

THE DILUTION PROBLEM AND OTHER  
ARGUMENTS AGAINST SAME-SEX MARRIAGE:  
HOW PERSUASIVE ARE THEY?

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Few issues today create so visceral a reaction, among so many people on both sides, as same-sex marriage.<sup>1</sup> The cultural reasons for

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this reaction are beyond the scope of this Article, but for better or for worse, the reaction is the context in which the issue is debated. Therefore, civil discourse about same-sex marriage is especially important. Advocates for same-sex marriage have made their arguments plain in the literature of the law,<sup>2</sup> and they have won some, if not all, of the battles. Several states have adopted laws authorizing same-sex marriage, either after judicial intervention or by legislation undertaken independently.<sup>3</sup> Meanwhile, most other states have rejected the idea.<sup>4</sup> In any event, to examine the issue competently, an analyst needs to consider the arguments against same-sex marriage, which have been developed less in legal literature.<sup>5</sup> After being informed by both viewpoints, a critic of either position has the ability to compare reasons and values and to make a decision—as well as to formulate counterarguments. It is the purpose of this Article to examine the lesser-described viewpoint in legal literature: the case against same-sex marriage.

In addition to placing the psychological reasons for visceral controversy beyond the reach of its subject, this Article will avoid some other related issues. For example, the Article is not about the constitutionality of prohibiting or authorizing same-sex marriage,

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1. See, e.g., Louis Thorson, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony?*, 92 MARQ. L. REV. 617, 617 (2009) (labeling same-sex marriage “one of the most controversial issues facing both the public and private sectors . . .”).

2. For a comprehensive treatment, see generally MICHAEL MELLO, *LEGALIZING GAY MARRIAGE* (2004). As for articles, see generally Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why “Separate” Nomenclature for Gay and Straight Relationships Will Never Be “Equal,”* 97 GEO. L.J. 1155 (2009); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Richard Salas, *In re Marriage Cases: The Fundamental Right to Marry and Equal Protection Under the California Constitution and the Effects of Proposition 8*, 36 HASTINGS CONST. L.Q. 545 (2009).

3. For example, the Iowa Supreme Court held that state’s law banning same-sex marriage unconstitutional. See *infra* note 26 and accompanying text. Vermont adopted same-sex marriage by legislation. See Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1.

4. In 2009, one court reported that forty-four states have adopted constitutional provisions or laws prohibiting same-sex marriage. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 683 (N.Y. Sur. Ct. Apr. 9, 2009).

5. There are some articles that oppose (or argue for caution in the authorization of) same-sex marriage. See generally Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245 (1998); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581 (1999); William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119 (2003). For an interesting argument in favor of different definitions of marriage-like relationships, and different nomenclature, for traditional and same-sex couples, see 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 (2009).

even though it will be necessary to consider some constitutional arguments because they can be restated as legislative arguments. The Article assumes freedom in the legislature to make either choice. The constitutional issue is important,<sup>6</sup> but the arguments before legislatures are also important. There is another issue that this Article will avoid. It will not attempt to evaluate the weight of the arguments developed and analyzed here when they are compared to the arguments of the other side. The purpose of this Article is to identify and describe the arguments against same-sex marriage, so that people of good will on both sides of the debate can consider what they are worth. In other words, although the Article will develop what the arguments are (and what they are not) and will analyze their meanings, the Article will not take an explicit position for same-sex marriage, and it will not take a position explicitly against it.

The first section of the Article deals with two contextual matters. This section begins by considering the separation between the rights given by marriage and the symbolism of marriage. If the State provides all of the rights and benefits of marriage to same-sex couples, and if the only issue is whether unions of those couples are to be called “marriages,” the issue is different than it would be without those rights and benefits. The controversy reduces, perhaps, to an argument about symbolism.<sup>7</sup> The argument for same-sex marriage may be stronger to some legislators in states where same-sex unions do not exist or where they create lesser rights. This Article does not take a position about that issue—whether same-sex and heterosexual couples should or should not have similar rights and benefits—but it assumes that the State can provide similar entitlements if it so chooses without affixing the marriage label, and therefore, that the controversy is about the symbolism of marriage.<sup>8</sup> Of course, symbolism is important, but the point is that the argument becomes different to some people if symbolism is all of it.

Then, a second part of the first section continues to set the context by considering whether the issue is properly argued if it is framed in terms of equality or discrimination without explanation of how those concepts apply.<sup>9</sup> There are many versions of equality, and there also

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6. The constitutional issue arises in many different contexts. *See, e.g.*, *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009) (evaluating constitutionality of state constitutional amendment prohibiting same-sex marriage on alleged ground that amendment was a broad “revision” of the constitution and therefore could not be adopted by referendum).

7. *See infra* Part I.A.

8. *See infra* Part I.A.

9. *See infra* Part I.B.

are many occasions for treating people and things differently, and both problems respond to many types of reasoning. To put it another way, an invocation of equality assumes that it can be supported by an explanation telling why a particular classification is similar to another classification and why the similarity is relevant to the claim of equality that is in controversy. Equality and discrimination are important, obviously, but they have meaning only after an advocate has established why these labels apply.<sup>10</sup> The Article will not conclude that prohibition of same-sex marriage is equal, or that it is unequal. Those are ultimate conclusions, to be reached only after the homework of figuring out the arguments has been done.

A second section begins the real work of the Article, by developing the arguments that might be asserted against same-sex marriage. It begins by considering the effects that recognition of same-sex marriage could have upon traditional marriage. An analogy to trademark dilution is relevant here.<sup>11</sup> A producer of a valuable product, with identifiable symbols, has an interest in not having a competitor use the same symbols. But even beyond that interest, which amounts to preventing trademark infringement, the person dependent upon a valuable symbol has an interest in avoiding the dilution of the symbol by persons who do not infringe but who use the symbol for non-infringing, unrelated products. The law is clear in recognizing this interest against trademark dilution. And protecting the symbolism of marriage against dilution arguably is more important to our society than avoiding dilution of trademarks.

Many people believe that the sanctity that they invest in marriage would be diluted if marriage were redefined so that it covered what they consider to be different kinds of relationships.<sup>12</sup> There is room, of course, for the argument that same-sex marriage will not discourage traditional marriage, but the truth is that it would be difficult to prove this proposition. The “dilution argument” therefore may be the strongest part of the case against same-sex marriage. It is this argument that same-sex advocates should expect to have to overcome. The Article next analyzes various arguments that same-sex advocates have used to debunk the contrary arguments of their opponents, and it considers whether these arguments effectively address the dilution issue.

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10. *See infra* Part I.B.

11. *See infra* Part II.A.

12. *See infra* Part II.A.

The third section of the Article raises additional issues. There are other arguments against same-sex marriage, although they may not carry as much weight as the dilution issue does. For example, same-sex marriage legislation could impinge upon religion in ways that create both establishment and free-exercise concerns. Marriage has not devolved in the United States as a completely secular institution. It has deep religious roots. One of the issues in religious freedom and in non-establishment is avoidance of the use of sacred symbols by the State for secular purposes.<sup>13</sup> A related, but separate, argument involves the possibility that authorization of same-sex marriage will interfere with the free exercise of religion or with the rights of religious people—and indeed, it already has.<sup>14</sup>

Then, too, the arguments include the danger of a slippery slope. If a State authorizes same-sex marriage, it may make sense to ask whether there are other groups that can make similar claims upon the right to marry, and indeed it may be that it will become theoretically difficult to justify denial of other extensions of marriage entitlement that otherwise would never have been intended.<sup>15</sup> Yet another argument is created by interstate effects. Choices by some states may interfere with the public policy of other states.<sup>16</sup> Finally, there is the argument that we do not know of the potential dangers of changing an institution as important as marriage. Effects upon children raised in the context of same-sex marriages are another point of controversy.<sup>17</sup>

The Article concludes with an evaluation of the relative merits of these arguments. As the Article does throughout, the conclusion does not attempt to state whether the arguments against are stronger than the arguments for the extension of same-sex marriage, but it does consider the persuasiveness of each argument opposing same-sex marriage as against each other argument on the same side. The ultimate conclusion is that the dilution argument outweighs the other arguments, although whether it is persuasive depends upon its comparison to arguments for same-sex marriage, in a way that is not subject to exacting proof.

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13. *See infra* Part III.A.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *See infra* Part III.D.

17. *See infra* Part III.E.

I. THE CONTEXT OF THE ARGUMENTS, FROM SYMBOLISM TO CLAIMS  
ABOUT EQUALITY

A. *Is the Issue only About Symbolism if the State Provides  
Equivalent Rights?*

In *Strauss v. Horton*,<sup>18</sup> the California Supreme Court considered the constitutionality of an initiative that had the effect of inserting a prohibition upon same-sex marriage into the state constitution. An initiative is one of two methods of changing the California Constitution. But the initiative method can be used only for changes that are not pervasive, and if a particular change amounts to a more extensive “revision” of the constitution, it can be accomplished only by the other, more complex method.<sup>19</sup> Therefore, the question facing the California court was whether the prohibition of same-sex marriage was pervasive enough to be called a “revision.”<sup>20</sup> If it had been a revision, the initiative would have been ineffective, because the constitution would not have allowed a too-extensive change, or in other words a revision, by initiative.

The court decided that the prohibition was constitutional.<sup>21</sup> The elimination of same-sex marriage was not pervasive enough, either quantitatively or qualitatively, to amount to a revision, said the court.<sup>22</sup> This conclusion, in turn, reflected the legislature’s power to give rights to same-sex couples that were equivalent to those that the legislature could give to married couples.<sup>23</sup> The court decided that the California Assembly could give those rights through civil unions or other vehicles, even if it did not attach the word “marriage” to them. Calling the relationship of two same-sex persons by the name “union,” rather than “marriage,” was not a wholesale “revision” of the state constitution.<sup>24</sup> In summary, the entire controversy was reduced to the question whether it was proper to call traditional unions “marriages” but deny that symbolism—the word “marriage”—to same-sex couples.

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18. 207 P.3d 48 (Cal. 2009).

19. *Id.* at 61. A revision would have required a constitutional convention, which is the other method. *Id.*

20. *Id.*

21. *Id.* at 62–63.

22. *Id.* at 98, 101.

23. *Id.* at 102 (stating that the only change brought about by the initiative was “access to the designation of ‘marriage’” and that the same substantive rights continued to be enjoyed).

24. *Id.* at 77, 102.

Those who disagree with the California court's decision may be entitled to point out that symbols are important. And they are, of course. One aspect of what same-sex couples probably wanted from the court was recognition by the State that their relationship had the same symbolism, the same sanctity, as the relationship of heterosexual couples who could claim the traditional word "marriage."<sup>25</sup> People are entitled to the symbols to which they have rights, and it should not be unexpected that the advocates of same-sex marriage would want no less than that. In fact, another court has come to a conclusion very different from California's. In *Kerrigan v. Commissioner of Public Health*,<sup>26</sup> the Connecticut Supreme Court held that it was unconstitutional for the State to use a different phrase, such as "civil union," and it established a right of same-sex couples to have their unions labeled as marriages. The Connecticut court's opinion is conclusory, as even some of its supporters have observed,<sup>27</sup> and it lacks the detailed reasoning of the California court. But it removed any doubt that there are multiple ways for a court to decide the issue.

When the issue is framed as the California Supreme Court saw it, however, the argument for same-sex marriage is different—and many people will say that it is lesser. Arguably, a claim that the State fails to provide a bundle of identifiable rights or benefits is not the same as a claim of entitlement to have the State put a particular symbolic label on that bundle of rights. Furthermore, the claim by one group of people of a symbol can impinge upon another group's different kind of interest in the same symbol. Many heterosexual couples who cherish the symbolism in the word "marriage" may believe that its extension, to what they view as a different kind of relationship, will dilute that symbolism in their own marriages, by changing the

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25. See Cahill, *supra* note 2 (claiming that different "nomenclature" for same-sex and traditional couples "will never be 'equal'"). See also *Strauss v. Horton*, 207 P.3d 48, 102 (Cal. 2009) (noting the significance of reserving marriage to heterosexual couples only).

26. 957 A.2d 407, 418, 420 (Conn. 2008). See also *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding statute limiting marriage to a man and a woman unconstitutional). The issue has been subjected to a frequently changing sequence of conflicting decisions, statutes, and popular votes, however, and it is difficult to keep count of them. See *supra* note 4.

27. E.g., Marc R. Poirer, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1429 (2009). The Illinois experience supports the conclusion that provisions for civil unions reduce the same-sex marriage argument to symbolism, and they weaken it. There, "even advocates [of same-sex marriage] acknowledge it's possible that by accepting civil unions now, they may be delaying movement toward being able to marry." Christopher Wills & Carla K. Johnson, *Illinois Senate Vote Clears Way for Civil Unions by Gay Couples*, HOUS. CHRON., Dec. 2, 2010, at A11.

meaning of the word.<sup>28</sup> And that effect upon symbolism, to them, may seem to counteract the claim of the symbol by same-sex couples. They may see it as robbing Peter to pay Paul. Same-sex advocates, of course, may view the issue quite differently.

B. *What Weight Should Be Attributed to Unexplained Invocations of Equality or Discrimination?*

Arguments about equality and discrimination are important, but not in a vacuum, and not about different things. If someone argues, for example, that the same label should be applied to a feather and a cannonball “because they are equal,” listeners can sensibly expect the proponent of that argument to explain just exactly why a feather and a cannonball are equal. It is only after that proposition has been established—the why—that the argument advances. And there is a second step in the process. The alleged equality should relate to a characteristic that is relevant to the issue at hand. If, for example, someone says that a feather and a cannonball are equal for a limited purpose, “because they are both objects, and the precise issue I’m arguing about is about how to classify things as objects or not-objects,” the argument for equating a feather and a cannonball is better than it would be if this explanation were absent. In that context, yes, a feather and a cannonball become “equal.” They are both objects.

Too often, arguments about the marriage issue lack this kind of depth. For example, the *New York Times* recently carried an editorial by a former gubernatorial candidate named Tom Suozzi titled, *Why I Now Support Gay Marriage*.<sup>29</sup> The article used the words “equality,” “equal,” or “unequal” eight times in eleven paragraphs and referred to “discrimination” four times. But although it showed that the author was in favor of providing equal benefits to heterosexual and to same-sex couples, it never explained why he now supported gay “marriage,” as opposed to equal benefits.<sup>30</sup> It did not say why the label put onto the concept should be “marriage” specifically, as opposed to “union,” or “civil union,” or for that matter, “gay marriage.”<sup>31</sup> And it did not explain why assertions of equality or

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28. See *infra* Part II.A.

29. Tom Suozzi, *Why I Now Support Gay Marriage*, N.Y. TIMES, June 13, 2009, at A19, available at [www.nytimes.com/2009/06/13/opinion/13suozzi.html](http://www.nytimes.com/2009/06/13/opinion/13suozzi.html).

30. *Id.*

31. *Id.*

discrimination were warranted.<sup>32</sup> Voters in California have rejected this argument by their initiative, and the California Supreme Court has upheld their action because the difference, with equal benefits, does not amount to enough of a change in state law to be called a “revision.”<sup>33</sup> Suozzi’s arguments amount to the kind of superficial analysis that occurs too often, unfortunately, in some news media, including the *New York Times*.

Aside from calling for equal underlying rights, which the legislature could provide otherwise than by the label “marriage,” Suozzi provided only the glimmer of an argument about what he really advocated, which was the application of the same sanctity, the same symbolism, and the same label to gay marriage as to traditional marriage.<sup>34</sup> “Civil unions for both heterosexual and same-sex couples would be an equal system,” he wrote, “but this compromise appears unlikely at the current time. Few heterosexual couples would give up their current civil marriage for a civil union.”<sup>35</sup> In other words, couples in traditional marriages would not choose a different label than “marriage,” and, by implication, Suozzi believes that same-sex couples should not be required to, either.<sup>36</sup> Again, however, his argument is mere assertion rather than explanation.

The arguments about this issue should be deeper. Perhaps Suozzi meant to invoke the concept of equality contained in the Fourteenth Amendment, the core meaning of which was to provide persons in classifications such as former slaves and racial minorities rights equal to those of the majority.<sup>37</sup> The core meaning now is recognized as extending to other classifications, such as gender, legitimacy, and the like, although at a lower level of scrutiny.<sup>38</sup> Same-sex couples can argue, of course, that their circumstances are so closely analogous to those of racial minorities that they should be treated as a suspect classification for Equal Protection purposes. But others argue the opposite, and the Supreme Court has never accepted arguments for

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32. *Id.* Arguments similarly lacking in this kind of explanation appear in legal contexts as well. *Cf. Strauss v. Horton*, 207 P.3d 48, 102 (Cal. 2009) (rejecting petitioners’ arguments claiming that the initiative resulted in “stripping’ same-sex couples of a fundamental constitutional right”).

33. *Strauss*, 207 P.3d at 62.

34. Suozzi, *supra* note 29.

35. *Id.*

36. *Id.*

37. *See* DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 568 (5th ed. 2009) (explaining that the strictest level of review is applied to classifications based on race, alienage, and nationality).

38. *See id.*

heightened scrutiny.<sup>39</sup> Opponents can point out obvious differences between traditional marriage<sup>40</sup> and same-sex relationships, contained in the procreative function of marriage, the tradition of its limitation to heterosexual couples, and the religious background that is contained in the symbolism of marriage.<sup>41</sup> These arguments, again, are subject to disagreement, and the issue ultimately will require resolution. But the point is that when the arguments swirl this way, and when the issue remains as it does today, an explanation for the reasons for resorting to words like “equality” and “discrimination” should be expected.<sup>42</sup>

Furthermore, groups that are distinguishable from gays, that are in fact entirely different, could make precisely the same argument, if all it takes is to say the word “equality”—and they do.<sup>43</sup> Imagine a trio consisting of a man and two women, who each want to be married to each other. Their main argument, let us say, is that prohibiting their triple marriage is *unequal*. “We didn’t ask to fall in love,” they might say. “There is a long tradition of our kind of arrangement, of men with multiple wives. Our twenty-five children deserve our marriage. It is ‘unequal’ to treat our love differently from a marriage of two persons, merely because we are three.” There are many people whom this argument would not persuade, and polygamy is illegal in every state.<sup>44</sup> Furthermore, the argument of the polygamist is different from that for preserving traditional

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39. Cf. *id.* at 710–17 (discussing holding of various courts, including the Supreme Court).

40. By “traditional marriage,” this Article refers to marriage between one man and one woman as it has existed in most of the world. Such a marriage can be affected by Christian, Jewish, Muslim or any other religious values, or by no religion at all. There have, of course, been other customs of marriages in various traditions, such as plural or polygamous ones. Traditional marriage is defended, here, not solely because it is traditional or because it has existed for a long time, see *infra* notes 46–48 and accompanying text, but because of its social value.

41. See also Collett, *supra* note 5, at 1262 (arguing that same-sex couples cannot share the mystery of marriage because their gender differences from each other are more limited than those between traditionally married couples).

42. See *supra* Part I.A.

43. See *Reynolds v. United States*, 98 U.S. 145, 165–67 (1878) (evaluating argument of polygamists for an exemption from criminal laws; denying such an exemption). One commentator labels this result “discriminatory.” Michel Rosenfeld, *Introduction: Can Constitutionalism, Secularism and Religion Be Reconciled in an Era of Globalization and Religious Revival?*, 30 CARDOZO L. REV. 2333, 2353 (2009).

44. One commentator argues that “we need a philosophic morality of sex that, while accepting consensual homosexual sex, will disapprove of bestiality, incest, and polygamy and from which one can then derive solutions to controversies.” Alan Brudner, *A Reply to Critics of Constitutional Goods*, 22 CAN. J.L. & JURISPRUDENCE 237, 244 (2009). He concludes, however, that a “neutral-grounds approach” cannot provide this “philosophic morality.” *Id.*

marriage, and it is different from same-sex arguments. But the point is, it takes more than the word “equal” to analyze the reasons. Again, same-sex marriage is an entirely different case, but it takes more than the mere term “equality” to say why. In summary, “equality” and “discrimination” are loaded words that can be used by people who are not entitled to them, and the context of the alleged equality is important.<sup>45</sup>

## II. INTRODUCING THE “DILUTION ARGUMENT”—AND THE CONTRARY POSITIONS OF SAME-SEX ADVOCATES

### A. *Negative Effects on Traditional Marriage, Analyzed from an Analogy to Trademark Dilution*

#### 1. *The Values at Stake: What Traditional Marriage Provides*

“The union of a man and woman in marriage is the most enduring and important human institution . . . .”<sup>46</sup> The Supreme Court has repeatedly recognized the importance of marriage.<sup>47</sup> It is pre-political and has existed since time immemorial.<sup>48</sup> Professor Lynn Wardle’s remarkable study of a social movement in Russia that weakened marriage supports his conclusions that for some subgroups in that society, “family life . . . ceased to exist” and that “moral decline and psychological excesses” grew, with the decrease in marriages.<sup>49</sup> Traditional marriage has been and is the foundation of society.

Aside from its place in society, traditional marriage is the locus of procreation. This is not to say that same-sex couples cannot raise children. In today’s conditions, when families are dramatically

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45. See generally *id.*

46. William C. Duncan, *Speaking Up for Marriage*, 32 HARV. J.L. & PUB. POL’Y 916, 926 (2009) (quoting an address by President George W. Bush). For a well-written (although some will disagree with its conclusions) judicial opinion holding that procreation provides a rational basis for constitutional purposes for distinguishing same-sex marriage from traditional marriage, see *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 677 (Tex. App. 2010) (refusing divorce to same-sex couple married elsewhere on the basis of Texas’ non-recognition of gay marriage). Although there is authority for procreation as an issue in constitutional cases, this Article does not consider it as an argument in the legislative context, because the legislature has power to authorize marriage that cannot result in procreation, and indeed some marriages authorized by statute have no prospect of procreation.

47. *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978).

48. See Duncan, *supra* note 46, at 930.

49. See Lynn Wardle, *The “Withering Away” of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917–1926*, 2 GEO. J.L. & PUB. POL’Y 469, 491 (2004) (quoting H. KENT GEIGER, *THE FAMILY IN SOVIET RUSSIA* 122 (1968)).

lacking who will care for abused and neglected children or children surrendered at birth, there are powerful reasons for authorizing adoption as well as foster care by same-sex couples.<sup>50</sup> We do not know whether there are endemic disadvantages to this arrangement,<sup>51</sup> but it can persuasively be asserted that otherwise, the limited number of possible placements and the tendency to return children to abusive parents on tenuous theories of rehabilitation,<sup>52</sup> would create conditions that would outweigh the theoretical disadvantages. But procreation itself is another thing altogether. Marriage “has served in virtually all human societies to encourage men and women who may create a child to take responsibility for that child and for one another.”<sup>53</sup> And a society that ceases to procreate at an acceptable level experiences threats to its older population and to its stability.<sup>54</sup>

In spite of these considerations, traditional marriage today is fragile. Heterosexual couples have the option of simply setting up housekeeping by living together without marriage, and divorce in most states is relatively easy to obtain. Of course, these factors existed well before the current controversy over same-sex marriage, and they decreased the incidence of traditional marriage before same-sex marriage was a major issue and independently of it. But the point is, the creation of new reasons for decreasing the incidence of traditional marriage is undesirable. And yet there is a cognizable argument that recognition of same-sex marriage would have exactly that effect: the further decrease of traditional marriage, at a time when traditional marriage is less frequent than ever.<sup>55</sup>

In fact, the trend against traditional marriage has accelerated during the same time that acceptance of same-sex marriage has grown. The “United States Marriage Index” fell from 76.2 in 1970 to 60.3 in 2008.<sup>56</sup> The Census Bureau reports that more and more

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50. “[T]oday over 100,000 children remain wards of the state waiting for a family to adopt them.” Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 801 (2009).

51. See *infra* Part III.E.

52. See generally Kristen Ditta, *Who Will Protect Me Now? An In-Depth Look at the Laws Protecting Children in Texas*, 50 S. TEX. L. REV. 285 (2008) (documenting cases of abuse and non-protection).

53. Duncan, *supra* note 46, at 930.

54. For example, “Germany is grappling with the effects of a falling birthrate and aging populace.” *More Women Opt Against Children*, HOUS. CHRON., July 30, 2009, at A14. One disadvantage is that this result means lesser productivity and greater need.

55. See *infra* Part II.A.2.

56. Ellen McCarthy, *Marriage Is on the Rocks in U.S., Report Indicates*, HOUS. CHRON., Oct. 24, 2009, at A6. The Marriage Index is a composite of statistics compiled by a panel of scholars and advocates to quantify the acceptance of marriage. *Id.*

heterosexual couples are forsaking marriage and opting instead for cohabitation.<sup>57</sup> Analysts conclude that “[m]arriage is on the rocks in [the] U.S.,” and a substantial percentage of survey respondents even say that it is “becoming obsolete.”<sup>58</sup> There is no deductive logic by which to infer reliably from these data alone that same-sex marriage is “the cause” of this trend,<sup>59</sup> nor is it possible to prove the opposite; but by taking additional facts into account, one can make the inference. For example, about two-thirds of survey respondents are unwilling to equate same-sex couples with what they call “families.”<sup>60</sup> This issue of causation is impossible to resolve conclusively and like other issues of society and government, it remains a matter of conflicting inferences.<sup>61</sup>

2. *An Analogy: Dilution of the Marriage “Trademark” or Symbolism, and Therefore, Reduction of Its Meaning, Appeal, and Use*

What follows is an analogy, and like all analogies, it is subject to debate. Analogy is a species of inductive logic, and it is only as good as the common characteristic of two concepts or things upon which it is founded.<sup>62</sup> By definition, the things that are compared have differences. This is to be expected, and the differences do not weaken the analogy, unless they undermine the argument that is based upon common characteristics.<sup>63</sup> The analogy used in this section of the Article is from commercial law, and it compares concepts from that realm to issues of society and custom. No analogy is perfect. But if there is a weakness in this analogy, perhaps it is that protecting the fundamental symbolism of marriage and its value to society is more compelling than protecting the value of a commercial symbol, as the law traditionally has done.

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57. See Hope Yen, *U.S. Definition of Families is Widening, Survey Finds*, HOUS. CHRON., Nov. 18, 2010, at A4.

58. See McCarthy, *supra* note 56; Yen, *supra* note 57.

59. Inference from a time sequence alone can be fallacious. “Post hoc, ergo propter hoc,” in other words, is not a method of deductive logic. Furthermore, causation is a murky and often unscientific concept. But inferences about causation often must be made from little more than time sequences and other incomplete data.

60. See David Crary, *Debate Rages on Definition of Family*, HOUS. CHRON., Sept. 15, 2010, at A6.

61. For the inference that same-sex marriage will not have any significant impact on traditional marriage, see *infra* notes 79–83 and accompanying text.

62. See DAVID CRUMP, *HOW TO REASON ABOUT THE LAW: AN INTERDISCIPLINARY APPROACH TO THE FOUNDATIONS OF PUBLIC POLICY* 5–7 (2001).

63. *Id.*

Trademark “dilution” is the foundation of this analogy. Dilution of a trademark is fundamentally different from “infringement,” which is the more frequent issue in trademark litigation. Infringement occurs when the similarity of a junior mark to an established symbol is so strong that customers will be subject to a “likelihood of confusion.”<sup>64</sup> Laws against trademark infringement, therefore, are a kind of consumer protection. The owner of the established mark is likely to be the one who vindicates the law by litigation, but the focus is upon consumers.<sup>65</sup> They are to be protected against confusion about the source of the goods. Trademark “dilution,” on the other hand, is a different matter. It is recognized even in situations in which there is no likelihood of confusion because the goods or services delivered by the junior user are dramatically different from the trademarked product.<sup>66</sup> Although consumers ultimately may be protected by dilution law, the primary focus of anti-dilution legislation is protection of the mark itself.<sup>67</sup> The idea is that other people’s uses of a famous and unique symbol, or of what in trademark parlance is called a “strong” mark,<sup>68</sup> injures the owner of the mark by degrading the owner’s property rights.<sup>69</sup>

Consider, for example, a well established and fanciful symbol such as the word “Exxon,” with symbolic colors and with the two “x’s” interlocked. Obviously, this symbol calls to mind a major oil and gas producer and processor. If a competing firm producing oil and gas were to affix the symbol “Exxon” to its goods or services, Exxon Corporation would have an interest in asserting a traditional infringement claim. But suppose that an interloper affixes the name not to an oil and gas business, but to something entirely different, so that there is little “likelihood of confusion.” A firm puts the word, complete with Exxon’s usual colors and interlocked “x’s,” on a product as remote from oil and gas as it can be. Imagine, for example that the symbol “Exxon” suddenly appears upon skateboards, soft drinks, and internet search engines. Or even, perhaps, upon beer,

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64. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004).

65. See J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION* § 24:72 (2009).

66. *Id.* § 24:69.

67. See *id.* “Dilution is a name for a kind of erosion of the strength of a mark that could occur in the *absence* of consumer confusion.” *Id.*

68. See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 167 (1995) (explaining that a “strong” mark is one that involves an arbitrary or fanciful symbol—so that it is not likely merely to describe the product—and that has acquired “secondary meaning,” which is a strong identification of the mark with the source of the product).

69. MCCARTHY, *supra* note 65, § 24:72.

cigarettes, and adult entertainment parlors. In this situation, even if it cannot prove a likelihood of confusion so as to prevail in an infringement action, Exxon Corporation has a clear basis for believing that its trademark has been diluted.<sup>70</sup> The symbol that it has used as the source of its goods, and that Exxon Corporation has fostered and protected by maintaining quality products, is diminished in recognition and public respect. This is the essence of the trademark dilution doctrine.

There are at least two distinct theories of dilution. First, dilution by “blurring” occurs when the symbol is weakened. “The theory says that if customers or prospective customers see the plaintiff’s famous mark used by other persons to identify other sources for many different goods and services, then the ability of the famous mark to clearly identify and distinguish only one source might be ‘diluted’ or weakened.”<sup>71</sup> The hypothetical placement of the “Exxon” symbol on skateboards, soft drinks, and internet search engines illustrates this kind of dilution. A second type of dilution occurs when there is “tarnishment” of the symbol. This kind of dilution occurs when “the effect of the defendant’s unauthorized use is to dilute by tarnishing or degrading positive associations of the mark and thus, to harm the reputation of the mark.”<sup>72</sup> The hypothetical use of the symbol “Exxon” to name beer, cigarettes, and adult entertainment parlors shows how this tarnishing effect can appear.

The use of the symbolic associations that accompany the word “marriage” by same-sex couples arguably would have the same diluting effect upon the meaning of traditional marriage as the use of “Exxon” on different products and services would. Marriage would become a less coherent concept. It would describe relationships that are fundamentally different, at least in the eyes of committed traditional husbands and wives. It therefore would cause dilution by blurring. The symbol, which is bound in sacred concepts, religious concepts, trappings ranging from bridesmaids’ dresses to transportation of the wife over the threshold by the husband (even if it does not happen in the majority of cases)—and yes, the language, legend, song, and poetry of the relationship—would change to accommodate the differences. Professor Collett describes these

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70. This example parallels others used by lawmakers. *See, e.g., id.* § 24:69 (“Hypothetical examples of dilution . . . were listed by the New York legislature and the U.S. Congress as: DuPont shoes, Buick aspirin, Schlitz varnish, Kodak pianos, and Bulova gowns.”).

71. *Id.*

72. *Id.* § 24:70.

values as reflecting the “mystery of marriage.”<sup>73</sup> In addition, although it is debatable whether this feeling should be taken into account, some heterosexual couples might believe that there would be a “tarnishment” of the symbol.<sup>74</sup> This is particularly true for religious couples, but it may be true for nonreligious couples as well, who would not choose a symbol for their relationships that also describes same-sex unions. The result, it seems likely, would be a dilution of the symbol and an additional factor discouraging traditional marriages. But it is not necessary to resort to a “tarnishment” theory, because blurring of the marriage symbolism would cause enough concern.

Some advocates of same-sex marriage will respond to these arguments by saying that they are founded upon bigotry or that they reflect only the views of same-sex marriage that prejudiced people would entertain.<sup>75</sup> But that argument, just as other arguments, is weaker when it is precisely the *symbolism* of the relationship, and the feelings or beliefs or adherence that the symbolism causes, that is at issue. Civil unions can give same-sex couples the same rights that the State can give to traditionally married couples.<sup>76</sup> What is at stake in the use of the word “marriage” is the symbolism of marriage, or the “mystery” of marriage, in Professor Collett’s phrase. Claims of prejudice or bigotry are claims about fixation upon symbolic issues to the exclusion of material realities. When what is at issue is precisely the pure symbolism of marriage, it seems illogical to say that a preference for use of the symbol to describe traditional marriage is mere prejudice. Thus, William C. Duncan asserts that the same-sex marriage movement seeks to appropriate the “immense social capital of the marriage institution.”<sup>77</sup>

Another argument against the consideration of effects upon traditional marriage is the assertion that the benefits of marriage to same-sex couples are more important than even the decrease in value

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73. Collett, *supra* note 5, at 1262.

74. Same-sex marriage advocates, assuming that their arguments are correct, might argue that such a belief is invidious. Opponents’ response might be that it is proper to consider private opinions about a symbol when it is precisely private opinions about that symbol that are at issue, because private opinions are all that influences the value of the symbol. But again, the tarnishment issue is not a necessary consideration.

75. This *ad hominem* charge is a dubious form of argument, but it should be expected from some people. William C. Duncan describes “the idea that redefining marriage is a civil right [and] that those who oppose redefinition are bigots and discriminators who merit legal and social obloquy.” Duncan, *supra* note 46, at 922.

76. See *supra* Part I.A.

77. Duncan, *supra* note 46, at 929–30.

of traditional marriage.<sup>78</sup> The validity of this assertion depends upon the values of the individual person. It is the ultimate political question. It would seem, however, that if there are serious negative effects on traditional marriage, those effects would be an obstacle for same-sex advocates to overcome. A related argument is that we simply do not know what effects there could or would be upon traditional marriage.<sup>79</sup> The behavior of human beings in social settings is difficult to predict. It could be that extension of marriage symbolism to same-sex couples would in fact seriously dilute that symbolism and badly discourage traditional marriage. Many people would consider that result disastrous. On the other hand, it could be that the coming population of heterosexual couples would not perceive any blurring of traditional marriage symbolism by its extension to same-sex couples. These heterosexual couples may consider that everyone has a unique feel for the meaning of marriage, and that someone else's use of the symbolism, or even the State's appropriation of it for a governmental purpose, is of little concern. It could even be that large numbers of heterosexual couples would deliberately choose traditional marriage just to reclaim the symbolism. We simply do not know. These latter scenarios seem improbable, however, and the trademark analogy suggests a concern for dilution. If dilution is a phenomenon important enough to address in the commercial context, it arguably is a phenomenon even more important to avoid in the context of an institution that is fundamental to all societies.

In advocating same-sex marriage, William Eskridge Jr. claims that there are "six myths" that "confuse" the debate. The alleged "myths" are:

- (a) that gay marriage will have a significant impact (good or bad) on marriage;
- (b) that marriage equality must come through judicial activism rather than legislative reform;
- (c) that it is important to have a national resolution of the issue in the near future;
- (d) that whether lesbian and gay parents do a good job raising children will play a major role in resolving the debate;
- (e) that Judeo-Christian religions/faiths are inherently opposed to marriage

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78. *E.g.*, Jane E. Cross, Nan Palmer & Charlene L. Smith, *Families Redefined: Kinship Groups that Deserve Benefits*, 78 MISS. L.J. 791, 807–10 (2009) (arguing, without balancing the concerns raised by dilution of traditional marriage, that same-sex couples should be able to marry because they suffer "widespread psychological and social harm . . . because they are denied the right to marry.").

79. *See infra* Part II.B.

equality; and (f) that opposition to gay marriage serves to reaffirm traditional marriage.<sup>80</sup>

Eskridge may be correct in concluding that propositions (b) through (f) are myths, although some of them seem debatable.<sup>81</sup> In any event, this list of issues is an important contribution to the debate. His assertion that proposition (a) is a myth, however, can only rest on broad inferences that others have drawn differently.<sup>82</sup> Inferences concerning the effects of symbols, the origins of incentives, and the directions of popular motivations are difficult to draw with much certainty, particularly when they require prognostications of an uncertain future in response to relatively new phenomena.<sup>83</sup>

### 3. *The Availability of Alternatives for Adherents to Same-Sex Relationships*

If indeed the rights and benefits of heterosexual marriage can be extended to same-sex couples in other ways, and if the ultimate issue is purely the symbolism of marriage, those who wish to preserve traditional marriage might suggest that same-sex couples, instead, can find symbolism that does not dilute the established form. This is the point of trademark dilution laws. From the standpoint of symbolism, Exxon would have no complaint related to dilution if producers of unrelated goods and services avoided putting the symbol “Exxon” on their wares—if they instead generated their own symbolism. For example, if skateboards are stamped with the label “FlyFast” instead of “Exxon,” if soft drinks are labeled “Coca-Cola” or “Pepsi,” and if an internet search engine calls itself “Google,” the dilution issue does not arise. Exxon Corporation can legitimately expect that makers of unrelated goods and services will invent their own symbols, rather

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80. William Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale Law School, Seegers Lecture at Valparaiso University School of Law: Six Myths that Confuse the Same-Sex Marriage Debate (Nov. 18, 2010).

81. For example, if future data were to demonstrate that gays and lesbians did a superior job (or an inferior job, for that matter) of raising children, advocates in the same-sex marriage debate (or their opponents) could be expected to have some success in arguing on the basis of these hypothetical data. On the other hand, some of the myths seem hard to defend, such as an insistence on judicial activism rather than legislation. This Article is premised on the conclusion that this proposition is a myth.

82. See *supra* note 5 (citing articles opposing same-sex marriage).

83. See *supra* notes 56–61 (analyzing data that might support the opposite conclusion and arguing that inferences are difficult to draw with much confidence).

than borrowing and diluting the symbolism that Exxon Corporation has built up over many years.

Same-sex couples did not create the symbolism of traditional marriage that their advocates wish to claim. The United States did not create it. It was created over many millennia by heterosexual couples in various societies. Advocates of traditional marriage, therefore, might take a position parallel to that of Exxon Corporation opposing the arrogation of its symbol, by asserting that people proposing a new and different sexual arrangement promulgate their own, new symbolism, rather than dilute the established trademark of traditional marriage.

William C. Duncan's observation is pertinent here, to the effect that same-sex marriage advocates wish to appropriate the "immense social capital of the marriage institution"<sup>84</sup> rather than generate a symbol that will not dilute that institution. This observation describes the opposing claims of some same-sex marriage advocates, to the effect that different "nomenclature" can "never be equal."<sup>85</sup> This is a question distinct from that of rights and benefits, which can be recognized or created by the State without the State having to dilute the symbolism of traditional marriage. In a way, this is what the label "civil union" is about: the provision of certain rights and benefits, which could be commensurate with the rights of traditional marriage, without diluting the terminology and symbolism of traditional marriage. Of course, the term "civil union" is hardly very poetic. It sounds antiseptic. That happenstance could be remedied if advocates for same-sex couples came up with a word more in keeping with the symbolism they think is appropriate. Perhaps the symbol "true union," as opposed to the mere union of an impermanently dating couple, would express the concept with more fitting symbolism.<sup>86</sup> But choosing the right symbolism is beyond the scope of this Article.

To give an example of much lesser importance, arrogation by a nonconsensual user of the persona of "Smokey Bear" or "Woodsy Owl" is illegal. In fact, the federal government has made this kind of use a crime.<sup>87</sup> These laws, like those against trademark dilution,

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84. See Duncan, *supra* note 46, at 930.

85. See, e.g., Cahill, *supra* note 2, at 1159.

86. Professor Musselman has proposed a different sort of two-tiered arrangement that might prevent dilution of traditional marriage symbolism while "narrowing" its availability. See Musselman, *supra* note 5.

87. See *Lighthawk, the Envtl. Air Force v. Robertson*, 812 F. Supp. 1095, 1097 (W.D. Wash. 1993) (interpreting 18 U.S.C. § 711 and 16 U.S.C. § 580p-4(a), which provide civil and criminal

suggest that there is a strong interest in keeping public symbols in undiluted form. Vendors of cartoons unlike Smokey or Woodsy have the ability to create their own separate symbols, without diluting symbols that have been created by others for different purposes. And if this is true of Smokey and Woodsy, how much more important is it for government to avoid choices that dilute the “immense social capital” of the fundamental institution of society that we know as traditional marriage? In summary, perhaps the strongest argument against government application of the marriage symbolism to a nontraditional form, given the likelihood of its dilution of the established symbolism, is that advocates of what many people consider to be a different relationship can adopt a different symbolism, a word that does not have that diluting effect. This argument is not dispositive without consideration of the interests on the other side,<sup>88</sup> but it is a consideration with considerable weight.

B. *Arguments Against the Dilution Argument*

1. *Is the Dilution Argument Addressed Effectively by Arguments About Separate-but-Equal Arrangements, Fear, Homophobia, Tradition, Government Monopoly, and the Like?*

One commentator maintains that at least some arguments against same-sex marriage are based on “fear.”<sup>89</sup> According to the same commentator, “all” of the arguments also reflect the assumption that “homosexuality is ‘bad.’”<sup>90</sup> Although this commentator’s article is cogent about some other issues, these contentions are overstatements. There are some arguments about same-sex marriage that are vulnerable to these criticisms, and there may be some cognizable arguments against the dilution theory, but charges about fear and homophobia do not supply them. The “fear” and “homophobia” arguments do not answer the dilution argument, and advocates for same-sex marriage should not resort to them in this context.

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remedies against use of “Smokey Bear’s” character or name, which are “property of the United States”). 18 U.S.C. § 711a and 16 U.S.C. § 580p-4(b) also protect Woodsy Owl.

88. See *supra* note 78 (citing commentary that supports same-sex marriage on ground of “widespread psychological and social harm” allegedly suffered by persons “denied the right to marry”).

89. Ben Schuman, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2121 (2008). See also Poirer, *supra* note 27, at 1425 (similar).

90. See Schuman, *supra* note 89, at 2121 (emphasis omitted).

Consider the Exxon example above, involving various hypothetical firms' uses of the "Exxon" symbol to furnish trademarks for skateboards, soft drinks, and internet search engines.<sup>91</sup> Exxon does not need to "fear" these products, or the firms that supply them, to be concerned about the resulting effect upon its symbolism. Instead, Exxon should be concerned about the dilution of the easily understood mark upon which it has built its goodwill. Nor does Exxon's position about its symbol need to involve any sort of judgment that skateboards are "bad," or that soft drinks are "bad," or that internet search engines are "bad," for Exxon to be concerned about preventing dilution of the "immense social capital" that it has put into its mark. The argument against dilution of the marriage symbol is parallel to this example. Thus, a couple that might consider marriage need not "fear" anyone before feeling that the marriage symbol should not be diluted by extension of its coverage to a different arrangement. The concept of marriage could be diluted in their eyes in numerous ways, in fact: if the label were applied to deliberately impermanent arrangements, for example, and not merely if it were applied to same-sex couples. Similarly, the traditional couple does not need to form the opinion that "homosexuality is bad" to decide that dilution of the marriage symbolism is undesirable. The fear and homophobia charges are ad hominem attacks that should not be taken seriously, at least if they are leveled at the dilution concern, which is an issue entirely apart from those arguments.

On the other hand, there have, actually, been arguments that have depended upon generalizations about same-sex couples, and some of these arguments are indeed vulnerable to the argument that they represent invidious assumptions that the State cannot permissibly indulge.<sup>92</sup> Other arguments extend alleged characteristics of some people to other people. For example, it has been argued that same-sex relationships should not qualify for marriage because they statistically involve a greater incidence of infidelity and less permanence than traditional marriages.<sup>93</sup> These characteristics probably vary from community to community, and we cannot know whether the practice

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91. See *supra* Part II.A.2.

92. An example of an assumption that would be an improper basis for government's prohibiting or permitting same-sex marriage is the beliefs of many people that homosexuality is (or is not) "sinful." See Schuman, *supra* note 89, at 2113 (illustrating these kinds of arguments).

93. See generally Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOC. ISSUES, no. 3, 1996 at 30-32 (referencing the criminalization of sodomy in many states based largely on moral views about such conduct).

of infidelity among heterosexual couples could exceed that among same-sex couples in some locations. In any event, we would be unlikely to deny a traditional marriage license on the ground that one applicant happened to fit the profile of a likely adulterer, and the argument seems weak in the context of same-sex marriage too. The statistics about same-sex infidelity are cause for concern (as is the incidence of infidelity in traditional marriage), and they may conceivably be a basis for some kinds of policy, but it seems inappropriate to impute their meaning to particular couples about the marriage question.<sup>94</sup> Still, even though they may describe some kinds of arguments, the fear and homophobia claims do not provide an answer to the dilution problem.

Other commentators have taken positions that depend upon the implicit assumption that consensual sexual relationships, and same-sex relationships in particular, are so completely identical to relationships underlying traditional marriage that different words cannot permissibly be used to describe them. Thus, one commentator argues that because of what it is called, a civil union regime is a “separate but equal” arrangement if it coexists with traditional marriage, even if the same rights and benefits are applied to each; and furthermore, the same commentator maintains that it is “universally accepted” that “separate can never be equal.”<sup>95</sup> In the first place, the premise is simply wrong. Although separate but equal cannot morally or legally be applied in some contexts, such as that of race,<sup>96</sup> it is applied with justification in some gender-related contexts. For example, although Title IX requires equal treatment of men’s and women’s college sports,<sup>97</sup> it does not require that men be allowed to compete on the women’s soccer team, and there would be serious practical problems if it did.<sup>98</sup> In other words, the claimed “universal”

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94. See Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127, 192 (2008) (arguing that although infidelity and instability are greater in same-sex relationships, same-sex marriage would be a positive development because it would promote fidelity). Although we cannot know whether it has any truth to it, this particular argument of Professor Redding’s may represent the triumph of hope over reason.

95. Bennett Klein & Daniel Redman, *From Separate to Equal: Litigating Marriage Equality in a Civil Union State*, 41 CONN. L. REV. 1381, 1384 (2009). Klein and Redman’s article is part of a group of commentary in the Connecticut Law Review that contains five articles fully favoring same-sex marriage, but strangely, none at all on the other side of the issue.

96. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding applied “in the field of public education” where race was concerned).

97. 20 U.S.C. § 1681(a) (2010).

98. See 34 C.F.R. § 106.41(b) (2007) (allowing schools to operate separate teams for men and women and exclude a person from a “contact” sport designated for the other gender). If this

principle does not exist. In the second place, the argument assumes, without proving, that this degree of precise equality—about terminology, not about rights and benefits—is mandated morally or legally, and as has been indicated above, this is the threshold question.<sup>99</sup> Similarly, another commentator claims that same-sex marriage, including the nomenclature, is required because marriage is a “government monopoly.”<sup>100</sup> In the first place, one might just as well say that marriage is private activity that merely is regulated by the government, especially since marriage long predated the establishment of the United States government, and since it involves major spheres of private choice about how it is contracted and conducted. The government does not tell private individuals who conduct marriage ceremonies how to do them, it does not mandate the roles or activities of husbands and wives, and although it requires a license that depends upon minimal qualifications, the same thing can be said about driving a car—and it would seem odd to say that there is a “government monopoly” on driving cars. In the second place, the argument, once again, assumes the conclusion: that equality and nondiscrimination require identical labels, regardless of whether identical rights and benefits are recognized by government.<sup>101</sup>

Then, too, denunciations of tradition are an argument for some commentators. It is true that long adherence to an unacceptable practice is not a reason for continuing it.<sup>102</sup> But the significance of the symbolism of traditional marriage does not depend upon the length of its pedigree alone. It has proved to support an extraordinarily valuable social institution, and it depends heavily upon the strength of couples’ attraction to it—to the “mystery” of marriage.<sup>103</sup> Again, the Exxon example is pertinent here. The “Exxon” symbol is valuable not merely because it has been used for a long time, but also because it has built public identification with a large complex of experiences with products and services offered by Exxon. That is why it should be protected against dilution.<sup>104</sup> If traditional marriage had ceased

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kind of separation were not possible, a school might see its “women’s” soccer or hockey team dominated by males, defeating the goal of expanding sports opportunities for women.

99. See *supra* Part I.B.

100. Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1411–16 (2009). See *supra* note 95, concerning the one-sidedness of this law review and treatment of the issue.

101. See *supra* Part I.B.

102. See Goldberg, *supra* note 100, at 1406–09.

103. See *supra* Part II.A. See also Collett, *supra* note 5, at 1262 (describing the “mystery of marriage”).

104. See *supra* Part II.A.2.

to be a valuable institution, or if its disadvantages somehow were exposed as having greater weight than its advantages, that would be another matter. Its long pedigree alone should not preserve it, then. But until then, there is an argument that dilution of traditional marriage would be harmful, just as dilution of the “Exxon” mark would be harmful.

Again, this does not mean that same-sex marriage advocates have no arguments. It means that some kinds of arguments, such as the ones critiqued here, are dubious. They do not address the dilution argument, and they are not good reasons for changing the nomenclature of traditional marriage to include same-sex marriage. The valid arguments, in this regard, could include at least two. First, same-sex marriage advocates could make the argument that traditional marriage would not be seriously diluted by extension of its symbolism to same-sex relationships. Second, they could make the argument that, even if there is dilution of traditional marriage, the desirability of applying the same nomenclature to same-sex and traditional couples is so great that it outweighs the concern about dilution. Either proposition is probably difficult to prove or to disprove, although one or the other, or their opposites, may be provable some day.<sup>105</sup> Until then, the balance is a matter of individual and political inference, and it is beyond the scope of this Article.

## 2. *The “Approbation” Argument and Its Difference from the Dilution Concern*

Judge Posner has observed that same-sex advocates seem to seek the approbation of the state for same-sex marriages.<sup>106</sup> Opposition to this tendering of approval may be seen as supporting some arguments against same-sex marriage, even if one concludes that the State extends approval to traditional marriages.<sup>107</sup> Judge Posner adds that all these advocates may be able to achieve is neutrality or “noninterference” from most states, as opposed to a state “stamp of

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105. Perhaps the existence of same-sex marriages in some states will provide data for comparative study. Even then, definitive proof may be impossible. *Cf. infra* Part III.E. (arguing that some issues of government or politics remain unprovable despite statistics, using the example of the deterrence controversy in death-penalty literature).

106. RICHARD A. POSNER, *SEX AND REASON* 309–11 (1992). *Cf.* Stanley E. Cox, *Nine Questions About Same-Sex Marriage Conflicts*, 40 *NEW ENG. L. REV.* 361, 368–71 (2006) (explaining the approbation theory and showing how it has been used to support same-sex marriage).

107. *See* Schuman, *supra* note 89, at 2115–16.

approval" for same-sex relationships.<sup>108</sup> As a political prediction, this evaluation of the case for approbation seems correct in most states,<sup>109</sup> at least for today.

On the other hand, as an argument against same-sex marriage, opposition to approbation should be distinguished from the dilution argument. Rightly or wrongly, opposition to approbation may arguably invite the criticism that is set out in the preceding section: the argument, that is, that it labels same-sex relationships invidiously.<sup>110</sup> A withholding of state approbation for same-sex relationships, when approbation is given to traditional relationships, may appear to some people to be based on an unjustified condemnation of the people involved in same-sex marriage.<sup>111</sup> The dilution argument lessens this problem, as is shown in the preceding section. It seeks to avoid harm to traditional marriage, not to treat relationships with different degrees of approval. It provides a more nearly neutral reason for withholding the marriage label from same-sex relationships.

Is the approbation argument really invidious? Perhaps not. The State does very little, when one thinks about it, to express "approbation" for traditional marriage, either. The State licenses and regulates the traditional marriage relationship. It defines property interests before, during, and after marriage. It can do the same for civil unions. In fact, government treats traditional marriage unfavorably in some respects. For example, the taxation of married people includes a "marriage penalty" that is imposed upon many two-income traditionally married couples.<sup>112</sup> Ironically, same-sex unions with similar incomes would not create this disadvantage. In fact, one commentator describes "the unintended tax advantages" of same-sex unions.<sup>113</sup> Perhaps the approbation argument is not invidious under this reasoning. But the issue remains complex, and opposition to approbation does not furnish as neutral an obstacle to same-sex marriage as the dilution argument does, simply because the dilution concern can be expressed entirely separately from any approval or disapproval.

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108. See POSNER, *supra* note 106, at 311. See also Adam J. MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 BYU J. PUB. L. 1 (2008) (making the case for neutrality).

109. See *supra* note 4 (indicating that most states prohibit same-sex marriage).

110. See *supra* notes 74–75 and accompanying text.

111. See *supra* notes 74–75 and accompanying text.

112. See generally Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008) (explaining this effect).

113. See *id.*

3. *The “Sedimentation” Theory and Its Inadequacy to Address the Dilution Problem*

In a related analysis, two commentators maintain that all arguments against same-sex marriage fall into three categories. First, they claim, there is the definitional argument, to the effect that marriage confined to heterosexuals is “the way it’s always been”; second, they describe the stamp-of-approval argument, which says the government should refrain from endorsing same-sex marriage; and third, they identify the defense-of-marriage argument, founded on a theory that same-sex unions will undermine the sanctity of traditional marriage.<sup>114</sup> Professor Eskridge takes the argument further and maintains that the three arguments are “sedimented,” meaning that each is built upon the one before it.<sup>115</sup> The implication is that the three arguments collapse into the simplistic definitional “that’s the way it’s always been” argument, so that the case against same-sex marriage becomes circular and illogical.<sup>116</sup>

Although Professor Eskridge’s “sedimentation” theory is more complex<sup>117</sup> than other arguments for same-sex marriage, it fails just as clearly to address the dilution problem. Again, consider the Exxon example. The reason that Exxon’s symbol should not be put on other, different, products has little to do with “the way it’s always been.” The reason is that placing the symbol on different products would blur the meaning of the symbol and decrease its value. Similarly, the idea that extending the symbolism of marriage to same-sex couples would dilute its meaning is not built upon an assumption that “that’s the way it’s always been,” nor does it depend upon the withholding of a stamp of approval. Instead, it is a reason for not confusing or blurring the “immense social capital” inherent in the trademark, the symbol, and the mystery of marriage.

Again, advocates can make at least two other arguments than these for same-sex marriage. They can argue that there would be no dilution of marriage. Or they can argue that whatever dilution might occur would be outweighed by what are claimed to be the positive values of same-sex marriage. Many legislators may expect to see

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114. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE* 20–31 (2006).

115. *Id.* at 21–29.

116. See CRUMP, *supra* note 62, at 36–37 (explaining the fallacy of circularity).

117. Complex is not necessarily good. See *id.* at 307 (describing “Occam’s razor,” or the view that the theory with the fewest elements is preferable over others that fit reality equally well).

these issues addressed directly, and they may be reluctant to authorize same-sex marriage unless they are persuasively treated.

### III. OTHER ARGUMENTS AGAINST SAME-SEX MARRIAGE

This Article will conclude, below, that the dilution problem provides the weightiest argument against same-sex marriage. What follows in this section is a description of what might be called “some lesser arguments.” At least one of these arguments, namely the concern about interference by same-sex marriage legislation with the free exercise of religion, could be substantial unless it were addressed by an exception broad enough to exempt conduct resulting from a bona fide religious motivation. Assuming, however, that such an exception can be created, each of the following arguments seems less persuasive than the dilution argument expressed above.

#### A. *Government Arrogation and Use of Religious Symbolism for Secular Ends*

Beyond effects on traditional marriage, there are other arguments against same-sex marriage, including arguments against government use of religious symbols. The prohibition upon establishment of religion in the First Amendment has been described as serving several discrete purposes. For example, it is designed to prevent the State from coercing individuals to adhere to a particular religion.<sup>118</sup> It disallows the taxation of nonbelievers for the purpose of advancing a religion with which they do not agree.<sup>119</sup> And more to the point here, it serves the purpose of protecting religious symbols. One of the foundations of the prohibition upon establishment of religion—the purpose most relevant here—is a concern about preventing government from appropriating sacred religious methods and symbols for government purposes.<sup>120</sup> Thus, James Madison condemned governmental practices of “employ[ing] Religion as an

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118. *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (documenting that establishment, historically, involved “coercion of religious orthodoxy”).

119. *Id.*

120. *E.g.*, *Van Orden*, 545 U.S. at 737, 742 (Souter, J., dissenting) (applying same reasoning to sacred religious symbol used by government on claimed ground that it did not “manifest a secular purpose”); *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (striking down posting of Ten Commandments as a moral exercise in the classroom).

engine of Civil policy.”<sup>121</sup> It seems unlikely that extending traditional marriage symbolism to same-sex couples, even by order of the state, would offend the Constitution,<sup>122</sup> and that is not the point. The point is that some of the same concerns are raised by this issue, which deals with governmental appropriation of symbolism heavily influenced by religious origins and meanings. The concern of the Constitution and the parallel argument raised here resemble the dilution argument described above, but in this section, the object is protecting religious symbolism from dilution by uses ordered by government.

Again, traditional marriage was not conceived or developed by same-sex couples, nor was it invented in the United States. It has existed since time immemorial,<sup>123</sup> and its symbolism has been intertwined with religious symbolism throughout much of recorded history.<sup>124</sup> For example, our concept of permanence in marriage, our idea of duties of each spouse to care for the other, and even our institutions of divorce and annulment, are all heavily influenced by religious traditions.<sup>125</sup> The ceremonial incantation of “till death do you part” (or “so long as you both shall live”), and Biblical injunctions against mortals’ act of “putting asunder” a relationship that God has created, are symbols that relate closely to our laws that prevent marriage from being terminated except in limited ways.<sup>126</sup> Legal duties to care for the spouse in need, in sickness, or in case of injury<sup>127</sup> are related to the religious tradition: “for richer or for poorer.” Divorce or its equivalent was available under limited circumstances in the medieval church, and, at the time of Henry VIII, newly minted religious concepts of divorce were a reason for the founding of the

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121. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 187 (Gaillard Hunt ed., 1901), cited in *Van Orden*, 545 U.S. at 737.

122. For example, the government has considerable authority to “accommodate” religion by recognition of religious symbols, as well as to use them in ways that reflect secular purposes. *Van Orden*, 545 U.S. at 687–92; *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

123. See *supra* note 48 and accompanying text.

124. The influence of religious institutions has grown and shrunk. The Bible prescribed many aspects of marriage, including permanence and monogamy. *The History of Marriage in Western Civilization*, MAGNUS HIRSCHFELD ARCHIVE FOR SEXOLOGY, [http://www2.huberlin.de/sexology/ATLAS\\_EN/html/history\\_of\\_marriage\\_in\\_western\\_html](http://www2.huberlin.de/sexology/ATLAS_EN/html/history_of_marriage_in_western_html) (last visited May. 12, 2011). In medieval Europe, for example, “marriage came more and more under the influence of the church.” *Id.* Although the Protestant reformation tended to secularize marriage, the Church resisted this trend. *Id.*

125. See *supra* note 124 and authority cited therein.

126. See *supra* note 124 and authority cited therein.

127. See WAYNE R. LAFAYE, CRIMINAL LAW § 6.2(a)(1) (5th ed. 2010) (explaining legal duty of spouses to care for each other).

Church of England.<sup>128</sup> In summary, much of the symbolism of marriage is religious in origin. Again, these are not constitutional arguments, or at least they probably are not successful ones. They could, however, be asserted as legislative arguments.

Traditional marriage is “perhaps the primary example of a mediating institution providing meaning and purpose apart from state purposes, shielding individuals from the otherwise all-powerful state.”<sup>129</sup> It is founded on a rejection of the idea that all sexual relationships are essentially alike and deserving of the government’s endorsement by identical symbolism.<sup>130</sup> Traditional marriage exists in contrast to a “statist, adult-centered institution,” and it is a “pre-political” concept.<sup>131</sup> If government were to appropriate what many people believe to be the sacred and religiously founded symbolism of marriage and extend it for secular purposes to an institution that is fundamentally nonreligious, it would, in the eyes of some people, appropriate and reduce religious symbolism for government purposes. It would contravene one of the distinct reasons for disfavoring government establishment of religion. Or so some advocates of traditional marriage would argue.

Again, the assumption of this Article is that civil unions or other appropriately named institutions could extend identical rights and benefits to same-sex couples, so that the argument for same-sex marriage is about symbolism. And again, the argument is not about unconstitutionality. It is instead about the wisdom or unwisdom of governmental use of what can be seen as religiously ordered symbolism for government’s purposes. And again, the argument perhaps is not dispositive until it is compared to arguments from the opposing viewpoint, although that comparison is beyond the scope of this Article.

Ultimately, in its conclusion, this Article will assert that this argument—the argument from government usage of religious symbols—is not particularly persuasive.

#### B. *Incursions upon Freedom of Religious Exercise*

The issue of same-sex laws that impinge upon religious exercise has been thoroughly explored in the literature, and therefore, just

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128. See *supra* note 124 and authority cited therein.

129. Duncan, *supra* note 46, at 930.

130. See *id.*

131. See *id.*

a few examples may suffice to illustrate the argument. In Great Britain, adoption agencies affiliated with the Catholic Church face a dilemma because a 2007 law forbids distinctions based upon sexual orientation.<sup>132</sup> A Catholic organization that might help bring about gay adoptions would be assisting the advancement of a social arrangement that the Church considers immoral—and indeed sinful, at least if the orientation produces conduct in conformity with it. In the United States, the issue is even more closely intertwined with same-sex marriage. In 2006, Catholic Charities of Boston agonized about compliance with antidiscrimination laws as they applied to the State's authorization of same-sex marriage. The then head of Catholic Charities was the Rev. J. Brian Hehir, a professor at Harvard's Kennedy School of Government.<sup>133</sup> He explained that the Catholic Church's position was that "gay men and women ought to have their civil rights protected. I think on the whole we've pretty much stood for that in terms of wages, jobs, access to living accommodations."<sup>134</sup> But the sticking point for the Church, he explained, "is the definition of marriage."<sup>135</sup>

The issue became acute when Massachusetts ordered Catholic Charities to place children equally with same-sex couples, thus requiring Catholic Charities to choose between discontinuing its important work and aiding behavior that it considered sinful.<sup>136</sup> The trouble is, although many children seeking adoption are easy to place, Catholic Charities of Massachusetts was highly effective at the most-needed adoptive task: placing unruly disabled and older children for whom it was difficult to provide homes.<sup>137</sup> For Hehir and Archbishop Sean O'Malley, there was no choice. They closed the adoption agency.

The same reasoning that produced this result would lead to a dilemma for the Church about performing same-sex marriages. Would the Church actually face litigation that would require it to participate in such an act, in spite of its religiously based opposition to the idea? The answer, probably, is yes. Under the assumption that

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132. See Lisa Miller, *The Sins of the Fathers: Raising Kids in a Same-Sex Union*, NEWSWEEK, June 22, 2009, at 32.

133. *Id.*

134. *Id.*

135. *Id.*

136. George W. Dent, *The Growing Clash Between Religious Freedom and the Gay Movement*, ENGAGE, July 2009, at 8, available at [http://www.fed-soc.org/doclib/20090720\\_DentEngage102.pdf](http://www.fed-soc.org/doclib/20090720_DentEngage102.pdf).

137. *Id.*

what the battle is about is symbolism, and that, as Rev. Hehir says, other civil entitlements can be furnished to same-sex individuals and couples, there easily could be individuals who would assert the right, under antidiscrimination laws, to be married in the Church. Would the Constitution not protect the Church's free exercise of religion in refusing to undertake an act that violates its core principles? No, because a law that is not targeted at religious exercise is generally constitutional even if it impinges upon religion.<sup>138</sup> The argument of same-sex-marriage advocates, then, would be that the antidiscrimination law is not aimed specifically at religious ceremonies of marriage, and it is generally applicable.

Would any couple actually wish to be married by an institution that so opposes their union? Consider the situation of Gregory Macguire, who wrote the novel *Wicked*, and who is legally married to a same-sex partner.<sup>139</sup> He has had all three of his adopted children baptized in the Catholic Church. "As the daughter of two dads," Macguire said proudly, his youngest child "sat in the first pew in her beautiful, white, borrowed gown" to take her first communion.<sup>140</sup> The Church's position is that any child is entitled to baptism if the parents consent and if there is a reasonable hope of a Catholic upbringing. Whether that condition is met has divided theologians, when a same-sex couple is the upbringer. Mr. Macguire considers himself to be a thoroughly committed Catholic, which many would find to his credit, but whether the Church should be required under antidiscrimination legislation to conduct such ceremonies, and in particular, whether it should be required to perform a ceremony of marriage that offends its tenets so fundamentally, is a different question.

This issue of religious exercise is raised automatically by a same-sex marriage law. It is intensified by a broad law against distinctions based upon sexual preference. One arguable way to resolve it is to legislate an exception for religious exercise. The trouble is, such an exception would be difficult to write in a satisfactory manner. If it were written as a protection only of "religious exercise," for example, it might excuse the Church from sinfully performing such sacraments as holy communion, but would it protect a refusal to perform adoption services or marriages, which have secular purposes intermixed with their religious characteristics? The result would be to

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138. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990) (holding that a generally applicable law furthering secular purposes can constitutionally be applied to prevent religious observances).

139. See Miller, *supra* note 132, at 32.

140. *Id.*

throw these kinds of questions to courts that have little legal guidance in making such decisions.

Alternatively, a much broader exception could be written to protect an action “motivated by” religious conviction. In other words, conduct of any kind—not just the performance of religious ceremonies—would be excepted from antidiscrimination laws if the impulse behind it were religious. That kind of law might sweep too broadly and protect actions that no one wants to sanction. Besides, if the issue really is about symbolism, would same-sex-marriage advocates be content with this kind of exception? But here is the dilemma. A law protecting religious “ceremonies” would be too limited to allow Catholic Charities to continue arranging adoptions, assuming that adoption is not a religious ceremony. Only an exception applying to religiously-motivated conduct of any kind would protect the beneficial activity of Catholic Charities in arranging adoptions.

Ultimately, in its conclusion, this Article posits that this argument—the religious exercise argument—raises significant problems for legalization of same-sex marriage, but that if it can be resolved in a way that protects religiously-motivated activity, it becomes a lesser argument.

C. *Slippery-Slope Effects: Does the Same Principle that Assertedly Supports Same-Sex Marriage Require Extension to Other Sexually-Oriented Combinations?*

A “slippery-slope” argument is an argument that is made to prevent a law or custom from coming into being, not because it itself is objectionable, but because it may lead to other laws or customs that are objectionable.<sup>141</sup> For example, if gun-rights advocates sometimes may appear to oppose even seemingly sensible regulation of weapons that have little potential for legitimate use, they may do so, arguably, to prevent extension of those kinds of regulations to weapons that, they believe, do have potential for legitimate use.<sup>142</sup> Similarly, if abortion-rights advocates oppose prohibitions of rare abortions that

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141. The most influential writer about slippery slopes is Professor Eugene Volokh. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003) (cataloguing different kinds of slippery slopes, along with their mechanisms and consequences).

142. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1460 & n.66 (2009) (raising slippery-slope concerns about “less-than-substantial” gun regulations that might “aggregate”).

are particularly and spectacularly gruesome in the eyes of their opponents, they may be doing so, in part, to prevent the extension of these prohibitions to other types of abortions that are of greater concern to them.<sup>143</sup>

The slippery-slope argument can be made with reference to same-sex marriage, although whether the argument has any effect remains debatable.<sup>144</sup> This Article has already noted the issue hypothetically raised by a sincere, loving polygamist triad.<sup>145</sup> And it could, for that matter, be raised by multiple combinations that go far beyond triads. It may be that, in their hearts, all right-thinking people think they know that there is a difference between same-sex marriage and polygamy;<sup>146</sup> but whether it is a difference that makes a difference is a different question.<sup>147</sup> The simplistic argument about “equality” or “discrimination” can be used by the sincere, loving polygamist.<sup>148</sup> The argument that polygamy can be harmful to children, and that it therefore differs from same-sex marriage, is there to be made; but many people believe that this argument applies also to same-sex couples.<sup>149</sup> Legal distinctions based upon this argument are suspect. A significant example is provided by the efforts of the State of Texas to remove hundreds of children from a polygamist community. The state supreme court rejected these efforts in the absence of concrete proof of harm to the individual child. Attribution of harm from a particular type of family or community was not enough.<sup>150</sup>

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143. See Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 29–31 & n.152 (2008) (acknowledging slippery-slope aspects of abortion-related issues).

144. There have been several articles that have raised the subject. Ben Schuman describes the controversy as involving claims that the slippery-slope argument is a “red herring,” opposing arguments that the slippery-slope possibility is “real,” and his own conclusion that the “truth is probably somewhere in between,” although he himself concludes that the slippery-slope contention “operate[s] on fear.” Schuman, *supra* note 89, at 2120–21.

145. See *supra* text accompanying notes 43–44.

146. “Much has been written distinguishing same-sex marriage from polygamy. . . . Some have even suggested that even if same-sex marriage . . . lead[s] to . . . polygamy, that is not necessarily a bad thing.” Schuman, *supra* note 89, at 2120. But “there may be a connection . . . and . . . the recognition of same-sex marriages may open up a new legal avenue for polygamists to use.” Schuman concludes, however, “[T]hat does not end the debate. Polygamy is a separate issue that will require its own debate when the time comes.” *Id.*

147. Cf. *supra* note 44 (reflecting argument that polygamy is a separate issue but deferring discussion of why it is separate).

148. See *supra* text accompanying notes 43–44.

149. See *infra* Part III.E.

150. *In re Tex. Dep’t of Family and Protective Servs.*, 255 S.W.3d 613, 615 (Tex. 2008). A more complete account of the case is contained in Elizabeth Durso Branch, *Family Law Year in Review*, 72 TEX. B.J. 98, 98–99 (2009).

One kind of slippery-slope argument should not be considered to have any weight, although it needs to be mentioned because it may be asserted. Pedophiles sometimes make the same sort of equal-rights argument that raises the slippery-slope concern. NAMBLA, the North American Man/Boy Love Association, even asserts that children have rights to be treated equally in choosing sexual relationships with adults.<sup>151</sup> This argument is easy to dispose of on the ground that sexual abuse of children is so much more likely to cause harm to the children than the activities of other heterosexual or same-sex unions that it is subject to scientific proof.<sup>152</sup> In other words, the argument probably will be made, but the concern it raises, if any, is entitled to no weight in the consideration of either traditional or same-sex unions.

D. *Interstate and International Effects: Will These Sovereigns Respect Each Other?*

Imagine that a same-sex couple is married in Massachusetts and then moves to another state, such as Texas, Virginia, or New Mexico. The latter states do not authorize same-sex marriages, and Texas law explicitly provides that a same-sex marriage “is contrary to the public policy of this state” and “is void in this state.”<sup>153</sup> Furthermore, the same Texas statute provides that no Texas agency may give effect to a public act of same-sex marriage contracted in Texas “or in any other jurisdiction.”<sup>154</sup> What then will be the effect of the interstate move upon the health insurance claims of the dependent member of the couple? In the case of traditional marriages, this issue has long been settled, except for rare situations such as marriages of first cousins, which can be contracted in some states but not in others. Even in those situations, a “rule of validation” generally holds that a traditional marriage in one state is recognized in another state if it is valid in the state where it was created.<sup>155</sup>

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151. NAMBLA’s stated goal is “to end the extreme oppression of men and boys in mutually consensual relationships by: building understanding and support for such relationships [and] educating the general public on the benevolent nature of man/boy love.” *An Introduction to NAMBLA, Who We Are*, <http://www.nambla.org/welcome.htm> (last visited May. 12, 2011).

152. See ALAN CARR, *THE HANDBOOK OF CHILD & ADOLESCENT CLINICAL PSYCHOLOGY* 804 (1999) (explaining harm to children).

153. TEX. FAM. CODE ANN. § 6.204 (West 2003).

154. *Id.*

155. This rule has also been applied in international cases. See *Ghassemi v. Ghassemi*, 998 So. 2d 731, 742 (La. Ct. App. 2008) (recognizing Iranian marriage because lawful in Iran, even if not in Louisiana, under statute applying the rule of validation).

The problem may be different in the case of same-sex marriage. Texas law seems to tell Texas institutions, directly and plainly, that a same-sex marriage contracted in Massachusetts is void, which presumably means that it is not to be recognized. The answer, then, is that the two putative spouses, although married in Massachusetts, are not married in Texas. But is that the answer? The Full Faith and Credit Clause<sup>156</sup> of the Constitution might be thought to require Texas to honor the marriage. On the other hand, the Full Faith and Credit Clause is subject to public policy exceptions,<sup>157</sup> which might enable Texas to carry out its democratically expressed policy and deny effect to the marriage.<sup>158</sup> Whether the marriage is valid, then, may depend upon the idiosyncratic social preferences of a judge. In fact, the state court decisions include some applying full faith and credit to sister-state same-sex marriages and some recognizing that it can be denied on public policy grounds.<sup>159</sup> Either way, a sovereign state (and some people) will see their claims about the law disrespected. If the judge orders Texas to recognize the marriage, that state's democratic preferences are frustrated, and people who oppose the extension of the marriage symbolism will be disappointed; but if the judge decides that Texas may deny the existence of the marriage, the policy of Massachusetts is frustrated, along with the preferences of the same-sex couple and their supporters.

All of this analysis assumes, of course, that there is no constitutional impediment to Texas's policy, which requires nonrecognition of same-sex marriages. If there is no constitutional impediment, it is at least theoretically desirable that each state be able to carry out the policies that its citizens choose. It may be that, some day in the future, there will be established legal principles that will resolve this problem. Until then, interstate effects will include clashes between the chosen approaches of disagreeing sovereignties.

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156. U.S. CONST. art. IV, § 1.

157. See *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 683 (N.Y. Sur. Ct. Apr. 9, 2009).

158. But the issue is still more complex. For example, one State's public policy may not enable it to refuse full faith and credit to judicial decrees in another state, no matter how strongly expressed the policy or how dramatic the clash. See *id.*

159. See *Embry v. Ryan*, 11 So. 3d 408, 410 (Fla. Dist. Ct. App. 2008) (holding that Florida must give full faith and credit to same-sex adoption decree in another state notwithstanding Florida's public policy against same-sex marriage); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 683 (N.Y. Sur. Ct. Apr. 9, 2009) (recognizing state's power to deny full faith and credit to same-sex marriage based on "clear legislative statements of public policy").

E. *The Unknown, Including Effects on Children*

The unfortunate fact is that we do not know the answers to some important questions about the effects of same-sex marriage. We may never know them. In this respect, the issue is similar to many others in law and government. We resolve these kinds of issues, generally, by inferences founded upon analogies and generalizations, which is to say, by inductive reasoning: the kind of thinking that cannot ultimately be proved definitively by logic.<sup>160</sup> The Supreme Court has faced similar kinds of issues, where arguments and empirical studies have left the most important conclusions in states of ambiguity. For example, there are many studies about whether the death penalty provides a deterrent to murder.<sup>161</sup> Some studies support the inference that there is a deterrent effect, while others support the opposite conclusion.<sup>162</sup> Perhaps the most interesting study is Isaac Ehrlich's use of regression analysis to produce a prediction that there is indeed a deterrent effect and that the first execution would deter eight murders. That would be powerful stuff, except for the unfortunate reality that the statistical noise in the data dwarfs the demonstrated deterrent effect, as Ehrlich himself explained.<sup>163</sup> With this observation, Ehrlich reduced his sophisticated and ingenious work to an academic exercise. And he left the deterrence question where it always had been: as a matter of inductive inference, for which we have little more than what we call common sense to go on. The most important questions of politics are of this character. And so it is with same-sex marriage.

It seems fair to infer that governmental appropriation of the marriage label and its affixation to same-sex couples might dilute the symbolism of marriage and reduce traditional marriage. The analogy to trademark dilution gives rise to the inference that there would be a similar dilution of the symbolism of marriage. The frequency today with which heterosexual couples choose cohabitation, when they probably would have engaged in traditional marriage in another era, shows how the institution waxes and wanes according to social

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160. See CRUMP, *supra* note 62, at 3–9 (explaining differences between inductive and deductive logic).

161. See *Gregg v. Georgia*, 428 U.S. 153, 184–85 & n.31 (1976).

162. See *id.* at 184–85 (describing “a great deal of debate,” with “inconclusive” results, and citing conflicting studies).

163. Jon K. Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976), (discussing Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975)).

conditions. The perception in many communities that same-sex unions are different from traditional marriages supports the inference that dilution would occur and would reduce resort to the institution even further. Many ill effects, not limited to impaired rates of procreation, would be likely to follow a decrease in traditional marriage.<sup>164</sup> Of course, the links in this chain of reasoning are inductive, which is to say that they are less than ironclad; but it seems reasonable, as a political position, to conclude that authorization of same-sex marriage could have a diluting effect upon traditional marriage.

What should be done to resolve a question that is in this condition of analytical difficulty? One possibility is to say that, if the proposition cannot be convincingly proven, it should be resolved by giving rights to the people who claim them. The answer is that this approach, if applied to every ambiguous proposition of politics, would give away the store. There are too many political questions of similar ambiguity for which it would make no sense to follow this simplistic formula. Another response that can be given to the chain of reasoning is that discouragement of traditional marriage by same-sex marriage is mere prejudice, if it is based upon the unpopularity of the latter institution.<sup>165</sup> And this argument might have some currency, if the argument were about differences in rights and benefits. But if the State provides equivalent rights and benefits, once again, the issue is merely about symbolism. And although positive symbols, like trademarks, are important, they claim their value precisely from peoples' attraction to them, which is to say, from the values people perceive that they symbolize. It seems dubious to claim that perceptions of a symbol like traditional marriage are nothing but prejudice, when it is precisely the public perception of the symbol—its symbolism—that gives it value in the first place.

A different argument, perhaps, against the chain of reasoning is that an enlightened citizenry might not have the same attitudes toward the symbolism of marriage. It may be that in a new tomorrow years from now, heterosexual couples who marry may accept same-sex couples as equivalent to them. Perhaps it is already happening, with new generations exhibiting greater tolerance of same-sex relationships than their forebears. And finally, there is the argument that the dilution argument just is not so in the first place. That is,

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164. See Wardle, *supra* note 49, at 490–97 (exhaustively cataloguing disadvantageous results of decreased marriage owing to policies of Russian government). See also *supra* Part II.A.1. (describing values of traditional marriage).

165. See *supra* Part II.B.1. (describing similar arguments).

there is the argument that same-sex marriage would not have a diluting effect upon traditional marriage. We do not know. Perhaps some day we will. Perhaps we will never know. Until then, the issue remains resolvable only in the same way as many important issues of politics or government: by inductive inferences that are not ironclad or certain.

What about children? It is possible to make the inference that a heterosexual child, raised by a same-sex couple, will have difficulties in life. Since heterosexuality is the more frequent condition, it makes sense to ask the question in this way. The literature, of course, contains contradictory contentions.<sup>166</sup> We do not have enough data to make a conclusion about that issue, either, except in the same way that we make the conclusion about discouragement of traditional marriage. Obviously, children are a major concern. If we were to infer that children of same-sex unions would be disadvantaged, that conclusion would furnish a strong case against same-sex marriage, or at least against same-sex parentage. Here, however, the inferences tumble against another, more unpleasant reality that already has been mentioned above: the inadequate numbers of foster and adoptive homes for the number of children needing parentage.<sup>167</sup> As is indicated above, I for one, have reached the conclusion that adoption or foster care by gay parents is appropriate policy, if only because it is preferable to the consequences of inadequate child placement. If there is a seeming paradox—my recognition that there are potential arguments against same-sex marriage, but acceptance of gay adoption—it is the compelling need for child placements that resolves the paradox and explains the difference in outcome.<sup>168</sup>

#### CONCLUSION

Some of the arguments contained in this compendium can be opposed more easily than others. For example, consider the argument that by extending marriage to same-sex couples, the government arrogates a religious symbol for secular purposes. There may be some truth to this argument, because the long interconnection of

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166. See Lynn Wardle, *The "Inner Lives" of Children in Lesbian Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511 (2006) (arguing that likely effects on children are negative); Cynthia G. Hawkins-Leon & Anesha Worthy, *10 Years Out of Step & Out of Line: Florida's Statutory Ban on "Lesbi-Gay Adoption" Violates the Adoption and Safe Families Act of 1997 (ASFA)*, 8 MD. L.J. RACE, RELIGION, GENDER & CLASS 71 (2008) (arguing the opposite).

167. See *supra* notes 50–54 and accompanying text.

168. *Id.*

marriage and religion in our traditions has created religious symbolism in marriage for many people, but the other truth is that marriage also has a secular side. It is possible for a traditional couple to contract their marriage completely outside any religious tradition, such as by appearing before a judge, and many married couples recognize no religious significance in their relationship at all. Perhaps the government-use-of-a-religious-symbol argument is there to be made in a legislative context, but it has less force than other arguments.

On the other hand, the argument that same-sex marriage will interfere with free exercise of religion is a more difficult contention to answer. There is no question that a law authorizing same-sex marriage can affect the rights and activities of religious people. In fact, this result already has occurred.<sup>169</sup> A provision that creates an exception for activities motivated by religious belief might go a considerable distance toward removing this problem. But other issues would remain. First, some advocates of same-sex marriage, perhaps many, might not be satisfied with this exception. They might wish to avoid what they would call discrimination even if practiced by religious people. Second, such an exception might require a great deal of adjudication to liquidate its precise meaning from case to case. Inevitably, there would be instances of effects that religious people would see as discrimination against religion. Nevertheless, if legislators can successfully craft an exception for conduct resulting from bona fide religious motivation, this argument will be weakened.

The slippery-slope allegation probably does not furnish a strong argument for opponents of same-sex marriage. If we assume, as this Article does, that there is discretion in the legislature to decide the question of same-sex marriage, then legislators probably have discretion to decide that polygamists are different from same-sex couples and can be denied the right to marry even if same-sex marriage is recognized. The reality may be that the true reason lies in the political effectiveness of same-sex advocates, which is greater than that of polygamists; but such is the legislative process. The distinction between same-sex couples and polygamists may be made on dubious grounds, and this circumstance sometimes can bring the law into disrepute, but the distinction can be made, and the slippery-slope argument is weaker as a result. The argument about interstate effects and derogation of sovereignty or of democratically-expressed policy is also there to be made, but perhaps the answer is that,

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169. See Part III.B. (giving examples).

assuming that the other arguments against same-sex marriage turn out to be unpersuasive, the interstate issues are no greater than those to be found in many other areas of the law.

The diluting effect upon traditional marriage that might result from same-sex marriage is probably the greatest concern among these different arguments. If the recognition of same-sex marriage were to cause a further decrease in the incidence of traditional marriage, many people would recognize this result as a major disadvantage. On the other hand, some people may say that this effect is merely the result of prejudice or bigotry on the part of some heterosexuals. That argument is much less forceful, however, if same-sex couples can be given similar rights and benefits to those enjoyed by traditionally married couples, because then the issue is solely about the symbolism of marriage. In other words, the issue, then, is about the feelings and emotions that traditional marriage symbolism creates in a couple, and it is less persuasive to criticize those feelings and emotions as bigoted or biased, because feelings and emotions are closely related to symbols and symbolism in the first place.

Same-sex marriage advocates have generated many arguments against their opponents' contentions, but most of the arguments do not address the dilution problem. A trademark holder does not act out of fear, disgust, or phobia when it opposes a diluting firm's use of its mark on another product, even a noncompeting one. Analogously, a traditional couple need not be motivated by fear, disgust or phobia to oppose the blurring of the marriage symbolism by its extension to a different relationship. The dilution problem is not answered by arguments against separate-but-equal racial classifications, and it is not based on the length of time that marriage has existed or on a conclusion that "that's the way it's always been." It is not an argument that depends upon the avoidance of a stamp of approval for any kind of relationship.

Then, there is the fact that we do not know with certainty that recognition of same-sex marriage will dilute and discourage traditional marriage. We also cannot be sure whether adverse effects may be produced, in fact, in children raised in the context of same-sex marriages. These are issues, like many others of politics and government, where numbers and statistics cannot provide clear answers, and the conclusion is to be found instead in inferences about incentives, motives, and human experience. There arguably is evidence supporting the inference that a diluting effect upon traditional marriage would result from extension of marriage symbolism to same-sex couples. This evidence can be seen in the opinions and

votes of large segments of the populace, and it seems rational for a legislator to infer the probability of a reduction in traditional marriage from this and other evidence. The trademark-dilution analogy represents a similar kind of inference: the conclusion, that is, that attachment of a symbol to a different thing dilutes its effect in symbolizing the thing to which it originally was attached. This argument, then—the possibility of adverse effects upon traditional marriage—is difficult to dismiss.

To come back to a point made at the beginning of this Article, however, this argument does not take account of the arguments on the other side. Same-sex marriage advocates will say that dilution will not occur. They also will argue that same-sex couples exhibit the same kinds of attachments that traditionally married couples do, and that these attachments, too, are worthy of encouragement. These advocates may say that the only symbol that fits their cause is the marriage label. This Article does not attempt to reconcile the clash between these two disparate arguments, which are created by different values in different people. Perhaps the answer is, once again, difficult to discern clearly, like the answer to many issues of politics and government, for which the conclusions are to be found not in numbers or statistics, but in human experience.