

In many cultures, marriage has been arranged by parents, frequently without their children's input or consent. It has more often been understood as an economic alliance between families, specifying rules for inheritance and division of labor, than as a romantic commitment between spouses: indeed, the romantic view of marriage is a relatively recent invention. It virtually always imposes sexual norms, though these vary from culture to culture. At times it has been deeply oppressive to women, treating them as the property of their fathers and husbands. For example, ancient Assyrian law declared that "a man may flog his wife, pluck her hair, strike her and mutilate her ears. There is no guilt."¹⁴

Marital living-arrangements vary considerably, as do parenting responsibilities. In some cultures, husbands and wives reside in separate homes, with their children raised by one spouse's family. In others, children are cared for collectively by the tribe. As historian Stephanie Coontz reports, "When Jesuit missionaries from France first encountered the North American Montagnais-Naskapi Indians in the early seventeenth century, they were shocked by the native women's sexual freedom. One missionary warned a Naskapi man that if he did not impose tighter controls on his wife, he would never know for sure which of the children she bore belonged to him. The Indian was equally shocked that this mattered to Europeans. 'You French people,' he replied, 'love only your own children; but we love all the children of our tribe.'"¹⁵

Sometimes marriage is ceremonially formalized; other times it is not. It is usually presumptively lifelong, with varying degrees of tolerance for divorce. Yet some Arabic cultures have permitted *mut'a*, or temporary marriages, where traveling men could acquire a "wife for a day" in order to have a sexual partner without incurring penalties for nonmarital sex. Any children born of these marriages are considered legitimate.¹⁶

Only one recorded culture, the Na people of the Yunnan Province of southwestern China, appears not to practice marriage

in any form.¹⁷ Instead, brothers and sisters live together, jointly raising the children born from casual sexual encounters with outsiders. (Incest is strictly forbidden.) While the Na have rules and customs related to sex, child-rearing, inheritance, household division of labor, and so on, they lack one key feature seen in every marriage culture: *in-laws*. (Some readers are no doubt thinking, “Sexual freedom and no in-laws? Sign me up!”)

Same-sex marriages have been documented in a handful of cultures, notably in African and Native American cultures.¹⁸ Significantly, these groups grant such marriages the same legitimacy as heterosexual marriages, and they use the same terminology for both.¹⁹ Consider the following account from the anthropologist Edward Evans-Pritchard, published in 1951, regarding the Nuer people of East Africa:

What seems to us, but not at all to Nuer, a somewhat strange union is that in which a woman marries another woman and counts as the pater [father] of the children born of the wife. Such marriages are by no means uncommon in Nuerland, and they must be regarded as a form of simple legal marriage, for the woman-husband marries her wife in exactly the same way as a man marries a woman. When the marriage rites have been completed the [woman-]husband gets a male kinsman or friend or neighbor, sometimes a poor Dinka, to beget children by her wife and to assist, regularly or when assistance is particularly required, in those tasks of the home for the carrying out of which a man is necessary. When the daughters of the marriage are married he will receive for each a “cow of the begetting” and more beasts if he has played any considerable part in the maintenance of the home.²⁰

Opponents sometimes respond that other cultures’ same-sex marriages are different from “gay marriage,” in part because they regularly involve a kind of gender transformation of one partner: a man “plays the wife” or a woman “plays the husband.”

But this response is a red herring. Sure, same-sex marriages in these cultures look different from ours in various respects—but so do their heterosexual marriages. In particular, their marriages (both heterosexual and homosexual) tend to exhibit strict gender roles in a manner that is increasingly uncommon in the West. In any case, it is doubtful that opponents would abandon their objection to contemporary same-sex marriages as long as partners agreed to adopt complementary gender roles.

Note, too, the circularity in the opponents' approach: they base the question of whether same-sex marriage is legitimate on the issue of whether it occurs throughout history, and then they refuse to recognize any same-sex unions in history as legitimate same-sex marriages, simply because they do not conform to contemporary patterns of marriage. They also ignore the problem of historical censorship. The fact that gay and lesbian lives tend to be erased from recorded history complicates claims about the way marriage has been "always and everywhere."

So the history of marriage shows that no argument for marriage's future can be limited to looking at its past. Marriage's history is various and complex, and it often diverges from the egalitarian, monogamous male-female union that we tend to think of as "traditional." Moreover, there's a difference between *how marriage has been* and *how it should be now*. Even if same-sex marriage were an entirely new idea—which it is not—that fact by itself wouldn't make it better or worse than old ideas: like any proposal, it needs to be evaluated on its merits.

But can we really evaluate marriage on its merits? There is another, more sophisticated way to understand the Argument from Tradition, and it challenges the presumption that we can step back and scrutinize marriage's logic in the requisite way. The argument has been expressed most clearly by marriage-equality advocate Jonathan Rauch, who calls it a Hayekian argument, after the award-winning economist Friedrich August von Hayek.²¹ The idea is that our customs and traditions have a kind

of internal practical logic to them, encoding far more information than any individual mind can process. This logic may not always be transparent. But the tradition evolved the way it did for a reason, and we tamper with it at our peril.

It is worth noting that, from the fact that something evolved as it did for a reason, it does not follow that it evolved as it did for a *good* reason. I am reminded here of the old Craig Claiborne story about the woman who received a ham and was disappointed that she didn't own a saw.²² Although she had never cooked a whole ham, she knew that her mother always prepared hams for cooking by sawing off the end, and she assumed it had to be done this way. So she called her mother, who explained that she learned to cook from her mother, who always did it that way—she had no idea why. Perplexed, the pair then called the grandmother and asked, “Why did you always saw the ends off of hams before roasting them?”

Surprised, the grandmother replied, “Because I never had a roasting pan large enough to hold a whole ham.”

My point is that the Hayekian argument against same-sex marriage requires several leaps of faith. It assumes not only that there is a good underlying rationale for our exclusively heterosexual notion of marriage, but also that the rationale still applies—not just for maintaining heterosexual marriage but also for prohibiting same-sex marriage. After all, no one is arguing that same-sex marriage become *mandatory*. Whatever reasons there are for marriage's evolution might continue to operate—indeed, might even be better served—by maintaining marriage for straight couples while simultaneously extending it to gay and lesbian couples.

Rauch goes on to explain that the Hayekian argument can be understood in two ways. In its strong form, it states that we should never tamper with tradition—but that form, clearly, is untenable. Many obviously flawed institutions, and some outright evil ones (such as slavery), are part of our tradition. In its

moderate form the argument states that, when modifying long-standing tradition, we should proceed with caution. I agree, as does Rauch. But we should not confuse a reasonable caution with obstinacy or complacency. Marriage has changed in many ways over the centuries—often for the better—and the history of debates over those changes is filled with Chicken-Little-type warnings. E. J. Graff captures the panic nicely, quoting from jurists, church leaders, and others in those prior debates:

Naturally, conservatives are dragging out the rhetoric that has been hurled against every marriage change...Allowing same-sex marriage would be like allowing married women to own property, “virtually destroying the moral and social efficacy of the marriage institution.” Or it would be like legalizing contraception, which “is not what the God of nature and grace, in His Divine wisdom, ordained marriage to be; but the lustful indulgence of man and woman.... Religion shudders at the wild orgy of atheism and immorality the situation forebodes.” Or it would be like recognizing marriage between the races, a concept so “revolting, disgraceful, and almost bestial” that it would lead directly to “the father living with his daughter, the son with the mother, the brother with his sister, in lawful wedlock”—and bring forth children who would be “sickly, effeminate, and...inferior.” Or it would be like making wives the legal equals of their husbands, a proposal that “criticizes the Bible...degrading the holy bonds of matrimony into a mere civil contract...striking at the root of those divinely ordained principles upon which is built the superstructure of society.” Or it would be like allowing divorce, “tantamount to polygamy,” thereby throwing “the whole community...into a general prostitution,” making us all “loathsome, abandoned wretches, and the offspring of Sodom and Gomorrah.”²³

When Gallagher writes that allowing same-sex marriage means “losing American civilization,” it is hard not to suspect similar

fearmongering.²⁴ As Graff's quotations make clear, previous generations saw many changes as disastrous to the meaning and future of marriage. And yet, not only does marriage endure, it is arguably better for these changes.

Meanwhile, not allowing same-sex couples to marry has consequences as well, consequences that can at times be devastating. Exclusion from marriage is no small deprivation.

The Definitional Objection

Which brings us to the Definitional Objection. According to this objection, what we are denying to gays is not *marriage*, since marriage is by definition the union of a man and a woman. Sure, we could call Boyd and Josh's union a "marriage," but we ought to use scare quotes when doing so, since a same-sex union can in fact no more qualify as marriage than a union between a man and a bicycle—that's just not what marriage *is*. Like Abraham Lincoln, who reportedly asked "How many legs would a dog have if we called its tail a leg?" and then insisted (correctly) that the answer is four, proponents of the Definitional Objection claim that calling same-sex unions "marriages" involves a conceptual error.²⁵ As Gallagher puts it, "Politicians can pass a bill saying a chicken is a duck and that doesn't make it true. Truth matters."²⁶

The Definitional Objection is one of those areas where each side tends to see its position as not merely correct, but *obvious*. Marriage-equality opponents say that marriage has been male-female pretty much forever, and you can't just change the meaning of words at will. Marriage-equality advocates say that marriage is an evolving legal and social institution, and if the law and society recognize same-sex couples as married, then they are in fact married. The Definitional Objection is also challenging because it's immune from empirical testing: it is not about the *consequences* of changing marriage, but about the meaning of the word itself.

In its barest form, the Definitional Objection contends that same-sex marriage is simply impossible. As Alliance Defense Fund attorney Jeffery Ventrella puts it, “[T]o advocate same-sex ‘marriage’ is logically equivalent to seeking to draw a ‘square circle’: One may passionately and sincerely persist in pining about square circles, but the fact of the matter is, one will never be able to actually draw one.”²⁷ And again, “The public square has no room for square circles, because like the Tooth Fairy, they do not really exist.”²⁸

It is tempting to respond that we don’t normally pass legislation or constitutional amendments banning impossible entities: why worry about something that not only doesn’t exist, but can’t possibly exist? Committed same-sex relationships certainly exist, and some jurisdictions grant them legal recognition under the name “marriage.” So the debate seems to be less about whether something exists than about what to call these existing things.

By analogy, consider a modified version of Ventrella’s “square circles” example. Surely there is no such thing as a square ball (or cubical ball, to use a more precise but clumsier term). Yet some tennis coaches have their players practice with irregularly shaped rubber “balls,” whose bouncing behavior is erratic, in order to improve their reflexes. Suppose that some of these “balls” are cubical, and that coaches and players refer to them as “square balls.” Now it might be an interesting academic question whether these or any objects could possibly be square balls. But that question has little relevance to whether people should continue to call them “square balls,” and it certainly has no relevance to whether players should continue to practice with them. These objects exist (we are supposing), and “square balls” is a handy term for them. In a similar way, committed same-sex unions exist, and “marriage” is a handy term for them. What’s the problem?

Conservative writer Robert H. Knight has tried to explain the problem with an analogy: “When the meaning of a word

becomes more inclusive, the exclusivity that it previously defined is lost. For instance, if the state of Hawaii decided to extend the famous—and exclusive—‘Maui onion’ appellation to all onions grown in Hawaii, the term ‘Maui onion’ would lose its original meaning as a specific thing. Consumers would lack confidence in buying a bag of ‘Maui onions’ if all onions could be labeled as such.”²⁹ In his public debates, Institute for American Values president David Blankenhorn makes a similar point using a different example, asking audiences to imagine what would happen if the word “ballet” were used to refer to all forms of dance.

Knight’s and Blankenhorn’s examples are revealing. Yes, it would be bad to use the term “Maui onion” for all onions or the term “ballet” for all forms of dance, but that’s because doing so would frustrate reasonable human aims. If you go to the theater expecting ballet but end up getting Riverdance, you may be disappointed. The same is true if you go to the grocer asking for Maui onions but getting plain white ones, or asking for a chicken but getting a duck. Indeed, Knight makes the frustration problem explicit: “Consumers would lack confidence in buying a bag of ‘Maui onions’ if all onions could be labeled as such.”

Would extending marriage to gays and lesbians frustrate human aims in a similar way? Not directly. No one worries that, if society extends marriage to same-sex couples, then grooms will meet brides at the altar, lift their veils, and exclaim in shock, “Damn, you’re a dude!”

But perhaps the similarity is indirect. Same-sex-marriage opponents often contend that stretching “marriage” to include same-sex couples would have bad consequences, such as severing the institution from its child-centered functions. Notice, however, that this contention represents a rather different sort of argument: a consequentialist argument based on same-sex marriage’s alleged harms. (We will cover such arguments in

subsequent sections.) Recall that the point of the Definitional Objection is not that treating same-sex unions as marriages would lead to bad consequences, but that doing so is *wrong in itself*, amounting to a kind of lie or confusion. It says that such marriages are not possible, which is different from saying that they're not desirable.³⁰

Knight's "Maui onions" example is misleading precisely because it obscures this distinction. "Maui onion" is a label that vendors attach to a distinctive variety of onion grown on the island of Maui. Suppose that a genetically identical variety could be grown on the island of Kauai, and that the resulting onion was indistinguishable in taste, texture, shelf life, and so on. In that case, it would be not only possible, but perhaps even sensible, for vendors to apply the "Maui onion" label to the genetically identical onion. Or consider how Americans often use the term "classical music" broadly to refer to all traditional Western instrumental music, not just music created during the Classical Period (as distinct from the Baroque and Romantic periods). Words are symbols, and speakers may use them in whatever ways serve their communicative aims.

Knight would doubtless respond that the cases are disanalogous: whereas traditional Maui onions and the hypothetical Kauai-grown "Maui onions" are genetically identical, traditional (heterosexual) relationships and same-sex relationships lack an underlying structural similarity. Perhaps so. But it doesn't follow that same-sex relationships are *so* different that they are ineligible for marriage. The problem with the Definitional Objection is that, instead of arguing for this conclusion, it simply asserts it. Eligibility for marriage is precisely what's at issue here. Yet the Definitional Objection says that same-sex couples cannot marry because same-sex marriage is impossible. That's a circular argument if anything is.

Another problem with the Definitional Objection is that it confuses a conceptual issue with a moral one. To see

why, consider what I call the Marriage/Schmarriage Maneuver. Imagine a marriage-equality advocate who, after hearing the Definitional Objection, responds:

You know what? You're right! This thing we're advocating isn't marriage at all. It's something else—let's call it schmarriage. But schmarriage is better than marriage: it's more inclusive, it helps gay people without harming straight people, etcetera. We'd all be better off if we replaced marriage with schmarriage. Now, it's unlikely that the word "schmarriage" will catch on—and besides, it's harder to say than "marriage." So from now on, let's have schmarriage—which includes both heterosexual and homosexual unions—but let's just call it by the homonym "marriage," as people currently do in Massachusetts, Canada, South Africa, and elsewhere. Okay?

Marriage traditionalists will surely respond "Not okay"—but why? The answer is that they reject the idea that the more inclusive institution—schmarriage—is better than marriage. Without some further argument for why it's morally important to maintain an exclusively heterosexual notion of marriage, the Definitional Objection looks like a mere academic quibble, akin to the "square balls" issue discussed earlier.

The Marriage/Schmarriage Maneuver is not entirely hypothetical. Many marriage-equality opponents are willing to grant gays (some or all of) the legal rights and responsibilities of marriage under a different name, such as "civil unions" or "domestic partnerships." In effect, they are willing to grant "schmarriage"—or a pared-down version thereof—for same-sex couples as long as they can keep "marriage" for opposite-sex couples. The semantic distinction matters to them because the underlying "real" distinction matters to them as well. In mirror image, marriage-equality advocates argue that calling same-sex unions by a different name suggests a difference that isn't present, and in turn creates a legal hierarchy: "separate-but-equal"

never ends up being equal. Both sides agree that the word “marriage” matters morally because the reality that it signifies matters morally.

What about Civil Unions?

I should digress for a moment to say a bit more about “civil unions” and other attempts to provide same-sex couples a legal status similar but not identical to marriage. “Civil union” was a term invented by the state of Vermont in 2000 in order to give same-sex couples the statewide legal incidents of marriage without using the word “marriage”; since then, a handful of other states have followed suit. Civil unions do not include the (very important) federal legal incidents of marriage—such as social-security and tax benefits, spousal privilege, immigration rights, and so on—they are not portable across state lines (except to jurisdictions that explicitly recognize them), and they do not include the less tangible but crucially important nonlegal incidents of marriage—the history, significance, and social currency of the institution. They’re a compromise, and like other historical attempts at providing “separate-but-equal” status, they fall far short of equal.

Suppose, however, that there were a federally recognized, portable civil-union status that genuinely granted *all* of the legal rights and responsibilities of marriage—a “robust” civil-union status. I’m not sure that this is practically achievable in the United States (though the United Kingdom and other European nations seem to have tried it under various names), but if it were achievable, what would I say to that?

I’d say that it would be far better than what we have now. I’m an incrementalist and a pragmatist: I’m willing to take half a loaf now while continuing to work to get the full loaf later—although perhaps a better analogy for “robust” civil unions would be taking virtually the full loaf now and not calling it bread.³¹

But the “virtually” is key. Marriage is much more than a legal status, and its legal meaning affects its social meaning. Insofar as civil unions, domestic partnerships, and other legal arrangements lack the same social significance as marriage, they involve unequal treatment under the law. Even if the legal incidents were identical, their effects would not be. We have seen this problem in a number of real-life cases, where hospital administrators, funeral directors, and other providers have discriminated against civil-union couples despite their alleged legal parity.³² (Note that this objection would not apply if the state were to get out of the “marriage” business altogether and simply offer civil unions to everyone.³³)

I also think that such a “robust” civil-union compromise would only work to the extent that people didn’t think too hard about it. For if it makes sense to grant same-sex couples truly *all* of the legal rights and responsibilities of marriage under a different name, wouldn’t it make as much (or more) sense to grant them legal marriage, period? That is what has since happened in Vermont and Connecticut, which within a decade realized that a “separate-but-equal” system was untenable—legally, morally, and practically—and came around to granting marriage to same-sex couples.

The New-Natural-Law Objection

So proponents of the Definitional Objection believe that there’s a reality—marriage—that is necessarily heterosexual. They believe that calling other things by the same name would obscure that reality, with the result that people would become less able to recognize and appreciate it. We still need answers to the following questions: What is this distinctive reality called marriage? Why must it be exclusively heterosexual? And why would it be wrong—not just conceptually, but ultimately morally—to replace it with a more inclusive alternative, whatever we might call it?

One way of answering these questions is to appeal to divine intentions: God sets the boundaries of marriage. But since this book is about civil marriage equality in a non-theocratic society, we will steer clear of theological debates. Another is to argue that the moral boundaries somehow exist in nature. The best attempt at this approach comes from a group of theorists known as the *new-natural-law theorists*, to whom we now turn.³⁴ They provide the most developed available argument for the idea that marriage *by definition* requires the sexual complementarity of one male and one female.

Although the new-natural-law theorists have intellectual roots in the “old” natural-law theory of St. Thomas Aquinas, their argument is rather different. Aquinas opposed homosexual conduct on the grounds that it violates the sexual organs’ “natural purpose” of procreation. By contrast, the new-natural-law theorists rightly acknowledge that even though sexual organs are *for* procreation in some sense, it doesn’t follow that it’s wrong to use them for other reasons.³⁵ To say otherwise would have absurd implications—for example, that it’s wrong to walk on one’s hands, as acrobats sometimes do.³⁶

Instead, the new-natural-law theorists appeal to the notion of “basic goods.” Among these is marriage, understood in a special, prepolitical sense: a comprehensive two-in-one-flesh union of the reproductive kind. While marriage may result in happiness, emotional and physical health, and so on, its function is not reducible to any of these. Nor is it reducible to procreation. According to the new-natural-law view, sex and marriage are not properly chosen merely as a means to some other thing, including children. They are to be chosen for the sake of the comprehensive union—marriage—*itself*.

As a comprehensive union, marriage unites the partners along multiple levels, which reinforce each other. On the mental/volitional level, it requires a loving, permanent, exclusive commitment between the spouses. On the physical level, it requires

that the spouses unite biologically in reproductive-type acts. In such acts, the male and the female become “literally, not metaphorically, one organism.”³⁷ The new-natural-law theorists refer to the resulting view of marriage as the *conjugal view*:

Marriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together. The spouses seal (consummate) and renew their union by conjugal acts—acts that constitute the behavioral part of the process of reproduction, thus uniting them as a reproductive unit.³⁸

So their basic argument against same-sex marriage looks like this: Marriage is, by definition, a comprehensive union. A comprehensive union requires uniting on all levels, including the biological level. The only way in which human beings can truly unite biologically is in conjugal acts (i.e., coitus). Because same-sex partners cannot engage in coitus, they cannot achieve the comprehensive union that is marriage. And it would be wrong for the state and society to treat their unions as marriage, since the state is responsible for the well-being of its citizens.³⁹ Notice how the new-natural-law theorists integrate the conceptual issue with the moral issue: because marriage is a fundamental good, it is morally important not to obscure or distort it.

For many people, there’s something intuitively attractive about the idea that sexual acts make spouses “literally” one organism. (Others find the single-organism idea controversial, if not incoherent.⁴⁰) The idea fits nicely with familiar wedding rhetoric about how “the two become one,” for instance.

There’s also something attractive about the new natural law’s emphasis on our bodily origins. While the importance of biology can be overplayed, and while other kinds of familial connections matter at least as much, if not more,⁴¹ the fact that each of us is a bodily person who exists because of the bodily (sexual)

actions of other persons—connected to our parents and grandparents and so on in an unbroken biological chain—is admittedly awe-inspiring. This widely shared attitude explains why most people would be curious to meet a previously unknown biological brother or sister in a way that they would not be curious about, say, a childhood neighbor with whom they had never crossed paths.⁴² It also explains why people who have the most wonderful adoptive parents often nevertheless seek to know their biological parents. It's not that their adoptive families aren't "real" or good: it's that, in addition to those families, they want to know the persons from whom they bodily emerged. (Borrowing from the feminist philosopher Sylviane Agacinski, David Blankenhorn frequently refers to this parental connection as the "double origin" of the child.⁴³) Biological connections tend to matter to people, and the new-natural-law view places moral weight on the sexual acts behind these connections.

The standard objection to the new-natural-law view concerns heterosexual partners known to be sterile. Consider a woman whose cancerous uterus has been removed. Her sex with her future husband cannot result in procreation, and they both know it. How, then, can they engage in reproductive-type acts? Consistency seems to require either that they cannot marry or that the same-sex couple can.

The new-natural-law theorists respond that although the sterile heterosexual couple cannot reproduce, their sexual acts—unlike the same-sex couple's—can still be "of the reproductive type." Because their coitus is still coordinated toward the common good of reproduction, it can still unite them in marriage. In a much-cited recent article entitled "What is Marriage?" Sherif Girgis, Robert George, and Ryan Anderson attempt to explain with an analogy:

When Einstein and Bohr discussed a physics problem, they coordinated intellectually for an intellectual good, truth. And

the intellectual union they enjoyed was real, whether or not its ultimate target (in this case, a theoretical solution) was reached—assuming, as we safely can, that both Einstein and Bohr were honestly seeking truth and not merely pretending while engaging in deception or other acts which would make their apparent intellectual union only an illusion.

By extension, bodily union involves mutual coordination toward a bodily good—which is realized only through coitus. And this union occurs even when conception, the bodily good toward which sexual intercourse as a biological function is oriented, does not occur.⁴⁴

The problem with this explanation is that there's a big difference between a goal that "does not occur" even though people are "honestly seeking" it, and a goal that *cannot* occur, and which thus cannot be honestly sought by anyone aware of its impossibility. Unlike Einstein and Bohr, who are genuinely intending a solution, the heterosexual couple who know they are sterile cannot intend reproduction—and in that sense, they seem to be in the same boat as the same-sex couple.

Much ink has been spilled on the sterile-couples objection, and I don't want to spend excessive time on it here.⁴⁵ What is clear is that when the new-natural-law theorists say *reproductive-type*, they don't mean that reproduction must be intended, and they don't mean that it must be possible. What on earth, then, do they mean?

As far as I can tell, what they really mean is *coital*—in other words, penis-in-vagina. (Or possibly, "*uncontracepted* coital": the new-natural-law theorists appear to differ on whether contraception undermines the reproductive character of otherwise conjugal acts.⁴⁶) Unlike, say, amoeba reproduction, human sexual reproduction requires complementary male-female pairing in coitus. It requires a number of other biological factors as well—such as a functioning uterus—but those are irrelevant

to whether sex is of the “reproductive type”: the salient factor here is coitus. Only in coitus do the spouses’ “bodies become, in a strong sense, one,” which is what the comprehensive marital union requires.⁴⁷

If marriage requires procreative-type acts, and “procreative-type” means “coital,” then it indeed follows that sterile heterosexual couples can engage in procreative-type acts whereas same-sex couples cannot. But other unpalatable conclusions also follow.

Consider the following case. While engaged to marry Jill, Jack has a horseback-riding accident that paralyzes him from the waist down, rendering him unable ever to perform coitus. Nevertheless, the two legally marry and spend the next several decades raising children that they adopt. Although coitus is impossible, they engage in other acts of sexual affection. Are Jack and Jill married? It seems obvious that they are. But according to the new-natural-law conjugal view, they are not. Jack’s inability to form a “bodily union” rendered him ineligible for “real marriage,” as the new-natural-law theorists understand it. And since “the state is justified in recognizing only real marriages as marriages,”⁴⁸ its recognition of their “marriage” is unjustified.

(Incidentally, while I think that the new-natural-law theorists have no choice but to admit that paraplegics cannot marry in principle, I suspect they’ll offer some pragmatic argument having to do with privacy invasions to avoid the unpalatable conclusion that the state should exclude paraplegics from legal marriage. But the initial bullet-biting would be a breathtaking concession.)

There are other counterexamples to the new-natural-law view. For example, its gloss on comprehensive unions implies that those who divorce and remarry are not really married to their second spouses (as long as the first ones are living) and that the state should not recognize them as such; the view is thus untenable for anyone who accepts divorce and remarriage.

In some versions, including those of Robert George and John Finnis, it also implies that spouses who permanently contracept—say, if the male has a vasectomy before the wedding—are not really married.⁴⁹ But the paraplegic case is sufficient to establish the conclusion that relationships can merit the label “marriage” even if they do not include—indeed, cannot include—coitus.

Once we acknowledge that conclusion, however, we abandon the new-natural-law theorists’ main argument for insisting that same-sex unions cannot be marriages—namely, that marriage requires “bodily union . . . which is realized only through coitus.”⁵⁰ The very same factors that lead us to recognize Jack and Jill as truly married—their love, sacrifice, commitment, romantic companionship, and so on—allow us to recognize Boyd and Josh and other same-sex couples as truly married.

What Marriage Is

Early in our collaboration Maggie Gallagher e-mailed me with the following challenge, “What’s *your* definition of marriage? If you’re going to use a word, you need a definition of the word.”

I doubt that.

After all, most English speakers can competently use the word “yellow,” but ask the average person to define the term (without merely pointing to examples) and watch him stammer. Then try words like “law,” “opinion,” “religion,” and “game” just for fun. It’s quite common to have functional knowledge of how to use a term without being able to articulate its definition.

Okay, you say, but as someone deeply involved in the marriage debate, surely I have some definition to offer? Yes and no. I have *definitions* to offer, not a single definition.

As already noted, marriage is multifaceted. It can be variously understood as a social institution, a personal commitment, a religious sacrament, and a legal status. It looks different from

the spouses' perspective than it does from the outside; it looks different respectively to anthropologists, philosophers, theologians, lawyers, and so on. Each of these perspectives can tell us something about what marriage is; none of them is complete or final. So my rejection of a single, final definition stems not from the fact that I don't know what marriage is, as critics will doubtless allege, but from the fact that I do.⁵¹ As one writer helpfully puts it: "There is no single, universally accepted *definition* of marriage—partly because the institution is constantly evolving, and partly because many of its features vary across groups and cultures."⁵²

That writer is David Blankenhorn, in his book *The Future of Marriage*. It's a surprising concession, since Blankenhorn—a marriage-equality opponent—spends most of the rest of the chapter railing against marriage-equality advocates for offering definitions that he calls "insubstantial" and "fluttery." Blankenhorn's main complaint is that these definitions are too focused on love and personal commitment. By contrast, he wants to define marriage by its social function, particularly its role in providing for children. He offers the following:

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived as both a personal relationship and an institution, primarily such that any children resulting from the union are—and are understood by the society to be—emotionally, morally, practically, and legally affiliated with both of the parents.⁵³

Blankenhorn's definition starts off a bit oddly: "marriage is . . . sexual intercourse." It seems more natural to say that marriage is the relationship that provides the context for such intercourse. (Perhaps Blankenhorn had the new-natural-law conjugal understanding of marriage in mind.) "Socially approved sexual intercourse" is certainly one angle from which to understand

marriage, and not an illegitimate one (pardon the pun). But it's scarcely the sole one, as even Blankenhorn seems to recognize. On the very next page, he acknowledges a counterexample—raised by Christian theologians, no less: Marriage can't be *necessarily* (that is, always) sexual, since if it were, the Virgin Mary's "marriage" to Joseph would not be a marriage. And one could point to plenty of contemporary sexless marriages that are nevertheless marriages. Moreover, Blankenhorn's own definition includes the hedge-words "nearly all" and "primarily," acknowledging that marriage has multiple goals, including goals beyond connecting parents with their biological offspring.

Are there strictly necessary conditions for a union's being a marriage? Yes. For instance, there must be at least two persons. (I say "at least" because polygamous marriages are still marriages, whatever other objections we might have to them.) The partners must at some time understand themselves to be married. Sexual relations between them are *prima facie* permissible, though not, despite the contrary claims of Blankenhorn and the new-natural-law theorists, required. Beyond those requirements, and maybe a few others, we find a host of typical features: romantic and sexual involvement, a shared domicile, mutual care and concern, the begetting and rearing of children, the intention to make the commitment lifelong and exclusive. But "typical" does not mean "strictly necessary," and for any one of these features, it takes little imagination to conceive of a genuine marriage that lacks it. A "marriage of convenience" is still a marriage, legally speaking. A childless marriage is still a marriage. A marriage on the brink of divorce is still, for the time being, a marriage. What marriage-equality opponents deride as "insubstantial" definitions are actually scholars' attempts to provide analyses broad enough to capture all of the different things that we identify as marriages: loving and loveless, parenting and childless, monogamous and polygamous, domestic and long-distance, same-sex and other-sex. Such definitions

may appear to lack specificity. But the alternative is either to pack the definition full of hedge-words (“nearly,” “typically,” “primarily,” “often”) or else to leave it vulnerable to counterexamples. Blankenhorn’s definition actually exhibits both “flaws,” although I’m not sure it’s right to call them flaws. The looseness is a feature, not a bug.

In the context of this debate, those who challenge others for definitions (or cite definitions of their own) typically do so with the ulterior motive of proving that same-sex unions either can or cannot count as marriages—which means that their definitions often beg the question against the other side. I’d rather not take the bait. Instead, when people ask me for a definition of marriage, I usually begin by pointing to the standard vow. Marriage is the institution in which people live out the commitment...

to have and to hold; from this day forward; for better or for worse; for richer, for poorer; in sickness and in health; to love and to cherish; until death do us part.

These are the words my parents used; indeed, that many Americans use. They are the words that Boyd and Josh used. Obviously, they do not provide any kind of complete or perfect definition. We would need to flesh out what it means “to have and to hold,” for instance, explaining why that phrase captures a relationship with a spouse but not with, say, a sister. But the vow tells us something important about what people are committing to when they commit to marry.

I shared some of these thoughts in my weekly column once, which prompted an animated e-mail from Blankenhorn. He wrote,

I invite you to look back at the entire world history of anthropological thought on the topic of what is marriage, and point out to me even ONE example of ONE scholar who has, based on ethnographic data, said, actually or in effect, since recorded history

began, that marriage in human groups is properly defined as the promise of abiding love. If you can identify even one reputable scholar in the history of the world who has made such a statement or implied such a thing, I will grovel before you in abject intellectual humility and gladly buy you the lunch of your choice.

I couldn't find an anthropologist who said that. Actually, I never even bothered looking. Anthropologists define marriage by its cultural function, and "abiding love" isn't really their angle. But I did find this: "The inner and essential *raison d'être* of marriage is not simply eventual transformation into a family but above all the creation of a lasting personal union between a man and a woman based on love."⁵⁴

What radical, "fluttery" activist wrote these words? In fact, it was Pope John Paul II.

Of course the late pope says that marriage is "between a man and a woman"—no surprise there. But the interesting thing is that he defines it as "above all...a lasting personal union...based on love." Perhaps he was distracted when he wrote this. Perhaps the Radical Gay Agenda had begun to infiltrate the Vatican. Or perhaps the pope realized what most people know: marriage is indeed a lasting personal union based on love—which is not to say that it is *only* that. As I said above—and it bears repeating—any pithy definition of marriage will be partial and imperfect. The theologian's perspective will be different from the anthropologist's, which in turn will be different from the philosopher's, the lawyer's, the historian's, the family therapist's, and so on. There are counterexamples to the pope's characterization, ways in which it is both too broad and too narrow. But "marriage" is not definable in the way "triangle" or "bachelor" is. And when marriage-equality opponents feel compelled to repudiate characterizations of marriage that strike me, the late pope, and most married couples as perfectly reasonable, something is clearly amiss.

The problem stems largely from the different senses of “love.” Do we mean love as a fluttery feeling? Then no, that doesn’t tell us much about what marriage is. Do we mean love as an abiding, exclusive, lifelong interpersonal commitment?⁵⁵ Then that tells us a lot about what marriage is. More important, it also tells us why marriage is so good at doing what it does: providing for the needs of children, for example. Blankenhorn and Gallagher keep insisting on a false dilemma: Either marriage is about providing for children, or else it is “merely” an adult expression of love. Actually, marriage is both of these things—in interconnected ways—and then some.

3. CHILDREN AND CONSEQUENCES

Which brings us to what is probably the core objection to same-sex marriage, and certainly the one most often cited in contemporary public debates: that extending marriage to same-sex couples would be bad for children.

This is a serious charge. If you want to smear an individual or a group of people, a good way to do it is to accuse them of threatening children. I mention this not to stifle whatever sincere concerns marriage-equality opponents have. I understand that they’re worried about future generations, as all of us should be. I mention it, rather, because, whether we like it or not, this discussion is fraught with emotion from the start, and it’s important to acknowledge that challenge if we want to start generating more light than heat. When the issue of children comes up, one side feels that they’re being smeared as predators or family-haters and the other side feels that their children are at risk. Actually, *both* sides feel that their children are at risk: lesbian and gay people have children too, and all of us started out as children. We must proceed with candor, but we must also proceed with care.

The “bad for children” argument comes in various forms, and I won’t address them all here. For example, some have argued that extending marriage to gays will cause more children to become gay, a claim that is not only unsubstantiated, but also ultimately question-begging (since it assumes that it’s bad for people to turn out gay). Others argue that gays can’t be trusted with children because they’re likely to harm them intentionally—for example, by molesting them. Fortunately, even social conservatives are beginning to acknowledge this latter argument for the slander that it is.

Still others argue that children whose parents are openly gay or lesbian will be teased by their peers. This is almost certainly true—just like children whose parents are too short or too tall, too fat or too thin, too poor or too rich; or who have funny accents, wear outdated clothing, or give them names like “Moonbeam.” Children will get teased about all kinds of things, no matter who their parents are. This fact should often affect how parents prepare children to face the world, but should seldom affect whether they choose to have children in the first place.

What I want to do is to examine the strongest forms of the “bad for children” argument, including the one that Maggie Gallagher offers, in the hopes of making some progress.

Most of the more plausible “bad for children” arguments rest on the claim that the best setting for raising children involves a mother and father, and more specifically, their own biological mother and father. (Even more specifically, their own married biological mother and father in a low-conflict relationship.) This claim is widespread, and many who offer it do so with no apparent antigay bias. For example, the nonpartisan Center for Law and Social Policy (CLASP), after reviewing research on how family structure affects children’s well-being, concludes that

Research indicates that, on average, children who grow up in families with both their biological parents in a low-conflict

marriage are better off in a number of ways than children who grow up in single-, step- or cohabiting-parent households. Compared to children who are raised by their married parents, children in other family types are more likely to achieve lower levels of education, to become teen parents, and to experience health, behavior, and mental health problems. And children in single- and cohabiting-parent families are more likely to be poor. This being said, most children not living with married, biological parents grow up without serious problems.⁵⁶

Opponents of same-sex marriage often cite such statements to show that their opposition to same-sex marriage is not right-wing bigotry, but instead a considered judgment based on scientific research. But here's an interesting thing about such research: when it says "biological mothers and fathers" it doesn't really mean biological mothers and fathers. As CLASP explains in a footnote, "The reference to biological parents is to distinguish between biological/adoptive parents and step-parents. Most studies that include data on adoptive parents include them in the biological-parent category."⁵⁷ In other words, "biological parents" really means two biological or adoptive parents, *as opposed to single parents or stepparents*.

But if the contrast class is single parents or stepparents, what can such research tell us about *same-sex* parents? Answer: very little.

At most, such research can tell us something about expected differences between gay *single* parents and gay two-parent families, or between same-sex *stepfamilies* and same-sex intact families. It is not surprising that two-parent, intact families have better child-welfare outcomes on average than single-parent families or stepfamilies, since the latter two kinds of families often involve the loss of a parent through death, abandonment, and divorce: things known to be traumatic for children. But to lump such situations together with *planned* same-sex

two-parent families—ones begun by adoption, insemination, or surrogacy—is to mix apples and oranges.

What happens when we control for these other variables and directly compare children raised by same-sex parents to children raised by different-sex parents? Although the research (like all research) has its limitations, its conclusions are consistent: children raised in same-sex households fare just as well as their peers on standard measurements of health and well-being.⁵⁸ But don't take my word for it. According to the American Academy of Pediatrics, the nation's premier child-welfare organization:

The American Academy of Pediatrics recognizes that a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the same expectations for health, adjustment, and development, as can children whose parents are heterosexual.⁵⁹

And here's the American Psychological Association:

There is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation. On the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children. . . . Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.⁶⁰

So too says the Child Welfare League of America, the National Association of Social Workers, the American Academy of Child and Adolescent Psychiatry—indeed, every major health and welfare organization that has examined the data.⁶¹ These are not gay-rights organizations; they are not advocacy groups (unlike, say, the American College of Pediatricians, which was founded

specifically to promote “traditional” families and is frequently cited by social conservatives).⁶² While I don’t want to play the game of “my sources can beat up your sources,” mainstream professional opinion resoundingly supports the conclusion that, on average, children in same-sex households fare as well as children in heterosexual households.

So the claim that children do best on average with their own married biological mothers and fathers is at best misleading. It conflates a number of distinct variables, including parental number, parental gender(s), marital status, and biological relatedness. One could isolate any of these characteristics and make meaningful comparisons, claiming, for example, that children with two parents do better on average than children with single parents (true), or that children of married parents do better on average than children of cohabiting or divorced parents (also true, keeping in mind that what’s true on average is not necessarily true in each individual case). But to the extent that researchers have isolated parental *gender*, comparing same-sex to different-sex parents, they have found that the children fare just as well in each case.

Let’s suppose, however—just for the sake of argument—that CLASP’s claim is right, and that children, on average, do best with their own married biological parents. What would follow?

To put it bluntly, what would follow is that gay and lesbian couples should not kidnap children from their own married biological parents.

Back on Planet Earth, where gay men and lesbians are not involved in a mass-kidnapping scheme, it’s less clear what would follow. Same-sex marriage never—and I mean *never*—takes children away from competent biological parents who want them.⁶³ I don’t mean to be glib, but from the premise

Children on average do best with their own married biological parents

to the conclusion

We should not allow same-sex couples to marry

there are a lot of missing steps. Indeed, more like entire missing staircases. I have yet to see any marriage-equality opponents fill in those missing staircases. Most do not even bother to try.

One immediate problem is that allowing people to marry is different from declaring that it would be ideal for them to raise children. Most same-sex couples don't have children. Those who do have children usually put a great deal of thought into this decision: they do not wake up one day and say "Oops, we're pregnant." In that sense, they are not like the "average" parent, who may or may not have planned for the child and may or may not be prepared for its arrival.

What's more, we allow many couples to marry who fall short of the alleged parenting ideal—as we should. Notably, we allow stepfamilies to form, even though the very same premise that opponents cite against same-sex marriage applies to them: children do best on average with their own married biological parents. We allow poor people to marry, people without college degrees to marry, people in rural areas to marry, and so on, even though research shows that children in these environments do less well on a number of factors than in the alternatives.⁶⁴

We even allow convicted felons serving prison sentences to marry; in fact, we allow it as a matter of constitutional right. The U.S. Supreme Court in *Turner v. Safley* unanimously affirmed that right, noting that "inmate marriages, like others, are expressions of emotional support and public commitment," even given the obvious limitations of prison life.⁶⁵ In reaching this decision the Court drew on *Zablocki v. Redhail*, which held that persons delinquent on child support retain the fundamental right to marry.⁶⁶

So a convicted murderer serving a life sentence may marry, but Boyd and Josh may not, because "Children do best on

average with their own married biological parents.” Do you see what I mean about missing staircases?

Indeed, there’s something quite backward about this argument. For if one really believes (against the evidence) that children in same-sex households are disadvantaged, isn’t that even *more* reason to provide them the support, stability, and security of marriage—especially in light of what we know about cohabiting parents versus married parents?

By what route can marriage-equality opponents get from the premise “Children do best on average with their own married biological parents,” to the conclusion “We should not allow same-sex couples to marry”? Let me here consider two, which I’ll call the Emboldening Argument and the Message Argument. (A third, related argument, “The Stretching Argument,” is considered in Part 4.)

The Emboldening Argument

The Emboldening Argument asserts that extending marriage to same-sex couples would encourage (or “embolden”) more of them to have children. The problem with the Emboldening Argument—aside from the fact that it’s speculative—is that it runs up against the “no kidnapping” point: remember, same-sex couples who have children never take them away from competent biological parents who want them. When we consider whether a same-sex household would be a good environment for a child, we must always ask, “Compared to what?”

Putting aside the cases where gay and lesbian individuals have children from prior heterosexual relationships, there are two ways in which same-sex couples usually acquire children. The first is adoption. In most of these cases, the couple is taking the child, not from its biological parents, but from the state, and almost no one—including Gallagher—argues that it would be better for children to languish in foster care than to be raised