

“Defending” Marriage: A Modest Proposal

STEPHEN L. CARTER*

I want to talk a little bit about *Loving v. Virginia*¹, a little bit about some other issues, but mostly, I want to talk about marriage. I stand before you as a married man. I have been married for sixteen years and change. Marriage is a sacred institution for me as a Christian and a vitally important institution for the construction of society.

Every society we know of either has had marriage in some form or has left us ambiguous evidence. There are some ancient societies about which we are not sure. But what anthropologists tell us today is that there is no society of which it can confidently be said, “These folks did not, in fact, get married.” Marriage seems to be natural to the human species.

Now, of course, in today’s terms, when we think about marriage, we think not just about *Loving v. Virginia*², about which I’ll say more in a bit, but also about the question of same-sex marriage, about which I’ll say more in a bit as well. One of the great virtues of a conference like this one is precisely, I think, the desire to celebrate marriage itself and take from that celebration lessons for other issues that may divide us. The issue of same-sex marriage is, of course, a tremendously divisive one in the nation and among scholars. Probably today’s conference would have been more fruitful if there had been more people here who have a firm position in favor of it, as a way of generating some interesting conversation. But then I hear that last night you had some of that conversation anyway.

As for me, I come here today as a scholar, not as a person with a stake in the outcome of any of these debates. The trouble is that I am

* William Nelson Cromwell Professor of Law, Yale University. © April 10, 1998, All Rights Reserved. This is a transcript of a speech given at the *Loving v. Virginia* Symposium, jointly sponsored by Howard University School of Law and The Columbus School of Law, The Catholic University of America from November 19-21, 1997.

1. *Loving v. Virginia*, 388 U.S. 1 (1967).
2. *Id.*

not any more what I think of as a general scholar of constitutional law. I am a scholar of the religion clauses. So, when I think about *Loving v. Virginia*³, I think about it somewhat differently than most people do. People talk about the case quite sensibly, in terms of racial equality, or in terms of personal autonomy. I want to talk about it in terms of religious freedom, which is for me, as a scholar of the religion clauses, what is most importantly at stake. Bear in mind the way that anti-miscegenation laws often functioned. Relatively few prosecutions were brought for violating anti-miscegenation laws as such. They were brought for fornication. That is a very important distinction. How did that come about? Because the anti-miscegenation laws denied state acknowledgment or recognition of a marriage. Therefore, if the married couple engaged in sexual relations, they were violating the anti-fornication law.

Why is this a religious freedom issue? I hope that the reason is straightforward. Because my view of marriage, which I see as a sacred enterprise, is that if this interracial couple was married in a church, was married in the eyes of God, the fact that the state refused to recognize their union or even sought to punish it, did not make it any less a marriage. It did make the state oppressive and even idiotic, but it did not in any way affect the question, for me, of whether the couple was married or not. If they were married in the sight of God, then why worry about whether or not the state agrees?

Or, look at it another way. If they are married in the sight of God and the state punishes them for it, it is violating their religious liberty. I look at the case this way, probably because like most scholars, I am quite chauvinistic; and I think everything should be viewed through the tools of my own discipline. But I also look at it this way because I think this is the most useful way of illuminating our contemporary debates about marriages in a variety of alternative forms, as well as our contemporary debate about the value of marriage itself.

Indeed, I would go further. For me as a scholar of the religion clauses, the current controversies over marriage raise a very basic-sounding, but really quite difficult to answer, question. Why is the state in the business of regulating marriage at all? Why in the world should the government adopt rules acknowledging or not acknowledging marriage?

3. *Id.*

Now, when I raise this question, don't misunderstand. I am not here to argue the state should not be in the marriage business. I am here because this seems to me an interesting analytical puzzle. I like analytical puzzles. Some years ago, I wrote a book in which I said, rather pompously, that the role of an intellectual is to follow ideas to the truth and follow the truth wherever it leads. An angry reviewer responded by saying, "That is a 12-year-old nerd's vision of intellectual activity." So let me try to give you a 12-year-old nerd's vision of marriage, by following these ideas wherever they may lead.

Let's take it from the top. Marriage. Now, my wife and I, Christians, married in the sight of God before our congregation. According to Christian tradition-particularly but not exclusively the Catholic tradition-our marriage is a union that symbolizes Christ's love for the church and for God's creation. This is very heavy stuff. But when we went to the church and said we would like to be married, the Episcopal Church's answer was, "Well, do you have a license?"

Now, this is an oversimplification, but it's a fair summary. But think about that conversation for a moment. It is really quite bizarre. The Church is implicitly taking the position, "If you would like our religion to confer upon you this sacred marital status, you must go to the state and get its permission first." This is not, it seems to me, an honorable role for churches to play.

I am well-aware that there are some churches that do not inquire, or that mention the license in counseling as a pastoral matter, but don't actually require it before they perform the ceremony. I think that is a very good idea, because there is no faith that I am aware of that teaches as any part of its doctrine that marriage is something created by the state. Certainly, the way I was taught, and what I still believe, is that the marriage relationship is created by God.

The distinction was not so important in common law, because the common law rules were basically the tenets of marriage as promulgated by the church. But in America, and especially as the society has grown more regulated, we have developed a law of marriage. Marriage has become something subject to enormous detailed regulation-a little of it by courts, most of it either statutory or administrative-so that, rather than holding this sacred and solemn status as something ordained by God, we treat it for practical purposes as something created, regulated, and ultimately controlled by the state.

It is peculiar, I think, and sad, that we have reached this point. It is peculiar because it suggests a kind of surrender on the part of reli-

gious organizations of a fundamental authority over the most basic form of human relationship. It's sad because, if experience teaches anything, it teaches that government involvement in detailed regulatory schemes, with the best of intentions and the warmest of hearts, almost always winds up going in unexpected and unpredictable directions for the simple reason that no government remains always captive to the same interests. So, whatever may have been the motivations or the hopes or the desires of earlier generations who believed that official acknowledgment of marriage was important, what we discover as time passes is that official acknowledgment of marriage causes enormous difficulty. One of the difficulties it causes is that marriage, precisely because of its honored status, becomes a prize for which people fight in the political arena instead of a part of the sacred side of life.

I asked a question at the end of the panel discussion this morning. I want to clarify what I meant. I mentioned Kirkegaard's famous argument (even though he was, in context, being somewhat ironic) that Christians should be wary of casting themselves in the role of defenders of their faith, because of the risk that they then reduce Christianity to the status of a thing needing defense. I think about this a little bit when I think about the Defense of Marriage Act⁴, which struck me always as a fairly innocuous bit of legislation, although I know that there were deeply committed people on both sides of the issue. In fact, this struck me as a strange statute in the following respect: Given what it was trying to do, it was either unnecessary or unconstitutional. If the states have the authority to deny the validity of a marriage from another state, they don't need the Congress of the United States to give them that authority. It resides in them as sovereign entities, unless it was taken away by the Constitution. But if it was taken away by the Constitution, I don't think that the Congress of the United States can give it back.

Now, consider the sentiment that marriage needs defending. I wonder if we can apply the Kirkegaardian caution here. If we try too hard to defend marriage, do we not run the risk of reducing its status to something needing defense? I think of this because I worry that a lot of the law of marriage that has been collected over the years is law that's been created precisely for the purpose of defending marriage, of helping it out, of protecting it.

4. VA. CODE ANN. § 20 (Michie 1960).

One of the results of all this law has been, I worry, a quite predictable weakening of marriage, because as it has become more and more a part of our political and regulatory culture, it has lost the hard solemn edge that it traditionally had and should continue to have. In fact, I would go further. I am not advocating that the government get out of the marriage business. But I do think that as long as the government is in the marriage business, marriage will weaken rather than strengthen. We will find ourselves relying on finding the right statute, or the right regulation to protect our solemn enterprise, rather than protecting it through the power of faith.

I think about this when I think about the problem of divorce. Everyone agrees that our divorce rate is too high. For a while, the divorce rate was close to one-half the marriage rate, although it has recently dipped a little bit, and there is a widespread view that the reason the divorce rate is so high is that we make it too easy to get divorced. Therefore, if you make it harder to get divorced, the divorce rate would be lower.

Well, this of course is literally true. If it is harder to do a thing, you have less of a thing, so it's a nice policy-style argument. But the question of the strength of marriage is not to my mind principally a government policy question. It is, to my mind, principally a religious question. I see marriage, remember, as fundamentally a religious institution. So, if there are too many divorces, it is because something about our culture or the way religions function in our culture has loosened the hold that our religious traditions have on the imaginations, and the desires, and the self-discipline of an entire generation.

Many of you may be aware of the following very depressing data—American children are the only children in the world of whom a majority agree with the following statement: If a married couple falls out of love, they should get a divorce. This is a terrible tragedy. If the question were, *Why should a boyfriend and girlfriend break up?*, then “I think I don't love you anymore,” is a perfectly legitimate reason.

But if marriage is the kind of sacred commitment I believe it ought to be, that can't possibly be an adequate reason to end a marriage. The commitment involved in marriage ought to be stronger than the pull of momentary desire, and stronger as well than the fading of any particular flame. Stanley Haverwas, the sometimes controversial but never dull theologian, once wrote that the power of a successful marriage is the power to stick with what you are stuck with. While that is perhaps a little cynical for my taste, part of it is precisely

on point. The idea of trading in a spouse, the way you trade in a car or change jobs (because “I’m not happy anymore”) represents a remarkable casualness about marriage. And it is that growing casualness, which I believe is partly a function of regulation, that is the greatest threat to marriage.

Think about that casualness for a moment. I am aware of no faith in which married people take a vow that says, “I promise to stay with you as long as I get out of it what I want to get out of it. I promise to stay with you until I get bored, until my interests move in another direction.” But even though that is not the vow that anybody takes, that is the vow that many people believe themselves to have taken. And so, the marital relationship becomes a casual relationship.

Now everybody knows this. People blame television, they blame other parts of the media, blame the birth control pill, blame a thousand villains. I don’t know where the blame lies, but I do believe this is the predictable result, or rather, as I said before, the *unpredictable* result of turning marriage over to government. Once government makes the rules, you cannot tell where it’s going to come out. It is quite natural-it always happens-that when we have rules with exceptions, we begin to interpret the exceptions rather than the rules.

Many of you are aware of the famous conundrum in philosophy. It has been debated for many decades. Imagine a terrorist who has hidden a nuclear bomb in New York City. You have the terrorist in your hands. You have ten minutes to find the bomb. Would you torture him for the answer? What philosophy teaches is the correct answer is, “No, we wouldn’t, but we would do it anyway.” Which is to say that the rule has to be, “We would never do it,” even if you believe that sometimes we would. Because once the rule becomes “We would never do it *except*,” it is the natural tendency of human beings to begin to interpret the exception rather than interpret the rule. So, for example, when rules of divorce become rules of civil law rather than of religious understanding, we quite naturally begin to interpret them, and in the nature of many rules of government, they begin to broaden and grow.

Again, it is predictable that government regulation will take you into unpredictable places. Think, for example, of the *Swanner*⁵ case. The *Swanner* case is one of actually a cluster of cases, all raising basically the same issue: You are a landlord, and you are a landlord in a

5. *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979 (1994).

state that prohibits housing discrimination on the basis of marital status, as many states and sometimes local governments do.⁶ And you say, “You know, I want to comply with the law. The law is really important to me. I am a law-abiding citizen. However, I happen to believe-my religion teaches-that sexual relations outside of marriage are fornication. I can’t allow that on my property.” This is a case that has arisen in a lot of places. The landlord interposes the religious freedom objection, and sometimes the landlord wins, and sometimes the landlord loses. I mention the *Swanner*⁷ case only because it reached the Supreme Court, which refused to hear the case.⁸ But, the landlord lost the case.⁹

Now, I venture to say, no landlord would have lost that case a hundred years ago or fifty years ago. But we have grown sufficiently casual about marriage that courts can say with perfectly straight faces, as the Alaska Supreme Court did in the *Swanner* case,¹⁰ that the state has a compelling interest in protecting the rights of unmarried couples to cohabit. What the source of this compelling interest might be, I haven’t a clue. And nothing in this turns on whether you happen to think that fornication is a sin, or whether you think that people should be able to do as they like. My point is that it is the casualness about marriage that leads to the notion that it should make zero difference to a landlord whether two people are living together married, or living together not married, and that to treat them differently is forbidden discrimination. That argument, while it has a grain of analytical interest, is only made possible because of our casualness about marriage.

So, how do we get “uncasual” about marriage? I will try to offer at least one proposal to anger each person in the room. I’m only going to mention three of them here. Proposal Number One: Nondiscrimination by the government on the basis of marriage. What I mean is a principle that the state cannot punish a religious marriage. That would get us to the *Loving* result directly through religious freedom, as I mentioned, instead of going through the equal protection clause.¹¹ (I don’t mean the equal protection argument is worse, it’s just not where I happen to work.) That might also mean that *Reynolds v.*

6. *Id.* at 979.

7. *Id.*

8. *Id.*

9. *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994).

10. *Id.*

11. U.S. CONST. amend. XIV, § 1.

*United States*¹² is wrong, or that it is a harder case. *Reynolds*, decided in 1878, is a hard case to describe because it involved so many things. One of the things it involved was the constitutionality of a prohibition on polygamous marriage, or, more specifically, polygynous marriage.¹³ One way of analyzing *Reynolds*, the way the Supreme Court did,¹⁴ is to conclude that the Mormons must change their ways. This is what the Court plainly meant when it concluded that the Mormons were “subversive of good order.”¹⁵ The Court said this at a time when other American citizens were busy bombing, maiming and burning and shooting them.

A better way of looking at it is to say that if a marriage takes place in a religious context, it is not for the state to have anything to say about it. Now the question of whether a participant in a polygamous marriage could get some state benefit is entirely a separate question from whether the state ought to have the power to prohibit polygamous marriage altogether. And, I am bound to say, for me as a religious freedom advocate, the interesting case about same-sex marriage is not the *Baehr*¹⁶ case that everyone is so exorcized about, but *Shahar v. Bowers*.¹⁷ *Shahar v. Bowers*, for those of you who don't know about it, was decided by the Fifth Circuit a few months ago. The case involved a woman who married another woman in a religious ceremony and subsequently had an employment offer revoked by the Attorney General's office in Georgia.¹⁸ The Attorney General argued that same-sex marriage is contrary to the public policy of the state.¹⁹ He insisted that he was not discriminating against Shahar on the basis of sexual orientation, but was punishing her because of her marriage.²⁰ Under the theory that I have suggested, the Attorney General would lose the case. He could not punish her because of what happened within the four walls of her house of worship.

But this first theory actually would only get us a tiny bit of the way—that you can't punish people for what happens within their houses of worship. It should be horn book constitutional law, and is

12. 98 U.S. 145 (1878).

13. *Id.* at 162.

14. *Id.* at 166.

15. *Id.* at 164.

16. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (reversing and remanding a lower court decision prohibiting same-sex marriages).

17. 114 F.3d 1097 (11th Cir. 1997).

18. *Id.* at 1100.

19. *Id.* at 1101.

20. *Id.*

not even really very interesting. So let me go to the interesting ones. In order to give an interesting answer to the question of what we ought to do, we have to figure out whether there might be some good reasons for the state to be in the marriage business. Let's go through some possible reasons.

Reason number one. The state is in the marriage business, some people say, because some people get divorced, and you need to allocate the property and the children, and so on. This strikes me as a remarkably poor reason that the reason the state should be involved in the regulation of this most solemn of human relationships is that it sometimes doesn't work out, and therefore we need rules about it. To me that's like saying that because some boyfriends and girlfriends break up, there should be a state law governing what happens when in fact that occurs. The mere fact that divorce happens seems to be a weak reason, as you'll see in a moment. Besides, we can get a divorce another way.

Reason number two. You can find this in literature: administrative convenience. Since most adults at some point get married, it's useful to have a set of laws creating a legal relationship so that they can understand what they are getting into. Well, this of course is sheer nonsense. If most adults got married in religious ceremonies, they would already know what they were getting into, because their religion would tell them what they were getting into. The only reason that administrative convenience sounds even interesting as a ground is that we have become casual about marriage.

Third ground: tradition. The state should regulate marriage because the state has always regulated marriage. This isn't even true, to say nothing of interesting. Moreover, our current network of laws and regulations about marriage bears only a distant relation to our English common-law inheritance of rules about marriage. So we can say that it's a tradition, that the state has always been involved in marriage in some way, but in fairness we would have to describe the common law as basically creating a situation in which the courts more or less adopted the prevailing religious view of marriage in England, which is not surprising at all, because marriage began as a religious institution.

The fourth reason that is sometimes given is that a lot of people get married without a religious ceremony. Not everyone's marriage is religious. That is why the state has to be in the marriage business. Nowadays, this argument is quite common, but it is also quite strange. Here's why: Suppose that there was a religious faith in which every

member, upon reaching the age eighteen, received a Mercedes Benz, as part of the religion. Perhaps the congregation takes up a collection. Somebody comes along and says, "Well, I'm not interested in that religion, but I would kind of like a Mercedes Benz. So I think there should be a government program, that all 18-year olds, whether or not members of that religion, also get Mercedes Benz's. Why? Because I want one!" Because I want one, that's why. That seems to me to be the content of the argument that some people want to get married in non-religious ceremonies.

Now, don't get me wrong. I am not saying there is anything wrong with wanting to get married without a religious ceremony. I am simply saying that desire does not itself supply an adequate reason for government involvement in the detailed scheme of regulation of marriage. One might object that there is much in our society that turns on whether you are married or not. Health benefits, for example. Well, they do, but that is a market phenomenon. Health benefits turn on marriage because people want it that way. Health insurers use government recognition of marriage as an administrative convenience. If there were no government recognition of marriage, and therefore no administrative convenience, we would simply find another way of allocating health benefits. I think the market could handle that in about three minutes without any difficulty at all.

Well, what about inheritance? What about all these cases in the law school casebooks: Somebody dies intestate, and there's a fight over the will. Some of you teach contracts, so you know the case of *Thomas v. Thomas*.²¹ Mr. Thomas has a dying wish: Give my wife a house for her lifetime. Then he dies, and his heirs give her the house for a couple of years, and then they boot her out. And it brings tears to your eyes. So, is that why the state has to be in the marriage business? To keep the Widow Thomas from getting booted out of her house? Actually, no. The Widow Thomas got to keep her house.²² But the result had nothing to do with whether the state was in the marriage business. She got to keep her house because the estate actually implemented the dying wish of Mr. Thomas, and created a contract.²³ So, it was because of a contract that Mrs. Thomas got to keep her house.

21. 107 Mo. 459 (1891).

22. *Id.* at 463.

23. *Id.* at 462.

Now, you might say, what about things like the widow’s portion? What about having to apportion estates? What about people who die intestate, with no dying wishes? This takes me to my third idea, an idea, I think it’s fair to say, that nobody likes. This is the idea I have suggested at a couple of workshops around the country, and not a single person has begun a question, as people at workshops like to say, “I agree with you, but” They have basically started with the eggs and followed with the tomatoes.

But let me give you the idea anyway: We repeal all marriage laws. And we replace marriage law with what I think of as The One Big Marriage Law. Here’s the One Big Marriage Law: If you want to get married, fine. You get married. We don’t do marriages, the state says. We’re not in the marriage business. There’s a lot of institutions out there, some religious, some non-religious—the market will provide some that *are* in the marriage business. You go and get married in one of those. The One Big Marriage Law provides that whatever private institution marries you also gets to decide what happens if you decide to seek a divorce. Thus the One Big Marriage Law provides an incentive to think really hard about where and how to get married.

People might say this is an outrage. Because, you know, you get married in an institution, but you might later change your mind. It might be oppressive. But all that is true of marriage anyway. The advantage of my proposal is that, at minimum, it forces us to think critically about where, in what tradition, we want to get married. My view of the divorce rate has always been that we don’t have divorce rates so high because divorce is too easy. The divorce rate is so high because marriage is too easy.

We don’t do enough work, I believe, to help young people understand what they are actually getting into when they get married. We don’t help them to understand what it means to be committed to the same person for the rest of your life. So it is quite natural that people get married and simply assume when push comes to shove that they can make a change, trade in a spouse the way they would trade in their car.

I’m not saying this One Big Marriage Law is a good idea. I think it’s a helpful way of thinking about the problem of why it is that government is in the marriage business. Because if you don’t like my One Big Marriage Law, that must mean that you have some vision of some set of marriage rules that you think should apply to everybody. You have a sense that what we really need is not the One Big Marriage

Law, with its diversification of the marriage function. We need one set of rules to govern all marital relationships. I teach my students that one-size-fits-all lawmaking can often be a form of totalitarianism, but nobody believes that either. But I do think there are real risks when we say there is one-size-fits-all marriage, and the government, by fiat, is going to tell everybody what it is.

Of course, my proposal also carries risks. One of the risks is that some of these private entities might perform marriages of a sort you or I don't like. Not just that we are uncomfortable with, but a form that we think is immoral or even dangerous. What do we do about that? Can the One Big Marriage Law be supplemented by some small marriage laws, prohibiting certain marital relationships? Well, maybe. That, it seems to me, is where the debate needs to be, in the following sense: if you return marriage to its solemn religious origins, then many of these debates would be carried on among people of faith, which is where I happen to think they actually belong. Marriage is, as I said, a religious institution, which has really been hijacked, in my judgment, by the state. So, we would have these debates, not principally at the level of the state, but principally at the level of religion, the place where marriage began.

You might say, "No, Carter, this isn't any good." (Whichever side you're on.) "This just isn't any good because I really think that I have got the answer, right here. If we just put the answer in law, we'll solve all the problems." Sometimes that is right. I am not one who is against law. I am one who is for marriage.

Which leads me to my interesting (to me) last point. I told you I would come back to the same-sex marriage issue. I look at the debate over same-sex marriage, and I really worry about the point about the solemnity of marriage, and its essentially religious nature being lost. So, I think that both sides in that particular debate could probably do a better job of focusing in on that, in the following sense.

I would say that what's really important for defenders of traditional marriage (and here when I say traditional, I am excluding same-sex marriage) is to be crystal-clear about why marriage is worth defending. Why do I say that? Because of the alarming casualness I have mentioned. That is to say, one has to have a plan for overcoming the casualness which is the greatest threat to marriage. I believe that abandoning state control of marriage and turning it over to religions and other private institutions could be a step toward recovering this solemn and sacred nature of marriage.

But I also think that people who are in favor of same-sex marriage ought to be trying to defend a traditional conception, within that same-sex marriage rubric. My own Episcopal church, for example, has been having big debates over same-sex marriage. Some Episcopalian supporters of same-sex marriage have taken the view that even if they succeed, they don't think that their marriages should be bound by the same standards of monogamy as traditional marriages. This seems to be a very bad argument, because this argument runs the risk of joining a movement that wants to be part of marriage to the very forces of casualness that are weakening marriage. The proper path, then, for same-sex marriage advocates is to try to join the movement that wants to be part of marriage to forces that are trying to strengthen rather than weaken marriage.

One of the beauties of *Loving v. Virginia*²⁴ was precisely that it was very easy to see how these were people trying to do a very ordinary thing, and got in trouble for it. We must not be ahistorical. We must not make the mistake of thinking, because it would not be true, that in the mid-1960s, most Americans believed interracial marriage was just fine. That just isn't so. But looking back on it now, we can see why most Americans would probably say, “Yes, I now understand this case” because of the sheer ordinariness of it, and because of the way it presents itself as a desire for a kind of fervent traditionalism. My view is that traditionalists, defending traditional marriage, and expansionists, defending same-sex marriage, ought both to be casting themselves as protectors of this image of marriage as an ordinary thing with clearly understood rules. Among those clearly understood rules is the proposition that marriage is a monogamous commitment that we make for life.

That doesn't mean that nobody is ever going to get divorced, and it doesn't mean that every marriage can be saved—some can't. But we should try to draw distinctions between marriages we think can't be saved, through any act of faith by the people involved (which I think is a very tiny set of marriages) and marriages that end for other reasons. Ideally, our understanding of divorce, like our understanding of marriage, should be driven by a sense that the marital commitment must never be treated casually.

As one who usually thinks of myself as a traditionalist on marriage, I am bound to say that this casualness about marriage, that

24. *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

makes it so hard to present it to young people as a loving and committed, lifelong relationship, is the greatest threat against which marriage needs to be defended.