



# MARITAL STRIFE:

## SAME-SEX MARRIAGE AND THE CONSTITUTION

by Charles J. Cooper and William N. Eskridge Jr.



**Charles J. Cooper** is a partner in Cooper & Kirk, PLLC. He represents the official proponents of Proposition 8, the ballot initiative that amended the California Constitution to prohibit same-sex marriage in the case *Perry v. Brown*.

**William N. Eskridge Jr.** is the John A. Garver Professor of Jurisprudence at the Yale Law School. He has authored an *amicus* brief arguing against the constitutionality of Proposition 8.





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### **A Note About This Series**

We live in a country of competing views. Our Constitution was framed in disagreement. And while the Constitution is a source of our most cherished and unifying political ideals, it also provokes some of our sharpest quarrels as its principles and protections are debated and applied to present circumstances.

At a time when corrosive partisanship distorts political dialogue, the Constitutional Spotlight Series provides a forum for civil debate. It is dedicated to the idea that robust and open dialogue is fundamental to America's constitutional legacy.

### **Introduction**

For more than a decade, the question of whether same-sex couples should have the right to marry has divided Americans and sparked a sharp debate about the purpose of marriage and the claims of equality.

Supporters of same-sex marriage say that gay and lesbian couples should be treated the same as heterosexual couples as a matter of justice. Opponents say that granting gay couples the right to wed weakens marriage, an essential social institution that has been defined by virtually all societies throughout history as between a man and a woman.

The debate over same-sex marriage has played out in the nation's courts, state legislatures, in the halls of Congress and at the ballot box. In the essays that follow, Charles J. Cooper makes the constitutional case for the traditional, gendered definition of marriage. William N. Eskridge Jr. argues for marriage equality.

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# The Constitutional Argument for Traditional Marriage

By Charles J. Cooper

The New York Court of Appeals observed in 2006 that, until quite recently, “it was an accepted truth for *almost everyone who ever lived*, in any society in which marriage existed, that there could be marriages only between participants of different sex.”<sup>1</sup> When the Massachusetts Supreme Court made Massachusetts the first state to legalize same-sex marriage in 2004, it acknowledged that its ruling “chang[ed] . . . the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries.”<sup>2</sup> The traditional gendered definition of marriage has likewise prevailed in California, where “from the beginning of California statehood,” as the California Supreme Court acknowledged in the *Marriage Cases*, “marriage has been understood to refer to a relationship of a man and a woman.”<sup>3</sup> And when the California Supreme Court ruled, by a 4-to-3 vote, that the California Constitution guarantees a right to same-sex marriage, the people of California promptly enacted Proposition 8, which made California the 31<sup>st</sup> state to amend its Constitution to expressly define marriage as the union of a man and a woman.

In light of this undisputed historical backdrop, the dispositive question in the Proposition 8 litigation, and in other cases challenging the validity of the traditional definition of marriage under the 14th Amendment to the federal Constitution, boils down to this: *Why* has marriage been universally defined, by virtually all societies at all times in human history, as an exclusively opposite-sex institution? This question is dispositive because under the highly deferential “rational basis” standard that has uniformly been applied by federal appellate courts in cases challenging distinctions based on sexual orientation, the traditional gendered definition of marriage must be upheld if there is any conceivable, legitimate rationale for it. As the Supreme Court has said many times, “Under rational-basis review. . . . where a group possesses ‘distinguishing characteristics relevant to interests the State has authority to implement,’ a State’s decision to act on the basis of those differences does not give rise to a constitutional violation.”<sup>4</sup> So the essential constitutional question is whether heterosexual relationships possess distinguishing characteristics that are relevant to the state’s interests in regulating marriage.

In their effort to establish that the answer to this question is no, the plaintiffs in the Proposition 8 case and other advocates of a constitutional right to same-sex marriage have been driven to argue that society’s interests in marriage are wholly indifferent to the gender of the spouses. The central societal purpose served by marriage, they say, is simply providing committed, loving couples with the “personal fulfillment” that comes with “state recognition and approval of a couple’s choice” to marry.

This understanding of the societal purpose of marriage—genderless, adult-oriented, and wholly divorced from procreation—is a recent academic invention; it can trace its pedigree no farther back than the modern movement to redefine marriage to include same-sex couples. And because advocates of a constitutional right to same-sex marriage must deliberately sever the obvious, abiding connection between marriage and the uniquely procreative potential of heterosexual unions, they must also come up with an explanation for why the opposite-sex definition of the institution has been a ubiquitous, cross-cultural feature of the human experience throughout recorded history.

The Proposition 8 plaintiffs’ answer is that the definition of marriage as the union of male and female—again, “an accepted truth for almost everyone who ever lived”—can be explained only as a manifestation of “naked animosity” toward gays and lesbians, as “the residue,” according to the plaintiffs’ co-lead counsel, “of centuries of figurative and literal gay-bashing.” And any contrary explanation, they say, is a pretext designed to mask a “bare desire to harm” gays and lesbians.

Under rational-basis review, the plaintiffs’ startling “naked animosity” explanation for the gendered definition of marriage can admit of no exceptions; if a single reasonable person genuinely believes that traditional marriage has a legitimate nondiscriminatory justification, the constitutional debate is over. And so the falsity of the plaintiffs’ claim is patent as soon as it is uttered. For it cannot stand up to the fact that every *appellate* court, both state and federal, that

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has addressed the validity of the traditional definition of marriage under the United States Constitution has upheld it as rationally related to the state’s interest in responsible procreation and child-rearing. These rulings certainly are not attributable to a bare desire by the judges to harm gays and lesbians. Nor can the plaintiffs’ claim stand up to the fact that President Obama and a host of other well-known champions of equal rights for gays and lesbians nonetheless support the traditional definition of marriage. “I believe that American society,” the President has written, “can choose to carve out a special place for the union of a man and a woman as the unit of child rearing most common to every culture.”<sup>5</sup> Are the president and the countless other Americans who profess this belief all masking anti-gay bigotry? Finally, if the institution of marriage had anything at all to do with anti-gay bias, surely some hint of that notion would have surfaced somewhere in a historical record that spans millennia. But the Proposition 8 plaintiffs can cite nothing—literally *nothing*—in the centuries-old historical record to support their claim.

The historical record, however, is far from silent on the issue. To the contrary, it leaves no doubt—*none at all*—that the traditional gendered definition of marriage has prevailed in virtually every civilized society, from the ancients to the American states, because it serves a societal purpose that is equally ubiquitous: to channel potentially procreative sexual relationships into enduring, stable unions to increase the likelihood that any offspring will be raised by both the mother and father who gave them life, rather than by the mother alone.

The most relevant historical record for constitutional purposes is the Supreme Court’s jurisprudence on the fundamental right to marry. The Court has consistently recognized that the natural procreative potential of marital unions is *definitional*, emphasizing that the institution of marriage is “fundamental to the very existence and survival of the [human] race.”<sup>6</sup> As early as 1888, in *Maynard v. Hill*, the Supreme Court explained that marriage is “an institution regulated and controlled by public authority, . . . for the benefit of the community”, because “it is the foundation of the family and of society, without which *there would be [no] civilization . . .*” (emphasis added). And in the seminal *Loving* decision, which struck down the Southern states’ anti-miscegenation laws, the Court reiterated that “[m]arriage is . . . fundamental to our very existence and survival.”<sup>7</sup> The Court was not referring to the “personal fulfillment” of married couples. Rather, it was obviously referring to the naturally procreative potential of sexual relationships between men and women, which alone explains society’s regulatory interest in marriage.

Likewise, the courts of virtually every state have recognized the essential procreative purpose of marriage. No state court has disputed it. For example, the California Supreme Court stated early on that “the first purpose of matrimony, by the laws of nature and society, is procreation.”<sup>8</sup> A century later, the California Supreme Court re-emphasized that “the institution of marriage” serves “the public interest” because it “channels biological drives that might otherwise become socially destructive” and “it ensures the care and education of children in a stable environment.”<sup>9</sup> And less than three years ago, the California Court of Appeals held that “the sexual, procreative, [and] child-rearing aspects of marriage” go “to the very essence of the marriage relation.”<sup>10</sup>

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Our courts, federal and state, inherited from the common law their understanding of the existential link between society’s regulatory interest in the institution of marriage and the natural procreative capacity of heterosexual relationships. William Blackstone, in his classic treatise on the common law, describes the marital relationship of “husband and wife” as “founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated.” He then turns to the relationship of “parent and child,” which he describes as “consequential to that of marriage, being its principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated.”<sup>11</sup>

The common law is, in turn, a reflection of the common sense of the ages. Throughout history, leading lawyers, philosophers, anthropologists, historians, theologians, lexicographers and social scientists have uniformly recognized the obvious, and existential, connection between the institution of marriage and society’s vital interests in procreation and childbearing. A recitation of these authorities would fill volumes, but the essential point can be made with just a few examples:

- John Locke: “For the end of conjunction between male and female, being not barely procreation, but the

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continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones, . . .”<sup>12</sup>

- Kingsley Davis: Marriage provides “social recognition and approval . . . of a couple’s engaging in sexual intercourse and bearing and rearing offspring.”<sup>13</sup>
- Bertrand Russell: “But for children, there would be no need for any institution concerned with sex . . . [for] it is through children alone that sexual relations become of importance to society.”<sup>14</sup>
- James Q. Wilson: “Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve.”<sup>15</sup>

In short, marriage is, in Justice John Paul Stevens’ concise formulation, a “license to cohabit and to produce legitimate offspring.”<sup>16</sup> No societal purpose of marriage other than procreation and child-rearing can plausibly begin to explain the institution’s existence, let alone its ubiquity. Indeed, as Professor Robert George asks, if “human beings reproduced asexually and . . . human offspring were self-sufficient[,] . . . would any culture have developed an institution *anything like* what we know as marriage? It seems clear that the answer is no.”<sup>17</sup> Surely no one really believes that the institution of marriage would have developed solely to promote the “personal fulfillment” of the spouses.

In light of this historical record, the constitutional question raised by the Proposition 8 plaintiffs and other advocates of same-sex marriage—whether the 14th Amendment, which was ratified almost 150 years ago, guaranteed same-sex couples in every state the right to marry—is not a hard one. Again, the Constitution prohibits only discrimination between individuals who are similarly situated with respect to the governmental interests at stake, and when “the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not,” the restriction on eligibility is simply not “invidiously discriminatory.”<sup>18</sup> The simple and

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inescapable fact is that same-sex relationships do not promote, and cannot threaten, society’s vital interests in responsible procreation and child-rearing in the same way that heterosexual relationships do. It is true, of course, that a same-sex couple can adopt a child, or produce a child with the assistance of an opposite-sex third party. But such a couple must go to great pains to do so. A typical heterosexual married couple, in contrast, must go to pains to avoid conceiving a child if they do not want one.

The Proposition 8 plaintiffs themselves brought this reality into sharp focus, unwittingly, by offering a hypothetical—contrasting a reprobate, irresponsible opposite-sex couple who “can get married the morning after meeting each other at a nightclub” with an upstanding, responsible same-sex couple in an enduring, committed relationship who are not allowed to marry. But society plainly has a vital interest in encouraging the heterosexual couple, whether reprobate or upright, to commit themselves to each other and to taking responsibility together for raising any child produced by their union, whether intentionally or *unintentionally*. The state’s vital interests are thus plainly related to the uniquely procreative capacity of heterosexual relationships, and it is plainly rational for the state to maintain a unique institution to serve these interests. As the Court of Appeals for the Eighth Circuit held in upholding Nebraska’s marriage amendment in 2006, the state’s interest in “steering procreation into marriage . . . justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot.”<sup>19</sup>

Finally, I hasten to acknowledge that the debate over same-sex marriage is not free of bigotry. To the contrary, at the extreme edges *on both sides* of that debate are those who are animated by hostility or irrational fears and prejudice. This is true, however, in virtually all hotly contested debates over deeply divisive, controversial social issues. Such debates inflame passions and arouse deeply held values and beliefs, and all too often can devolve into partisan efforts to marginalize or, worse, to demonize the other side. But the overwhelming majority of people *on both sides* of the same-sex marriage debate, in California and throughout the country, are good and decent Americans, coming from

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all walks of life, all political parties, all races and creeds. Their opinions on this issue are motivated not by animosity or ill-will toward anyone, but rather by their belief as to what is right for their families, their communities, and their country. Their opinions are therefore entitled to consideration and respect, and that fact alone is fatal to the claim that the issue is settled, one way or the other, by the Constitution. Because people of good will can and do differ in good faith on the issue of same-sex marriage, their differences must be resolved through the political process, not through the courts.

## The Constitutional Argument for Marriage Equality

By William N. Eskridge, Jr.

Many Americans are in committed, same-sex relationships. More than 250,000 children are being raised in lesbian and gay households throughout our country. Thousands of lesbian and gay partners living in New York, Massachusetts, Iowa, Connecticut, the District of Columbia, New Hampshire and Vermont have validated their unions through civil marriages authorized in those jurisdictions. But most couples do not live in states that recognize gay marriages. Does the U.S. Constitution guarantee those same-sex couples the same marriage rights enjoyed by different-sex couples?

The Fourteenth Amendment guarantees all persons the “equal protection of the law.” As originally understood, this Equal Protection Clause was meant to be a constitutional bar to a caste system, whereby some groups are excluded from important legal rights and benefits enjoyed by the majority. Because civil marriage carries with it hundreds of legal rights and duties, one would expect marriage to be one of those important rights presumptively available to all adult Americans. And this is precisely the way the Supreme Court has interpreted the Equal Protection Clause.

So the constitutional burden is on opponents of marriage equality: Why shouldn’t lesbian and gay Americans have the same right to civil marriage that is enjoyed by straight Americans?

Consider some objections that seek to overcome this constitutional presumption of marriage equality. Although popular support for marriage equality has recently increased, many Americans still object to “gay marriages” on moral grounds. The Constitution does not tolerate such a heckler’s veto, however. The Equal Protection Clause does not contain a proviso exempting unpopular minorities from its guarantees. To the contrary, the reason the Framers included that clause in the 14th Amendment was to protect unpopular minorities against majority-based discriminations.

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Think about this historical parallel: More than four-fifths of the American public disapproved of different-race marriages when the Supreme Court addressed the constitutionality of anti-miscegenation laws in *Loving v. Virginia* (1967). Many of those Americans believed that different-race marriages violated the Word of God contained in Scripture, and for those persons opposition to different-race marriage was a matter of religious faith.

Nonetheless, the Supreme Court overruled the state marriage discrimination law in *Loving*. The unanimous Court reasoned that civil marriage is a “fundamental” right that cannot be denied to any citizens without a neutral and important public justification. Majority-based moral judgments, including those resting upon religious belief, cannot justify such laws. Because the Virginia discrimination rested upon moral objections to interracial marriage, the Supreme Court found a violation of the 14th Amendment.

*Loving* supports the constitutional case for same-sex marriage; just as morality could not justify state discrimination against different-race couples in 1967, so morality cannot justify state discrimination against same-sex couples today.

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The marriage-based discrimination struck down in *Loving* represented a race-based classification, which is constitutionally suspect, as the Supreme Court also held in *Loving*. Should the fundamental right to marry extend to couples who are excluded for reasons other than race? As a matter of principle, the answer must be yes. Rights that are “fundamental” are ones that ought, presumptively, to be available to everyone. The Supreme Court said that in *Loving* and has reasserted that principle in subsequent cases.

In *Turner v. Safley* (1987), the Supreme Court, without recorded dissent, ruled that Missouri could not constitutionally deny marriage rights to prisoners. Because such marriages could not be sexually consummated while the inmates were in prison, the Court emphasized the expressive and dignitary features of civil marriage, as well as the tangible benefits flowing from marriage. If convicted felons have a constitutional right to marry, why shouldn’t committed lesbian and gay partners have the same right?

In response, critics of marriage equality say that allowing lesbian and gay couples to marry will undermine the institution of marriage, and the integrity of the institution is a neutral reason that was not present in *Loving* and *Turner*. The logic of this response remains elusive. I can see how no-fault divorce, a legal innovation sought by straight couples, can undermine the institution of marriage. No-fault divorce reduces the likelihood that marriage will be “till death do us part.” I can also see how the legalization of cohabitation, another innovation sought by straight couples, can undermine marriage. With less stigma for sexual cohabitation, fewer straight couples get married.

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What I cannot see is how opening up civil marriage to committed lesbian and gay couples undermines the institution. There are enough marriage licenses to go around. Recognizing the committed union of a lesbian couple does nothing to impair the union of the straight married couple.

Yet many religious and political leaders bemoan the decline of marriage because of straight couples’ choices that have been

facilitated by legal reform—and then oppose same-sex marriage, often strenuously, because they say marriage equality would be the final straw destroying the institution. This argument is scapegoating at its worst. Discrimination against a minority cannot cogently be justified because the majority has already undermined the institution the minority wants to join.

Moreover, there is no fact-based reason to believe that *adding* same-sex couples to the marriage-eligible population will *subtract* from the attractiveness of marriage for society as a whole. The experience of most jurisdictions granting equal legal rights to same-sex couples confirms this logic. In 1989, Denmark became the first modern Western polity to grant lesbian and gay couples the rights and benefits of marriage (as “registered partners”). American pundits from Judge Bork to Senator Santorum cited Denmark as an example of how relationship rights for gays destroyed straight people’s institution of marriage. As Darren Spedale and I have documented, marriage in Denmark actually got a gay bounce: after 1989, marriage rates went up after 20 years of decline, and divorce rates plummeted after a century of increases.

When Massachusetts became the first American state to recognize same-sex marriages (2003–04), marriage in that state also got a gay bounce. Between 2003 and 2009, the Massachusetts marriage rate *increased* just as the national marriage rate plummeted by 12 percent. In the same period, the Massachusetts divorce rate *sank* by 23 percent; the national divorce rate also declined in the same period, but only by 11 percent. While the evidence does not establish that gay marriage in Massachusetts *caused* the rebound of marriage, it is inconsistent with the claim that gay marriage will *cause* marriage to decline.

The foregoing “defense of marriage” argument is a lavender herring. It seeks to shift attention away from the “reforms” demanded by straight couples that have already contributed to the decline of marriage, and to impose unjustified costs and discriminations upon minority couples.

Some marriage reforms have sought to strengthen marital obligations. For example, Wisconsin barred deadbeat dads (former husbands who did not pay their child support obligations) from remarrying until they had discharged their family debts. This was a neutral, nonsectarian state justification for restricting a person’s marriage rights—yet the Supreme Court invalidated Wisconsin’s restriction in *Zablocki v. Redhail* (1978). As in *Loving* and *Turner*, the

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baseline was that the Constitution presumes against state restrictions on the fundamental right to marry. Although enforcement of child support obligations was a neutral state justification, the Court ruled that Wisconsin could achieve that laudable goal without infringing on the fundamental right to marry enjoyed by deadbeat dads.

Under *Zablocki*, even if the state could demonstrate that denying gay couples the right to marry would protect or even revive marriage, the state would still have to show that other reforms could not accomplish the same goal without denying marriage rights. Thus, if the state wanted to encourage more citizens to marry, it could limit rights available to cohabiting couples—and such a measure would surely be more efficacious than disrespecting committed lesbian and gay families.

A more abstract version of the defense-of-marriage argument is the claim that marriage is all about procreation, and so marriage should be limited to couples who can procreate. This is one of the worst arguments in a crowded field of bad claims. To begin with, the marriage-is-for-procreation argument can support same-sex marriage, because lesbian and gay couples are procreating up a storm. The lesbian baby boom of the 1990s has now been joined by a “gayby” boom among bisexual and homosexual men. Many other lesbians and gay men adopt children, even when they do not procreate directly. If marriage is for families, marriage is for lesbian and gay families.

Moreover, marriage is not, and ought not be, limited to couples who are capable of, or interested in, procreation. The Supreme Court has never entertained a case where the state denied elderly couples or other non-procreative relationships the right to marry—because no state has been loony enough to insist that marriage is only for procreation. If such a case ever reached the Court, the Justices would surely invalidate the state law, based upon the *Loving-Zablocki* fundamental right to marry. (The Court might consider the issue already decided by *Turner*, where inmates with life sentences and no chance for parole would never have been able to consummate their marriages, yet the Court’s judgment included them.)

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Consider the final line of defense against gay marriage. Some critics of marriage equality argue that lesbian and gay relationships ought not be included in civil marriage because of that institution’s rich different-sex history, but might instead be given all the same legal rights and duties of marriage under the aegis of “civil unions” or “domestic partnerships.” California, Illinois, New Jersey, Washington and four other states recognize such marriage-equivalent unions or partnerships, but not as marriages.

In my view, these civil union or domestic partnership statutes have been major advances in American law, for they replaced legal regimes where lesbian and gay couples had few legal rights and duties. Civil unions are what I call *equality practice*: efforts to provide the same legal rights and duties, but without associating civil marriage with lesbian and gay couples. Equality practice is a step in the right direction, in part because it brings lesbian and gay couples, their children, and their relatives “out of the closet” and into the public sphere. For 20 years, I have maintained that lesbian and gay families are worthy, productive and admirable. The more Americans engage in cooperative projects with openly gay and lesbian families, the more support there is for complete marriage equality. In other words, equality practice makes equality perfect.

Ultimately, however, a separate institution for gay and lesbian couples is not going to meet the requirements of the Equal Protection Clause. Consider this analogy: The Supreme Court struck down Virginia’s bar to different-race marriage in *Loving*. Assume that Virginia responded to the Court by enacting a new law recognizing “civil unions” for different-race couples and according such unions every one of the legal rights and duties of marriage.

Would Virginia’s regime of marriage for same-race couples and civil unions for different-race couples have satisfied the *Loving* Court? Almost certainly *not*, because the Justices had spent the previous decade interring the notion that “separate but equal” satisfies the Equal Protection Clause. What is unequal for different-race couples is unequal for same-sex couples as well.

The Constitution, properly understood, requires states to recognize same-sex marriages. The constitutional mandate should inform state legislative deliberations, for the preferred forum for marriage practice and ultimately for marriage equality is legislative enactments, not judicial decrees. Indeed, the large majority of state legislatures followed the constitutional equality principle mandated by *Brown v. Board of Education* (1954) when they repealed their anti-

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miscegenation laws in the 1950s and 1960s.

Ultimately, the Supreme Court will have to address this issue, preferably after a period of more state-by-state deliberation. But when the issue does become ripe for Supreme Court review on the merits, the answer is clear: equal treatment for lesbian and gay unions is required by the U.S. Constitution.

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# Discussion Questions

The Constitutional Spotlight Series is intended to provoke civic dialogue by providing competing perspectives on constitutional issues. Now it's your turn to weigh in on this timely topic! Here are some questions to spark conversation in your classroom, with your book club or around the kitchen table.

1. What is the purpose of marriage? Is it primarily an expression of love and commitment on the part of a couple, or is it primarily a social institution dedicated to the raising of children?
2. Both authors agree that marriage is a fundamental social institution, but each frames his constitutional question differently. What questions do the authors ask at the outset of their respective essay?
3. Charles Cooper points out that marriage has been “universally defined, by virtually all societies at all times in human history, as an exclusively opposite-sex institution.” What conclusions does he draw from that? Do you agree?
4. William Eskridge observes that the 14th Amendment’s guarantee of “equal protection of the law” prohibits excluding minority groups from important legal rights and benefits enjoyed by the majority. Do you agree that marriage is one of those important legal rights?
5. Is there a difference between a law that prohibits people of different races from marrying and a law prohibiting the marriage of people of the same sex?
6. If you were a justice on the Supreme Court and were asked to decide a case involving a law that bans same-sex marriage, how would you rule?

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# Notes

- <sup>1</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (emphasis added).
- <sup>2</sup> *Goodridge v. Department Pub. Health*, 798 N.E.2d 941, 965 (Mass. 2003).
- <sup>3</sup> *In re Marriage Cases*, 183 P.3d 384, 407 (Cal. 2008).
- <sup>4</sup> *Board of Trustees v. Garrett*, 531 U.S. 356, 366–67 (2001).
- <sup>5</sup> Barack Obama, *The Audacity of Hope* 263 (2006).
- <sup>6</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).
- <sup>7</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
- <sup>8</sup> *Baker v. Baker*, 13 Cal. 87, 103 (1859).
- <sup>9</sup> *De Burgh v. De Burgh*, 39 Cal.2d 859, 863–64 (1952).
- <sup>10</sup> *In re Marriage of Ramirez*, 81 Cal. Rptr.3d 180, 184–85 (2008).
- <sup>11</sup> William Blackstone, 1 *Commentaries*, 410.
- <sup>12</sup> *Second Treatise of Civil Government* § 79 (1690).
- <sup>13</sup> *The Meaning & Significance of Marriage in Contemporary Society* 5, in *Contemporary Marriage: Comparative Perspectives on a Changing Institution* (Kingsley Davis, ed. 1985).
- <sup>14</sup> Bertrand Russell, *Marriage and Morals* 77, 156 (2009).
- <sup>15</sup> James Q. Wilson, *The Marriage Problem* 41 (2002).
- <sup>16</sup> *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986).
- <sup>17</sup> Robert P. George, et al., *What is Marriage?* 34 *Harv. J. L. & Pub. Pol’y* 245 (2010).
- <sup>18</sup> *Johnson v. Robison*, 415 U.S. 361, 383 (1974).
- <sup>19</sup> *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).



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