The Boundaries of Belonging: Community, Allegiance, and the Definition of Marriage
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“Good fences make good neighbors.” – Robert Frost¹

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III. Boundaries Must Support the Core Purposes of the Community
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V. Same-Sex Marriage Undermines the Core Gender-Integrative Purposes of Marriage.
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I. Introduction: Belonging

“No man is an island.” – John Donne²

My paper addresses an important theme in scholarship about families and family law. That is the theme of “belonging.” Belonging was an important theme in the writing of my former colleague, Bruce C. Hafen, about families and family law. Professor Hafen was one of

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¹ Robert Frost, Mending Wall in North of Boston (1914).
² John Donne, Meditation XVII in Devotions on Emergent Occasions (1624) available at http://www.online-literature.com/donne/409/ (seen 17 January 2011) (“[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.”)
the leading family law scholars who write in about family law from communitarian perspective.  

Belonging to communities and the essential role of marriage and families are core to communitarian scholarly commentary. In that vein, I will address the boundaries of belonging, and the need to preserve boundaries to preserve certain communities and the opportunity and value of belonging to them. 

The yearning to belong is said to be inherent in human nature. 

From ancient times to modern, from Genesis to Aristotle, to Locke, to Montesquieu, to Blackstone, to
Tocqueville,10 and Bellah,11 the social nature of human beings has been noted, reiterated, celebrated, protected, and regulated. Humans are communal and seek, and flourish in, some degree of social association. 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.12 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.13 We generally by nature also seek to associate outside of our families in social, business, commercial, religious, ethnic, and civic communities which enrich and broader our lives and our society.

One of the paradoxes of belonging is that the need to belong creates also a need to exclude; in order for belonging to occur, there must be boundaries, standards defining the relationship, criteria that separate. All communities have membership requirements that define

7 John Locke, Second Treatise of Government, in Two Treatises of Government §§ 4-8, 77-83, 121-131 (Peter Laslett ed. 1960) (“—“).
8 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws, Bk. 1, Ch. 1 (___) (man is “formed to live in society.”); id. at ___ (“—“).
9 I William Blackstone, Commentaries on the Laws of England *43-48 (Intro., § 2) (“—“).
10 See 1 Alexis de Tocqueville, Democracy in America (Phillips Bradley ed., 1945) (1835) (“—“).
13 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).
the boundaries of the community. A variety of disciplines and theories of belonging, community, identity, inclusion, etc., help us understand how to draw such boundaries. A key point is the need to reflect, protect and promote the purpose of the community in drawing boundaries of belonging.

This paper about belonging is specifically about belonging to a particular (and particularly important) kind of community – marriage. Marriage is the primary expression of and preferred locus for the most meaningful and socially beneficial forms of belonging. Many other personally meaningful and fulfilling relationships exist, but the benefits to society, and to family members of marriage are unique.

As with inclusion in other communities, membership in marriage requires some understanding of the boundaries of that relationship, and necessarily some exclusion, to preserve the institution – the community of marriage. Some kinds of belonging are inconsistent with and contrary to the core purposes of the community. The trend towards inclusiveness in public policies is present in family law has spawned some excesses. Recent controversies about legalizing same-sex marriage, recognizing alternative adult intimate relationships, and alternative forms of parenting are the most recent examples of this misdirected trend towards individualistic over-inclusiveness in family law. Applying the standard of defining the boundaries of a community in terms of its core and essential purposes, we see that some of the inclusiveness developments in family law have been beneficial and others have been harmful or are potentially harmful and self-destructive. The inclusiveness of a proposed law reform is just one factor in assessing its wisdom; some forms of boundary-erasure or removal are harmful to the institution itself, and to society, families and individuals.
This paper seeks to establish four 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. Finally, legalizing same-sex marriage denies and undermines the core gender-integrative purposes of marriage.

II. Boundaries and Exclusion Are Necessary for Community

“Good fences make good neighbors.” – Robert Frost

A “community” is “[a] body of people of things viewed collectively,”14 and includes “a nation or state,”15 “the public, society,”16 “a religious society,”17 “a commune,”18 “[a] body of people who live in the same place, usually sharing a common cultural or ethnic identity,”19 “a group of people distinguished by shared circumstances of nationality, race, religion, sexuality, etc.;”20 “a group of people who share the same interests, pursuits, or occupation,”21 and groups characterized by the “social cohesion; mutual support and affinity such as derived from living in a community,”22 “[t]he fact of having a quality or qualities in common; shared characters,

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14 Robert Frost, Mending Wall in North of Boston (1914).
16 Id. at 2.a.
17 Id. at 6.
18 Id. at 3.a.
19 Id. at 3.b.
20 Id. at 2.b.
21 Id. at 5.a.
22 Id. at 5.b.
23 Id. at II.9.b.
similarity; identity; unity,”

24 and “[t]he fact of being in communion . . . .”

25 Thus, the very concept and meaning of community establishes the need to define boundaries, to establish standards for membership, to identify the common qualities that are criteria for belonging.

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 . . . .”

26 Membership may expand to a point of diminishing returns; that it, membership is defined in a way to prevent marginal costs exceeding the marginal benefits to each member of the benefits the group is formed to achieve.

27 We need boundaries to define, understand and protect our institutions, as well as to live in peace with others not members of the particular community. Boundaries protect our community, our communities’ identity, our communities independence, and our relations with those outside the community, in other communities.

In Robert Frost’s poem, Mending Wall, from which the lines quoted at the beginning of this section was taken, the annual spring ritual of rebuilding the wall may seem like an exercise in reinforcing separation and alienation, but the process of mending the wall is a regular social event that draws two neighbors together to the boundaries of the physical-property relationship,

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24 Id. at II.11.
25 Id. at II.12.
27 Froomkin, supra note __ at 152, citing Olson, supra note __, at 30-31. I do not have time to examine to the pathology of groups being unduly exclusive – 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.” Froomkin, supra note __, 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 of negative qualities and demonization of excluded persons.
and provides the occasion for them to work together for a while in a common endeavor, to talk, to renew, and to help rebuild 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.  

Boundaries also protect our neighbors and our relationships with them. Clear boundaries, bright lines, help responsible individuals to self-regulate, to self-monitor, to plan and implement plans with freedom knowing that they can rely upon the 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.

I will discuss briefly three intellectual traditions that underscore the importance of boundaries to protect communities and give meaning to belonging. They are communitarian theory, group and identity theory, and the allegiance doctrine theory.

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28 *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,* the poet have have meant the voice to be self-indicting and the words to be self-condemning of the speaker. *See*  

29 Brewer, *supra* note __ at 478.
The “doctrine of allegiance” is another example of the importance of boundaries that define membership in a group and also the linkage of boundaries to the purposes of the 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. . . .”30 In other words, the duties and benefits were linked; allegiance was the duty owed by those who enjoyed the benefits of membership in the political community. As Coke explained in Calvin’s Case, “[L]iegance 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.”31 Membership in the political community carried with it significant duties of which allegiance was central, and membership was determined by manifesting allegiance to and accepting the benefits for which the political community was formed. The individual did not have the right to abandon the duty of allegiance.32


32 Indeed, at Anglo-American legal history, at least until the Expatriation Act of 1868 (Act of July 27, 1868, 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.
Allegiance theory is being discussed today in relation to several important political issues, including same-sex marriage. For example, historically, under one 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.”\textsuperscript{33} Some decisions of the Supreme Court have called the continued viability of this aspect of the doctrine of allegiance into question as it relates to the law of treason.\textsuperscript{34}

Another aspect of the “doctrine of allegiance” is its implications for the debate over interpretation of the “natural born citizen” clause of Section One of the Fourteenth Amendment. 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.\textsuperscript{35} 


\textsuperscript{34} See United States v. Quinn, 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) (due process requires that 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).

\textsuperscript{35} See generally \textit{Natural Law and Birthright Citizenship in Calvin’s Case}, 9 Yale J. L. & Human. 73, 74-75 (1997) (discussing the natural law origins of the rule of birthright citizenship expressed in \textit{Calvin’s Case}) ; * * Christopher L. Eisgruber, \textit{Birthright Citizenship and the Constitution}, 72 N.Y.U. L. Rev. 54 (1997); Katherine Pettit, Comment, \textit{Addressing the Call for the Elimination of Birthright Citizenship in the United States: Constitutional and Pragmatic Reasons to Keep Birthright Citizenship Intact}, 15 Tul. J. Int.’l & Comp. L. 265 (2006); * *
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 used for purposes of apportionment of seats in the House of Representatives.\textsuperscript{36} 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.\textsuperscript{37} 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] . . . .”\textsuperscript{38} For our purposes, which side is right is not the point, but 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.

\textbf{III. \textit{Boundaries Must Support the Core Purposes of the Community}}

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. \textsuperscript{**}


\textsuperscript{37} Charles, \textit{Apportionment}, \textit{supra} note __, at 61-67; Lee & Lunder, \textit{supra} note __, at __.

\textsuperscript{38} \textit{Eastman}, \textit{supra} note __, at 1484. \textit{See also} Wood, \textit{supra} note __, at 476-80, 504-08.
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 O.E.D. 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.”39 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 importance of allegiance in defining marriage is underscore by the observation of anthropologist Claude Levi-Strauss that the core and essential purpose of marriage historically was to create alliances and allegiances with other kinship groups.40 Additionally, historically, the roots of the social compact theory and republican government theories lay in linking membership in the community with allegiance to the purposes of the community.41 Blackstone identified the reciprocal duties of membership and allegiance as the “original contract of society . . . [that] in

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41 See generally John Locke, Two Treatises of Government §§ 4, 7-12, 123-130, 211-243 (Peter Laslett ed. 1960); John Trenchard & Thomas Gordon, Cato’s Letters No. 62 (1733); Heyman, *supra* note __, at 512-22.
nature and reason must always be understand 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 . . . .”42 (Today, not only the do the purposes of the community define the boundaries of membership, but, according to John Rawls, they even define the scope of appropriate reasons expressed by members of the political community about fundamental political questions.)43

Marriage is a public community status and institution that serves both public and private purposes, as Roscoe Pound long ago noted.44 While individual marriage couplings will certainly reflect private purposes of the parties, such unions also must conform to -- and the legal definition of marriage in the United States is governed and defined by -- the public purposes of marriage.

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42 I William Blackstone, Commentaries on the Laws of England *47-48; see also id. at *233..  
43 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.”)  
44 Roscoe Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 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 further 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).
Thus, we have established two points. First, all communities have boundaries. Second, the boundaries defining membership in a community must reflect and protect the essential purposes of the community.

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

The next question is -- what are the essential purposes of marriage? Does the dual-gender requirement reflect and protect core purposes of the institution of marriage?

Marriage is fundamentally a gender-integrating community. United and integrating unrelated men and women in long-term, consensual unions is the core purpose generally of marriage. Gender-integration is short-hand for a number of specific essential qualities, characteristics and critical purposes of marriage. Five of these gender-integration purpose of marriage are “(1) safe sexual relations, (2) responsible procreation, (3) optimal child-rearing, (4) healthy human development, and (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers . . .”45 All of these relate to, require or assume gender-integrating unions of male and female.

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, important, essential ways that are complementary. The union of man and woman, thus, is different different in innumerable, important, essential ways from the union of two men or of two women. The integration of mutually matching, harmonious, corresponding gender differences is

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45 See generally Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 Hofstra L. Rev. 349, 374 (2003) (noting that eight key social purposes of marriage, the six above plus (6) securing the stability and integrity of marriage, (7) fostering civic virtue, democracy, and social order, and (8) facilitating interjurisdictional compatibility.)
an indispensable purpose of the institution of marriage. Gender differences between men and women are uniquely fit and mutually, reciprocally, complementary. Our marriage law for millennia has protected marriage as a gender-integrative, dualistic, paired, and exclusively appropriate for the particular and particularly important social purposes and functions of the institution of marriage. 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.”

Professor Scott Yenor has recently shown in *Family Politics, The Idea of Marriage in Modern Political Thought*, that the uniting of genders has been a consistent core conception of marriage across the millennia, across cultures, and across a wide variety of philosophical and jurisprudential schools and traditions, from Locke to Marx to John Paul II. Likewise, Professor Robert George has noted that unification of male and female has been identified in philosophy for millennia as the core constitutive purpose of marriage.

One contemporary intellectual school that provides compelling and eloquent justifications for gender-integration core purpose of marriage is relational feminism. That body includes especially French feminists, African feminists, and religious feminists. All have in common the rejection of the sterile individualism of most American feminism, the appreciation

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46 See Id. at 45.
of the duality of humanity (women are different than, not mere imitations of, men), celebration of the great worth of the unique and irreplaceable contributions of women to our social institutions, including marriage, and insistence upon their need to be included in 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. 50 I 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, first, because it acknowledges the “mixity” of humanity and it prohibits exclusion of one gender (historically women have been most vulnerable) from the public definition and constitution of a basic legal institution. Second, 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. Third, 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. 51

For example, French feminist Sylviane Agacinski argues for what she calls mixité (which she translates as “mixity” in English, “to maintain the specificity of the term in its implication of

50 Lynn D. Wardle, Gender Neutrality and the Jurisprudence of Marriage,” in THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 37-65 (Scott FitzGibbon, Lynn D. Wardle, & A. Scott Loveless, eds. 2010).
51 Id. at 44-45.
the bringing together of two different elements"). 52 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,”53 and that one “cannot separate the meaning and value of sexual difference from the question of generation.”54 Id. at 47.

Many African feminists, also, have advocated legal recognition of gender differences and representation of both genders in public institutions. . . . “[T]he feminism that is slowly emerging in Africa is distinctly heterosexual, prenatal, and concerned with ‘bread, butter, and power’ issues.” 55 Id. at 48.

Feminists writing from particular religious traditions also have 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


53 Id. at xxviii.

54 Id. at 22. Accordingly, Agacinski supports same-sex Pactes Civils 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, mixity (conjugal) in marriage is essential, whereas in PACS conjugality is not required.

roots. Among those remarkably insightful writers is one of our participants today, Helen Alvare.

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

Some Mormon feminists have also written about the importance of male-female marriage, reflecting the influence of their faith’s unique religious doctrines that marriage is a God-ordained, dual-gender institution. For example, Mormon feminist writer Camille S. Williams explains that “the norm of heterosexual marriage is a necessary—albeit not sufficient—condition for social equality for women.” She asserts: “Marriage and the marital family are arguably the only important social institutions in which women have always been necessary

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57 Helen Alvaré, The Turn Toward the Self in Marriage: Same-Sex Marriage and its Predecessors in Family Law, 16 STAN. L. & POL’Y REV. 101, 163 (2005); * * *.


participants.” 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), woman’s presence and voice may not be indispensable in other public institutions either.62

Additionally, Professor Margaret Brinig, another of our presenters, has written powerfully and perceptively about the covenant tradition and covenant religious dimensions of marriage.63

V. Same-Sex Marriage Undermines the Core Gender-Integrative Purposes of Marriage.

Same-sex unions are inconsistent with and fail to meet and to manifest allegiance of 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 because all married or marriageable persons cannot meet and are not able to satisfy or further all of the purposes of marriage, gay and lesbian couples must not be denied the opportunity also to marry simply because they are of the same-gender. For example, the argument claims that no states requires a test for fertility before giving couples marriage licenses; that many couples who marry are infertile; that as elderly men and women may marry even though they are no longer able to procreate, and as young men and women who are sterile are still eligible to marry, so ability to procreate is not a core purpose of

61 Id. at 487.
62 Id. at 494–99 (arguing that dual-gender marriage promotes the social and economic equality of women).
63 Margaret Brinig, From Contract to Covenant: Beyond the Law and Economics of the Family (2000); * *
marriage and inability to procreate is not ground to deny same-sex couples the right to marry. Opponents 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 of its linkage to child-bearing and child-rearing to core social interests by the institution of marriage. Nevertheless, same-sex marriage advocates claim that there is no legitimate reason to prohibit marriage by same-sex couples.

I would observe initially that this argument for same-sex marriage is reductionist and is simplistically disconnected from reality. Marriage is defined, understood, and intended to be a

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64 See generally 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); Morrison v. Sadler, 821 N.E.2d 15, 36-37 (Friedlander, J. concurring) (many infertile non-same-sex couples can marry); 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 Law & Inq. 307, 315 (2010); 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, (2010); Kerry Abrams & Peter Brooks, Marriage As A Message: Same-Sex Couples and the Rhetoric of Accidental Procreation, 21 Yale J. L. & Human. 1, 13, 20, 32 (2009); Richard F. Storrow, Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction, 39 U.C. David 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, Note, 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).

life-long (but dissoluble) bonded relationship. We all marry with the intent and 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 of life including stages and conditions in which in 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. As married persons we pass from mutual interdependence to eventually dependent and care-giver relationships. So what! If it is the purpose of marriage to unite couples in a marital community throughout their lives, it anticipates and includes times when they will be unable to perform or contribute to and further all of the core functions of marriage.

Allegiance theory bridges the gap between ability to procreate and marriage for male-female couples. Just as 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 our military wars, citizenship imposes the expectation of loyalty and allegiance, 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 allegiance powerfully in quieter, patriotic ways. 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, to present oneself for marriage with another person of the same-sex, is to fail to bear allegiance to the institution of marriage and, to several of its core purposes. That lack of allegiance to a core purpose of marriage is one of
several factors that distinguishes infertile heterosexual couples from same-sex couples. The lack of allegiance to the institution of marriage as a dual-gender, gender-integrating, gender-complementary institution threatens and undermines core purposes of the institution of the marital community. That lack of allegiance to this core purpose of marriage is another of several factors that distinguishes heterosexual couples from same-sex couples.

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Another source of concern about inability to bear allegiance to and fulfill a core purpose of marriage is increasing data about the sexuality porousness, fluidity and instability of the fidelity in same-sex unions. Fidelity goes to the essence of allegiance in the marital bond.

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V. Conclusion: “And this, too, shall pass away.”

66 See infra, note ___.

67 Abraham Lincoln, Address before the Wisconsin State Agricultural Society, Milwaukee, Wisconsin, September 30, 1859, available at http://showcase.netins.net/web/creative/lincoln/speeches/fair.htm (seen 17 January 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 This, too, Shall Pass, ChristianStandard (31 March 2010), available at http://christianstandard.com/2010/03/this-too-shall-pass-mark-a-taylor/ (seen 17 January 2011) (“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.”) See also 1 Peter 1:6 (“now for a little while” we must suffer); Lord Jim 1965 Movie Quotes, available at
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, but which faded and passed into oblivion leaving only a few scattered, broken human relationships as the littered remains of the transitory phenomenon. For example, some in this room may remember to “free love” movement of the 1960s, the communes of the hippie days of the 1960s and 1970s, and the “divorce-harms-noone” euphoria of the early-days of the no-fault divorce (that also seemed to erupt about the same time -- in the late 1960s and early 1970s).68

Other changes in marriage and family law have also passed, but they lasted much longer, and only passed after they did much more significant damage to society – not just to a few individuals or couples or families to but to an entire generation or two or more. Anti-miscegenation laws forbidding inter-racial marriage are an example of such fads that lasted longer and caused deeper wounds and left more permanent scars even after the faddish influences finally passed. 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 their racists ideology into the marriage law.


68 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.
The danger is in the amount (scope and time) of damage done both to specific individuals and families who are the victims of the social scams, as well as to the institution of marriage itself. In a free society complete protection of individuals is not possible and complete prevention of the harmful consequences of relationship fads is not 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 transitory 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 to 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.”

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 communities). Such cohort fads and fancies have come and gone leaving only minimal harm to society.

The great danger of our times is from the law adopting and imposing those experiments in new forms of marriage upon society. When such marriage experiments are legalized, they become imbedded more deeply in the fabric of society, making the practice last longer, and making it harder to change. Our long and tragic national experience with anti-miscegenation

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69 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws, Bk. VI, Ch. 13.
laws that 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 crystalize into law distorted perceptions of marriage.70

One protection against the most damaging dimension of legalization of same-sex marriage – the national legalization of same-sex marriage – is the protection of the principle of federalism in family law. That principle leaves the marriage policy to the fifty separate state legal communities to decide for themselves. It slows and contains the scope of the corruption of law and the disintegration of the community called marriage.

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.71 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 imbed a corruption of marriage deeply into our society.

One of the most ironic consequences of the battle over same-sex marriage in California, Iowa and Massachusetts has been the move to judicially disenfranchise citizens who oppose the redefinition of marriage to include same-sex couples. The institution of marriage and the political community of citizens have overlapping interests, but serve some profoundly different

70 Loving v. Virginia, 368 U.S. 1 (1967). While some individual states prohibited inter-racial 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).
purposes. Exclusion from the political community because of views on where the boundaries of the social institution of marriage are drawn is one of the malicious ironies of our time.

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.\textsuperscript{72} The disintegration of marriage and with it of other family relations has tsunami-sized ripple effects on all other communities in 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. This issue is far too important to leave to judges to decide. The issue is in our hands; the future of marriage is up to us.

Thank you.

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*** ADD CONCLUSION

\textsuperscript{72} William Goode, \textemdash; Carle Zimmerman, Family and Civilization (\textemdash).