

# The Fundamental Argument for Same-Sex Marriage\*

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## I. INTRODUCTORY

OF ALL the arguments for same-sex marriage, one stands out as the most central and fundamental. The gist of this fundamental argument is as follows:

The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples. But many same-sex couples have the same interests, which marriage would serve in essentially the same way. So restricting marriage to opposite-sex couples is a denial of *equality*. There is no way of justifying this denial of equality without appealing to controversial conceptions of the good (such as the moral superiority of heterosexuality or the procreative family); and it is a basic principle of *liberalism* that the state should not promote, or justify its actions by appeal to, such controversial conceptions of the good. So the institution of marriage ought to be reformed so as to allow same-sex couples to marry.<sup>1</sup>

As it stands, this argument is open to a number of objections. In this article, I shall restate the argument in a form in which it can answer the most serious of these objections.

Clearly, this argument depends on empirical assumptions. First, it relies on the assumption that many same-sex couples have the same interests as opposite-sex couples, which marriage would serve in essentially the same way; and this is clearly an empirical assumption. Second, the argument also relies on the assumption that the laws excluding same-sex couples from marrying cannot be justified without appealing to controversial conceptions of the good; this assumption implies that there is not enough empirical evidence supporting the

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<sup>1</sup>A version of this argument is given in A. A. Wellington, 'Why Liberals Should Support Same-Sex Marriage', *Journal of Social Philosophy*, 26 (1995), 5–32. For classic statements of this liberal principle, see Ronald Dworkin, 'Liberalism', *Public and Private Morality*, ed. S. Hampshire (Cambridge: Cambridge University Press, 1978), and John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), especially Lectures IV and V. Not all liberals accept this principle, of course; see for example Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chs 5 and 6. Raz himself is sympathetic to 'homosexual marriages', apparently on the grounds that they are supported by the value of autonomy (*The Morality of Freedom*, p. 206).

view that same-sex marriage would have clearly harmful effects to give a non-controversial justification of these laws. In this paper, I shall simply assume that these empirical assumptions are true. I want to focus on the *philosophical basis* of this argument.

The argument is a *political* argument, about what laws and social institutions there ought to be. It is not a *legal* argument, about the interpretation of constitutional provisions or other aspects of current law;<sup>2</sup> nor is it an *ethical* argument, about which sorts of individual conduct are right or wrong. Thus, the argument depends on principles that express certain *political values*—specifically, the principle of equality, and the liberal principle that the state should not promote, or justify its actions by appeal to, controversial conceptions of the good. It is certainly a challenging matter to give the most persuasive formulation of these principles. But it is widely accepted that at least some version of these principles is acceptable; and the philosophical problems with this argument do not depend on the precise formulation of these principles.

The most serious problems with this argument arise from its lack of any precise account of what marriage is, and of its essential rationale. I shall consider four such problems here.

First, the argument relies, not only on the empirical assumption that ‘many same-sex couples have the same interests as opposite-sex couples, which marriage would serve in essentially the same way’, but also on the assumption that ‘the basic rationale for marriage lies in its serving these important interests’. This assumption about marriage’s rationale is crucial. If marriage had some other rationale—so that it was somehow essential to this rationale that every marriage be the union of a man and a woman—then the state’s refusal to allow same-sex marriages would not be a denial of equality at all. In that case, the right to marry would essentially be the right *to marry someone of the opposite sex*. But no one is denied *this* right (and no one has the right to ‘marry’ someone of the same sex); so how is anyone denied a right that someone else possesses? Without an account of marriage’s rationale, the argument that restricting marriage to opposite-sex couples is a denial of equality cannot even get off the ground.

Second, even if excluding same-sex couples from marriage is a denial of equality, it may seem that this inequality could be rectified without allowing same-sex marriage. After all, it may seem that marriage is simply a *legal* relationship, consisting of a cluster of legal rights, obligations and benefits. In that case, the inequality in excluding same-sex couples from marriage must consist in the fact that same-sex couples are denied the concrete legal benefits (such as the tax breaks, the preferential immigration treatment and the health

<sup>2</sup>The legal questions have been extensively explored. See William N. Eskridge, Jr., *The Case for Same-Sex Marriage* (New York: Free Press, 1996); Cass R. Sunstein, ‘Homosexuality and the Constitution’, *Sex, Preference, and Family: Essays on Law and Nature*, ed. D. M. Estlund and M. C. Nussbaum (New York: Oxford University Press, 1997), pp. 208–26; and Mark Strasser, *Legally Wed: Same-Sex Marriage and the Constitution* (Ithaca, N.Y.: Cornell University Press, 1997).

insurance benefits) that are attached to marriage. But this cluster of legal rights, obligations and benefits could be split up. Such benefits as the tax breaks and the health insurance benefits could be detached from marriage, and provided on a different basis. But then all the remaining legal rights and obligations of marriage are already available to same-sex couples, in the form of private contracts, wills and power-of attorney agreements. So long as same-sex couples are free to have sex, live together and make contracts, they do not seem to be denied the right to 'intimate association'. So it is not clear that we have an argument for same-sex *marriage* at all.

To defend same-sex marriage, then, we must point to some inequality in the refusal to allow same-sex marriage other than its denial of these concrete legal benefits. In effect, we must argue that there is a basic inequality in the fact that same-sex couples, unlike opposite-sex couples, are denied the *marital status itself*; and we must also argue that this marital status is an important matter, not a mere piece of legal flummery. But to explain why marital status is important, we need an account of marriage and of its essential rationale.

Many writers suppose that the marital status is important because, as one legal scholar put it, marriage 'constitutes an affirmation by the state, a larger-than-life acknowledgment of one's relationship, a seal of approval'.<sup>3</sup> It is widely believed that the state's purpose in honouring married couples in this way must be to express the view that married life is an especially virtuous or valuable way of life. But then marriage would itself conflict with the *liberal* principle mentioned above: in underwriting the institution of marriage, the state would be promoting this conjugal ideal, which is a controversial conception of the good.

This brings us to the third problem with the argument for same-sex marriage. What if marriage itself is an unjust institution? As Claudia Card argues:<sup>4</sup>

Suppose that slave owning in some mythical society were denied to otherwise free women... It would not follow that women should fight for the right to own slaves... Likewise, if marriage is a deeply flawed institution, even though it is a special injustice to exclude lesbians and gay men arbitrarily from participating in it, it would not necessarily advance the cause of justice on the whole to remove the special injustice of discrimination.

If the institution of marriage really were like slavery—if it were effectively impossible for marriage to be anything other than seriously unjust—then, even if excluding same-sex couples from marriage is unjust discrimination, the only acceptable way to end this discrimination would be by abolishing marriage altogether. To defend same-sex marriage, then, we need to argue that marriage, unlike slavery, need not be seriously unjust, or at least not *as* seriously unjust as the laws that exclude same-sex couples from marriage. To argue this, we must

<sup>3</sup>Harlon L. Dalton, 'Reflections on the Lesbian and Gay Marriage Debate', *Law and Sexuality*, 1 (1991), 1–8 at p. 7.

<sup>4</sup>Claudia Card, 'Against Marriage', *Same Sex: Debating the Ethics, Science and Culture of Homosexuality*, ed. J. Corvino (Lanham, Md: Rowman & Littlefield, 1997), pp. 317–30 at p. 320.

give an account of marriage that makes it plausible that marriage need not violate any principles of justice as basic as those violated by this exclusion of same-sex couples. Here, too, the argument for same-sex marriage must rely on an account of marriage and its essential rationale.

Finally, the fourth problem with this argument is simply that we need to know how far the argument extends. Some ethnic or religious minorities, for example, may wish to enter polygamous marriages, or even incestuous or child marriages. If the state's refusal to allow same-sex marriage is a denial of equality, is the refusal to allow polygamy a denial of equality too? The answer to this question will also depend—at least in part—on an account of marriage and its rationale.

In this paper, I propose an account of marriage and of its essential rationale, and explain how this account enables the fundamental argument for same-sex marriage to overcome the four problems that I have canvassed above.

## II. WHAT IS MARRIAGE?

We need to find out what is *essential* to marriage. But how are we to do this? One approach would be to try to find some features that are common to every single institution that we would be prepared to call 'marriage'. On second thoughts, however, this approach seems unpromising. Anthropologists are prepared to regard an astounding array of practices as marital practices—apparently even including practices in which one man marries another man's left foot or right arm.<sup>5</sup> It is not obvious that there is anything very interesting that all these practices have in common. We need to focus on marriage as we know it in the modern period in the West.<sup>6</sup> For short, I shall say that we need to understand the essential features of 'modern Western marriage'.

The *essential* features of modern Western marriage are its most important features, the features that explain the other general facts about the institution, especially those that explain why the institution plays such a central role in so many people's lives. So a full defence of any claim about the essential features of marriage would have to include an extensive investigation. Since I cannot undertake such an investigation here, my proposals about the essence of marriage are provisional. These proposals are guided by the assumption that we should regard a given feature as essential to modern Western marriage if and only if we modern Westerners find it intuitively hard to understand how an institution that lacks that feature can really be a form of marriage.

So, for example, it seems essential to modern Western marriage that it involves *marriage law*. We find it hard to understand how an institution that does not involve law in any way can really be a form of marriage. This is not to say that there could not be a society with an institution that deserved to be called

<sup>5</sup>Ruth Benedict, *Patterns of Culture* (Cambridge, Mass.: Riverside Press, 1934), p. 207.

<sup>6</sup>I am thinking especially of English-speaking countries; one of my main sources is John Gillis, *For Better, for Worse: British Marriages, 1600 to the Present* (New York: Oxford University Press, 1986).

‘marriage’ but did not involve law in any way. But when we try to imagine such an institution, we imagine it as involving rules or customs that play an analogous role in that society to the role that laws play for us. So, I shall assume, marriage law is essential to our modern Western conception of marriage.

This is not to say that modern Western marriage essentially involves *civil* law. In the early modern period, while Western societies were still relatively non-pluralistic, marriage law was part of religious law, administered by religious authorities. In those non-pluralistic societies, however, religious authorities were still generally regarded as a valid source of law. In pluralistic societies like ours, the state is the only authority generally recognized as a valid source of law. So, in our societies, marriage law must be part of civil law; for us, marriage must take the form of *civil* marriage.

Still, it seems to me, it is a mistake to suppose that marriage is a purely legal institution. The laws surrounding marriage do not seem enough by themselves to explain why marriage plays such a central role in so many people’s lives. To explain why marriage plays this role, it seems at least as important to appeal to marriage’s *social meaning*, the web of common knowledge and assumptions about marriage that are shared throughout society.

It seems clear that modern Western marriage has such a social meaning. This social meaning consists of certain *generally shared expectations* about the sort of relationship that married couples typically have; these expectations are ‘generally shared’ in the sense that it is common knowledge that practically everyone expects married couples typically to have a relationship of this sort. These shared understandings and expectations have changed over time; but it seems that there is a certain basic core of expectations that is essential to the institution.

This basic core, I propose, consists of the expectation that a married couple’s relationship typically involves the following three elements: (1) sexual intimacy; (2) domestic and economic cooperation;<sup>7</sup> and (3) a voluntary mutual commitment to sustaining this relationship. ‘Domestic and economic cooperation’ can take various forms: but it is generally expected that a married couple will normally be living together; that they have shared finances, or at least will support each other economically if necessary; and that if the spouses have a shared household, they will cooperate with each other in running their household (even if they play quite different roles in that cooperative activity). In particular, it is expected that if the married couple have children, they will cooperate in the task of raising their children together.

Of course, no one expects that every single married couple has a relationship of this kind. It is well known that some married couples live apart, and widely assumed that some married couples never have sex together. Still, these marriages are generally regarded as atypical. Similarly, people do not expect that married

<sup>7</sup>As Richard Mohr puts it, we expect that married couples will ‘share the necessities of life’; ‘The Case for Gay Marriage’, *Same-Sex Marriage: The Moral and Legal Debate*, ed. R. M. Baird and S. E. Rosenbaum (Amherst, N.Y.: Prometheus Books, 1997), pp. 84–104 at p. 91.

couples typically have this sort of relationship for the whole time that they are married; everyone knows that in many marriages, the mutual commitment eventually fades as the couple separates or gets divorced. But it is at least generally expected that married couples typically *intend* this sort of relationship when they first regard themselves as married.

These aspects of marriage's social meaning seem essential to modern Western marriage. The fact that it is generally expected that married couples typically have a relationship characterized by sexual intimacy, domestic and economic cooperation, and so on, seems one of the most important facts about marriage, which plausibly helps to explain the institution's centrality in the lives of so many people. Moreover, we modern Westerners find it intuitively hard to understand how an institution could really count as marriage unless it were at least generally *expected* that couples participating in this institution would typically have a relationship of this kind. So, I shall assume, these generally shared expectations are part of the essential core of the social meaning of marriage.

In fact, it does not matter much what belongs to this essential core of marriage's social meaning. It matters more what does *not* belong to this essential core. It is certainly part of the *current* social meaning of the institution that a marriage is assumed to be the union of one man and one woman: if you say 'I'm married', everyone assumes that you are married to someone of the opposite sex. But, I claim, this assumption is not part of marriage's *essential* social meaning. The fact that marriage is known to be reserved for opposite-sex couples seems much less important for explaining why marriage is so central in people's lives than the fact that marriage is generally expected to involve domestic and economic cooperation, sexual intimacy and a mutual commitment to maintaining the relationship. Moreover, we have no difficulty understanding how a society could have the institution of marriage even if it were common knowledge in that society that some marriages were the unions of two men or two women. The same seems true of certain other expectations about marriage that are generally shared in our society. We expect that people will have no more than one marriage at a time, and that marriage typically involves a commitment to refrain from all extramarital sex. But we have no difficulty understanding how a society could have the institution of marriage even if it lacked these expectations about marriage. So, I shall assume, the exclusion of same-sex couples, the ban on polygamy, and the commitment to refrain from all extramarital sex are not *essential* components of the social meaning of marriage.

As I have claimed, however, marriage law is an essential component of marriage. So we need to investigate the legal aspects of marriage and their relation to its social meaning.

The legal aspects of marriage fall into the following three categories. First, it is the law that determines who is married and who is not. If any dispute arises about whether A is married to B, that dispute can be settled in a court of law. Indeed, it seems part of the social meaning of marriage that being married is a

legal status. This point is not refuted by the fact that same-sex couples often describe themselves as ‘married’—meaning that they have a relationship of the kind that is typically expected of married couples (sexual intimacy, domestic and economic cooperation, and so on). These descriptions are practically always taken as humorous or metaphorical, since everyone knows that the same-sex couples are not really (that is, legally) married.

Second, marriage gives spouses certain mutual legal rights and obligations, of the kind that they could also acquire through contracts, wills or power-of-attorney agreements.<sup>8</sup> Many of these mutual rights and obligations have the function of assuring the spouses that they can rely economically on each other. These rights include, above all: the right to be financially supported by one’s spouse; the right (in the event of divorce or separation) to an equitable division of property and, if necessary, alimony; and the right to inherit if one’s spouse dies intestate. Other such mutual rights follow from the principle that spouses are each other’s ‘next of kin’. These rights include priority in being appointed guardian of an incapacitated spouse; priority in being recognized as acting for an incapacitated spouse in health care decisions; and priority in claiming a deceased spouse’s body. These rights also reflect society’s expectations about the kind of relationship that is typical of married couples; because of these expectations, it is a reasonable presumption that one’s spouse will understand one’s interests best, and will have those interests at heart, and so is best placed to act on one’s behalf if necessary.

Third, marriage often confers a right (of a kind that could not be acquired through an ordinary contract between individuals) to receive certain benefits from the state, in addition to the marital status itself and the enforcement of spousal obligations. (Similarly, many other organizations, especially employers, provide certain special benefits to married couples, most notably health insurance.) Some of these additional legal benefits reflect the expectation that married couples have shared finances: married couples can elect to be taxed as a single economic unit; and capital transfers between spouses are not taxed. Other such legal benefits include the right to visit one’s spouse on furlough while incarcerated in prison; the right to claim an evidentiary privilege for marital communications; and the right of a foreign spouse to preferential immigration treatment. These benefits reflect the presumption that marriage is a relationship of great importance to the spouses involved: it would be thought unacceptably cruel to undermine such a relationship by denying spousal visits to prisoners,

<sup>8</sup>Marriage need not strictly speaking *be* a contract, however. Under US law, for example, the rights and obligations of marriage can be changed by new legislation even without the consent of the spouses themselves. This is consistent with the constitutional principle that ‘no state shall pass any law impairing the obligation of contracts’, because marriage is not a contract, the obligations of which are defined by the contracting parties, but a *legal status*, the obligations of which are defined by state and federal law. For this point, and for an account of the legal rights and obligations of marriage, see Harry D. Krause, *Family Law in a Nutshell*, 3rd edn (St. Paul, Minn.: West, 1995), pp. 88–90 and chs 8, 25 and 26; see also Eskridge, *The Case for Same-Sex Marriage*, pp. 66–72.

compelling anyone to testify against his or her spouse, or keeping spouses apart through immigration barriers.

This third legal aspect of marriage—the benefits that the state provides for married couples, over and above the marital status itself and the enforcement of spousal obligations—is undeniably an important aspect of contemporary marriage law. But these additional legal benefits seem not to be *essential* to the institution of marriage itself. We have no difficulty understanding how an institution could be a form of marriage even if it involved no tax breaks for married couples.

So these additional legal benefits are not essential to marriage. In consequence, a justification of marriage need not itself involve a justification of these additional benefits. Instead, there should be a *separate* justification for attaching these benefits to marriage. But we need not inquire into the justification of these additional benefits here; indeed, we need not even consider whether these additional benefits are justified at all.

On the other hand, the first two legal aspects of marriage do seem essential. It seems intuitively hard to understand how an institution could be a form of marriage unless it involved laws that determined which couples counted as married, and gave married couples mutual legal rights and obligations that in some way reflected the social meaning of marriage.

So these three elements—the legal marital status, the mutual legal obligations, and the core social meaning of marriage—are essential to the institution of marriage. But how are these elements related? Together, I shall argue, these three elements produce the following result: married couples not only have mutual spousal obligations; they also have an assurance that marriage will have a well-understood social meaning, involving the basic core that I have described, and that the rest of society will understand their relationship in the light of this social meaning.

The legal rights and obligations of marriage are at least roughly standardized throughout society.<sup>9</sup> These rights and obligations ‘reflect’ society’s general expectations of marriage in the following way: these obligations oblige spouses to behave towards each other in ways that are generally expected of spouses; and these rights enable spouses to rely on their relationship’s having features that are generally expected of marriages. When necessary, these mutual rights and obligations are enforced, thus making it more likely that society’s general expectations of marriage will be fulfilled. This helps to ensure that society as a whole shares certain definite expectations about marriage. In this way, marriage law provides an assurance that marriage will have a social meaning that involves

<sup>9</sup>I say ‘roughly standardized’, not only because of differences between the marriage laws of different states, but also because of the variations introduced by prenuptial agreements. Not all spousal rights and obligations can be waived by means of such agreements, however. For example, spouses cannot contract away their obligation to support their spouse during the marriage. There are several other restrictions as well; see Krause, *Family Law in a Nutshell*, pp. 91–9.



the basic core reflected in these mutual rights and obligations—a social meaning that is understood, not just by a limited subculture, but by society as a whole.

The fact that the law determines who is married also ensures that there is general agreement about who is married and who is not. This assures the married couple that they will be regarded as married, not just by their circle of friends or their particular subculture, but by society as a whole, and that society will understand their relationship in the light of the social meaning of marriage.

Without marriage law, married couples would have no such assurance that marriage will have a generally-understood social meaning, let alone that their relationship will be understood in the light of this social meaning. Suppose that individuals were allowed to enter any legally binding contracts that they wished, and non-government organizations (such as churches) were allowed to call any relationship a ‘marriage’ if they wished, but there were no laws that determined which relationships were marriages and which were not. The risk is that this situation might lead to widespread confusion about what it means to be married. Some churches might regard couples as married even if the spouses had no legal obligations towards each other; some churches might insist that marriages must be indissoluble, while others might allow ‘temporary marriages’ that expired after a few months; some churches might allow polygamous marriages, and some might even allow people to marry their dogs or their cars. The upshot would be that marriage would no longer have a definite social meaning; except within limited subcultures, people would no longer share any definite expectations about the kind of relationship that married couples typically have. If we are to be *assured* that marriage will not cease to have a definite social meaning in this way, then marriage must be insulated from the risk of such confusion; and the most effective way to insulate marriage from this risk is for the law to determine exactly who is married, and to associate marriage with a standard package of rights and obligations.

In sum, then, marriage is a legal relationship between two people, involving mutual legal rights and obligations, which reflect society’s shared expectations about marriage; and the core of these expectations is that marriage typically involves sexual intimacy, economic and domestic cooperation, and a voluntary mutual commitment to sustaining this relationship.

### III. MARRIAGE’S ESSENTIAL RATIONALE

In the previous section, I proposed an account of the institution of marriage. In this section, I propose an account of marriage’s essential rationale.

My proposal is not intended as a full justification of marriage. Indeed, I shall remain neutral on the question of whether marriage is, on balance, justified at all. Still, as I remarked earlier, if I am to argue in favour of same-sex marriage, I must at least make it plausible that the institution of marriage, unlike slavery, need not be seriously unjust—or at least not *as* seriously unjust as the laws that restrict

marriage to opposite-sex couples. I shall try to make this plausible in two steps. First, in this section, I propose an account of what *would* justify the institution of marriage, if it is justified at all. Then, in the following section, I argue, on the basis of this account, that marriage need not conflict with either of the two principles of justice invoked by the argument for same-sex marriage.

In this section, I am trying to find a justification of marriage *itself*, not a justification of the various other laws or policies that happen to be attached to marriage. As I have already remarked, I am not concerned with the justification of the additional legal benefits attached to marriage, such as the tax breaks, the health insurance benefits, and so on. I want to find the justification that is *internal* to the institution of marriage itself: a justification that applies to every possible case in which marriage is justified at all. I shall call this justification marriage's *essential rationale*.

As I have argued, it is essential to modern Western marriage that it has a social meaning. This social meaning need not include any *ideal* of married life as an especially good life to lead; indeed, there is no such generally shared ideal of married life in Western society today. The essential social meaning of marriage consists solely in expectations about the sort of relationship that is *typical* of married couples—expectations that are shared by practically everyone, even by those who reject married life as an ideal. In reinforcing this social meaning, then, the law need not be directly promoting any controversial ideal of married life, since this social meaning need not include any such ideal.

Civil marriage, then, need not involve the state's promoting any conjugal ideal, or conferring any special honour on married couples. Indeed, it need not involve the state's positively encouraging marriage at all. If the state *does* in fact encourage marriage, that is an additional policy that is not necessarily bound up with marriage itself. Clearly, then, we must reject the claims of many conservatives that the essential rationale for the institution of marriage lies in its promoting married life and its distinctive virtues.<sup>10</sup>

Indeed, it is not even essential to marriage that it involves the state's discouraging unmarried couples from having children. Marriage could still exist even if it was favoured only by a minority of couples. In such a case, marriage might still be justified, even if it brought negligible benefits to society as a whole—so long as it brought benefits to the married couples themselves, and imposed no significant burdens on others. So the *essential rationale* for the institution must consist in the benefits that marriage brings to the married couples themselves (and indirectly to their families and friends).<sup>11</sup>

<sup>10</sup>Andrew Sullivan, *Virtually Normal: An Argument about Homosexuality* (New York: Knopf, 1995), p. 182; see also his 'Three's a Crowd', *Same-Sex Marriage: Pro and Con*, ed. A. Sullivan (New York: Vintage Books, 1997), pp. 278–82.

<sup>11</sup>An anonymous referee for this Journal made the correct and important point that the value of marriage plausibly consists not only in the benefits that marriage brings to those who are married, but also in the power that it gives everyone to decide whether to marry or not. However, there would be little value in having this power if people never benefited from being married. So the benefits that people derive from being married are still fundamental to any justification of marriage.

It is plausible that marriage often brings benefits to married couples. Many writers claim that marriage helps to cement stable relationships in a way that tends to be beneficial both to those involved and, more indirectly, to their children, family and friends. These claims appear to be supported by the empirical evidence, which seems to show that, in modern Western societies, married couples are significantly more likely to stay together than unmarried couples, while single people are more likely to commit suicide, to suffer from poor health, to become dependent on public assistance, and so on.<sup>12</sup>

Still, I shall argue that even these benefits are only *side-effects* of marriage, not its essential rationale. I am assuming that the essential rationale for an institution must be a justification of the institution that applies to every possible situation in which the institution is justified. But these benefits need not be present in every possible situation in which marriage is justified. Imagine that marriage did not bring these benefits: imagine that married couples were no more likely to stay together than unmarried couples, that couples were no happier and no healthier than single people, and that such stable relationships brought negligible benefits to the couple's family and friends. Even in this situation, the institution of marriage might still be justified by the mere fact that people *want* to marry, where this desire to marry is typically a serious desire that deserves to be respected. On the other hand, if no one ever desired to marry, or only ever had essentially frivolous or malicious desires for marriage, there would be no justification for the institution of marriage. So the essential rationale for marriage is simply that many people *want* to be married, where this desire to marry is typically a serious desire that deserves to be respected.

A desire counts as a 'serious desire that deserves to be respected' if and only if it is a desire of a certain kind, such that there is widespread agreement there are good reasons for the state to support and assist people's attempts to fulfil such desires, and strong reasons for the state not to impede or hinder people's attempts to fulfil such desires.<sup>13</sup> It is strong evidence that a desire is of this kind if the desire is widely and strongly held, and if few people sincerely resent those who succeed in fulfilling the desire.

It seems that there is evidence, of exactly this sort, that the desire to marry is a serious desire of this kind. This desire is both widely and strongly held; and few people sincerely resent those who satisfy this desire. Moreover, my account of marriage helps us to understand people's typical reasons for wanting to marry, and to see why these are reasons that command respect.

In getting married, couples make a legally binding commitment, and thereby also give each other assurances of mutual loyalty. Couples clearly may have

<sup>12</sup>The Editors of *The Economist*, 'Let Them Wed', *Same-Sex Marriage: Pro and Con*, ed. A. Sullivan, pp. 181–5.

<sup>13</sup>The general idea of desires that are serious and deserve to be respected is related to T. M. Scanlon's idea of 'urgency'; see his 'Preference and Urgency', *Journal of Philosophy*, 82 (1975), 655–69, and 'The Moral Basis of Interpersonal Comparisons', *Interpersonal Comparisons of Well-Being*, ed. J. Elster and J. Roemer (Cambridge: Cambridge University Press, 1991), pp. 17–44.

serious reasons for wanting to do this. But, of course, couples could always give each other such assurances through private contracts, without getting married. As Leslie Green puts it, to defend marriage, ‘one must show that there is some intrinsic value in a common public status, such as being married, which value would not be realizable, or would only be realized to a lesser degree, under a regime of individualized private contracts’.<sup>14</sup>

My account of marriage helps us to see why this common public status is indeed of value to married couples. Marriage involves legally binding commitments that the rest of the community will especially readily understand. Through marrying, the couple can make their relationship intelligible to others, in a uniquely clear and easy way—and indeed not only to members of their own subculture, but to all other members of their society. So long as most of the rest of society wishes the couple no harm, it will often be in the couple’s interests for such important aspects of their lives to be understood by others—such as their employers, health care providers, and government officials—many of whom may belong to other subcultures. This is why people want to enter a relationship that will be so widely and so easily understood; it would not be enough for them to enter a relationship that was understood only by their own subculture. In this way, marriage furthers a fundamental interest in *mutual understanding*, both between the spouses themselves, and between the couple and the rest of society. For this reason, the desire to marry seems an eminently serious and important desire.

It is plausible that one way in which a social institution can be justified is by showing that it is indispensable for enabling people to fulfil certain serious desires that they have, and that, at the same time, it imposes no serious burdens on anyone else, and violates no principle of justice. Many couples have a serious desire to make a legally binding mutual commitment, of this uniquely familiar and widely-understood kind; so these couples need some assurance that this commitment will have a generally-understood social meaning of the relevant kind. As I argued in the previous section, they can have this assurance only if marriage is undergirded by marriage law. So legal marriage really is indispensable for enabling these couples to fulfil this serious desire. If marriage also imposes no serious burdens on anyone else, and violates no principle of justice, then this fact would justify the institution of marriage.

One might object that there is an unacceptable circularity in justifying marriage by appeal to the fact that many people want to marry. After all, this desire is presumably itself an artifact of the community’s social and legal traditions. But this objection misunderstands the kind of claim that I am making. I am not claiming that every just society must contain the institution of marriage,

<sup>14</sup>*The Authority of the State* (Oxford, Clarendon Press, 1990), p. 206. (I am not endorsing Green’s demand that there must be *intrinsic* value in this common status; it would be enough for my argument if this common status is valuable purely because it is indispensable for achieving some further goal.) Compare Raz’s arguments about the importance of ‘social forms’ for personal well-being (*The Morality of Freedom*, pp. 307–13, especially p. 309).

or that any society that lacked marriage would have compelling reasons to introduce it. (There is no reason, for example, to suppose that the parties in a Rawlsian ‘original position’ must insist that their society contain the institution of marriage.) I claim only that, in any situation in which the institution of marriage is justified, it is justified, at least in part, because it is indispensable for fulfilling this serious desire.

This desire is indeed an ‘artifact’ of the social and legal traditions, since in large part people want to marry precisely *because* marriage is such a long-established and familiar institution. However, the desire to marry is not an ‘artificial desire’ in the sense of being merely a superficial reaction to those traditions. As I have argued, marriage furthers a fundamental interest in mutual understanding. The desire to marry is a response to the fact that marriage is, for people living within our traditions, the best way to advance this fundamental interest. So this desire seems a perfectly adequate basis for the justification of marriage.

#### IV. IS MARRIAGE NECESSARILY UNJUST?

In the previous section, I proposed an account of what would justify the institution of marriage, if it is justified at all. This account was not a full justification of marriage: a full justification would also have to show that marriage does not impose any serious burdens, and that it violates no principle of justice; and I cannot undertake to show this here.

In this section, I shall try to make it plausible that marriage need not be *seriously* unjust. I shall do this by arguing, on the basis of the account proposed in the previous section, that marriage need not conflict with either of the principles of justice invoked by the argument for same-sex marriage—either with the liberal principle (that the state should not promote, or justify its actions by appeal to, controversial conceptions of the good), or with the principle of equality (that the state should not discriminate between relevantly similar classes of people without a compelling reason).

First, need marriage conflict with the liberal principle? No doubt marriage does favour some conceptions of the good over others—that is, it contributes to a climate in which some conceptions flourish more easily than others. But this is true of every basic social institution. Capitalist economic systems, for example, may favour certain individualistic or consumerist conceptions of the good; but that is not the same as their directly *promoting* such conceptions. It is inevitable that social institutions will favour some conceptions of the good over others in this way. The liberal principle can only require that the state should not *directly promote, or justify its actions by appeal to*, such controversial conceptions.<sup>15</sup>

<sup>15</sup>Compare Joshua Cohen, ‘Deliberation and Democratic Legitimacy’, *The Good Polity: Normative Analysis of the State*, ed. A. Hamlin and P. Pettit (Oxford: Blackwell, 1989), pp. 17–34 at p. 27.

If civil marriage does conflict with this liberal principle, that is presumably because it involves the state's directly promoting, or justifying its actions by appeal to, the view that marriage is a particularly virtuous or valuable way of life. It hardly seems likely that it involves the state's promoting or appealing to any *other* controversial conception of the good.

As I have already argued, however, civil marriage need not involve the state's *directly promoting* this controversial view. True, civil marriage involves the state's supporting a certain social meaning. But the essential social meaning of marriage does not include any controversial view about the value of married life; it concerns only the more mundane matters of everyday life—namely, the kind of relationship that married couples typically have. Supporting this social meaning then need not entail promoting any such controversial view. So only one question remains: need civil marriage involve the state's *justifying its actions by appeal to* this contentious view of the value of married life?

The justification of marriage that I have outlined does not appeal to this controversial view. This justification appeals to the fact that many couples *want* to marry, for reasons that are serious and deserve to be respected, along with the fact that legal marriage is indispensable for enabling couples to fulfil this serious desire. Even someone who rejects the view that there is anything particularly valuable or virtuous about married life can appreciate that the desire to marry is typically a serious desire that deserves to be respected. This justification of marriage should be quite acceptable to those who reject this controversial view. So marriage need not conflict with the liberal principle.

What about the principle of equality? It may seem that civil marriage does involve unfair discrimination on the part of the state. According to my proposal, the state supports the institution of marriage in order to ensure that marriage will have a certain generally-understood social meaning. But does this not amount to the state's making a particular conception of marriage culturally 'hegemonic'? This may indeed be valued by those whose ideals are thereby furthered; but what of those whose ideals are thereby set back? The institution of marriage singles out just one sort of intimate relationship for special treatment;<sup>16</sup> does this not discriminate unfairly against those who prefer relationships of other sorts?

This objection is stated too abstractly. We should try to think of specific sorts of intimate relationship that are necessarily excluded from modern civil marriage. These would have to be types of relationship that do not conform to the *essential core* of the social meaning of modern marriage. As I have argued, this essential core consists purely of the expectations that marriages typically involve sexual intimacy, domestic and economic cooperation, and a voluntary mutual commitment to sustaining the relationship. But many different sorts of

<sup>16</sup>Marriage is certainly not the only relationship whose social meaning is underwritten by law: another such relationship is *parenthood*. But marriage is the only such relationship that is generally expected to involve sexual intimacy.

relationship could conform to these expectations—even including, as I have argued above, same-sex marriages and some forms of polygamy. Modern civil marriage, then, is a highly flexible institution. It need not exclude many kinds of intimate relationship, not even homosexual or polygamous relationships. (Whether it *should* exclude these relationships we shall consider in the next section.)

Still, modern civil marriage does necessarily exclude some sorts of relationship. For example, it excludes the practices mentioned above in which one man marries another man's left foot; it also excludes the 'temporary marriages' practised by Shiite Muslims, as well as forced marriages in which there is no consent or voluntary commitment on the part of one of the spouses.

These sorts of relationship could be legally recognized. This legal recognition might lead to new institutions with new social meanings; or it might make the social meaning of marriage still more flexible, so that even these sorts of relationship would conform to the social meaning of (post-modern) marriage.

If there really are people in contemporary Western society who seriously want to enter a legal relationship that has a social meaning of this kind, then modern civil marriage would involve the state's discriminating against these people. But if no one seriously wants to do this, then civil marriage would not involve any such discrimination.<sup>17</sup>

As a matter of brute empirical fact, it seems that marriage does not *actually* involve any such discrimination. So far as I know, no one in modern Western society seriously wants to enter one of these alternative legal relationships (while many people want to enter a legal relationship that has the essential social meaning of marriage).<sup>18</sup> Those who reject marriage as an ideal do so, not because they want other sorts of relationship legally recognized, but because they do not want their relationships legally recognized at all; no one seriously wants the state to create any of these legal alternatives to marriage. So there is nothing unfair and discriminatory in the state's supporting marriage rather than one of these alternatives.

It seems then that marriage need not conflict either with the liberal principle or with the principle of equality. This makes it plausible, I believe, that marriage need not be seriously unjust.

<sup>17</sup>It might be objected: 'How can the fact that no one seriously wants to do X show that the policy of not enabling people to do X is not discriminatory? If, as you admit, the policy would be discriminatory if people did want to do X, then surely the policy is discriminatory after all'. This objection is based on an implausible conception of discrimination. For example, imagine a country where there is public funding for football but not for badminton. This policy might well be discriminatory if some people were as passionate about badminton as others were about football; but that is surely not enough to show that this policy is actually discriminatory if in fact many people are passionate about football and no one takes any interest in badminton at all.

<sup>18</sup>Some Roman Catholics would prefer it if marriage were generally understood to be *indissoluble*. Still, they share with others the desire to enter a relationship that has *at least* the essential social meaning of modern Western marriage.

## V. EQUALITY AND SAME-SEX MARRIAGE

In this section, I shall explain how the arguments of the previous three sections help to reinforce the fundamental argument for same-sex marriage.

First, we can see now why an appeal to *equality* is necessary. The argument cannot be based simply on the claim that failing to give people the right to marry in itself abridges a fundamental freedom. It is not necessary that every just or free society give people the right to marry: a society that never had the institution of marriage need not thereby be less just or free than one that had it. In that sense, there is no natural or pre-political right to marriage.<sup>19</sup> The most plausible objection to laws that exclude same-sex couples from marrying is not that these laws violate a natural or pre-political right to marry, but that they deny a legal right to some that is *actually given* to *others*. That is, these laws conflict with the value of *equality*.

Whatever exactly the best formulation of the principle of equality may be, it will surely entail that every adult citizen should have an equal right to participate in the basic institutions of society (unless—perhaps—there is sufficient evidence that an equal arrangement of this kind would have uncontroversially harmful effects). Marriage seems to be one of the basic institutions of society. So, according to the principle of equality, everyone should have an equal right to participate in the institution: everyone should have an equal right to marry (unless an unequal arrangement has some uncontroversial and compelling justification).

Marriage's essential rationale, I have argued, is to enable couples to fulfil their serious desire to make a legally binding mutual commitment, of a certain uniquely familiar and well-understood kind. But, I claim, many same-sex couples have exactly the same desire, to make a mutual commitment of this kind, as opposite-sex couples. So we can now answer the first problem for the argument for same-sex marriage that I raised at the beginning. The right to marry must not be specified as 'the right to marry someone of the opposite sex' (no more than it may be specified as 'the right to marry someone of the same race'). The way in which getting married fulfils this serious desire has nothing to do with the fact that one is marrying someone of the opposite sex (no more than it has anything to do with the fact that one is marrying someone of the same race). The right to marry must be specified as the right to marry the person with whom you share this serious desire—whatever that person's race or sex.

<sup>19</sup>This is not to say that the legal right to marry is not a fundamental legal right *within Western legal traditions*. If it is such a fundamental legal right, then the state's refusal to allow same-sex marriage may violate the Due Process clause (as well as the Equal Protection clause) of the Fourteenth Amendment to the US Constitution; see Eskridge, *The Case for Same-Sex Marriage*, ch. 5 and Strasser, *Legally Wed*, ch. 3. Philosophically, however, the equality argument seems to be more fundamental: it is less dependent on the peculiarities of our legal traditions, and so a stronger basis for the claim that those traditions ought to be reformed.



If my claim is true, that same-sex couples are motivated to marry by exactly the same desire as opposite-sex couples, then we can also answer the second problem for the argument for same-sex marriage that I raised at the beginning: anything less than full same-sex marriage is ‘separate and unequal’. Marriage is more than just a relationship that is publicly avowed, or a cluster of concrete legal rights and obligations. It is a legal relationship that has a generally-understood social meaning of a certain kind. None of the options currently available to same-sex couples—‘commitment ceremonies’ with sympathetic clergymen, private contracts, or ‘registered domestic partnerships’—has a social meaning of this kind; none of these options is as familiar and widely understood as marriage. As a result, these options will be less effective than marriage for couples who want to affirm their commitment in a way that the community will readily understand. To fulfil this desire effectively, same-sex couples need to enter a relationship that has a social meaning of the appropriate kind. For this, they need the legal status of marriage, since, as I have argued, the social meaning is tied to this legal status. In effect, they need to be able to *say that they are married*. Suppose that same-sex unions had a different name—as it might be, ‘quarriage’. There will presumably be many fewer same-sex quarriages than opposite-sex marriages; so the term ‘quarriage’ would be much less familiar and widely understood than ‘marriage’, and for this reason quarriage would be less effective at fulfilling this serious desire than marriage.

There is no reason to doubt that same-sex couples could have access to a relationship that has the social meaning of marriage. True, the current social meaning of marriage involves the assumption that marriage is the union of one man and one woman. But if same-sex couples could legally marry, it would presumably soon become common knowledge that some marriages were same-sex marriages. So introducing same-sex marriage would *change* the social meaning of marriage. But there is no reason to think that it would change society’s *core expectations* of marriage (that marriage involves sexual intimacy, domestic and economic cooperation and a voluntary mutual commitment). Thus, we may presume that the legalization of same-sex marriage would give same-sex couples access to the social meaning of marriage.

So the laws excluding same-sex couples from marrying are, *prima facie*, a violation of the principle of equality, and hence an unjust form of discrimination. So long as there is not sufficient evidence that allowing same-sex marriages would have uncontroversially harmful effects, the refusal to allow such marriages must be presumed to be seriously unjust.

I will assume that the points made in the previous two sections were enough to answer the third problem for same-sex marriage that I raised at the beginning—the problem that marriage itself might be like slavery, an incurably unjust institution that should be abolished altogether rather than reformed. So only the fourth problem remains. How far does the argument extend? In particular, can it be immediately adapted into an argument for polygamy?

It would be presumptuous to deny that anyone could have a serious desire to have more than one marriage at the same time. It seems perfectly possible for someone to have the most serious religious or personal reasons for wanting this. So, offhand, my version of the fundamental argument for same-sex marriage seems to support a parallel argument for polygamy.

Although it is *possible* for someone to have such a serious desire to have more than one spouse, it seems (as a matter of brute empirical fact) that this is rarely *actually* the case. Even among Mormons and Muslims living in the West, there is remarkably little demand for polygamy. This point is not enough to overcome the presumption in favour of allowing polygamy; but it seems to make the presumption easier to rebut.

The presumption in favour of allowing polygamy could be rebutted if there is enough evidence that allowing polygamy would have uncontroversially harmful effects. While there is little historical evidence about what the effects of same-sex marriage would be, there is ample historical evidence about polygamy. This historical evidence clearly needs careful examination, which I cannot provide here. However, in my opinion, there is sufficient evidence to justify a serious concern that polygamy would have uncontroversially harmful effects, especially for women.<sup>20</sup> If my opinion is correct, it would be wrong to allow polygamy until this concern is shown to be groundless.

The difference between same-sex marriage and polygamy then is not an essential difference in kind; it is a purely empirical difference in degree. There is much less demand for polygamy than for same-sex marriage; and there is far more evidence that polygamy would have clearly harmful effects than that same-sex marriage would.

This empirical difference in degree grounds a sharp difference in the requirements of political morality. We should hesitate to allow polygamy until there is serious demand for it, and until an examination of the ample historical evidence lays to rest the suspicion that polygamy would have clearly harmful effects. On the other hand, there is already serious demand for same-sex marriage, and little or no evidence that same-sex marriage would have uncontroversially harmful effects. So justice requires that we press ahead with the struggle to achieve full same-sex marriage.

<sup>20</sup>See Richard Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992), pp. 253–60.