





*If everyone  
is family,  
then no one  
is family.*

BARACK  
OBAMA.<sup>2</sup>

..... LYNN D. WARDLE<sup>1</sup> .....

T H E B O U N D A R I E S O F B E L O N G I N G

P H O T O G R A P H Y B Y B R A D L E Y S L A D E

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## I. Introduction: Belonging

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*"No man is an island."*—JOHN DONNE<sup>3</sup>

The yearning to belong is said to be inherent in human nature.<sup>4</sup> As Bruce C. Hafen put it, "People simply feel a desire to be connected with others, especially in close relationships. They are feeling the longing to belong."<sup>5</sup> Humans are communal and seek (and flourish in) social associations, beginning with the family. From ancient times<sup>6</sup> to modern,<sup>7</sup> the social nature of human beings has been noted, protected, and regulated.

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. 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.

Marriage is a particularly important kind of community. Marriage is the primary expression of and preferred locus for the most meaningful and socially beneficial forms of intimate belonging. Though many other personally meaningful and fulfilling relationships exist,

harmed some families and generated confusion in family law and in social expectations concerning marriage.<sup>9</sup> 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.

The boundaries of marriage must reflect the key purposes of that public community. Gender integration—uniting a man and woman in a gender-complementary union—is an essential, and perhaps the most indispensable, purpose of marriage. Allowing same-sex couples to marry seriously undermines the basic legal and social institution of marriage.

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## II. Boundaries and Exclusion Are Necessary for Community

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*"Good fences make good neighbors."*

—ROBERT FROST<sup>10</sup>

A "community" is "a group of people distinguished by *shared circumstances* of nationality, race, religion, sexuality, etc.,"<sup>11</sup> "a group of people who *share the same interests, pursuits, or occupation*,"<sup>12</sup> and a group of people who exist because of "[t]he fact of *having a quality or qualities in common; shared characteristics, similarity; identity; unity*."<sup>13</sup> 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 community.

Identity and group theorists remind us that boundaries are needed to define, understand, and protect our institutions as well as to live in peace with others who are not members of the community. Boundaries protect the community, its identity, its independence, and the relations community members have with those outside the community. Boundaries also protect our neighbors and our relationships with them.<sup>15</sup>

Clear boundaries—bright lines—enable responsible individuals to make and implement plans on their own, knowing that they can rely upon clear 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.*<sup>16</sup>

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."<sup>17</sup> In other words, duties and benefits were linked. As Coke explained in *Calvin's Case*, "Ligeance is the mutual

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## AS WITH OTHER COMMUNITIES, MEMBERSHIP IN THE COMMUNITY OF MARRIAGE REQUIRES AN UNDERSTANDING OF THE BOUNDARIES

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the benefits of marriage to society and to family members are unique.<sup>8</sup> As with other communities, membership in the community of marriage requires an understanding of the boundaries of that relationship and some necessary exclusions to preserve the core community purposes of the institution. Some kinds of belonging are inconsistent with and contrary to the core purposes of the community. Some well-intentioned attempts to expand inclusiveness in laws governing family relations have

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 theory. 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."<sup>14</sup>

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."<sup>18</sup> Membership in a community carries with it significant duties, including allegiance to the purposes for which the community was formed.

The doctrine of allegiance came to America with the English colonists. For

example, both the Mayflower Compact<sup>19</sup> and the so-called “Arabella Covenant,” in Jonathan Winthrop’s sermon “A Model of Christian Charity,”<sup>20</sup> 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.<sup>21</sup> Allegiance theory assumes the connection between allegiance to the purposes of the community and membership in it. Allegiance to boundaries strengthens relationships.

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### III. Boundaries Must Support the Core Purposes of the Community

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The doctrine of allegiance also emphasizes that boundaries must reflect the core reasons and functions of the community. Not accepting the duty of allegiance to the core purposes of the community disqualifies one from membership in the community.

Anthropologist Claude Levi-Strauss observed that, historically, the core and essential purpose of marriage was to create alliances and form intergroup allegiances with other kinship groups.<sup>22</sup> Additionally, social compact theory and republican government theories historically linked membership in the community with allegiance to the purposes of the community.<sup>23</sup> 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

Marriage is a public community status and a public institution that serves both dual purposes, public and private, as Dean Roscoe Pound long ago noted.<sup>26</sup> While individual marriage couplings will certainly reflect the private purposes of the parties, such unions also must conform to and reflect allegiance to the public trust—and to the core public purposes of marriage.

Boundaries preserve and protect the community of marriage for the sake of individuals, families, and 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.<sup>27</sup> Belonging loses meaning if those boundaries are expanded beyond the core purposes of family relationships. One may seek to preserve the label of “family” or “marriage,” but through overinclusive 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, as noted below.

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### IV. Gender Integration Is a Foundational Purpose of Marriage

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One of the core purposes of marriage is to unite and integrate men and women in long-term, consensual unions. Gender integration is shorthand for a number of specific essential qualities, characteristics, and critical purposes of marriage. Among these

contexts—relationships in which there is minimal risk of violence (for young persons and women especially)<sup>29</sup> and also little risk to public health (from sexually transmitted diseases, dangerously premature childbearing, etc.).<sup>30</sup> Husbands and wives, not insignificantly, are said to enjoy the most healthy, most satisfying, and most socially beneficial sexual relations.<sup>31</sup> Likewise, there continue to be enormous social interests in responsible procreation. These include providing the optimal situation for pregnancy and childbirth (including emotional commitment to and financial support of the pregnant woman and the child she is carrying). This also includes providing the most positive environment that offers 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).<sup>32</sup>

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.<sup>33</sup> Gender-integrated relationships are also the strongest types of relationships and are least susceptible to instability and to related and consequential insecurities.<sup>34</sup>

The core purposes of marriage are built around human recognition across time and cultures that men and women are different in ways that are complementary. The integra-

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## OF THAT RELATIONSHIP AND SOME NECESSARY EXCLUSIONS TO PRESERVE THE CORE COMMUNITY PURPOSES OF THE INSTITUTION.

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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.”<sup>24</sup>

It is the commonality that defines the community. “[D]istinctiveness per se is an extremely important characteristic of groups.”<sup>25</sup> Change the common characteristics, the boundaries for belonging to a community, and you change the community itself. Thus, the boundaries of community must protect the core purposes of the community.

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.”<sup>28</sup> All of these purposes require or assume gender-integrating unions between a male and a female.

Society has a great interest in channeling sexual relations into safe, socially beneficial

tion of mutually matching, harmonious, and corresponding gender differences is an indispensable purpose of the institution of marriage. “The classic purpose and function of marriage is to integrate biology, social conventions, law, etc., into one package, which is the intact married family.”<sup>35</sup> The uniting of genders has been a consistent core conception of marriage since the Enlightenment, found across a wide variety of philosophical and jurisprudential schools and traditions.<sup>36</sup>





Likewise, the integration of a male and a female has been identified in the philosophies of Western civilization for thousands of years as a core constitutive purpose of marriage.<sup>37</sup>

One contemporary intellectual school that provides compelling and eloquent justifications for gender integration as the core purpose of marriage is relational feminism, including, especially, French feminists, African feminists, and religious feminists. All of these groups appreciate the duality of humanity; celebrate the unique and irreplaceable contributions of women to our social institutions, including marriage; and insist upon their need to be equally included and valued as women in all of the basic institutions of society.<sup>38</sup>

From a feminist perspective, gender-integrating marriage is important because it acknowledges the duality of humanity and prohibits exclusion of one gender from the public definition and constitution of a basic legal institution. Additionally, male-female marriages are different from same-sex unions because they 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.<sup>39</sup>

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”).<sup>40</sup> 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”<sup>41</sup> and that one “cannot separate the meaning and value of sexual difference from the question of generation.”<sup>42</sup>

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.”<sup>43</sup>

Feminists writing from many religious traditions also have explained the importance of recognizing valid gender differences in the law and have celebrated gender-integrating marriage. A large and growing body of literature by some remarkable Catholic feminists, including Professor Elizabeth Schiltz, seeks to connect contemporary feminist concerns with historical Catholic theological roots.<sup>44</sup> Helen M. Alvare describes marriage as “the crucial social institution harmonizing men’s, women’s, children’s, and society’s

needs and goals.”<sup>45</sup> Notre Dame Law School professor Margaret Brinig has also written about the covenant tradition and covenant religious dimensions of marriage.<sup>46</sup> She and her family law casebook coauthor warn: “Opening marriage to homosexual as well as heterosexual might be the most dramatic change in the institution in American history.”<sup>47</sup> Likewise, some Evangelical feminists also have articulated justification for appropriate recognition of gender differences in the law generally and in marriage particularly.<sup>48</sup>

Some Mormon feminists have written about the importance of male-female marriage, reflecting the influence of their faith’s unique religious doctrine that marriage is a God-ordained, dual-gender institution.<sup>49</sup> For example, Camille S. Williams writes that “the norm of heterosexual marriage is a necessary—albeit not sufficient—condition for social equality for women.”<sup>50</sup> She asserts that “[m]arriage and the marital family are arguably the only important social institutions in which women have always been necessary participants.”<sup>51</sup> 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.<sup>52</sup>

Thus, the integration of a male and a female has been long and widely identified as one of the core purposes of marriage. Gender integration is not a useless vestigial remnant of ancient primitivism but is 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.<sup>53</sup>

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.<sup>54</sup> Those decisions consistently assume, clearly imply, and directly reinforce the dual-gender, male-female, gender-complementary nature of marriage:

*[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.*<sup>55</sup>

Gender integration remains a core and essential purpose 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 note that no state requires a test for fertility before giving couples marriage licenses and that many couples who marry are infertile. They argue that the inability to procreate is not ground to deny same-sex couples the right to marry.<sup>56</sup>

This argument for same-sex marriage is reductionist and overly simplistic. Married couples age together, passing 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, though they remain loyal to and supportive of those institutional purposes.

Allegiance theory bridges the gap between ability to procreate and marriage for infertile male-female couples. By analogy, 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; yet 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. 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. That lack of allegiance to a core purpose of marriage is one of several factors that distinguish infertile heterosexual couples from same-sex couples.

Another source of concern about the inability to bear allegiance to and fulfill a core purpose of marriage comes from data about the high rate of sexual fluidity and instability—infidelity—in same-sex unions. Fidelity goes to the essence of allegiance in the marital bond. Sexual fidelity is especially critical to the safe and responsible socialization and rearing of children and to the optimization of children's chances and prospects for creating successful marriages of their own.<sup>57</sup>

## VI. Permanence and Process: "And This, Too, Shall Pass Away"<sup>58</sup>

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 passed into oblivion, leaving only a few broken human relationships in their wake. For example, some still living may remember the "free love" movement of the 1960s and the communes of the hippie days of the 1960s and 1970s.

The history of changes in marriage and family law have left significant, widespread damage to society—not just to a few individuals or couples or families, but to entire generations. For example, antimiscegenation laws forbidding interracial marriage and the unilateral no-fault divorce fad have done great harm and left permanent scars. Those social movements "captured marriage" and redefined marriage by changing marriage

laws in ways that endorsed harmful ideologies imbedded within them. Our long and tragic national experience with antimiscegenation laws, which took a full century—and a major Supreme Court decision—to correct, is evidence of the scope of the problem of marriage laws that codify misguided social ideologies which crystallize into law-distorted perceptions of marriage.<sup>59</sup>

Legal processes and structural balances provide important buffers against damaging fads and temporary fashions that sweep through societies and become embedded in the laws. 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.<sup>60</sup> Similarly, the unilateral decision of President Obama's Justice Department to refuse to defend the federal Defense of Marriage Act (DOMA),<sup>61</sup> after DOMA had been successfully defended and upheld in multiple cases before his administration,<sup>62</sup> undermines the democratic processes and demeans, marginalizes, and disenfranchises the people and institutions that enacted DOMA. It also has boundary-shifting effects to redefine the institution of marriage—and does so by executive fiat.

## VII. Conclusion: Belonging

All communities, including the community of marriage, have boundaries that define membership in that community and which must reflect and protect the essential purposes of the community. The definition of marriage is the defining issue of our generation. How it is decided will have life-changing, world-changing consequences.



TO SOCIETY—NOT JUST TO A FEW INDIVIDUALS OR COUPLES OR FAMILIES, BUT TO ENTIRE GENERATIONS.





- 1 Lynn D. Wardle is the Bruce C. Hafen Professor of Law at J. Reuben Clark Law School, Brigham Young University. The full version of this article can be found in 25 B.Y.U. J. Pub. L. 287 (2011). An earlier draft of this article was presented at the Symposium on Belonging, Families and Family Law on January 28, 2011, at Brigham Young University Law School, where a dozen scholars addressed themes prominent in the legal scholarship of former dean Bruce C. Hafen. The valuable research assistance of Curtis Thomas, Robert Selfaion, and Alyssa Munguia is gratefully acknowledged.
- 2 Barack Obama, DREAMS FROM MY FATHER 347 (Crown Publishers 2004) (1995).
- 3 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).
- 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 4, 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, “Ours is the age of the waning of belonging.” *Id.* at 43.
- 6 Genesis 2:18 (King James) (“It is not good that . . . man should be alone.”); Aristotle, THE POLITICS 3 (Stephen Everson ed., Benjamin Jowett trans., Cambridge Univ. Press 1988) (“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.”).
- 7 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); Charles Secondat, Baron de Montesquieu, THE SPIRIT OF THE LAWS 3 (Thomas Nugent trans., George Bell & Sons 1902) (1748); 1 Alexis de Tocqueville, DEMOCRACY IN AMERICA (Phillips Bradley ed., Alfred A. Knopf 1945) (1835); Robert N. Bellah, et al., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE viii (1985).
- 8 *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“[M]arriage involves interests of basic importance in our society.”); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (marriage is “the most important relation in life”). Recognition of the importance of marriage as the

foundational social unit underlies the state marriage amendments that have already been adopted in thirty states and over thirty-five nations. 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); Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 Cal. W. L. Rev. 143 (2010).

- 9 See 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).
- 10 Robert Frost, *Mending Wall*, in NORTH OF BOSTON 6 (Edward Connery Lathem ed., Dodd, Mead & Co. 1977) (1916).
- 11 *Community Definition*, Oxford English Dictionary Online [hereinafter “OED”] at I.5.a, <http://www.oed.com/view/Entry/37333?redirectedFrom=community#> (last visited Feb. 18, 2011) (emphasis added).
- 12 *Id.* at I.5.b (emphasis added).
- 13 *Id.* at II.11 (emphasis added).
- 14 See Mancur Olson, THE LOGIC OF COLLECTIVE ACTION 26, 30–26 (Harvard Univ. 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).
- 15 Boundaries protect those outside the group from intrusion, such as persons who do not wish to conform to the expectations of marriage by having marital obligations imposed upon them.
- 16 Marilyn 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>.
- 17 William C. Bradford, “The Duty to Defend Them”: A Natural Law Justification for the Bush Doctrine of Preventative War, 79 Notre Dame L. Rev. 1365, 1450 n.339 (2004). See Charles, *Apportionment*, *supra* note 42; 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).
- 18 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”* (*Otipahemsi’uk*): Towards a Constitutional Theory of Métis Self-Government, 67 Sask. L. Rev. 339, 344–45 (2004).
- 19 *Mayflower Compact*, THE AVALON PROJECT (1620) [http://avalon.law.yale.edu/17th\\_century/mayflower.asp](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.”)

- 20 Jonathan Winthrop, *A Model of Christian Charity*, THE RELIGIOUS FREEDOM PAGE (1630) <http://religious-freedom.lib.virginia.edu/sacred/charity.html> (“[W]e are a company professing ourselves fellow members of Christ; . . . the care of the public must oversway 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.)
- 21 *Virginia Declaration of Rights*, THE AVALON PROJECT (June 12, 1776), [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp).
- 22 Claude Levi-Strauss, THE VIEW FROM AFAR 47–48 (Joachim Neugroschel & Phoebe Hoss, trans., Basic Books 1985) (1983).
- 23 See also Locke, *supra* note 9, §§ 4, 7–12, 123–130, 211–43; John Trenchard & Thomas Gordon, *Letter No. 62*, in Cato’s Letters (1733); Heyman, *supra* note 50, at 512–22.
- 24 Blackstone, *supra* note 11, at \*35; see also *id.* at \*233.
- 25 Brewer, *supra* note 43, at 478.
- 26 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.”).
- 27 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).
- 28 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).
- 29 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.”).
- 30 See Wardle, *supra* note 15, at 1022–25.
- 31 See Linda J. Waite & Maggie Gallagher, THE CASE FOR MARRIAGE 47–52, 75–89, 152–58, 162–68 (2000).
- 32 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).
- 33 See Waite & Gallagher, *supra* note 70, at 47-64, 101, 143-149, 152.
- 34 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, 219-225 (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).
- 35 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.
- 36 Scott Yenof, FAMILY POLITICS, THE IDEA OF MARRIAGE IN MODERN POLITICAL THOUGHT (2010).
- 37 See Sherif Girgis, Robert George & Ryan T. Anderson, *What is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2010).
- 38 Lynn D. Wardle, *Gender Neutrality and the Jurisprudence of Marriage*, in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 37, 37-65 (Scott FitzGibbon, Lynn D. Wardle & A. Scott Loveless, eds., 2010) [hereinafter "Wardle, Gender"].
- 39 *Id.* at 44-45.
- 40 Sylviane Agacinski, PARITY OF THE SEXES viii (Lisa Walsh trans., Columbia Univ. Press 2001) (1998).
- 41 *Id.* at xxviii.
- 42 *Id.* at 22.
- 43 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 79, at 48.
- 44 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).
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- 52 *Id.* at 494-99 (arguing that dual-gender marriage promotes the social and economic equality of women).
- 53 *Id.* See also Maria Sophia Aguire, *Marriage and the Family in Economic Theory and 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) (nonmonetary contribution of women in the family is crucial to family development, and such contributions contribute greatly to overall social capital); see further Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. Democracy 65, 74 (1995).
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- 55 *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (emphasis added).
- 56 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); 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).
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