

INTRODUCTION

WHY MARRIAGE MATTERS

This book defends same-sex marriage, marriage (as a distinctive relationship defined by law), and monogamy. It upholds and extends the emerging common sense of the American public and American law against those who would arrest and reverse the historic movement toward a more inclusive institution. It also argues for the justness and goodness of preserving marriage against those who demand something radically new in our law.

But why do we need such an argument now?

INTRODUCTION

Marriage, the family, and gender relations have changed remarkably over the past sixty years. The changes include greater gender equality, with women working in far greater numbers, better access to contraception, and greater reproductive freedom; higher rates of divorce; more permissive attitudes toward premarital sex; delayed marriage; and many more children being raised by single parents. Marriage was once a precondition for having licit sexual relations and for having children. But sexual activity, procreation, and childrearing increasingly take place outside marriage, and far fewer Americans are currently married than in the past. Nevertheless, while Americans now marry later in life and half of these marriages end in divorce, they still marry in impressive numbers. The vast majority of Americans marry at some point in their lives, and 95 percent of American adults are either married or would like to be. So, in spite of all the changes, Americans still aspire to marriage, and marriage still matters.¹

The intensity of the debate over same-sex marriage in the United States reflects the importance that Americans ascribe to this institution. And while young people have recently expressed somewhat less

inclination to marry than other age-groups, the keen interest of many same-sex couples has given the institution a boost.²

Consider Jacques Beaumont and Richard Townsend, 86 and 77 years old, respectively, who were featured in the Weddings/Celebrations section of the *New York Times* in August 2011.³ Beaumont worked for decades with a refugee organization, and Townsend was a playwright who also taught playwriting at the YMCA. They had met thirty-nine years ago and lived together for many years. Townsend had developed Parkinson's disease some time ago, and they spent much of their time caring for each other. At the time the story ran, Beaumont had recently been diagnosed with leukemia, and the prognosis was not good. A few days after celebrating the signing of New York State's same-sex marriage legislation, they were forced to call an ambulance and together check in to the Beth Israel Medical Center, where they insisted on sharing a room. There, in a patient lounge on August 2, they were wed. "When he got sick," said Mr. Townsend, "it changed everything. We said we must get married. It's vitally important."

It is left to our imaginations to fill in the details. Townsend's sense of marriage's vital importance may have referred only to particular legal rights. As we will see, marriage brings with it a wide range of rights and obligations under law that reflect and support couples' shared lives together. Very likely he also referred, in part at least, to the significance of the status of marriage as a way of publicly declaring and solemnizing their mutual commitment. The symbolic and expressive dimension has, indeed, been at the center of what some call our "culture war" over marriage.

In the litigation in California over Proposition 8 (which overturned a California Supreme Court decision extending marriage rights to same-sex couples⁴), a conservative justice observed that, as a matter of state law, same-sex couples in California already had domestic partnerships with nearly all the same legal entitlements of marriage, so the protracted litigation there was over the word "marriage." Charles Cooper, a lawyer defending Proposition 8, responded that the word "is essentially the institution."⁵ That may be an overstatement, but it captures an important truth: the institution of marriage in the United States is freighted with social meaning and moral, cultural, and religious significance; these words and their public meanings, and the recognition that "marriage" entails, are a crucial part of what is at stake.

To Kristin Perry, the lead plaintiff in the constitutional challenge to Proposition 8, marriage provides access to the language to describe her relationship with her partner: "I'm a 45-year-old woman. I have been in love with a woman for 10 years and I don't have a word to tell anybody

about that. . . . Marriage would be a way to tell our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment . . . we are not girlfriends. We are not partners. We are married.”⁶

Marriage is a singular institution. The law of marriage sets out a host of legal rights and obligations that bind and enable those who enter into it. As we will see in chapter 4, over a thousand federal laws touch on these legal aspects, though marriage is defined mostly by state law. The profound meaning of marriage in people’s lives and its resonance in our culture are also shaped deeply by religious traditions that variously define the terms on which they will recognize marriages and their dissolution. While state laws allow members of the clergy, along with judges, court clerks, and others, to officiate at marriage ceremonies, the rules governing civil and religious marriages are independent of each other: to be married in the eyes of the state is not necessarily to be married in the eyes of any particular church, and vice versa. The deep resonance of “marriage” in law, religion, and culture intensifies the conflicts around it while also enhancing its capacity to solemnize and stabilize the commitments that underlie the most important relationship in the lives of most people.

The conflicts inherent in our long-running debate are intensified by two sets of issues that are closely bound up with marriage: sexual ethics and children’s well-being. Many opponents of same-sex marriage regard same-sex sexual relations as inherently immoral; exactly why is a question we will need to investigate in part 1. In addition, most Americans are troubled, and for good reason, about the impact of changes in family structure on children’s well-being. It is frequently charged that same-sex marriage is a threat to children. This too is a matter we consider below.

In late June 2013, a slim majority of the U.S. Supreme Court insisted that the lawful marriages of same-sex couples are equal in “dignity and status” to traditional marriages under the U.S. Constitution and must be treated that way in federal law. In *United States v. Windsor*, the provision of the Defense of Marriage Act (DOMA) defining marriage as a relationship between one man and one woman—a law passed overwhelmingly by Congress and signed by President Bill Clinton in 1996—was held to rest on “a bare congressional desire to harm a politically unpopular group.”⁷ The “avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawfully by the unquestioned authority of the States.”⁸ The Constitution, wrote Justice Kennedy for the Court, does not permit the federal government to tell same-sex couples, “and all the world, that their otherwise valid marriages

are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.⁹ On the same day that it struck down the federal Defense of Marriage Act, the Supreme Court let stand lower federal and state court rulings that made same-sex marriage legal in California by invalidating Proposition 8.¹⁰

In the months and years after *United States v. Windsor* was decided, a steady cascade of state and federal courts and electorates extended *Windsor's* rationale and reach by finding DOMA-like requirements in state law unconstitutional. These courts found, as the Supreme Court had in *Windsor*, that state officials failed to offer good reasons and evidence to justify denying same-sex couples access to a public institution as important as civil marriage. Several other courts disagreed, however, and held that the reasons advanced were sufficient to warrant continued deference to state legislatures. Writing for the Sixth Circuit Court of Appeals, whose decision finally prompted the U.S. Supreme Court to take up the same-sex marriage question, Judge Jeffrey Sutton upheld the constitutionality of same-sex marriage bans while observing that marriage equality appears inevitable.¹¹

FOR BETTER OR WORSE?

The rapid ascent of same-sex marriage makes further questions inescapable: What next? What does same-sex marriage portend for the meaning and future of marriage? Many on the political right and left who disagree vehemently on most issues agree on one thing: *same-sex marriage is an unstable way station on the road to more radical change*. So this book asks: Does victory for same-sex marriage sound a death knell for marriage as we have known it? Do the moral and practical arguments for same-sex marriage also compel us to enact other, more radical reforms? Are civil marriage and monogamy still justifiable and viable?

Conservatives have long warned that recognition of same-sex marriage rights puts us on a slippery slope to unions both abhorrent and outlandish. Professor Hadley Arkes, a scholar and advocate of natural law, put it this way in his 1996 testimony in favor of DOMA:

If we detach marriage from that natural teleology of the body, on what ground of principle could the law confine marriage to couples? On what ground would the law say no to people who profess that their love is not confined to a coupling, but woven together in a larger ensemble of three or four? . . . If that arrangement

were made available to ensembles of the same sex, it would have to be made available to ensembles of mixed sexes, which is to say we'd be back in principle to the acceptance of polygamy.¹²

“Legal recognition and social acceptance” of people who are gay would leave us with no grounds for excluding from marriage “a father and daughter who want to marry. Or two sisters. Or men who want (consensual) polygamous arrangements,” said William Bennett. “We’ll become more accommodating to man-boy associations, polygamists and so forth,” added Robert H. Bork. Gary Bauer, president of the Family Research Council, similarly claimed that if same-sex marriage were permitted, it would be logically indefensible to prohibit polygamy and logically inappropriate to continue “the limitation of the [marital] relationship to human beings.”¹³ The slippery slope to polygamy, incest, and even bestiality has been deployed against even the basic right of gay and lesbian adults to be free of criminal prosecution for engaging in sexual acts in the privacy of their own homes: “If the Supreme Court says that you have a right to consensual (gay) sex within your home,” warned former U.S. senator Rick Santorum in 2003, “then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”¹⁴ Weeks later, in *Lawrence v. Texas*, a majority of the Supreme Court extended the Constitution’s privacy right to gays, prompting Justice Antonin Scalia to declare: “called into question by today’s decision” are “state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”¹⁵

The specter of polygamy was raised frequently by defenders of California’s Proposition 8, which sought to reverse marriage equality for same-sex couples by defining marriage as the relationship of one man and one woman.¹⁶ That was not the end of it. Writing in *National Review* in August 2014, Ryan T. Anderson warned that “redefining” marriage to include same-sex couples “leads to the dissolution of marriage, to a social mess of adult love of manifold sizes and shapes. Defenders of the truth about marriage should redouble our efforts while there is still time to steer clear of that chaos.”¹⁷ In upholding Puerto Rico’s same-sex marriage ban in October 2014, U.S. District Judge Juan Pérez-Giménez conjured up the specters of polygamy and “the marriage of fathers and daughters.”¹⁸ In upholding Louisiana’s same-sex marriage ban, Judge Martin C. Feldman asserted that

inconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? . . . All such unions

would undeniably be equally committed to love and caring for one another, just like the plaintiffs. Perhaps in a new established point of view, marriage will be reduced to contract law, and, by contract, anyone will be able to claim marriage.¹⁹

In late 2014, in the wake of dozens of court decisions and decades of debate, Professor John Finnis argued that “concerns about polygamy go unreported and unanswered” in even the most celebrated of decisions in favor of same-sex marriage. And Judge Sutton, penning the opinion that led the Supreme Court to take on same-sex marriage, affirmed that, “If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to this point.”²⁰

Sometimes, or perhaps often, such arguments amount to right-wing “fear mongering,” but not always. The shift in public opinion on gay marriage has been swift but far from unanimous. Many continue to regard same-sex marriage as “preposterous . . . something barely imaginable.” For them, as David L. Chambers argues, these various unions are “moral equivalents, each repellant,” and it is “the appropriate province of the law to discourage or prohibit” them.²¹

After all, *if marriage is not necessarily about procreation but is centrally about adult happiness, which individuals define for themselves, then why not grant people the freedom to choose not only the sex but the number of their marital partners? Why not indeed, say many on the left, in order to entertain rather than restrain the manifold forms of “self-definition” and “moral and sexual choice” that conservatives warn against.*

“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life,” wrote Justice Anthony Kennedy in *Planned Parenthood v. Casey* (1992), the case that dramatically “reaffirmed the essential holding” of *Roe v. Wade*, upholding a woman’s right to choose to have an abortion.²² Many progressive academics argue that marriage ought to be “disestablished” or privatized because the state has no good basis for setting the terms of our most intimate and important relationships and the number of participants. These ought to be left up to the free choice of the parties, as in other contracts.

Indeed, feminists have long argued that the magnetic power of marriage in our culture and the bundling of so many benefits into marriage lead people to overinvest in this one form of caring and caregiving relationship. It ill serves most people’s interests to put all their eggs in the basket of marriage, an institution whose fragility in the real world mocks

fantasies of lifelong permanence.²³ Feminists and queer theorists brand traditional marriage as “heteronormative,” charging that it unfairly enshrines in law “heterosexist” values such as monogamy. From this point of view, same-sex marriage is “an alarming movement toward assimilationist erasure of Gay identity” that undermines the liberationist potential of gay relationships. Gay marriage, like marriage generally, “privatizes energies into the family unit” and “results in the dismantling of support systems found in the community.” Gays were once ready to recognize all other gays as “family”; now they are abandoning this “communitarian conception of family in favor of the heterosexualized, privatized, monogamous family model found in marriage.”²⁴

Yet others assert that monogamous marriage’s preferred status unjustly privileges Western and Christian models of family life. Prejudice against polygamy is held to reflect racism as well as religious and civilizational chauvinism. The state has no business encouraging its citizens “to couple, but only to couple,” argues one Canadian scholar.²⁵ Many now embrace the idea that principled consistency requires legal recognition and protection for polygamous or “polyamorous” unions of three or more.

But is the embrace of “poly” marital unions sufficiently inclusive? Many theorists say no. One set of progressive proposals would replace marriage with a new, more inclusive, and more ethically neutral model of relationships. This could be done by extending support to caring and caregiving relations, whether monogamous or amorous or not.²⁶ Philosopher Elizabeth Brake, in a widely cited argument, brands marriage as “amatonormative,” meaning that it unfairly privileges amorous or romantic relationships.²⁷ Rather than extend such relationships to groups larger than two, she would radically broaden the character of marriage and refound it on a more ethically neutral and inclusive basis. “Minimal marriage,” as she calls her proposal, should recognize and support “adult care networks” or “caring relationships” of any number and combination of persons, with or without a romantic component.²⁸

Some philosophers go so far as to invoke principles of liberty, fairness, and state ethical neutrality to argue for the legal recognition of adult incestuous relations. Professor Sonu Bedi of Dartmouth College provocatively asks what is wrong with an adult incestuous relationship in which procreation is not intended, or indeed where it is impossible—in, for example, an adult gay or lesbian incestuous relationship.²⁹ Bedi is not alone.

Participants in these debates are often strangely inarticulate. In the past, conservatives frequently fell back on the moralistic assertion that homosexuality is “unnatural,” and in many parts of the world such sentiments are expressed even now with great vehemence. In the West, we

more commonly hear that polygamy is simply “abhorrent” and inconsistent with American, Canadian, and European traditions.³⁰ Yet feelings of that sort are frequently unreliable and do not in themselves provide a good reason: Why is it abhorrent? What is the harm? And traditions are frequently revised, so why not the one pertaining to monogamy? On the left, academics and intellectuals are typically alert to the importance of choice, diversity, and free self-definition but less willing to acknowledge that some choices and ways of defining oneself are less conducive than others to one’s own well-being and that of others.

Whereas conservatives see gay marriage as the infiltration of destructive radicals, radicals see it as a surrender to conservatives. The marriage issue is very personal, and the most important human interests are at stake. That makes the questions urgent and fascinating, but it can also derail clear thinking.

As I explain at the beginning of chapter 1, there is also a deep global divide on the various issues discussed here, and in many places the arguments for and against equal rights for gay people have yet to be aired. That is yet another reason for considering the arguments advanced by opponents of same-sex marriage.

“I tell my students that it is difficult to think about sex,” a wise Jesuit has observed. “People can fairly easily pant, picture or pontificate about sex. But it is hard to think deeply, clearly and cogently about it.” He adds that with respect to sexual ethics, and, I would add, the marriage question, “most of us begin with our conclusions” and then, “if ever, we seek reasons to justify our conclusions.”³¹ Father Edward Vacek seems to me on the mark. We need to do better.

Many conservatives and progressives agree that same-sex marriage is an unprincipled and unstable stopping point on the path to marriage abolition or radical reform. Their disagreement is about whether to condemn or welcome this prospect.

The debate over marriage and its future will not be ended by the inclusion of gay and lesbian Americans. I argue in what follows that both sides fail to appreciate the good reasons and considerable evidence in support of marriage reform and preservation, not abolition. Justice requires the extension of marriage to same-sex couples. It does not require adopting a privatized “contractual” model, the extension of marriage to groups of three or more, or other radical reforms. There is a sensible, liberal, and democratic case for monogamy and against legal recognition of polygamy, which I elaborate below. Monogamy helps advance core values of

liberal democracy. At the same time, I agree with those progressives who argue that the law should do more to recognize and support a variety of forms of nonmarital caring and caregiving relationships; not as substitutes for monogamous marriage but as supplements.

Indeed, the argument goes an important step further: the core liberal democratic values of equal liberty and opportunity for all argue for monogamy as the preferred social form. Monogamous marriage helps to secure everyone's fair access to the great good of family life and is conducive to social well-being in a wide variety of ways. The case for marriage, as we will see, remains intact and even strengthened after same-sex marriage: it rests on liberal democratic justice as well as the good of individuals and society.

There are other steps that ought to be taken by those concerned about marriage and the wider forms of caring and caregiving on which all of us depend. Large numbers of disproportionately poor children and adults are no longer living within intact marriages, and there is no serious prospect of this changing soon. The value of marriage and the legitimacy of public recognition and support for it are called into question by the increasingly dire plight of those whom our society is leaving behind. Stable marriage is increasingly associated with socioeconomic privilege: along with the declining economic fortunes of the less educated has come declining marital prospects.³² Feminist and other progressive critics of marriage have been right to insist that marriage must not be made an excuse for failing to attend to the needs of those outside of marriage.

If the assertions just advanced sound overly confident, let me assure the reader that I am aware that there are many difficult questions to be addressed here about which reasonable people of good will disagree.

LIBERALISM AS PUBLIC PHILOSOPHY

The debate over marriage raises wider and deeper questions concerning our governing political philosophy. Virtually all Americans are "liberals" in the broadest sense: committed to the values of individual freedom and equality that are enshrined in the Declaration of Independence, the Constitution, and many later sources. We interpret our founding values differently, however, and those differences animate our politics. The "conservatives" among us place greater emphasis on private property, personal responsibility, and sexual restraint. Progressives, whom we tend to call "liberals," emphasize the need for an active government to secure fair opportunity in the face of inherited inequalities. Those on the free-market right are often radicals nowadays, but true conservatives are cautious in

the face of proposed reforms to complex institutions. Liberals are insistent on the need to extend equality and freedom to those who have been marginalized, including women and sexual minorities. Our public debates tend to be dominated by those who argue stridently for one side or the other, but most Americans care about values on both sides of these divides, and I think they are right to do so.

The polarization that plagues our politics is too often reflected in academic debates. Conservatives tend to caricature “liberalism,” and many on the left seem all too ready to embrace the caricature. The caricatures may be based on the ideas of “neutrality” or “political liberalism” and associated with particular writings of John Rawls and Ronald Dworkin, the two greatest defenders of progressive liberalism over the past half century. Among many on the left, radical marriage reform is thought to be required by the vast religious and ethical diversity of America today and our government’s obligation to be fair or “neutral,” as some would say, among citizens with different beliefs about what makes for a good life. We cannot publicly justify, they say, a law of civil marriage that bestows a “special” status and benefits on monogamous pairings because not everyone values such pairings. Indeed, Professor Bedi, whom I have already quoted, lampoons the position I defend as “natural law but with a gay spin.”³³

So along the way, and especially in the conclusion, I make the case for a moderate and flexible approach to liberalism (by which I shall henceforth mean progressive liberalism): one that allows the state to promote such widely if not unanimously valued goods and activities as health, happiness, knowledge, prosperity, the preservation of areas of great natural beauty, progress in science, humanistic understanding, and excellence in the arts and athletics. The liberal democratic state should, in short, favor all genuine human goods but do so within a constitutional framework that gives priority to the defense of equal basic liberties and the fair distribution of resources and opportunities. Fairness among citizens and their worthwhile conceptions of the good life is a moral imperative but not one that requires the elimination of civil marriage.

I argue against those who believe that liberal principles impose narrow limits on the state’s authority. Core liberal values of equal liberty and fairness among citizens allow support for widely, if not unanimously, valued institutions such as marriage, along with many other broadly public goods. Justice and equal liberty are at the core of our public morality, but they are not the whole of it: they leave space for public institutions to promote a wide array of broad-based human goods. We can honor fairness by recognizing the value of marriage along with other nonmarital caring relations that people also wish to enter and that also advance

their good and the good of society. The idea of an ethically neutral state has been misconceived: democratic institutions have a wider scope for discretion than marriage's critics have allowed.

Admittedly, and as we shall see, marriage is unlike other institutions that liberal states routinely support in order to make a wide and inclusive array of human goods available to citizens. Unlike museums, parks, and concert halls, monogamous marriage imposes a certain ordering on the most intimate aspects of almost everyone's personal life. It shapes and constitutes the most important and most personal relationships in the lives of individuals. It creates certain kinds of families and rules out other forms of family life that have prevailed across most human societies in the past and much of the world today. Monogamous marriage imparts a common shape to most people's deepest aspirations for their lives as a whole. And all this in spite of the great diversity that is supposed to characterize modern societies.

The moderate reformism defended here holds that justice and respect for equal basic rights leave *significant scope* for democratically accountable legislatures to facilitate widely valued and generally beneficial institutions such as marriage. This approach respects the values of democratic deliberation, social learning, and incrementalism in the face of complex social changes. Those values are especially important when contemplating reform of an institution as complex and central to so many people's lives—and the life of our society—as marriage. I defend an understanding of justice, rights, and the public good that is sensitive to empirical evidence and our evolving public understandings of human sexuality and family life.

We should embrace a moderate and flexible liberalism that is closer to the common sense of ordinary citizens and takes seriously the “formative project” of liberal constitutionalism: the need to fashion institutions that cultivate the virtues on which a liberal society depends.³⁴ The case for marriage advanced here incorporates sensible conservative concerns, including incrementalism in the reform of complex institutions. I urge, further, that we proceed on the basis of widely available reasons and evidence and acknowledge the importance of democratic deliberation and social learning. We can be fair to the diversity of reasonable conceptions of the good life and extend new forms of recognition and support to caring and caregiving relationships while continuing to recognize the special role of monogamous marriage in a liberal democracy.

The focus of the book is most directly on marriage in the United States and, with respect to polygamy at least, Canada. Marriage cultures vary, and marriage has a distinctive resonance in the United States. Part

of my argument is that we ought to respect the particularity of democratic law and culture, at least to a point, and within the limits of basic rights and distributive fairness.³⁵ Nevertheless, while my particular focus is marriage here and now in America, the discussion can illuminate inquiry elsewhere. Indeed, much of the evidence and argument concerning polygamy is drawn from a wider historical and anthropological record.

THE PLAN OF THE BOOK

This book asks: what does the recognition of same-sex marriage portend for the future of marriage as an institution? I ask, in effect: *what's next for marriage?*

The debate over same-sex marriage has been at the center of our public life for over two decades. Those who defend what they call the “traditional” conception of marriage as necessarily and inherently heterosexual portray same-sex marriage as a deeply destructive development that subverts an institution on which the good of children, spouses, and society as a whole depends. As marriage equality spreads rapidly and the arguments against it are rejected, the question becomes: where does that leave us with marriage?³⁶

Specifically:

- Why has the conservative case against same-sex marriage collapsed so quickly, and where does this leave the defense of monogamous marriage?
- How can we, after same-sex marriage, justify preserving marriage as a *status* institution in law, that is, as a relationship whose terms are defined in advance by law rather than negotiated by the parties to the arrangement? Can we justify a “one-size-fits-all” institution of marriage given the great diversity of American society?
- What, if any, is the principled argument for monogamy, or limiting marriage to two people only? What sorts of relationships should count as marriage, and why?
- Which of the traditional legal privileges and obligations of marriage should be kept, which should be eliminated, and which should be made available on another basis, say, to unmarried couples or groups in various caregiving relationships?

These are complicated questions, and any attempt to pursue them comprehensively could fill many volumes. I examine the main issues only. One also needs to decide where to begin, and how to organize the journey. I proceed by asking three interrelated questions in each of the

successive parts of this book: *Why same-sex marriage? Why marriage? Why monogamy?*

My contention is that the case for marriage and monogamy remains intact and in many ways strengthened after same-sex marriage. I examine these matters from the standpoint of ethics and political theory, or what some would call public philosophy, considering the merits of the debates in light of ordinary standards of soundness and rigor, as well as the available evidence.

Part 1 traces the trajectory of conservative moral arguments against same-sex marriage over the past three decades, including the arguments featured in prominent court decisions and state and federal legislative battles. It is important to reexamine these arguments because, irrespective of what courts decide, many harbor objections to same-sex marriage, and their concerns will shape other debates going forward.

In chapter 1 I trace the arc of three decades of conservative arguments against same-sex marriage and gay rights more broadly, distinguishing several different strands. The debate over gay rights has been shaped by the repeated articulation of a demand for public reasons and evidence to justify the shape of the law touching on gay rights and marriage. The demand for reasons was laid down by the dissenters in *Bowers v. Hardwick* (1987), and it has shaped and elevated the subsequent debate.

In chapter 2 I give more extended treatment to the most philosophically sophisticated opponents of same-sex marriage. The New Natural Law defense of marriage as necessarily the relation of one man and one woman is linked to an account of sexual morality that few Americans entertain. These arguments will seem somewhat academic, but their influence extends to the center of American politics. In his dissenting opinion in *United States v. Windsor* (2013), Justice Samuel Alito referred to these arguments to buttress his assertion that the merits of same-sex marriage remain unsettled, and others have also done so.³⁷ I show that natural law arguments fail to provide a reasoned basis for excluding same-sex couples from the civil institution of marriage.

Other conservatives oppose gay wedlock because they say it will weaken marital commitments and fidelity and degrade parenting, to the detriment of spouses, children, and society as a whole. We take up a variety of such charges in chapter 3. Concerns about children and families can be addressed far more effectively once they are disentangled from the injustice of discrimination on the basis of sexual orientation. Extending marriage to same-sex couples will allow them to make the sorts of

stabilizing commitments that marriage stands for, which is exactly what conservatives should want.

Having made the case for same-sex marriage in part 1, I turn in part 2 to the even broader complaints of a variety of critics who regard civil marriage in its current form as unjust. Invoking libertarian, feminist, and liberal political principles, critics charge that the “special status” of marriage in our law unfairly favors some people’s conceptions of the good life over others. It fails the principle of state ethical neutrality. Instead of a one-size-fits-all marital arrangement whose specific terms are defined in advance by law, we would be much better off with a contractual arrangement whose terms are set out by the parties, or a much more flexible and open institution.

There are two broad aspects of the civil institution of marriage: the symbolic dimension, which has in many ways been at the center of the controversy surrounding same-sex marriage, and the specific legal “incidents”: the obligations, benefits, and entitlements that spouses acquire in marriage.

After laying out the complaints of marriage critics, chapter 4 focuses on the symbolic dimension of marriage, which is one source of the complaint that marriage’s special status is problematic. I explain and defend the practical work done by this symbolism: it allows people to publicly declare their commitment to each other in a way that will be well understood in society as a whole, and not only in their church or local community. Marriage as a status relation whose terms are set out in law facilitates people’s reasonable desire to enter a socially legible committed relationship surrounded by expectations and norms that can help stabilize and support their commitment.

Chapter 5 sets out, in broad terms, the many “legal incidents” of marriage: the specific rights and responsibilities created by the law of marriage. My brief overview makes the case that these usefully recognize and support the spouses’ mutual commitments and lives together. While critics focus on the special privileges or benefits that spouses acquire in marriage, those are balanced by special obligations. I suggest that the whole package seems reasonably appropriate for both opposite-sex and same-sex couples. This chapter also describes the ways in which marriage seems to promote the good of spouses, children, and society, and it describes the astonishing class divide that now characterizes marriage and parenting. This class divide, not same-sex marriage, is the great challenge for the future.

Chapter 6 considers a variety of reform proposals that have been advanced as alternatives to the current law of marriage. These include marriage “privatization” and a much greater emphasis on contractual choice and personalization. Relatedly, some recommend enhancing the use of “prenuptial” agreements. While allowing that such suggestions are worth taking seriously, I also explain and defend the comparative advantages of an open-ended marital commitment. I cast doubt on the proposal to leave the term “marriage” to churches and other nonpublic associations as a way of avoiding both confusions and conflicts between “church and state.” I also consider the conditions of just marriage, which include extending greater support to those in nonmarital relationships of care, and to singles.

Parts 1 and 2 make the cases for same-sex wedlock and marriage as a special status in civil law. If marriage continues to make sense in the wake of same-sex marriage, what about monogamy? This is one of the most interesting and least examined questions, which we take up in part 3. Critics on the political right have repeatedly warned that if equal rights are extended to same-sex couples, there will be no principled basis for denying equal rights to polygamists. Polygamy has received increased attention in the popular media, thanks in part to television shows such as *Big Love* and *Sister Wives*. It has figured in debates concerning the rights of Muslim minorities in Western countries, and it has been the subject of notable court cases in Canada and the United States. We consider polygamy, both its traditional form—of one husband with multiple wives—and the new, supposedly “postmodern” form of egalitarian “polyamory.”

Why monogamy? Is it simply a matter of unthinking traditions rooted in Christianity, and racial and civilizational prejudices directed at practices associated with non-Western family forms? Part 3 explores these questions in part by using two important legal cases on the rights of polygamists, in British Columbia and Utah, and their surprising results, to make the case that polygamy is an unwelcome social practice.

Chapter 7 lays out the variety of forms of plural marriage and provides some historical background and context, focusing on the long-running conflict around polygamy in the Mormon Church in North America. As we will see, the large majority of human societies in history have practiced plural marriage in one form or another, and opposition to the practice over the past two centuries has often been rooted in religious, civilizational, and racial chauvinism. Is there a good public case against polygamy?

Chapter 8 lays out a variety of principled factors that help to distinguish plural marriage from same-sex marriage as a matter of both justice

and constitutional principle. I also explore the impressive array of evidence that led the Supreme Court of British Columbia, in a landmark case decided in December 2012, to uphold Canada's criminal prohibition on polygamy. I argue that this evidentiary record, while certainly not beyond challenge, stands in contrast to the abstract and moralistic arguments advanced against the rights of gay and lesbian citizens. There is a good case for not extending equal rights to plural marriages, and for in some manner discouraging polygamy.

One year after the Canadian decision, a federal court in Utah came to the opposite result and struck down that state's criminal prohibition based on considerations altogether different from those relied on in British Columbia. This surprising case, introducing a number of complications, involved none other than the polygamous family that stars in *Sister Wives*. Kody Brown and his four wives present polygamy in a far more favorable light than do the other polygamists who have been the subjects of other legal actions since the 1950s. Their case also raises the difficult question of whether law enforcement officials can be trusted with the discretion supplied by general criminal prohibitions on polygamy. The chapter explores the issues raised by polygamy today. It also considers whether legal prohibitions against adult incest can be justified when partners avoid having children, and it closes by considering the new, "postmodern" form of plural relationship known as polyamory.

Conservatives have long warned that gay marriage would change marriage for all, ultimately spelling the death of marriage and monogamy. It is undeniable that marriage and monogamy face new and ongoing challenges. While same-sex marriage is likely to affect the wider marriage culture, the clearest changes seem likely to be for the good. In the concluding chapter, I argue that monogamous marriage is made stronger as a liberal and democratic social institution by same-sex marriage. With respect to other complex aspects of law pertaining to marriage and family relations, when issues of basic justice and the public good are unclear, consequences are uncertain, and many people have come to rely on and build their lives around existing institutions and rules, the law should change incrementally.