

3. Even in traditions that permit or have permitted polygamy, each marriage is between a man and a woman. See infra Part II.E.


6. For a brief defense of this idea, and the implications for our argument of denying it, see infra Part I.F.


10. Throughout history, no society’s laws have explicitly forbidden gay marriage. They have not explicitly forbidden it because, until recently, it has not been thought possible. What is more, antimuscelenation laws, at least in the United States, were meant to keep blacks separate from whites, and thus in a position of social, economic, and political inferiority to them. But traditional marriage laws were not devised to oppress those with same-sex attractions. The comparison is offensive, and puzzling to many—not least to the nearly two-thirds of black voters who voted to uphold conjugal marriage under California Proposition Eight. See Cara Mia DiMassa & Jessica Garrison, Why Gays, Blacks are Divided on Prop. 8, L.A. TIMES, Nov. 8, 2008, at A1.

11. For a brief defense of this idea, and the implications for our argument of denying it, see infra Part I.F.


13. This point requires elaboration: Some revisionists might deny that there is a “real marriage” from which any relationship might deviate, and instead maintain that marriage is purely conventional. Those who think marriage is a useless or unjustifiable fiction have no reason to support any marriage law at all, while those who think it is a useful and legitimate fiction must explain why the state should keep even the restrictions on marriage that they support. On this latter point, see infra Part II.B. On the implications of regarding marriage as pure construction, see infra Part I.F.

14. The Oxford English Dictionary charts the usage of “consummation” as, among other definitions not relating to marriage, “[t]he completion of marriage by sexual intercourse.” OXFORD ENGLISH DICTIONARY III, at 803 (2d ed. 1989). The earliest such usage recorded in law was the 1548 Act 2–3 Edw. VI, c. 23 § 2: “Sentence for Matrimony, commanding Solemnization, Cohabitation, Consummation and Tractation as becometh Man and Wife to have.” Id. In more modern usage, “consummation of marriage” is still regarded in family law as “[t]he first postmarital act of sexual intercourse between a husband and wife.” BLACK’S LAW DICTIONARY 359 (9th ed. 2009).

15. That is, made even richer as the kind of reality it is.

16. For more on this point, see infra Part I.D.

17. For more on the difference between infertile and same-sex couples, see infra Part I.D.


25. For more on this point see supra Part I.B.1.


27. For more on this point see supra Part I.B.1.


31. See supra Part I.B.2.

32. See supra Part I.B.3.

33. See infra Part II.C.

34. See infra Parts I.E.2–3.


38. See supra Part I.B.2.


40. They are clearly the primary victims of the erosion that has already taken place. See W. Bradford Wilcox, The Evolution of Divorce, 1 NAT’L AFFAIRS 81, 88–93 (2009).

41. See supra Part I.B.2.

42. See supra Part I.C.1.

43. See supra Part I.B.2.

44. Marc D. Stern, Same-Sex Marriage and the Churches, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1, 11–14 (Douglas Laycock et al. eds., 2008). This collection of essays includes the views of scholars on both sides of the same-sex marriage question, who conclude that conflicts with religious liberty are inevitable where marriage is extended to same-sex couples.


47. See, e.g., Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008).
48. Monica Hesse, Opposing Gay Unions With Sanity & a Smile, WASH. POST., Aug. 28, 2009, at C01.
51. See, e.g., HUMAN RIGHTS CAMPAIGN, http://www.hrc.org (last visited Nov. 8, 2010) (self-identifying the organization as a 501(c)(4) advocacy group “working for lesbian, gay, bisexual, and transgender equal rights”); Annie Stockwell, Stop the Hate: Vote No on 8, ADVOCATE.COM (Aug. 20, 2008), http://www.advocate.com/Arts_and_Entertainment/People/Stop_the_Hate (framing opposition to California’s Proposition Eight, which provides that “only marriage between a man and a woman is valid or recognized in California,” as a struggle against hate).
52. See supra Part I.B.
53. See supra Parts I.B.1–3.
54. See supra Part I.B.1.
55. Whether bodily union is truly marital depends on other factors—for example, whether it is undertaken freely to express permanent and exclusive commitment. So bodily union is necessary but not sufficient for marital union.
56. On the conjugal view, spouses pledge to form a union that is comprehensive and thus bodily, and thus procreative by nature. They do not and cannot pledge to form a union that results in procreation.
57. See id.
58. See supra Part I.B.2.
59. See supra Part I.B.3.
60. See supra Part I.B.2.
61. See supra Part I.C.
63. See supra Parts I.B.1–2
64. See supra Part I.A.1.
65. Note that only sound arguments based on true principles can be inherently decisive.
69. This is because, if the State failed to recognize the institution of marriage altogether, social costs would be imposed, in large part on children, due to the breakdown of traditional family structures which lend stability.
70. See supra Part I.B.2.
73. See supra Part I.B.2.
74. See supra Part I.B.1.
75. See supra Part I.B.1.
76. See supra Part I.B.2.
77. See supra Part I.B.3.
80. See supra Part I.A.
81. Brake, supra note 36, at 303.
82. See, e.g., Eskridge, supra note 5, at 1421–22 (“A social constructivist history emphasizes the ways in which marriage is ‘constructed’ over time, the institution being viewed as reflecting larger social power relations.”).
83. See id. at 1434 (“[M]arriage is not a naturally generated institution with certain essential elements. Instead it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away.”).
85. See supra Part I.B.2.
86. See supra Parts I.C, I.D.2.
87. See supra Part II.B.
88. See Gallagher, supra note 68, at 62.
89. Beyond Same-Sex Marriage, supra note 80.
90. Brake, supra note 36, at 336, 323.
92. E.J. Graff, Retying the Knot, in SAME- SEX MARRIAGE: PRO AND CON, supra note 93, at 134, 136.
95. Id. at 59.
98. Id.
101. Id. at 3.
104. See supra Part I.B.3.
109. Again, we do not think all acts of coitus even within marriages are marital. Unloving coitus between spouses, especially where it is based on coercion or manipulation, is not truly marital—it fails to embody and express true (comprehensive) spousal communion.
110. See supra Part II.B.
111. See supra Parts I.B.1–3.
113. For more on the effects of a sexualized culture on friendship, see Anthony Esolen, A Requiem for Friendship: Why Boys Will Not Be Boys & Other Consequences of the Sexual Revolution, 18 TOUCHSTONE


117. See supra Part I.D.2.

118. See supra Parts I.B.2, I.E.2.