

Chapter 2

National Citizenship and Civil Marriage: Ascriptive and Consensual Models

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Abstract A contrast between the ascriptive and consensual models of citizenship allows for an interesting parallel between national citizenship and civil marriage as state institutions. First, ascriptive citizenship is based on birth or some immutable characteristic, while consensual citizenship is in varying degrees rooted in both the prospective member of the community and also the community itself. Second, although consensual citizenship is typically regarded as more compatible with liberal democratic values, I show that in marriage as in citizenship, the consensual model may facilitate exclusion as much as inclusion. Third, I examine the interface between the views of both enthusiasts and skeptics about same-sex marriage and relate these to conceptions of citizenship. Finally, because many still seek the formal statuses of national citizenship or civil marriage, greater attention to the ascriptive model will promote greater inclusiveness in a context of increasing diversity.

What is the meaning of citizenship in the liberal democratic polity? Michael Walzer suggests that “admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life” (Walzer 1983, 62, emphasis original). Admission and exclusion refer not simply to one’s presence in the territorial jurisdiction of a sovereign state but also to one’s participation in various elements of this common life. According to Yael Tamir, “A group is defined as a nation if it exhibits both a sufficient number of shared, objective characteristics — such as language, history, or territory — and a self-awareness of its distinctiveness.” Objective similarities among members are by themselves insufficient. The drawing of boundaries “involves a conscious and deliberate effort to lessen the importance of objective differences within the group while reinforcing the group’s uniqueness vis-à-vis outsiders”

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(Tamir 1993, 66; see 63–69). National self-determination entails the public expression of this collective identity, or “the right of individuals to a public sphere, thus implying that individuals are entitled to establish institutions and manage their common life in ways that reflect their communal values, traditions, and history—in short, their culture” (70; see also 42–48, 74). Individuals enjoy a type of self-fulfillment in interacting with others who are similar that they cannot experience alone. The members of such an expressive association, as we might term it, experience special and seemingly constitutive ties and obligations, a shared culture, and perhaps a collective destiny, and view each other as “partners in a shared way of life” (115; see also 63, 74, 83–86, 94, 96–102).

If the nation state is a type of expressive association, who participates in its common life? The growth of global ties blurs what formerly were clear divisions between insiders and outsiders. Citizenship is less essential than it was before as a source of rights and benefits. In the view of Peter Spiro, birthright citizenship has been grounded on the expectation that individuals will develop their affective ties and community attachments in the land of their birth. This expectation is belied today, however, both by increasing global mobility and also by the ability to maintain ties with communities outside of those in which one resides. Individuals living in border communities are often equally fluent in both cultures, although knowledge about American government, history, and culture is common worldwide. “Happenstance Americans,” then, may include individuals born in the United States who experience few affective ties here, whereas this group does not include those who might have ties and knowledge of the culture but remain outside the circle of birthright citizenship. With the growing acceptance of multiple citizenships, Spiro observes a self-reinforcing departure from strong definitions of national community. “The larger the group of happenstance citizens, the less likely the status will be consequential, which renders existing citizens more accepting of expansive admission criteria and the addition of nominal members, which in turn entrenches the lack of consequence” (Spiro 2008, 31; see also 19–25). More simply, “*Once everyone is an American, no one is an American...Once the difference disappears, the identity disappears with it*” (52, emphasis original).

In this paper I contrast the ascriptive and consensual models of citizenship to draw parallels between national citizenship and civil marriage as state institutions. First, I shall discuss some contrasts between ascriptive citizenship, which is based on birth or some immutable characteristic, and consensual citizenship, which in varying degrees is rooted in the consent of both the prospective member of the community and also the community itself. Second, although consensual citizenship is typically regarded as more compatible with liberal democratic values, I shall show that in marriage as in citizenship, a consensual model may facilitate exclusion as much as inclusion. Third, I shall briefly examine the viewpoints of both enthusiasts and skeptics regarding same-sex marriage, discussing the interface between these views and conceptions of citizenship. Finally, I conclude that because many still seek the formal statuses of national citizenship or civil marriage, greater attention to the ascriptive model will promote greater inclusiveness in a context of increasing diversity.

2.1 Ascriptive and Consensual Citizenship

Ascriptive models of citizenship base status on who an individual is rather than on what an individual chooses. Birthright citizenship, or citizenship derived from *ius soli*, birth on American soil, or from *ius sanguinis*, birth to an American citizen, exemplify ascription. According to what Rogers Smith terms “inegalitarian ascriptive Americanist traditions,...‘true’ Americans are ‘chosen’ by God, history, or nature to possess superior moral and intellectual traits associated with their race, ethnicity, religion, gender, and sexual orientation.” Because they emphasize involuntarily acquired or immutable traits as the basis for differentiation, ascriptivists often support exclusionary or hierarchical policies (Smith 1997, 508 n. 5). Smith contrasts ascriptive views with consensual ones such as that of John Locke, who rejected natural or birthright citizenship in favor of the membership acquired by choice that grounds social contract theory (78–80). Smith does not reject birthright citizenship, as infants born into a polity can neither choose nor be chosen. He merely wants to highlight the existence of two contrasting models.

Consent, however, is a two-way street. An individual may choose to take on a status such as national citizenship or civil marriage, but on the other side of the equation is the political entity that controls that status. Although he is inclusive in his own views, Smith argues that in theory, too much emphasis on ascriptive or de facto ties “represents an ascriptive infringement on the community’s democratic authority to shape its own destiny” (Schuck and Smith 1985, 40). If individuals are collectively entitled to manage their common life in ways congruent with their shared values, they explain, control over membership is key to accomplishing this end. However, the consensual tradition may be interpreted in ways that are exclusive rather than inclusive. Robin Jacobson points out, for example, that immigration restrictionists have used consensual arguments to exclude Native Americans, Chinese, and more recently Mexicans from American citizenship. Correspondingly, an ascriptive standard such as that of birthright citizenship, “while based on an unchangeable characteristic, leads towards a more liberal and equitable citizenship policy” (Jacobson 2006, 645).

In the nineteenth century, for example, citizenship was denied to Chinese immigrants and potentially to their American-born children because of their racial and cultural differences, which “would prevent them from being able to give their loyalty and allegiance to America; the Chinese could not consent to American citizenship....America, therefore, did not consent to the inclusion of Chinese as citizens” (Jacobson 2006, 646; see also 650). The republican tradition’s emphasis on a communal need for homogeneity plus the liberal tradition’s foregrounding of consent added up to an exclusivist result. Although the basis for this exclusion was ascriptive, ascriptive characteristics were deployed as the tools of a consensually justified conclusion.

Jacobson observes that during the 1990s, immigration restrictionists used two different types of arguments, but both were grounded in consensual models of citizenship. In the mid-1990s, they foregrounded republican conceptions of collective

self-definition and self-rule. Proponents of reform advocated various laws and/or constitutional amendments stipulating that birthright citizenship be limited to the children of parents and/or mothers who were citizens or legal residents or were lawfully present under some other status. Although these limitations might seem objective, restrictionists consistently portrayed the problem immigrant as “a female, hyper-reproductive, dependent Mexican” (Jacobson 2006, 647), present without community consent and a burden on taxpayers, particularly on reproductive health services (648–649). In other words, if undocumented adults were present without the consent of the community, why should their undocumented offspring also be permitted to strain the nation’s resources?

In the late 1990s, the focus shifted from a republican emphasis on community consent to a liberal emphasis on individual consent. The issue is less one of fairness to current citizens and legal residents, and more one of invasion by individuals who ostensibly want to join the polity but refuse to assimilate. The rollback of social service denials to the undocumented that characterized California’s Proposition 187 in 1994 and the federal welfare reform act in 1996 reinforced this shift. Restrictionists continue to portray immigrants in racialized terms, but focus on the political power of opponents of reform that enabled this rollback as evidence of invasion. For them, loyalty means exclusive national allegiance. “Allegiance is about individual choice to join a community. Invasion...is understood as a result of permitting individuals to reside here who have not chosen to be American citizens, legally, culturally, or economically.” Birthright citizenship gives unchosen citizenship to individuals. “Therefore a way to stop the invasion, according to restrictionists, is to promote a liberal notion of consensual citizenship, by providing citizenship on the basis of an individual choosing membership” (Jacobson 2006, 653; see 650–653). To restrictionists, maintaining Mexican culture by displaying Mexican flags at political and sporting events or by speaking Spanish betokens a failure of loyalty. Therefore, individuals may be present territorially and may even be citizens, but on this argument have not actually “chosen” membership.

Jacobson concludes that the mutually consensual model of citizenship we associate with liberalism is less liberal than it seems. That is, it is ostensibly grounded in choice, but behind the emphasis on choice lurk preconditions that must be fulfilled if either the community is to consent to the membership of aspiring individuals or if these individuals are deemed to be giving their own consent. Because the current interpretation of consent “is imbued with racial meaning,” consent functions as an illiberal basis for citizenship. “The ascriptive nature of birthright citizenship may not follow in our liberal republican heritage..., but is crucial to our liberal future” (Jacobson 2006, 645). I now propose to examine how these models of ascriptive and consensual citizenship map onto attitudes towards the institution of civil marriage.

2.2 Marriage as an Instrument of Self-Definition and Self-Rule

Marriage is the most intimate of private commitments, yet it also possesses a public character. In its civil aspect marriage comprises both rights and obligations that span both the marriage itself and also its possible dissolution. Like citizenship, ideally marriage benefits both its participants and also society at large. Although it is rooted in consent, its public character means that one consents to a status, a model of marriage reinforced by laws that can both privilege and punish. As in the consensual model of citizenship, those seeking this status must give their consent. Additionally, the community must also consent, and it may attach conditions to its agreement. What many fail to recognize, however, is the extent to which local community recognition of existing personal bonds has historically been constitutive of marriage (Snyder 2006, 19).

This point is well demonstrated by Nancy Cott in her account of the gradual extension of governmental control over personal relationships in the early history of the United States. “The dispersed patterns of settlement and the insufficiency of officials who could solemnize vows meant that couples with community approval simply married themselves. Acceptance of this practice testified to the widespread belief that the parties’ consent to marry each other, not the words said by a minister or magistrate, mattered most” (Cott 2000, 31; see also Snyder 2006, 17–19; Cherlin 2009, 45–46). Moreover, fruitful sexual relationships often preceded marriage; thus, “Pregnancy or childbirth was the signal for a couple to consider themselves married.” A chaplain on a surveying expedition in 1728 on the North Carolina-Virginia border reportedly “was called on to marry no one while he was asked to christen more than a hundred children” (Cott 2000, 31; see also Snyder 2006, 17–19).

Although in time state legislatures regulated access to legal marriage, states’ desire to promote monogamous relationships and the building of stable households led the courts to presume in doubtful cases that a couple was married, often on the basis of circumstantial evidence. Marriage was considered a common right. Otherwise the offspring of too many parents would be held illegitimate. Overall, Cott explains, “A couple’s known consent to marry and general repute as married was sufficient, so long as there was ‘public recognition’ of the marriage—meaning acknowledgement by the informal public” (Cott 2000, 40; see also 30, 39), or “at least some publicity beyond the couple themselves” (1–2; see also 101). Although these intimate relationships were grounded in choice, in such circumstances the state was recognizing a *fait accompli*, an existing state of affairs. This recognition resembles the ascriptive model of citizenship, just as the conferral of national citizenship by birth recognizes existing facts. The government “consented” by recognizing such couples as married, but the initial consent was the couple’s mutual commitment, putting them in the driver’s seat. Therefore, the government was in effect consenting to an existing ascriptive status.

Simultaneously, however, the practice of recognizing informal relationships as marriages co-opted couples into acquiescing to a particular conception of

matrimonial relationships, or the sort of status relationship described above. “In accepting self-marriage, state authority did not retreat, but widened the ambit of its enforcement of marital duties. By crediting couples’ private consent, the law drew them into a set of obligations set by state law” (Cott 2000, 40). Similarly, states developed divorce laws that allowed for the termination of marital relationships by means other than “self-divorce” or desertion. But by thus defining what constituted proper marital behavior, “the states in allowing divorce were perfecting the script for marriage, instructing spouses to enact the script more exactly (52; see also 48–49). Although personal choice is primary, it may be co-opted by the state either to regularize relationships or to prevent the recognition of some kinds of relationships as constituting marriage. To use Cott’s terminology, some relationships may be excluded altogether from the “script” that is being perfected. Similarly, immigration restrictionists would prevent some types of births on American soil from conferring birthright citizenship, thereby excluding some individuals from the “script” that is being perfected as to the appropriate attributes of American citizenship.

Analogies between consent to the marriage contract that initiates family relationships and consent to the social contract that legitimates political authority are a standard feature of liberal theory. Once again, however, what one consents to is a status. Nonconforming groups can be made to conform, such as the Mormons in Utah, who abrogated polygamy in 1890 (Cott 2000, 120). Alternatively, just as Chinese immigrants were formerly excluded from citizenship, some groups might be excluded from marriage altogether, as illustrated by nineteenth-century anti-miscegenation laws as well as by today’s laws and state constitutional amendments defining marriage as between one man and one woman. The terms of marriage were not to be left to individual discretion. Moreover, couples understood that they had to comply with state requirements if they wanted to marry and that they could not marry on their own terms—an understanding that elevated the status of legally defined marriage (101, 110). The implication was that “the institution of marriage had to be insulated or salvaged from misuse by irresponsible, unsuited, or defiant couples,” which in turn “created an atmosphere of moral belligerence about Christian monogamous marriage as the national standard” (128; see also Metz 2010, 3–15).

The consensual standard for citizenship that has focused variously on both community consent and individual consent can be found in contemporary arguments of traditionalist opponents of marriage equality. As we have seen, the late-1990s emphasis on the individual consent of immigrants was not true recognition of individual consent. Rather, restrictionists argued that the national community should decide whether Mexicans were actually capable of giving their consent. Like the Chinese in the nineteenth century who were deemed too culturally different to assimilate, those who do not fit the standard definition of marriage cannot give true allegiance to this all-important social institution, and as a result, opponents argue, the government should not consent to their inclusion in it. For Maggie Gallagher, marriage communicates a shared ideal of exemplary relationship, but the institution is in crisis because we have forgotten “its great universal anthropological imperative: family making in a way that encourages ties between fathers, mothers, and

their [biological] children—and the successful reproduction of society” (Gallagher 2003, 19). For traditionalists, the defense of this imperative is—or should be—a shared communal value, and therefore it should be insulated from misuse.

Households headed by same-sex couples often include children from a prior marriage of one or both partners and/or unrelated children whom such couples have adopted. David Blankenhorn of the Institute for American values recognizes that although caring families may form through adoption, adoptive and stepfamilies all represent a failure or unhappy ending—through widowhood, divorce, remarriage, the mistreatment or abandonment of children—of traditional biological family formation and maintenance. Therefore, “adoption is ultimately a derivative and compensatory institution. It is not a stand-alone good, primarily because its existence depends upon prior human loss” (Blankenhorn 2007, 191; see 189–194). Some states have in the past tried to bar same-sex couples from fostering or adopting children; when these attempts have failed in the courts, they have tried barring unmarried couples altogether, also a failing strategy with the spread of marriage equality. The existence of children needing parents is a *fait accompli*, however, and allowing fostering or adoption by all qualified individuals is a response akin to the ascriptive model of citizenship. It is a rational response to existing facts. The overwhelming impact of same-sex marriage bans, notes legal scholar Evan Gerstmann, “is to prevent children *already being raised in same-sex households* from having the protection afforded by the benefits of marriage, a policy that has the irrational consequence of punishing children for the ‘sins’ of their parents” (Gerstmann 2008, 39, emphasis original).

Both the opposition to same-sex marriage and the valorization of the biological family demonstrate the weaknesses of the consensual model of citizenship as described by Jacobson. For traditionalists, attempts to alter the historical standard for marriage of one man and one woman represent an impingement upon, in Tamir’s terms, our communal values, tradition, and history without the consent of the community. Moreover, although many same-sex couples desire to marry, these attempts represent an invasion by those who not only will not but in fact cannot succeed in assimilating to the institution of marriage as it has been understood. The “natural teleology of the body” (Whitehead 2012, 135–136) or lack of sexual complementarity prohibits it, whatever they might will. If sexual orientation and attraction are innate, traditionalists are focusing on an ascriptive and immutable trait as a basis for exclusion from a crucial civil institution. As put by Jyl Josephson, “This ascriptive status is not based on race or national origin, but on heterosexual identity and willingness to participate in and benefit from the state-sanctioned institution of marriage” (Josephson 2005, 272; see also 271). Although same-sex couples are often willing and eager to participate, their ascriptive status precludes their inclusion.

At first glance this statement may suggest that the ascriptive approach is at least as exclusivist as the consensual approach, if not more so. Traditionalists, however, are actually foregrounding the consensual model by using an ascriptive status as a basis for denying that consent. They are doing so, moreover, both on republican grounds of community self-definition and also on individualist grounds that some individuals are incapable of true consent even if they choose to give it. Put differently,

traditionalists use ascriptive status as an excuse, deciding somewhat arbitrarily who is and who is not capable of consent, and then use that conclusion as a basis for policing the borders of the institution of civil marriage just as immigration restrictionists have attempted to police the borders of the nation.

Respecting those who valorize the biological family, traditionalists who think that allowing same-sex couples to adopt might encourage the breakdown of biological families are in the same position as the state of Texas when it denied public funds for the education of undocumented schoolchildren. In 1982 in *Plyler v Doe*, the Supreme Court ruled that the Texas law violated the Fourteenth Amendment guarantee of the laws to which all persons within the territorial jurisdiction of the United States are entitled. “We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests” (*Plyler v. Doe*, 457 U.S. 202 [1982], at 221). Many undocumented children will remain here even if uneducated, some becoming legal residents or citizens, at worst adding to the burden of unemployment, welfare, and crime and at best suffering “a lifetime of hardship” for which they themselves are not accountable (223; see also 226, 230, 234, 239). The fact that these undocumented children are here is an unchosen status on their part, and for the state’s purposes an ascriptive and immutable trait. The fact that educating undocumented children can be viewed as a compensatory policy, like Blankenhorn’s view of adoption, as a result of a failure to exclude their undocumented parents from national territory, does not detract from the value of this education.

A final example of the weaknesses of the consensual model appears in the circumstances surrounding *Romer v. Evans* (517 U.S. 620 [1996]). Here the Supreme Court struck down a Colorado constitutional amendment, passed by referendum, that not only repealed ordinances adopted by three political subdivisions to prevent discrimination based on sexual orientation, but also barred any state or local entity from enacting similar protections in future. In his majority opinion, Justice Anthony Kennedy wrote that the rights withheld under the amendment “are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society” (631). Therefore, “a State cannot so deem a class of persons a stranger to its laws” (635).

For the purposes of this chapter it is Justice Antonin Scalia’s dissent that is most relevant. Noting that the constitutions of five states, Congress, and the Supreme Court had previously singled out the sexual practices of polygamists by depriving them of the franchise, he argued that the state should not take sides in this culture war, in which “Amendment 2 is designed to prevent the piecemeal deterioration of the sexual morality of a majority of Coloradans....Striking it down is an act, not of judicial judgment, but of political will” (653). For Scalia, the issue in *Romer* was whether those with conventional views concerning sexual morality might use the power of the state to enforce those views. Here again the consensual model of citizenship is being advanced as an arbitrary justification for exclusion on the basis of an ascriptive and immutable trait, one that is considered a disqualification whether or not it *ought* to disqualify.

For example, according to Jonathan Chait, in 2009 the National Organization for Marriage was telling activists that if people ask who gets harmed if same-sex couples can marry, they should answer, “The people of this state who lose our right to define marriage as the union of husband and wife, that’s who.” In Chait’s view, this assertion simply means that “expanding a right to a new group deprives the rest of us of our right to deny that right to others,” thereby devaluing the right by making it less special (Chait 2009, 2). Concerning both Amendment 2 and traditional marriage, both sides of the consensual model of citizenship are in evidence. Traditionalists assert a right to police the borders, based on communal values and history, thereby refusing the community’s consent to change, as in the republican justification for exclusion. Correspondingly, those who would invade these precincts are sufficiently different from those who have historically populated the institution of marriage that they cannot “consent,” meaning they cannot assimilate in ways that evidence their loyalty to the institution. The individualist attempt to consent is overridden by the judgment that some are incapable of true consent.

2.3 Enthusiasts and Skeptics

The consensual model of citizenship analogizes to the traditional understanding of marriage. The state defines civil marriage with specific parameters that couples aspiring to the institution must fulfill if they are to be accepted as participants. Moreover, they are judged not only on the basis of formal criteria, but also as to whether their consent manifests true loyalty to the institution. On the other hand, as in Spiro’s view of citizenship, marriage is less essential as a source of rights and benefits than it once was. Both single individuals and unmarried couples have many of the same rights as those who are married. As explained by Stephanie Coontz, “Marriage was once part of the credentialing process that people had to go through to gain adult responsibility and respectability....It was the gateway to adulthood and respectability and the best way for people to maximize their resources and pool labor. This is no longer the case” (Coontz 2005, 276; see 275–278; Cott 2000, 133, 178).

Just as the special status of one religion faded in many Western nations as a variety of religious institutions proliferated, Nancy Cott suggests that “by analogy one could argue that the particular model of marriage which was for so long the officially supported one has been disestablished,” as “plural acceptable sexual behaviors and marriage types have bloomed.” As in the early years of United State history, many are now willing to accept “marriage-like relationships *as* marriage” (Cott 2000, 212, emphasis original). Governments have in part colluded in this shift, because they have been able to enforce family support obligations outside of formal marriage relationships (213; see 212–215; Coontz 2005, 256–257; 278–280). Like a number of other countries, some states without marriage equality have provided various alternative arrangements, such as civil unions and domestic partnership, some of which are open to traditional couples, that are often accompanied by all the material

benefits that these states provide to married couples. Unmarried partners can also access benefits at many large corporations. In France an individual can enter a legal resource-pooling relationship by designating virtually any other person to receive material benefits and legal privileges. “Two sexual partners can take advantage of this arrangement. So can two sisters, two army buddies, or a celibate priest and his housekeeper” (Coontz 2005, 279). As with Spiro’s view of citizenship, the status of civil marriage becomes less consequential as other forms of union proliferate.

Many marriage enthusiasts deplore this proliferation, not as exclusivists but because they want to include more couples within its potentially capacious embrace. Andrew Sullivan, for example, argues that the very absence of social incentives and guidelines with respect to same-sex relationships renders traditionalist opponents’ expectations a self-fulfilling prophecy. To disapprove of same-sex intimacy because of the instability often thought to accompany these relationships is to ignore not only the non-monogamous behaviors of straight couples, but also the fact that these consequences may flow from the very disapproval that traditionalist opponents recommend (Sullivan 1996, 106–116). For him, marriage equality constitutes an endorsement not of same-sex relationships themselves, but rather the ideal of long-term commitment that marriage represents. Because marriage equality “would integrate a long-isolated group of people into the world of love and family, gay marriage would...help strengthen it, as the culture of marriage finally embraces all citizens” (Sullivan 2001, 7).

Along related lines, Jonathan Rauch suggests that the growing prevalence of domestic partnerships and civil unions, accompanied by various material benefits, competes with and devalues the institution of marriage as the unique option for committed couples, straight and gay. Writing in 2005 when marriage equality was rare, he warned that if marriage were undermined, “the culprit...is not the presence of same-sex couples; it is the absence of same-sex marriage” (Rauch 2005, 91; see 91–93). That is, the presence of stable same-sex couples who cannot marry advertises the irrelevance of the institution of marriage. Marriage, he argues, should not be regarded simply as a lifestyle choice. Rather, it should be expected of committed couples and should be privileged as “better than other ways of living...a general norm, rather than a personal taste” (81–82; see also 89). Where Sullivan argues that marriage strengthens same-sex relationships, Rauch suggests that marriage equality strengthens the institution of marriage itself. “Marriage is for everyone—no exclusions, no exceptions” (6; see also 42–43, 89, 94). Rauch argues that all couples should marry if they want the benefits of marriage, thereby reinforcing “marriage’s status as the gold standard of committed relationships” (94).

On the other hand, for both marriage and citizenship, perhaps an institution with a well-defined status and specific parameters is now less important than what the status betokens. Joseph Carens, an advocate of open borders, argues that the same reasons that we accept birthright citizenship for those born in the United States also ground what he terms social membership for those who came to reside here at a young age—and also potentially all individuals who have developed social ties over a period of time. Birthright citizenship recognizes the ties that children will develop with their families, with other people, and with their community as a whole. It

“acknowledges the realities of the child’s relationship to the community and the fundamental interest she has in maintaining that relationship,” as well as the state’s moral obligation to attend to these interests (Carens 2013, 25; see 21–26). Similarly, when adults come to a society, settle down, and put down roots over time, they develop moral claims to social membership that deepen over time. For him, citizenship in another nation, absence of good behavior (unless one has committed a crime serious enough to warrant deportation), lack of economic self-reliance, and tests of civic competence should not be bars to social membership (45–61). As Spiro notes, today individuals are increasingly knowledgeable about cultures other than their cultures of origin. Many immigrants know more about the country to which they are immigrating than native-born American citizens do. Carens’s core insight “is that living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the community, and that these claims deepen over time.” In sum, “social membership matters morally” (158; see 158–169). More specifically, “What matters most morally...is not ancestry or birthplace or culture or identity or values or actions or even the choices that individuals and political communities make but simply the social membership that comes with residence over time” (160). Social membership is in fact “more fundamental than citizenship because it is actually the basis for the moral claims of citizens themselves to many legal rights....Social membership is [thus] normatively prior to citizenship” (160–161). In Spiro’s terms, citizenship based on consent can be underinclusive of those with ascriptive ties to the community. Similarly, one could argue that committed couples possess social membership as couples in the community, and therefore have a moral claim to be treated as such whether or not they embrace the formal status of civil marriage.

If in Sullivan’s terms, marriage enthusiasts want the culture of marriage finally to embrace all citizens, skeptics about marriage point out that it cannot do so. Because the terms of civil marriage are externally defined by the state rather than internally defined by its participants, greater inclusiveness without reforms simply means more couples are subject to an inherently restrictive institution, while other individuals and couples are excluded altogether. As we have seen in the case of France, individuals with no sexual connection can pool resources. Why do matters such as finances and health insurance need to be bundled into packages that accompany sexual relationships? (Jakobsen and Pellegrini 2004, 140–147; see also Lehr 1999, 33). As Nancy Polikoff suggests, “The most contested issue in contemporary family policy is whether married couple families should have ‘special rights’ not available to other family forms” (Polikoff 2008, 2). Although couples may want to choose marriage for its religious or cultural meaning to them, “they should never have to marry to reap specific and unique legal benefits” (3; see 3–10, 84; Metz 2010, 133–139, 151, 159).

Thus, both traditionalists and marriage equality advocates valorize marriage as a special legal status that is rightly accompanied by special rights and benefits. They only differ in regard to who should be admitted to this status. The law still privileges adults who marry over those who do not. Marriage equality advocates, then, are still traditionalists, but of a different sort. Their understanding of marriage is still “one

that ensconces a particular form of intimate relationship as the state-recognized norm” (Josephson 2005, 272; see also 274), but it is inclusive of same-sex couples as well as traditional couples. As put by Jaye Cee Whitehead, both the religious right and marriage equality advocates erroneously portray “marriage as a natural grouping rather than a historically constructed and state-consecrated classification that inherently privileges one form of intimacy and care structure above all others.” Equality advocates “in effect fortify the boundary between normal (monogamous) and deviant (non-monogamous) sexualities.” Both equality opponents and proponents “are responding to a larger call from the state to disguise its symbolic power as a prepolitical longing” (Whitehead 2012, 139; see also 106–108, 127–130, 142–145).

Discussion of reforms to address this asymmetry is beyond the scope of this paper. However, once again, with respect to both civil marriage and citizenship, perhaps formal status is less important than what that status betokens. In *Ambach v. Norwick* (441 U.S. 68 [1979]) the Supreme Court determined that a New York law forbidding teaching certification to resident aliens eligible for citizenship who have not at least “manifested an intention to apply for citizenship” was legitimate (70). Public schoolteachers, the Court declared, perform a function that goes to the heart of representative government. Through both teaching and example, “a teacher has the opportunity to influence the attitudes of students towards government, the political process, and a citizen’s social responsibilities. This influence is crucial to the continued good health of a democracy” (79). Because teachers are obliged “to promote civic virtues and understanding in their classes,” they unquestionably perform a governmental function (80). If, however, Spiro is correct that many noncitizens in the United States possess knowledge of the culture and strong ties here, it should not matter whether or not they possess the formal status of citizenship. For a variety of reasons, perhaps 40 % of individuals who are permanent residents of the United States do not apply for citizenship. Aside from the inability to vote in elections, one three-decade resident says, “I really have everything that I need. I am treated pretty much just like a citizen” (Semple 2013, A3). They are indeed social members, and this membership matters morally, as Carens asserts. Similarly, individuals or couples may meet the requirements for civil marriage, but their social membership, in Carens’s terms, may to them be enough without the formal status.

2.4 Conclusion

For some, the benefits of both citizenship and marriage should be contingent on the consent not only of individuals aspiring to these statuses, but also on that of the political community in question. For others, benefits should be grounded on a moral claim deriving from facts about individuals’ relationships with a society. Ascription “implies that people are *entitled* to citizenship in any state in which they have sufficiently powerful social ties” (Carens 1987, 426, emphasis original; see 423–235). The first view argues that it is the community’s decision to bestow a status that

renders individuals members or participants. The second view suggests that *de facto* membership in the community through social ties is what eventually should earn individuals the *de jure* status of citizenship or the benefits typically associated with marriage if these are desired. Moral claims may be a matter of fact regardless of will. As Jacobson suggests, the liberal principle of consent, which is traditionally linked with choice and empowerment, can become a tool of exclusion, whereas ascription, or attention to established facts, may increase the possibility of inclusion.

Both citizenship and marriage might be defined as a status bestowed on those desirous and capable of taking on the responsibilities associated with full membership in a community. The self-marriage practices of our early history suggest an ascriptive interpretation of marriage. That is, committed couples whom the community recognized as such had already formed relationships that entitled them to be regarded as married. Their *de facto* ties earned them the right to the *de jure* status of marriage. As states widened the scope of their authority, however, marriage became a more exactly defined formal status. In this consensual model, marriage rested not only on the consent of the individual parties who were to be married but also on the civil consent of the state in whose eyes the couple wished to be seen as married. This development put governments in a stronger position to withhold consent to marriages of which they disapproved, as we have seen. As of this writing, however, the Supreme Court in *Obergefell v. Hodges* (576 U.S. ____) just struck down marriage equality bans in the states that still maintained them. It asserted that rather than disrespecting the institution of marriage, same-sex couples respect it so much that they want to participate in it also. The Court in effect decided that these couples might truly consent to this institution. It was their ascriptive status, however, their demonstrated attachments and social membership, in Carens's terms, that grounded the argument.

We do not need to adhere to a traditional view of either citizenship or marriage to acknowledge that these statuses still matter. The difference, rather, is in what should entitle individuals to acquire them. Although legal residency in a nation state or alternative institutions to marriage provide many of the benefits of formal citizenship or civil marriage, many nevertheless desire to make a public and formal statement recognizing their commitment to what *they* view as the gold standard for these relationships. Although Spiro concludes that "American citizenship no longer reflects or defines a distinctive identity" (Spiro 2008, 161), Rogers Smith argues that Spiro does not attend to the social or psychological aspects of citizenship or "how much people feel that their national citizenship is crucial to their identity" (Smith 2009, 930). Most people not only want community memberships that provide physical and economic security, but also "want to believe that those community memberships have ethical worth" (932). Although analogously to Spiro, some argue that similarly, civil marriage cannot carry the ethical worth afforded only by a community with shared worldviews (Metz 2010, 114–119), many still believe that it can. For those who wish to participate in the institutions of national citizenship and/or civil marriage, the consensual model can function to exclude, whereas the ascriptive model can be more inclusive.

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