

The Disestablishment of Marriage

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Abstract:

The purpose of this paper is to analyze the theoretical benefits of disestablishing marriage as a legal institution in the United States. By pointing out both the legal and moral inequalities in the institution, this paper aims to identify why marriage in itself is an unacceptable practice in American society and advocate the option of disestablishment as most suitable for confronting these issues. This focus seeks to reverse traditional thinking about marriage, as well as demonstrate the viability of alternative practices.

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In *Meyer v. State of Nebraska*, the District Court upheld a law making the teaching of subjects in any language other than English in all grades below eighth illegal (*Meyer v. State of Nebraska*, 1923). Those who supported the ban on foreign language saw immigrant families as a political threat, and the Court maintained that the laws intended to "foster a homogeneous people" in order to cultivate good citizens (Ristoph and Murray, 1264). Instead, the laws excluded non-English speaking students from an education, fostered inequality and prejudice, and finally were reversed (Ristoph and Murray, 1264). Just as *Meyer* attempted to define the "acceptable citizen," the laws regarding the institution of marriage dictate the "acceptable" and "unacceptable" family. Despite the many visible successes of the marital unit in the United States today, the

institution of marriage should be disestablished because of its inappropriate place in the legal system, resulting in inequality and exclusion.

Disestablishing marriage will protect individuals from unnecessary governmental encroachment. Just as the non-establishment of religion ensures that a citizen's right to vote cannot depend on his or her religious affiliation, the disestablishment of marriage would guarantee that government-provided benefits for intimate caregiving would not require an individual to have a particular vision of marriage (Metz). In 2001, in response to the rejection of gay marriage in *Goodridge v. Department of Public Health*, former President Bush said, "Marriage is a *sacred* institution between a man and a woman... I will work with congressional leaders and others to do what is legally necessary to defend the *sanctity* of marriage" (Miller, 2205). By using "sacred," meaning "worthy of religious veneration," to define marriage, it appears that Bush uses his religious beliefs to justify excluding certain individuals from the institution. Since marriage vows use religious terms such as "holy matrimony," "before the Church," "accordance with the Holy Prophet," "the faith of Israel," state involvement is not appropriate in the marital union. If marriage is to represent the spiritual, emotional, and physical connection between individuals, the government should not be in the business of creating parameters to define the institution.

Government encroachment on the institution of marriage also impedes the viability of the family unit. In *Michael H. vs. Gerald D.*, Carole D. was married to Gerald D. when she became pregnant by Michael H. during an extramarital affair (Ristroph and Murray, 1254). While the child regarded both men as her fathers and both served as father figures, the Court denied Michael's claim for recognition as the child's biological

father, which would have been granted had he been married to Carole (Ristroph and Murray, 1254). *Michael* demonstrates the court's clear affinity for the marital family. In a similar sense, research has shown that social welfare policies are aimed at discouraging unwed single mothers (Metz). This perpetuates the negative stereotype assigned to single mothers and subsequently makes single motherhood an even more difficult challenge (Metz). By disestablishing marriage, intimate caregiving would no longer plague those who stray from the government's preferred marital model.

In addition to protecting the other than legally defined family unit, disestablishment of marriage will enable unwed individuals to have the same legal rights as married couples. Employment assistance, immigration benefits, medical insurance, and tax deductions comprise several of the benefits that are unavailable to individuals who stray from the traditional concept of marriage (Wardle, 443). In *Loving vs. Virginia*, a landmark civil rights case, the Supreme Court ruled that the government could not restrict marriage based on race citing the violation of the Free Exercise Clause and Establishment Clause of the First Amendment (Miller 2206). The Court said that this restriction highlighted state-sponsored marriage's intentional favor for certain individuals and discrimination towards others (Miller 2206). Therefore, *Loving* serves as a model for eradicating government control over marriage on the grounds of favoring those wishing to engage in the traditional marriage prototype.

Thus, disestablishing marriage would help eliminate the unconstitutional exclusion of specific groups of individuals. Marriage, which is currently limited to the union between one man and one woman, deems same-sex couples, polygamous partners, and other non-traditional partnerships non-normative and excludes and punishes them for

their lack of conformity. While no individual should be punished because of the color of his or her eyes or skin, no individual should be punished for his or her sexual preference or lifestyle choice either. Although some argue that alternative forms of unions are recognized under the laws in some areas of the United States, these unions still do not afford all the legal benefits of traditional marriage. Even if the benefits were equivalent, in *Brown v. Board of Education*, the United States Supreme Court declared that state laws establishing separate but "equal" public schools for black and white public schools were inherently unconstitutional (Miller, 2187). Similarly, while the option of civil unions for non-traditional couples may appear a just alternative, the sheer separation of marriage-like institutions is by definition discriminatory.

Lastly, disestablishing marriage will eliminate the current institution of marriage's inherent inequality. Society validates the relationship of married couples who cohabitate, have children, and take part in activities typically practiced by those in romantic relationships. By default, those who participate in "married culture" yet are not legally bound are automatically invalidated and regarded as having lower status. Michael Warner, a social theorist at Yale University, argues, "Marriage sanctifies some couples at the expense of others. Stand outside it for a second and you see the implication: if you don't have it, you and your relations are less worthy" (Cruz, 1023). Therefore, marriage, by definition, results in discrimination.

While there is much support for the disestablishment of marriage, there is some support for maintaining the traditional marriage model as well. Without traditional marriage between a man and a woman, there is potential for the subsequent abolishment of the family unit. The primary function of marriage is to "foster and protect the

propagation of the human race," as was resolved by Hawaii legislature after the decision in *Baehr v. Miike*, which is for the most part biologically limited to heterosexual couples (Dent, 593). In addition, the disestablishment of marriage could endanger child rearing, the primary social function of marriage. It has been argued that children of families that stray from the traditional two-parent, heterosexual marriage model are more likely to have problems with educational achievement, drug use, criminal activity, physical and emotional health, social adjustment, and adult earnings (Dent, 594). Although the quality of a child's school is also important in his or her development, some recent studies have shown that it is nearly impossible for children to excel academically and personally without proper stimulation in a traditional home environment (Dent, 430).

While disestablishment potentially endangers the traditional family unit, it also arguably eliminates an important outlet for an individual's self-identity. Generally, individuals define themselves through their affiliations and associations. Marriage then may be seen as the ultimate symbol or expression of loyalty to an association, and a means of adopting a formal status in order to make a symbolic statement of commitment and self-identification (Cruz, 938). In such cases, marriage serves as a forum from which individuals can express and protect said emotions and sentiments. In *Zablocki v. Redhail*, the U.S. Supreme Court held that that Constitution protected "something less tangible than living together and having children, and more important: the values of self-identification and commitment," thereby enforcing the importance of protecting the right of marriage (Metz). Author and professor Steven Carter argues, regarding the inherent value of marriage, "Most people see the value of children or the horror of murder without

the need for explanation. It is not merely an instinct but part of their vision of the good," (Dent, 435).

Finally, the disestablishment of marriage would eliminate the long-standing and respected tradition of the marital unit. Under the First Amendment, it is unconstitutional for the government to limit symbolic expression in such a fashion (Cruz, 996). More broadly, traditional marriage is inherently tied to our altruistic concern for future generations and the welfare of others; goodness is arguably learned from the family in a community where marrying and raising children is normal. Marriage is one of the few social institutions found in all cultures throughout history, and that fact alone argues that marriage is important to the survival of a culture (Dent, 431). If the traditional family is no longer the norm, such altruism will arguably erode and equal acclaim will be given to partnerships that counter procreation (Dent, 598). Therefore, disestablishing marriage would potentially alter not only the institution of marriage, but also the focus and goals of individuals.

Nevertheless, the counter argument advocating the preservation of the traditional marriage model falls short in several ways. While disestablishing marriage may transform the concept of the traditional marital unit, the concept of the "family" would remain constant and merely create leeway for multiple possible interpretations. In *Stanley vs. Illinois*, the Supreme Court struck down a state law requiring the children of unwed fathers to become wards of the state upon death of the mother (Ristroph and Murray, 1252). Yet even as the Court emphasized constitutional protections for biological fathers, wed or unwed, it noted with favor that Stanley shared in the parenting of his children, living with them and their mother for eighteen years and sharing responsibility for their

upkeep (Ristroph and Murray, 1253). Stanley was able to act like a father and a husband, performing his paternal role in a manner that did not threaten his family's quality life, yet legally, he had no rights concerning his children. The traditional marital model does not necessarily dictate the family structure.

While marriage may serve as an option for aiding in the formation of one's self-identity, an individual certainly has the opportunity to continue this process through engagement in romantic associations and affiliations in civil society without endorsing an institution that is inherently discriminatory. Much like the separation of church and state, individuals would gain equality in their opportunity to engage in a diverse set of associations necessitated by America's heterogeneous population, without the state's interference. For example, Metz proposes to defend liberty, equality, and fairness through the creation of what she calls an "ICGU status" (Metz). This would provide individuals with legal recognition, protection, and certain material benefits, but would be expressly tailored to protect intimate care in its various forms and without any purposeful expressive significance (Metz). Leaving the definition of marital status to civil society is no different than leaving the control of bar-mitzvah status to civil society.

While disestablishment may abolish the traditional symbolism of the union of marriage, the sentiments synonymous with loving, supportive, relationships would not erode. And while tradition is an important part of the foundation of America, it is certainly not grounds to preserve any given practice when its integrity is up for dispute. In the *2004 Tenth Circuit Judicial Conference* in Utah, Harvard professor Michael J. Sandel argued in conjunction to the issue of gay marriage, "Segregated schools were not prohibited for a very long time. Does that mean it was wrong to change that?" (Sandel,

192). While the procreative definition of marriage-like unions would wither with disestablishment, it would not signify the demise of child-bearing. Instead, the concept of procreation would be removed from the marital unit and replaced as the product of simply one type of civil relationship, given no greater or lesser respect than other relationships. As a result, the qualities fundamental to cohesive married couples would remain, yet would be carried out through a wide variety of means.

Although marriage may be a longstanding tradition in American society, it is morally and legally unacceptable for the government to continue supporting a practice that excludes individuals and creates inherent inequalities. While the media today is filled with images such as "No on H8," simply advocating for changes within the marital model, there will always be alternative groups of individuals who still do not fit and will subsequently be forced to endure the pain of rejection not only from governmental rights, but also from the acceptance of greater society. Instead of focusing on altering marriage to complete the theoretically impossible task of including all individuals, the government should focus on ensuring protections and rights to humans at large. The disestablishment of marriage will therefore lead to greater liberty, equality, and fairness, and curb unnecessary discrimination.

Citations

1. Amelia A. Miller, "Letting Go of a National Religion: Why the State Should Relinquish All Control over Marriage," *Loyola of Los Angeles Law Review*, (2005): 2186-2216.
2. Alice Ristroph & Melissa Murray, "Disestablishing the Family," *Yale Law Journal*, Vol. 119 (2010): 1236-1279.
3. David B. Cruz, "Just Don't Call It Marriage: The First Amendment and Marriage as an Expressive Resource," *Southern California Law Review*, Vol 74 (2000): 932-1073.
4. Tamara Metz. "The Liberal Case for Disestablishing Marriage," *Contemporary Political Theory* (2007): 196-217.
5. E.P. Brandon, "Disestablishing Marriage," last modified May 3, 1999, <http://www.cavehill.uwi.edu/BNCCde/epb/DISEST.html>
6. Michael J. Sandel, "2004 Tenth Circuit Judicial Conference," *Utah Law Review*, Vol. 186 (2005): 186-215.
7. Lynn D. Wardle, "Federal Constitutional Protection for Marriage: Why and How," *Brigham Young University Law Review* (1996): 439-482.
8. George W. Dent, Jr., "The Defense of Traditional Marriage," *Journal of Law and Politics*, Vol. 15: (1999): 581-645.
9. George W. Dent, Jr., "Traditional Marriage: Still Worth Defending," *Brigham Young University Journal of Public Law*, Vol. 18, No. 2 (2004): 419-446.