

Nussbaum, Martha. *Liberty of Conscience* [In Defense of America's Tradition of Religious Equality]. New York: Basic Books; 2008; pp. 334-346.

Fearing Strangers: Same-Sex Marriage

No issues in our time are more divisive than the political and legal issues surrounding the standing of gays and lesbians in U.S. society. Sodomy laws have now been declared unconstitutional, as have a range of state initiatives that block local efforts to protect gays and lesbians through antidiscrimination legislation. These decisions, however, remain controversial. The controversy over same-sex marriage, meanwhile, becomes ever more intense, as one state (at present) makes same-sex marriage available, as three others offer civil unions, and as many more have passed or are currently debating laws or state constitutional amendments defining marriage as the union of one man with one woman. Can the framework we have worked out to think about religious fairness help us in this delicate issue? (Nussbaum 2008: 334-335)

[The United States Supreme Court has ruled that same-sex marriage is a legal constitutional right just as marriage is a legal constitutional right for heterosexual couples. See [NPR the two-way.](#)]

First of all, are the issues religious issues or not? Certainly, a common justification offered for policies denying gays and lesbians equality in marriage and other areas of public life is a religious reason, namely, the prohibition on homosexual acts in *Leviticus* (20:13), where males are forbidden to “lie with man as with a woman”). Sometimes this textual appeal is combined with appeal to a shared moral/religious tradition. We might, then, regard a set of commitments about the status of gays and lesbians as a part of many people’s religious views, and consider whether the religious clauses have any bearing on what the state ought to say. (Nussbaum 2008: 335)

The idea that denying gays and lesbians a variety of public privileges under law is an essential part of Judeo-Christian religion, something without which religion suffers a substantial burden, is, put just that way, unconvincing. There are so many parts of the Bible that believing Jews and Christians do not seek to enforce as public law: prohibitions on idol worship and heresy, for example, which cannot be enforced as public law because of the religion clauses themselves. There are so many biblical prohibitions that, in the modern era, strike most people as an implausible basis for public law: few, for example, would support general laws forbidding intercourse during a woman’s menstrual period or laws forbidding tattooing, even though observant Jews impose these prohibitions on themselves. To my knowledge nobody supports laws making fortune-telling illegal, and yet it is as strongly denounced in the Bible as homosexuality—indeed more so, since same-sex relations are mentioned only once, whereas consulting fortune tellers and mediums is mentioned repeatedly in *Leviticus* 19-20, and they are singled out for a particularly gruesome mode of death, by stoning (20:27). Cursing one’s father or mother is assigned the death penalty in *Leviticus* 20, shortly before the list of sexual offenses in which same-sex acts figure; and yet nobody is proposing enforcing that prohibition through public law. Same-sex acts, moreover, are treated in *Leviticus* exactly the way adultery is treated (20:10), and few Jews and Christians, however pious, still support criminal penalties for adultery. (Nussbaum 2008: 335-336)

Then there is the matter of greed, sharp dealing in business, withholding the wages of one’s laborers (*Leviticus* 19:13), putting obstacles in the way of people who are deaf or blind (19:14), failing to give aliens exactly the same treatment that the native-born receive (19:34), and failure to help the poor. Such sins of retentiveness and egoism are mentioned far more often in the Bible than is homosexual conduct (which, as I’ve said, is mentioned just once). Some of them may be good grounds for public law, part of an overlapping consensus based on equal respect, since violations in these areas harm others and violate their rights. But these biblical texts are ignored in the debate about gay rights. Jews and Christians do not seek legal action against the greedy on account of the long tradition of biblical denunciations, and they certainly do not all line up behind laws mandating equal treatment for aliens. One might then wonder why homosexuality is singled out for special attention: one might at least pose the question whether the motives for singling it out are pure religious motives or some mixture of fear, shame, and disgust that would not bear close scrutiny. We can also see that people are far more eager to target others, especially a relatively powerless minority, than they are to work on their own sins and errors, so (among heterosexuals) greed gets little attention and homosexuality gets a lot of attention. (Nussbaum 2008: 336)

Even were there some people who sought the implementation of the entirety of *Leviticus*, the Roger Williams tradition that we have defended tells such people that they must stop short when acting on their religion threatens the equal standing of others in the political realm. It has never been our tradition’s view that religious freedom entitles citizens to act on and enforce any and every commandment of their religions, where those commandments impact the rights of others. (Nussbaum 2008: 336)

Is the sinfulness of homosexuality even a shared religious tenet? We also need to confront the inconvenient fact that the Judeo-Christian religions differ greatly in their understanding of the tradition concerning homosexuality. The well-known sentence in *Leviticus* is difficult to interpret. What does it mean to say that men shall not lie with a man as one would with a woman? Scholars agree that the sentence does not say anything about females, thus nothing about same-sex conduct among them (which, in antiquity, was usually not regarded as similar to or classified with same-sex conduct among males). Most, moreover, think that the male acts it forbids do not include all same-sex sexual acts. (One view, strongly suggested by the text, is that it forbids only active, insertive male-male acts.) But suppose it did condemn all same-sex acts, or is read nonliterally so as to do so: what then? Most Judeo-Christian denominations do not read everything in the Bible ahistorically. They ignore some prohibitions (e.g., on fortune-telling) as the legacy of another era, and they consider only a part of what they read as lasting moral insight applicable to their own time. For example, most denominations now accept female clergy, although earlier they believed that a literal reading of scripture forbade female clergy. (Nussbaum 2008: 336-337)

(....) Change, then, is an ongoing fact of life in every religion.... One thing one can see clearly is that there is no single Judeo-Christian position on such questions. (Nussbaum 2008: 337)

(....) From the seventeenth century onward, the fear of strangers has led insecure Americans to try to establish hierarchies that subordinate an unpopular group, and this fear has often taken the form of imputing to the group a diseased, or hyperaggressive, sexuality.... The idea that heterosexual marriage is damaged by allowing same-sex couples who want to marry to do so is an idea hard to understand without invoking fear-inspired ideas of stigma and taint. Surely, if one were to ask seriously why heterosexual marriage is ending in divorce more often than formally, and what could be done about that, one would not turn in this direction before considering many other explanatory factors.... Nor would one conclude that the best remedy for the problems of heterosexual marriage was the exclusion of same-sex couples who value and seek the institution, at least before considering many more obvious remedies, such as subsidized counseling, drug and alcohol treatment, and subsidized child and elder care. So, the nature of the debate does suggest that irrational ideas of stigma and taint are fueling panic. (Nussbaum 2008: 342)

Many people have sincere religious convictions that require them to forgo same-sex acts and to hold, within their own religious communities, that same-sex marriage should not be practiced there. Not all reasons for opposing same-sex marriage are based on irrational fear. But the reasons that are not based on fear do not look like public reasons, part of the shared ethical space we inhabit together; they look like theological reasons that are inside the private domain of the religions in question. Some religions hold this, but other religions (and/or other branches of the same religion) don't agree. So the religious reasons not to favor same-sex marriage look very like the religious reasons not to get a tattoo, not to eat pork, not to go to a fortune teller: these are commandments internal to a particular sect or sects. Certainly they are obligatory for the members of these sects, but they cannot be made public law without extruding the religious into the public domain in an impermissible way. We do not think Jews and Muslims have reason to make the eating of pork illegal for everyone, simply because it is religiously off limits to Jews and Muslims. Same-sex marriage looks like it could well be this sort of issue: a good source of specific religious reasons, but not of public reasons. (Nussbaum 2008: 343)

(....) Some people do offer purported public reasons against recognizing same-sex marriage. One such reason that is not very strong is that by admitting such marriages the state would thereby be endorsing "the gay lifestyle," and thus insulting sincere believers for whom it is sinful. Certainly, the state uses many considerations when it decides which marriages to recognize, as it does when it defines the family, but moral approval has never been salient among these interests.... Arguments do not always wear their true purpose on their face, nor are courts required to take them at face value. Laws against miscegenation paraded in a religious and moral dress, but the Supreme Court ultimately held that they were nothing but a device to shore up "White Supremacy." We might, however, try to argue that the desire to pass laws against same-sex marriage is different. What, for example, about the view that marriage ought to retain its traditional link with procreation? (Nussbaum 2008: 343-344)

Unfortunately, this argument goes either too far or not far enough. The state has never sought to limit marriage to those who wish to procreate or who are able to procreate. Religions may impose such further limits if they choose, through commandments peculiar to that religion, but the traditional public concept of marriage has opened marriage to the infertile as well as the fertile, and, very conspicuously, to those who are too old to procreate as well as those in childbearing years. So if the (putatively) public argument does any work, it entails excluding such couples from marriage. Moreover, same-sex couples can and do have and raise children, whether by adoption or through artificial

insemination or by raising the biological children of one member of the pair. So it just isn't true that the state's interest in children is not served by the recognition of same-sex marriages. (Nussbaum 2008: 344)

(...) The failure to suggest such limits for heterosexual marriage suggests that the people who proffer the marriage-for-procreation argument don't really mean what they are saying, that the restriction on same-sex marriage is not supported, in actuality, but this plausible-seeming public argument but, rather, by fear that the heterosexual institution will somehow be defiled or tainted. And this fear does lie close to the fears that underlay laws against miscegenation, which the Court held to be based merely on the desire to establish "White Supremacy." (Nussbaum 2008: 345)

Other moral arguments against same-sex marriage suffer from similar problems. If one speculates that same-sex marriages are more unstable, or bad for children, and uses that speculation as an argument against legal recognition of same-sex marriage, one will first of all have to contend with the lack of empirical evidence for such theses, and indeed the presence of counterevidence. (Nussbaum 2008: 345)

(...) Asserting something despite the evidence against it is a likely sign of prejudice. Moreover, one will need to grapple, as well, with the fact that we do not refuse marriage rights to people who seem flaky or uncommitted, who have had bad records of fidelity or seriousness in previous marriages, or who have shown evidence of being bad parents.... Once again, then, the opponent of same-sex marriage, if sincerely committed to a consistent ethical principle, must conclude that we should drastically limit access to heterosexual marriage. If this conclusion is not drawn, then the argument, once again, looks like a fancy dress for something like "White Supremacy." (Nussbaum 2008: 345)

In short, we seem to have some reasonable intrareligious arguments for not permitting same-sex marriage *as part of that religion*, but no plausible public arguments can be shared by all citizens. What we have, instead, is what justice Kennedy talked about in *Romer v. Evans*: a lot of "animus." Talking about the referendum in Colorado that deprived only gays of the right to propose and campaign for local nondiscrimination laws, he said that, "the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." This seems just as true in the same-sex marriage area as in the area of discrimination law. To allow mere animus to prevail in the political process, he continued, is the most naked and direct sort of violation of the very idea of the equal protection of the law. "It is not within our constitutional tradition to enact laws of this sort." (Nussbaum 2008: 346)

Same-sex marriage is not, as such, a religion clause issue. Nonetheless, thinking about the fear of strangers that has marred our history in the area of religion has heuristic value for our reflections about same-sex marriage. The current antigay panic expressed in the virulent crusade against same-sex marriage is comparable to the panics that have beset us in the religion area, and is, indeed, our nearest analogue, in today's United States, to those lamentable panics. Thinking about this history, then, gives us ample food for critical reflection. (Nussbaum 2008: 346)