

# Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?

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At several points in her characteristically acute discussion of the debate swirling around same-sex marriage,<sup>1</sup> Professor Nussbaum suggests that perhaps the best solution to the current controversy is for the state to abandon the business of conferring marital status: “Might a good solution,” she asks, “be for the state to back out of the expressive domain altogether, offering civil unions for both same-sex and opposite-sex couples?”<sup>2</sup> The state would replace marriage with a new nomenclature for officially recognizing family relationships, one that would not carry the baggage of tradition that marriage trails behind it like a car with tin cans tied to its bumper after a wedding.

Professor Nussbaum’s tentative proposal raises a number of intriguing issues. First, is it actually possible for a state to “back out of the expressive domain altogether”? Second, does the Constitution impose any constraints on a state’s elimination of civil marriage?

I have some skepticism that, as a practical matter, a state can actually avoid the expressive domain. To be sure, official adoption of terms like “civil union” or “domestic partnership” might contribute to the emergence of familial arrangements that depart in material ways from one or more aspects of “traditional” marriage.<sup>3</sup> Calling a relationship a “civil” union, for example, can

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1. Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667 (2010).

2. *Id.* at 695; *see also id.* at 672 (observing that “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”).

3. As Professor Nussbaum shows, many of the features of marriage that opponents of same-sex marriage celebrate as “traditional” are quite recent arrivals. *See Nussbaum, supra* note 1, at 672–78.

highlight the fact that the recognition is secular rather than religious. More broadly, given the novelty of institutions such as civil unions or domestic partnerships, participants might find themselves thinking more self-consciously about how to arrange their lives than do couples who enter into an institution with a set of traditional expectations. But if this is so, then a state's move away from "marriage" to "civil union" *itself* becomes expressive: it communicates the message that alternative arrangements to marriage—or alternative ways of organizing families—are worthy of state support. Moreover, to the extent that reform simply substitutes some other word for "marriage" while continuing to provide special benefits to specified familial structures or organizations, over time the state will reenter the precise expressive domain from which Professor Nussbaum hopes to remove it: If couples in civil unions receive government benefits and legal protections that do not accrue to individuals in other relationships, this sends a message that civil unions are distinctively important or worthy bonds. For example, if a state provides health benefits to its employees' domestic partners, but not to their siblings or best friends, this itself expresses a constellation of views about the relative importance and dignity of these ties. Professor Nussbaum has good reasons to prefer that state-conferred dignity and benefits attach to forms of family organization that are more egalitarian and less hidebound than the conservative vision of marriage. But as long as government benefits and protections attach to some statuses and not to others, there will always be at least a subtle expressive dimension to government policy.<sup>4</sup>

In the remainder of this Comment, I focus on the more doctrinal question whether the Constitution permits a state to abolish the institution of civil marriage. At several points in her Essay, Professor Nussbaum assumes that states have this power: Because a state is not required to offer its citizens a "right to marry" in the first place, marriage is a status or institution that the state has discretion to abolish. Given this view, legal arguments center on whether some individual or group of individuals can be denied access to this gratuitously created status while it exists. Professor Nussbaum describes this as the "minimal" understanding of the right to marry: "[I]t just means that if the state chooses to offer a particular package of expressive and/or civil benefits under the name 'marriage,' it must make that package available to all who seek that status without discrimination."<sup>5</sup>

I think the answer to whether a state may abolish the institution of civil marriage is actually more complicated. Although the Supreme Court's "right to marry" cases did not directly confront this basic question, they invoke constitutional principles that suggest substantial constraints on states' ability to

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4. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591–96 (1983) (explaining that the federal government does not award tax-exempt status to racially discriminatory private schools because doing so would undercut a fundamental national commitment to nondiscrimination).

5. Nussbaum, *supra* note 1, at 686.

eliminate civil marriage.

Part I of this Comment suggests that antidiscrimination principles themselves place one significant limit on scrapping the institution of marriage as a response to gay couples' demands. A state's decision to abolish civil marriage may run afoul of the Equal Protection Clause if the decision is motivated by a desire to deny same-sex couples access to the institution. Even if the state were not required to create the institution of marriage in the first place, a decision to eliminate the institution for discriminatory reasons raises serious constitutional questions, in light of the general rule that the appropriate response to findings of impermissible discrimination is to provide the benefit at issue to the previously excluded group, rather than to withdraw the benefit from the previously advantaged class.

Part II then turns briefly to the question whether there is an affirmative "right to marry" that requires states to offer some form of official recognition for family relationships. The Supreme Court's substantive due process cases involving marriage, such as its foundational decision in *Loving v. Virginia*,<sup>6</sup> at least suggest that the freedom to marry—or at least the right of individuals to *some* form of official recognition for their family relationships—may be a liberty too fundamental to eliminate.

## I

### EQUALITY AND THE ABOLITION OF MARRIAGE

The leading Supreme Court decisions discussing the "right to marry" fit comfortably within a nondiscrimination perspective. In those cases, Virginia, Wisconsin, and Missouri already had in place a state-recognized institution of marriage. The question before the Court was simply whether certain groups—interracial couples in *Loving v. Virginia*,<sup>7</sup> individuals who owed child support in *Zablocki v. Redhail*,<sup>8</sup> or prisoners in *Turner v. Safley*<sup>9</sup>—should enjoy a right already available to other individuals.

In this view, even if marriage is very important, it is a contingent right because its existence depends on state action. It thus stands in significant contrast to many of the other aspects of intimate decisionmaking accorded constitutional protection. At least as a matter of current constitutional doctrine, the fundamental right to bear (or not to bear) a child,<sup>10</sup> or the right to practice one's religion, are best described as "negative" rights:<sup>11</sup> they consist in

6. *Loving v. Virginia*, 388 U.S. 1 (1967).

7. *Id.*

8. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

9. *Turner v. Safley*, 482 U.S. 78 (1987).

10. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (joint opinion) (describing decisions about family and parenthood as involving fundamental liberty interests); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (involuntary sterilization deprives individuals of "one of the basic civil rights of man" and "a basic liberty").

11. I borrow this term from Sir Isaiah Berlin. ISAAH BERLIN, *Two Concepts of Liberty*, in

“warding off interference”<sup>12</sup> from the state. They are not “affirmative” rights that the state has some duty to facilitate. Thus, the government has no constitutional obligation to provide individuals with reproductive health services or funds to go on religiously mandated pilgrimages.<sup>13</sup> The ability of people to exercise those rights does not depend directly on positive action by the government. The conventional grouping of many rights regarding intimate association under the rubric of “privacy” reflects this critical feature.

By contrast, other fundamental rights—such as the right of access to the courts or the right to vote—could not exist in a state of nature and depend on the government’s having created an institution to which individuals then demand access. For example, there is no federal constitutional requirement that any particular state office be filled through election.<sup>14</sup> Nonetheless, “[o]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”<sup>15</sup> Similarly, there is no federal constitutional requirement that states create judicial systems (although the constitutional structure certainly presupposes that they will). But “[a]lthough the Federal Constitution guarantees no right to appellate review, . . . once a State affords that right . . . the State may not ‘bolt the door to equal justice’” by denying access to indigent litigants.<sup>16</sup>

The relatively spare version of the antidiscrimination principle that

FOUR ESSAYS ON LIBERTY 118–72 (1969).

12. *Id.* at 127.

13. There is, of course, a rich critique of the treatment of many of these rights as involving only a negative liberty interest and no corresponding obligation on the part of the government to enable individuals to exercise them effectively (for example, indigent women may be unable to exercise their right to terminate a pregnancy absent government-provided medical care). *See, e.g.,* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 384–85 (1985). But for present purposes, the point holds: the existing legal regime assumes that the relevant question is not whether government *provides* these rights but rather whether government can *interfere* with rights that individuals would otherwise have the power to exercise.

14. *See, e.g.,* *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967) (finding “no constitutional reason” why states could not fill many public offices through appointment); *Fortson v. Morris*, 385 U.S. 231 (1966) (upholding a Georgia constitutional provision that directed, under certain circumstances, that the legislature, rather than the electorate, choose the state’s governor). The Constitution does expressly provide for election for Members of Congress. U.S. CONST. art. I, § 2 (directing that members of the House of Representatives be “chosen...by the People” and referring to the “People” who do the choosing as “Electors”); *id.* amend. XVII (providing that Senators shall be “elected by the people” of the states). And the Constitution assumes that states will at least have an elected legislature, since Article I, Section 2 provides that the eligible electorate for seats in the House of Representatives shall consist of persons having the “[q]ualifications requisite for Electors of the most numerous Branch of the State Legislature.” *Id.* art. I, § 2; *see also id.* art. IV, § 4 (guaranteeing to each state a “Republican Form of Government”).

15. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966) (italics omitted); *see also* Nussbaum, *supra* note 1, at 688 (discussing the right to vote as a contingent right).

16. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

Professor Nussbaum draws from the Court's marriage cases and deploys in her argument takes as its starting point a fixed institution of marriage and asks only whether states must make that institution available on a nondiscriminatory basis to same-sex couples. But if the institution of marriage is truly contingent, there are potentially two ways to fulfill a mandate of nondiscriminatory treatment: a state could extend the right to marry to same-sex couples or it could withdraw that right from opposite-sex couples. Theoretically, either course would treat both groups equally.

As I have explained elsewhere, in cases involving so-called fundamental rights equal protection claims, the plaintiffs seek to acquire some important government-created benefit that members of a dominant group already enjoy. The normal response to a finding of impermissible discrimination is to remedy the inequality by providing that benefit to the previously excluded group ("leveling up") rather than by depriving the previously advantaged group ("leveling down").<sup>17</sup> This response makes sense to the extent that the dominant group initially provided itself with the benefit because of its intrinsic value, and not out of a bare desire simply to have something others lacked. The Equal Protection Clause forces the majority to treat the minority the same way it treats itself.<sup>18</sup> This assumption is reflected in Justice Jackson's famous concurrence in *Railway Express Agency v. New York*<sup>19</sup> and Paul Brest's theory that the Equal Protection Clause is meant to address selective sympathy or indifference.<sup>20</sup>

In the abstract, of course, a government could comply with its

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17. I lay out the contrast between "leveling up" and "leveling down" remedies in Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027–29 (1998). I apply this framework to voting-related issues in Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1363–64 (2001). For an extensive discussion of leveling down across a range of areas of constitutional law, see Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004). Cf. Heckler v. Mathews, 465 U.S. 728 (1984) (involving a challenge to a Social Security Act provision whose severability clause provided that if a gender-based distinction were held invalid, the relevant benefits would be denied to women, rather than extended to men).

18. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("[T]he *Equal Protection Clause* . . . requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.").

19. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

*Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

20. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976).

responsibilities by leveling downward instead. But in constitutional practice, there are serious problems with doing so, particularly if the motive behind the downward leveling is a desire to deprive the previously excluded group from a long-enjoyed benefit. In *Romer v. Evans*,<sup>21</sup> the Supreme Court reaffirmed that “a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>22</sup> And it applied that principle to legislation directed at gay people. Thus, if a state were to abolish marriage because it wanted to deny same-sex couples the dignity and public approval that access to civil marriage has conferred, that motive would itself be impermissible and would taint the state’s abandonment of the field.

The Supreme Court has interpreted the antidiscrimination principle to prohibit this sort of retrogression in various areas of constitutional law.<sup>23</sup> Perhaps the most pointed analogy to leveling down in the context of marriage equality involves Prince Edward County, Virginia, one of the five jurisdictions whose school systems were part of the *Brown v. Board of Education* litigation.<sup>24</sup> Following the Supreme Court’s decisions in *Brown*, the county, faced with the prospect of having to desegregate its schools, responded by simply shutting them down altogether.

In *Griffin v. Prince Edward County*,<sup>25</sup> however, the Supreme Court held that the federal district court had the power to order the county to reopen, and to fund, its public schools. The Court recognized that states had “wide discretion” in deciding whether to provide public education.<sup>26</sup> But it concluded that “[w]hatever nonracial grounds might support a State’s allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.”<sup>27</sup> Particularly in light of the fact that the county’s closure came in response to a judicial order requiring equal access to the existing school system, the county’s action was impermissible.

Similarly, in the electoral arena, the Supreme Court held in *Allen v. State Board of Elections*<sup>28</sup> that a state’s decision to switch from filling public offices by election to filling them by appointment could constitute impermissible racial discrimination if the reason for the change was a desire to prevent an emerging majority-black electorate from gaining the political power to which it might

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21. *Romer v. Evans*, 517 U.S. 620 (1996).

22. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (ellipses in original; italics omitted)).

23. See generally John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211 (1998).

24. For discussions of the Prince Edward County experience, see RICHARD KLUGER, *SIMPLE JUSTICE* 450–79, 778 (Vintage Books 2004) (1976); BOB SMITH, *THEY CLOSED THEIR SCHOOLS* (1965).

25. *Griffin v. County Sch. Bd. of Educ.*, 377 U.S. 218 (1964).

26. *Id.* at 231.

27. *Id.*

28. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

otherwise have aspired under the preexisting system.<sup>29</sup>

Finally, the Supreme Court has approached some First Amendment issues by treating an originally contingent baseline as fixed. In *Board of Education of Island Trees v. Pico*,<sup>30</sup> for example, the Court held that even though school boards have virtually plenary discretion in deciding which “books to add to the libraries of their schools,” they cannot “remove” books “from school library shelves simply because they dislike the ideas contained in those books.”<sup>31</sup> Such targeted removal would constitute impermissible viewpoint discrimination.

In short, when it comes to constitutional law, motive matters. There are certainly progressive arguments for ending civil marriage, rather than amending it. However, it might be hard to escape the conclusion in some jurisdictions that leveling down would occur not to create a more egalitarian society, but rather to resist gay people’s claims for equality and to accommodate the desire of opponents of same-sex marriage that the state not extend the status to same-sex couples.<sup>32</sup> And doctrine tells us that, as a legislative motivation, majoritarian spitefulness can be as constitutionally problematic as majoritarian disgust.

To be sure, leveling down is not per se impermissible. For example, in the notorious Jackson, Mississippi, pools case, *Palmer v. Thompson*,<sup>33</sup> the Supreme Court upheld the city’s decision to close its public swimming pools shortly after it was ordered to desegregate all public recreational facilities.<sup>34</sup> But it is unclear whether *Palmer* would be decided the same way today: the Court’s decision rested in substantial part on the since-eroded proposition that the motive or purpose behind a law is irrelevant to its constitutionality.<sup>35</sup> Today, of course, it is black-letter law that a showing of discriminatory purpose is the linchpin of an equal protection claim alleging impermissible group-based discrimination.<sup>36</sup> In any event, the very rarity of cases like *Palmer v. Thompson*

29. See *id.* at 569–70. For an account of the racially discriminatory impetus for Mississippi’s decision to switch from electing to appointing school superintendents immediately following passage of the Voting Rights Act, see FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, at 55–58 (1990).

30. Bd. of Educ., *Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

31. *Id.* at 871–72 (emphasis in original).

32. Consider that in the wake of the Iowa and California Supreme Courts’ decisions requiring marriage equality, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) and *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), several local officials responsible for issuing marriage licenses or performing marriages announced their intention not to issue any licenses, rather than to issue marriage licenses to same-sex couples. See, e.g., Jason Clayworth, *Iowa Judge To Stop Performing Marriages*, *DES MOINES REGISTER*, Apr. 23, 2009, at 1; Cecilia M. Vega, *Straight Couples Rush To Wed As Kern County Ends Civil Ceremonies*, *S.F. CHRONICLE*, June 13, 2008, at A1.

33. *Palmer v. Thompson*, 403 U.S. 217 (1971).

34. *Id.* at 219, 224–26.

35. See *id.* at 224–25.

36. *Washington v. Davis*, 426 U.S. 229, 240 (1976) (holding that under the Equal Protection Clause, “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose”).

or the equally notorious and more recent example of *Bush v. Gore*<sup>37</sup>—where the Supreme Court purported to remedy the equal protection problem that arose from the use of different standards in counting ballots by halting the recount rather than requiring that all ballots be counted under the same standard<sup>38</sup>—suggests the powerful force that the remedy of leveling up exerts on antidiscrimination claims.

Thus, it seems to me that a government's decision to abolish civil marriage, rather than to extend it on a nondiscriminatory basis to same-sex couples, would run afoul of antidiscrimination principles if the motive for that decision were a desire to deny the benefits of marriage to same-sex couples. That is, once a court decides that same-sex couples are entitled to equality under the law, leveling down because of spite becomes constitutionally problematic. Simultaneously denying access to marriage to as-yet unmarried opposite-sex couples would not save the decision from constitutional infirmity.

## II

### LIBERTY AND THE ABOLITION OF MARRIAGE

Suppose Professor Nussbaum convinced a jurisdiction to abolish marriage on the principle that we would be better off adopting a new form of official recognition free from the baggage of traditional marriage. Would individuals, either gay or straight, be able to challenge *this* decision as violating a fundamental liberty protected by the Due Process Clause?

Professor Nussbaum is certainly right that a state is not required to offer any particular package of benefits as part of its institution of marriage.<sup>39</sup> However, that the incidents of marriage have changed over time, and will continue to change, does not wholly answer the question. Whether a state may take what Professor Nussbaum recognizes as the “extrem[e]” steps of eliminating marriage and adopting “a regime of private contract for marriages, in which the state would play the same role it plays in any other contractual process,”<sup>40</sup> presumably placing the burden of negotiating all the contract terms on the individuals involved, remains unanswered.

The California Supreme Court's recent decision in the wake of Proposition 8<sup>41</sup> suggests the outlines of a liberty-based argument that would require states to offer some form of official recognition and protection for family relationships. In its previous decision, holding that California's statutory

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37. *Bush v. Gore*, 531 U.S. 98 (2000).

38. See Pamela S. Karlan, *The Newest Equal Protection: Regressive Doctrine on a Changeable Court*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* 77, 83–90 (Cass R. Sunstein & Richard A. Epstein eds.) (2001).

39. See Nussbaum, *supra* note 1, at 694.

40. *Id.* at 688.

41. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

restriction of marriage to opposite-sex couples violated the state constitution,<sup>42</sup> the California court had stated that “the right to marry, as embodied in Article I, Sections 1 and 7 of the California Constitution”—which protect liberty<sup>43</sup>—“guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.”<sup>44</sup> Faced with a voter initiative that reinstated and constitutionalized the definition of marriage as a union between a man and a woman, the California court insisted that whether or not the “term ‘marriage’”<sup>45</sup> should be used to describe a same-sex couple’s relationship, such couples continue to enjoy the “liberty” protected by the California Constitution’s due process clause. The clause continues to require a substantive “opportunity [for] an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities.”<sup>46</sup>

To be sure, the California court does not entirely answer the question,<sup>47</sup> for its analysis presupposes that the state will continue to offer *some* form of official recognition and protection to *some* families. But it seems almost inconceivable that any state would abandon the field of family recognition, protection, and regulation altogether. Particularly in contemporary society, where a passel of benefits and obligations depends on official recognition of family relationships, it is hard to imagine a government stepping out of the arena altogether and leaving individuals to negotiate their obligations to support children, their rights to employee benefits, and their divisions of property without any default rules set by the state.

More generally, at some point, the government’s unbroken historical

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42. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

43. See CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”); *id.* art. I, § 7 (providing, in pertinent part that “[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws” and that “[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens”).

44. *In re Marriage Cases*, 183 P.3d at 388.

45. *Strauss*, 207 P.3d at 404.

46. *Id.* at 404 (emphasis in the original).

47. The California Supreme Court ordered the parties in *In re Marriage Cases* to brief the question whether the Legislature could, consistent with the California Constitution, abandon the term “marriage” altogether and simply preserve the underlying rights and obligations that are now associated with marriage under a new nomenclature. See Order in *In re Marriage Cases* (Cal. June 20, 2007), available at <http://www.courtinfo.ca.gov/courts/minutes/documents/SJUN2007.PDF> (“Do the terms ‘marriage’ or ‘marry’ themselves have constitutional significance under the California Constitution? Could the Legislature, consistent with the California Constitution, change the name of the legal relationship of ‘marriage’ to some other name, assuming the legislation preserved all of the rights and obligations that are now associated with marriage?”).

practice of providing official recognition and protection to family relationships has hardened into a liberty interest. Consider, in this regard, the Supreme Court's often-cited decision in *Meyer v. Nebraska*<sup>48</sup> regarding the liberty protected by the Due Process Clause:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>49</sup>

Whether the state was required to create marriage in the first place, marriage has since become a privilege essential to happiness. In that sense, it fits Justice Harlan's influential description in *Poe v. Ullman* of the scope of liberty protected by the Due Process Clause as reflecting deeply rooted principles and "[c]onstitutional purposes, as they have been rationally perceived and historically developed."<sup>50</sup>

Having come to occupy a central position in the spectrum of liberties essential to human freedom, marriage has become more than simply a contingent right or a gratuitous status. Consider the uproar that occurred in 2004 when Benton County, Oregon, decided to stop issuing marriage licenses in the face of an Oregon law that restricted licenses to opposite-sex couples.<sup>51</sup> As Justice Holmes once remarked,

[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.<sup>52</sup>

While states can create additional statuses beyond marriage—either self-consciously innovative institutions such as civil unions and domestic partnerships, or more avowedly reactive institutions such as Louisiana's "covenant marriage"<sup>53</sup>—the almost insurmountable political obstacles to

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48. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

49. *Id.* at 399.

50. *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

51. See Kate Zernike, *Gay? No Marriage License Here. Straight? Ditto.*, N.Y. TIMES, Mar. 27, 2004, at A8.

52. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

53. See LA. REV. STAT. § 9:272 (2009). Louisiana's Covenant Marriage Act established a new category of marriages—covenant marriages—that were both more difficult to enter into, because parties were required to undergo and provide evidence of premarital counseling, and more difficult to exit, because the grounds for divorce were sharply limited. See Jeanne Louise Carriere,

eliminating “marriage” from the statute books offer a powerful illustration of why the “right to marry” has come to be at least a quasi-affirmative right: one which the state has some obligation at least to record. The “(equal) liberty in setting up households” that Professor Nussbaum recognizes<sup>54</sup> may depend in our times on the state’s recognition and protection of those households.

#### CONCLUSION

Mae West once remarked that “marriage is a great institution, but I’m not ready for an institution yet.”<sup>55</sup> The converse may also be true: even if marriage is often a troubling institution for many of the reasons Professor Nussbaum trenchantly explores, we may face significant constitutional constraints on the ability to abandon it. Regardless of whether states were initially required to create the institution, it is now understood as a fundamental liberty. To abolish marriage rather than to extend it to same-sex couples raises serious issues under the nondiscrimination and nonretrogression principles embodied in contemporary constitutional law.

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*“It’s Déjà Vu All Over Again”*: *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701 (1998) (describing Louisiana’s new legal regime). The covenant marriage movement represents a self-conscious reaction to the liberalization of divorce and other changes in marriage, family structure, and gender relations that occurred in the 1960s and 1970s. See generally Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 606, 628 (2005) (charging, in an article by one of the authors of the Louisiana law, that “the air and vigor has been ‘sucked out’ of the nascent national discussion of marriage” and arguing that covenant marriage offers “those who belong to a religious community or those who adhere to traditional morality, a safe haven from the post-modern, dominant culture”).

54. See Nussbaum, *supra* note 1, at 695.

55. JILL WATTS, MAE WEST: AN ICON IN BLACK AND WHITE 107 (2001).

