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# Marriage, Reason, and Religious Liberty: Much Ado About Sex, Nothing to Do with Race

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**Abstract**

*Whatever one's views of marriage and however the state defines it, there is no compelling state interest in forcing all citizens to facilitate, participate in, or celebrate a same-sex relationship as a marriage. Believing that marriage is the union of man and woman is a reasonable position held by many. Bans on interracial marriage, by contrast, were grossly unreasonable. Protecting religious liberty and the rights of conscience does not restrict anyone's freedom to enter into whatever romantic partnerships he or she wishes. Americans should remain free to speak and act in the public square based on their belief that marriage is the union of a man and woman without fear of government penalty. No one should demand that government coerce others into celebrating their relationships.*

Is opposition to same-sex marriage at all like opposition to interracial marriage? One refrain in debates over marriage policy is that laws designating marriage as exclusively the union of male and female are today's equivalent of bans on interracial marriage. Some further argue that protecting the freedom to speak and act publicly on the basis of a religious belief that marriage is the union of a man and woman amounts to the kind of laws that enforced race-based segregation.

These claims are wrong on several counts.

Whatever one believes about marriage and however government defines it, there is no compelling state interest in forcing every citizen to treat a same-sex relationship as a marriage when this would violate their religious or other conscientious beliefs. It is reasonable

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## Key Points

- Whatever one believes about marriage and however government defines it, there is no compelling state interest in forcing every citizen to treat a same-sex relationship as a marriage when this would violate their religious or other conscientious beliefs.
- It is reasonable for citizens to believe that marriage is the union of a man and woman. When citizens lead their lives and run their businesses in accord with this belief, they deny no one equality before the law.
- Bans on interracial marriage and Jim Crow laws denied the fundamental equality and dignity of all human beings, forcibly segregated citizens, and were based not on reason, but on prejudiced ideas about race.
- Protecting religious liberty does not restrict anyone's freedom to enter into whatever romantic partnerships he or she wishes, but no one should demand that government coerce others into celebrating their relationships.

for citizens to believe that marriage is the union of a man and woman. When citizens lead their lives and run their businesses in accord with this belief, they deny no one equality before the law. As a result, such beliefs and actions deserve protection against government coercion.

Great thinkers throughout human history—and from every political community up until the year 2000—thought it reasonable to view marriage as the union of male and female, husband and wife, mother and father. Indeed, support for marriage as the union of man and woman has been a near human universal. The argument over redefining marriage to include same-sex relationships is one over the nature of marriage. Same-sex marriage is the result of revisionism in historical reasoning about marriage.

Indeed, belief that marriage is a male–female union is shared by the Jewish, Christian, and Muslim traditions; by ancient Greek and Roman thinkers untouched by these religions; and by various Enlightenment philosophers.

Bans on interracial marriage and Jim Crow laws, by contrast, were aspects of a much larger insidious movement that denied the fundamental equality and dignity of all human beings and forcibly segregated citizens. When these interracial marriage bans first arose in the American colonies, they were inconsistent not only with the common law inherited from England, but also with the customs of prior world history, which had not banned interracial marriage.[1] These bans were based not on reason, but on prejudiced ideas about race that emerged in the modern period and that refused to regard all human beings as equal. This led to revisionist, unreasonable conclusions about marriage policy. Thinking that marriage has anything at all to do with race is unreasonable, and as a historical matter, few great thinkers ever suggested that it did.

Protecting religious liberty and the rights of conscience does not infringe on anyone's sexual freedoms. Those who believe that marriage is a male–female relationship and want to lead their lives accordingly deny no one equal protection of the law. While Americans are free to live as they choose, no one should demand that government coerce others into celebrating their relationships. All Americans should remain free to believe and act in the public square based on their belief that marriage is the union of a man and woman without fear of government penalty.

## Thinking of Marriage as the Union of Man and Woman Is Reasonable

It is reasonable for individuals and policy to affirm that marriage is the union of a man and a woman.[2] Belief that marriage is a male–female union is shared by the Jewish, Christian, and Muslim traditions; by ancient Greek and Roman thinkers untouched by these religions; and by various Enlightenment philosophers.[3] It is affirmed by canon, common, and civil law and by ancient Greek and Roman law.

The conclusion that marriage is the union of man and woman follows from a proper understanding of human nature. Rightly understood, marriage is a comprehensive union. It unites spouses at all levels of their being: hearts, minds, and bodies, where man and woman form a two-in-one-flesh union. It is based on the anthropological truth that men and women are distinct and complementary, on the biological fact that reproduction requires a man and a woman, and on the sociological reality that children benefit from having a mother and a father.[4]

1. See Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage, and American Law* (Chapel Hill: University of North Carolina Press, 2009), Kindle edition, locations 730–740, and Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000), Kindle edition, location 483.
2. This has the additional virtue of being true, as Sherif Girgis, Robert P. George, and I show in our book, *What Is Marriage?* but demonstrating this is not necessary for purposes of my argument here. See Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Books, 2012), http://whatismarriagebook.com/ (accessed March 12, 2014).
3. John Finnis, *Human Rights and Common Good: Collected Essays*, Vol. 3 (New York: Oxford University Press, 2011), pp. 315–388; John Witte Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2nd ed. (Louisville, KY: Westminster John Knox Press, 2012); and Scott Yenor, *Family Politics: The Idea of Marriage in Modern Political Thought* (Waco, TX: Baylor University Press, 2011).
4. See Ryan T. Anderson, "Marriage: What It Is, Why It Matters, and the Consequences of Redefining It," Heritage Foundation *Backgrounder* No. 2775, March 11, 2013, http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it.

Marriage is not just a personal relationship. It also serves a public purpose. Indeed, from the law's perspective, marriage exists to unite a man and a woman as husband and wife to be equipped to be mother and father to any children that their union produces. As the act that unites spouses can also create new life, marriage is especially apt for procreation and family life. Uniting spouses in these all-encompassing ways, marriage, calls for all-encompassing commitment: permanent and exclusive.[5]

Government recognizes marriage because this institution benefits society in a way that no other relationship does. Marriage is the institution that different cultures and societies across time and place developed to maximize the likelihood that a man would commit to a woman and that the two of them would then take responsibility for protecting, nurturing, and educating any children that they may create.

Far from having been devised as a pretext for excluding same-sex relationships—as some now charge—marriage as the union of husband and wife arose in many places over several centuries entirely independent of and well before any debates about same-sex relationships. Indeed, it arose in cultures that had no concept of sexual orientation and in some that fully accepted homoeroticism and even took it for granted.[6]

## Race Has Nothing to Do with the Nature of Marriage

Searching the writings of Plato and Aristotle, Augustine and Aquinas, Maimonides and Al-Farabi, Luther and Calvin, Locke and Kant, Gandhi and Martin Luther King Jr., one finds that the sexual union of male and female goes to the heart of their reflections on marriage but that considerations of race with respect to marriage never appear.[7] Only late in human history does one see political communities prohibiting intermarriage on the basis of race. Bans on interracial marriage had nothing to do with the nature of marriage and everything to do with denying dignity and equality before the law.

Colonial America stands out for its bans on interracial marriage. Commenting on these prohibitions, Harvard University history professor Nancy Cott argues:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class.... But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations.[8]

Laws banning interracial marriage were virtually unique to America. Professor David Upham points out: "As one jurist explained in 1883 ... '[m]arriage is a natural right into which the question of color does not enter except as an individual preference expressed by the parties to the marriage. It is so recognized by the laws of all nations except our own.'"[9]

The natural right of marriage, without race imposed onto it, was recognized as such by all other nations because, as Irving Tragen noted back in 1944, "at common law there was no ban on interracial marriage."[10] Professor Francis Beckwith explains:

5. See Girgis et al., *What Is Marriage?*
6. Finnis, *Human Rights and Common Good*, pp. 315–388.
7. Ibid.; Witte, *From Sacrament to Contract*; and Yenor, *Family Politics*.
8. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000), Kindle edition, location 483.
9. David R. Upham, "Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause," working paper, p. 15, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2240046 (accessed March 12, 2014), citing Gordon A. Stewart, "Our Marriage and Divorce Laws," *The Popular Science Monthly*, Vol. 23 (1883), pp. 224 and 234, http://en.wikisource.org/wiki/Popular_Science_Monthly/Volume_23/June_1883/Our_Marriage_and_Divorce_Laws_I (accessed March 12, 2014).
10. Irving G. Tragen, "Statutory Prohibitions Against Interracial Marriage," *California Law Review*, Vol. 32, No. 3 (September 1944), pp. 269, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3614&context=californialawreview (accessed March 12, 2014). See also Francis Beckwith, "Interracial Marriage and Same-Sex Marriage," *Public Discourse*, May 21, 2010, http://www.thepublicdiscourse.com/2010/05/1324/ (accessed March 12, 2014). The relation "of parent and child ... is consequential to that of marriage, being it's [*sic*] principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated." William Blackstone, *The Commentaries of Sir William Blackstone, Knight, on the Laws and Constitution of England* (1769; Washington, DC: American Bar Association, 2009), p. 49, http://books.google.com/books?id=LdgpnczSUs0C (accessed March 12, 2014).

> [A]nti-miscegenation laws were not part of the jurisprudence that American law inherited from the English courts. Anti-miscegenation laws were statutory in America (although never in England), first appearing in Maryland in 1661 after the institution of the enslavement of Africans on American soil.[11]

America's history of race-based chattel slavery explains the origins of these laws. As Cott notes, "African American slaves could *not* marry legally; their unions received no protection from state authorities. Any master could override a slave's marital commitment."[12] This was because slaves were viewed not as citizens or even as persons. This overarching assault on their dignity and equality before the law drove the bans on marriage. Cott explains further: "The denial of legal marriage to slaves quintessentially expressed their lack of civil rights. To marry meant to consent, and slaves could not exercise the fundamental capacity to consent."[13]

This history shows that bans on interracial marriage had nothing to do with reasoning about the nature of marriage itself. Beckwith notes:

> The overwhelming consensus among scholars is that the reason for these laws was to enforce racial purity, an idea that begins its cultural ascendancy with the commencement of race-based slavery of Africans in early 17th-century America and eventually receives the imprimatur of "science" when the eugenics movement comes of age in the late 19th and early 20th centuries.[14]

He thus concludes:

> Anti-miscegenation laws, therefore, were attempts to eradicate the legal status of real marriages by injecting a condition—sameness of race—that had no precedent in common law. For in the common law, a necessary condition for a legitimate marriage was male-female complementarity, a condition on which race has no bearing.[15]

In other words, anti-miscegenation laws were part of a much larger regime that denied human equality in order to hold a race of people in a condition of economic and political inferiority and servitude. They had nothing to do with the nature of *marriage*. At their heart was a mistake about the dignity of all human beings.

## Marriage Must Be Color-Blind but Not Gender-Blind

Some supporters of redefinition make the following analogy: Laws defining marriage as a union of a man and a woman are unjust—that is, they fail to treat people equally—just like laws that prevented interracial marriage. Yet such appeals beg the question of what is essential to marriage. They assume exactly what is in dispute: that gender is as irrelevant as race in marriage.

Everyone is in favor of marriage equality. Everyone wants the law to treat all marriages equally. But the only way that one can know whether a law is treating marriages equally is to know what a marriage is. Every marriage law will draw lines between what is a marriage and what is not a marriage. If those lines are to be drawn on principle and are to reflect the truth, one must know what sort of relationship is marital, as contrasted with other forms of consenting-adult relationships.

Race has nothing to do with marriage, and laws that kept the races apart were wrong. Marriage has everything to do with uniting the two halves of humanity—men and women, as husbands and wives and as mothers and fathers—so that any children that their union produces will be united by the man and woman who gave them life. This is why principle-based policy has defined marriage as the union of one man and one woman.

Marriage must be color-blind, but it cannot be gender-blind. The melanin content of two people's skin has nothing to do with their capacity to unite in the bond of marriage as a comprehensive union naturally ordered to procreation. The sexual difference between a man and a woman, however, is central to what marriage is. Men and women regardless of their race can unite in marriage, and children

11. Beckwith, "Interracial Marriage and Same-Sex Marriage."
12. Cott, *Public Vows*, location 382 (emphasis in original).
13. Ibid., location 382.
14. Beckwith, "Interracial Marriage and Same-Sex Marriage."
15. Ibid.

regardless of their race deserve moms and dads. To acknowledge such facts requires an understanding of what, at an essential level, makes a marriage.

## Religion, Race, and Marriage

Some attempted to use the Bible to support laws against interracial marriage, but as a historical matter, religious views about marriage helped to eliminate those bans. Moreover, any objective look at the Bible shows that from the first page to the last, the Bible is replete with spousal imagery and an understanding of marriage as the union of man and woman, husband and wife—and never with marriage as the union of similar skin pigmentation.

Indeed, the first court to strike down an interracial marriage ban did so in light of a religious argument advanced by an interracial Catholic couple. In 1948, the California Supreme Court decided *Perez v. Sharpe*, the couple's lawsuit challenging California's interracial marriage ban.[16] Professor Fay Botham notes:

> [The argument] hinged upon several key points of Catholic doctrine: first, that Jesus Christ is the "founder of the Roman Catholic Church"; second, that marriage is a sacrament "instituted by Jesus Christ"; third, that the Catholic Church has no law forbidding "the intermarriage of a nonwhite person and a white person"; and fourth, that the Church "respects the requirements of the State for the marriage of its citizens as long as they are in keeping with the dignity and Divine purpose of marriage."[17]

Botham goes on to show:

> [The argument] appealed to the highest source of Catholic authority: the Holy Father himself. Citing Pope Pius XI's 1937 encyclical to the church in Germany, *Mit brennender Sorge*, [the lawyer] pointed out that the "Church has condemned the proposition that 'it is imperative at all costs to preserve and promote racial vigor and the purity of blood; whatever is conducive to this end is by that very fact honorable and permissible.'"[18]

The California Supreme Court sided with the Catholic plaintiffs and overturned the state ban on interracial marriage. Part of the argument hinged on what marriage is and its connection to procreation:

> The right to marry is as fundamental as the right to send one's child to a particular school or the right to have offspring. Indeed, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[19]

A few years later, in 1952, the California Supreme Court again clearly approached the meaning of marriage, noting that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "ensures the care and education of children in a stable environment."[20]

The U.S. Supreme Court followed a similar course. In 1967, the U.S. Supreme Court struck down interracial marriage bans nationwide in *Loving v. Virginia*. The Court found such laws to be premised on "the doctrine of White Supremacy," with no discussion of race as intrinsic to marriage's purpose.[21] The Court's conclusion acknowledged the law's singular focus on race and not marriage, finding

> no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[22]

The law thus fell as an impermissible racial classification.

16. *Perez v. Sharpe*, 32 Cal. 2d 711 (Cal. 1948).
17. Botham, *Almighty God Created the Races*, location 310.
18. Ibid., location 313.
19. *Perez v. Sharpe*, 32 Cal. 2d 711, 715 (Cal. 1948) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942)).
20. See *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952).
21. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).
22. See id. at 11–12.

As in *Perez*, numerous religious groups argued that racism distorted a clear-eyed understanding of marriage. As Susan Dudley Gold recounts in *Loving v. Virginia: Lifting the Ban Against Interracial Marriage*:

> A coalition made up of Catholic bishops, the National Catholic Conference for Interracial Justice, and the National Catholic Social Action Committee filed a fourth amicus brief in favor of the Lovings. The bishops and the nonprofit groups became involved in the case because of their commitment "to end racial discrimination and prejudice" and because of the "serious issues of personal liberty" raised by the Lovings' ordeal.[23]

Catholics were not alone. Southern Baptist theologians also opposed bans on interracial marriage. In 1964, three years before the Supreme Court ruled in *Loving*, T. B. Maston published a booklet for the Christian Life Commission of the Southern Baptist Convention titled "Interracial Marriage." While Maston thought "interracial marriages, at least in our society, are not wise," he was clear on their Biblical status: "A case cannot be made against interracial marriages on the basis of any specific teachings of the Scripture."[24] Indeed, he argued, "The laws forbidding interracial marriages should be repealed."[25]

## Protecting Religious Liberty in the Context of Marriage

Protecting the freedom to speak and act publicly on the basis of a religious belief that marriage is the union of a man and woman does not amount to the kind of laws that enforced race-based segregation. Professor Robin Wilson explains: "The religious and moral convictions [about marriage] that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."[26]

**Marriage has everything to do with uniting the two halves of humanity—men and women, as husbands and wives and as mothers and fathers.**

Today's debates about religious liberty and marriage are profoundly different.[27] First, as argued above, marriage as the union of man and woman is a reasonable position; bans on interracial marriage were not. Second, as also argued above, marriage as the union of man and woman is witnessed to repeatedly in the Bible; prohibitions on interracial marriage were not. Third, to be argued below, while interracial marriage bans were clearly part of

23. See Susan Dudley Gold, *Loving v. Virginia: Lifting the Ban Against Interracial Marriage* (New York: Cavendish Square Publishing, 2009), pp. 71–72 (quotations in original).
24. T. B. Maston, "Interracial Marriage," Christian Life Commission, Southern Baptist Convention, p. 9.
25. Ibid., p. 9. Of course, there were Christians who claimed the Bible supported their position, but Maston showed how they misinterpreted the Scriptures. Any Old Testament prohibitions about marriage "were primarily national and tribal and not racial. The main motive for the restrictions was religious.... The Prohibitions regarding intermarriage in the Old Testament might be used to argue against the marriage of a Christian and a non-Christian, and even against the marriage of citizens of different nations, but they cannot properly be used to support arguments against racial intermarriage" (p. 5). Maston went on to note that in the Old Testament, "there are a number of instances of intermarriages," and "many of the great characters of the Bible were of mixed blood" (pp. 5–6). Maston pointed out that a sound Christian view of marriage had nothing to say about race but everything to say about sexual complementarity of male and female: "The Christian view which is soundly based on the biblical revelation is that marriage, which was and is ordained of God is a voluntary union of one man and one woman as husband and wife for life" (p. 7).
26. Robin Fretwell Wilson, "Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context," in Douglas Laycock Jr., Anthony R. Picarello, and Robin Fretwell Wilson, eds., *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Lanham, MD: Rowan & Littlefield Publishers, 2008), pp. 77 and 101.
27. As a historical matter, Ramesh Ponnuru notes, "Religious exemptions from federal law have been part of the legal landscape for decades. The Supreme Court insisted on them as a matter of constitutional law from 1963 to 1990, and Congress made them part of statutory law with the Religious Freedom Restoration Act in 1993." Ramesh Ponnuru, "RFRA and Race," *National Review Online*, March 4, 2014, http://www.nationalreview.com/corner/372537/rfra-and-race-ramesh-ponnuru (accessed March 12, 2014). Yet during that time, only one lawsuit was brought to the Supreme Court claiming a religious liberty right to ban interracial dating on campus. That claim was roundly rejected. Thus, there is little reason to worry that protecting religious liberty for beliefs about marriage as the union of a man and woman will lead to claims made on behalf of racists arguing from religious grounds.

a wider system of oppression, beliefs about marriage as the union of male and female are not.[28]

Before the Civil War, a dehumanizing government regime of race-based chattel slavery existed in many states. After abolition, Jim Crow laws enforced race-based segregation. Those wicked regimes legally coerced people to keep them separated, to prevent them from associating or contracting. Even after the Supreme Court struck down Jim Crow laws, integration did not come easily or willingly in many instances. As a result, public policy sought to eliminate such discrimination, even when occurring by private actors on private property.

Such government action infringing on property rights required justification. As Law Professor Adam MacLeod notes, "The most robust of all property rights is the right to exclude, which enables an owner to choose which friends, collaborators, and potential collaborators to include in the use of land and other resources."[29] In common law, these protections extend even in the commercial domain: "If a property owner opens his or her domain to the public as a bakery, for example, the owner does not thereby relinquish her right to exclude. Rather, the common law requires the landowner to have a reason for excluding."[30]

But such reasons do not exist with respect to race, MacLeod argues:

> To combat widespread racial discrimination, Congress and state legislatures promulgated rules in the latter half of the twentieth century that prohibit discrimination in public accommodations and large-scale residential leasing on the basis of race....
>
> In essence, these laws established a bright-line rule. Exclusion on the basis of race is always unreasonable, and therefore unlawful. These laws pick out motivations for exclusion that are never valid reasons. This wasn't really a change in the law—it was never reasonable to discriminate on the basis of race—but rather a conclusive statement of what the law requires.[31]

While racial segregation was rampant and entrenched when Congress intervened, today market forces are sufficient to ensure that people identifying as gay or lesbian receive the wedding-related services they seek. Indeed, in various instances of business owners declining to facilitate a same-sex ceremony, the service was readily available from other businesses. In other words, civil society is policing itself; no law is needed here.

In a growing number of cases, government coercion and penalties have violated religious freedom with respect to marriage.

Furthermore, the religious liberty concerns that have been raised deal not with sexual orientation, but with marriage. Citizens who have raised them are concerned about being coerced into celebrating or participating as a service provider in same-sex weddings or being coerced into treating same-sex relationships as marriages. Many religions teach that marriage is the union of a man and woman, and the religious liberty concern is in being coerced into violating that belief.

Yet in a growing number of cases, government coercion and penalties have violated religious freedom with respect to marriage. Family businesses—especially photographers, bakers, florists, and others involved in the wedding industry—have been hauled into court because they declined to facilitate or participate in a same-sex ceremony in violation of their religious beliefs.

In New Mexico, a photographer declined to use her artistic talents to promote a same-sex ceremony because of her religious beliefs, and the New Mexico Human Rights Commission ordered her to pay a fine of nearly $7,000. Christian adoption and foster-care agencies in Massachusetts, Illinois, and Washington, D.C., have been forced to stop providing those servic-

28. This is not to deny that gays and lesbians have experienced unfair treatment. Such treatment should be condemned. Understanding marriage as the union of a man and woman, however, is not an instance of such unjust treatment.
29. Adam J. MacLeod, "What's at Stake at the Bakery: How Property Rights Got Sexy," *Public Discourse*, March 4, 2014, http://www.thepublicdiscourse.com/2014/03/12391/ (accessed March 12, 2014).
30. Ibid.
31. Ibid.

es because they believe that the best place for children is with a married mom and dad. Other cases include a baker, a florist, a bed-and-breakfast, and more.[32]

Professor MacLeod explains how the right to exclude on a reasonable basis applies in these situations:

> Why is it unreasonable for a photographer to serve all people, including those who self-identify as homosexual, but to refuse to endorse by her conduct the claim that a same-sex commitment ceremony is, in fact, a wedding? If a jury or other competent fact-finder determines that the photographer has a sincere moral or religious conviction that marriage is the union of a man and a woman (and therefore does not include a same-sex couple, a polyamorous group, a polygamous family, and so on), then the photographer has a reason not to use her property (in this case, her camera and her business) to endorse what she believes to be a lie.[33]

Many of the family businesses cited above understand their professions to be extensions of their religious commitments. Being a wedding photographer, for them, is not simply being another business offering services, but using God-given talents to tell the story of a particular couple and their relationship. Likewise, many of these professionals believe they have an obligation to witness to the truth, and celebrating a same-sex relationship as a marriage denies this. Thus, it is understandable why such religious believers do not want the government coercing them to do so.

Legislators should enact commonsense religious liberty protections that would prevent the imposition of substantial burdens on sincere religious beliefs unless the government proves that imposing such a burden is necessary to advance a compelling government interest (and does so by the least intrusive or restrictive means).[34]

Such religious liberty protections would not justify blanket discrimination, as some wrongly claim. For example, one does not hear of any sincere religious beliefs that would lead a pharmacist to refuse to dispense antibiotics to any patients. Furthermore, it has long been recognized that the government has a "compelling interest" in protecting public health by combating communicable diseases. Consequently, prohibiting pharmacies from denying appropriately prescribed antibiotics to any patient might very well be the least restrictive means possible of ensuring access to necessary medicines for preventing the spread of communicable diseases.[35] The absurd hypotheticals tossed into current debates are of the same nature, in contrast with legitimate religious liberty concerns raised by religious adherents.

As law professor and religious liberty expert Douglas Laycock—a same-sex marriage supporter—notes:

> I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling.[36]

Thus, when it comes to flower arrangements and wedding photographers, what is the compelling state interest? How is forcing every photographer to take same-sex wedding photos the least restrictive way of serving that interest, whatever it may be? Not every florist need provide wedding arrangements for

32. Ryan T. Anderson and Leslie Ford, "Religious Liberty in the State Marriage Debate," Heritage Foundation *Backgrounder* No. 2891, forthcoming.
33. MacLeod, "What's at Stake at the Bakery."
34. Anderson and Ford, "Religious Liberty in the State Marriage Debate." On state religious freedom restoration acts, see Christopher C. Lund, "Religious Liberty After Gonzales: A Look at State RFRAs," *South Dakota Law Review*, Vol. 55 (2010), p. 466, and Wayne State University Law School *Research Paper* No. 10-1, http://ssrn.com/abstract=1666268 (accessed March 12, 2014).
35. This situation differs significantly, for example, from that of a pro-life pharmacist who has a conscientious objection about dispensing drugs that could kill an unborn child. It is unclear how such drugs would constitute a compelling state interest. Indeed, the religious liberty of such pharmacists has been upheld in the courts. For one example, see Dominique Ludvigson, "Religious Liberty of Illinois Pharmacists Vindicated," The Heritage Foundation, *The Foundry*, December 13, 2012, http://blog.heritage.org/2012/12/13/a-win-for-religious-freedom-in-illinois/.
36. Doug Laycock, "What Arizona SB1062 Actually Said," *The Washington Post*, February 27, 2014, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/ (accessed March 12, 2014).

every ceremony. Not every photographer need capture every first kiss. Competitive markets can best harmonize a range of values that citizens hold without government interference.

## Conclusion

Part of the genius of the American system of government is our commitment to protecting the liberty and First Amendment freedoms of all citizens while respecting their equality before the law. The government protects the freedom of citizens to seek the truth about God and the free exercise of their religion, including the freedom to live out their convictions in public life. Likewise, citizens are free to form contracts and other associations according to their own values.

While the government must treat everyone equally, private actors are left free to make reasonable judgments and distinctions—including reasonable *moral* judgments and distinctions—in their economic activities. The government should not infringe citizens' freedoms unless government has a compelling government interest and pursues it by the least restrictive means.

Whatever one's views of marriage and however the state defines it, there is no compelling state interest in forcing all citizens to facilitate, participate in, or celebrate a same-sex relationship as a marriage. Believing that marriage is the union of man and woman is a reasonable position held by many, including Christians seeking to live in a manner consistent with the Bible's demonstrable pattern concerning marriage. Bans on interracial marriage, by contrast, were grossly unreasonable and cannot claim such biblical authorization.

One need not be against baking wedding cakes for same-sex couples to think the government should not be able to force evangelicals to do so. Likewise, one need not be pro-life to think that a pro-life nurse should not be forced to participate in an abortion. Nor need one be against *Duck Dynasty*'s religious beliefs to think that A&E was within their rights to suspend Phil Robertson.

Competitive markets can best harmonize a range of values that citizens hold without government interference.

Americans ought to be able to run their businesses in accord with their own values even if most of us disagree with those values. That is the thing about living in a free society: A person can respect the freedom of other people even when he or she disagrees with how they are using their freedom.

Protecting religious liberty and the rights of conscience does not restrict anyone's freedom to enter into whatever romantic partnerships he or she wishes. While Americans are free to live as they choose, no one should demand that government coerce others into celebrating their relationships. Americans should remain free to speak and act in the public square based on their belief that marriage is the union of a man and woman without fear of government penalty.

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