



## Toward a Liberal Theory of Marriage and the State

On June 17, 2008, San Francisco's straight and iconoclastic mayor Gavin Newsom presided over the wedding of Del Martin, 87, and Phyllis Lyon, 84. Partners for more than half a century, Martin and Lyon were the first same-sex couple to be married under the California Supreme Court's landmark ruling *In re Marriage Cases*. In addition to the joy that normally accompanies a wedding, Martin and Lyon's ceremony was marked by the euphoria of injustice righted. Mayor Newsom declared, "Today, marriage as an institution has been strengthened."<sup>1</sup>

On January 20, 2009, in Washington, DC, on the steps of the United States Capitol building, Pastor Rick Warren opened the historic inauguration of the forty-fourth president, Barack Obama, with the words, "Almighty God, our father." At that moment, amid the thick whirl of hope and virtue, on the side streets in the capital and cities across America, some of Obama's most loyal supporters stood and waved flags of protest. Warren's comments on same-sex marriage stirred the only noticeable disturbance in Obama's transition into the White House. One month earlier, War-

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ren had explained why, though he supported “equal rights for all Americans,” he opposed same-sex marriage:

The issue to me, I’m not opposed to that [laws that enable couples to share insurance benefits] as much as I’m opposed to redefinition of a 5,000 year definition of marriage. I’m opposed to having a brother and sister being together and calling that marriage. I’m opposed to an older guy marrying a child and calling that marriage. I’m opposed to one guy having multiple wives and calling that marriage.

Friendly interviewer, fellow evangelical star Steven Waldman pressed: “Do you think those are equivalent to gays getting married?”

Oh, I do. For 5,000 years, marriage has been defined by every single culture and every single religion—this is not a Christian issue. Buddhist, Muslims, Jews—historically, marriage is a man and a woman. . . . I just don’t believe in the redefinition of marriage.<sup>2</sup>

Newsom and Warren clearly stand at opposite ends of the political spectrum. Yet for all of their obvious disagreement, they share one crucial—and problematic—assumption: that the state *should* be in the business of defining and controlling marriage. Fights rage over who ought to have access to the status, but rarely do parties to these debates defend the very foundation of their position. “Today,” Mayor Newsom proclaimed, “marriage has been affirmed.”<sup>3</sup> True though this may have been on that day, it does not tell us why the *state* must be involved in making love public. And despite his own observation that marriage long predates the modern state—by some four-thousand-plus

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years—Warren unquestioningly equates *the* definition of marriage with the state of California’s definition of it.

This book challenges this widely held and typically undefended assumption that the state should create, control, and rely upon marriage. Prudence and liberal commitments to liberty, equality, and stability weigh heavily against this arrangement.



In most, if not all, liberal democracies today, marriage is established.<sup>4</sup> To say this is to highlight two facts. First, despite a flourishing diversity of family forms and public debates about what marriage is, governments define and confer marital status and use it as an exclusive and privileged means for meeting public-welfare aims.<sup>5</sup> Marriage is the favored family form—or the favored veil under which to place the family.<sup>6</sup> The state privileges the marital family in designing and dispersing legal benefits aimed at protecting and supporting networks of intimate care. Legal kinship presumptions (for example, paternity presumption when a birth occurs within marriage), frameworks for dissolving families (for example, settled divorce procedures),<sup>7</sup> and material bonuses for engaging in family life under the marital veil (for example, the spousal benefits of Social Security) evince this practice.<sup>8</sup> Other family forms are not roundly ignored or excluded from government policies. Welfare benefits often target nonmarried, single-parent households, and food assistance is typically available regardless of marital status.<sup>9</sup> Still, the marital family is the preferred form. In the United States, government efforts after the 1996 welfare reform to support poor families by strengthening their marriages are perhaps the most striking examples of this fact.<sup>10</sup>

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Second, to say that marriage is established is to highlight the fact that the state exercises final say over the content and public use of the marital label. Although the state is often lenient with most extralegal uses of the marital label, it can and does exercise final control over the public, even nonlegal use of the term *marriage*. Take the case of polygamist Tom Green: he ended up in jail for violating Utah's laws against plural marriage, even though he and his "spiritual wives" scrupulously avoided seeking legal recognition for their unions.<sup>11</sup> The state prosecuted Green for misusing the marital label, even in its extralegal form. Government wields control of marriage over and against all other public authorities—religious and secular—and in doing so serves as *the* predominant authority in the reproduction not just of a legal status but also of what I will argue is a comprehensive social institution. In sum, to call marriage "established" is to draw attention to the integral place of marriage in state policy *and* to the central role assumed by the state in defining a particular version of marriage.

To assess arguments for and against expanding the legal definition of marriage or arguments for and against using marriage as a vehicle for public policy—in short, to answer questions raised by debates that rage around us today—we must consider why marriage is established in the first place. Unless we are clear about what marriage gets from the state and the state from marriage, to what ends, and at what costs, we cannot decide whether the legal definition should be restricted or expanded, how and to whom. Marriage may or may not need saving, but until we know just what is being saved, how the state might assist in its rescue, and at what cost, we cannot say whether the state should be involved in the rescue effort.

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Common views and practices notwithstanding, the justification for the establishment of marriage is far from obvious. As a practical matter, the state can, does, and, I shall argue, should achieve legitimate public-welfare goals through other means. Parents are and should be held legally responsible for their offspring, regardless of their marital status.<sup>12</sup> Registered domestic-partnership status—appropriately, though insufficiently—provides many of the legal benefits and burdens associated with marriage without the marital label.<sup>13</sup> For its part, marriage does not require *state* recognition to exist. Think of polygamous unions; these are called, experienced, and understood as marriage by those party to them, despite being outlawed.

Furthermore, state control of marriage is not a universal arrangement. In many European and North American jurisdictions, religious authorities wielded final control over the institution until well into the eighteenth and even nineteenth centuries.<sup>14</sup> Today, many same-sex couples assume marital status conferred by nongovernmental religious officers in many of these same countries. Similarly, among peoples who live in traditional societies at the fringes of the modern nation-state, marital status and practices proceed apace without the involvement of the state. Of course, where the modern state possesses the capacity to define and control marriage, it does and perhaps without exception. But prevalence alone does not make a convincing position.

By the measure of liberal principles, the justification for the establishment of marriage is also far from obvious. “Liberal” here refers to a family of ideas about political life, at the core of which is a commitment to liberty, equality, and stability amid deep diversity.<sup>15</sup> This is a theory of politics in the tradition of John Locke, John Stuart Mill, Isaiah Berlin, and John Rawls. By drawing a line between private/

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nonpolitical and public/political life, liberalism negotiates the conflicting pulls of freedom and fairness, diversity and equality, independence and dependence, the individual and the community. As Judith Shklar explains, liberalism is a political doctrine, not a “philosophy of life.” It has “only one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom.” To achieve this end, liberalism insists on drawing a line between public and political on one side and private and nonpolitical life on the other; it “must reject only those political doctrines that do not recognize any difference between the spheres of the personal and the public.”<sup>16</sup> In the nonpolitical sphere, individual freedom reigns unfettered by the demands of political unity, and diversity flourishes. In the political sphere, universal norms and uniform laws govern the actions of independent citizens.

The presumption that the state should aim for neutrality with respect to matters that do not impinge on the physical and material well-being of citizens has long been central to the liberal democratic approach to negotiating the inevitable conflicts between freedom and equality.<sup>17</sup> In liberalism’s calculus, a fair scheme of social cooperation may cost unfettered freedom in public but is reimbursed by public equality, relatively unrestrained freedom in private life, and stability in both spheres. The appeal of this approach is clear: it aims to enable deeply diverse societies to operate according to rules of justice without undermining many of the most significant differences that freedom bears.<sup>18</sup> Individual rights, limited but not absent government, toleration, and some sort of separation of church and state are among its basic mechanisms for achieving the always changing and usually imperfect balance between liberty and equality in the face of diversity.

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Before coming under full control of secular courts—which did not happen until the mid-nineteenth century in England, for example—marriage typically fell under the shared purview of political and religious authority.<sup>19</sup> And still today, most citizens, customs, and laws of liberal democracies treat marriage as more than any given set of actions or delineable legal obligations and more than a simple social institution or private union. The diversely defined form(s), function(s), and forces of marriage derive from traditions of meaning and practice that exist historically and socially beyond or before the liberal state. Marriage, in traditions that dominate liberal democratic polities, was not bred to fit neatly within the limited reach of the state.

Given these facts, it is clear that the establishment of marriage flirts with violating liberalism's most basic values. Because citizens disagree deeply about what marriage is and because families assume such diverse forms, the arrangement would appear to threaten equality, both formal (before the law) and substantive (within and among families and cultures). Liberty too is threatened: because the arrangement draws the state into the most intimate corners of citizens' lives (family and sexual life, religious and cultural value systems) and effectively privileges some views of the good life while punishing others, the establishment of marriage threatens freedoms of conscience, expression, and association. With its border-crossing tendencies, marriage poses an obvious challenge to a political theory that relies heavily on distinctions between public and private life. On its face, the establishment of marriage would appear to interfere with privacy. And, to the extent that stability depends on liberty and equality, the current policy regime would seem also to threaten this third basic commitment. At the very least, a liberal justification for the establishment of marriage is not

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obvious. On the contrary, as this cursory consideration suggests, there is good reason to believe that state-sanctioned marriage conflicts with the most basic liberal commitments to equality, liberty, and stability. While all these violations may well be justified, assumption and assertion are not adequate to making the case.

The challenge to justifying the establishment of marriage is that it be true to the two primary players in the arrangement: marriage and the liberal state. To do this, a convincing defense would include four things: first, a full and accurate picture of the institution and, second, an explanation of why, in order to flourish, marriage needs the sort of state involvement entailed by its establishment. Third, it would delineate the goods the state secures through the establishment of marriage and explain why, to achieve its legitimate functions, the state needs to be so involved in marriage *per se*. Fourth, such a defense would explain how this arrangement avoids violating basic commitments to liberty, equality, and stability.

It is both striking and telling that few have attempted to defend the establishment of marriage, and the justifications that can be gleaned from their writing are not up to the task. As chapter 2 shows, American jurists tend to err in favor of marriage *or* liberal principles. Not until recently did they even acknowledge the need to negotiate a just coexistence. In chapter 3, we see that liberal theorists Locke, Mill, and Susan Moller Okin have tended to focus on the material side of marriage and the instrumental purposes of marital status, at least when considering the state's role. This focus makes some sense, for it highlights those aspects of marriage that fit comfortably into a liberal tradition that takes the state as properly limited to matters of material concern—of action and behavior and not of belief and meaning.



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It does not, however, capture how most, including these same thinkers, actually treat marriage. Lost in the gap between the usually implicit explanations for state control of marriage and the view of marriage that most citizens and laws actually hold is the *meaning* side of marriage, that aspect of marriage that embodies nonmaterial beliefs, relationships, and obligations and that fundamentally challenges those borders established by liberal principals. Lost in the gap is a series of questions about marriage, the functions of public definition and conferral of marital status, and the role of the state therein that remain unanswered at the potential peril of basic commitments to freedom, equality, and stability.

The confusions of practice and the inadequacies of the liberal canon leave us with the task of elaborating a fuller picture of the institution of marriage embedded in liberal traditions—and especially of the unique function of public recognition therein—than is typically offered by liberal thinkers. Chapter 4 turns to critics of liberalism—some friendlier than others—to help draw this picture. These thinkers attend to aspects of marriage that their liberal counterparts ignore and thus help fill out the picture. The view of marriage that dominates liberal democratic traditions is best described as a formal, comprehensive social institution (FCSI). With its peculiar mix of extralegal character, scope, method, and purpose, marriage, on this account, is more like religion than other institutions and legal statuses such as civil unions, business partnerships, motherhood, or even funerals, to which it is often compared.

This *explanation* should not be confused with *endorsement* or *justification*. While this account better captures the way most people experience it and our laws treat marriage, it does not justify state control and use of the FCSI, at least not in liberal terms. It helps identify the differences between

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marriage and, say, civil union better than devoted liberals have done but does not explain why the state must be involved for marriage to produce its magic, or how the state can serve the role it currently serves without violating limits essential to securing liberty, equality, and stability in the face of deep cultural, religious, ethnic, and moral diversity.

Feminists and queer theorists have given us more than enough reason to worry about the abusive and injurious potential of comprehensive social institutions and of this one, in particular.<sup>20</sup> My explanation of “the ‘m’ word” and of the added value that many believe it gives to conjugal unions and the state alike fills in pieces missing from the typical liberal account. It tells us what liberal theorists, jurists, and citizens assume but do not articulate and thus makes sense of the liberal reservations. It helps us understand the reason liberals would be ambivalent about defending *or* rejecting the establishment of marriage, even as it adds fodder to the case for disestablishment.

One source of the awkward silences and unanswered questions this book aims to resolve is the uneasy incorporation of marriage into liberal political thought. With a full account of the version of marriage that dominates liberal traditions, we are situated to understand the pull and push in liberal treatment of the relationship between marriage and the state. The pull comes from the popularity, institutional logic, and historical and sociological power of marriage. Most citizens in liberal polities marry. Much, if not most, intimate caregiving takes place in the ideational folds of marriage. And as liberals since Locke have made clear, there are good reasons for the state to be concerned with relationships of care. Furthermore, but distinctly, marriage is a public institution; it demands the formal engagement—the recognition and regulation—of a public authority. The

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state is the public authority par excellence. The public authority that controls marriage exercises influence over the very self-understanding and intimate lives of those who inhabit the institution. No wonder liberals embrace the establishment of marriage.

The push against the establishment of marriage is also clear. Although most citizens in liberal polities marry, fewer are getting and staying married, and an increasing proportion of what I call the “material side” of marriage—particularly intimate caregiving—no longer takes place within the marital walls. Moreover, liberal citizens disagree profoundly about just what marriage is. More importantly, as chapter 4 elaborates, it is especially appropriate to speak of marriage as established. Just as the “establishment of religion” refers to the state’s active involvement in defining, inculcating, and supporting particular religious worldviews and institutional arrangements, so the “establishment of marriage” highlights the state’s integral role in reproducing and relying on belief in a particular, comprehensive account and institutional form of intimate life. Marriage asks more of the public authority that regulates it than the liberal state can and should provide. The unique transformative potential of marriage depends on the recognizing authority’s functioning as an ethical authority, which in turn depends on a shared, comprehensive account of the interconnectedness of the regulated individuals and the regulating community. But liberalism promises that stable political life can and must exist without such deep and expansive ideational unity in order to protect individual freedom and equality.<sup>21</sup> Marriage offers goods that the state needs (in part because many citizens embrace marriage unreflectively), and the state in turn seems to offer goods that marriage needs. And yet the fit is imprecise. The misfit is ignored at the cost of liberty, equal-

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ity, and the health of both marriage and families. Elaborating and defending these claims are the tasks of this book.

With the institutional logic of the dominant account of marriage clearly articulated, chapter 5 turns to the task of imagining an arrangement that does better by liberal values *and* marriage. We make novel use of liberal resources for dealing with challenges ostensibly different from that of marriage. If marriage is an FCSI, it makes sense to draw from traditions of negotiating relations between the state and religion, the FCSI par excellence, as we reimagine the relationship between the state and marriage. Seen through this lens, the virtues of doing away with marriage as a legal category are clear: it would protect freedom of expression, intimate association, and cultural pluralism while enhancing equality between and within intimate associations. These benefits weigh in favor of disestablishing marriage.

And yet those who anticipate a libertarian argument will be disappointed. The liberal perspective developed in this book is heavily indebted to the insights of feminist theorists such as Okin, Joan Tronto, Eva Kittay, and Linda McClain.<sup>22</sup> I assume that sex and gender are essential lenses through which to understand power and politics in the world. Two facts of particular importance become clear through these lenses. First, deep, inevitable, and varied connections link public and private life. So even as I defend the need for guarding a distinction between public and private life, I am sensitive to the ways that this conceptual divide is misleading, inaccurate, and even dangerous, useful though it may be. Awareness of these connections generates constant vigilance toward the exclusions, injuries, and potential lies created or facilitated by the imaginary divide between the political and nonpolitical. The liberal solu-

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tion to the challenges of marriage relies on a reformed and ever-self-critical version of the public/private.

Second, our attention to sex and gender attunes us to the facts and implications of our inevitable interdependency. Human beings are not, as often advertised in the liberal canon, fundamentally independent. Rather, we begin life utterly vulnerable and proceed through it provisionally vulnerable, dependent on others for survival and nurturance. And caregiving creates its own vulnerability: caregivers must expend resources on care receivers that they might otherwise use to care for themselves.<sup>23</sup> If care is to be done well and its benefits and burdens to be distributed fairly, some entity must provide a degree of insurance against its risks. The second feature of the liberal perspective endorsed and developed here is an awareness of this fact and the implications it has for determining the proper reach of state action. Neither freedom nor equality nor stability can be secured by a state that merely protects individuals from external impediment. The state must recognize and regulate intimate caregiving units to insure against the inherent risks of care, but it must do so in ways that neither undermine their norms of reciprocity nor exacerbate existing inequalities. The argument here is not so much one that flows from positive freedom or liberal perfectionism as one that recognizes that there is no such thing as purely negative freedom. The argument here does not depend on a comprehensive picture of human flourishing but rather on the recognition that *interdependence* is the unavoidable state for human beings. Against the background of this view of persons, liberalism's challenge is to balance these apparently conflicting insights and commitments in order to secure liberty, equality, and stability in the face of diversity.

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There is no good liberal justification for the establishment of marriage. The state should cease participating actively in the creation and privileging of marriage, as such, and the use of marriage as a category for dispersing benefits.<sup>24</sup> Still, marriage is currently the primary avenue through which most liberal states secure (however inadequately) important public-welfare goals. Thus, any argument that the state should get out of the marriage business must identify which of these goals fall within the proper purview of the state and offer an alternative method for realizing them. Intimate caregiving is the aspect of domestic associational life that the state currently treats through marriage and with which it should continue to be engaged positively. There are compelling liberal reasons—beginning with the physical health and well-being of citizens and the polity—for the state to recognize and protect intimate caregiving unions. To do this and best protect liberty and equality, the state should treat this set of concerns through an intimate caregiving union status.<sup>25</sup> Against suggestions that the state's legitimate welfare concerns with respect to intimate associational life are best treated by reforming marriage or replacing it with a system of private contract, an intimate caregiving union status, narrowly and carefully tailored to recognize, protect, and support intimate caregiving in its many forms, would most effectively balance liberal commitments to liberty, equality, and stability.

This proposal will strike many as radical, if not unwise. As a historical matter, severing the direct link between marriage and the state would be radical. Reigning political powers have, in most places and times, controlled and used marriage for both material and nonmaterial ends.<sup>26</sup> In the Anglo-American liberal tradition, nonecclesiastical authority had a hand in governing marriage since the earliest stir-

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rings of the liberal state in the late seventeenth century.<sup>27</sup> And yet, as recent trends indicate—Canada’s *Beyond Conjugality* and the matching legislation; France’s *pacte civil de solidarité* (PACS); and, in the United States, the demise of fault-based divorce, the increasing legal recognition and protection of nonmarried cohabitants, and the criminalization of marital rape—neither in principle nor in practice would the disestablishing of marriage be so radical. Getting the state out of marriage per se—but not out of many of the material concerns often housed in its ideational folds—is a move that squares with basic liberal values and widely shared understandings of marriage, and would, as a practical matter, do better by our values and by marriage itself. My aim here is to present a political philosophical defense of the shift away from state control and use of marriage and toward policies that are more narrowly tailored to support intimate care in its many guises. Upon reflection, most citizens of today’s liberal democratic polities would see their values and beliefs reflected in this proposal.



Marriage is much in the news these days. A few words are thus in order to explain what this book is and what it is not. This book is an exercise in political theory.<sup>28</sup> It is political in two senses: the object of this study is, at its core, power in its institutional and discursive forms. It is also political in that it aims to affect current arrangements of power. And yet this study is not mere polemic.<sup>29</sup> Far from it. Nor is it concerned narrowly with public-policy reform or arguing within the confines of any particular liberal polity’s legal framework. In presenting a model of how we might realize

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our shared, if contested and often-conflicting, commitments, the present study is an exercise in normative but not uncritical theory.<sup>30</sup> A central aim is to expose the hidden subtexts of current policy, law, and popular debates in order to assess the reasons, assumptions, and attachments expressed in our common lives. Further, the model of marriage-state relations offered stands as a critique of current arrangements.

For readers interested in American law and jurisprudence on marriage, this book should be useful, although somewhat indirectly. My argument is not conducted within the strict conventions of American constitutional law, but rather, within a broader tradition of political thought upon which these conventions are based. I draw on and aim to speak to a more abstract set of ideas—the liberal family of political commitments to liberty (via individual rights and limited government), equality (before the law and among citizens), and stability (one of the necessary preconditions for liberty and equality) as essential characteristics of a regime that honors the moral equality of citizens. I use judicial opinions to understand and evaluate liberal theory because to a great extent they reflect the liberal values and approaches that shape our Constitution.

More broadly, I aim to contribute to discussions about the proper role of the state in the intimate associational lives of its citizens.<sup>31</sup> And while I hope to bring critical clarity to contemporary debates and practices, the policy conclusions are the outcomes of wider aims. One of these aims is to contribute to a history of political ideas by identifying and grappling with persistent and influential but rarely noticed features of liberal political theory. Addressing the unresolved challenge of marriage serves more than a purely



historical purpose: it serves critical and constructive purposes as well.

Although marriage is the immediate focus, the conceptual considerations speak to broader concerns within liberal political theory. I assume a critical view of the traditional public/private and political/nonpolitical divides—as conceptual, descriptive, and prescriptive devices—without abandoning them altogether. Feminists, especially, have convincingly shown that, as conceptual tools, these distinctions have been the cause of many theoretical and practical obfuscations and abuses.<sup>32</sup> At the same time, they and others have shown that the elimination of zones of privacy serves neither equality nor liberty.<sup>33</sup> In light of these insights, the argument presented here assumes that the distinctions between public and private and between political and nonpolitical can be useful. But to be useful, they require constant vigilance to the exclusions, abuses, and obfuscations they facilitate. As the pressing dilemmas provoked by increased cultural, ethnic, and religious diversity of many liberal democratic polities demonstrate, this relationship between marriage and the state offers a direct road into the heart of some of the most important, hallowed, and troubled areas of liberal political theory—those areas where public and private overlap and collide.<sup>34</sup> The line between public and private, between political and nonpolitical must be continually negotiated and renegotiated. This book contributes to the project of redrawing this line and thus brings us closer to achieving liberalism's promise of liberty and equality in the face of deep diversity.

The argument of this book takes a basic commitment to liberal values. It defends the position that the liberal approach to arranging political life is both viable and valuable and that the current relationship between marriage and the

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state does not square with that approach. Classical liberal distinctions between thought and action, belief and behavior, nonpolitical and political, private and public are, for all their faults, essential tools for balancing the often-competing demands of freedom, equality, and stability in the area of state involvement in intimate associations. Intimate associations are deeply problematic for liberalism. They draw affection away from the liberal state and often demand its protection. They are home to what are commonly understood as the most private relationships, yet they have vast influence upon our public, political selves. Intimate associations simultaneously demand to be recognized—both systematically, as when a man and a woman get married, and unpredictably, as when a never-married couple goes to court over a break-up—and to be left alone. (It is hardly a coincidence that in the United States, privacy law was, until recently, built around the marital couple.) Marriage is a special variety of intimate association, one for which liberalism has not yet devised a sensible model for state involvement. A basic aim of this book is to craft such a model, one that delivers on liberalism's promise to protect liberty, equality, and stability.

This is not a book specifically about California's Proposition 8 or Rick Warren or antipolygamy legislation *per se*. Rather, it is about the assumptions, attachments, and arrangements that make these contemporary events possible. By elucidating the theoretical and practical issues that lie behind the headlines and public debates, we are better situated to evaluate, argue about, and reform them.