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Why the Teleology of Marriage Matters to Law[1]

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Abstract: What is at stake in the conversation over same-sex marriage is competing definitions of marriage. One good argument for same-sex marriage depends on a definition that came to prominence after the sexual revolution. A different understanding of marriage was prominent in the nineteenth century, and this shows that *Obergefell* was wrongly decided, at least as far as Originalist understandings of law are concerned. Accordingly, the nature, purpose, and function of marriage, and what people think of them, are important for understanding the requirements of Constitutional law. But the teleology of marriage is a topic philosophers and theologians are well suited to study, and thus philosophy and theology have much to contribute to the study of law and to all the other disciplines interested in marriage.

The discussion of marriage in and surrounding *Obergefell v. Hodges* inevitably focuses on law. But what is really at stake is competing definitions of marriage. One good argument for same-sex marriage depends on a description of marriage that came to cultural prominence after the sexual revolution. That a different understanding of marriage was prominent in the nineteenth century shows that *Obergefell* was wrongly decided, at least as far as Originalist understandings of law are concerned. And *this* shows that law is not a self-contained body of knowledge, but relies in part on truths which philosophers and theologians are well suited to investigate.

That this is so is not surprising. The approximately one hundred and fifty *amicus curiae* briefs submitted to the Supreme Court of the United States of America for *Obergefell* represent various not only citizens, states, advocacy organizations, scholars of law and the social sciences, but also a number of scholars of theology and philosophy. For example, I count forty-one such scholars in four of the briefs arguing against judicial imposition of nationally

[1] This article grew out of an essay I wrote at Ricochet.com: Mark Boone, "Marriage, Schmarriage, and Blarriage;" Ricochet; available at https://ricochet.com/marriage-schmarriage-and-blarriage/ (August 20, 2015). The ideas in this essay were shaped in part by the tireless conversing of Ricochet users on both sides of the same-sex marriage issue.

recognized same-sex marriage: one in the *Ryan T. Anderson, Ph.D.* brief; three in the *Scholars of History and Related Disciplines* brief; thirteen in the *47 Scholars* brief; and twenty-four (including myself) in the *100 Scholars of Marriage* brief.[2]

In this essay I introduce the argument, explain the competing definitions of marriage on which its viability depends, explain why the argument is a failure as far as Originalism is concerned, and conclude by pointing to the contributions philosophers and theologians can make to the study of law.

A Good Argument for Same-Sex Marriage

I say the argument is good because its premises provide good support for its conclusion and all of the premises—if not unquestionably true—at least have *something* going for them. It's best to *not* jump right into the argument itself, but its *form* is as follows: If governmental institution X excludes group of people Y from Z for merely prejudicial reasons, it is unconstitutional under the Fourteenth Amendment. One of the impressive aspects of such an argument is that, if applied successfully to same-sex marriage, it could show that *Obergefell* is rightly decided even if Originalism is correct. This would be quite an accomplishment, for the authors and adopters of the Fourteenth Amendment to the United States Constitution surely would not have agreed that it requires national recognition of same-sex marriage. In fact, proponents of same-sex marriage have recognized that "it may be true that no one alive at the time of the Fourteenth Amendment's ratification" would have thought such a thing.[3] Before going any further it is necessary to look a bit more carefully at what Originalism is. After that I will prepare the ground for the argument by considering, using a series of thought experiments, some relevant scenarios, and then present and explain the argument itself.

Originalism in law is, roughly, the view that the meaning of the Constitution does not change unless the text changes. Although Originalist emphases in Christian theology tend to focus on authorial intent as a source and locus of meaning,[4] Originalism in law has tended to move away from this emphasis. In recent legal theory, Originalism has shifted from an emphasis on

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[2] 100 Scholars of Marriage, *Brief of* Amici Curiae *100 Scholars in Support of Respondents*; 47 Scholars, *Brief of* Amici Curiae *47 Scholars in Support of Respondents & Affirmance*; Ryan T. Anderson, *Brief of* Amicus Curiae *Ryan T. Anderson, Ph.D. in Support of Respondents*; *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015).

[3] Cato Institute, et al, *Brief of* Amici Curiae *Cato Institute, William N. Eskridge Jr., and Steven Calabresi in Support of Petitioners*; *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015), 4).

[4] See, for example, The International Council on Biblical Inerrancy, *The Chicago Statement on Biblical Inerrancy* (Chicago, 1978).

the original intent in writing on the part of the Constitutional authors, to the original understanding in approving by the Constitutional adopters, to the original meaning in reading by reasonable and informed readers. Originalism is well explained by Michael Paulsen and Gary Lawson,[5] and the story of these shifts in Originalist legal theory has been told by Paulsen and others.[6] If any version of legal Originalism is correct, it is going to matter if no Americans at the time—whether the authors, adopters, or readers of the Fourteenth Amendment—would have thought that it gave the federal government the authority to require a state to recognize same-sex marriage. Nevertheless, it is consistent with Originalism that things never contemplated by the authors or adopters of this part of the Constitution would fall within its scope. But how far does that extend into marriage law? Let's see.

Scenario 1

I get in a time machine and travel to the future and find that white Zimbabwean immigrants are subjected to harsh discrimination in the late 21st century in New York. Then I go back to the time of the adoption of the Fourteenth Amendment. I talk to the people who wrote it, to the people in Congress who debated it and voted on it, to the state legislatures that voted for it, to the people who voted for the Congressmen who voted for it, and to people who read about it in newspapers. I ask them if the Fourteenth Amendment gives the federal government any authority to stop New York's treatment of white Zimbabwean immigrants.

Most people initially say no, but that's only because they have never heard of an oppressed class of white Zimbabwean immigrants. So, I explain to them what happens in the future. I remind them that the Fourteenth does not even mention African Americans and suggest that the Fourteenth applies to all groups of oppressed people.

They're not all convinced, but a good number come around; if I had more time to persuade them maybe I could convince a majority. But time is short even for people who have time machines, so back I go into my time machine and return to my own time.

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[5] Michael Stokes Paulsen, "The Text, the Whole Text, and Nothing but the Text: Un-Writing Amar's Unwritten Constitution," *The University of Chicago Law Review* 81 (2014). Gary Lawson, "No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory," *Florida Law Review* 64.6 (2012).

[6] Michael Stokes Paulsen, "The Interpretive Force of the Constitution's Secret Drafting History," *Georgetown Law Journal* 91 (2003), 1134-1148. Robert J. Delahunty and John Yoo, "Saving Originalism," *Michigan Law Review* 113 (2015), 1088-1097.

And the lesson of Scenario 1 is: You don't have to abandon Originalism to think that the Fourteenth Amendment applies to oppressed groups whom its authors and adopters weren't even thinking about.

Scenario 2

I take my time machine and travel straight back to the time of the adoption of the Fourteenth, where I talk to all the same people. I ask them if the Fourteenth Amendment gives the federal government any authority to force a state to adopt a non-gendered definition of marriage.

It doesn't take a time machine, or any special expertise in history or law, to know that they will all say no.

Now I might try to explain that they're prejudiced against homosexuals. Since I already have a time machine in this scenario, let's say I also have a machine that allows people to see their prejudices. But after using it on them, they still disagree!

After a while, I realize that the man-woman definition of marriage is the only definition of marriage they recognize—indeed the only one most of them ever imagined. I tell them that, in my time, people often say that a man-woman definition of marriage discriminates against homosexuals.

They hear me as an ordinary man hears a lawyer who claims that the definition of life discriminates against the dead, that the definition of adult discriminates against children, or that the definition of a cat discriminates against dogs.

It's not discrimination, they say; it's just the definition of marriage.

And the lesson of Scenario 2 is: If we presume Originalism, it matters a great deal that no one alive at the time of the adoption of the Fourteenth Amendment would think that it grants the federal government the authority to strike down a state's man-woman definition of marriage. (This was, by the way, the theme of one amicus brief for *Obergefell*.[7])

Scenario 3

I travel forward in time and discover that, in the 2050s, Louisiana provides free drinking water for all citizens except practicing homosexuals. I then travel back in time to the adoption of the Fourteenth. I tell them all about it.

[7] Scholars of Originalism, *Brief of* Amici Curiae *Scholars of Originalism in Support of Respondents*; *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015).

At first, they tell me that this sounds ok. They say it's actually a pretty light sentence for sodomy.[8]

But then I tell them that we actually get rid of our last sodomy laws in the early 21st century. Louisiana's law isn't punishing homosexuals for sodomy (and any law that was wouldn't fly politically in the 2050s).

Louisiana's law is—plainly and simply—discriminatory. From what I saw in the 2050s a bunch of people who just thought gays were kind of icky found a way to exclude them; not to punish them for sodomy, but just to make them feel left out.

After I explain all this, a few reluctantly come to the conclusion that maybe—just maybe—the Fourteenth gives the federal government the power to stop Louisiana and require equal treatment of all citizens regardless of sexual orientation.

And the lesson of Scenario 3 is: A law which has the function—and only the function—of discriminating on the basis of prejudice might be considered unconstitutional under the Fourteenth Amendment without sacrificing Originalism! And even if the law targets people whose behavior the adopters of the Fourteenth disapproved of and even if they would have approved of harsh punishment for those same people for the same behavior!

Scenario 4

I go back to the time of the adoption of the Fourteenth. I tell all those folks the following tale:

> *In my time we have an institution called "schmarriage." It's a state recognition of the special amorous relationship of two individuals. How does it work, you say? Well, it's pretty simple; if I fall in love with a girl we agree to schmarry, and we fill out a form and give it to the local government, and we make some promises in front of a couple of witnesses, and the state gives us a special piece of paper—a schmarriage license—that recognizes that we two have very special romantic feelings for each other and promise to stay together until we don't have those feelings anymore. What's the point, you say? That's all: We think our romantic feelings are so special that we like to have them recognized by the government. (Well, there might be some tax benefits; I don't keep track of that legal stuff much.) What's that you say? Are couples in schmarriages*

[8] My understanding that this attitude towards sodomy was typical, or at least not uncommon, at the time of the adoption of the Fourteenth is influenced by remarks from Richard Epstein in Richard Epstein, John Yoo, and Troy Senik, "Episode 74: Rainbow Riders;" *Law Talk with Epstein, Yoo, & Senik*; Ricochet.com; available at https://ricochet.com/podcasts/rainbow-riders/ (June 30, 2015).

> *supposed to reproduce? Well, that's up to them. Some do, some don't. No one really cares what happens in a schmarriage; there's not really any point beyond having the government recognize how important our romances are to us.*

Then I explain to them that in my time we have two other interesting things going on: Some states allow schmarriages for same-sex couples, and some allow only man-woman schmarriages, but no states have any laws prohibiting homosexual behavior. As far as the states are concerned, same-sex romances and opposite-sex romances are morally equivalent.

Then I ask them whether the Fourteenth Amendment would give the federal government the authority to strike down state laws treating homosexual couples differently from heterosexual couples by excluding them from schmarriage.

There's some debate, but most of them come around in the end to the view that the feds could require equal schmarriage for all.

Then I tell them this: "Hey, guess what! This schmarriage thing: We call it 'marriage' in my century!"

A few 1800s traditionalists get upset at this point. But they already gave up their case.

And the lesson of Scenario 4 is: If a state gives schmarriage licenses, it's plausible that the Fourteenth Amendment requires them to be given to homosexual couples on equal terms with heterosexual couples. Again, this is without sacrificing Originalism and even if the original authors and adopters of the Fourteenth Amendment strongly disapprove of homosexual acts.

It is now, at last, time for the argument:

1. If governmental institution X excludes group of people Y from Z for merely prejudicial reasons, it is unconstitutional under the Fourteenth Amendment.
2. The state marriage laws considered in *Obergefell* exclude homosexuals from marriage for merely prejudicial reasons.
3. *Therefore*, the state marriage laws considered in *Obergefell* are unconstitutional under the Fourteenth Amendment.

If the premises are true, the conclusion is true. I offer no objection to the first premise.[9] The second premise, however, depends on a certain understanding of

[9] Nor will I defend it, however, for I am not entirely convinced it is true. It may be that the Fourteenth in its original meaning *only* protects racial classes—not religious, regional, sexual, or marital classes. But this calls for the expertise of someone with better knowledge of history or law than I possess.

marriage: specifically that state marriage laws are really schmarriage laws. There's something to be said for that: A lot of people really do treat marriage like schmarriage. And if the state marriage laws really *are* schmarriage laws, then it would be easy to affirm the second premise, as no reason—other than mere prejudice—exists to exclude homosexuals from marriage (at least, no obvious reason).

The Ways We Think About Marriage

All the same, I don't think that's all there is to it. I don't think that the state marriage laws were merely schmarriage laws. Now I shall introduce the concept of "blarriage," explain how it is different from "schmarriage" and make a few observations. Then I'll give some reasons I don't think the state laws in question were just schmarriage laws.

There's another way of looking at those romantic relationships that are blessed with state recognition. Ryan Anderson puts it succinctly, saying that marriage—"blarriage" as I'm referring to it here—is based on

> [T]he truth that marriage unites a man and a woman as husband and wife so that children will have both a mother and a father. Marriage is based on the anthropological truth that men and woman are distinct and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that children deserve a mother and a father.[10]

Observe: This blarriage thing is how a lot of people treat their own marriages and those of their friends and family and neighbors: These marriages unite two people who are sexually complementary (and perhaps complementary in other ways as those who hold to, for example, the complementarist position in New Testament interpretation), and one of the goals of formalizing these relationships is to keep them united in order to raise any ensuing babies together.

Many people think marriages are blarriages, or at least accept some component of that thesis. People still think marriage has as one of its purposes providing optimal circumstances for having and raising kids; and some say it's the only thing that has this as a purpose. People say you should marry first

[10] Ryan Anderson, "Judicial Activism From Supreme Court on Marriage. Here's How to Respond." *The Daily Signal*; available at http://dailysignal.com/2015/06/26/judicial-activism-from-supreme-court-on-marriage-heres-how-to-respond (June 26, 2015).

and then have kids.[11] Guys think, "I got her pregnant; I'd better marry her." Girls think, "He got me pregnant. He better marry me now." People think, "We'd better get married before the baby is born."[12]

Observe also: Blarriage falls under Scenario 2, not Scenario 4. So, presuming Originalism, the federal government lacks the authority to overturn a state's man-woman definition of blarriage—even if it has the authority to overturn a state's man-woman definition of schmarriage.

Observe, moreover: What we call "marriage" in America today includes both relationships treated like schmarriages and relationships treated like blarriages.

They aren't always easily distinguishable. "Marriage" is the umbrella institution for them all, and under that umbrella the relationships treated as schmarriages are mingled with those treated as blarriages.

(Parenthetically, observe that: People who think blarriage is important and who think blarriage needs a man-woman definition are, thereby, not being plainly and simply discriminatory, though whether they are correct is another matter!)

Reasons Why the Argument's Second Premise Is False

Reason One: The state laws covered both both schmarriages and blarriages. So it's not the case that the state marriage laws were just schmarriage laws. They were also blarriage laws.

(Now if a gendered definition of both blarriage and schmarriage is considered unacceptable, one option would be to separate the two. This is one thing the idea of gender-undefined civil unions existing alongside gender-defined marriage had going for it; of course, that ship sailed away when Obergefell came into port.)

Reason Two: To say that the states' man-woman definitions of marriage were all definitions of schmarriage and only schmarriage is to say that the states never treated any marriages as blarriages.

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[11] For example, economist Larry Kudlow, "Marriage Is Pro-Growth;" NationalReview.com; available at http://www.nationalreview.com/article/392728/marriage-pro-growth-larry-kudlow (November 14, 2014).

[12] These attitudes are common enough experiences. I suspect most of can remember people saying something like this, or attending what used to be called a "shotgun wedding." Some recent film productions show that this is not a thing of the past, but is still a part of western culture. See the characters Cheyenne and Van in the television series *Reba*, produced by Mindy Schultheis, Michael Hanel, Allison Gibson, et al. Acme Productions (2001-2007) and the protagonist and his fiancée in the 2013 feature film *About Time*, directed by Richard Curtis; Relativity Media (2013).

But can one really say that? Not easily; for one thing, one would need to do a good deal of research on family law in these states before one could knowledgeably say that.

Furthermore, look at what the states themselves do say. For example, consider the oral arguments in *Obergefell*, in which Mr. Bursch represents the states. Bursch distinguishes schmarriage and blarriage, and explicitly says the state laws were for the reason of the latter, not the former.[13] (Bursch doesn't use the words "schmarriage" and "blarriage," of course. You can thank me for providing you with those names.)

Thus, it's hard to say that the states were treating all marriages as schmarriages, and it's pretty easy to make a case that they were treating marriages as blarriages: a Scenario 2 thing, not a Scenario 4 thing.

Reason Three: Historically, it seems that the schmarriage phenomenon evolved out of blarriage. Marriage understood as blarriage goes back a long, long way—as far back as Cicero (as Chief Justice Roberts noted in his *Obergefell* dissent[14]), and, still earlier, back to Malachi 2:13-16 and Psalm 128 in the Old Testament.

Additionally, consider Plato. Homosexuality is all over the place in his works and the Athenians even had a few customs superficially resembling same-sex schmarriage (see the *Symposium*). But same-sex marriage is unheard of, and, to all appearances, unthought of. Marriage ain't schmarriage; it's blarriage (this is especially plain from the reasons for the creepy marriage regulations in the *Republic* that were very much concerned with reproduction).

So how did we evolve from a common understanding of marriage as blarriage to a situation where schmarriage is about as common an idea as blarriage, perhaps even more common? I would point to the usual suspects that weaken the connections between sex, reproduction, and permanent marriage: no-fault divorce, birth control, abortion, etc. (I'm not here saying these are bad things, though I tend to think rather poorly of them—only that they are a pretty good understanding of what caused the evolution of the schmarriage phenomenon.)

Anyway, since marriage was understood as blarriage a long way back—and even a short way back before those usual suspects took their effects—it's hard to say that the state laws in question were just schmarriage laws.

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[13] John M. Bursch, "Oral Argument of Mr. John M. Bursch." *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015); available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7l48.pdf, 43ff.

[14] Chief Justice John Roberts, Dissent in *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015).

It's very hard, actually: Cultural inertia alone would make it next to impossible to draw this conclusion.[15]

To put Reason Three more concisely: These states' marriage laws might just be schmarriage laws, but that's a result of *Obergefell*, not a reason for it!

Reason Four: There are folks who think that schmarriages don't even exist. What marriage is—what all real marriages are—is blarriage. No marriage is a schmarriage. (There are marriages that are treated like schmarriages, but that doesn't make them schmarriages.)

These folks typically have religious reasons for this view, or metaphysical reasons, or both. Those who regularly read ThePublicDiscourse.com or have read *What Is Marriage?*[16] by Anderson, Robert George, and Sherif Girgis should have a pretty good idea of what these metaphysical reasons are. The religious reasons are somewhat better known and are influenced by biblical passages such Genesis 1-3 and the Old Testament references above.

I happen to be among these people, but that's not the point. Rather, the point is that such people think of the state laws as blarriage laws.

Accordingly, to affirm the second premise of the argument for same-sex marriage is to say that these religious or metaphysical views are incorrect. And the courts don't have any business ruling against Anderson et al's metaphysics, still less business saying that Catholic theology and Section XVIII on The Family in The Baptist Faith and Message are mistaken.[17]

Note that Reason Four—unlike the first three reasons—is not a reason I reject Premise 2—but a reason federal Courts should not affirm it. Let saints and metaphysicians debate, and let the people decide! American courts don't need to be like the court on an episode of *Star Trek: The Next Generation* whose Judge tells us her goal is to "make some good law out here" and then proceeds to make the law immediately after admitting she's not qualified because she lacks the metaphysical expertise necessary to make it well.[18]

Conclusion

Of course, this is of more interest to those who are Originalists like myself than to those who aren't. If Originalism is false, you don't even need

[15] For more on this theme, see the *Scholars of History and Related Disciplines* brief.

[16] Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012).

[17] The Southern Baptist Convention, *The Baptist Faith and Message* (June 14, 2000).

[18] Robert Scheerer, "The Measure of a Man," *Star Trek: the Next Generation* (February 13, 1989).

this argument; you can—and Justice Kennedy did[19]—use other lines of reasoning.

Still, for what it's worth, and especially for the Originalists among us, here it is: a respectable argument that *Obergefell* was rightly decided, and the reasons I don't buy the argument's Premise 2.

And, for all of us, here is another insight: If Originalism is correct, then one impressive argument that *Obergefell* was rightly decided is a failure. This shows that the nature, purpose, and function of marriage—or at least what people have taken them to be—are necessary for understanding the requirements of Constitutional law—at least if Originalism is true. But the teleology of marriage—and what people have thought it to be—is a topic philosophers and theologians are well suited to study, and thus these fields of study have much to contribute to the study of law and to all the other disciplines interested in marriage.

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[19] Associate Justice Anthony Kennedy, Majority Opinion in *Obergefell et al v. Hodges, Director, Ohio Department of Health, et al.* 576 U. S. (June 26, 2015).