

**MODERN MARRIAGE AND SAME-SEX COUPLES:
Expanding the Good of Marriage**

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WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE. By *Sherif Girgis, Ryan T. Anderson & Robert P. George*. New York: Encounter Books. Pp. 1, 127. \$15.99.

INTRODUCTION

In his dissenting opinion in *United States v. Windsor*,¹ Justice Samuel Alito began by observing that “[o]ur Nation is engaged in a heated debate about same-sex marriage[.]” a debate that “is, at bottom, about the nature of the institution of marriage.”² According to Justice Alito, the legal issue in *Windsor*, like the public policy debate about same-sex marriage more generally, boils down to “a debate between two competing views of marriage.”³ The “traditional” or “conjugal” view, on the one hand, “sees marriage as an intrinsically opposite-sex institution;” while a “newer view,” the “consent-based” view, on the other hand, “defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.”⁴

Justice Alito’s legal framework in *Windsor* mirrors Sherif Girgis, Ryan T. Anderson and Robert P. George’s analytic framework in their book *What is Marriage?* (pp. 1-2). Both Justice Alito⁵ and Girgis, Anderson and George (pp. 78-81) respond to the primary justification of same-sex marriage—the argument that same-sex couples are fundamentally similar to their opposite-

¹ 133 S. Ct. 2675 (2013).

² *Id.* at 2718.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 2716.

sex counterparts—by contending that in order for an equality argument to have rhetorical force, such similarity must actually exist. For Justice Alito, “the silence of the Constitution on this question” dictates that it is beyond the purview of the Court to “enshrine” any particular “vision of marriage.”⁶ Instead, he argues that “our constitutional order assigns . . . questions of this nature to the people,” preferably the states, to resolve.⁷

For Girgis, Anderson and George, in contrast, the focus is on the morality rather than the constitutionality of same-sex marriage. They argue that same-sex couples are significantly dissimilar to opposite-sex couples because marriage requires (at least the possibility of) vaginal-penile penetration and same-sex couples, regardless of whether they are committed, loving, lack the requisite bodily equipment (pp.24-25). In this respect, *What Is Marriage?* is a lonely island of lucid criticism in a sea of transparently sophistic objections to gay marriage. *What Is Marriage?* offers an argument rooted in a claim about the nature of marriage—one which, if true, could undermine the theoretical basis for same-sex marriage. Further to its credit, the book takes on the daunting task of formulating a defense of a traditionalist conception of marriage and an argument against gay marriage, which rely on broad public reasons rather than narrow prejudice, a particular religious belief or a blind sense of traditionalism (pp. 10-11).

Ultimately, despite providing the most sincere and coherent argument against gay marriage, Girgis, Anderson and George’s project fails. It fails both on its own terms and by comparison. First, at the core of *What Is Marriage?* is the sex-obsessed assertion that marriage requires coitus (the “coitus requirement”). As shall be shown, the coitus requirement cannot be accepted absent a particular religious commitment or unreflexive intuition. Second, while

⁶ *Windsor*, 133 S. Ct. at 2718.

⁷ *Id.* at 2718-20.

George, Anderson and George's traditionalist the conception of marriage is alien to contemporary Western observers, a more modern conception of marriage ("modern marriage") resonates most Americans today. Modern marriage defines the institution as a legal commitment based on consent, monogamy, fidelity and, most basically, love. This conception of marriage dates back to the founding and represents a historical evolution of marriage. Modern marriage developed and adapted as American society at large progressed to become more just, more tolerant and more respectful of the status of women, African Americans and homosexuals.

After sketching the historical roots of modern marriage, Part I explains why a rigorous defense of same-sex marriage requires a compelling definition of marriage and why modern marriage presents the most persuasive justification for state-sponsored marriage. Part II lays out Girgis, Anderson and George's traditionalist view of marriage and their arguments for the coitus requirement. In Part III, it is argued that traditionalist marriage is unpersuasive since it: (1) fails to capture that the marriage debate is fundamentally a *civil* institution, (2) debases marriage by trivializing the foundation of marriage—spousal love—and fetishizing vaginal-penile penetration and (3) excludes vast swaths of heterosexuals who are unable to achieve vaginal-penile penetration including the impotent, imprisoned, and physically incapacitated as well as those who are simply uninterested in coitus. Finally, Part IV explores Girgis, Anderson and George's possible objections to modern marriage and why they are ultimately unconvincing.

I. MODERN MARRIAGE AND EXPANDING THE GOOD OF MARRIAGE

Many same-sex marriage supporters take two propositions for granted. First, they presuppose that all arguments against gay marriage are fundamentally flawed. Second, they assume as a result that justifications for same-sex marriage must be compelling. Although ultimately both of these propositions are true, they are not necessarily linked. One of the keenest

insights of *What Is Marriage?* is that even if objections to gay marriage fail, this does not entail, on its own, that same-sex marriage ought to be permitted (pp. 14-15). The conclusion of most “marriage equality” arguments⁸—that same-sex marriage *ought not to be prohibited*—is not equivalent, strictly speaking, to establishing that same-sex marriage *ought to be promoted*, or even that it *ought to be permitted*.

This distinction, although subtle, is fundamental. Absent a justification of marriage in the first place, “the argument that restricting marriage to opposite-sex couples is a denial of equality cannot even get off the ground.”⁹ Arguing for gay marriage starting with an equality premise puts marriage quality advocates in the awkward position of arguing for same-sex marriage contingently. They argue that “so long as the state is in the marrying business,” as Martha Nussbaum puts it, “equality concerns require it to offer marriage to same-sex couples.”¹⁰ However, the marriage equality argument neither explains why the state is in the “marrying business” in first place nor provides a compelling definition of marriage.¹¹

As Girgis, Anderson and George point out, many justifications of same-sex marriage rest on the “implicit assumption” that if arguments against gay marriage are weak, arguments in favor of same-sex marriage must be strong (pp. 14-15). This “obviously mistaken logic,” the authors argue (p.15), has led supporters of same-sex marriage to pay insufficient attention to what marriage is as opposed to what it is not. As a result, Girgis, Anderson and George are free

⁸ See e.g., *About Marriage Equality USA*, MARRIAGE EQUALITY USA, <http://www.marriageequality.org/about-meusa> (last visited Dec. 18, 2013); see also *Equal Marriage NOW: Talking Points*, NAT.’L ORG. FOR WOMEN, <http://www.now.org/issues/marriage/points.html> (last visited Dec. 18, 2013).

⁹ Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage* 7 J. POL. PHIL. 225, 226 (1999).

¹⁰ MARTHA NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATIONS & CONSTITUTIONAL LAW* 132 (2010).

¹¹ As Girgis, Anderson and George point out, some call for the abolition of state sanctioned marriage (p. 37).

fashion their own account of how Justice Alito calls the “newer view” of marriage is defined.¹² According to Anderson and George, this “revisionist view” of marriage (p. 1) “fails on its own terms” (p. 15).

While *What Is Marriage?* astutely observes that too few same-sex marriage supporters to articulate a compelling conception of marriage, this deficiency is unnecessary. For there exists an account of marriage that can capture the most significant aspects of the institution and can underpin a full-throated defense of same-sex marriage—modern marriage. Modern marriage is defined as a legal commitment based on consent, monogamy, fidelity and, most basically, love. This conception of marriage is so basic to the modern American experience, it is almost unnecessary to rely more than intuition alone to demonstrate its appeal.¹³ Yet, the modern understanding of marriage is also supported by American history and tradition.

The term “modern marriage” is a bit of a misnomer. It seems to imply what Girgis, Anderson and George call “revisionism,” a fundamental break from the historical understanding of marriage (p. 1). Modern marriage is not so radical. Instead, it is fully consistent with the history of marriage in the United States and embodies the true core of marriage, those facets of marriage that have remained constant throughout American history.

Historian Nancy Cott chronicles how, in early American political theory, there was a widely accepted republican conception of marriage.¹⁴ The founders were heavily influenced by Baron de Montesquieu, whose *Spirit of the Laws* shaped “the central tenets of American

¹² *Windsor*, 133 S. Ct. at 2718.

¹³ *Id.* (According to the intuition test, an element of marriage is essential “if and only if we modern Westerners find it intuitively hard to understand how an institution that lacks that feature can really be a form of marriage.”); see Wedgwood, *supra* note 8 at 228 (Ralph Wedgwood proposes an intuition test to “find out what is essential to marriage,” specifically ‘modern Western marriages.’).

¹⁴ See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 10-21 (2002).

republicanism.”¹⁵ “[T]he founders learned to think of marriage and the [republican] form of government as mirroring each other.”¹⁶ Marriage, like government, is a lasting union that is entered into only by consent. These parallels were especially important to the signatories of the Declaration of Independence.¹⁷ In seeking separation from the British crown, the founders compared the bond between citizens and their government to the bond between spouses, arguing that both ought to be lasting and held together by love rather than coercion.¹⁸ Indeed, a great deal of Revolutionary era political writing discussed the proper conception of marriage as one which is rooted in love and “the ties of reciprocal sincerity.”¹⁹

The reason the founding fathers held marriage in such high regard was that, aside from its metaphorical meaning, “actual marriages of the proper sort were presumed to create the kind of citizen needed to make the new republic succeed.”²⁰ Following Montesquieu, the founders held that in a republic, where “we the people” are sovereign, a virtuous citizenry is vital. Republican virtue requires:

[N]ot only moral integrity, but public-spiritedness. Selfish, small-minded individuals narrowly seeking their own advancement would not do: citizens in a republic had to recognize civic obligation, to see the social good of the polity among their own responsibilities. How would the nation make sure that republic citizens would appear and be suitably virtuous? Marriage supplied an important part of the answer. . . . American republicans [saw] . . . marriage as a training ground for citizenly virtue.²¹

¹⁵ *Id.* at 10; see MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler et. al. eds., trans., 1989) (1748).

¹⁶ Cott, *supra* note 13 at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 15-16.

²⁰ *Id.* at 17-18.

²¹ Cott, *supra* note 13 at 18.

Marriage was believed to foster other-regarding and to subdue self-love as well as to habituate sociability and compromise.²²

Marriage was also understood as a mechanism for encouraging the private virtue necessary for republican governance.²³ Because marriage was considered part of “the foundations of national Morality,” the founders favored monogamy to polygamy and other forms of marriage.²⁴ Philosophers as far back as Plato and Aristotle have noted virtue of moderation and self-control and how man’s unbridled desires for “animal pleasures,” such as food and sex, tend to lead towards excess and immorality.²⁵

Monogamous marriage idealizes fidelity and the restraint of one’s sexual desires. Societal expectations and support help sustain one’s commitment to this ideal. Monogamy encourages self-control.²⁶ John Adams discussed the importance of monogamy in one’s moral education. “How is it possible,” he wrote, “that Children can have any just Sense of the sacred Obligations of Morality and Religion if, from their earliest Infancy, they learn that their Mothers live in habitual Infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.”²⁷ At the same time, the founders, following Montesquieu, came to equate polygamy with “despotism . . . political corruption, coercion, elevation of the passions over reasons,

²² *Id.*

²³ *Id.* at 10.

²⁴ *Id.* at 21.

²⁵ Plato, *Republic*, in PLATO COMPLETE WORKS, 327a; 329c-d, 389e, 390c, 402e-403c (John M. Cooper & D.S Hutchinson eds., G.M.A Grube & C.D.C Reeve trans., 1997); Aristotle, NICOMACHEAN ETHICS, bk. 3, at 77-82 (Martin Ostwald trans., 1962).

²⁶ Stephen Macedo, *Against the Old Sexual Morality of the New Natural Law*, in NATURAL LAW, LIBERALISM, AND MORALITY, 27, 43 (Robert George ed., 1996).

²⁷ Cott, *supra* note 13 at 21.

selfishness, [and] hypocrisy . . . Monogamy, in contrast, stood for government of consent, moderation, and political liberty.”²⁸

In short, marriage is not simply an individual right or matter of legal status, marriage is also a process—a tool the state employs to habituate pro-social behavior. This understanding of marriage benefits both the spouses as individuals and strengthens the institution of marriage itself. Part of what marriage as a process means is that spouses should have realistic expectations about what wedlock involves. Although most basically about love, a marriage cannot be built upon an unsophisticated notion of love; it, instead, involves love that is more lasting and more patient. Marriage is not like a prefab home, it is an edifice constructed brick by brick and designed to bend but not break (like a structure built to withstand an earthquake). A marriage is strong only insofar it can endure mundane misfortune and the tremors of adversity.

In sum, the essential values that have underpinned the institution of marriage in the United States since its founding are consent, monogamy, fidelity and most fundamentally, spousal love. Although these values have remained constant and central, the institution of marriage is not exactly as it was in 1776.²⁹ The history of American marriage, like the history of the nation itself, is one progression (“form[ing] a more perfect Union”).³⁰ Modern marriage is a part of this social evolution.³¹ It embodies these core values, while allowing the incidental and unfounded aspects of the institution to fade into the ash heap of history along.³²

²⁸ *Id.* at 22.

²⁹ Nancy Cott, No Objections, BOSTON REV. (Jan. 1, 2011), <http://bostonreview.net/nancy-f-cott-no-objections-history-of-marriage-same-sex-gay> [hereafter *No Objections*].

³⁰ U.S CONST. pmbl.

³¹ *See No Objections*, *supra* note 28.

³² *See Id.*

With the advances in women's rights and civil rights since 1776, marriage likewise has evolved to become a more just and tolerant institution. As Nancy Cott explains, at common law:

[M]arriage was based on the legal fiction that the married couple was a single entity, with the husband serving as its sole legal, economic, and political representative. Under this doctrine, known as coverture, the wife's identity merged into her husband's. She had no separate legal existence. A married woman could not own or dispose of property, earn money, have a debt, sue or be sued, or enter into an enforceable agreement under her own name. The spouses were assigned opposite economic roles understood as complementary: the husband was bound to support and protect the wife, and the wife owed her service and labor to her husband.³³

Further, despite the Supreme Court's recognition of the fundamental right to marriage in 1923,³⁴ prohibitions on interracial marriage continued well into the twentieth century.³⁵

Over time, however, attitudes toward gender and race evolved. Americans realized that coverture and prohibitions on interracial marriage, far from being integral to the institution of marriage, perverted the institution. They came to be considered historical anachronisms, relics of a less tolerant time. Still today, many Americans have intuitions shaped coverture and bans on interracial marriage. There are husbands who view their wives as simply extensions of their identity ("Let me introduce you to Mister and Missus John Smith.") and those who see interracial marriage as unnatural. Surely, in the mid-1800s when coverture began to receive increased criticism or in the late 1960s after the bans on interracial marriage were held unconstitutional,³⁶ there were those whose intuitions about marriage reflected their traditionalist understanding of

³³ *Id.*

³⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³⁵ *No Objections*, *supra* note 28.

³⁶ *Id.*; *Loving v. Virginia*, 388 U.S. 1 (1967).

the institution. However, neither tradition nor unexamined intuition is a sufficient basis for abridging one's fundamental right to marry.³⁷

Recognizing gay marriage is the next phase in the evolution of American marriage law. Just as there is no principled basis for prohibiting interracial marriage, there is similarly no principled basis for excluding same-sex couples from marriage.³⁸ Modern marriage is a legal commitment based on consent, monogamy, and fidelity and, most basically, love. It is a commitment states encourage as a way of promoting these marital values and habituating republican virtue. Further, it is a commitment that all couples, regardless of skin color or sexual orientation, can make. As a result, states ought to strengthen marriage by permitting and promoting same-sex marriage just as it does interracial marriage and just as it does opposite-sex marriage. In so doing, states would reaffirm the values that underpin marriage—monogamy, fidelity and spousal love.

II. *WHAT IS MARRIAGE?*: TRADITIONALIST MARRIAGE

Just as too few supporters of same-sex marriage have put forth a compelling positive account of what marriage is, the same can be said of opponents of gay marriage. A common refrain amongst opponents of same-sex marriage is that “Marriage = One Man + One.”³⁹ Slightly cleverer, religious critics quip that “Marriage is between Adam and Eve, not Adam and Steve.”⁴⁰ But, this is a tautology, not a definition (nor an argument).

³⁷ See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 477-81 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 898-99 (Iowa 2009).

³⁸ See *Bostic v. Rainey*, 2:13CV395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014).

³⁹ See Deborah Acosta, *Reactions to DOMA on Social Media*, N.Y. TIMES (June 28, 2013), at 1:15, <http://www.nytimes.com/video/us/100000002309682/doma-on-social-media.html?ref=samesexmarriage> (showing reactions *Windsor* on Twitter under the hashtag #OneManOneWomen).

⁴⁰ See *Id.* (“When God created Adam, He created woman [sic] for him and named her Eve . . . not Steve.”).

What Is Marriage? offers both a definition of marriage and an argument against gay marriage. Girgis, Anderson and George seek to restore a traditionalist, carnal conception of marriage which requires (at least the possibility of) vaginal-penile penetration (pp. 24-25). In defensive of this alleged libidinal prerequisite, Girgis, Anderson and George start with a very simple question—what is marriage?—and spend an entire book attempting to answer it. *What Is Marriage?* represents the most recent refinement of a long line of arguments against gay marriage offered by Robert George and his colleagues.⁴¹ In the mid-1990s, George and Gerald Bradley defined marriage using fairly opaque natural law terminology: a “two-in-one-flesh communion of persons that is consummated and actualized by sexual acts of the reproductive type, [which] is an intrinsic (or . . . ‘basic’) human good.”⁴² Substantively, there are few differences between *What Is Marriage* and George and Bradley’s definition of marriage. Instead, the refinements are mostly cosmetic, an attempt add a gloss straightforwardness to a complicated, implausible argument.

Still, Girgis, Anderson and George concede that their argument in *What Is Marriage?* is “[u]navoidably . . . complex” (p. 12). Although their defense of traditionalist marriage is exceedingly complicated, its distinguishing feature from modern marriage, at bottom, is that it requires a particular unifying act—coitus (p. 23). One might expect that if marriage required a specific bodily act it would be natural procreation.⁴³ After all, there is a long tradition of rooting

⁴¹ See e.g. Robert P. George & Gerald Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2010) [hereinafter “HJLPP”].

⁴² George & Bradley, *supra* note 40 at 301-02.

⁴³ Girgis, Anderson and George apparently hold that in vitro fertilization and other forms of reproduction that do not involve intercourse do not constitute “biological” or “natural” procreation (pp. 23-25). This paper follows them in this supposition. However, in light of technological advances, it is not at all clear that Girgis, Anderson and George have reasoned basis for excluding alternative forms of reproduction as being unnatural or non-biological.

marriage in procreation, one that dates back to St. Augustine.⁴⁴ However, this conception of marriage is foreclosed to George, Girgis and Anderson by infertile straight couples (pp. 31, 73-77). This infertility objection charges that opponents of same-sex marriage “cannot give a principled basis for recognizing infertile couples’ unions that would not equally apply to same-sex unions” (p. 73). If marriage is about natural procreation, then same-couples would be ill-equipped for marriage; but, as Justice Elena Kagan points out, so would straight couples over the age of fifty-five.⁴⁵

As a result, George, Girgis, and Anderson assert that marriage requires a “procreative-type act”—vaginal-penile penetration, but not procreation itself (pp. 24-27). First, they allege that marriage requires a “bodily union” (pp. 24-25). They then contend that it requires not just sex but a particular type of sex, coitus (pp. 25-27). Their argument in favor of the first proposition is metaphysical and rather brief:

- (1) “Marriage is a comprehensive union of persons” (p. 23).
 - (2) “[Y]our body is an essential part of *you*” (p. 24).
 - (3) “Because of that embodiedness, any union of two people *must include bodily union* to be comprehensive” (p. 24).
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- Therefore, “marriage . . . includes bodily union” (p. 24).

Setting aside the potential objections to this argument for a moment, it only gets Girgis, Anderson and George halfway. As they acknowledge, “Much of our argument turns on what we call organic bodily union,” coitus (p. 99).

Girgis, Anderson, and George offer three justifications for the centrality of consummation to marriage. The first is teleological:

⁴⁴ George & Bradley, *supra* note 40 at 304..

⁴⁵ Amy Davidson, What About The Children? *Prop 8 and Procreation*, THE NEW YORKER (Mar. 26, 2013), <http://www.newyorker.com/online/blogs/closetread/2013/03/prop-8-and-the-court-what-about-the-children.html>.

- (1) Marriage requires bodily union (p. 24).
- (2) Bodily unity requires “unity for a common action: activity toward common ends” (p. 25).
- (3) “[F]or two individuals to unite organically, their bodies must coordinate toward a common biological end of the whole that they form together” (p. 25, emphasis omitted).
- (4) The only common biological end which requires two individuals to form together is sexual reproduction.
- (5) Sexual reproduction can only be achieved organically through coitus.
Therefore, marriage requires coitus.

Although Girgis, Anderson, and George assert that marriage does not require procreation, it has this “inherent link to procreation” (p. 30).

Girgis, Anderson, and George’s second justification for the necessity of intercourse relies on intuition. To demonstrate the supposed centrality of coitus and its inherent link to procreation, *What Is Marriage?* concludes with the following thought experiment: “[I]magine that human beings reproduced asexually and that human offspring were born self-sufficient. In that case, would any culture have developed an institution anything like what we know as marriage? It is clear that the answer is no” (p. 96).

The final justification the authors offer comes from common law. “Unsurprisingly, in the common-law tradition, only coitus,” they write, “has been recognized as consummating a marriage” (p. 30). They argue that the only explanation for this requirement is that the “law reflected the rational judgment unions consummated by coitus were valuable in themselves,” which in turn undergirds their traditionalist understanding of marriage (p. 50). In support of this

proposition, Girgis, Anderson and George look to dictionary definitions of “consummation” and cite the English common law of 1548 (p. 113 n.6).⁴⁶

For Girgis, Anderson and George, carnal marriage circumvents the infertility objection since it does not require procreation (pp. 31, 73-77). Instead, it requires only *the capacity* to engage in a procreative-type act (vaginal-penile penetration).⁴⁷ Further, marriage does not require even the possibility of procreation.⁴⁸ As a result, (many) infertile couples are covered by Girgis, Anderson and George’s definition of marriage since (many) infertile heterosexual couples can engage in vaginal-penile penetration, even if such contact cannot result in procreation. Homosexual couples, on the other, hand lack the requisite bodily equipment for vaginal-penile penetration, an indispensable aspect of traditionalist marriage.

II. OBJECTIONS TO *WHAT IS MARRIAGE?* AND TRADITIONALIST MARRIAGE

Although Girgis, Anderson and George craft a coherent definition of marriage, their carnal conception of marriage, particularly its coitus requirement, fails for three reasons. First, Girgis, Anderson and George’s carnal conception of marriage is sex-obsessed and denigrates the institution of marriage. It treats love, the foundation of marriage, as but a “secondhand emotion;” and, to further quote Tina Turner, leaves readers wondering “what’s love got to do with it?”⁴⁹ The book barely makes any mention love in its account of marriage despite the fact that love is the undisputed foundation of marriage. Instead, Girgis, Anderson and George strangely endorse the awkward euphemism “emotional union” which is repeated throughout

⁴⁶ They cite OXFORD ENGLISH DICTIONARY III, at 803 (2d ed. 1989); BLACK’S LAW DICTIONARY, 359 (9th ed. 2009); 1548 Act 2–3 Edw. VI, c. 23 § 2.

⁴⁷ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 265-66 (1995).

⁴⁸ *Id.*

⁴⁹ *Tina Turner Lyrics*, AZLYRICS, <http://www.azlyrics.com/lyrics/tinaturner/whatslovegottodowithit.html> (last visited Dec. 18, 2013).

What Is Marriage? (see e.g., pp. 55-56). While Girgis, Anderson and George assert penile-vaginal penetration is integral to marriage, they are highly suspect of love (p. 56).

The authors argue that the modern conception of marriage, which is predicated primarily on love, means that “marriages will increasingly take on emotion’s tyrannical inconstancy” (p. 56). In short, Girgis, Anderson and George contend that love is “but a second hand emotion.”⁵⁰ For them, love is just “feelings” which “cannot [even] be central to a vow, for we have no direct control over them” (p. 55n). They view the common perception that love is most central to marriage as indicative of its decline (p. 55, p.119 n.5-6). Indeed, they contend as the centrality of love waxes, its companion marital virtues of “permanence and exclusivity would wane” (p. 57).

Contrary Girgis, Anderson and George, love is not so ethereal. It appears the authors confuse love, which Shakespeare refers to as “an ever-fixed mark [t]hat looks on tempests and is never shaken,” with lust.⁵¹ It is true that sex alone cannot sustain a healthy, lasting marriage. But, love is a union of the hearts and minds, not hearts and genitals. The defining feature of a marriage ceremony is the vow, not the honeymoon. To imply, as Girgis, Anderson and George do, that love is not enough for marriage to survive and thrive is to desecrate the sacred institution. Moreover, to argue that marriage requires not only a “bodily union” but a specific type of sex—vaginal-penile penetration— to be “true” is to further befoul the great bond of marriage.

Neither vaginal-penile penetration nor any other particular sexual act is necessary for marriage. Although it is difficult to imagine marriage without some romance or intimacy, not all

⁵⁰ *Id.*

⁵¹ WILLIAM SHAKESPEARE, SONNET 116, *available at* <http://www.shakespeare-online.com/sonnets/116.html>.

romantic attraction is synonymous with sexual desire, notwithstanding Girgis, Anderson and George's genital fixation.⁵² Unlike lust, romance and intimacy includes a wider range of activity and can take a multitude of different forms—from penning a loving note to holding hands to embracing physically (kissing, hugging, etc.). Romantic attraction is aimed at a person, whereas sexual desire is directed at a body, often any body. Romance is a matter of hearts and minds, of one's noblest pursuits; lust is a matter of libido, of one's base instincts.

A second objection to *What Is Marriage?* is that it implausibly entails that the impotent, imprisoned, and immobilized as well as those simply uninterested in consummation ought not to be able to marry. A rather counterintuitive feature of traditionalist marriage is that it is required to accept this rather strange conclusion. The coitus requirement commits Girgis, Anderson and George to maintaining that the impotent and those otherwise incapable of vaginal-penile penetration (including heterosexuals that are imprisoned or immobilized) should not be permitted to marry (p. 127 n. 5). George and Bradley conceded this point in the mid-1990s.⁵³

As a result, even assuming the authors can avoid the infertility objection,⁵⁴ they are susceptible to a parallel problem, the “impotence objection.” The impotence objection is perhaps best explained through a thought experiment crafted by Richard Chappell:

Suppose an old heterosexual couple get legally married, and spend the rest of their lives together. They are dedicated to each other's welfare, and share all that they consider important in life. . . . They kiss, buy each other flowers on occasion, and are sexually intimate in various ways. But, for some reason (perhaps the woman suffers from severe vaginism [a rare condition which makes vaginal intercourse

⁵² HJLPP, *supra* note 40 at 271 (“Romance is the kind of desire that aims at bodily union[.]”).

⁵³ George & Bradley, *supra* note 40 at 308 (“A marriage can, however, be annulled on the ground that impotence (or some other condition) prevents the partner from consummating it.”).

⁵⁴ See e.g., Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 87–88 (2002) (questioning whether Girgis, Anderson and George can convincingly escape the infertility objection).

painful, if not impossible]), they just never have vaginal intercourse. Does anyone really want to say that they aren't *really* married[?]⁵⁵

However, the impotence objection is not limited to impotent men or women with vaginism. One can conceive of scores of scenarios in which heterosexual couples would be unable to achieve coitus due to unfortunate circumstance. Girgis, Anderson and George raise the specter of paraplegia (p. 127 n. 5). Another possibility is life imprisonment without conjugal visits.⁵⁶ In sum, the impotence objection is not a trivial implication of an otherwise sound argument. It covers a wide array of the population. According to one study, "18 million men in the United States over age 20 are affected by erectile dysfunction."⁵⁷ Needless to say, it is a major problem if one's conception of marriage turns on access to Cialis or Viagra. Further, the impotence objection undermines the coitus requirement, the only aspect of Girgis, Anderson and George's argument that can explain why same-sex couples ought to be excluded from wedlock.

The impotence objection is further supported by both intuition and constitutional law. First, virtually (if not absolutely) no one believes that impotent men, women with vaginism, the paraplegic or even prisoners should be excluded from marriage. Girgis, Anderson and George resist this conclusion even though it logically follows from their traditionalist conception of

⁵⁵ Richard Chappell, *What's Wrong With 'What Is Marriage?'*, PHILOSOPHY, ET CETERA (May 7, 2011), <http://www.philosophyetc.net/2011/05/whats-wrong-with-what-is-marriage.html>; *see also* *Vaginismus*, U.S. NAT'L LIBRARY OF MED., <http://www.nlm.nih.gov/medlineplus/ency/article/001487.htm> (last visited Dec. 18, 2013).

⁵⁶ *See e.g., Turner*, 482 U.S. 78.

⁵⁷ *18 Million Men in the United States Affected by Erectile Dysfunction*, J. HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Feb. 1, 2007), <http://www.jhsph.edu/news/news-releases/2007/selvin-erectile-dysfunction.html>.

marriage.⁵⁸ Moreover, the Supreme Court’s most recent decision to discuss the fundamental right to marriage, *Turner v. Safley*, supports the impotence objection.⁵⁹

At issue in *Turner* was a regulation that permitted inmates to marry “only with permission of the superintendent of the prison.”⁶⁰ The Court held that this regulation was unconstitutional and that the fundamental right to marriage endures even in the prison context, where one’s rights are greatly curtailed.⁶¹ Although the bodily aspect of marriage is often impossible for inmates, the “important attributes of marriage remain.”⁶² The Court noted that “inmate marriages, like others, are expressions of emotional support and public commitment” and that “these elements are an important and significant aspect of the marital relationship.”⁶³

The third and final failing of *What Is Marriage?* is that it rests on a fallacious inquiry in the nature “true marriage” (p. 55) rather than what the civil right to marriage entails. Girgis, Anderson and George are correct to point out that the same-sex marriage debate ultimately turns on the definition of marriage (p. 1). For an equality-based argument for same-sex marriage even “to get off the ground,” it must be able to provide a compelling definition of marriage.⁶⁴ But, *What Is Marriage?* goes astray in its insistence that marriage has a pre-political, “moral reality” (p. 6), what the authors have referred to as “true marriage” (p.55). George Girgis, Anderson and

⁵⁸ Girgis, Anderson and George note that although “permanently unconsummated unions” like a paraplegic man’s is certainly incomplete . . . “good marriage policy would go on recognizing it. For inquiring into its true status would be invasive (in *what* is asked, not just *how*), and recognizing it would not negate the *public* understanding of marriage as a conjugal union” (p. 127 n. 5).

⁵⁹ 482 U.S. 78 (1987).

⁶⁰ *Id.* at 82.

⁶¹ *Id.* at 96.

⁶² *Id.* at 95.

⁶³ *Id.* at 95-96.

⁶⁴ Wedgwood, *supra* note 8 at 226.

George support this proposition primarily by arguing against what they call “constructivism”—the notion that marriage is whatever the state decides that it is (p. 46). They argue that “marriage is not a legal construct with totally malleable contours—not ‘just a contract.’”⁶⁵ Otherwise, it would be “impossible for the state’s policy to be wrong about marriage.”⁶⁶

Instead, they posit that “[m]arriage has an objective core, fixed by our nature as embodied, sexually reproductive (hence complementary beings) and to deviate from it is to miss a crucial part of this basic human good” (p. 48). In short, to quote Senator Rick Santorum, “marriage is what marriage is,” regardless of what the state calls it.⁶⁷ However, to define marriage in such a way that ignores its political and legal dimensions is fundamentally misguided. Whether or not marriage has a moral reality is irrelevant to current same-sex marriage debate.

The essential issue is one of legal recognition, of the *civil* institution of marriage. The key question is: What types of relationships warrant the state’s recognition and endorsement? As historian Nancy Cott explains, marriage has been a “civil institution, regulated by government to promote the common good” throughout American history.⁶⁸ Further, it is intuitively difficult to understand the institution of marriage without involving the state.⁶⁹ As the Massachusetts Supreme Judicial Court stated, now famously, in *Goodridge v. Department of Public Health*:

⁶⁵ HJLPP, *supra* note 40 at 250, 274.

⁶⁶ *Id.* at 274.

⁶⁷ Jo Ling Kent, *Santorum gets 'metaphysical' on gay marriage*, MSNBC (Aug. 10, 2011, 11:20 AM), http://firstread.nbcnews.com/_news/2011/08/10/7332224-santorum-gets-metaphysical-on-gay-marriage?lite.

⁶⁸ *No Objections*, *supra* note 28.

⁶⁹ Wedgwood, *supra* note 8 at 228

“Simply put, the government creates civil marriage. . . . In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”⁷⁰

For Girgis, Anderson and George look to their pre-political definition of marriage to inform their conception of the state’s rationale for marriage gets the key issue in the same-sex marriage debate precisely backwards.⁷¹ The state’s rationale for marriage ought to inform what the right to marriage entails. When the authors disregard what the right to marriage entails, which is the true focus of the same-sex marriage debate, and instead focus on an occult notion of “true marriage;” it is, at best, changing the subject. At worst, such a move is strikingly similar to the “No True Scotsman” fallacy, or an ad hoc rescue.

The No True Scotsman fallacy can be illustrated by the following dialogue between Scott and Burns:

Scott: All Scotsmen enjoy haggis.

Burns: But McDougal is a Scotsman, and he finds haggis unpalatable.

Scott: Well, all *true* Scotsmen enjoy haggis.

When presented with the proposition that the modern marriage is applicable to both same-sex couples as well as opposite-sex couples, the essence of Girgis, Anderson and George reply echoes that of Scott’s—“Well, all *true* marriages are inconsistent with same-sex relationships.” Such a move is especially problematic when one recalls that the purpose of their book is to refute the arguments in favor of same-sex marriage “without appeals to revelation or

⁷⁰ 798 N.E.2d 941, 954 (Mass. 2003).

⁷¹ HJLPP, *supra* note 40 at 251.

religious authority of any type”⁷² (pp. 10-11). Girgis, Anderson and George’s intuitions about marriage’s “moral reality” appear heavily influenced by religious belief.

For instance, Senator Santorum takes a similar stance on marriage. Senator Santorum also believes that the essence of “marriage existed before government existed.”⁷³ He concurs with Girgis, Anderson and George’s, statement “the state cannot choose or change the essence of [true] marriage.”⁷⁴ Senator Santorum analogizes marriage to water⁷⁵ and a napkin.⁷⁶ “Water is what water is,” just as “marriage is what marriage is.”⁷⁷ Recognizing same-sex marriage is “like saying . . . [a] glass of water is a glass of beer. . . . [Y]ou can call it a glass of beer, but it’s not a glass of beer.”⁷⁸ Similarly, one can call a napkin a paper towel, but this does not change the napkin’s “metaphysical” character.⁷⁹ A napkin, like a marriage, “is what it is.”⁸⁰

For Senator Santorum as well as Girgis, Anderson and George, marriage’s moral reality is confirmed by nature and marriage’s supposed similarity across cultures (pp. 47-50).⁸¹

However, Senator Santorum makes explicit that his views on natural law come from God and

⁷² *Id.* at 285.

⁷³ *Rick Santorum: Obama’s Health Care “Will Rob America of Its Soul”*, S.F. CHRONICLE POL. BLOG (Aug. 8, 2011, 2:24 PM) <http://blog.sfgate.com/nov05election/2011/08/08/rick-santorumobamas-health-care-will-rob-america-of-its-soul/> [hereinafter *Santorum*].

⁷⁴ *Id.*; HJLPP, *supra* note 40 at 252.

⁷⁵ Kent, *supra* note 66.

⁷⁶ *Santorum*, *supra* note 72.

⁷⁷ Kent, *supra* note 66.

⁷⁸ *Id.*

⁷⁹ *Santorum*, *supra* note 72.

⁸⁰ *Id.*

⁸¹ *Id.*; HJLPP, *supra* note 40 at 275.

that natural law is God's law.⁸² Again, Girgis, Anderson and George deny that their arguments rely on "revelation or religious authority of any type"⁸³ (pp. 10-11). However, in light of the fact that it is widely believed that modern American marriages have essential elements that are social, political, and legal, it seems as though the source Girgis, Anderson and George's intuitions regarding "true marriage" are similar to those of Senator Santorum—a matter of faith.

III. OBJECTIONS TO MODERN MARRIAGE

So far, it has been established that there exists a *prima facie* case in favor of modern marriage and that Girgis, Anderson and George's traditionalist conception of marriage fails. This section explores *What Is Marriage?*'s objections to non-carnal conceptions of marriage. Girgis, Anderson and George assert that modern marriage cannot account for three fundamental principles of marriage: (1) "the state has an interest in regulating certain types of relationships;" (2) "that interest exists only if the relationships are sexual;" and (3) "it exists only if they are monogamous" (p. 15). They attempt to illustrate their position through their example of Oscar and Alfred, who:

[L]ive together, support each other, share domestic responsibilities, and have no dependents. Because Oscar knows and trusts Alfred more than anyone else, he would like Alfred to be the one to visit him in the hospital if he is ill, give directives for his care if he is unconscious, inherit his assets if he dies first. Alfred feels the same about Oscar. Each offers the other security amid life's hardships, and company in its victories (p. 16).

Girgis, Anderson and George ask: if same-sex marriage were permitted, what would differentiate Oscar and Alfred's relationship (as, say, best friends) from a married couple? Their answer is Oscar and Alfred do not have sex (pp. 16-18).

⁸² *Santorum, supra* note 72.

⁸³ HJLPP, *supra* note 40 at 285.

Here, again, Girgis, Anderson and George appear to be sex-obsessed and rely on intuitions that run counter to our everyday experience. There can be no doubt that there is a difference between spousal love and friendship (as well as other types of love). The question is whether the difference is coitus. Although Girgis, Anderson and George assert that vaginal-penile penetration is the distinguishing factor (pp.16-18), no one seriously believes this. The difference between a friend and a spouse is not simply that one has sex with the later but not the former.

So what is the difference? While love generally involves caring for the welfare of others, the love one has for a spouse is different from that of a parent or sibling or friend. There are two ways for accounting for this difference. First, spousal love is different in kind from the love between friends (or siblings or between parents and children). Conjugal love, on this view, goes deeper. As Carlos Ball explains, conjugal love “allows for an expansion of the self. When a person loves another, she begins to see that other as an extension of herself.”⁸⁴ Aristophanes discusses this conception of conjugal love in Plato’s *Symposium*:

When a person meets the half that is his very own, whatever his orientation . . . something wonderful happens: the two are struck from their sense by love, by a sense of belonging to one another, and by desire, and they don’t want to be separated from one another, not even for a moment.”⁸⁵

In short, the difference is romance and intimacy. Part of spousal love is a romantic attraction and a desire for intimacy that is absent with one’s parents or friends. It is perhaps impossible to describe with particularity precisely how romantic attraction and spousal love

⁸⁴ Carlos A. Ball, *THE MORALITY OF GAY RIGHTS* 109 (2003).

⁸⁵ PLATO, *Symposium*, in *PLATO COMPLETE WORKS*, 172a, 189c-193e (John M. Cooper & D.S Hutchinson eds., Alexander Nehamas & Paul Woodruff trans., 1997).

operate, for this is a question that has puzzled philosophers and poets as far back as Plato.

Aristophanes states that there are:

[P]eople who finish out their lives together and still cannot say what it is they want from one another. No one would think it's the intimacy of sex . . . It's obvious that the soul of every love longs for something else; his soul cannot say what it is, but like an oracle it has a sense of what it wants . . .⁸⁶

Though it is difficult to describe the nature of romantic attraction with precision, it is clear that the difference between spousal love and other types of love is not rooted merely in sex. As Supreme Court appears to confirm in *Turner*, although sex is often part of most marriages, it is not essential to modern marriage.⁸⁷

Yet, Girgis, Anderson and George take for granted “no one really holds” that marriage is possible without sex (p. 17). As demonstrated above, this presumption is unfounded and is based on a fetishism of vaginal-penile penetration.⁸⁸ In his past work, Robert George even goes as far as to claim that elderly couples who no longer enjoy sex ought to still do it “at least occasionally, as a way of actualizing and experiencing their marriage as a one-flesh union.”⁸⁹ Further, George has written that marriage requires uncontracepted sex since “[n]obody . . . performs a reproductive-type act when he or she deliberately thwarts that act’s reproductive potential.”⁹⁰

Such a traditionalist conception of marriage is simply at odds with the modern American experience. Does anyone really believe that those who cannot achieve coitus (gay or straight) should be prohibited from marriage? Does anyone really think that sex is so essential to

⁸⁶ *Id.* at 192c-d.

⁸⁷ *Turner*, 482 U.S. at 95-96.

⁸⁸ *See supra* Part III.

⁸⁹ George & Bradley, *supra* note 40 at 310.

⁹⁰ *Id.* at 310n, 318.

marriage that elderly couples who longer enjoy sex must consummate in order to “actualize” their marriages? Does anyone really hold that contracepted sex within a marriage is immoral? Absent a commitment to a particular religious belief, a blind faith in tradition, or genitally fixated intuition, Girgis, Anderson and George’s obsession with vaginal-penile penetration has little bearing on the modern institution of civil marriage.⁹¹

Additionally, the difference between the love of friendship and spousal love is one of degree. In some aspects, conjugal love and the love of friendship are on the same continuum. Both kinds of love are an extension of the self; but, with conjugal love, the self is so intermingled with the other that the two cannot be separated. The degree of affection is so strong that the couple wants society and the state to recognize and, thereby, help reinforce their relationship.⁹²

They want to take on the burdens of social pressure that accompany marriage (as opposed to simply living together). Marriage is a covenant not only between a couple but also between a couple and society. “In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State.”⁹³ As Andrew Sullivan notes, “society has good reason to extend legal advantages to heterosexuals who choose the formal sanction of marriage over simply living together. They make a deeper commitment to one another and to society; in exchange society extends certain benefits to them.”⁹⁴

⁹¹ See Nussbaum, *supra* note 9 at 142 (this is not to suggest that those who are religiously opposed to homosexuality or same-sex marriage do not have a right to their private beliefs. But, in a Western democracy, one’s private religious beliefs cannot be a basis for curtailing one’s fundamental rights unless those religious beliefs are bolstered by public reasons that appeal to all citizens).

⁹² Ball, *supra* note 83 at 109.

⁹³ *Goodridge*, 798 N.E.2d at 954.

⁹⁴ Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC (Aug. 28, 1989) at 20.

Finally, Girgis, Anderson and George argue that absent the “definite structure” of heterosexual marriage, there is no principled basis for limiting marriage to two people (pp. 18-21). This assertion again misunderstands spousal love and the social purpose of marriage. First, inherent in spousal love is a oneness through two-ness. It involves a reciprocal unit. As Aristophanes explains, when A loves B and B loves A, they become AB, something greater than the sum of its parts.⁹⁵ With polygamous relationships, such reciprocity is impossible.

Spousal love and romantic attraction can only be directed at individuals. A can love B and A can love C, but A cannot love BC. Spousal love and romantic attraction directed at two or more individuals as a unit is counterintuitive. Again, it is difficult to describe the nature of spousal love and romantic attraction or how they operate precisely. However, there is a reason Aristophanes describes love as a meeting of two halves rather than three thirds.⁹⁶ Spousal love by its nature requires two people.

Further, allowing polygamous relationships to marry would not achieve the social purpose of marriage. The founders explicitly rejected polygamous marriage.⁹⁷ They equated polygamy with “despotism . . . political corruption, coercion, elevation of the passions over reasons, selfishness, [and] hypocrisy . . . Monogamy, in contrast, stood for government of consent, moderation, and political liberty.”⁹⁸ According to the founders, monogamous marriage was a mechanism for encouraging civic virtue and moral integrity, necessary ingredients under republican governance.⁹⁹ Marriage would lose these pro-social features if it were expanded to

⁹⁵ Plato, *supra* note 84 at 189c-193e.

⁹⁶ *Id.* at 191c-d.

⁹⁷ Cott, *supra* note 13 at 20-22.

⁹⁸ *Id.* at 22.

⁹⁹ *See generally Id.* at 17-22.

include polygamous relationships. The more partners in a relationship, the more spousal love will diffuse.¹⁰⁰

CONCLUSION

What Is Marriage? represents the best articulation of the case against gay marriage. It does not contain an ounce of homophobia. It is instead grounded in a reverence for traditionalist marriage and a coherent definition of marriage. Ironically, Girgis, Anderson and George inadvertently sully the institution of marriage by insisting that marriage requires vaginal-penile penetration. Their genital fixation makes traditionalist marriage a carnal enterprise. This sex obsession undermines marriage by confusing what is essential to the institution and what makes it special.

Modern marriage, in contrast, is fundamentally about spousal love, a sacred social bond. Though most marriages involve sex, sex is not essential to modern marriage. Instead, marriage is, at bottom, a legal commitment based on consent, monogamy, fidelity, and most basically, love. The reason the state permits and promotes marriage is to encourage these values. Because same-sex couples are capable of achieving these values, it is arbitrary and unjust to prohibit gay marriage.

In the final analysis, it seems that *What Is Marriage?* gerrymanders its definition of marriage. Requiring coitus and excluding same-sex couples makes sense for someone such as Rick Santorum who explicitly bases his beliefs about marriage on “God’s law.”¹⁰¹ However, absent a commitment to a particular religious view or a blind faith in tradition, it is clear that the

¹⁰⁰ See *Episode 513: Dear Economist, I Need A Date*, PLANET MONEY (Jan. 30, 2014), at 16:00 <http://www.npr.org/blogs/money/2014/01/29/268422490/episode-513-dear-economist-i-need-a-date> (noting that even if love is boundless, time is not and that strong relationships require time).

¹⁰¹ Santorum, *supra* note 72.

historical consummation requirement is an anachronism. Same-sex marriage bans, like coverture and interracial marriage prohibitions, are artifacts of a less tolerant time and blights on the institution of marriage.

In sum, the same-sex marriage debate goes beyond gay rights. It offers an opportunity to reflect on marriage, and its social function, more generally. Enshrining modern marriage and recognizing gay marriage would strengthen the institution of marriage by making clear that marriage, in addition to being an individual right, is a process sanctioned by the state to encourage love, fidelity and monogamy. In addition to reaffirming these essential values, modern marriage allows the coitus requirement and bans on same-sex marriage, incidental and unfounded aspects of the institution, to fade to the ash heap of history along with coverture and prohibitions on interracial marriage.