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Regulating Marriage in a New Environment

*Carmen Garcimartin**

ABSTRACT

The definition of marriage in a number of Western juridical systems has been deprived of some of its constitutive elements. This new idea of marriage, that includes different kinds of unions with diverse aims, appears to enjoy the support of the majority of the population. Recent rulings of the Supreme Courts of Spain, the United States, and other countries confirmed the general acceptance of this new shape of the marital union. The scenario of the debate of marriage has deeply changed in a short time; now, those who defend marriage with all its essential features are regarded as outlaws or even bigots. These developments have led the regulation of marriage to a crossroads, where we may ask ourselves which direction should we take, or what can we do to protect marriage in the current situation. The paper conveys some reflections on this issue, as well as the prospective on the regulation of marriage in the future.

I. MARRIAGE AT A CROSSROADS

The regulation of marriage is facing a crucial moment. We are witnessing how the laws of marriage are fading away from the essence of the marital union. Their future appears uncertain; we do not really know what else is ahead or what the next juridical battle will be. We can try and predict some developments in forthcoming years, but none that will better protect marriage.

In most Western countries, courts and legislators have been depriving marriage of its essential elements for some time. As a consequence of those interventions, stability has not been a characteristic of the marital bond since non-fault divorce was generally accepted in civil law. The nuance of the aim of marriage to rear and educate offspring is evident as well in those juridical systems where impotence is not an impediment to marry. But despite these and other advance-

*UDC, Spain. This work has been funded by the Spanish Government - Economy Department, in the framework of the Project DER 2012-34765, "La religión en el espacio público: conflictos y soluciones jurídicas."

ments and their undeniable impact on the regulation of marriage, heterosexuality embodied a special significance. It was considered a kind of red line that, once passed, would open the door to every imaginable variation of the marital union. That is the reason why *Obergefell v. Hodges* is deemed a breakoff point on the regulation of marriage, and why the regulation of marriage is at a critical junction.

Obergefell is not significant because of an overreaction to a ruling that did not fulfil expectations. Rather, it is significant because it poses a real challenge to marriage laws going forward. Chief Justice Roberts, in his dissenting opinion, warned that if same-sex marriages were allowed, so-called polyamorous relationships, or plural marriages, would be entitled to ask for official recognition as well.¹ Plainly, this ruling renders other forms of currently unacceptable marriage relationships possible. Aiming to fulfil that prophecy, in the aftermath of *Obergefell* some comments criticized the ruling for being too conservative: One paper says this:

[The Court] envisions marriage in an extraordinarily traditional and conservative way. According to the Court, people wishing to become their best selves and to live a life free from loneliness must follow the most traditional of all paths: find a life-long companion to the exclusion of all others and then get hitched. Any other way that an individual might seek fulfilment and happiness is inferior.²

Another paper praised the ruling as the beginning of real equality for homosexuals, still with a long way ahead.³

What is the prospect of marriage in the current setting? I will convey my opinions on this matter, leaving aside a neutral analysis of marriage law that is well known and greatly publicized.

II. THE STATUS OF THE ISSUE

First, we cannot let dialogue on the meaning of marriage be removed from the public arena. The idea that the debate on the definition of marriage has ended, at least regarding the latest amendments, is widespread. Courts or legislators, depending on the country, pledge that they have said the last word, adopting a broader defini-

1. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., dissenting).

2. Leonore Carpenter & Davis S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, GEO. L.J. ONLINE 124, 126–27 (2015).

3. Jack B. Harrison, *At Long Last Marriage*, 24 AM. U.J. GENDER SOC. POL'Y & L. 5, 27 (2015).

tion of marriage that is regarded as a point of no return.

We can see this approach at different levels. In my own country (Spain), the law allowing same-sex marriage was enacted when the Socialist Party was in power.⁴ The Popular Party appealed to the Constitutional Court, arguing that the law contravened the Constitution.⁵ For complicated political reasons, the Constitutional Court did not issue a ruling until seven years later, when the Popular Party was in power (2012).⁶ The ruling upheld the law; the Constitutional Court said that the amendment of the Civil Code that introduced same-sex marriage was consistent with the Constitution.⁷ But the Court stated that the other possible option, reserving marriage to heterosexual unions and granting homosexual unions another regulation, would also be consistent with the Constitution.⁸ Therefore, the Popular Party had no juridical obstacle to reinstate traditional marriage in the Civil Code. However, this party did not want to engage in that particular matter at that point in time, and they did not propose any amendment to the law of marriage. Even worse, they used a reasoning that was not accurate from a juridical point of view to maintain the current regulation of marriage.⁹ The Secretary for Justice said that the government was bound by this judgment and would not modify the law.¹⁰ That is not the whole truth. Of course, the law binds courts and civil servants, and they must apply it. However, politicians can propose an amendment to a law in force; hence, the Popular Party could have amended the Civil Code regulating marriage as a heterosexual union, especially since they had a positive statement from the Constitutional Court about this option and they had a majority in Parliament. Nonetheless, they did not modify it. They went even further. A Vice Secretary of the Popular Party announced publicly that he was going to marry his partner of nineteen years, and that the President and other members of the government would be

4. Maria Linacero de la Fuente, *Ley 13/2005, de 1 de julio, por la que modifica el Código civil en materia de derecho a contraer matrimonio*, FORO, NUEVA ÉPOCA, 02/2005, at 411–38 (2005).

5. *Appeal of unconstitutionality No. 6864-2005, in relation to Law 13/2005, of 1 July, amending the Civil Code concerning the right to marry*, B.O.E. n. 273, Nov. 15, 2005 (Spain).

6. S.T.C., Nov. 6, 2012 (B.O.E., No. 286, p. 168) (Spain).

7. *Id.*

8. *Id.*

9. Gallardón: “No modificaré la ley y la dejaré exactamente como está”, EL PAÍS (Nov. 7, 2012, 02:27 CET), http://politica.elpais.com/politica/2012/11/06/actualidad/1352226880_949406.html.

10. *Id.*

attending. He added, "I would like weddings like the one I am about to have to no longer be in news."¹¹ But it *was* in the news, and the current Secretary for Justice, also from the Popular Party, added that the Constitutional Court appeased the controversy on same-sex marriage, so "everything is solved."¹²

Despite this context, we must avoid thinking that these recent developments are irreversible. The discussion about the meaning and the proper regulation of marriage must continue and be re-launched. As Chief Justice Roberts writes in his dissenting opinion in *Obergefell*, "[c]losing debate tends to close minds."¹³ Although the academic field is a privileged one for keeping this discussion alive, we cannot retain it inside universities. This implies making an effort to communicate the legal reasoning in a way that works for everybody. Legal scholars, as lawyers, must be proper and precise in the use of terms. However, lawyers are a very small part of society, and we must be able to express what marriage is in an understandable and clear way. Language, like other skills, can greatly contribute not to define truths, but to clarify them.

The regulation of marriage has completely changed in a very short time. As a consequence, it is necessary to adapt to this new context. As little as twelve or fifteen years ago, talking about marriage was not a great challenge. The terms of the discussions about marriage used to be confronting different views regarding this institution and its elements. Of course, different opinions arose and debates were sometimes heated, but family scholars usually found themselves explaining marriage in a context of the traditional understanding of marriage. Now, the environment is more often than not harsh or even hostile. Those who argue in favor of the traditional meaning of marriage have moved, in slightly more than a decade, from being in the majority to being in a minority. Furthermore, this minority is deemed to hold unacceptable opinions. Only one view is allowed, and often, those who do not accept it are labelled as bigots and therefore, at times, are denied even the chance to engage in social dialogue or to utter their arguments. Disagreement with this official truth, that is,

11. *Maroto*: "Quiero que una boda como la que voy a celebrar deje de ser noticia", ABC ESPAÑA (Sep. 10, 2015), <http://www.abc.es/espana/20150910/abci-boda-maroto-rajoy-201509101011.html>.

12. *Maroto*: "Así todo se arregló", ABC ESPAÑA (Sep. 10, 2015), <http://www.abc.es/espana/20150910/abci-boda-maroto-rajoy-201509101011.html>.

13. *Obergefell*, 135 S.Ct. at 2625 (Roberts, C.J., dissenting).

marriage includes everything allowed by the legislator, is not a choice in some particular spheres.

III. CURRENT CHALLENGES

Adjusting to this new state of affairs is demanding. It requires delving into some subjects that perhaps we took for granted, or expressing them in a different way. Thus, new challenges have been added to those already inherent to the marriage debate. So, what direction should the regulation of marriage take? I will now share my opinions on the right and wrong ways to regulate marriage. I will start with what I consider to be the wrong ways.

The first wrong way to regulate marriage would be to procure the refuge of religion and abandon the field of its civil regulation. The regulation and protection of marriage in compliance with its constitutive elements is being taken back to the realm of the religious denominations to the same extent as the withdrawal of the civil law to protect it. Furthermore, some religious denominations are also pushing for a separation—or a definitive divorce—of civil and religious marriages.¹⁴ These religious individuals and groups, perhaps dismayed by the current situation and the prospective of marriage, press for greater freedom to make judgments about sex, marriage, and family life, based on their own religious beliefs.¹⁵ Marriage would be a mere religious concept, whilst a new figure, called “civil union” or any other way, would replace the “civil marriage,” as this figure has lost its main elements, and does not deserve this denomination any

14. See Laura Turner, *What Happens When the ‘Moral Majority’ Becomes a Minority?*, THE ATLANTIC (Sept. 27, 2015), <http://www.theatlantic.com/politics/archive/2015/09/end-of-moral-majority/407359/>; *Church Urges “Protection” of Marriage*, THE CAYMAN REPORTER (Sept. 28, 2015), <http://www.caymanreporter.com/2015/09/28/church-urges-protection-marriage/>; Neil J. Foster, *Address at the Religious Freedom in a Multi-Cultural World Conference, Newcastle Law Sch.: How Should Religious Marriage Celebrants Respond if Same Sex Marriage is Introduced in Australia?* (Sep. 25, 2015) (transcript available at http://works.bepress.com/neil_foster/96) (Author is an Associate Professor of Law at Newcastle Law School).

15. John Witte, Jr. & Joel A. Nichols, *Who Governs The Family? Marriage as a New Text Case of Overlapping Jurisdictions*, 5 FAULKNER L. REV. 321 (2013). See also Martin D. Stern, *Time to Divorce Civil and Religious Marriage*, BELFAST TELEGRAPH (May 24, 2013), <http://www.belfasttelegraph.co.uk/opinion/letters/time-to-divorce-civil-and-religious-marriage-29292930.html> (Stern, an Orthodox Jew, states: “As far as I can see, the only way out of the current dispute [on the definition of marriage] is for the state to legislate for ‘civil partnerships’ only and eschew the word ‘marriage’, while recognizing marriages within religious communities as qualifying as such. What the state chooses to call ‘marriage’ should be irrelevant to religious communities, so long as it does not force its definition on them. Perhaps the time has come for the ‘divorce’ of civil and religious marriage.”).

more.¹⁶ This is an understandable approach for the religious denominations, which are witnessing a progressive erosion of marriage in society, and are trying to protect it inside their own walls. But this is not completely desirable. The outcome of this trend would be a dichotomy that would “prevent [us] from speaking simply of *marriage*,” as a universal institution,¹⁷ and as a consequence, the protection of traditional marriage would be transferred to the field of religious freedom.

Indeed, marriage has a religious element that should not be underestimated. As we have recently seen, with the Kentucky clerk affair, if regulation of marriage does not count on the religious element, freedom of religion may be neglected.¹⁸ Looking for accommodation of religion in the civil sphere is fair, and even unavoidable. An example of this intent is the Texas Pastor Protection Act, enacted some months ago.¹⁹ Texas Attorney General Ken Paxton said, “[n]o pastor, priest, rabbi or other religious leader should be forced to perform or recognize a marriage that contradicts his or her sincere religious belief.”²⁰ Examples like that may become more frequent in the future, amid the statements in *Obergefell*. But marriage is not an exclusively religious institution; it is a secular relationship both for believers and non-believers. Marriage must be protected by itself as a foundation of society, not just as a manifestation of religious freedom. Focusing only on the religious component will lead to relinquishing the concept of marriage as a universal institution. Even the suspicion that marriage is only a part of certain religious conservative beliefs or ideologies should be avoided. Religion (including all religious faiths that depict a traditional marriage) should be an

16. Linda C. McClain, *Marriage Pluralism in the United States*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT 309, 313 (Joel A. Nichols, ed., Cambridge Univ. Press 2012).

17. Katherine S. Spaht, *Covenant Marriage Laws: A Model for Compromise*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT 120, 132 (Joel A. Nichols, ed., Cambridge Univ. Press 2012).

18. See Travis Loller, *Kentucky Clerk Case Divides Religious Liberty Advocates*, ASSOC. PRESS (Sept. 13, 2015), <http://bigstory.ap.org/article/7e2c85dd132947a2a-fa7e-b1c54515fad/kentucky-clerk-case-divides-religious-liberty-advocates>. See also comments by Lynn Wardle, *With Kim Davis, Federal Court Botched Opportunity to Show it Can Protect Religious Liberty*, CNSNEWS (Sept. 8, 2015), <http://cnsnews.com/commentary/lynn-wardle/judicial-coercion-and-respect-religious-liberty>.

19. TEX. FAM. CODE ANN. § 2.601 (West 2015).

20. See Liz Crampton, *Abbott Signs “Pastor Protection Act” into Law*, TEXAS TRIBUNE (June 11, 2015), <http://www.texastribune.org/2015/06/11/gov-abbott-signs-pastor-protection-act/>.

aide, not a shelter, to the task of protecting marriage.

Another less than desirable approach to regulating marriage would be attempting to separate “black label marriage”, the one with all the constitutive elements of this union, from “legal marriage,” that will convey all unions accepted by law. This is a secular variation of the previous position. Although it seems reasonable, it may be difficult to accept because it will be deemed as elitist and discriminatory. All regulations that try to differentiate between heterosexual unions and homosexual unions will likely be rejected. After all, they bring about the controversy of accepting same-sex unions yet denying same-sex marriage.

Finally, I think it would be a disservice to the debate to adopt a merely resistant attitude, refusing to comply with the law but without actively trying to get the proper legal recognition of marriage. In other words, relinquishing the protection of marriage not in a certain field, but in all: giving up in protecting marriage. It is not enough to say that the regulation of marriage is wrong altogether, and to take the path of objection of conscience or civil disobedience. This negative approach, that at times is needed and even acquires great relevance, should be the consequence of a positive option in favor of freedom, but not the central statement in any position. Besides, it bears the risk of being ignored, as nothing but controversy is offered.

IV. THE FRAMEWORK OF THE DEBATE ON MARRIAGE

What would be the correct framework to place this new debate on marriage in?

First, we must emphasize the idea that marriage is an institution that stems from human nature. A majority or a minority cannot decide its definition and characteristics. This is the central issue, and the main reason not to give up on the protection of marriage. From this perspective, I find Chief Justice Robert’s dissent in *Obergefell* not fully accurate, because his defense of marriage does not rely on the nature of marriage. His words are clear:

Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the an-

swer.²¹

To be fair, Chief Justice Roberts explains a little later that

This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.²²

A hypothetical ruling rejecting same-sex marriage only because it is not within the powers of the Court to decide would have been only a temporary achievement. Judges, even the Supreme Court, cannot change the definition of marriage as the dissenting opinions rightly sustain. But legislators cannot redefine the marital union either. Marriage does not depend on a majority opinion that can change; it is immutable; “the core meaning of marriage has endured.”²³ The majority can decide that same-sex unions, or other kind of unions, should be regulated by the State. This may be considered a good or bad policy, but it does not pose any problem from the juridical point of view. Changing marriage to include other juridical figures that do not bear its constitutive elements, such as polygamy, non-committed bonds or same-sex unions, is not good juridical practice, even though a majority supports the regulation of those unions. Even if only very few countries in the world keep a traditional conception of marriage, marriage would still be marriage.

Under this approach, data should be properly used in the debate on marriage. Numbers can help demonstrate that a government poli-

21. *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting). Chief Justice Roberts insists on this idea:

It can be tempting for judges to confuse our own preferences with the requirements of the law. But as this Court has been reminded throughout our history, the Constitution “is made for people of fundamentally differing views.” *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Accordingly, “courts are not concerned with the wisdom or policy of legislation.” *Id.*, at 69 (Harlan, J., dissenting). The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question. And it answers that question based not on neutral principles of constitutional law, but on its own “understanding of what freedom is and must become.” *Ante*, at 19. I have no choice but to dissent.

22. *Id.* at 2613.

23. *Id.* at 2615.

cy is, or is not, suitable, or if a particular issue deserves attention due to its social support. However, a well-aimed defense of marriage should raise other arguments: it is not the numbers, but the nature of marriage, that merits government protection. If marriage were not an institution based on human nature, those who wanted to fight to defend it should give up and move to the political field to do so. A juridical opinion, even based on reliable data, does not deserve such a strong defense as the protection of an institution that goes beyond the law, or better, that is logically prior to the law.

Secondly, as marriage is a pre-judicial institution, there should be a reason why the State regulates it. What is that reason? It is none other than the benefits that marriage provides for society. Otherwise, the State regulation of marriage would not make sense; marriage would exist either with or without the intervention of the State; couples have established marital unions well before any written law appeared. But marriage is not only a personal relationship, or an agreement to live together and share expenses. It bestows an essential benefit to society: the community created by the marital bond is the best environment to rear children.²⁴ Family based on marriage is considered the cell of society because it has the best ambience for raising and educating the new generation. The offspring of a marriage grow up in an environment of mutual respect and cooperation of both progenitors. If marriage did not provide this benefit, the State would not be any more interested in marriage than it is in friendship or in sexual relationships out of marriage, and the State has never—as far as I know—enacted laws on friendship or other personal relationships.

This assessment may raise an objection. If marriage deserves the

24. *Id.* at 2612 (Roberts, C.J., dissenting) (quoting J.Q. WILSON, *THE MARRIAGE PROBLEM*, 41 (2002)):

The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.

Society has recognized that bond as marriage. And by bestowing a respected status and material benefits on married couples, society encourages men and women to conduct sexual relations within marriage rather than without. As one prominent scholar put it, "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."

attention of the State because of the interest of children, what about sterile couples? Would sterile couples, then, also be excluded from marriage for the same reasons same-sex couples would be? The answer to this question is that marriage is protected by the State because of the aims it pursues, not because any or every single couple achieves them. The aim of marriage is to ensure the well being of the spouses and the creation and education of children, and those goals benefit society. Therefore, all who enter into this relationship should aim to reach these goals, although not all couples will do so. However, the failure of some couples to reach the goals does not affect the essence of the institution. The same happens in any other institution; a company or an enterprise that does not obtain benefits is still a company or enterprise albeit an unsuccessful one, but the company does not become a non-profit corporation because of its lack of profit.

Besides this, let us not forget that laws not only regulate social life, they inform, teach, and shape public values. People without juridical knowledge tend to identify what is legal and what is right. There are many who assume that if an act or institution is allowed by law, it is “right” from every other perspective. We saw how many people switched their position endorsing express divorce, same-sex marriage, and maybe other unions soon after the enactment of those laws.²⁵

If marriage is regulated and protected because of its benefits, a logical conclusion is that if the new idea of marriage depicted by the law does not necessarily provide for those benefits, the grounds for its regulation and protection may not be the same as those of traditional marriage. The developments of these past decades—non-fault divorce, same-sex marriage and others—have completely changed the shape and aims of the marital relationship. It still has to be demonstrated that all unions that now fall under the umbrella of civil marriage purport a benefit to society, because their aim is not to create and educate the new generation.²⁶ Sure, some individual unions can

25. See David Blackenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html?_r=0; Stella Morabito, *Bait and Switch: How Same Sex Marriage Ends Family Autonomy*, THE FEDERALIST (Apr. 9, 2014), <http://thefederalist.com/2014/04/09/bait-and-switch-how-same-sex-marriage-ends-marriage-and-family-autonomy/>; Paul Elias, *Schwarzenegger: Let Same-sex Weddings Resume Now*, LAS VEGAS REV. J. (Aug. 7, 2010), <http://www.reviewjournal.com/news/schwarzenegger-let-same-sex-weddings-resume-now>.

26. See Harrison, *supra* note 3, at 48.

contribute to this goal, but it is not an unavoidable target of marriage any more. Then, if the marital unions are only self-fulfilling unions, without an outcome that may be of general interest, even if they are satisfactory for individual persons, why should public powers regulate them? There is not an apparent reason for the State to regulate these unions. Marriage appears as a relationship based on affection that demands economic benefits for no other special reason than two persons living together; something that good friends living together without having sex could demand as well, following the same rationale. Besides, it is difficult to label a bond that does not have a real expectation of being permanent as the foundation of society. While the bond of true marriage is *a bond*, where both parties commit themselves permanently to certain rights and duties, it is not the same in most regulations of marriage currently in force, where one can opt-out from that relationship so easily. Rather, it is a relationship that exists today and tomorrow may disappear without much more trouble than returning an unwanted item bought in a store.

Then, when *Obergefell*, like some scholars, continues to insist that marriage is the keystone of social order, we should wonder what it is talking about. Traditional marriage, real marriage, or true marriage, was the keystone of society for many centuries, and history has shown the importance of this institution, as well as the failure of other structures that tried to replace marriage as the foundation of society, as it happened in some totalitarian regimes. We still have to see if this new legal marriage, where personal choice and satisfying individual's desires are its main aims, may be the foundation of society as well.

We must put the debate on marriage in the right context: when we talk about acceptance of same-sex marriage, or polyamory, or the like, we are not talking about human rights. We are talking about trying to modify an institution that has neither been invented nor designed by legislators. Homosexuals and heterosexuals all have the same fundamental rights. Homosexuals already had the right to enter into marriage before the recognition of same-sex marriage; they were not denied a right, in the sense that neither any law nor statute—as far as I know—denied homosexuals the right to marry. Only, the marital relationship requires two persons of different sex because of its aims; therefore, two individuals of the same sex could not enter into it. Likewise, heterosexuals can now enter into same-sex marriages; they are not restricted to homosexual couples. Thus, the only thing that changed is that marriage does not need two people of dif-

ferent sex in the civil law; the regulation of the institution changed, rights are the same before and after the recognition of same-sex marriage.

Making same-sex marriage a case of fundamental rights brings this debate to a field where dissent is not possible. Fundamental rights enjoy a special protection, and everybody is supposed to endorse them. If same-sex marriage is considered a fundamental right, those who do not support it are outlaws, not lawyers or scholars that back up a certain juridical interpretation of the law. And, as a consequence, they are not admitted into public debate.

A further step with regards to the rights related to marriage is that they are moving from a right to privacy to a right to recognition. Roberts says in the *Obergefell* dissent:

[T]he privacy cases provide no support for the majority's position, because petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State. . . . Thus, although the right to privacy recognized by our precedents certainly plays a role in protecting the intimate conduct of same-sex couples, it provides no affirmative right to redefine marriage and no basis for striking down the laws at issue here.²⁷

If, during the last century, people demanded to do whatever they wanted inside the relationship of marriage, the current century seems to be presided by the claim that the State must recognize which people want to be married, banning those who want to monopolize this relationship—in the sense that marriage would be only a heterosexual, permanent and committed relationship—, keeping it into certain boundaries, or not allowing any possible union to get into the fold of marriage. The pledge of keeping the State out of bedrooms seems to have been transformed into a petition of regulating what is going on in everybody's bedrooms. In the United States, this change may be perceived in case law. We can compare the Griswold trilogy *Griswold v. Connecticut*,²⁸ *Turner v. Safley*,²⁹ and *Zablocki v. Redhail*,³⁰ which appealed to the right to marital privacy, to the Romer trilogy—*Romer v.*

27. *Obergefell*, 135 S.Ct. at 57 (dissenting).

28. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

29. *Turner v. Safley*, 482 U.S. 78 (1987).

30. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

Evans,³¹ *Lawrence v. Texas*,³² and *Windsor v. United States*³³—which demanded that public powers impose a certain idea of the marital union.

V. CONCLUSION

We must keep in mind that there is a particular item in the background of the debates on marriage. The two different positions on this issue appear to be irreconcilable: on one side, the idea of marriage as a permanent union, exclusive and comprehensive, based on the nature of man, and aimed at rearing offspring. On the other side, the conception of marriage as an agreement between two parties based on an emotional compromise, that lawmakers must regulate according to social demands—or pressures—of time and place. These two different positions are not only juridical but ideological ones. Therefore, no meeting point seems to be possible unless one of the sides relinquishes its principles. Undoubtedly, this is a more uncomfortable situation than another one where compromise is possible; here, one or the other will prevail. However, an ideological conviction gives meaning to the effort of protecting marriage. A merely juridical opinion does not deserve the endeavor.

History shows, over and over again, that marriage survives the toughest challenges. The truth about marriage—or better, the truth about men and women—will eventually prevail, although, maybe, we will not live to see it. In this case, the challenging task of family scholars is keeping this truth safe for the next generation.

31. *Romer v. Evans*, 517 U.S. 620 (1996).

32. *Lawrence v. Texas*, 539 U.S. 558 (2003).

33. *Windsor v. United States*, 570 U.S. ____ (2013).

