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The Laws Are Made for People: An Argument for Equal Marriage

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Introduction

On 22 May 2007, an elderly couple married in Toronto, Canada. One was 77. The other was 75. The younger of the two was dying from progressive multiple sclerosis, and at that point had only one usable finger, with which she guided her electric wheelchair. They had been a couple, at that point, for some forty years. They were not Canadian, but American, from New York: at that point, a marriage in their home state in the US was illegal. They went north of the border because the disabled half of the pair feared death before the opportunity to marry. Fortunately, the state of New York recognized their marriage, and they were able to live out two years at home as an 'official married couple' before the sick one died.

Both had enjoyed successful careers, one as a computer programmer for IBM, one as a consultant psychologist. Both had paid their taxes, obeyed the law, been model citizens. And yet, when one died, the federal government refused to recognize the marriage that was good enough for Canada and New York, levying tax on the estate of $363,053. Normally, spouses receive an unlimited deduction for property that passes on death from one to the other. Normally, the IRS tax bill in circumstances like these would be $0.

The survivor fought the tax assessment, and on 6 June 2012, the U.S. District Court in New York found in her favor. The federal government appealed, but on 18 October, 2012, the U.S Court of Appeals again found in the survivor's favor. Then, on 7 December 2012, the Supreme Court of the United States announced that it would hear the case.

The survivor's story is of particular significance not because she, Edith Windsor, was married in Canada, nor because she had been with her spouse for forty years prior to their marriage, or even because she had nursed her spouse through progressive multiple sclerosis; but because her spouse, Thea Spyer, was a woman. Under section 3 of the Defense of Marriage Act, the federal government regards same-sex couples as not married even when they are validly married under state law. The Supreme Court's forthcoming ruling in *United States v. Windsor* will thus affect far more than Edith Windsor's finances.[1]

Beside the lapidary tale of Edith Windsor and Thea Spyer, the story of *Hollingsworth v. Perry* is messy and fraught, an ugly public spat over a ballot initiative somehow gone horribly wrong. 2008's Proposition 8—introduced by Dennis Hollingsworth and his co-proponents—asserts that 'only marriage between a man and a woman is valid or recognized in California.'

In some respects, we have been here before, to this battle over validity. It is shocking, on reading the first page of the opinion in *Loving v. Virginia*,[2] to find this:

> *Almighty God created the races white, black, yellow, malay and red, and He placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages. The fact that He separated the races shows that He did not intend for the races to mix.*

It is, of course, the trial judge's justification for sentencing the Lovings to a year's jail, to be suspended for twenty-five years as long as they left the state of Virginia. Many people read *Loving* expecting to see an argument against interracial marriage couched in social Darwinist terms. That the decision was defended on Biblical grounds does, however, invite comparison with the latest legal marital row. Once again, the Supreme Court is being invited to reformulate the definition of marriage while removing federal interference in an area—family law—traditionally in the States' purview.[3]

This Brief's Scope

In rebutting the arguments against equal marriage, this brief addresses empirical issues surrounding the definition of marriage. Of necessity, this involves consideration of legal history and marriage customs, as well as arguments drawn by analogy from other disputes. As part of this discussion, it considers comparative law—especially Roman law—and then recounts the uses to which various definitions of 'marriage' have been put in social policy debates, including by libertarians. It also outlines why rights instruments may be unhelpful to those who support changes to existing law.

When People Say 'Marriage', What Do They Mean?

'Marriage' itself is often elusive in this debate, the term used uncritically by parties on all sides. Typically, equal marriage opponents tend to use the word 'marriage' as though it has always and everywhere meant something very similar to that which currently exists across the developed

world in the second decade of the 21st century. This takes in not only an assumption that heterosexual monogamy was the historical and legal norm worldwide (it wasn't).[4] It also suggests that in supporting or endorsing marriage when it comes to falsifiable social science hypotheses—intact marriages between biological parents produce better outcomes for children, for example—any heterosexual, monogamous marriage will do (it won't).

If it becomes clear that marriage has changed over time, then it is harder to argue against equal marriage. If the historical forms of marriage endorsed by opponents of equal marriage would be struck down under the 14th Amendment in the U.S. or laughed out of the House of Commons, then that argument is harder still. Finally, if some of the historical changes to marriage were larger than the proposed legalization of same-sex marriage—and there is considerable evidence that they were—then the argument cannot be sustained.

The Bible, Blackstone, and 'Traditional' Marriage

On that tremendous repository of all things Constitutional, the SCOTUS Blog, is a collection of amici briefs[5] and shorter essays[6] on equal marriage. In the briefs opposing equal marriage, there are some striking commonalities. Three make uncritical use of the words 'marriage' or 'traditional marriage' or 'Biblical marriage', with one providing extensive citations from scripture.[7] Three quote related passages from Blackstone's Commentaries, attempting to recruit the great English jurist to support their conceptualization of marriage.[8] One reaches even further back, to Bracton.[9] Only one of the shorter essays makes limited acknowledgement of the extent to which 'marriage' has changed over time.[10] Similarly, only one brief makes the most telling argument of all, at least to a British lawyer: that by leaving difficult political decisions to the courts, the U.S. is creating the sort of democratic deficit one associates with the European Union.[11]

The Blackstone cited in three briefs concerns that jurist's view that marriage was instituted for the purposes of procreation and continuation of the species, and to oblige fathers to look after their children.[12] However, all the 'Blackstone briefs' ignore the preceding chapter, which includes the following:

> *By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. […] For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.*

The same chapter goes on to sanction domestic violence (at least among what Blackstone calls the 'lower ranks') and prohibit divorce, except in the case of adultery.[13] In sum, in Blackstone's time, the wife lost both property and legal capacity on marriage; the couple could not divorce without extraordinary difficulty, and what we now consider criminal activity was sanctioned within the relationship. This latter included, of course, marital rape, as the woman had supposedly given 'irrevocable consent'.[14] In this context, it is perhaps worth noting that Blackstone thought consensual sodomy was worse than rape, and that he was in good company: so did Aquinas.[15]

The citation of Henry de Bracton—who wrote in the 13th century—is even more historically illiterate. Not only does the brief uncritically repeat Bracton's classification of marriage as part of the *ius gentium* (the law of nations), rather than the *ius naturale* (the law of nature), thereby undermining its argument for the universality of marriage, it forgets what marriage looked like in 13th century England. This was a world before the historical development of the Equitable jurisdiction,[16] which meant that men who died without heirs would see their lands *escheat*, or revert permanently to the feudal overlord; where young heiresses would be forced to marry against their will; where heirs under the age of 21 would be forced into wardship, thereby losing control of their property; and where (in Edmund Burke's memorable account) the following was routine:

> *[W]idows, who had made one sacrifice to the feudal tyranny, were neither suffered to continue in the widowed state, nor to choose for themselves the partners of their second bed. In fact, marriage was publicly set up to sale. The ancient records of the Exchequer afford many instances where some women purchased, by heavy fines, the privilege of a single life; some the free choice of an husband; and others the liberty of rejecting some person particularly disagreeable. And […] there are not wanting examples, where a woman was fined in a considerable sum, that she not be compelled to marry a certain man; the suitor on the other hand has outbid her; and solely by offering more for the marriage than the heiress could to prevent it, he carried his point directly and avowedly against her inclinations.*[17]

It is also worth pointing out that this abusive treatment of women was something that Magna Carta tried (and failed) to extirpate.[18]

Those who call upon scripture are in an even more difficult position, particularly when that scripture is the Old Testament unmediated by rabbinical scholarship. Often only *Genesis 2:24* is quoted (the closest to the nuclear family), ignoring Levirate marriage,[19] the sanctioning of marriage between a rapist and his victim,[20] the coverture built into early Jewish law,[21] and the widespread polygamy endorsed throughout. To this end, Matthew 5:31-32 and 19:4-6 (with their monogamy and prohibition on divorce) are often pressed into service.

It has become fashionable among Christians anxious to shed their religion's historical reputation for misogyny and homophobia to ascribe those aspects to Paul, and it is true the Pauline and pseudo-Pauline epistles are replete with both. However, reliance upon the prohibition on divorce in the synoptic Gospels[22] has also been socially destructive, even in developed countries. When, historically, people—and especially women—were trapped in unhappy marriages *from which they*

could not escape, they often finished up dead: sometimes by their own hands, sometimes by their spouses'.

In the two decades after California Governor Ronald Reagan signed America's first unilateral divorce regime into law in 1969, 36 US states followed suit. As each state passed unilateral divorce laws, women acquired the ability to leave the marriage *and retain their property*. Data suggest that many chose not to exercise this option—divorce rates are not as high as commonly imaged—the threat was enough. Even when not exercised, however, the credible threat gave men stronger incentives to behave well inside marriage. Domestic violence fell by almost a third, and the number of wives murdered by their husbands fell by 10%. There was also a statistically significant drop in rates of female suicide—between 8 and 16%, depending on a number of variables.[23] At the same time—in data collected between 1975 and 2005—the number of husbands murdered by their wives dropped from 1.50 per 100,000 to 0.25 per 100,000, a six-fold decline.[24] Steven Pinker suggests—in light of this—that 'feminism has been very good for men'.[25]

Although it shouldn't bear repeating, it clearly has to be repeated for the benefit of people who think that Blackstone and Bracton and the Bible are suitable guides for defining marriage. A definition of marriage that deprives women of their property, along with their contractual capacity and capacity to consent, prohibits divorce, and encourages criminal offences into the bargain bears no resemblance to marriage law as it currently exists in any US state. Any attempt to enact such a marriage law would be struck down under the 14th Amendment. Remember, too, that 'Biblical marriage' once excluded interracial couples, at least in large parts of the U.S.

In other words, marriage has been put through the laundromat of the Enlightenment, two waves of feminism, and the civil rights movement: what we have now would be unrecognizable to Bracton or Blackstone or Jesus, *and this is a good thing*. If one were to isolate the greatest change in the definition of marriage over time, it would come down to a choice between the enactment of unilateral divorce (with its attendant effect on murder, suicide, and domestic violence rates) and the ending of coverture, granting women property rights in marriage and separate legal personality.[26] Compared to these definitional shifts, equal marriage is *peanuts*.

A Lesson in Comparative Law

When discussing Roman law, it is important to keep three things in mind. First, it is divided into periods. Most of the observations here concern classical Roman law, which ran (roughly) from the second century BC to the early 3rd century AD. Secondly, when it comes to the law of the family, parents' interests always trumped children's interests. This shocks us today but, as Pinker outlines,[27] it was the common sense of most civilizations before the 20th century.[28] What made Roman law striking is that it took women's interests seriously, and did not treat them as property *even after marriage or in criminal law*. Rape was a crime against the person, for example, as it is across the modern developed world.[29] Thirdly, it was rule driven, setting down precepts to which bargaining parties were forced to turn their minds: it exemplifies 'rules, not discretion' in a way that surprises many common lawyers.

Consistent with the Roman view of children, the justification for marriage was the same as that in the modern developed world—they used the term *affectio maritalis*, which means exactly what it says. The jurist Modestinus states:

> *Marriage, or matrimony, is a joining together of a man and a woman, implying a united life-style (individuam consuetudinem vitae continens).*[30]

It has become fashionable to argue that marriage in the past was always loveless, a matter of arrangement and alliances, but that is just as historically illiterate as universalizing the modern world's focus on love and affection. Modestinus' comment also highlights another reality often neglected by those who insist that marriage always equals procreation: we have forgotten what it is like to live in a world where between a third and a half of all children died before their tenth birthday. Children were by no means guaranteed.

Another common claim made by those arguing for religiously inflected marriage law is that Christian Europe was the first truly monogamous civilization. In fact, classical Rome made monogamy a marital universal, with its great Empire imposing civilizational family values on conquered peoples in a manner to make the governors of British India blush.[31] Of course, the inevitable riposte is that the Romans permitted concubinage, but only seldom was it a wealthy man with a wife and formal mistress, requiring maintenance of a separate household and his wife's consent. Usually, concubinage was a monogamous union for those who wanted some, but not all, of the incidents of marriage: the parties enjoyed considerable freedom to contract. The Roman jurists were thus willing to provide cohabiting couples with rules to govern their relationships.[32]

The crucial point is that classical Roman monogamy was strikingly modern, while the later Christian version was not. Classical Roman marriage law protected women's property,[33] respected women's autonomy,[34] did not impair married women's capacity to contract, and granted unilateral and consensual divorce to both men and women on equal terms.[35] The practice in common law countries (until recently) of making a woman's access to her own property subject to her husband's authority would have mortified every Roman jurist. Instead, Roman law kept husband and wife's property separate to the greatest practical extent, up to and including prohibiting women from guaranteeing their husband's debts or business expenses. Ulpian shows a shrewd awareness of the problem of 'sexually transmitted debt' when he notes that 'this rule is upheld to prevent people from impoverishing themselves through mutual affection by means of gifts which are not reasonable, but beyond their means'.[36]

By contrast, Christian emperors restricted access to divorce, eventually banning it outright; severely impaired a married woman's capacity not only to manage her property but also to leave the house without her husband's permission; stripped women who did obtain divorce on any but the narrowest grounds of their property; and—under Constantine—attempted to make (female) adultery a capital offence.[37] There was also a concerted campaign against concubinage, but the institution proved remarkably resilient, turning up in all sorts of odd places—including among supposedly celibate clergy![38] Perhaps most significantly, the Christian Emperor Theodosius enacted this law (at the same time as he was stripping married women of their rights):

> *When a man marries and is about to offer himself to men in womanly fashion (quum vir nubit in feminam viris porrecturam), what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment.*[39]

In addition to the same-sex marriage ban, consensual sodomy was the subject of a separate enactment, and also punishable by death.[40] It was this bit of Christian Roman law—enacted late, and by a religious group that had only recently laid its hands on the levers of state power—that led Burger CJ to opine that 'proscriptions against sodomy have very ancient roots'.[41]

Theodosius' enactments were directed at males, and as Daniel Ottoson points out,[42] laws attacking homosexuals—in those societies that evince prejudice against same-sex attraction—are commoner and often more severe than those directed at lesbians. That changes, however, when the lesbians in question want to marry. When the Jewish authors of the *Sifra* looked at other societies around them, they saw a great variety of marriage forms and expressly rejected same sex unions..'[43] Unsurprisingly, these prohibitions passed into Christianity and Islam.[44]

In short, Christianity does not own marriage, and when it did 'own' it, it treated women badly and excluded same-sex couples, often simultaneously. Its conception of marriage should not be universalized. To the extent that modern marriage law in the developed world resembles any historical marriage law, the resemblance is to classical Roman marriage law. The great German legal scholar Fritz Schulz commented:

> *It is, nevertheless, of great importance for the history of civilization as well as for critical jurisprudence. It reminds us that a humanistic law of marriage did exist in antiquity for five hundred years and stimulates us to throw off the fetters both of Canon law and patriarchal philistinism. The classical law of marriage bides its time; it is still a living force.*

He wrote those words in 1951,[45] when—as he conceded—the Roman law of marriage was in force nowhere in Europe or the United States.

'You Break It, You've Bought It': a Roman Tailpiece

When Martha Nussbaum made extensive use[46] of the differential sexual morality of classical Athenian society—particularly as regards same-sex attraction—to attack John Finnis as part of the *Romer v. Evans* litigation, classicist Jeffrey Carnes criticized her for her elision of that civilization's misogyny.[47] His point is a fair one. Whenever we reach for the past in order to buttress arguments in the present, it is wise to remember that the past is, indeed, a foreign country. With the Romans, the problem is not misogyny, but cruelty. In the midst of an elegant and thoughtful account of the differences between contracts of hire and contracts of sale, for example, the jurist Gaius states the following:

> *Again, suppose I deliver gladiators to you on the express terms that I will get 20 denarii for the efforts of each one who comes off unharmed but 1,000 denarii for each one killed or maimed, is this sale or hire? The received opinion is that there is hire of those unharmed but sale of those killed or maimed, and events determine the classification, as if there were a conditional sale or hire of each one. There is no doubt that things can be both sold and hired subject to conditions.48*

That passage speaks for itself.

Arguments from Science and Social Policy

Opponents of equal marriage often make a subsidiary case against equal marriage by using scientific research that allegedly supports 'traditional' marriage. As is clear from the above, 'traditional' marriage is a rather flexible concept, so for the purposes of argument, it is here treated as a monogamous, heterosexual union with the *indicia* of modernity: unilateral divorce, women's property rights, freedom from spousal criminality, full contractual capacity for women: marriage in extremely narrow, modern terms. A necessary corollary of this definition is that we should approach with caution any social policy proposals that seek to make divorce more difficult to obtain or to constrict women's property rights on exiting the marriage.

Some of the most informative analyses of the beneficial effects of marriage take marriage in its post 1990s form as a given. However, earlier studies—even famous ones like Daniel Patrick Moynihan's *The Negro Family: The Case for National Action*, written as it was in 1965—have to be treated with caution. Not only was Moynihan's study pre-*Loving*, it was pre Reagan's *California Family Law Act* 1969. Consistent with the constraints on divorce then common, in 1965 a number of US states still had laws against 'harboring' (where, if a woman fled her husband and returned to her parents, they could be charged while she might be forcibly returned to the matrimonial home).[49] In those circumstances, many women—black and white—had an incentive not to marry, especially if the male was not a 'good prospect'.

The argument from science and social policy has two limbs. The first is that marriage generates better outcomes for children; the second is that legalizing same-sex marriage will have deleterious effects on children raised in same-sex relationships. In other words, it argues that same-sex marriages are qualitatively and quantitatively inferior to heterosexual unions. Buried within these assertions, of course, is a further argument: that single-parenthood has a negative effect on children. There is in fact a substantial amount of evidence that children raised in intact marriages enjoy better outcomes, although it is important to control for a significant number of variables. As should be clear, contrasting children from single parent households with those from intact same-sex households is fraught with danger, a clear case of not comparing like with like.

To deal with the last argument first, the available research reveals that the poor outcomes associated with children raised by single parents are linked to poverty and neighborhood dynamics,

not single parenthood. When single parents are educated and middle class, their children's outcomes are similar to those of children in intact families.[50] Similarly, once economic circumstances are controlled for, there is no statistically discernible difference between children raised in same-sex or opposite sex relationships,[51] and may even be a small positive effect for same-sex couples' children.[52] This is probably a selection effect—once same-sex parenting becomes commoner, the differences will either wash out or manifest along class lines, as they do with children from heterosexual unions. In sum, while there is evidence that—in certain economic and social circumstances—single parenthood may have a deleterious effect on children, there is no difference in parenting outcomes for children raised in same-sex and opposite sex families.

It is worth noting that these findings have proven deeply unsettling for those anxious to demonstrate that same-sex parents will be bad parents. This culminated in immense controversy over Mark Regnerus's study[53] purporting to show differential outcomes for children of same-sex couples when compared with children of opposite sex couples. Not everything about the study was as bad as some critics maintained, but it is true that Regnerus did not compare like with like.[54] The same-sex parents sample took in anyone whose biological or adopted mother or father had a same-sex relationship that the child knew about by age 18, while the heterosexual married families sample was confined to circumstances where the child's parents were married at the time of his or her birth *and still married.*

Of course, to the extent that marriage as redefined in modern law *does* promote stable relationships and superior outcomes for children, that is an argument for opening it to the same-sex attracted.[55]

A Libertarian Aside

Because the fight over marriage equality has been so fraught (think, for example, of the Chick-fil-A bitterness last year), libertarians have periodically suggested an alternative: privatize marriage altogether, allowing people to govern their private lives entirely by the law of contract. The libertarian position is deeply principled, in that it accepts that the state has no business in trying to promote certain family structures. David Boaz comments:

> *And what of gay marriage? Privatization of the institution would allow gay people to marry the way other people do: individually, privately, contractually, with whatever ceremony they might choose in the presence of family, friends, or God. Gay people are already holding such ceremonies, of course, but their contracts are not always recognized by the courts and do not qualify them for the 1049 federal laws that the General Accounting Office says recognize marital status. Under a privatized system of marriage, courts and government agencies would recognize any couple's contract—or, better yet, eliminate whatever government-created distinction turned on whether a person was married or not.*[56]

The argument is not flawless: Boaz's historical account understates the extent to which the Canon law of marriage came to control people's lives long before the Earl of Hardwicke's Marriage Act of 1754, especially the deleterious effects of illegitimacy. Indeed, the Latin Church took over

marriage law under pressure from the landowning elite to provide clear common rules on legitimacy and so inheritance; in modern language, to reduce uncertainty and transaction costs.[57]

Additionally, libertarians squeamish about same-sex marriage but who know, intellectually, that it is difficult for someone from their tradition to oppose it often adopt Boaz's position in order to avoid offending conservative-leaning friends and colleagues, or to protect an anarchist position. Boaz's fellow libertarian, economist Steven Horwitz, argues that ignoring or opposing state sanctioning of equal marriage on the basis that the state should not define marriage at all is a classic case of letting the perfect become the enemy of the good:

> *We cannot avoid making judgments about how governments should act. Our own tradition as libertarians points to how to do this: Government must treat all its citizens equally, and nothing paid for with tax dollars may involve invidious discrimination. It would be wrong on classical-liberal grounds for a government to refuse to pay Social Security to nonwhites even though we think Social Security is an illegitimate use of government power. The same is true of same-sex marriage. If government grants certain privileges to those who are married, it must grant them equally to all its citizens who wish to marry. In the same way that prohibitions on interracial marriage were wrong on libertarian grounds, so are the prohibitions on same-sex marriage.*[58]

Horwitz also makes the telling observation that the state is unlikely to separate itself from its marital definitional power anytime soon.

Independently of Horwitz's last point, it may just be more difficult to privatize marriage in *any* common law jurisdiction. At common law, the law of marriage and the family is part of public law—*and always has been*—even when in the hands of the Church. This is why there was no 'common law marriage' in England. In civilian countries, by contrast, family law is private law, and thus much more amenable to manipulation via private law mechanisms. That is why there was 'marriage by habit and repute' in Scotland. Every lawyer in a common law jurisdiction ought to remember, from his or her first year contract classes, the presumption against intention to create legal relations when the parties are in an intimate relationship.[59]

Any recourse to the dry, technical language of the law of contract when it comes to governing intimate relationships (cohabitation as well as marriage) amounts to 'thinking like a Roman'; any common lawyer who tries it is stepping outside his tradition when he does so.[60]

Rights-Talk v. Reality

During the equal marriage debate thus far, the roles of protagonists have in at least one important respect been reversed. Those opposed to equal marriage—typically monotheists of various stripes—often make empirical arguments that take in testable (or at least discoverable) religious, scientific, and social policy claims. Meanwhile, supporters commonly rely on the presumption of natural rights. Yet, natural rights—with their universal claims—have historically been associated

with Christianity and Islam, whose adherents claim that such rights are of divine origin.[61] Empirical claims, by contrast, are linked with natural law's great jurisprudential rival, positivism, which has always had a strong kinship with the natural sciences. In a real sense, the arguments are batting for the wrong teams.

This jurisprudential role-reversal leads to absurdities all around, in part because everyone is so unfamiliar with the arguments they are attempting to make. We have seen the assertion (by the pro-equal marriage faction) that Article 16 of the Universal Declaration of Human Rights confers marriage rights on same-sex couples,[62] for example, alongside the claim (by the anti-equal marriage faction, and addressed above), that 'traditional' or 'Biblical' marriage is somehow coterminous with marriage as now defined throughout the US and elsewhere in the developed world.

However, attempts to recruit rights instruments like the UDHR or the Bill of Rights in favor of equal marriage—although superficially attractive—are awkward at best. This is because our understanding of what constitutes 'human rights' or 'civil rights' keeps changing, as should be clear from the complexities surrounding the historical definitions of marriage. 'Natural rights' are of their time, and entrenched rights instruments, no matter how lucid or generously conceived, are always snapshots of the values present at that time. This reality is brought home when the language of those documents—even when soaring and beautiful—is tortured to bring its meaning up to date with a changed present.

Concluding Comments: Procrustean Beds, Drystane dykes, and Laws for People

On the Scottish Borders, you will often see walls surrounding farms and fields made from irregularly shaped stones fitted together without mortar. Called 'drystane dykes' in Scots, the craftsman's skill consists of looking at odd shaped pieces of rock in a field and putting them into a wall by understanding what is available and thinking how to use the individual features to best advantage. Those defending marriage could learn something from Scotland's dry stone-wallers: much of the (religiously-inflected) defense of 'traditional' marriage seems to be borne of a desire to use procrustean methods to make everyone brick-shaped, with the state as bricklayer. Of course, as those hitherto excluded from making rules about what constitutes the right sort of brick are included (women, blacks), the definitions change and the bricks become progressively more oddly shaped, until eventually no amount of mortar will hold them together, or at least not without a great deal of waste and expense. Those who make the laws should not be in the business of making people fit the laws, but rather the other way around. Much law is facilitative, not prescriptive, allowing people to shape their lives as they wish. Is it so very difficult to allow Edith Windsor—and others like her—to fit the law to their own circumstances?

Endnotes

[1] In addition to the iniquitous application of federal death duties, same-sex couples cannot file joint federal tax returns (resulting often in higher levels of federal taxation). They are also penalized under immigration law: the foreigner married to a citizen may acquire a green card and then citizenship; such opportunities do not automatically exist for same sex partners.

[2] 388 U.S. 1 (1967).

[3] *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) and *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

[4] Polygamy was commoner; see Stephanie Coontz, *Marriage: A History* (2005).

[5] The *amici* are here: <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/>.

[6] The essays are here: <http://www.scotusblog.com/category/special-features/same-sex-marriage/>.

[7] See <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-Hollingsworth_v_Perry_FMLamicus_Prop8_08.31.12.pdf >for use of scripture, <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-Eagle-Forum-Prop-8-Pet-Br.pdf>, and <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-Evangelical-Amicus-26929-pdf-Gunnarson.pdf> for a-historical treatment of marriage more generally.

[8] This brief: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/11/12-144-Proof-American-Civil-Rights-Union-Amicus.pdf> cites Blackstone, as does this one: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-Judicial-Watch-FINAL-AS-FILED-Amicus-Brief-for-Cert-Prop-8.pdf>

[9] This brief cites both Blackstone and Bracton: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-CCJ-Amicus-iso-cert-Hollingsworth-v-Perry-Final.pdf>.

[10] *Same-sex marriage symposium: Same-sex marriage in the courts of law and reason*, SCOTUSblog (Sep. 18, 2012, 11:54 AM), <http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-same-sex-marriage-in-the-courts-of-law-and-reason/>.

[11] The brief also makes accurate use of European Union jurisprudence: <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-144-Georg-MLF-Amicus.pdf>.

[12] See William Blackstone, *Commentaries on the Laws of England* (1765-1769) <http://www.lonang.com/exlibris /blackstone/bla-116.htm>.

[13] The whole sorry chapter is worth reading, if only for civilians to be amused by Blackstone describing Justinian's Christian marriage law as 'partly of pagan original'. See <http://www.lonang.com/exlibris/blackstone/bla-115.htm>.

[14] Marital rape is now illegal in all 50 states and throughout Europe. The late date of laws criminalizing it, even in advanced democracies (South Carolina was the last US state, in 1993; England waited until 1991, following a 1989 Scottish decision) is revealing.

[15] See Burger CJ's concurring judgment in *Bowers v. Hardwick* 478 U.S. 186 (1986) p 197, and Aquinas in the *Summa: Secunda Secundae Partis, Q. 154*: <http://www.newadvent.org/summa/3154.htm>.

[16] Starting in the 14th century, the Lord Chancellor and, later, the Court of Chancery, developed various legal remedies designed to address the inflexibility and harshness of existing common law doctrines.

[17] 'Towards an Abridgment of English History Chapter VIII: Reign of John' from *Writings and Speeches of Edmund Burke, Volume I: The Early Writings* (Oxford 1997), p 545.

[18] Long after Magna Carta, Equity brought with it the trust (often called the 'use' in early law). This meant that some women were able to draft around coverture. Two sample precedents are here.

[19] *Genesis 38:6-10*

[20] *Deuteronomy 22:28-29* and 21:11-14, *Numbers 31:1-18*. Judaism had abandoned the forced marriage of a rapist and his victim by the 1st century BC; it was later reanimated in Canon law without ever being readopted by the Jews.

[21] *Genesis 16*.

[22] See also Mark 10:11-12 and Luke 16:18.

[23] Betsey Stevenson and Justin Wolfers (2006) 'Bargaining in the Shadow of the Law: Divorce Laws and Family Distress', *Quarterly Journal of Economics,* 121(1): 267-288. The analysis is Coasian, and telling.

[24] Data from US Bureau of Justice Statistics, 2011, with adjustments by the *Sourcebook of Criminal Justice Statistics Online*: <http://www.albany.edu/sourcebook/pdf/t31312005.pdf>.

[25] *The Better Angels of Our Nature: The Decline of Violence in History and its Causes* (New York, 2011), p 412.

[26] Achieved in England with passage of the *Married Women's Property Act* 1882.

[27] Pinker, pp 415-441.

[28] Stair, the Scottish institutional writer, noted (in 1693) the difference in status between Roman women and Roman children, with high status for the former. 'The Roman law hath exceedingly varied in this matter from natural law,' he states, tartly. *Institutes* 1.5.11*ff.*

[29] This shocked Blackstone; see <http://ebooks.adelaide.edu.au/b/blackstone/william/comment/book4.15.html>: '[Women] whom the Roman laws suppose never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women […] But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only'.

[30] D.23.2.1.

[31] Any decent textbook on Roman law will provide extensive additional detail on this and the following points: see Schulz, Borkowski, Watson, Birks, etc.

[32] P.S. 20.1; D.27.7; D.25.7.3pr. Concubinage laws covered all enlisted men in the Roman army, for example, who had to be unmarried on joining up, were expected to find a (non-citizen) partner in the provinces, and then make a citizen of her and their children. Various laws enabled soldiers to will their pensions and other property to their concubines.

[33] D.24.1.1

[34] D.35.1.15

[35] D. 24.2 *and ff.*

[36] D.24.1.1. A rule of this type would have been helpful in cases like *Barclays Bank v O'Brien* [1993] 4 All ER 417, *Smith v Bank of Scotland* 1997 SC (HL) 110, and *Garcia v National Bank of Australia* (1998) 194 CLR 395.

[37] See Th. C. 3.16.1; N. 117.8; N.117.10

[38] Borkowski's discussion at 132 (and his references) is helpful.

[39] Th. C. 9.8.3

[40] Th. C. 9.7.6; Just. C. 9.9.31

[41] *Bowers v. Hardwick*, 478 U.S. 186 (1986) *concurring* at 196.

[42] *LGBT World Legal Wrap-Up Survey* (Brussels, 2006).

[43] "I did not say this [prohibition] except for the statutes enacted by them, their fathers, and their father's fathers. And what would they do? A man would marry a man, a woman would marry a woman, a man would marry a woman and her daughter, and a woman would marry two men. Therefore it says, 'and in their statutes do not follow…" *Achrei Mot* 9:8

[44] It is significant that when local religious bodies departed from the unremitting harshness characteristic of centralised religious authority, that authority would be inevitably be reimposed with uncommon rigor: see <http://www.web.archive.org/web/19981205014731/http://www.bway.net/~halsall/lgbh/lgbh-montaigne.txt>

[45] In *Classical Roman Law* (Oxford, 1951).

[46] In (1994) 'Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies', *Virginia Law Review* 80, 1515.

[47] "'Certain Intimate Conduct': Classics, Constructionism and the Courts", in *Gender and Diversity in Place: Proceedings of the Fourth Conference on Feminism and Classics*, <http://www.stoa.org/diotima/essays/fc04/Carnes.html>.

[48] *Institutes* 3.146.

[49] Pinker, p 407.

[50] See Judith Rich Harris, *The Nurture Assumption: Why Children Turn Out the Way They Do* (New York, 2009).

[51] See research summary of available data, American Psychological Association (2004). <http://www.apa.org/about/governance/council/policy/parenting.aspx>.

[52] Nanette Gartrell and Henny Bos, 'US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents', (2010) <http://pediatrics.aappublications.org/content/early/2010/06/07/peds.2009-3153.full.pdf>.

[53] 'How different are the adult children of parents who have same-sex relationships? Findings from the New Families Structure Study.' (July 2012) *Social Science Research* 41: 752-770. <http://www.sciencedirect.com/science/article/pii/S0049089X12000610>.

[54] A fair summary of the controversy is available here: <http://www.thedailybeast.com/articles/2012/06/12/mark-regnerus-s-gay-parenting-study-starts-a-political-war.html>.

[55] 'David Cameron urges Tories to back gay marriage', 5 October 2012 <http://www.pinknews.co.uk/2011/10/05/david-cameron-urges-tories-to-back-gay-marriage/>.

[56] 'Privatize Marriage', 25 April 1997 <http://www.cato.org/publications/commentary/privatize-marriage>.

[57] Christopher Brooke, *The Medieval Idea of Marriage*, (Oxford 1994) pp 126-154.

[58] 'The Other Principle of Classical Liberalism', *The Freeman* 30 June 2011 <http://www.fee.org/the_freeman/detail/the-other-principle-of-classical-liberalism/>.

[59] Roman certainty as opposed to English discretion is illustrated here: 'Court Rules on Unmarried Couples' Property Rights' 9 November 2011 <http://www.bbc.co.uk/news/uk-15651540>.

[60] 'Common law marriage' exists in nine US States—in contrast to the situation in England—which may provide an opportunity for those states to tinker with Roman private law mechanisms in their family law.

[61] The origin of the concept of natural rights and its corollary natural law can be traced to Hugo Grotius and Samuel Pufendorf, who grounded their arguments for such rights in notions of universality.

[62] Here is Amnesty getting it wrong: <http://www.amnestyusa.org/our-work/issues/lgbt-rights/marriage-equality>.