

Response to Martha Nussbaum

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INTRODUCTION

I find much to agree with in Professor Martha Nussbaum's elegant and lucid Essay, "A Right to Marry?" However, I will not begin by responding to it directly, but will instead start my analysis by taking a step back from the debate. Many observers believe that the politics of the gay marriage issue in the United States has just passed a tipping point due to successful gains in the recognition of equal rights for gay couples.¹ The recognition of gay marriage in Connecticut, Vermont, Iowa, and New York may signal a trend, which some believe is irreversible. Some high-level Republicans have given support to this view by defecting from the orthodoxy of marital absolutism that has been so central to their party's politics in recent years. These advances lead many to believe that the position in favor of same-sex marriage advocated by Professor Nussbaum will likely prevail.

Is this too optimistic? Obviously there are long struggles ahead, particularly as long as the Defense of Marriage Act (DOMA) is on the books. Because so many states have amended their constitutions to prohibit gay marriage, overturning DOMA will require a vast political change. Same-sex marriage may be an issue that maps regional differences for generations to come. We might end up with a protracted crisis of federalism, in which the same-sex marriage states and the states that are constitutionally bound against gay marriage appear shaded in large blocs on the map. This situation would form new routes for gay migration. Even in the most "gay-friendly" states, marriage will continue to be something of a tease for gay people as long as it does not entail the significant entitlements that are available only at the federal level, including taxation benefits and foreign sponsorship rights for immigrant spouses. Given the generational trends in the polling data, it is possible to argue that repeal of DOMA looks inevitable in the long term, but that might be a very

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1. See Frank Rich, *The Bigots' Last Hurrah*, N.Y. TIMES, Apr. 19, 2009, at 10.

long term indeed.²

In the meantime, we must consider what the debate should look like. The danger is that an emergent generational consensus about same-sex marriage—while a massive repudiation of the public homophobia that dominated the twentieth century—will be predicated on a naturalization of marriage as an institution, entailed in the phrase “the right to marry” and based on a naive folk theory of marriage as expressive.³ If a consensus of this kind emerges, it will end the opportunity to reexamine the regulatory work of marriage and demand some justification for its existence.

I

THE FUNCTIONS OF MARRIAGE

Gay marriage became a legally contested issue around 1970, yet only became politically unavoidable in the last fifteen years. The debate during this period has had some distinctly odd features. I do not just mean the fringe positions; most people would count my own views as a fringe position. I mean the oddness of the two basic questions that people feel compelled to ask: First, what is marriage? Second, what is it for? The first question is difficult to answer because most people remain highly unwilling to face it honestly. They prefer to rush to the second one, correctly assuming that it will be impossible to determine a good answer for the second question without some radical simplification—and mystification—of the first. Do we want marriage to be primarily a way of regulating personal life, a state-sponsored means of making sure that people are more likely to form intimate associations in a way that we approve?⁴ Or do we want it to be a noninstrumental means of recognition for personal expression and love? Many argue for marriage as a kind of social engineering—steering people by means of powerful and numerous incentives into a way of living that they regard as better for children. This argument is often coupled with another: that marriage is just a way for the public to recognize whatever is authentic love in a private adult relationship. These arguments are at odds.

Many people give credence to both arguments, though it is hard to see

2. Generational divides appear in all the polls I have seen. *See, e.g.*, THE PEW FORUM ON RELIGION & PUBLIC LIFE, REPUBLICANS UNIFIED, DEMOCRATS SPLIT ON GAY MARRIAGE: RELIGIOUS BELIEFS UNDERPIN OPPOSITION TO HOMOSEXUALITY (2003), http://pewforum.org/uploadedfiles/Topics/Issues/Gay_Marriage_and_Homosexuality/religion-homosexuality.pdf; Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP, May 27, 2009, <http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx>. An instructive meta-analysis appears in Jeffrey Lax & Justin Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367 (2009).

3. On the limitations of the prevailing common sense about marriage, see STEPHANIE COONTZ, *MARRIAGE, A HISTORY* (2005); STEPHANIE COONTZ, *THE WAY WE NEVER WERE* (2000 ed. 2000); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999).

4. This was Andrew Sullivan’s argument for gay marriage in ANDREW SULLIVAN, *VIRTUALLY NORMAL* (Vintage Books 1996) (1995).

how they could be made consistent. The first function seeks to delegitimize some desires in an effort to ensure a stable social order, recognized as a higher good than individual desires. The other function insists that a personal relationship derives its value from its own unconstrained and private character, and that marriage recognizes this value without playing a role in its creation.

Considered as a regulatory program analogous to drivers' licenses or pet licenses, state licensing of marriage is oddly incoherent in any event, as Professor Nussbaum points out—lax or indifferent about most things that might be thought to matter with regard to the care of children or other ideals often said to be its purpose; Byzantine in legal and jurisdictional complexity; and insistent only on the sex of the participants.⁵ On the other hand, if considered as personal expression or a religious rite, marriage hardly seems to need state sanction at all. If it does, there presumably ought to be a different and simplified state sanction, replacing the complex map of incentives and regulations currently on the books.

A debate in which such questions can be made pressing is an anomaly in history. Whatever marriage has been in the past, it has never been theory-driven. And whatever marriage is now cannot have been its purpose in the past. Despite the quaint charm of U.S. Senator Robert Byrd's belief that an unbroken chain of meaning and intention connects the marital ideologies of bronze-age patriarchs to himself, marriage has been refashioned so deeply that seeking a justification in its past can only be delusional.⁶ Marriage in nonmodern societies was, and in some cases remains, largely an economic and political system of alliances formed through the exchange of women. Marriages in such contexts affect whole kin groups, which is why they must be both collective and public (though not necessarily monogamous), with both groups present and a mediating ritual to ensure the formation of secure alliances.⁷ No one currently argues for that view of marriage in the developed world—except to a degree in France, where Lacanian and Levi-Straussian orthodoxy has persuaded some intellectuals that the gender symbolizations of that ancient kinship system simply are “the symbolic order,” and thus presumably immutable.⁸ Thus, we suddenly find ourselves in an age when marriage as an institution—from license to probate—needs a theory, and all the going theories are post hoc rationalizations that ignore historical contexts.

5. Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 678–84 (2010).

6. This point has been made repeatedly by historians, though politicians prove surprisingly resistant to knowledge on this point. See, e.g., NANCY F. COTT, *PUBLIC VOWS* (Harvard Univ. Press 2002) (2000); COONTZ, *THE WAY WE NEVER WERE*, *supra* note 3.

7. For an illuminating analysis of marriage rituals in one such context, see Elinor O. Keenan, *A Sliding Sense of Obligatoriness: The Poly-Structure of Malagasy Oratory*, 2 LANGUAGE IN SOCIETY 225–43 (1973).

8. One prominent example is Sylviane Agacinski. See the illuminating discussion in Eric Fassin, *Same Sex, Different Politics: “Gay Marriage” Debates in France and the United States*, 13 PUBLIC CULTURE 215–32 (2001).

The central assumption of the entire same-sex marriage debate is the state's continued monopolization of marriage sanctions. Even though the gay rights movement and the religious opposition possess sufficient reasons to distrust the secular state, neither seems to have entertained a strategy of marriage disestablishment. Yet this assumption of the state's monopoly over legitimate means of coupling is itself a relatively recent development in the longer history of marriage. Mary Anne Case argues that in English law, a licensing system representing the state's monopoly over legally recognized marriage first originated in the 1753 Act for the Better Preventing of Clandestine Marriages. The Act established the requirement of a marriage license and triggered years of further legal expansion predicated on the licensing system.⁹ The colonies of the British Atlantic have a somewhat different history. In New England, marriage was secular for religious reasons: the Puritans so distrusted the papistical idea of marriage as a sacrament that they not only allotted the right to sanction unions to the magistrate, but also laid a taboo on such pagan corruptions as wedding rings. A seventeenth-century English satirical verse about the Massachusetts Puritans included a dig at their marriages:

But this, above all, to me wonder did bring,
To see a Magistrate marry, and had ne'r a ring;
[I] thought they would call me the woman to give,
But [I] think he stole her, for he askt no man leave.¹⁰

The Puritan secularization of marriage, of course, was not at all secular in the more modern sense; it derived from an attempt to purify the ordinances of the church, and not from any openness to the multiplicity of ideals and norms in private life. The explicit and strong theory that monogamous coupling was divinely mandated and necessary for any orderly society remained unchallenged. Native and other rival sexualities were ruthlessly suppressed, and in later years American missionaries would carry that work of suppression to all parts of the world. The aggressive agenda of Christianization thus supported the state sanctioning of marriage.

It is not quite clear to me, in the American case, when this theological conception of secular marriage came to be overlaid with the more distinctively secular business of state-based licensing and regulating systems; it seems to have been a long, diffuse process. By the time a web of licenses and regulation had come to be seen as essential to the nature of marriage, however, the original Puritan rationale for its removal from the church—fear of papistical control—had long since faded. Ministers were back in the marrying business. It may well be that America has never experienced a moment when the state

9. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1767–68 (2005).

10. A WEST-COUNTRY MAN'S VOYAGE TO NEW ENGLAND (ca. 1632), reprinted in THE ENGLISH LITERATURES OF AMERICA, 1500–1800, at 533 (Myra Jehlen & Michael Warner eds., 1997).

codified marriage using a consistent rationale.

II

THE COURTS' STRUGGLE TO DEFEND MARRIAGE

Writing with simplicity and clarity, Professor Nussbaum has managed to do what is evidently a very tricky thing, since so few others in the debate have managed to do it: she has separated the equality and due process issues from the question of a "right to marry." She begins her discussion by distinguishing three aspects of marriage: the civil rights questions, the expressive performance, and the religious sanction. She notes that the current debates have mostly moved away from civil rights issues. Civil unions and domestic partnership laws, created as alternatives to gay marriage, have obviously been intended to sequester the question of obligations and entitlements from the issue of symbolization. She also says that the religious questions are not the center of the debate, not only because the religious traditions have their own internal arguments over this, but also because the legal questions are presumed to be separate. (In fact, I have already suggested that the secularity of the question has historically been much more complicated than this, and I think it remains so, as I'll suggest in a moment.)

To put my cards on the table, I wholly agree with Professor Nussbaum's position that:

[S]o long as the state is in the marrying business, concerns with equality require it to offer marriage to same-sex couples—but . . . it would be a lot better, as a matter of both political theory and public policy, if the state withdrew from the marrying business, leaving the expressive domain to religions and to other private groups, and offering civil unions to both same-and opposite-sex couples.¹¹

My concern, however, is that the rhetoric of the same-sex marriage movement inhibits recognition of the inherent inequalities produced by marriage. I see a persistent blindness to equality concerns in all three areas when people argue for marriage.

In the civil rights area, this can be quite striking. Take for example the recent Iowa decision. The decision reviews the evidence of inequality in civil rights:

Various plaintiffs told of the inability to share in their partners' state-provided health insurance, public-employee pension benefits, and many private-employer-provided benefits and protections. They also explained how several tax benefits are denied. Adoption proceedings are also more cumbersome and expensive for unmarried partners. Other obstacles presented by the inability to enter into a civil marriage include numerous nongovernmental benefits of marriage that are so

11. Nussbaum, *supra* note 5, at 672.

common in daily life they often go unnoticed, such as something so simple as spousal health club memberships. Yet, perhaps the ultimate disadvantage expressed in the testimony of the plaintiffs is the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage.¹²

Neither the plaintiffs nor the court seem to have considered that all of these civil inequalities will continue to exist after the extension of marriage to same-sex couples. Marriage before this decision excluded same-sex couples from all the benefits addressed by the court. However, it also excluded all unmarried or divorced people, or people with multiple partners, and it continues to do so after the decision. Why? Don't ask.

More peculiar are the reasons for marriage that Professor Nussbaum categorizes as expressive. The folk theory that marital law exists to confer "the personal and public affirmation that accompanies marriage" is an assumption largely shared by both the proponents and opponents of gay marriage. Gay people rightly bristle at the implication that their intimate relationships are less worthy than heterosexual couplings. Yet despite struggling against discrimination themselves, many gay people do not seem troubled by any implication that the only relationships deserving personal and public affirmation are marriages. And they do not seem troubled by the assumption that the agency of this affirmation should be the state.

These same issues inadvertently come out in *Kerrigan*, the Connecticut marriage decision.¹³ On its face, there is much to like about this decision, particularly its analysis of equality, discrimination, and power. Also prominent is the passage in which the court dismantles the defendants' astonishing argument that "our laws are facially neutral" with respect to sexual orientation, "because they treat homosexual and heterosexual persons alike by providing that anyone who wishes to marry may do so with a person of the opposite sex."¹⁴

However, the decision has its own moments of circular logic, and at the heart of the case is an unresolved contradiction that I think will haunt the cause of marriage reform going forward:

"We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it *a status and significance* that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm."¹⁵

This is elaborated a bit later: "Plaintiffs," the court writes, "contend that

12. *Varnum v. Brien*, 763 N.W.2d 862, 873 (Iowa 2009).

13. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

14. *Id.* at 414.

15. *Id.* at 412 (emphasis added).

marriage is not simply a term denominating a bundle of legal rights. Rather, they contend that it is an institution of unique and enduring importance in our society, one that carries with it a special status.”¹⁶

Marriage *is*, however, a bundle of legal rights—a big, messy, largely irrational bundling of obligations and privileges that have no necessary relation to coupling—from access to health care to shared property and taxes.¹⁷ The *Kerrigan* court argues against this view because if marriage is seen essentially as bundling—that is, as a complex regulatory program by which government tries to incentivize certain ways of living over others—there would be no constitutionally relevant grievance. Therefore, instead of all the hundreds or thousands of legal provisions that together constitute the practical meaning of marriage, the court focuses on the “special status” thought to underlie all these provisions.

Denial of this *status* constitutes the harm that the decision seeks to redress. Why should marriage have this status? Oddly, the court does not ask this question, though it goes out of its way to criticize the traditionalist arguments in *Bowers*.¹⁸ The *Kerrigan* court deploys religion, just as in *Bowers*, to explain the special status and significance of marriage, and thus authorizes itself to recognize a sacralization that religion itself is apparently thought to be no longer capable of conferring.¹⁹

This in itself is a staggering phenomenon. One might notice here the crypto-Christianity of the law’s being in this business at all. The Hardwicke Act of 1753 was explicitly political-theological, expanding the activities of the established church in conjunction with the then-burgeoning state bureaucracy. American law is at least theoretically disestablished. But almost everyone who wants the privileges and benefits of marriage extended beyond heterosexual couples wants the sacralization effect. It is stunning to observe the unanimity with which people agree that churches, synagogues, and mosques do not in themselves have the power of solemnization that is so widely cited as the principal object of marrying.

The *Kerrigan* opinion approvingly cites *Griswold* to the effect that marriage is “intimate to the degree of being sacred,”²⁰ though of course later decisions expanded the rights of *Griswold* to unmarried persons. The decision also approvingly cites *Goodridge*, reiterating that “[c]ivil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and

16. *Id.* at 416; see WARNER, *supra* note 3.

17. See WARNER, *supra* note 3.

18. *Kerrigan*, 957 A.2d at 433–34 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled on other grounds by* *Lawrence v. Texas*, 539 U.S. 558 (2003)).

19. *Id.* at 416 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)) (“[M]arriage has been characterized as ‘intimate to the degree of being sacred.’”).

20. *Id.*

family.”²¹ A system that only acknowledges heterosexual marriages thus denies same-sex couples the “equal dignity and respect” that it finds constitutionally guaranteed. The court does not contemplate the implied differential of dignity and respect for all other public forms of mutuality, such as companionship, intimacy, fidelity, and family. (Elsewhere, “exclusivity” is named as one of the intrinsic virtues of marriage.) This is not a subsidiary argument in the decision—it is the central argument that exclusion from marriage constitutes a harm. Marriage “is an institution of transcendent historical, cultural and social significance,” whereas civil unions are not. The law must confer that which transcends law.²²

The language of the transcendent here stands in sharp contrast to the analysis of power in a later section of the decision. It also, to my mind, stands in contrast to the way the dignity concerns of *Lawrence*²³ and the equality concerns of *Casey*²⁴ are considered. The *Kerrigan* court, by way of *Lawrence*, quoted *Casey*, which states that “[a]t 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,” without imagining the possible consequence that there might be a diversity of transcendent values attached to intimacy.²⁵ The court quotes *Lawrence* to the effect that “the protected right of homosexual adults to engage in intimate, consensual conduct [represents] an integral part of human freedom,”²⁶ and adds that “individual decisions by consenting adults concerning the intimacies of their physical relationships are entitled to constitutional protection.”²⁷ As noted in *Kerrigan*, *Lawrence* expressly endorsed a portion of Justice Stevens’s dissent in *Bowers*, which explained that “this protection extends to intimate choices by unmarried as well as married persons.”²⁸

Thus we find an odd contradiction running throughout the *Kerrigan* opinion, even though it is one of the most carefully reasoned decisions in this area of law. On one hand, it moves consistently to ground the marital rights claim in basic norms that run across the married/unmarried distinction—norms that apply to all individuals, such as the privacy of intimate associations. At the same time, the court attributes a transcendent meaning to marriage. It defines that transcendent meaning as a special public formalization of the very values of intimacy, companionship, mutuality, and care that it also describes as irreducibly variable.

21. *Id.* at 417 (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003)).

22. *Id.* at 418.

23. *Lawrence v. Texas*, 539 U.S. 558 (2003).

24. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

25. *Kerrigan*, 957 A.2d at 466 (quoting *Lawrence v. Texas*, 539 U.S. 558, 573–74 (2003)).

26. *Id.* at 438 (quoting *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003)).

27. *Id.*

28. *Id.* at 466 (quoting *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003)).

CONCLUSION

If the equality issues Professor Nussbaum highlights are really seen as the core of the same-sex marriage debate, then sooner or later we will decide that the state should withdraw from the marrying business, “leaving the expressive domain to the religions and to other private groups, and offering civil unions to both same- and opposite-sex couples.”²⁹ However, the politics of same-sex marriage is likely to remain intractable as long as both sides seek from state-sanctioned marriage what is essentially a sacralization. The opponents of same-sex marriage are generally more explicit—outside the courtroom, at least—that sacralization is what they are after, although they often have to find other ways of arguing in court. Same-sex marriage advocates more typically describe an effect of sacralization in nominally secular terms, such as “special status” and “transcendent significance.” Because they feel that they need to emphasize these mystical qualities in order to claim that civil unions are inadequate, the advocates’ position is oddly parasitic on—or at least uncritical of—a sacred state.

Many gay people have no doubt fully internalized the view of state licensing as actually providing a consecration that supercedes law. But I suspect that many others, if pressed, would explain the sacralization effect as instrumental. What advocates for gay marriage are seeking, they might say, is a political shortcut to dignity and respect from straight people through the granting of marriage rights. Many people respect the consecration of marriage, in other words, and it is this respect that many gay people might be seeking, more than the consecration per se. The benefits of marriage will follow for them, not so much because they see the state as having intrinsic powers of consecration, but because so many other people in society view the state in this way. There is a kind of circularity in this thinking; and to argue for gay marriage on these grounds is to despair that respect can be compelled on any other terms.

29. Nussbaum, *supra* note 5, at 672.

