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The Boundaries of Belonging: Allegiance, Purpose and the Definition of Marriage

Lynn D. Wardle*

If everyone is family, then no one is family. —Barack Obama.¹

I. INTRODUCTION: BELONGING

“No man is an island.” —John Donne²

This article addresses an important concept theme in family law scholarship: that of “belonging.” This has been a major theme in the writings of my former colleague, Bruce C. Hafen, a leading family law scholar who wrote from a communitarian perspective.³ Belonging

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1. BARACK OBAMA, DREAMS FROM MY FATHER 347 (Crown Publishers 2004) (1995).

2. John Donne, *Meditation XVII reprinted in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE* 332 (John Hayward ed., Random House 1941)

[A]ll mankind is of one author, and is one volume; when one man dies, one chapter is not torn out of the book, but translated into a better language; and every chapter must be so translated . . . As therefore the bell that rings to a sermon, calls not upon the preacher only, but upon the congregation to come, so this bell calls us all; but how much more me, who am brought so near the door by this sickness No man is an island, entire of itself; every man is a piece of the continent, a part of the main. . . If a clod be washed away by the sea, Europe is the less . . . any man’s death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.

(Spelling and capitalization modernized).

3. Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 266 (2000) (identifying Bruce Hafen, Mary Ann Glendon, and Carl Schneider as leading “communitarian scholars in the family law area”). I have been identified as writing from this tradition as well. *Id.* at 311–12. For examples of Hafen’s “belonging” scholarship, see BRUCE C. HAFEN & MARIE K. HAFEN, *THE BELONGING HEART* (1994) [hereinafter HAFEN, BELONGING]; BRUCE C. HAFEN, *COVENANT HEARTS: MARRIAGE AND THE JOY OF HUMAN LOVE* (2005); Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1 (1991); Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865 (1989); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

to communities and the essential role of marriage and families is core to the communitarian scholarly commentary. Following that path, this paper will address the boundaries of belonging, the need to preserve boundaries to preserve communities, particularly the community of marriage, and to protect and maintain the opportunity and value of belonging to such communities.

The yearning to belong is said to be inherent in human nature.⁴ As Bruce Hafen put it: “People simply feel a desire to be connected with others, especially in close relationships. They are feeling the longing to belong.”⁵ From ancient times to modern, from Genesis⁶ to Aristotle,⁷ Locke,⁸ Montesquieu,⁹ Blackstone,¹⁰ Otis,¹¹ Tocqueville,¹²

4. Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 499 (1995).

5. HAFEN, BELONGING, *supra* note 3, at 6. As Hafen notes, some psychologists identify this need to belong as the most powerful and important of all basic human psychological needs. *Id.* at 10. Yet, Hafen says “[o]urs is the age of the waning of belonging.” *Id.* at 43.

6. One of the first comments on the nature of humanity in the ancient Book of Genesis is that “It is not good that . . . man should be alone.” *Genesis* 2:18 (King James). This passage introduces the process by which woman was made and man and woman were commanded to become one. It is relevant for this symposium to note that the Bible is filled with stories about families and family interactions, through which God’s dealings with humanity and teachings about belonging are exemplified. It could reasonably be said that the Bible is principally about relations within family communities, from God’s family to human families, from marriages to nuclear families, to extended families, to family-tribes or houses, to family-connected peoples, religions and nations. Consider the biblical stories of Adam and Eve, Cain and Abel, Noah and his sons, Abraham, Isaac, Jacob, and Joseph and their families, Ruth and Naomi, Esther and Mordecai, and in the New Testament, Joseph, Mary and Jesus.

7. Greek philosophers, too, emphasized the social nature of humankind. For example, Aristotle famously observed that man is a political animal. As Aristotle explained: “Now, that man is more of a political animal than . . . any other gregarious animals is evident . . . [I]t is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state.” ARISTOTLE, *THE POLITICS* 3 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1988); see Wolfgang Kullmann, *Man as a Political Animal in Aristotle, in A COMPANION TO ARISTOTLE’S POLITICS* 94, 99 (D. Keyt & Fred D. Miller, Jr. eds., 1991) *cited in* C.M.A. McCauliff, *Didn’t Your Mother Teach You to Share?: Wealth, Lobbying and Distributive Justice in the Wake of the Economic Crisis*, 62 RUTGERS L. Rev. 383, 436 n.245 (2010). . . See also ARISTOTLE, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1.7 at 1097b8-11, VIII.9 at 1159b25-1160a14, IX.9 at 1169b3-21 (Jonathan Barnes ed., W.D. Ross & J.O. Urmson trans., Revised Oxford Translation, Princeton Univ. Press 1984) (“Since ‘man is by nature a political [or social] animal’ who cannot be self sufficient (fully realized) as a human being in isolation from others, but rather can achieve such self-sufficiency only in a voluntary community of friends, ‘the chief end, both of individuals and states,’ is the attainment of the common good of the citizens of the state through the creation and maintenance of such a community.”).

8. JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT §§ 4–8, 77–83, 121–131 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

9. CHARLES SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 3 (Thomas Nugent trans., George Bell & Sons 1902) (1748) (man is “formed to live in society”).

10. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 43–48.

11. JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1764), available at http://www.freedomandcapitalism.com/James_Otis_.html (last visited Feb. 18, 2011) (“[God] has made it equally necessary that from Adam and Eve to these degenerate days the

and Bellah,¹³ to mention just a few, the social nature of human beings has been noted, reiterated, celebrated, protected, and regulated. Humans are communal and seek (and flourish in) social associations, beginning with the family. We are born as the result of human sexual communion; most often and most desirably that intimate communion occurs in a special relational community called marriage.¹⁴ We are born into, or our birth creates, another type of community—a parent-child community, usually and most beneficially nested within the marital community.¹⁵ By nature, we generally also seek to associate outside of our families in social, business, commercial, religious, ethnic, civic, and other kinds of communities which enrich and broaden our lives and strengthen our society.

One of the paradoxes of belonging is that the need to belong also creates a need to exclude; in order for belonging to occur, there must be boundaries, standards defining the relationship, and criteria that separate members of the group from nonmembers. All communities have membership requirements that define their boundaries.¹⁶ A variety of disciplines and theories of belonging, community, identity, inclusion, and allegiance help us understand how to draw such boundaries. A key element in all of these bodies of knowledge about belonging is the need to reflect, protect and promote the purpose of the community in drawing boundaries of belonging.¹⁷ The perspectives of allegiance theory, in particular, help us to understand the connection between the purposes and boundaries of communities.¹⁸

This article is specifically about belonging to a particularly important kind of community—marriage. Marriage is the primary expression of and preferred locus for the most meaningful and socially

different sexes should sweetly attract each other, form societies of single families, of which larger bodies and communities are as naturally, mechanically, and necessarily combined as the dew of heaven and the soft distilling rain is collected by the all enlivening heat of the sun.”).

12. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Alfred A. Knopf 1945) (1835).

13. ROBERT N. BELLAH, ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* viii (1985).

14. See generally 42 U.S.C. § 710(b)(2)(D) (2006) (sex education programs should teach that sexual activity should occur in “a mutually faithful monogamous relationships in [the] context of marriage”); John E. Taylor, *Family Values, Courts, and Culture War: The Case of Abstinence-Only Sex Education*, 18 WM. & MARY BILL RTS. J. 1053, 1053–55 (2010); Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 1023–29 (2007).

15. See generally Sara S. McLanahan, *Fragile Families and the Marriage Agenda*, in *FRAGILE FAMILIES AND THE MARRIAGE AGENDA* 1 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006).

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part III.

beneficial forms of intimate belonging. Though many other personally meaningful and fulfilling relationships exist, the benefits of marriage to society and to family members are unique.¹⁹

As with inclusion in other communities, membership in the community of marriage requires an understanding of the boundaries of that relationship and some necessary exclusion to preserve the community and institution of marriage.²⁰ Some kinds of belonging are inconsistent with and contrary to the core purposes of the community. A well-intentioned trend towards inclusiveness in public policies and laws relating to family relations has spawned some excesses that have harmed some families and generated confusion in family law and in social expectations concerning marriage.²¹ While inclusion is usually identified with caring and empathy, sometimes greater caring and deeper empathy require exclusion and protection of boundaries. When inclusion undermines the purposes, meaning, and functions of a core social institution, long-term negative family social consequences outweigh short-term benefits for the additional members included (as explained in Part II below).

19. Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (marriage is the “foundation of the family in our society”); Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (“[M]arriage involves interests of basic importance in our society.”); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is a fundamental freedom); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage is a “basic civil right[]” and “fundamental” to human existence); Maynard v. Hill, 125 U.S. 190, 205 (1888) (marriage is “the most important relation in life”); see also Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1262 (1998); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL’Y 581 (1999); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998). Recognition of the importance of marriage as the foundational social unit underlies the state marriage amendments that have been adopted in thirty states already. See William C. Duncan, *Thirty (30) State Marriage Amendments & Maine Question 1: Language, Votes and Origins* reprinted in Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, app. 1, at 993 (2010) [hereinafter Wardle, *Section Three*]. That is also the judgment of the thirty-five national constitutions that extend special protection to conjugal marriage. See Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. L. REV. 143 (2010). Even while invalidating that state’s dual-gender requirement for marriage, the California Supreme Court noted (perhaps instrumentally) that marriage has unique, intangible qualities that distinguish it from other relationships. *In re Marriage Cases*, 183 P.3d 384, 424–25 (Cal. 2008).

20. See *infra*, Part II.

21. One example is the American Law Institute’s proposed extension of equivalent parental rights to “de facto parents” and “parents by estoppel,” and other expansions of inclusion in the status and benefits of family relationships. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, ch. 2 (2002). See generally RECONCEIVING THE FAMILY (Robin Fretwell Wilson ed., 2006) and the chapters therein, including Robin Fretwell Wilson, *Introduction*, *id.* at 1; Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, *id.* at 9; Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, *id.* at 90; Marsha Garrison, *Marriage Matters: What’s Wrong with the ALI’s Domestic Partnership Proposal*, *id.* at 305; Jane Adolphe, *The Principle’s and Canada’s “Beyond Conjuality” Report: The Move towards Abolition of State Marriage Laws*, *id.* at 351.

As with other communities, the boundaries of marriage must reflect the key purposes of the community. Gender integration, uniting a man and woman in a gender-complementary union, is an essential, perhaps the most indispensable, purpose of marriage.²² This article explains why allowing same-sex couples to marry would seriously undermine the basic legal and social institution of marriage.²³ It also responds to the argument that since infertile heterosexual couples may marry, same-sex couples also should be allowed to marry, noting the profound distinction between those two categories of couples from the perspective of allegiance theory.²⁴

Finally, a brief conclusion explains the importance of legitimate and inclusive democratic processes in resolving the important social-legal question of whether same-sex marriage should be legalized.²⁵ *How* changes are adopted may be as important, if not more important, in the long run than *what* changes are adopted. Respect for the basic processes of democracy is critical in resolving the controversy over whether same-sex marriage should be legalized in the American states.

This article seeks to establish five basic points about the boundaries of marriage. First, boundaries and exclusion are necessary for all communities, including the community of marriage. Second, boundaries must reflect, protect and reinforce the core purposes of the community. Third, gender integration is a critical, core purpose of marriage. Fourth, legalizing same-sex marriage denies and undermines the core gender-integrative purposes of marriage. Finally, in setting the boundaries of basic social institutions such as marriage, it is especially important to follow the legitimate processes of democratic self-government, and not abuse or circumvent, evade or cut-off (such as by judicial usurpation of the decision-making process) those important political processes which help the society learn, grow, unite and heal.

22. See *infra* Part IV.

23. See *infra* Part V.

24. See *infra* Part V.

25. See *infra* Part VI.

II. BOUNDARIES AND EXCLUSION ARE NECESSARY FOR COMMUNITY

“Good fences make good neighbors.” —Robert Frost²⁶

A “community” is “[a] body of people or things viewed collectively,”²⁷ and includes “a nation or state,”²⁸ “the public, society,”²⁹ “a religious society,”³⁰ “a commune,”³¹ “[a] body of people who live in the *same* place, usually *sharing a common* cultural or ethnic *identity*,”³² “a group of people distinguished by *shared circumstances* of nationality, race, religion, sexuality, etc.,”³³ “a group of people who *share the same interests, pursuits, or occupation*,”³⁴ and groups characterized by the “*social cohesion; mutual support and affinity* such as derived from living in a community,”³⁵ “[t]he fact of *having a quality or qualities in common; shared characteristics, similarity; identity; unity*,”³⁶ and “[t]he fact of being in *communion*”³⁷ Thus, the very concept and meaning of community creates the need to define boundaries, establish standards for membership, and identify the common qualities that are criteria for belonging to a particular community.

Numerous intellectual disciplines and traditions as well as significant legal doctrines underscore the importance of boundaries to protect communities and to give meaning to belonging. These include group and identity theory, communitarian theory, and allegiance doctrine and theory.³⁸ Scholars of many perspectives and disciplines have noted that “groups come into being in order to provide members with a collective good, and that these collective goods will often be public goods”³⁹ Group theorists note that membership may

26. ROBERT FROST, *Mending Wall*, in *NORTH OF BOSTON* 6 (Edward Connery Lathem ed., Dodd, Mead & Co. 1977) (1916).

27. *Community Definition*, OXFORD ENGLISH DICTIONARY ONLINE [hereinafter “OED”] at I.1.a, <http://www.oed.com/view/Entry/37337?redirectedFrom=community#> (last visited Feb. 18, 2011).

28. *Id.* at I.2.a.

29. *Id.* at I.6.

30. *Id.* at I.3.a.

31. *Id.* at I.3.b.

32. *Id.* at I.2.b (emphasis added).

33. *Id.* at I.5.a (emphasis added).

34. *Id.* at I.5.b (emphasis added).

35. *Id.* at II.9.b (emphasis added).

36. *Id.* at II.11 (emphasis added).

37. *Id.* at II.12.

38. Group theory is discussed in the next two sentences and notes, allegiance theory in the following six paragraphs, and communitarianism at notes 96–100 and accompanying text.

39. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 26, 30–26 (Harvard Univ.

expand to a point of diminishing returns; that is, membership cannot be redefined to the point that the marginal costs of membership exceed the marginal benefits to each member.⁴⁰

Identity and group theorists remind us that boundaries are needed to define, understand and protect our institutions, as well as to enable us to live in peace with others who are not members of the particular community. Boundaries protect the community, its identity, its independence, and the relations community members have with those outside the community.⁴¹ Boundaries also protect our neighbors and our relationships with them.

Clear boundaries—bright lines—help responsible individuals to self-regulate, self-monitor, plan and implement plans with freedom knowing that they can rely upon the settled boundaries.

To secure loyalty, groups must not only satisfy members' needs for affiliation and belonging *within* the group, they must also maintain clear boundaries that differentiate them from other groups. In other words, groups must maintain distinctiveness in order to survive—effective groups cannot be too large or too heterogeneous. Groups that become overly inclusive or ill-defined lose the loyalty of their membership or break up into factions or splinter groups.⁴²

The doctrine of allegiance provides an especially relevant example of and basis for understanding the importance of boundaries that define membership in a group. “By the traditional English doctrine of allegiance, every loyal subject was entitled to the protection of the king However, allegiance was conditional upon the provision of that protection.”⁴³ In other words, duties and benefits were linked;

Press 2d ed. 1971) (1965), *cited in* A. Michael Froomkin, *Building from the Bottom Up from the Top Down*, 5 I/S: J. L. & POL'Y FOR INFO. SOC'Y 141, 150–52 (2009).

40. Froomkin, *supra* note 39 at 152, citing Olson, *supra* note 37 at 30–31. Some groups may be unduly exclusive— by stigma, demonization of enemies, etc. As Froomkin noted: “It would be foolish to deny the existence of these and other related social dysfunctions. The question is, which tendencies predominate in groups, the good or the bad.” *Id.* at 150. There is a significant difference if the reason for the exclusionary distinction relates to the purpose of the group, focuses on the positive quality of the group and does not require the invention or inflation of negative qualities or the demonization of excluded persons.

41. Patrick J. Charles, *Representation Without Documentation?: Unlawful Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35 (2011) [hereinafter Charles, *Apportionment*]. Group boundaries also protect those outside the group from intrusion, such as persons who choose not to marry or who do not wish to conform to the expectations of marriage from having a marital or quasi-marital status or relationship imposed upon them.

42. Marilynn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 475, 478 (1991), available at <http://psp.sagepub.com/content/17/5/475.full.pdf+html>.

43. William C. Bradford, “*The Duty to Defend Them*”: A Natural Law Justification for

allegiance was the duty owed by those who enjoyed the benefits of membership in the political community. As Coke explained in *Calvin's Case*, "Ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them."⁴⁴ Membership in the political community carried with it significant duties, of which allegiance was central, and membership was determined by manifesting allegiance to and acceptance of the benefits for which the political community was formed. The individual did not have the right to abandon the duty of allegiance.⁴⁵

The doctrine of allegiance came to America with the English colonists. For example, both the Mayflower Compact⁴⁶ and the so-called "Arabella Covenant" in Jonathan Winthrop's sermon, "A Model of Christian Charity,"⁴⁷ emphasize the reciprocal rights-duties relationship between rulers and the governed as the basis for the duty of allegiance. The landmark 1776 Virginia Declaration of Rights linked allegiance to the right of suffrage in the political community:

the Bush Doctrine of Preventative War, 79 NOTRE DAME L. REV. 1365, 1450 n.339 (2004). See Charles, *Apportionment*, *supra* note 41; William H. Dunham, Jr., *Doctrines of Allegiance in Late Medieval English Law*, 26 N.Y.U. L. REV. 41 (1951); Maximilian Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance," 56 YALE L.J. 58 (1946); see also Patrick J. Charles, *Plenary Power Doctrine and the Constitutionality of Ideological Exclusion: A Historical Perspective*, 15 TEX. REV. L. & POL. 61 (2010); Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 CARDOZO L. REV. DE NOVO 18, 28, 42 (2010).

44. *Calvin's Case*, (1608) 77 Eng.Rep. 377 (K.B.), cited in Albert Peeling & Paul L.A.H. Chartrand, *Sovereignty, Liberty, and the Legal Order of the "Freeman" (Otipahemsu'uk): Towards a Constitutional Theory of Métis Self-Government*, 67 SASK. L. REV. 339, 344-45 (2004).

45. Indeed, at Anglo-American legal history, at least until the Expatriation Act of 1868, ch. 249, 15 Stat. 223 (1868) in the United States, the common law "perpetual allegiance" doctrine denied individual citizens or subjects any legal right to forsake their sovereign. The U.S. Supreme Court in *Shanks v. Dupont*, 28 U.S. 242, 246 (1830), described and endorsed this doctrine: "The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens." See also MONTESQUIEU, *supra* note 9, at bk. XXVI, ch. 21 (stating that men are subject to civil laws where they reside).

46. *Mayflower Compact*, THE AVALON PROJECT (1620) http://avalon.law.yale.edu/17th_century/mayflower.asp ("We whose names are underwritten . . . covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid . . . do enact, constitute, and frame, such just and equal laws . . . for the general Good . . . [and] we promise all due Submission and Obedience.").

47. Jonathan Winthrop, *A Model of Christian Charity*, THE RELIGIOUS FREEDOM PAGE (1630) <http://religiousfreedom.lib.virginia.edu/sacred/charity.html> ("[W]e are a company professing ourselves fellow members of Christ; . . . the care of the public must overshadow all private respects . . . we are entered into covenant with Him [God] for this work . . . the Lord hath given us leave to draw our own articles . . . if we shall neglect the observation of these articles . . . the Lord will surely break out in wrath against us.") (In this case, God is the ruler and the people are the governed.).

“[A]ll men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage”⁴⁸

In addition to same-sex marriage, allegiance theory is today being discussed in relation to several important political issues. For example, under one historical facet of the doctrine of allegiance, “those persons who owed allegiance were subject to trial for treason [in ordinary criminal court trials]; those who did not [owe allegiance to the sovereign] were subject to military authority.”⁴⁹ Some decisions of the Supreme Court have called into question the continued viability of this aspect of the doctrine of allegiance as it relates to the law of treason.⁵⁰

Another aspect of the doctrine of allegiance is its implications in the debate over interpretation of the “natural born citizen” clause of Section One of the Fourteenth Amendment.⁵¹ One issue that is sometimes vigorously debated, despite the seemingly clear text of the Fourteenth Amendment, is whether children born in the United States to illegal aliens and to transitory aliens are, or properly should be, deemed citizens of the United States.⁵² The relevance for our discussion is that the allegiance-membership connection is a critical factor on both sides of the debate.

Similarly, the doctrine of allegiance is at the core of the debate over whether non-citizens should be excluded from the census count

48. *Virginia Declaration of Rights*, THE AVALON PROJECT (June 12, 1776), http://avalon.law.yale.edu/18th_century/virginia.asp. See also MASS. CONST. pmbl., part the first, art. VII, X, part the second, ch. I, § II, Art. V, Art IV (1780) available at http://www.lexrex.com/enlightened/laws/mass1780/mass_main.html (last visited Feb. 19, 2011).

49. Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 867 (2006); see also Erin L. Guruli, *International Taxation: Application of Source Rules to Income from Intangible Property*, 5 HOUS. BUS. & TAX L.J. 205, 212–13 (2005) (history of doctrine of economic allegiance in international taxation discussed); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and Fourteenth Amendment*, 41 DUKE L.J. 507, 516–17 (1991).

50. See *Ex parte Quirin*, 317 U.S. 1 (1942) (allowing a man claiming U.S. citizenship to be tried by a military tribunal); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (stating that due process requires that a U.S. citizen captured abroad while allegedly making war on U.S. troops and held by military authority as an enemy combatant be given meaningful opportunity to contest the factual basis for his detention).

51. U.S. Cont. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

52. See generally Christopher L. Eisgruber, *Birtright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54 (1997); Polly J. Price, *Natural Law and Birtright Citizenship in Calvin’s Case*, 9 YALE J.L. & HUMAN. 73, 74–75 (1997) (discussing the natural law origins of the rule of birtright citizenship expressed in *Calvin’s Case*); Katherine Pettit, Comment, *Addressing the Call for the Elimination of Birtright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birtright Citizenship Intact*, 15 TUL. J. INT’L & COMP. L. 265 (2006). While the language of the Fourteenth Amendment seems to clearly answer this question, the underlying policy issue seems to be debated and even litigated with some frequency.

used for purposes of apportionment of seats in the House of Representatives.⁵³ It has been reasonably argued that, historically, non-transitory residence in the territory was deemed proof of a degree of allegiance sufficient to count for inclusion in the apportionment census.⁵⁴ On the other hand, it also has been credibly argued that “birth, together with being a person subject to the complete and exclusive jurisdiction of the United States (i.e., not owing allegiance to another sovereign), was the constitutional mandate [for citizenship]”⁵⁵ For our purposes, which side is right is not the point; what is relevant is the fact that both arguments assume the connection between allegiance and membership—at least the membership benefit of counting for apportionment of seats in the House of Representatives.

In Robert Frost’s poem, *Mending Wall*, from which the lines introducing this Part are taken, the annual spring ritual of rebuilding the wall may seem at first glance like an exercise in reinforcing separation and alienation; however, further examination reveals that the process of mending the wall is a regular social event that draws two neighbors together to the boundaries of the physical–property relationship, providing an occasion to work together for a while in a common endeavor, to talk, and to renew their relationship. The boundary wall that separates their property connects them interpersonally. Mending the wall between them may be a metaphor for (and in life actually is an opportunity for) mending, clarifying, and strengthening their relationship.⁵⁶

53. Charles, *Apportionment*, *supra* note 41, at 61–67; MARGARET MIKYUNG LEE & ERIKA K. LUNDER, THE CONSTITUTIONALITY OF EXCLUDING ALIENS FROM THE CENSUS FOR APPORTIONMENT AND REDISTRICTING PURPOSES, CONGRESSIONAL RESEARCH SERVICE No. 7-5700 (Jan. 20, 2010), *cited in* Charles, *Apportionment*, *supra* at 41 n.142; John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over Bush v. Gore?*, 94 GEO. L.J. 1475, 1484 (2006); William Ty Mayton, *Birtright Citizenship and the Civic Minimum*, 22 GEO. IMMIGR. L.J. 221 (2008); Charles Wood, *Losing Control of America’s Future —The Census, Birtright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465 (1999); *see also* Steve D. Shadowen, *Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences*, 21 GEO. MASON U. CIV. RTS. L.J. 31, 54–55 (2010).

54. Charles, *Apportionment*, *supra* note 41, at 61–67; LEE & LUNDER, *supra* note 53, at 11.

55. Eastman, *supra* note 53, at 1484; *see also* Wood, *supra* note 53, at 476–80, 504–08.

56. *Mending Wall* is a marvelously multi-layered, superficially simple but very complicated poem. The title can be read as referring to or emphasizing the act of mending, or the wall. The voice in the poem seems to question the value of the wall. Yet it is the speaker who initiates the appointment to mend the wall and who does most of the talking during the process, seeming to get most of the social enjoyment from the interaction. The neighbor speaks little and is content with the axiom that “good fences make good neighbors,” thus emphasizing his concern to be and have a good neighbor. Thus, like the speaking “voice” in Robert Browning’s *My Last Duchess*, Frost may have meant for the voice to be self-indicting and the words to be self-condemning of the speaker.

III. BOUNDARIES MUST SUPPORT THE CORE PURPOSES OF THE COMMUNITY

Membership in a community is defined primarily (if not entirely) by the purposes for which the community is organized. This basic principle is reflected not only in the common understanding of the word “community,” but in the principles and theories of many related and interested disciplines, including numerous discussions of belonging theory, identity theory, group theory, communitarian theory, and allegiance theory. Creating, preserving, and strengthening communities requires the definition and regulation of belonging to those communities.

The Oxford English Dictionary definitions of *community* noted above all underscore the indispensable necessity of common qualifications, collective qualities, shared characteristics, and identifying elements. “[D]istinctiveness per se is an extremely important characteristic of groups.”⁵⁷ It is the commonality that defines the community. Change the common characteristics, the boundaries for belonging to a community, and you change the community itself. Thus, the boundaries of community must reflect and protect the core purposes of the community.

The “doctrine of allegiance” also establishes the linkage of boundaries to the purposes of the group. These boundaries must reflect the core reasons and functions of the community, and membership in the community accompanies the acceptance of community benefits (the purposes for which the community is established) and the assumption of the duty of allegiance to the community and its purposes.⁵⁸ Non-acceptance of the duty of allegiance to the community disqualifies one from membership in the community.

The importance of allegiance in defining marriage is underscored by the observation of anthropologist Claude Levi-Strauss that historically, the core and essential purpose of marriage was to create alliances and form inter-group allegiances with other kinship groups.⁵⁹ Additionally, the roots of the social compact theory and republican government theories historically lay in linking membership in the community with allegiance to the purposes of the community.⁶⁰

57. Brewer, *supra* note 42, at 478.

58. See *supra*, notes 43–53 and accompanying text.

59. CLAUDE LEVI-STRAUSS, *THE VIEW FROM AFAR* 47–48 (Joachim Neugroschel & Phoebe Hoss, trans., Basic Books 1985) (1983).

60. See also LOCKE, *supra* note 8, §§ 4, 7–12, 123–30, 211–43; John Trenchard & Thomas Gordon, *Letter No. 62*, in *CATO’S LETTERS* (1733); Heyman, *supra* note 49, at 512–22.

Blackstone identified the reciprocal duties of membership and allegiance as the “original contract of society . . . [that] in nature and reason must always be understood and implied in the very act of associating together,” and it was that “the whole should protect all its parts, and that every part should pay obedience to the will of the whole”⁶¹ Today community purposes not only define the boundaries of membership, but, John Rawls seems to suggest that, such purposes delineate the scope of appropriate expressions by community members regarding fundamental political questions.⁶²

Marriage is a public community status and institution that serves both public and private purposes, as Roscoe Pound long ago noted.⁶³ While individual marriage couplings will certainly reflect the private purposes of the parties, such unions also must conform to and reflect—and the legal definition of marriage in the United States is governed and defined by—the core public purposes of marriage.

Boundaries are needed to preserve and protect the community of marriage. In the family context, this is critical not only for individual families, but also (and especially) for society. Marriage is a core social institution protected by law; marriage laws communicate our shared understandings and clarify our expectations of persons in the communities and relationships that are prescribed by law.⁶⁴ Belonging loses meaning if those boundaries are expanded beyond the core purposes of the family relationships. As Barack Obama wrote in his best-selling autobiography, “If everyone is family, then no one is family.”⁶⁵ One may seek to preserve the label of “family” or

61. BLACKSTONE, *supra* note 10, at 35; *see also id.* at 233.

62. JOHN RAWLS, *POLITICAL LIBERALISM* (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 766 (1997) (“The basic requirement is that a reasonable doctrine accepts a constitutional democratic regime and its companion idea of legitimate law.”); *id.* at 765–66 (“The idea of public reason . . . is part of the idea of democracy itself. This is because a basic feature of democracy is the fact of reasonable pluralism Citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines. In view of this, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake. I propose . . . the politically reasonable addressed to citizens as citizens.”).

63. Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916) (“It is important to distinguish the individual interests in domestic relations from the social interest in the family and marriage as social institutions.”). *See also* Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2839–40 (2008) (noting but disputing conservative social, political and economic justifications for marriage).

64. *See generally* William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 266–70 (2007) (discussing institutional realities of marriage); Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL’Y 1, 7–27 (2006) (discussing the role of marriage as an institution); Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 560–67 (2005) (marriage is a social institution and attempts to redefine marriage undermine a basic social institution).

65. OBAMA, *supra* note 1, at 347.

“marriage,” but through over-inclusive redefinition of the boundaries of family relationships, it will be drained of meaning and significance for both society and for the individuals in those relationships.

Thus, two points have been established. First, all communities have boundaries and, second, the boundaries defining membership in a community must reflect and protect the essential purposes of the community. The next questions are —what are the essential purposes of marriage? Does the dual-gender requirement reflect and protect core purposes of the institution of marriage?

IV. GENDER INTEGRATION IS A FOUNDATIONAL PURPOSE OF MARRIAGE

Today, there is extensive debate over the essential purposes and qualities of marriage. The movement to legalize same-sex marriage challenges the historic belief that gender-integration is a core purpose of marriage, that marriage is fundamentally a gender-integrating community.

It is not unreasonable to conclude that the core purpose of marriage is to unite and integrate unrelated men and women in long-term, consensual unions. Gender-integration is short-hand for a number of specific essential qualities, characteristics and critical purposes of marriage. Among these are “(1) safe sexual relations, (2) responsible procreation, (3) optimal child-rearing, (4) healthy human relationship development, [and] (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers”⁶⁶ All of these purposes require or assume gender-integrating unions of male and female.

Society has a great interest in channeling sexual relations into safe, socially beneficial contexts, relationships in which there is minimal risk of violence (young persons and adult women are particularly, but not uniquely, vulnerable to sexual violence and exploitation),⁶⁷ and also little risk to public health (from sexually transmitted diseases, dangerously premature child-bearing, etc.).⁶⁸ Married husbands and wives, not insignificantly, are said to enjoy the most healthy, most

66. See generally Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 374 (2003) (noting eight, key social purposes of marriage, including the five above plus (6) securing the stability and integrity of marriage, (7) fostering civic virtue, democracy, and social order, and (8) facilitating interjurisdictional compatibility).

67. WILL DURANT & ARIEL DURANT, *THE LESSONS OF HISTORY* 35–36 (1968) (“[S]ex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group.”).

68. See Wardle, *supra* note 14, at 1022–25.

satisfying, and most socially-beneficial sexual relations.⁶⁹ Likewise, there continues to be enormous social interests in responsible procreation. That includes providing the optimal situation for pregnancy and child-birth (including emotional commitment to and financial support of the pregnant woman and child she is carrying). It also includes providing the most positive environment offering the best prospects for the most beneficial child-rearing (dual-gender child rearing provides the greatest protection for healthy development with the least fears and incompetencies).⁷⁰ Gender-integrating marriage links and mutually reinforces all three of these social interests. The social interest in healthy human relationship development is reflected in the terrible financial and social costs (from crime, to loss of productivity, to physical and emotional health problems, and to detrimental impacts upon children) that result when significant intimate relationships break up.⁷¹ Gender-integrated relationships are also the strongest type of relationship and are least-susceptible to instability and to related and consequential insecurities.⁷² Likewise those who make the greatest sacrifice of personal income-maximization in order to provide nurturing roles within the family (especially wives and mothers) are best protected by gender-integrated marriage to an opposite-sex partner upon whom expectations of being the family provider are socially reinforced.⁷³

The core purposes of marriage are built around human recognition across time and cultures that men and women are different. Males and females differ profoundly in innumerable, essential ways that are complementary; thus, the union of man and woman, is different in innumerable, essential ways from the union of two men or of two women. The integration of mutually matching, harmonious,

69. See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 47-52, 75-89, 152-58, 162-68 (2000).

70. See Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL'Y 771, 784-96 (2001).

71. See WAITE & GALLAGHER, *supra* note 69, at 47-64, 101, 143-49, 152.

72. See Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in *What's the Harm? Does legalizing same-sex marriage really harm individuals, families or society?* 207, 219-25 (Lynn D. Wardle, ed. 2008) (reviewing literature on infidelity and instability of same-sex unions); see also Bradford Wilcox, *Honoring Thy Fathers*, Catholic Education.org, June 13, 2008) available at <http://www.freerepublic.com/focus/f-religion/2031631/posts> (last visited March 23, 2011) (children are less insecure when raised with a father in the home); Cynthia Hujar Orr, *Meet Marcel Johnson*, 34 *Champion* 5, 13 (April 2010) ("One thing I remember about my youth was the constant feeling of insecurity. Things never felt right. Money was always tight. Watching my mom struggle and sacrifice deeply affected me. It wasn't fair, in my opinion, for her to have to live the way she lived."); *Concern over absent father stats*, *BBC News*, available at http://news.bbc.co.uk/2/hi/uk_news/wales/7959970.stm (last visited March 23, 2011).

73. See WAITE & GALLAGHER, *supra* note 69, at 150-173.

corresponding gender differences is an indispensable purpose of the institution of marriage. Gender differences between men and women uniquely fit and are reciprocal and complementary. For millennia, our laws have protected marriage as a gender-integrative, dualistic, paired, and exclusively appropriate institution to bring about particularly important social purposes and functions.⁷⁴ As Professor Bradford Wilcox recently declared: “The classic purpose and function of marriage is to integrate biology, social conventions, law, etc., into one package, which is the intact married family.”⁷⁵

In *Family Politics, The Idea of Marriage in Modern Political Thought*, Professor Scott Yenor has recently shown that the uniting of genders has been a consistent core conception of marriage across the ages, across cultures, and across a wide variety of philosophical and jurisprudential schools and traditions, including writings in recent centuries from Locke to Marx to John Paul II.⁷⁶ Likewise, Professor Robert George has powerfully argued that unification of male and female has been identified in the philosophy of western civilization for thousands of years as the core constitutive purpose of marriage.⁷⁷

One contemporary intellectual school that provides compelling and eloquent justifications for gender-integration as the core purpose of marriage is relational feminism. That body includes French feminists, African feminists, and religious feminists. All of these groups share the rejection of the sterile individualism of most American feminism, the appreciation of the duality of humanity (women are different than, not mere imitations of, men), the celebration of the great worth of the unique and irreplaceable contributions of women to our social institutions, including marriage, and an insistence upon their need to be included and valued equally in all of the basic institutions of society.

I have recently written about relational feminists’ contribution to recognition of the core gender-integrating purposes of marriage.⁷⁸ I

74. See WAITE & GALLAGHER, *supra* note 60, at 45.

75. Bradford Wilcox, *Why Marriage Matters: A Natural Law Perspective on Marriage and Family Life*, Address at the Wheatley Institution Conference on Defense of the Family: Natural Law Perspectives, Brigham Young University, 27 Jan. 2011; see generally Sara Israelsen-Hartley, *Traditional Marriage Has Impact Beyond Faith, Scholar Says*, DESERET NEWS, Jan. 27, 2011, at A1, 13.

76. SCOTT YENOR, *FAMILY POLITICS, THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT* (2010).

77. Robert P. George, *What Is Marriage?*, Address at the Wheatley Institution Conference on Defense of the Family: Natural Law Perspectives, Brigham Young University, 27 Jan. 2011; see Sara Israelsen-Hartley, *Defense of the Family Conference: Defining Marriage*, DESERET NEWS, Jan. 27, 2011, at A13; see also Sherif Girgis, Robert George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2010).

78. Lynn D. Wardle, *Gender Neutrality and the Jurisprudence of Marriage*, in *THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS* 37, 37–65 (Scott

will not repeat here what I elaborated there. But by way of overview I mention three powerful strands of relational feminism that explain the gender-integrative purpose of marriage.

From a feminist perspective, gender-integrating marriage is important because it acknowledges the “mixture” of humanity and prohibits exclusion of one gender (historically women have been most vulnerable) from the public definition and constitution of a basic legal institution. Additionally, male-female marriages are different from same-sex unions because they are gender-integrated and manifest and implement the important value of inclusion of and respect for the different contributions of both men and women. Finally, from a utilitarian perspective, same-sex marriage is ill-advised because marriage has been customized over millennia for gender-integrating, male-female unions, and same-sex unions have different characteristics and expectations.⁷⁹

For example, French feminist Sylviane Agacinski argues for what she calls *mixité* (which she translates as “mixture” in English, meaning “to maintain the specificity of the term in its implication of the bringing together of two *different* elements”).⁸⁰ Her core claims are that “the duality of the sexes—whether viewed as a universal existential condition or as a social differentiation . . . will not allow itself to be reduced or passed over, but only . . . to be *practiced*,”⁸¹ and that one “cannot separate the meaning and value of sexual difference from the question of generation.”⁸²

Similarly many African feminists have advocated legal recognition of gender differences and representation of both genders in public institutions. “[T]he slowly emerging African feminism is distinctly heterosexual, pro-natal, and concerned with many ‘bread, butter, culture and power’ issues.”⁸³

Feminists writing from many religious traditions also have

FitzGibbon, Lynn D. Wardle & A. Scott Loveless, eds., 2010) [hereinafter “Wardle, *Gender*”].

79. *Id.* at 44–45.

80. SYLVIANE AGACINSKI, *PARITY OF THE SEXES* viii (Lisa Walsh trans., Columbia Univ. Press 2001) (1998).

81. *Id.* at xxviii.

82. *Id.* at 22. Accordingly, Agacinski supports same-sex *Pactes Civiles* or PACS (civil unions) but does not endorse same-sex marriage, because “[w]ith the PACS, the legalization of homosexuality has no direct connection to the family or marriage because . . . marriage was not instituted to legalize heterosexuality, but to regulate filiation.” *Id.* at xiii. In other words, because marriage as an institution is tied to procreation, mixture (conjugal) in marriage is essential, whereas in PACS conjugal is not required. *See generally* Wardle, *Gender*, *supra* note 78, at 47.

83. Gwendolyn Mikell, *Introduction* to *AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA* 1, 4 (Gwendolyn Mikell ed., 1997); *see also* Wardle, *Gender*, *supra* note 78, at 48.

explained the importance of recognizing appropriate gender differences in the law and have celebrated gender-integrating marriage. Most prominently, a large and growing body of literature by some remarkable Catholic feminists seeks to connect contemporary feminist concerns with historical Catholic philosophical roots.⁸⁴ Among those remarkably insightful writers is Helen M. Alvaré.⁸⁵ Notre Dame Law School Professor Margaret Brinig has also written powerfully and perceptively about the covenant tradition and covenant religious dimensions of marriage.⁸⁶ She, and her family law casebook co-author, wrote: “Opening marriage to homosexual as well as heterosexual might be the most dramatic change in the institution in American history.”⁸⁷

Evangelical and other Protestant feminists have been marginalized by both feminists and Evangelicals until recently, and, some Evangelical feminists also have articulated justification for appropriate recognition of gender differences in the law generally, and particularly in marriage.⁸⁸

Some Mormon feminists have also written about the importance of male-female marriage, reflecting the influence of their faith’s unique

84. See generally Elizabeth Schiltz, *Does Sarah + John = 3? The History and Future of Complementarity in Catholic Feminism*, Keynote Address presented at The Family: Searching for the Fairest Love, Notre Dame Center for Ethics and Culture, Ninth Annual Fall Conference (Nov. 7, 2008) available (in video) at <https://sites.google.com/a/nd.edu/the-notre-dame-center-for-ethics-and-culture/video/fall-conference-videos/the-family-searching-for-fairest-love-videos> (last visited March 24, 2011); Sr. Prudence Allen, *Analogy, Law and the Workplace: Complementarity, Conscience and the Common Good*, 4 U. ST. THOMAS L.J. 350, 356 (2007); Patrick Lee, *Why Marriage Is Inherently Heterosexual*, CATHOLIC ONLINE (Dec. 21, 2008), <http://www.catholic.org/politics/story.php?id=31195>; William E. May, *Feminism and Human Sexuality, Part I*, CULTURE OF LIFE FOUNDATION (Feb. 25, 2009), http://culture-of-life.org/index2.php?option=com_content&do_pdf=1&id=545.

85. Helen M. Alvaré, *Communion or Suspicion: Which Way for Woman and Man?*, 8 AVE MARIA L. REV. 167, 167, 195 (2009) (endorsing what she calls the Roman Catholic “‘communion and mutual service model’ of intimate, heterosexual relationships,” which she concludes “support[s] continuing efforts to promote marriage as the crucial social institution harmonizing men’s, women’s, children’s, and society’s needs and goals”); see *id.* at 177–79 (discussing Brinig); Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage and its Predecessors*, 16 STAN. L. & POL’Y REV. 135, 163 (2005).

86. MARGARET BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000). Brinig does not limit her analysis to the religious notion of covenant in marriage, but includes functionally similar other serious commitments that involve “solemn vows” that “stem[] . . . from the values of the family members.” *Id.* at 1. In that sense, the covenant idea motivates the parties to contribute to the family enterprise and relationship without counting their individual costs. *Id.* at 84, 109; See also Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1601 (1994) (book review); Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137 (2004).

87. CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES 57 (2d ed. 2001).

88. See Sally K. Gallager, *The Marginalization of Evangelical Feminism*, 65 SOC. RELIG. 215, 227–28 (2004); see generally Wardle, *Gender*, *supra* note 78, at 53–54.

religious doctrine that marriage is a God-ordained, dual-gender institution.⁸⁹ For example, Mormon feminist Camille S. Williams writes that “the norm of heterosexual marriage is a necessary—albeit not sufficient—condition for social equality for women.”⁹⁰ She asserts, “[m]arriage and the marital family are arguably the only important social institutions in which women have always been necessary participants.”⁹¹ She argues that if women are not indispensable in the core public institution of marriage (if two men can make a marriage without a woman), women’s presence and voice may not be indispensable in other public institutions either.⁹²

Gender integration is also an important constitutive element of the communitarian perspective.⁹³ While most communitarian writing occurred before the same-sex marriage debate arose,⁹⁴ their writings emphasized the value and importance of such natural and constitutive communities and mediating institutions as marriage and family.⁹⁵ Because claims for same-sex marriage are based primarily upon liberal, libertarian, and individual rights principles, there has been little advocacy for same-sex marriage from a communitarian perspective,⁹⁶ though some communitarians have argued for same-sex

89. See Alan J. Hawkins et al., *Equal Partnership and Sacred Responsibilities of Mothers and Fathers*, in *STRENGTHENING OUR FAMILIES: AN IN-DEPTH LOOK AT THE PROCLAMATION ON THE FAMILY* 63 (David C. Dollahite ed., 2000) (reviewing scriptural basis for Mormon belief in the dual-gender, gender-equal, gender-interdependent marriage in the Book of Mormon, Doctrine and Covenants, and Pearl of Great Price, as well as the Bible).

90. Camille S. Williams, *Women, Equality and the Federal Marriage Amendment*, 20 *BYU J. PUB. L.* 487, 489 (2006).

91. *Id.* at 487.

92. *Id.* at 494–99 (arguing that dual-gender marriage promotes the social and economic equality of women).

93. Tanya E. Coke, *Lady Justice May be Blind, but is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 *N.Y.U. L. REV.* 327, 360 (1994) (“[G]ender integration is a constitutive aspect of the communitarian justice that the sixth amendment promises.”).

94. See generally DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* (1993); STEPHEN MULHALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* (1996); *COMMUNITARIANISM AND INDIVIDUALISM* (Shlomo Avineri & Avner de-Shalit eds., 1992); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL. & PUB. AFF.* 308 (1985), available at <http://www.jstor.org/stable/2265353?origin=api> (last visited Feb. 8, 2011); Daragh Minogue, *Etzioni’s Communitarianism: Old (Communion) Wine in New Bottles*, 17 *POLITICS* 161 (1997).

95. See also Jane Adolphe, *The Holy See and the Universal Declaration of Human Rights: Working Toward A Legal Anthropology of Human Rights and the Family*, 4 *AVE MARIA L. REV.* 343, 377 (2006) (discussing the 1989 Convention on the Rights of the Child, which “reaffirms the centrality of the natural family founded on marriage” and which “recognize[s] the fundamental importance of the family and the communitarian perspective of children’s rights”); Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 *POL. THEORY* 81 (Feb. 1984), available at <http://www.jstor.org/openurl?volume=12&date=1984&spage=81&issn=00905917&issue=1> (last visited Feb. 8, 2011) (arguing that enduring attachments and commitment define human beings, community requires a strong sense of moral and political union, and strong unions must be on a community (less-than-national) size-scale).

96. Carlos A. Ball, *Communitarianism and Gay Rights*, 85 *CORNELL L. REV.* 443, 446–

civil unions.⁹⁷ The communitarian perspective emphasizes unity, integration, and cooperation for the good of the community, and easily translates to recognition of the value of gender-integration in marriage.⁹⁸ Communitarians believe in an ultimate source of values that arise from religion, natural laws, or deontological normative factors,⁹⁹ which consistently endorse and support dual-gender marriage.¹⁰⁰

Thus, from ancient Greek philosophers, to the geniuses of the Enlightenment, to contemporary post-liberalism, to post-modern philosophical writers, the integration of male and female has been identified as one of the core purposes of marriage. Gender-integration is not a useless vestigial remnant of ancient primitivism, but acknowledged to be consistent with and reflective of fundamental human nature throughout history, endorsed by thoughtful scholars and commentators today, and recognized as serving essential social functions that contribute to the stability of marriage and to social capital in society.¹⁰¹

48 (2000) (gay rights movement is tied to individual rights, but some feminists and critical legal scholars admit the limits of liberalism and gay communities are important part of gay dignity). *But see* Barbara Bennett Woodhouse, “*It All Depends on What You Mean by Home*”: *Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569, 572–76 (1996) (most academic discourse pits individualistic advocates of nontraditional families against communitarian supporters of traditional families but Woodhouse presents a context-based definition of family relations based on socially-constructed kinship communities).

97. Amitai Etzioni, *A Communitarian Position for Civil Unions*, JUST MARRIAGE, at 63, 65–66 (Mary Lyndon Shanley ed., 2004) (advocating civil unions as a “reasonable middle ground” for a society divided on the issue of gay marriage).

98. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1016 (2001) (“[S]ociety benefits from marriages that have duties of exclusive sexual relations, and a communitarian perspective might require men and women to make some sacrifices of individual autonomy for the good of society.”); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253, 1297 (1994) (stating that American “families retain a communitarian character,” and marriage is valued as the “bond between a man and a woman” involving more than mere contract but a holistic integrative union); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1573 n.108 (1998) (defending covenant marriage between man and woman as promoting the communitarian ideal).

99. Amitai Etzioni, *A Moderate Communitarian Proposal*, 24 POL. THEORY 155 (1996) available at <http://www.jstor.org/openurl?volume=24&date=1996&spage=155&issn=00905917&issue=2> (last visited Feb. 8, 2011). Differing norms of what constitutes right action, moral conduct, ethical behavior are implicated in the marriage debate.

100. *See* MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE 1 (Martin King Whyte ed., 2000), available at http://www.wjh.harvard.edu/soc/faculty/whyte/Publications/Marriage_America.pdf (last visited March 24, 2011) (“The contributions to this volume share a number of concerns and assumptions. . . . [W]e assume that marriage is an institution worth supporting and that American society would be better off if marriages were more common, long-lasting and satisfying. . . . [Also,] the declining popularity and brittleness of American marriages imposes social costs, particularly by endangering the prospects that children will . . . become competent, happy and productive adults.”).

101. *Id.* *See also* Maria Sophia Aguire, *Marriage and the Family in Economic Theory and*

The Supreme Court of the United States has repeatedly emphasized the fundamental importance of marriage in our society as well as in our constitutional system of laws.¹⁰² Those decisions consistently assume, clearly imply, and directly reinforce the dual-gender, male-female, gender-complementary nature of marriage. They consistently accept, confirm, and endorse the Court's description of the community of marriage articulated well over a century ago:

[N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from *the union for life of one man and one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.¹⁰³

Murphy remains good law; it has been repeatedly cited by the Supreme Court of the United States throughout the twentieth and twenty-first centuries for a variety of propositions.¹⁰⁴ Thus, gender-integration remains a core and essential purpose of marriage.

Policy, 4 Ave Maria L. Rev. 435, 436 (2006) ("From an economic policy point of view, both marriage and the family are important. Healthy families are essential because they directly impact human, moral, and social capital . . ."); Maria Sophia Aguire *The Feminine Vocation and the Economy*, 8 Ave Maria L. Rev. 49-52-54 (2009) (non-monetary contribution of women in the family is crucial to family development and such contributions contribute greatly to overall social capital); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U. Cal. Davis L. Rev. 305, 352 (2006) ("[M]arriage generates 'social capital'—interfamily and intergenerational bonds that embed married couples and their children within larger social networks and direct their efforts to the good of all."); see further Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. Democracy 65, 74 (1995), available at <http://xroads.virginia.edu/~HYPER/DETOC/assoc/bowling.html> (last visited March 24, 2011) (declining social capital influenced by declining marriage and increased divorce because "married, middle-class parents are generally more socially involved than other people.")

102. See *supra* note 19.

103. *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added).

104. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 765 (2008); *Romer v. Evans*, 517 U.S. 620, 651–52 (1996) (Scalia, J., dissenting); *United States v. Wheeler*, 435 U.S. 313, 320 (1978); *Richardson v. Ramirez*, 418 U.S. 24, 52 (1974); *Trop v. Dulles*, 356 U.S. 86, 97 (1958); *Caminetti v. United States*, 242 U.S. 470, 487 (1917); *Downes v. Bidwell*, 182 U.S. 244, 269 (1901); *Wiley v. Sinkler*, 179 U.S. 58, 66 (1900). It also has been cited by state courts specifically for the dual-gender nature of marriage.

V. SAME-SEX MARRIAGE UNDERMINES THE CORE GENDER-INTEGRATIVE PURPOSES OF MARRIAGE

Same-sex unions are inconsistent with and fail to meet and manifest allegiance to several of the core gender-integrating social purposes of marriage. They are by definition a rejection of the core, dual-gender composition and integrating purposes of marriage.

Some advocates of same-sex marriage argue that because all married, or marriageable persons, cannot satisfy or further all of the purposes of marriage, gay and lesbian couples also must not be denied the opportunity to marry simply because they are of the same-gender. For example, the argument claims that no state requires a test for fertility before giving couples marriage licenses, and that many couples who marry are infertile, that elderly men and women may marry even though they are no longer able to procreate, and that young men and women who are sterile are still eligible to marry; thus, the ability to procreate is not a core requirement of marriage and inability to procreate is not a ground on which to deny same-sex couples the right to marry.¹⁰⁵ In contrast, proponents of same-sex marriage point out the broader and more complex nature of the dual-gender integrating purposes of marriage, such as the importance of responsible procreation, and the link it creates between child-bearing/child-rearing and core social interests.¹⁰⁶ Nevertheless, same-

105. See *Morrison v. Sadler*, 821 N.E.2d 15, 36–37 (Ind. Ct. App. 2005) (Friedlander, J., concurring) (many infertile non-same-sex couples can marry); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (procreative interests of the state are not rational justifications for limiting marriage to male-female couples because fertility and procreation are not prerequisites for obtaining a marriage license); Kerry Abrams & Peter Brooks, *Marriage As A Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 20, 32 (2009); James L. Musselman, *What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed By Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 68–69 (2009); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, and Biology*, 28 L. & INEQUAL. 307, 315 (2010); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006); see also Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 410 (2009); *id.* at 413 (“Women at an age that suggests they have gone through menopause are still allowed to marry. Infertile men, people who are on their deathbeds, and prisoners serving life sentences with no chance of parole or conjugal visits are allowed to marry.”); Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 572, 626–27 (2007).

106. See DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 8 (2005); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 44 (2004); Richard Stith, *Keep Friendship Unregulated*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 263, 268–70 (2004); Lynn D. Wardle, *“Multiply and Replenish”: Considering Same-Sex Marriage in*

sex marriage advocates claim that there is no legitimate reason to prohibit marriage by same-sex couples.

This argument for same-sex marriage is reductionist and simplistically disconnected from reality. Marriage is defined, understood, and intended to be a life-long (but dissoluble) bonded relationship. We all marry with the intent, hope, and legally fostered expectation that we will remain married until death. As married couples age together, they pass through many biological and developmental stages; including stages in which, due to the normal course of life, they will not be able to procreate, perhaps will not be able to have sexual communion, and in end-of-life conditions, may not be able to interact with each other at all. Married persons eventually pass from mutual interdependence to dependent and care-giver relationships. If it is the purpose of marriage to unite couples in a marital community throughout their lives, it anticipates and includes times in the life of the couple when they may not be able to personally perform, contribute to, and further all of the core functions of marriage, though they remain committed to those institutional purposes.

More broadly, allegiance theory bridges the gap between ability to procreate and marriage for male-female couples. Though citizenship does not oblige all citizens, including infants, adolescents, the infirm, and the elderly to take up arms in defense of their nation on the front-lines of its military wars, citizenship imposes the expectation of loyalty and allegiance, and a willingness to show allegiance to and to do what one can in defense of the nation in times of armed conflict. The aged and infirm show their allegiance in quieter, still-powerful, patriotic ways outside of the war zones. Likewise, the infirm and aged and infertile may not be able to fulfill personally the procreative purposes of marriage, yet the nature of their gender-integrating union expresses their ongoing allegiance to that social purpose and to the institution so conceived. To demand that the institution of marriage be radically redefined to include same-sex unions as marriages, presenting oneself for marriage with another person of the same-sex, is to fail to bear allegiance to the institution of marriage and several of its core purposes. That lack of allegiance to a core purpose of marriage is one of several factors that distinguish infertile heterosexual couples from same-sex couples.¹⁰⁷ The lack of allegiance to the institution of marriage as a dual-gender, gender-integrating, gender-

Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771, 781 (2001); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1078 n.54 (2005).

107. See *supra*, notes 41–53 and accompanying text.

complementary institution, which threatens and undermines core purposes of the institution of the marital community, is another factor.

Another source of concern about inability to bear allegiance to, and fulfill a core purpose of, marriage is increasing data about the sexual porousness, fluidity, and instability of fidelity in same-sex unions. Fidelity goes to the essence of allegiance in the marital bond. Yet even the *New York Times*, a leading journalistic voice promoting same-sex marriage, reports that serious studies reveal that the parties in half of all studied gay marriages in California had made agreements allowing sexual relations outside of the marriage.¹⁰⁸ Many studies confirm the extraordinarily high rates of extra-relational sexual relations among same-sex couples that dwarf marital infidelity by heterosexual spouses.¹⁰⁹ The standard of both expectations and behavior for dual-gender marriages are profoundly different, reflecting high moral values in a relational paradigm of fidelity. Embracing same-sex unions within the definition of marriage will have a transformative impact upon the expectations and understanding of marriage, including the commitment to sexual fidelity.¹¹⁰ Preservation of the standard of exclusive sexual fidelity between spouses is essential if marriage is to survive as a meaningful, socially-beneficial institution. Sexual fidelity is especially critical to the safe and responsible socialization and rearing of children, and to optimizing their chances and prospects for creating successful marriages of their own.¹¹¹ Since marriage “giv[es] character to our whole civil polity,”¹¹² the deleterious implications of legalization of same-sex marriage for our society are significant.

108. Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. TIMES, Jan. 28, 2010, at A17A, available at http://www.nytimes.com/2010/01/29/us/29sfmetro.html?_r=1 (last visited Feb. 7, 2011).

109. See Lynn D. Wardle, *A House Divided: Same-Sex Marriage and Dangers to Civil Rights*, 4 LIB. U. L. REV. 537, 560–75 (2010) (reviewing literature showing high rates of infidelity and promiscuity in committed same-sex relationships, especially gay relationships); Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in WHAT’S THE HARM? *supra* note 72 at 220–25.

110. *Id.* at 226–27.

111. Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 110–27 (2002).

112. *Maynard v. Hill*, 125 U.S. 190, 213 (1888).

VI. PERMANENCE AND PROCESS: “AND THIS, TOO, SHALL PASS AWAY.”¹¹³

One of the values of belonging to a community is institutional: the connection with an identity that consists of and lasts longer than the life or interests or contributions of the individual member. For foundational social institutions like marriage, the importance of continuity is heightened because the marriage relationship of every couple needs time to develop and mature, and because continuity of the core meaning and essential expectations of the relationship over time are a large part of what gives stability and reliable meaning to society and to the institution over generations and through the centuries. Such consistency protects the temporal space that couples need to plan and commit for the future of their own marriage relationships, and provides society with a bright-line standard upon which laws, social mores, root paradigms, and rising generations may dependably rely.

While change in particular peripheral aspects of the institution are common and continuous, there have been few socially beneficial changes in marriage of a radical nature over the millennia. However, the history of marriage and marriage law includes the story of many popular fads that seemed to signify revolutionary changes in the nature and structure of the institution of marriage. Eventually, each faded and

113. Abraham Lincoln, *Agriculture: Annual Address Before the Wisconsin State Agricultural Society, at Milwaukee, Wisconsin, Sept. 30, 1859*, in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 493, 504 (Roy P. Basler ed., unabr. paperback ed. 2001), available at <http://showcase.netins.net/web/creative/lincoln/speeches/fair.htm> (last visited Jan. 17, 2011) (“It is said an Eastern monarch once charged his wise men to invent him a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him the words: ‘*And this, too, shall pass away.*’ How much it expresses! How chastening in the hour of pride! — how consoling in the depths of affliction! ‘*And this, too, shall pass away.*’ And yet let us hope it is not *quite* true. Let us hope, rather, that by the best cultivation of the physical world, beneath and around us; and the intellectual and moral world within us, we shall secure an individual, social, and political prosperity and happiness, whose course shall be onward and upward, and which, while the earth endures, shall not pass away.”); see also Mark A. Taylor, *This, too, Shall Pass*, CHRISTIAN STANDARD (Mar. 31, 2010) <http://christianstandard.com/2010/03/this-too-shall-pass-mark-a-taylor/> (“This, too, shall pass” is the proverb repeated especially by those who have lived decades and seen the truth of the saying. In no situation is this more reassuring than when we’re suffering with the extremes of a season: numbing cold, flood-producing rain, exhausting heat, or autumn’s onslaught of fallen leaves. Aren’t we glad we don’t shovel or rake all year long? . . . When our situation seems impossible, we can remember that nothing bad lasts forever.”); 1 *Peter* 1:6 (KJV) (“[N]ow for a little while” we must suffer.); *Lord Jim:1965 Movie Quotes*, Movie Quotes, <http://www.moviequotes.com/repository.cgi?pg=3&tt=47899> (last visited Jan. 17, 2011) (“This too shall pass and when it does give it back.”); GEORGE HARRISON, ALL THINGS MUST PASS (Apple Records 1970); *This Too Shall Pass*, Lord of the Rings (Aug. 18, 2004); *Sadness Quotes*, JOY OF QUOTES, http://www.joyofquotes.com/sadness_quotes.html (last visited Jan. 17, 2011). (“Remember sadness is always temporary. This, too, shall pass.” —Chuck T. Falcon).

passed into oblivion, leaving only a few broken human relationships in their wake. For example, some may remember the “free love” movement of the 1960s, the communes of the hippie days of the 1960s and 1970s, and around the same time, the “divorce-harms-no one” euphoria of the early-days of the no-fault divorce.¹¹⁴

Other changes in marriage and family law have also passed, but they lasted much longer, only fading after they had done much more significant, widespread damage to society—not just to a few individuals or couples, or families, but to entire generations. Anti-miscegenation laws forbidding inter-racial marriage are an example of such fads which lasted longer, caused deeper wounds, and left more permanent scars. They had the long-lasting effect of nurturing racism and a racist conception of marriage because the leaders of a social movement (generally, the racial eugenics movement) succeeded in “capturing marriage” by changing marriage laws to redefine marriage in a way that imbedded it with their racist ideology.

The danger of such fads is in the amount (scope and time) of damage done both to specific individuals and families who are the victims of these social scams, as well as to the institution of marriage itself. In a free society complete protection of individuals is not possible. Neither is prevention of the harmful consequences of relationship fads compatible with the foundations of human liberty. Being free includes being free to make some mistakes (at least those which do not threaten to damage society too greatly or significantly harm other members of the community). The greater danger is when the harmful fad and fancy becomes part of the marriage or family law; then it is institutionalized and not only does the fad last longer, but it influences how large numbers of people view and understand the institution of marriage.

The law has a powerful influence in regulating belonging and exclusion in key social institutions, including marriage. Montesquieu distinguished corruption of laws by the people and corruption of the people by the laws, and noted that “when the people . . . are corrupted by the laws” it is “an incurable evil.”¹¹⁵

Thus, the great danger of our times is not the experimentation with various forms of intimate interpersonal relationships that might be deemed “marriages” by particular couples, families, religions, or other sub-groups of society (though that may be very dangerous to the health and happiness of the parties involved in those relationships and

114. Passing social fashions in matters of family relationships seem to reflect the mood and maturity of the dominant generation; free love, communes, and no-fault divorce seem to have been generated by the baby-boom generation and its preceding cohort.

115. MONTESQUIEU, *supra* note 9, at bk. VI, ch. 12.

communities). Such cohort fads and fancies have come and gone leaving only minimal harm to society. Rather, the great danger of our times is the possibility of the law adopting and imposing those revolutionary experiments in new forms of marriage upon society. When such marriage experiments are legalized, they become embedded more deeply in the fabric of society, making the practice last longer and harder to change. Our long and tragic national experience with anti-miscegenation laws, which took a full century, and a major Supreme Court decision, to correct and eradicate, is evidence of the scope of the problem of nationalized legal policies about marriage that codify misguided social policies and ideologies that crystallize into law-distorted perceptions of marriage.¹¹⁶

Processes and structural procedures provide important buffers against damaging fads and temporary fashions that sweep through societies becoming imbedded in the laws. One protection in the American constitutional system against the most damaging dimension of the adoption of revolutionary redefinition of marriage,—including the national legalization of same-sex marriage—is the protection of the principle of federalism in family law. That principle allows the fifty separate state legal communities to make their own marriage policy decisions. Federalism slows, and narrows the geographic scope of the radical, deeply controversial redefinition of the institution of marriage in the law and partially contains the potentially disintegrating effects upon of the community of marriage in society. Thus, a state-by-state, fifty state laboratories¹¹⁷ approach to addressing the issue of same-sex marriage has substantial advantages over a national-all-at-once approach for resolving the debate.¹¹⁸

116. *Loving v. Virginia*, 388 U.S. 1 (1967). While some individual states prohibited interracial marriage before the Civil War, see Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966), the nationalization of anti-miscegenation laws occurred after the Civil War and lasted until the Supreme Court ruled in 1967 in *Loving* that such laws were unconstitutional. Lynn D. Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 HOW. L.J. 117 (2007).

117. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788–89 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("[T]he 50 States serve as laboratories for the development of new social, economic, and political ideas.").

118. See Robert A. Burt, *Belonging in America: How to Understand Same-Sex Marriage*, 25 BYU J. PUB. L. 351, 359 (2011) (recommending the "virtues" of not "automatically apply[ing] marriage redefinition] to the entire United States); *id.* at 360 (endorsing the "multiplicity" of state-by-state resolution of same-sex marriage policy); see also Kraig James Powell, *The Other Double Standard: Communitarianism, Federalism, and American Constitutional Law*, 7 SETON HALL CONST. L.J. 69 (1997) (arguing for combining

Federalism in family law, however, is under attack. Just this past summer, two federal courts ruled that federal constitutional doctrines compel the legal recognition of same-sex marriage.¹¹⁹ The great danger of claims that federal constitutional doctrines mandate national legal recognition of same-sex marriage is that it will mandate same-sex marriage upon all fifty states and embed a corruption of marriage deeply into our society, just as legalization of anti-miscegenation policies did.

Sometimes the process of change is more critical to our society and legal system than the actual changes resulting from the process. The process of addressing policy differences by participatory electoral politics in a democratic society is intended to strengthen the society, not just by the substance of the newly-adopted laws, but by helping us appreciate and understand each other better, to strengthen our ties to each other by the common effort of seeking to resolve the controversy, and by building trust and other aspects of social capital as a result of the interaction. Of course, dirty politics, cheap-tricks, and coercive cram-down tactics can have the opposite disintegrative effect, as can circumvention of those democratic processes by seeking quick-fix, winner-take-all legal-result victories in the courts (as the unfinished, ongoing political wound of *Roe v. Wade* poignantly illustrates).¹²⁰ Thus, federalism in family law, leaving the issue to the states to decide, has enormous advantages.

Separation of powers is another structural protection against hasty and ill-advised radical redefinition of marriage. Usually the people of a political community are less inclined to be led astray about fundamental questions than a smaller group of political rulers; liberal democracies vest most policy-making power in the branch of government connected most closely to the people – the legislative branch. However, as the history of anti-miscegenation laws illustrates, even legislatures (and the people themselves) can become enamored of fads and fashions that lead them to revise important aspects of the institution of marriage. That is why there is merit in protecting by constitutional provision or amendment the definition of marriage as the union of a man and a woman – and why thirty states have already done so in the past fifteen years.

The legislature normally will be the proper body to make such important policy decisions in a democracy, not the courts—though in

communitarianism with federalism).

119. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010); *Gill v. 699 F.Supp.2d 374* (D. Mass 2010); see also *Commonwealth v. Dep't. Health & Human Servs.*, 698 F.Supp. 2d 234 (D. Mass. 2010).

120. 410 U.S. 113 (1973).

states where the people can directly vote on the issue, as by constitutional amendment or direct-democracy legislative processes, such a process would be more appropriate because the issue concerns the proposed reconstitution of a basic social institution of and for the people. Using processes of local decision, not national determination, reflective of popular will and with popular-involvement, allowing for incremental change, not all-at-once quick-solution universal revolution, are important to any effort to redefine marriage that respects citizen belonging in the state and national political communities.

One of the most ironic consequences of the battle over same-sex marriage in California, Iowa, and Massachusetts has been the judicial disenfranchisement of the citizens in those states who opposed the redefinition of marriage to include same-sex couples.¹²¹ It was particularly disturbing when a California federal court overturned the results of an extensively debated constitutional amendment ballot-initiative (Proposition 8).¹²² Exclusion of citizens from the political community and the silencing their voices because of their views on where the boundaries of the social institution of marriage are drawn is one of the tragic, malicious ironies of our time. Similarly, the unilateral decision of President Obama to refuse to defend the federal Defense of Marriage Act,¹²³ after it had been successfully defended and upheld (and never held invalid) in multiple cases before his administration took office,¹²⁴ reflects a troubling presidential authoritarianism that demeans the marriage values established and supported by democratic processes, undermines both democratic processes and popular sovereignty, marginalizes and disenfranchises the people.

121. *Varnem v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re* Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases, No. 4365, 2005 WL 583129 (Cal. Super. Ct. S. F. County, Mar. 14, 2005), *aff'd In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by* Cal. Proposition 8, Nov. 4, 2008, *as recognized in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 943, 959 (Mass. 2003); *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 569–71 (Mass. 2004).

122. *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010).

123. Statement of the Attorney General on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011, available at <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html> (last visited Feb. 23, 2011).

124. *Smelt v. County of Orange*, 447 F.3d 673, 686 (9th Cir. 2006) (affirming the district court's dismissal of a Section Two claim, and remanding to dismiss a Section Three claim on the merits); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303–09 (M.D. Fla. 2005) (finding DOMA does not violate the Full Faith and Credit Clause, equal protection, or due process); *In re Kandu*, 315 B.R. 123, 131–48 (Bankr. W.D. Wash. 2004) (finding DOMA does not violate comity, the Fourth Amendment's protection against unlawful seizure, the Fifth Amendment's guarantees of due process and equal protection, or the Tenth Amendment's reservation to the states of the power to regulate marriage), The first time a suit challenging DOMA succeeded was after the Obama administration took over the defense of DOMA and presented a tepid, cave-in defense. *Commonwealth v. Dep't. Health & Human Servs.*, 698 F.Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Personnel Management*, 699 F.Supp. 2d 374 (D. Mass. 2010).

VII. CONCLUSION: BELONGING

The definition of marriage and family are the defining issues of our generation. How the issues are decided will have life-changing, world-changing consequences, for better or worse.¹²⁵ The disintegration of marriage and other family relations has tsunami-sized “ripple effects” on all other communities in and comprising society. As goes marriage so goes the family, and as goes the family so goes the nation, and the world. The boundaries of belonging matter immensely for our own families, our children and grandchildren, and for our nation.

Just as Frost’s “Mending Wall” ambiguously leaves us to decide whether his emphasis is on the wall (arguably a negative) or the communal-neighborly effort of mending (clearly a positive), the issue of legalization of same-sex marriage is for us to decide. In matters of relationships, including political relationships, the process sometimes (often) is as critical, if not more critical, than the particular results of the process. The process of addressing policy differences by participatory electoral politics in a democratic society is intended to strengthen society not just by the substance of the new laws adopted, but by helping us to appreciate and understand each other better, to strengthen our ties to each other by the common effort of seeking to resolve the controversy, and by building trust and other aspects of social capital as a result of the interaction. Of course, dishonorable political tricks can diminish respect for the political process and produce an alienating, disintegrative effect. Likewise, circumvention of democratic processes (popular ballot or legislative) by litigation campaigns seeking “quick-fix, winner-take-all” victories in the courts undermines legitimate process and subverts the unifying, edifying purposes and benefits of the democratic system. Thus, federalism in family law, leaving the issue to the states to decide by democratic popular ballot procedures or by legislative determination is critical. This issue is far too important to leave to judges to decide. The issue is and should remain in the hands of the people. Unless the courts inappropriately usurp the issue, the future of marriage should be, and is, up to us to decide.

125. WILLIAM GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 318 (1993) (“[T]he family is so intertwined with other social structures that it is not possible to transform it without reversing a multitude of other trends in modern social life. . . . I know of no great civilization that at the height of its power and material splendor ever changed its grand onward movement, except by dissolution and military defeat.”); CARLE C. ZIMMERMAN, *FAMILY AND CIVILIZATION* (1947) (breakdown of family often precedes breakdown of civilization).

