that has both civil benefits and expressive dignity, it must offer it with an even hand." On the basis of this observation, Professor Nussbaum concluded, "There appears to be no constitutional barrier to a decision of a state to [move] to a regime of civil unions, or, even more extremely, to a regime of private contract for marriages." Professor Patricia Cain similarly observed in 1996, "One cannot even tell under current Supreme Court jurisprudence whether marriage is a 'fundamental right' for purposes of substantive due process (which would suggest it could not be abolished), up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.").

137. *See, e.g.*, Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 706–07 (2008) (asking "why . . . the Court also [held] that the statute deprived the Lovings of their fundamental right to marry under substantive due process [and suggesting that perhaps the Court] meant to emphasize how odious the law was.").
138. *Zablocki*, 434 U.S. at 383 (citing *Loving*, 388 U.S. at 11–12) ("[In *Loving*], the Court's opinion could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause. But the Court went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry.").
139. *See supra* note 131.
141. *Id.* Professor Nussbaum continues, "[T]he Constitution does not require the state to use this particular name rather than some other, although it does require the state to protect people's (equal) liberty in setting up households." *Id. at* 695.
or whether it is only a fundamental right whose allocation must adhere to notions of equal protection. 142 Professor Cain ultimately concluded that marriage was the latter type of right, in part because "the Supreme Court's right to marry cases have all involved situations in which some, but not all, people experienced a denial of the right." 143

*Loving* presented such a situation in 1967, as did two important subsequent cases—*Zablocki v. Redhail* in 1978, and *Turner v. Safley* in 1987. 144 In *Zablocki*, the Court invalidated a Wisconsin law that prohibited persons with child support obligations from marrying unless they could show that they were in compliance with their obligations and that their children were not presently (or likely to become) public charges. 145 While the Court applied heightened scrutiny because the law burdened the "fundamental" right to marry, *Zablocki* was an equal protection case because only certain persons were being denied the right to marry. 146 The *Zablocki* Court could arguably have reached the same result without invoking the right to marry by noting that Wisconsin's law facially discriminated against persons with child support obligations and applying rational basis review under the Equal Protection Clause. 147 The law arguably lacked even a rational relationship to the state's legitimate interest in collecting child support, since it excluded parents who were in full compliance with their support obligations but whose children remained public charges due to circumstances outside of their control. 148 The right to marry was unnecessary to the outcome.

While the Court decided *Loving* and *Zablocki* at least partly on equal protection grounds, it decided *Turner* solely on substantive due process grounds. 149 In *Turner*, the Court invalidated a prison regulation

143. Id. at 34.
145. *Zablocki*, 434 U.S. at 383 (requiring judicial permission upon such showings).
146. *Zablocki*, 434 U.S. at 383 (citations omitted) ("[U]nder the Equal Protection Clause, 'we must first determine what burden of justification the classification created thereby must meet, by looking at the nature of the classifications and the individual interests affected.' . . . Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required.").
147. Rational basis review applies to laws burdening classes, including prisoners, that are not suspect (suspect classes include race, alienage, and national origin) or quasi-suspect (quasi-suspect classes include sex and legitimacy). *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985).
148. Indeed, Mr. Redhail would not have been allowed to marry even if he had met his child support obligations, as his child would have remained a public charge.
149. *Turner*, 482 U.S. at 78.
that barred prisoners from marrying unless they received permission from their prison superintendent, who would give permission only for "compelling" reasons such as pregnancy or the birth of an illegitimate child.\textsuperscript{150} While the \textit{Turner} Court invoked the right to marry, which had historically triggered heightened scrutiny, it invalidated the regulation under rational basis review because of the special judicial deference due to prison regulations.\textsuperscript{151} The Court found that the regulation at issue was not even "reasonably related" to "penological interests" such as security and rehabilitation.\textsuperscript{152} The \textit{Turner} Court could clearly have reached the same result without invoking the right to marry by noting that the regulation facially discriminated against prisoners and applying rational basis review under the Equal Protection Clause.\textsuperscript{153} Recognizing a right to marry was, in \textit{Turner}, as it had been in \textit{Loving} and \textit{Zablocki}, unnecessary.

The Court could have reached the same result not only in \textit{Loving}, \textit{Zablocki}, and \textit{Turner}, but also in the more minor cases of \textit{Boddie v. Connecticut}, \textit{Califano v. Jobst}, and \textit{Bowen v. Owens} without ever recognizing a constitutional right to marry.\textsuperscript{154} \textit{Boddie}, \textit{Califano}, and \textit{Bowen}, like \textit{Loving}, \textit{Zablocki}, and \textit{Turner}, all involved marriage regulations impacting only certain persons, which means that they all could, in theory, have been decided solely on equal protection grounds.\textsuperscript{155} The right to marry has been unnecessary to the disposition of the Court's prior cases; in fact, the only context in which the right could be necessary to the disposition of a case would be if a state entirely repealed its marriage statutes. While such a case has not yet been presented, there are at least two strong arguments that the right to marry likely would not—and should not—prevent a state from disestablishing civil marriage.

First, the right to marry likely would not prevent a state from disestablishing civil marriage because the Court has never used the due process clauses to require the government to provide any positive rights.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{150} \textit{Turner}, 482 U.S. at 82.
  \item \textsuperscript{151} \textit{Turner}, 482 U.S. at 85, 89–90.
  \item \textsuperscript{152} \textit{Turner}, 482 U.S. at 97 ("[T]he Missouri prison regulation, as written, is not reasonably related to these penological interests.").
  \item \textsuperscript{155} Boddie involved the waiver of a filing fee for divorce that indigents were uniquely unable to afford. Boddie, 401 U.S. at 383. Califano and Bowen are discussed supra note 120. \textit{Loving}, \textit{Zablocki}, and \textit{Turner} are discussed supra note 131.
  \item \textsuperscript{156} While I argue in Part I that the Court should recognize at least some positive rights as implied by the Due Process Clauses (e.g., the rights to food, healthcare, and education—but not marriage), my present argument is that the Court \textit{has not} and \textit{will not} likely recognize any positive rights under the existing doctrine. Professor Susan
\end{itemize}
Professor Cain made this argument in her 1996 article, explaining that “after the Supreme Court's [1989] decision in DeShaney, it is unlikely that the Court will recognize any affirmative obligations under substantive due process.” In DeShaney, the Court held that a severely abused child had no positive right to governmental protection; Justice Brennan, dissenting, characterized the majority opinion as emphatically rejecting the “idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens.” Since the courts clearly view the Constitution as “a charter of negative rather than positive liberties[,]” it seems unlikely that they would invoke the right to marry to prevent a state from abolishing civil marriage—so long as the abolition applied equally to all citizens.

Second, the right to marry should not prevent a state from establishing civil marriage, because the right does not satisfy the Court's test of being "‘implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'” Recognizing the right to marry actually diminishes individual liberty because it requires states to privilege those who are willing to self-define as "married," which (as previously discussed) entails adopting religious, heterosexual, and gendered identities. Privileging such identities encourages the adoption of those identities and thus constitutes a deprivation of liberty. Thus, the right to marry is not properly among the substantive rights protected by the Due Process Clauses, and recognizing the right is both doctrinally unnecessary and inappropriate.

C. American Civil Marriage Violates Equal Protection Rights

Civil marriage, as defined above in Part II(A), violates the Equal Protection Clause of the Fourteenth Amendment, which provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This argument proceeds in two parts—Part

---


157. Cain, supra note 142, at 40.
159. DeShaney, 489 U.S. at 204 (Brennan, J., dissenting).
160. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (citations omitted) ("The Constitution is a charter of negative rather than positive liberties.").
162. U.S. CONST. amend. XIV, § 1. It should be noted that our constitutional commitment to equality derives not only from the Equal Protection Clause, but also from
II(C)(i) illustrates that civil marriage creates identity-based hierarchies, and Part II(B)(ii) illustrates that the creation of such hierarchies violates the Equal Protection Clause.

1. American Civil Marriage Creates Hierarchy

Civil marriage creates an identity-based hierarchy by privileging married individuals, who tend to adopt religious, heterosexual, and gendered identities. Civil marriage privileges married individuals by affording them exclusive access to a broad array of tangible and intangible benefits arising under both state and federal law. The tangible benefits of civil marriage relate to financial matters such as pensions, taxes, inheritances, and property ownership, as well as to deeply personal matters such as surrogate decisionmaking. Its intangible benefits relate primarily to social status. Courts and commentators alike have recognized marriage’s importance to social status. The Massachusetts Supreme Judicial Court has explained that marriage “bestows enormous private and social advantages on those who choose to marry.” Professor Anita Bernstein has similarly explained, “Like race and coverture, marital status functions to elevate some individuals and to subordinate others.” Professor John Culhane has added that, while being unmarried “is less likely to be as fully subordinating [as membership in a subordinated racial group] the effects of governmental

the Citizenship Clause, which provides that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States and of the state wherein they reside.” Id. Professor Akhil Amar has written that the Citizenship Clause “aimed to . . . mak[e] clear that everyone born under the American flag—black or white, rich or poor, male or female, Jew or Gentile—was a free and equal citizen.” AKHIL AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 381–82 (2005).


164. See Sunstein, supra note 11, at 2090–92. See also Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955–57 (2003) (providing a non-comprehensive catalog of many of the tangible benefits of civil marriage); Abrams, supra note 29, at 31. (“Access to a spouse’s social security pension and the tax-free transfer of property upon a spouse’s death [are examples of] clear benefits of marriage over non-marriage that could be translated into a dollar figure.”).

165. Goodridge, 798 N.E.2d at 957 (2003) (holding that Massachusetts must offer same-sex couples the same benefits as opposite-sex couples).

signaling are real." He has further stated that such signaling may cause some unmarried individuals to feel "undervalued or even stigmatized." The tangible and intangible benefits of civil marriage privilege married individuals, thereby establishing insidious identity-based hierarchies.

2. American Civil Marriage Violates Equality Rights

By establishing identity-based hierarchies, civil marriage deprives individuals of the equality secured by the Equal Protection Clause. Civil marriage has historically promoted hierarchies based on not only religion, sexuality, and gender, but also race and marital status. It thereby violates the Fourteenth Amendment's Equal Protection Clause on multiple grounds. While religion-based hierarchy is more appropriately understood as an Establishment Clause violation as discussed in Part II(D)(i), this section discusses the remaining four hierarchies and illustrates how each violates the Equal Protection Clause. It explores, first, the race-based hierarchy that privileged whites over non-whites; second, the sex-based hierarchy that privileges males over females (as well as transsexuals and intersexuals); third, the sexuality-based hierarchy that privileges straights over gays (as well as bisexuals who wish to marry persons of the same sex); and fourth, the marital-status based hierarchy that privileges married persons over unmarried persons. While the hierarchies based on race, sex, and sexuality either have been or are currently in the process of being removed from our marriage statutes, the hierarchy based on marital status is implicit in the institution of civil marriage and cannot be removed by any act short of abolishing the entire institution.

Under the Equal Protection Clause, the Supreme Court has held that race-based hierarchies receive more intense scrutiny than sex-based hierarchies, and that sex-based hierarchies receive more intense scrutiny than those based on religion and gender. 168

167. Culhane, supra note 48, at 509. Professor Culhane writes:

The substantial economic advantage that government confers on married couples is itself a powerful societal signal that the institution is preferred over other adult relationships, including cohabitation (whether chosen or forced, as in the case of same-sex couples), single status, more transient affiliations, and multiple-partner relationships. Even if these government-conferring advantages were substantially or completely withdrawn, though, we would expect married couples to benefit from continued societal privilege.

Id. at 507.
169. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (explaining that laws discriminating based on the suspect classifications of race, alienage, and national origin receive "strict scrutiny and will be sustained only if they are suitably
scrutiny than sexuality-based hierarchies.\textsuperscript{170} Other hierarchies—for example, those resting on marital status—receive minimal scrutiny and are almost always permitted.\textsuperscript{171} By reviewing how civil marriage has historically promoted (and, in some cases, continues to promote) hierarchies based on race, sex, sexuality, and marital-status, this section illustrates two broader points. First, even if all explicit references to race-, sex-, and sexuality-based hierarchies were removed from our laws, the hierarchies inherent in the institution of civil marriage would continue to influence our practices, at least for the foreseeable future. Second, even if civil marriage could be separated from its history of race, sex, and sexuality discrimination, it would continue to violate the Equal Protection Clause by inherently privileging married over unmarried persons.

a. Race-Based Hierarchy

Race-based hierarchy has been deeply entrenched in our marriage statutes since our nation’s founding.\textsuperscript{172} The pre-Reconstruction Constitution did not prevent (and, in many ways, encouraged)\textsuperscript{173} race-based hierarchy. Prior to Reconstruction, several states maintained anti-miscegenation laws banning marriage between whites and non-whites.\textsuperscript{174} After ratification of the Fourteenth Amendment in 1868,
many states enacted or re-enacted anti-miscegenation laws, which were transparently intended to privilege whites over non-whites and preserve the purity of the white race. It was not until nearly a century later in the 1967 case of Loving v. Virginia that the Supreme Court invalidated an anti-miscegenation law on the basis that it engaged in invidious racial discrimination and thus violated the Equal Protection Clause. Because Virginia’s anti-miscegenation law facially discriminated on the basis of race, the Loving Court applied strict scrutiny and effectively asked whether the law was narrowly tailored to meet a compelling governmental purpose. Since the law’s purpose of “maintain[ing] White Supremacy” was clearly not compelling, the law was invalidated.

Although our marriage statutes have not constitutionally permitted race-based hierarchy since 1967, the history of anti-miscegenation laws has indelibly marked our marital practices. Inter-racial marriage rates remain low, and as recently as 2009, a Louisiana judge refused to marry an interracial couple, reportedly on the basis that he did not “believe in mixing the races.” Thus, while marriage may have been formally redefined after the Court’s decision in Loving, it has not been practically redefined and continues to bear the marks of its discriminatory history.

175. Emily Field Van Tassel, “Only the Law Would Rule Between Us”: Antimiscegenation, the Moral Economy of Dependency, and the Debate over Rights After the Civil War, 70 CHI.-KENT L. REV. 873, 899-900 (1995) (“Before the War, all but four slave states had laws forbidding marriages between Whites and people of African descent... In the last third of the nineteenth century, as virtually all Northern states (and some Midwestern states) that had banned racial intermarriage stripped those laws from the books, virtually every Southern state enacted or re-enacted laws against intermarriage, often increasing the severity of the punishment.”).
176. See, e.g., Loving v. Virginia, 388 U.S. 1, 7 (1967) (noting that anti-miscegenation bans were motivated by desires “to preserve... racial integrity” and maintain “White Supremacy”).
179. Loving, 388 U.S. at 11.
180. Russell K. Robinson, Racing the Closet, 61 STAN. L. REV. 1463, 1505 (2009) (Data collected circa 2005 suggests that “[j]ust 5% of black married women are married to a man of another race, compared to 23% of Asian women and 19% of Latinas.”).
b. Sex-Based Hierarchy

Sex-based hierarchy, like race-based hierarchy, has been deeply entrenched in our marriage statutes since our nation's founding.\(^\text{182}\) This hierarchy derives largely from English ecclesiastical marriage.\(^\text{183}\) While English ecclesiastical marriage was not imported wholesale into American law, many significant aspects were adopted.\(^\text{184}\) Early American states maintained sex-based hierarchy both during marriage and upon divorce. During marriage, wives were barred from controlling property or entering contracts and were required to be good homemakers.\(^\text{185}\) Husbands, in contrast, were allowed to hold property and enter contracts for their wives, and were required to be good providers.\(^\text{186}\) Upon divorce, wives were almost always awarded custody of young children under the “tender years” doctrine,\(^\text{187}\) while husbands were almost always ordered to pay alimony.\(^\text{188}\) The sex-based hierarchy implicit in the traditional

---

\(^{182}\) See Sack, supra note 79, at 33.


\(^{184}\) Id. at 212-13 (explaining that, while Americans inherited coverture from the English, early American law was nevertheless flexible enough that women were able to retain their legal identities in some situations).

\(^{185}\) As Professor Julia Halloran McLaughlin reports, “Early American [marriage and] divorce law reveals [a] focus on the husband. Property was divided by title, residency was determined by the husband, wages earned by wives and children belonged to the husband and father, corporal punishment of wives and children was legally permitted, and married women lacked the capacity to contract, and, thus, to manage their financial estates.” Julia Halloran McLaughlin, The Fundamental Truth about Best Interests, 54 ST. LOUIS U. L.J. 113, 135 (2009).

\(^{186}\) Siegel, supra note 61, at 2129 (“As [a] Kentucky court explained . . . in 1922, a husband had a duty to perform market labor (‘bring home the bacon’)[.].”) See also Ian W. Freeman, Court Examines the Application of the Necessaries Doctrine and the Preconditions of a Person’s Liability for the Debts of a Spouse, 48 S.C. L. REV. 53, 53-54 (1996) (“At English common-law, the husband solely was liable for the expenses of necessary food, clothing, shelter, and medical services provided to his wife during cohabitation . . . Until recently, American courts . . . retained [this] common-law doctrine of necessities in a form virtually unchanged from its English ancestor.”).

\(^{187}\) Allan Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. FAM. L. 423, 425 (1976)(“[W]hen the children were of ‘tender years,’ the mother, unless shown to be unfit, should be given preference over the father in the award of custody.”).

\(^{188}\) Twila L. Perry, The “Essentials of Marriage”: Reconsidering the Duty of Support and Services, 15 YALE J. L. & FEMINISM 1, 24 (2003)(“[H]istorically, as well as currently, the vast majority of alimony recipients are ex-wives rather than ex-husbands”).
female-homemaker and male-provider roles was thus formally inscribed in early American marriage law.

It was not until the mid-nineteenth Century that legislatures began to dismantle the sex-based hierarchies associated with being married through the adoption of Married Women's Property Acts. And it was not until the mid-twentieth Century that courts began to dismantle the sex-based hierarchies associated with divorce. Only in the 1970s and 1980s did state courts begin to invalidate the “tender years” doctrine that had automatically allocated custody of young children to wives, and only in 1979 did the Supreme Court invalidate a statute that had allowed judges to award alimony to wives but not husbands. Yet, as was the case with race-based hierarchy, the removal of sex-based hierarchy from our statutes has not dramatically affected our marital practices. Since married men continue to be the primary providers and married women continue to be the primary homemakers, divorce courts still often award women custody of young children and order men to pay alimony.

Furthermore, although many aspects of sex-based hierarchy have been removed from our marriage statutes, some important ones remain—most significantly, the opposite-sex requirement for entry into marriage. At present, only six states allow both opposite-sex and same-sex couples to obtain marriage licenses. Thus, in forty-four states, sex

189. See Sack, supra note 79, at 33 (noting that Married Women’s Property Acts “gave married women the right to own property and incur legal obligations in their own names, [and thereby] slowly unraveled the system of coverture.”). Professor Sack further explains that “[t]he first Married Women’s Property Act was enacted in Mississippi in 1839 and, within fifty years, every state had adopted some form of such an act.” Id. at 33, n.6.
191. Orr v. Orr, 440 U.S. 268 (1979) (invalidating Alabama’s alimony statute, under which only men could be ordered to pay alimony).
192. BUREAU OF LABOR STATISTICS, Married Parents, supra note 60.
remains relevant to entry into marriage. While opposite-sex requirements would seem to entail facial discrimination of the sort that ought to trigger intermediate scrutiny under the Equal Protection Clause, most courts have not taken this view. They have instead reasoned that since such requirements bar both men and women from “precisely the same conduct”—i.e., marrying a person of the same sex—they do not create sex-based inequality. Commentators have criticized this reasoning on a variety of grounds. Some have argued that inasmuch as “constitutional rights are individual rights[,] a statute that denies a woman the right to marry another woman but permits a man to marry [that same] woman discriminates on the basis of sex.” Such discrimination, the argument proceeds, cannot be justified because it rests on unfounded sex stereotypes, which ultimately reflect the intent to promote and maintain male supremacy.


196. Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that sex-based classifications are subject to intermediate scrutiny and therefore invalid unless they are “substantially related” to the achievement of “important governmental objectives”).

197. See, e.g., Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999) (rejecting the argument that the opposite-sex requirement was problematic sex discrimination, while nevertheless holding that same-sex couples were entitled to the same benefits as opposite sex couples). But see, e.g., Baehr v. Lewin, 852 P.2d 44, 57–63 (Haw. 1993) (a two-judge plurality, comprised of Levinson, J., and Moon, acting C.J., accepted the sex-discrimination argument). Paul Benjamin Linton reports that “[i]n sum, twelve state reviewing courts, three federal courts, and the District of Columbia Court of Appeals have all held that statutes reserving marriage to opposite-sex couples ‘do not subject men to different treatment from women; each is equally prohibited from the same conduct.’” Paul Benjamin Linton, Same-Sex Marriage and the New Mexico Equal Rights Amendment, 20 GEO. MASON U. C.R.L.J. 209, 218 (2010).

198. See, e.g., Baker, 744 A.2d at 880 n.13 (Vt. 1999) (explaining that “the marriage laws ... do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex” and that “there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct”).

199. Alison Lorenzo, Note, 39 RUTGERS L.J. 1003, 1022 (2008) (emphasis added). See also William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1425 (1993) (“Although the state will give a marriage license to virtually any woman-man couple, no license will be dispensed to any woman-woman couple. As a consequence, the state is discriminating against the latter couple simply because the second partner is a woman and not a man. That, the argument goes, is de jure sex discrimination[.]”).

200. See Eskridge, supra note 199, at 1425 (“A deeper form of the sex discrimination argument, developed by Sylvia Law, is that any effort by the state to hardwire sex differences into the concept of marriage perpetuates traditional sex-based stereotypes of man-as-breadwinner and woman-as-housekeeper.”) (citing Sylvia A. Law, Homosexuality and the
Since most courts have held that opposite-sex requirements do not constitute sex discrimination, they have applied only rational basis review and upheld such requirements.\textsuperscript{201} One common rationale is that they rationally serve a legitimate interest in privileging individuals who provide for dependent children under "optimal" conditions.\textsuperscript{202} This rationale proceeds from the assumption that opposite-sex parenting conditions are "optimal."\textsuperscript{203} A second and related rationale is that opposite-sex requirements rationally serve a legitimate interest in privileging individuals who provide for dependent (or inter-dependent) partners.\textsuperscript{204} This rationale proceeds from the assumption that opposite-sex relationships are more likely to entail dependency than same-sex relationships.\textsuperscript{205} A third rationale is that opposite-sex requirements rationally serve a legitimate interest in maintaining the traditional definition of marriage as "a union between one man and one woman."\textsuperscript{206}

\textit{Social Meaning of Gender}, 1988 Wis. L. Rev. 187, 232 (1988)). The Supreme Court has, of course, held that legislation cannot be justified by reference to sex stereotypes. See, e.g., Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975) (articulating the general proposition that legislation should not rest on "gender-based generalization[s]").


202. Hernandez, 7 N.Y.3d at 359 (stating that the legislature could rationally have viewed opposite-sex parenting as preferable).

203. See, e.g., Hernandez, 7 N.Y.3d at 359 (upholding New York’s ban on same-sex marriage). The Hernandez majority identified two child-related reasons for upholding the exclusion of same-sex couples under rational basis review: “First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. . . . [S]econd[, ] the Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.” Id. at 359.

204. Goodridge, 440 Mass. at 336 (noting, but ultimately dismissing as unsubstantiated, the state’s argument that "same-sex couples are less financially dependent on each other than opposite-sex couples").


206. See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 476 (Conn. 2008) (noting, but ultimately rejecting, the state’s arguments that opposite-sex requirements are needed to, inter alia, “preserve the traditional definition of marriage as a union between one man and one woman.”); In re Marriage Cases, 49 Cal. Rptr. 3d 675, 718–24 (Cal. Ct. App. 2006) (“We cannot say the state’s interest in continuing this institution in the form it has always taken, and continues to take across the country, is so unreasonable that the marriage laws must be stricken under rational basis review.”), reversed by In re Marriage Cases, 43 Cal.4th 757 (Cal. 2008). Note that there are other rationales for upholding opposite-sex requirements under rational basis review—e.g., promoting uniformity with other states that ban same-sex marriage. See Kerrigan, 957 A.2d at 476 (noting, but rejecting, the state’s argument that opposite-sex requirements are needed “to promote uniformity and consistency with the laws of other jurisdictions”).
Each of these three arguments is subject to critique. The first two, taken together, suggest that marriage is intended to privilege providers—those who support dependent children (under the first rationale) or partners (under the second rationale). While privileging providers is certainly a legitimate interest, opposite-sex requirements are not rationally related to its achievement. Individuals in opposite-sex relationships are not inherently more likely than others to assume provider roles. Therefore, privileging providers cannot provide the rational basis necessary to limit marriage to opposite-sex couples. The third rationale—maintaining the traditional definition of marriage—similarly fails, because maintaining tradition cannot in itself be a legitimate interest. As one (dissenting) judge explained, “That civil marriage has traditionally excluded same-sex couples—i.e., that the ‘historic and cultural understanding of marriage’ has been between a man and a woman—cannot in itself provide a rational basis for the challenged exclusion.” This third rationale, indeed, reveals the difficulty of redefining the term “marriage.” While opposite-sex requirements may not be constitutionally justified, they continue to dominate our statutes and define our institution.

Although opposite-sex requirements are the most obvious way in which our current marriage statutes maintain sex-based hierarchy, they are by no means the only way. Most states make it substantially easier for women than men to change their surnames upon both marriage and divorce. Most women take advantage of this relative ease, changing

207. See U.S. Census Bureau, Household Characteristics of Opposite-Sex and Same-Sex Couple Households: 2008 (2009), http://www.census.gov/population/www/socdemo/files/ssex-tables-2008.xls (reporting that 43% of opposite-sex couples and 20% of same-sex couples have children in their households). While opposite-sex couples are currently more likely than same-sex couples to have children in their households, these statistics must be understood in light of the current legal climate, which often prevents same-sex couples from enjoying the same parental rights as opposite-sex couples. Furthermore, child-rearing is only one way in which an individual can function as a provider. Individuals may also provide for their partners, or for other adults, such as relatives or longtime friends. There is little evidence to suggest that same-sex partners are less likely to be inter-dependent, or less likely to be caring for other adults, than opposite-sex partners. See Goodridge, 440 Mass. at 336–37 (dismissing the state’s contention that same-sex couples are less likely to be dependent on each other as a “conclusory generalization” and noting that many same-sex couples have children or other family members (e.g., “aged parents”) who are dependent on them).


209. The difficulty of redefining “marriage” was discussed above, in Part I(A).

210. See Kelly Snyder, All Names are Not Equal: Choice of Marital Surname and Equal Protection, 30 Wash. U. J. L. & Pol’y 561, 583 (2009) (reporting that “in most states, it is easier for women to change their last names [upon marriage] than for men to do so.”) (citing Elizabeth F. Emens, Changing Name Changing: Framing Rules and the
their names when they marry\textsuperscript{211} and thus symbolically (even if not intentionally) importing the history of male domination into their own marriages. Our current marriage statutes also maintain sex-based hierarchy through the use of sex-based terminology in that they typically refer to men as "grooms" or "husbands" and to women as "brides" or "wives."\textsuperscript{212} While our statutes no longer formally assign husbands and wives different rights and obligations, their continued use of sex-based terminology suggests that the practical roles of husbands and wives remain somehow saliently different. Our marriage statutes, in sum, continue to maintain sex hierarchy through a wide variety of mechanisms.

However, in light of the above discussion of the race-based requirements, we can predict that even if all of the existing sex-based requirements were successfully removed from our statutes, they would likely continue to influence our practices. We have already seen that, despite the removal of legal requirements that husbands act as providers and wives act as caregivers, husbands and wives continue to adopt those sex-based roles.\textsuperscript{213} Similarly, even if future legislation were to equalize the ease of surname changes and de-gender the statutory terminology, it is likely that women would continue to change—and men, to retain—their surnames upon marriage, that couples would continue to select traditional wedding ceremonies that involved distinct roles for "brides" and "grooms," and that married women and men would continue to self-identify as "wives" and "husbands," respectively. While the removal of sex-based requirements from our marriage statutes would be progressive, it would not likely be transformative.


\textsuperscript{211} Suzanne A. Kim, \textit{Marital Naming/Naming Marriage: Language and Status in Family Law}, 85 Ind. L.J. 893, 895 (2010) ("noting that women almost universally adopt their husbands' last names upon marriage, despite the formal freedom of women to retain their names and of men to adopt their wives' last names . . . . Recent data suggest this practice may even be on the rise among the college-educated women who have been most likely to retain their names."). \textit{See also} Emens, supra note 210, at 785 ("Overall, only 10 percent of married women in the U.S. have as their last name their own birthname or any name other than their husband's birthname.").

\textsuperscript{212} \textit{See, e.g.}, \textit{Idaho Code Ann.} \textsection 32-304 (2011) "[T]he parties must declare, in the presence of the person solemnizing the marriage that they take each other as husband and wife."); \textit{Ariz. Rev. Stat. Ann.} \textsection 25-130 (2010) (referring to parties as "groom" and "bride").

\textsuperscript{213} \textit{Bureau of Labor Statistics, Married Parents, supra note 60}. 
Like race- and sex-based hierarchies, sexuality-based hierarchy has been deeply entrenched in our marriage statutes since the our nation's founding. Sexuality-based hierarchies arise implicitly from opposite-sex requirements to prevent gays, lesbians, and certain bisexuals effectively from marrying. While many have argued that sexual orientation ought to be considered a suspect classification that triggers heightened scrutiny, most courts have rejected this argument and applied only rational basis review. Accordingly, such courts have upheld the exclusion of gays, lesbians, and certain bisexuals from civil marriage—generally, based on one or more of the three rationales discussed above as justifications for sex discrimination. Such courts have, in other words, held that excluding gays, lesbians, and certain bisexuals from marriage is "rationally related" to "legitimate" interests in privileging those who provide for dependent children or partners, and maintaining the traditional definition of marriage as a union between one man and one woman.

While the removal of sexuality-based discrimination from our marriage statutes seems inevitable within the next generation, it will not


215. See Courtney Megan Cahill, *Celebrating the Differences that Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality*, 70 Ohio St. L.J. 943, 965 n.99 (2009) (citing instances in which "marriage equality advocates have argued that heightened scrutiny should apply to [marriage] restrictions because gays and lesbians constitute a suspect class and because sexual orientation constitutes a suspect classification").


217. See supra text accompanying notes 203, 204, and 206.

218. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 Mich. L. Rev. 431, 484-85 (2005) (reporting that "The demographics of public opinion on issues of sexual orientation virtually ensure that one day in the not-too-distant future a substantial majority of Americans will support same-sex marriage: young people are much more likely to support gay rights than are their elders. Indeed, a poll taken in June 2003 showed that sixty-one percent of respondents aged eighteen to twenty-nine already supported the legalization of same-sex marriage, while among those aged 65 and over just twenty-two percent did so.") (internal citations omitted).
necessarily eliminate the gendered or heterosexist aspects of our marital practices for reasons similar to those already discussed with respect to the removal of race- and sex-based discrimination. Many have argued that gays, lesbians, and bisexuals will not transform marriage, but rather will be transformed—and, ultimately, assimilated—by its patriarchal and heterosexist norms. Some evidence of this lies in the fact that, among the same-sex couples who obtained civil unions in Vermont during the first year they were available, women were much more likely than men to change their surnames. Thus, while the removal of sexuality-based requirements will be progressive, it will (like the removal of race- and sex-based requirements) most likely not be transformative.

In conclusion, marriage statutes have been used throughout our nation's history to create and maintain a variety of clearly illegitimate hierarchies. While we have removed some of these hierarchies through legislative reforms or judicial decisions, many remain. Even if we could successfully remove all of the remaining hierarchies from our statutes, we could not remove the indelible marks they have left on our practices. The term “marriage” cannot be successfully redefined to exclude its racist, patriarchal, and heterosexist history. As evidenced by the debates over whether same-sex couples ought to be entitled to enter “marriages” or relegated to a separate regime of “civil unions,” the term “marriage” has an “evocative and important meaning” that cannot be separated from its history.

d. Marital-Status-Based Hierarchy

Even if our marriage statutes could be separated from their discriminatory history, they would still continue to violate the Equal Protection Clause because of their inherent privileging of married over unmarried individuals. Despite the fact that courts have deemed marital status a non-

219. See, e.g., Paula Ettelbrick, Since When is Marriage a Path to Liberation?, in SAME-SEX MARRIAGE: PRO AND CON 118–24 (Andrew Sullivan ed., 1997) (arguing that same-sex marriage will assimilate gays and lesbians into the mainstream).
220. Kim, supra note 211, at 940 (“In data that she collected regarding naming practices in Vermont civil unions during the first year that such relationship status was offered, Emens found that of the six percent of couples who shared some part or all of their last names, women disproportionately shared their names compared to men.”) (citing Emens, supra note 210, at 789).
221. Lewis v. Harris, 908 A.2d 196, 200 (N.J. 2006) (holding that same-sex couples are entitled to the same rights and benefits as other couples—but not to the title of “marriage”).
suspect classification and applied only rational basis review, privileging long-term sexual partnerships is so arbitrary that it could not survive even that lowest level of review.

D. American Civil Marriage Violates First Amendment Rights

Civil marriage violates at least two of the rights secured by the First Amendment and incorporated against state governments via the Fourteenth Amendment's Due Process Clause. Part II(D)(i) illustrates that civil marriage violates the Establishment Clause; Part II(D)(ii) illustrates that civil marriage also violates the Free Speech Clause.

1. American Civil Marriage Establishes Religion

The Establishment Clause of the First Amendment, which was incorporated against the states via the Fourteenth Amendment's Due Process Clause in 1940, provides that "Congress shall make no law respecting an establishment of religion[.]" The Supreme Court has interpreted the Establishment Clause to prevent the privileging of one religion over others as well as the privileging of religion over nonreligion. While the Court's Establishment Clause jurisprudence has not been entirely consistent, statutes that are neutral and generally

222. See, e.g., Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 712 (6th Cir. 2001) (applying rational basis review to a policy treating married and unmarried individuals differently).


224. U.S. Const. amend. I.

225. McCreary Cnty. Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005) (citing, inter alia, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) and Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 15–16 (1947)) ("The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

applicable regarding religion have often been subject to some version of the test announced in *Lemon v. Kurtzman.* To survive the "Lemon test," a statute must satisfy three requirements: "First, [it] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'"

This section argues that American marriage statutes violate the Establishment Clause by privileging some religions (i.e., Christian religions) over others, as well as by privileging religion over non-religion. It begins by analyzing American marriage statutes under the *Lemon* test and arguing that they fail to satisfy any of the requirements. It proceeds by conceding that while most courts would disagree with this analysis and find American marriage statutes compliant with the *Lemon* test, such statutes violate a more proper and robust interpretation of the Establishment Clause.

American marriage statutes fail the first requirement of *Lemon* test because they lack a "secular purpose." The Court elaborated on what it means to have a secular purpose in the 2005 decision of *McCreary County v. ACLU.* There, the Court upheld an injunction that had prevented two Kentucky counties from displaying the Ten Commandments in their courthouses because their purpose was "predominantly religious[]." The justices explained that, to avoid violating the Establishment Clause, a state's purpose must be "predominantly secular," and not "merely secondary to a religious objective." They further explained that "[t]he eyes that look to purpose belong to an 'objective observer,'" who is aware of

---


231. *McCreary,* 545 U.S. at 881 ("Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction.").

232. *McCreary,* 545 U.S. at 860 ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality[].")

the entire "historical context." Because the McCreary County Court found that an objective observer, who was aware of the entire historical development of the Ten Commandments displays, would have perceived them as motivated by a predominantly religious purpose, it held that the displays lacked the requisite secular purpose.

Similarly, an objective observer, aware of the historical development of American marriage statutes discussed in Part I(A), would perceive those statutes as motivated by a predominantly religious purpose. Even though American marriage may have been intended to serve some legitimate secular purposes, such as promoting stability, child-rearing, and partnership, those purposes were arguably secondary to its predominant purpose of codifying religious precepts. Some evidence that American marriage was motivated by this purpose lies in the fact that the requirements for entry into and exit from the institution were largely imported from English ecclesiastical marriage. As Professor Jane C. Murphy observes, while laws regarding the licensing, solemnization, and dissolution of marriage "have always been the subject of secular state control in this country, [they] are directly traceable to the ecclesiastical courts and canon law of medieval Europe and England." These deep roots in religion suggest that American marriage statutes were originally motivated by a predominantly religious purpose.

Some might argue that although American marriage statutes were originally motivated by a predominantly religious purpose, they have over

---

234. *McCreary*, 545 U.S. at 862.

235. The displays began as overtly religious, and were then somewhat diluted in an ultimately unsuccessful effort to comply with the Establishment Clause.

236. *McCreary*, 545 U.S. at 881. The Court also found a religious purpose and invalidated state practices in Edwards v. Aguillard, 482 U.S. 578 (1987) (holding that the government could not require public schools teaching evolution to also teach "creation science"); Stone v. Graham, 449 U.S. 39 (1980) (holding that the government could not require the Ten Commandments to be posted in public school classrooms); Wallace v. Jaffree, 472 U.S. 38 (1975) (holding that the government could not authorize public school teachers to hold a one-minute silence for meditation/prayer). The Court, however, found secular purposes and upheld laws in cases such as McGowan v. Maryland, 336 U.S. 420 (1961) (holding that the government could require businesses to close on Sundays because having a uniform day of rest was a valid secular purpose).

237. See supra Part I(A).

238. Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. Pitt. L. Rev. 1111, 1136, 1162 (1999) (citing S. v. S., 29 A.2d 325, 326 (Del. Super. Ct. 1942) ("Though the Ecclesiastical Law of England is no part of our Common Law ... that part of the jurisdiction of the Ecclesiastical Courts relating to annulment of marriage and divorce was given by law to our Courts, [such that] we should follow the principles and precedents of the Ecclesiastical Courts in the administration of our law.")
time come to serve the predominantly secular purpose of promoting relationships characterized by stability, care-taking, and partnership. In the 1961 case of *McGowan v. Maryland*,\(^\text{239}\) the Supreme Court indicated that laws that were originally motivated by predominantly religious purposes could become constitutional if they came to serve predominantly secular purposes over time.\(^\text{240}\) While the *McGowan* Court acknowledged that “Sunday Closing Laws” were originally motivated by the predominantly religious purpose of promoting observation of the Sabbath,\(^\text{241}\) it held that the laws were nevertheless constitutional at the time of litigation because they had come to serve the predominantly secular purpose of providing a “uniform day of rest for all citizens[].”\(^\text{242}\) The Court found the evolving motivations of Sunday Closing Laws vitiated the initial Establishment Clause violation.\(^\text{243}\)

Marriage is not analogous. American marriage statutes continue to serve predominantly religious purposes. In the 1965 decision of *Griswold v. Connecticut*, the Supreme Court described marriage as “a coming together for better or for worse [that is] intimate to the degree of being sacred.”\(^\text{244}\) The phrase “for better or for worse” echoes the Anglican marriage vows from the *Book of Common Prayer*,\(^\text{245}\) and the concept of marriage as “sacred” clearly derives from religion—for Catholics, marriage is a sacrament.\(^\text{246}\) Similarly, in the 1978 decision of *Turner v. Safley*, the Court reaffirmed the existence of the “right to marry” at least in part based on a recognition that “many religions recognize marriage as having spiritual significance.”\(^\text{247}\) In recent same-sex marriage cases, state courts

\[\text{240. McGowan, 366 U.S. at 442–43. The Court further explained that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."}\]
\[\text{241. McGowan, 366 U.S. at 446.}\]
\[\text{242. McGowan, 366 U.S. at 445. The Court continued by explaining that "the fact that this day [of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals."}\]
\[\text{243. McGowan, 366 U.S. at 444 ("In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.").}\]
\[\text{244. Griswold, 381 U.S. at 486 (emphasis added).}\]
\[\text{245. The Book of Common Prayer requires each spouse to promise to remain married "for better for worse [sic]." Book of Common Prayer, supra note 65.}\]
have approvingly quoted both of the above passages to illustrate marriage's continuing importance to our society.\textsuperscript{248} Professor Murphy writes that, while marriage statutes may "have many secular goals—record keeping, public health, prevention of fraud—they [are also] grounded in moral concerns[.]"\textsuperscript{249} Because our marriage statutes are motivated by a predominantly religious purpose, they fail to satisfy the first requirement of the \textit{Lemon} test.

American marriage statutes fail the second requirement of the \textit{Lemon} test because their primary effect is to advance religion. The comparison of two cases that triggered substantial discussion of the second requirement—one that resulted in invalidating the law at issue, and another that resulted in upholding it—will be instructive. First, in the 1985 case of \textit{Estate of Thornton v. Caldor},\textsuperscript{250} the Supreme Court invalidated a law that gave every employee the "right not to work" on his or her Sabbath, based on a finding that the law's primary effect was to advance religion.\textsuperscript{251} Second, in the 1987 case of \textit{Church of Christ of Latter-Day Saints v. Amos},\textsuperscript{252} the Supreme Court upheld a law exempting religious organizations from certain anti-discrimination provisions, based in part on a finding that the law's primary effect was not to advance religion.\textsuperscript{253} The \textit{Amos} Court explained, "A law is not unconstitutional simply because it allows churches to advance religion[.] For a law to have forbidden 'effects' under \textit{Lemon}, it must be fair to say that the government itself has advanced religion through its own activities and influence."\textsuperscript{254}

Based on a comparison with the applications of \textit{Lemon}'s second requirement in \textit{Estate of Thornton} and \textit{Amos}, one can reasonably argue that

\begin{itemize}
  \item \textsuperscript{248} See, e.g., Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 416 (Conn. 2008).
  \item \textsuperscript{249} Murphy, \textit{supra} note 238, at 1162. Professor Steven Nock has also recognized the close relationship between civil and religious marriage, and has observed that the norms associated with civil marriage clearly derive from the norms associated with religious marriage. Steven L. Nock, \textit{Why Not Marriage?}, 9 VA. J. SOC. POL'Y & L. 273, 289–90 (2001). It should also be noted that identities within civil marriage derive from identities within religious marriage. As Kathleen McDonald writes, "Historically, religions codified explicit rules giving husbands the authority to beat ('chastise') their wives." Kathleen A. McDonald, \textit{Battered Wives, Religion, and Law: An Interdisciplinary Approach}, 2 YALE J.L. & FEMINISM 251, 252 (1990).
  \item \textsuperscript{250} \textit{Estate of Thornton}, 472 U.S. 703 (1985).
  \item \textsuperscript{251} \textit{Estate of Thornton}, 472 U.S. at 710–11 (O'Connor, J. & Marshall, J., concurring).
  \item \textsuperscript{252} Corp. of Presiding Bishop of the Church of Christ of Latter-Day Saints \textit{v. Amos}, 483 U.S. 327 (1987).
  \item \textsuperscript{253} \textit{Church of Christ of Latter-Day Saints}, 483 U.S. at 327.
  \item \textsuperscript{254} \textit{Church of Christ of Latter-Day Saints}, 483 U.S. at 337 (emphasis in original). The Court continued, "As the Court observed in Walz, 'for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.' " (citing Walz \textit{v. Tax Comm'n}, 397 U.S. 664, 668 (1970)).
\end{itemize}
marriage's primary effect is to advance religion. By establishing a governmental institution called "marriage," and then defining that institution almost entirely by reference to religious understandings of marriage, the government is not simply allowing churches to advance their religions. Rather, the government itself is advancing religion by directly converting religious precepts into legal provisions and modeling a civil institution after a religious one. As Professor Perry Dane explains, "[M]arriage as an institution challenges the secular/religious dichotomy."

American civil marriage, he writes, "is a secular legal institution that has a central, and distinctive, layer of religious meaning." Inasmuch as American marriage statutes effectively incorporate religious understandings of marriage, they fail to satisfy the second requirement of the Lemon test.

American marriage statutes fail the third requirement of the Lemon test because they foster excessive governmental entanglement with religion. As the Lemon Court explained, a statute "entangles" the government with religion when its administration requires a "comprehensive, discriminating, and continuing state surveillance." The law at issue in Lemon, which subsidized the teaching of secular subjects in religious schools, essentially required constant state surveillance of religious school teachers to ensure that they did not invoke their religious beliefs while being compensated by government funds. Accordingly, the law was invalidated.

Like the law at issue in Lemon, American marriage statutes foster excessive governmental entanglement with religion. American marriage statutes entangle the government with religion in the sense that their administration requires "comprehensive, discriminating, and continuing state surveillance." The primary reason that American marriage statutes require state surveillance is that they authorize religious officials to satisfy statutory solemnization requirements. New York law, for exam-

255. See supra Part II(A).
256. Perry Dane, A Holy Secular Institution, 58 Emory L.J. 1123, 1156 (2009) (ultimately concluding "that the 'secular' and 'religious' meanings and institutions of marriage are so intermeshed in our history, legal and religious imagination, and doctrine that trying to wall off 'civil marriage' from religious considerations is neither possible nor desirable").
257. Id. at 1156.
259. Lemon, 403 U.S. at 606.
260. Lemon, 403 U.S. at 619 ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.").
261. Lemon, 403 U.S. at 619.
262. Lemon, 403 U.S. at 619 (setting forth the requirement of state surveillance).
ple, provides that "No marriage shall be valid unless solemnized by either [a] clergyman or minister of any religion [or a government official]." A secondary reason that some American marriage statutes require state surveillance is that they authorize religious officials to satisfy premarital counseling requirements. Utah law, for example, provides that any "[p]remarital counseling required . . . shall be considered fulfilled if the applicants present a certificate verified by a clergyman that the applicants have completed a course of premarital counseling approved by a church and given by or under the supervision of the clergyman." Inasmuch as regulating entry into civil marriage requires state surveillance of religious officials, American marriage statutes foster excessive governmental entanglement with religion and fail to satisfy the third requirement of the Lemon test.

Despite the above analysis of each of Lemon's three requirements, most courts would likely hold that American marriage statutes do not fail the Lemon test and, accordingly, do not violate the Establishment Clause. The 1992 case of Dean v. District of Columbia, in which a same-sex couple argued that their exclusion from marriage was motivated by a "sectarian biblical interpretation," provides an example of how most courts would likely apply the Lemon test. While the Dean court was considering the legality of an exclusion from the institution rather than the legality of the institution itself, Dean is the most on-point example available since no court has yet engaged in a serious analysis of whether the institution of marriage itself violates the Establishment Clause.

The Dean court found each of the three requirements of the Lemon test satisfied and ultimately upheld the exclusion of same-sex couples.

264. Id.
266. Id.
from marriage. It found Lemon's first requirement satisfied by holding that the exclusion of same-sex couples from marriage served several secular purposes. Confusingly, these purposes included "protect[ing] the sacred institution of marriage" by ensuring that it was reserved for couples who could appropriately engage in sexual intercourse. It found Lemon's second requirement satisfied by holding that, even if the exclusion of same-sex couples had been "motivated by religious convictions," the exclusion did not actually "advance" religion since it excluded same-sex couples regardless of whether they were "atheists, agnostics or believers" and did not "coerce [anyone] in the slightest to alter his or her convictions." It found Lemon's third requirement satisfied without providing any analysis. Based on these three findings, the Dean court ultimately dismissed the Establishment Clause claim as "totally frivolous."

While the Establishment Clause issues raised by the institution of civil marriage are not identical to those raised by the exclusion of same-sex couples from the institution, Dean nevertheless illustrates how courts might reason that marriage satisfies at least the first two requirements of the Lemon test. With respect to the first requirement, it illustrates that marriage can be viewed as serving the "secular purpose" of maintaining a social institution that merely happens to overlap with a religious institution. With respect to the second requirement, it illustrates that marriage can be viewed as not affirmatively "advancing" religion since religiosity is not a formal requirement for entry into marriage. Perhaps most importantly, however, Dean illustrates the Lemon test's inability to effectuate a robust interpretation of the Establishment Clause.

270. Dean, 1992 WL 685364, at *8 ("[T]he prohibition against same-sex marriages advances no religion and has secular purposes. Moreover, it fosters no excessive governmental entanglement with religion. Hence, said prohibition, even if based upon the legislators' religious and moral beliefs, does not run afoul of the Establishment Clause.").

271. Dean, 1992 WL 685364, at *8 ("[T]he secular purposes in prohibiting homosexual, same-sex marriages are ... (a) to foster ... socially-acceptable procreation; (b) to avoid taking any action which would denote societal approval, condonation or encouragement of the sexual practice (i.e. sodomy) so intimately associated with homosexuality as to "define the class" (Bowers, Poe and Padula) and (c) to protect the sacred institution of marriage from such a radical transformation and re-definition that its very "consummation" by the marital partners would be biologically impossible and the anticipated sexual intimacies of said partners immoral and, under the current state of the law, illegal.").


274. Dean, 1992 WL 685364, at *8 ("[The exclusion of same-sex couples] fosters no excessive governmental entanglement with religion.").

While some have argued that the Lemon test is satisfactory, it fails to honor the "wall of separation between church and state" that Thomas Jefferson envisioned in his 1802 letter to the Danbury Baptists.276 The Supreme Court acknowledged as much in Lemon, when it stated that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."277 Although the Court has, on occasion, claimed to endorse the "wall of separation,"278 a true embrace of this interpretation would require the renunciation of civil marriage—an institution so intertwined with religious marriage that there can be no meaningful separation.

2. American Civil Marriage Violates Free Speech

The Free Speech Clause of the First Amendment, which was incorporated against the states via the Fourteenth Amendment's Due Process Clause in 1925,279 provides that "Congress shall make no law . . . abridging the freedom of speech[.]"280 The Supreme Court has held that laws sometimes "abridge" the freedom of speech without directly mandating or prohibiting any speech—as, for example, in the case of laws that condition government benefits on individuals engaging in or refraining from certain speech.281 Speiser v. Randall, discussed above in Part II(A)(ii), influenced the Court's unconstitutional conditions doctrine.282

276. Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802), available at http://www.loc.gov/loc/leib/9806/danpre.html ("Believing with you that religion is a matter which lies solely between Man & his God, . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State.").
278. Ewerson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 16 (1947) (citation omitted).
281. Bd. of Cnty. Comm'r's of Wabunsee Cnty., Kan. v. Umbehr, 518 U.S. 668, 674 (1996) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights,' our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit[,]" (internal citations omitted).
282. Speiser v. Randall, 357 U.S. 513 (1958). While Speiser rested primarily on procedural due process grounds, see supra note 114, the Court in Regan v. Taxation with Representation referenced Speiser's contribution to the unconstitutional conditions doctrine. 461 U.S. 540, 545 (1983) (discussing the unconstitutional conditions doctrine and referring to the "Speiser-Perry model").
In *Speiser*, the Court considered a law that conditioned a governmental benefit in the form of a tax exemption for veterans on veterans subscribing an oath that stated, among other things, that they would not advocate overthrow of the United States government by unlawful means. The fact that the law conditioned a governmental benefit on engagement in certain speech influenced the Court’s decision to deem the law unconstitutional.

American marriage statutes unconstitutionally condition governmental benefits, including tax benefits, on expression of the ideologies implicit in marriage. Illustrating that American marriage statutes impose unconstitutional conditions requires proving, first, that American marriage statutes condition governmental benefits on entry into the institution of marriage and, second, that entry into marriage is inherently expressive.

Courts and commentators have long recognized marriage as expressive. The Supreme Court has described marriage as an “[expression] of emotional support and public commitment.” Professor Nussbaum explains, “When people get married, they typically make a statement of love and commitment.” Professor David Cruz describes marriage as “a unique symbolic or expressive resource, usable to communicate a variety of messages to one’s spouse and others.” The messages, which he says may include expressions of “love, fidelity, . . . commitment[,]” and “maturity,” are manifest not only in wedding ceremonies, but also in the enduring status of being married. Because marriage has such a thick

---

283. *Speiser*, 357 U.S. at 529.
284. *Speiser*, 357 U.S. at 529 (“[A]ppellants could not be required to execute the declaration as a condition for obtaining a tax exemption[.]”).
287. Nussbaum, *supra* note 11, at 669 (“The statement made by the marrying couple is usually seen as involving an answering statement on the part of society: we declare our love and commitment, and society, in response, recognizes and dignifies that commitment.”).
288. David B. Cruz, “*Just Don’t Call it Marriage*”: The First Amendment and Marriage as an Expressive Resource, 74 S. Cal. L. Rev. 925, 298 (2001) (arguing that opposite-sex requirements for entry into marriage burden the right to freedom of speech that is protected by the First Amendment).
289. *Id.* at 929, 942. One of the ways in which marriage may express maturity is that it “communicates to the world (however accurately or not) that one’s sex life is simply one facet of one’s life, incorporated into a presumptively balanced whole.” *Id.* at 942.
290. *Id.* at 935–36 (“[C]ivil marriage, and not just marriage ceremonies or religious marriage, should be understood as expressive. Access to the status relationship that is civil marriage provides couples with an important and unique expressive resource, some-
and intractable definition, getting married and being married are inherently expressive. Marriage may, in addition to the messages that Professor Cruz mentioned, convey messages associated with religiosity, heterosexism, and patriarchy. Moreover, because American marriage statutes condition access to government benefits on getting married and being married, they violate our freedom of speech.

One need not, however, rely solely on the argument that marriage imposes unconstitutional conditions. One might make the more direct argument that, under Professor Robson’s view of marriage as “compulsory,” governments that establish marriage directly mandate speech. Professor Robson asserts that by coercing individuals to marry, the government is effectively coercing them to engage in the expressive activity associated with marriage.  

III. American Civil Marriage Should Be Abolished

Having illustrated that American civil marriage is incompatible with American democracy, Part III assesses the potential remedies. It begins by asking whether civil marriage could be redefined to comport with democratic principles, and concludes that such fundamental redefinition is impossible. It proceeds by asking whether civil marriage could be replaced by another relationship-centered institution that better comports with democratic principles, and concludes that the civil union regimes some have proposed are preferable but ultimately undemocratic. It ends by arguing that civil marriage should be abolished and that state governments should shift their focus from privileging sexual partners to privileging individual providers. Part III(A) explains why redefinition and replacement of civil marriage are inadequate solutions; Part III(B) explores what our society might look like if state governments extricated themselves from the business of privileging relationships and instead invested their resources in privileging individual providers.

---

292. Robson, supra note 28, at 798 (commenting on David Cruz’s account of marriage’s expressive capacity).
Civil marriage, in privileging those who enter sexual partnerships and embrace religious, heterosexist, and patriarchal identities, unjustifiably deprives individuals of the liberty right to self-determine and of the equality right to interact without reference to identity-based hierarchies. Some have suggested that these deprivations might be vitiates by redefining civil marriage; others have suggested that they might be vitiates by replacing civil marriage with another relationship-centered institution such as a civil union regime. While these suggestions might succeed in rendering the institution less undemocratic, they will not succeed in rendering it affirmatively democratic.

The first suggestion—that civil marriage be redefined to conform to democratic principles—is impossible. It would require eliminating not only civil marriage's religious, heterosexist, and patriarchal aspects, but also its narrow focus on long-term sexual partnerships. While we might succeed in the former, we would almost certainly fail in the latter. Civil marriage cannot be redefined without amending our legal provisions as well as our social norms, and we cannot realistically hope to alter our social norms to the point of removing any one of marriage's three definitional aspects. In sum, while we might succeed in eliminating civil marriage's religious, patriarchal, and heterosexist aspects, we would not succeed in eliminating its de facto requirements of longevity, sexuality, and partnership.

The second suggestion—that civil marriage be replaced with another relationship-centered institution such as a civil union regime, which could potentially be expanded to include non-sexual partnerships—would be achievable and preferable, but ultimately still undemocratic. Entering a civil union would not destroy liberty in as many ways as entering a civil marriage does (assuming that the term “civil union” has not yet become inextricably associated with any specific set of identities). It would, however, destroy equality in many of the

293. She writes, "[I]t would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering civil unions to both same- and opposite-sex couples." Nussbaum, supra note 11, at 672.

294. Civil marriage is not within the unilateral control of state governments. Indeed, it is only partly defined by state statutes and constitutions. When a state government establishes "civil marriage," it inevitably invokes a broad set of social norms that are beyond its own control—and those norms universally entail a focus on sexual partnerships that is inherently undemocratic.

same ways that entering a civil marriage does. States would still be re-
quired to justify awarding benefits to civil unions by illustrating that 
they provide substantial social benefits. It is unclear how states could 
meet this goal. Being in a relationship does not per se justify govern-
mental benefits; providing for others, as Part IV(B) will argue, is what 
justifies benefits.

B. The Post-Marriage Landscape

If civil marriage were abolished as proposed in Part III(A), states 
would need to determine how to proceed. Part III(B), to that end, 
makes two proposals. First, states should allocate benefits to individual 
providers rather than sexual partners; second, states should allow sexual 
partners to enter private contracts that would be enforceable to the same 
extent that pre-marital agreements are currently enforceable.

The first proposal—that states should allocate benefits to individu-
al providers rather than sexual partners—would result in privileging all 
those who could prove that they were supporting others, physically or 
financially, regardless of whether their dependents were sexual partners, 
children, other relatives, or friends. Each provider would receive benefits 
commensurate with the amount of support they were providing. This 
would further the state's interests in encouraging individuals to serve as 
providers and in privileging individuals who are serving as providers. 
These are surely legitimate interests, because they prevent the state from 
having to expend its own resources in caring for dependents.

This first proposal would be preferable to civil marriage in at least 
two significant ways. First, awarding benefits to individuals rather than 
couples—based on provider status rather than marital status—would 
result in a more just distribution of resources. It would allow the state to 
privilege those who are providers, as opposed to those who are merely 
made. Anyone who could illustrate that he or she was serving as a 
provider—regardless of the identity of his or her dependent—would 
receive benefits. Such a system would likely reduce the number of sexual 
partners receiving benefits (though sexual partners who served as pro-
viders would, of course, continue to receive benefits), and increase the 
number of other persons receiving benefits. Two sexual partners who

the existing civil unions bills, the Vermont, Connecticut, New Hampshire, and Ore-
gon bills are expressly limited to same-sex couples. Maine's statute is silent as to 
whether heterosexual couples are eligible. California and New Jersey allow opposite-
sex couples to form civil unions, but only if both members are sixty-two or older. . . . 
Illinois's proposed statute is the only one that would open up civil unions to all cou-
pies of all sexual orientations, regardless of their age.


were caring for the same child would each be entitled to benefits commensurate with the amount of their individual contributions.

Second, this proposal would be preferable to marriage because its burdens on liberty and equality would be minor in relation to its benefits to society. While it would admittedly encourage individuals to serve as providers and privilege individuals who did serve as providers—thereby burdening both liberty and equality—these burdens would be justified because they would confer substantial benefits on society. They would, indeed, ensure that all citizens had access to the basic resources needed to develop their own identities and interact as equals—which, as discussed in Part II, is a prerequisite of democracy.

The second proposal—that states should allow sexual partners to enter legally enforceable private contracts fixing the terms of their relationships and making arrangements for their dissolution—would be preferable to marriage because, while many couples currently enter marriage without any knowledge of their statutory rights and obligations regarding property, support, and child custody, this proposal would require all couples to take the initiative to create their own agreements. In doing so, it would likely increase the incidence with which couples define the terms of their own relationships, and thereby increase individuals' awareness of the terms to which they are agreeing. This transition to a regime governed by private contracts rather than default statutory provisions might not be as radical or difficult as some might expect, since many couples already contract around the default marriage and divorce laws by entering pre-marital agreements.296

CONCLUSION

This Article is aimed at improving our democracy. It exposes marriage as an inherently coercive and hierarchical institution. Marriage is coercive in the sense that it encourages us to adopt religious, heterosexual, and gendered identities; it is hierarchical in the sense that it privileges those who acquiesce in adopting those identities. While the coercive nature of marriage deprives us of the liberty to self-determine, its hierar-

296. Elizabeth F. Emens, Monogamy's Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 370 n.464 (2004) (“Though data on prenuptial agreements are hard to obtain because couples are not required to register the agreements, it is estimated that only five to ten percent of marrying couples sign prenuptial agreements.”); Erika L. Haupt, For Better, For Worse, For Richer, For Poorer: Premarital Agreement Case Studies, 37 REAL PROP. PROB. & TR. J. 29, 43 (2002) (“[O]ne commentator indicates that only twenty percent of couples enter into premarital agreements.”).
chical nature deprives us of the ability to interact as equals—both of which are prerequisites to a fully functioning democracy. Because marriage cannot realistically be redefined to vitiate these deprivations and foster the liberty and equality that are crucial to democracy, it should be abolished. Yet it will not suffice to replace marriage with another institution designed to recognize a slightly broader set of inter-personal relationships, such as a civil union or domestic partnership regime. States should instead allocate their limited resources toward supporting individuals who provide for others through either physical care-taking or financial contributions.

Couples or groups who wish to create “marriages” or “unions” should be permitted to do so through private ceremonies without any legal consequence. Couples or groups who wish to enter legal contracts establishing the terms of their relationships should also be permitted to do so, and states should enforce those contracts to the same extent that they would enforce comparable contracts such as existing pre-marital agreements. These reforms would, if adopted, enhance our liberty and equality—and, ultimately, our democracy. §