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Privacy, Authenticity, & Equality: The Moral and Legal Case for the Right to Homosexual Marriage

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PRIVACY, AUTHENTICITY & EQUALITY: THE MORAL AND LEGAL CASE FOR THE RIGHT TO HOMOSEXUAL MARRIAGE

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I.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.[1]

There is neither a claim to self-evidence, nor the authority of natural law, but that deeply and widely held political and moral values, as well as contemporary constitutional principles, demand that we look more thoroughly at our commitment to equality, liberty, and the pursuit of happiness. Such an examination makes it close to self-evident that homosexual couples should have the right to full legal marriage.

It should be immediately obvious that this thesis is intended as philosophical and jurisprudential and in no way empirical. Although recent constitutional law is used generously, it is not a prediction whatsoever about what legislatures and courts will be doing in the near future. To the degree that they do tackle this issue, the odds are that the results will be disappointing. Nevertheless, this argument is sketched for its intrinsic interest, and because arguments of pure principle have value even in the absence of political will and judicial courage.

II.

> No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper

1. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

> guardian of his own health, whether bodily, or mental and spiritual.[2]

Mill is the starting point for any examination of political liberty. He argues for its normative centrality on utilitarian grounds.[3] In addition, he ties personal freedom to the absence of harm to others.

> [T]the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[4]

It is doubtful that such a principle would always result in the strict mathematical maximization of pleasure over pain. Despite many obvious moral and political deficiencies, a society that severely limited certain freedoms might well be efficient, orderly, and secure. A strong case might be made that on a utilitarian cost-benefit analysis, it was to be preferred. Even more problematic, however, is the harm principle itself. Pure self-regarding acts are so rare as to make Mill's protection vacuous – seat belt laws protect all of us from higher insurance and medical costs, *etc.*

Mill's central insight regarding "the nature and limits of the power which can be legitimately exercised by society over the individual"[5] might be salvaged by abandoning his strict utilitarianism and the attendant harm to others principle. Indeed the quote above suggests an attractive alternative – "freedom . . . is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[6] This is reminiscent of the language, if not the spirit, of Rawls.

> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.[7]

Now Rawls is clear that he is not concerned with the freedom to act, but civil liberties as rights. But if a just system treated the liberty in "life, liberty, and the pursuit of happiness," or "life, liberty and property,"[8] as robust civil liberties like freedom of religion or the right to

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2. JOHN STUART MILL, ON LIBERTY 16-7 (Currin V. Shields ed., Bobbs-Merril 1976) (1859).

3. *Id.* at 14 ("I regard utility as the ultimate appeal on all ethical questions.").

4. *Id.* at 68.

5. *Id.* at 59.

6. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

7. JOHN RAWLS, A THEORY OF JUSTICE 53 (Harvard Univ. Press 1999) (1971).

8. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

vote, Rawls and Mill come close to being on the same page. Arthur Ripstein presents the most thorough defense of political liberty from a perspective focused on equalizing personal freedom.

> [A] person is free if she, rather than anyone else, is the one who gets to decide how to use her powers. In so far as another person decides for her, she is dependent on that person, and her sovereignty is compromised. . . . [T]he only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other.[9]

An unabashed political liberal might find such a standard virtually unexceptionable. It will not do, however, for the purposes in the present context. The first problem concerns legal moralism. Jeffrie Murphy makes a powerful case that liberals feel comfortable with a certain amount of private morality encroaching into the law.[10] He focuses on the sentencing discretion of judges. Most liberals want judges to make judgments about the moral virtues and vices of the defendants they are sentencing. Consider hate crimes, or mitigating factors in a vehicular homicide. More directly challenging to the equal freedom criterion, however, are cases like corpse desecration. Thomas Grey argued a generation ago that these actions were a clear counter-example to Mill's harm to others principle.[11] They are probably equally troubling to the equal freedom principle.

Perhaps most devastating to this argument so far is the obvious fact that not everyone is a political liberal. Communitarians, long before liberals had the convenient moniker, have insisted that there should be legitimate restrictions on individual behavior that have nothing to do with the harm of others, or the equal freedom of individuals. Indeed, as if anticipating the gay marriage issue, Hart and Devlin debated homosexual rights a half-century ago on precisely these liberal and communitarian lines.[12] In an attempt to marshal consensus here, there will be no further attempts to defend liberalism,[13] but rather outline some additional political values that communitarians may share.

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9. Arthur Ripstein, *Beyond the Harm Principle*, in 34 PHILOSOPHY & PUBLIC AFFAIRS No. 3 pp. 216-46 *reprinted in* PHILOSOPHY OF LAW at 264, 271 (Joel Feinberg & Jules Coleman eds., 8th ed. 2007) p. 264 and p. 271.

10. Jeffrie G. Murphy, *"Legal Moralism and Liberalism,"* 37 ARIZ. L. REV. pp. 73-88 (1995).

11. THOMAS C. GREY, *The Legal Enforcement of Morality* (Knopf, 1983).

12. *See* H.L.A HART, LAW, LIBERTY, AND MORALITY (Oxford Univ. Press) (1963) and PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (Oxford Univ. Press) (1965).

13. JOEL FEINBERG, HARM TO OTHERS 14 (Oxford Univ. Press) (1984). "[T]he word "liberal" . . . should refer to one who has so powerful a commitment to liberty that he is motivated to limit the number of acknowledged liberty-limiting principles as narrowly as possible."

III.

> [The] celebration of fidelity to oneself gives voice to a central theme of modern consciousness: the search for authenticity. The idea that there is an "intimate self" whose needs cannot be fulfilled by following "borrowed truths" is a familiar modern notion and one that contrasts sharply with traditional outlooks.[14]

Consider the businesswoman who abandons a lucrative career because she has always felt that her true calling was to be a public school teacher, or the highly recruited, top of his class, Harvard law student who accepts a position as a public defender not to hone his litigation skills, but because he feels that the poor deserve good legal representation as well. These cases are chosen to engender normative attitudes of admiration, but cases focusing on disapprobation are just as easy to construct. Think about the woman who remains in the loveless marriage for the sake of a large inheritance, or a colleague who moves from his true love, the classroom, into administration for the money.

All of these hypothetical choices raise questions of liberty. Judge them not merely on the matrix of free versus compelled, but against some equally vague and abstract standard of being true to yourself. Certain choices gain significance because they help define who a person is, and who he or she shall become. Leslie Green in a brilliant short article argues that choices and the legal absence of choices about sexuality often fall into this special category of authenticity.[15]

> The so-called sexual revolution is a creature of modernity, as is the distinctive notion that there is an inner truth about sexuality. The example is important, not merely because it considers an issue too rarely discussed by mainstream philosophy, but because around sexuality the notions of authenticity, being true to oneself, defining one's life with or against traditional meanings, are all right at the surface.[16]

Being true to one's sexual self is tricky business. No one wants pedophiles or serial adulterers to be comfortable with being true to their authentic nature. But even in these cases it is easily seen how a most basic part of who the person is comes into tragic conflict with the larger social environment. Now pedophilia and serial adultery have

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14. Leslie Green, *Sexuality, Authenticity, and Modernity*, 8 CANJLJUR. pp. 67-82 (1995), *reprinted in* FEINBERG, *supra* note 9, at 380-1.

15. *Id.* at 381.

16. *Id.* at 381.

such serious and obvious negative consequences that no one, certainly not the strict utilitarian, will have any qualms with society enacting severe sanctions expressly designed to prevent personal authenticity in this important psychologically, if not normatively, part of who the person really is. The case is far less clear, however, with restrictions on homosexual authenticity. It's not that the gay couples are denied something they want. Nor are they faced with a severe restriction on their personal liberty. It is that they are forced to deny something that truly defines who they are for reasons that often seem arbitrary, prejudicial, and almost superstitious.

IV.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone the most comprehensive of rights and the right most valued by civilized men.[17]

Louis Brandeis in many ways began the scholarly investigation of personal and legal privacy. In 1890, his concern was print media and its intrusion into the private lives of prominent Boston citizens, including his partner and co-author, Samuel Warren.[18] By 1928, as a Justice on the Supreme Court, the right "to be left alone" had expanded from not just the media, but from government, and its source from the common law to the Fourth Amendment.[19] For over a hundred years now, philosophers, academic lawyers, and other scholars have sought to make, in Brandeis' wonderful subtitle, "the implicit made explicit."[20] This is a very difficult task, one guaranteed to engender controversy, and that even the most promising models may be vulnerable to philosophical and legal counter-example. However, the difficulty of the analytical task in no way compromises the existence of the moral, political, and legal value. Precise philosophical models may never be

17. Olmstead v. United States, 277 U.S. 438, 478 (1928), (Brandeis J., dissenting).

18. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy [The Implicit Made Explicit],* 4 HARV. L. REV. 193, 193-220 (1890), *reprinted in* PHILOSOPHICAL DIMENSIONS OF PRIVACY, 75-103 (Ferdinand Schoeman ed.,Cambridge, UK: Cambridge Univ. Press, 1984).

19. *Olmstead,* 277 U.S. at 478.

20. *Supra* at n. 18

found that improve on colloquial speech – "the right to be let alone," or what is "nobody's business."[21]

If there is such a thing as privacy; and what could be more obvious than that there is privacy? Privacy should be able to be described in some quasi-precise way. For many years, privacy was a moral, social, and legal immunity from the judgment of others.[22] The model now needs to be expanded to include non-judgmental intrusions as well. A working hypothesis is that privacy is defined as immunity from the illegitimate focused attention of others, including but not limited to, reporters, snoops, voyeurs, law enforcement officials, and legislators.[23] Such a definition is candidly normative, since not all focused attention is barred, but only that which is illegitimate. Here, of course, lies the rub. What focused attention counts as illegitimate?

The precise parameters of privacy are culturally determined and, consequently, differ across cultures and even within cultures as those cultures change. None of the sociological factors, however, in any way diminish the reality and importance of personal privacy. One continual theme in the scholarly literature is that privacy is closely connected to the concept of intimacy.[24] Justice Brennan offered a clear statement of this aspect of personal privacy in legislative and constitutional spheres.

> If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion in to matters . . . fundamentally affecting a person . . .[25]

Even those most suspicious of the constitutional existence of such a right within the Due Process Clause should grant its existence within the wider social and political culture.

Justice Brennan was specifically concerned with birth control, and was foreshadowing abortion – "as the decision whether to bear or

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21. *See* JAMES RACHELS, *Why Privacy is Important*, 9 PHILOSOPHY & PUBLIC AFFAIRS 4, 223-33 (Princeton University Press 1975), *reprinted in* Schoeman, *supra* note 18.

22. *See* Jeffery L. Johnson, *Constitutional Privacy*, 13 LAW AND PHILOSOPHY 161-93 (Springer Netherlands 1994). *See also*, Jeffery L. Johnson, *Privacy and the Judgment of Other*, 23 JOURNAL OF VALUE INQUIRY 157-68, (Springer Netherlands 1989); and *A Theory of the Nature and Value of Privacy*, 6 PUBLIC AFFAIRS QUARTERLY 3, 271-88, (University of Illinois 1992).

23. Jeffery L. Johnson, *Immunity from the Illegitimate Focused Attention of Others: An Explanation of Our Thinking and Talking About Privacy*, ETHICS AND THE INTERNET 49-70 (Anton Vedder ed., Intersntia, 2001), and *Immunity for the Focused Attention of Others: A Conceptual and Normative Model of Personal and Legal Privacy*, 2. FLA. AGRIC. & MECH. U. L. REV. 131-83 (2007).

24. *See, e.g.*, JULIE INNES, PRIVACY, INTIMACY AND ISOLATION, (Oxford Univ. Press, 1992).

25. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

beget a child."[26] On the other hand, our Court has also clearly seen the privacy implications of laws restricting the right to die,[27] homosexual sodomy,[28] and sexuality in general.[29] Most significantly for the argument prosecuted here, the Court clearly sees the significance of marriage as an area where citizens are entitled to be left alone. In a case involving forced sterilization, and assuming a very conventional heterosexual form of marriage, Justice Douglas sees marriage as a fundamental right.

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.[30]

It's not that marriage is not exactly none of the government's business, that marriage is, in part, a secular and social institution that government needs to be involved with. Nevertheless, individual marriages, as well as the institution of marriage itself, remain, intimate, special, and deserving of as much "letting alone" as is possible.[31]

V.

> The Constitution does not require that things different in fact be treated in the law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.[32]

Homosexual couples are clearly different than heterosexual couples, even though this apparent biological fact contains deeply cultural constructions. The question with gay marriage is whether they are similarly situated. All couples seeking to marry are different in significant ways — the age of the partners, their religions, their races, politics, residence, and opinions on salad before or after the entrees.

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26. *Id.*

27. Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 277 (1990).

28. Bowers v. Hardwick, 478 U.S. 186, 199 (1986), and Lawrence v. Texas, 539 U.S. 558 (2003).

29. *Lawrence*, 539 U.S. 558.

30. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

31. Jeffrey L. Johnson (Though not complete letting alone. As many feminist scholars have pointed out, too much privacy in a marriage can provide a fertile medium for abuse and exploitation).

32. Joseph Tussman and & Jacobus Tenebroek, *"The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341-81 (1949), pp. 341-81, . Reprinted in Frederick Schauer and Walter Sinnott-Armstrong, editors, *The Philosophy of Law* (Fort Worth: Harcourt Brace, 1996), 547).

The law, however, only treats them differently in certain very specific cases, both partners being of legal age, or not being of the same sex. At the very least, it would seem that opponents of homosexual marriage have the burden of establishing that they are not similarly situated to otherwise legal heterosexual couples.

Some have argued that the whole notion of equality is vacuous. The argument is simple.

> So there it is: equality is entirely "[c]ircular." It tells us to treat like people alike; but when we ask who "like people" are, we are told they are people who should be treated alike. Equality is an empty vessel with no substantive moral content of its own.[33]

The critic poses an impossible task. No one can analyze inherently normative concepts such as "similarly situated," or "like people," in a way that is normatively neutral.[34] Fortunately, the task in the current context is not a philosophical analysis of equality. A right, whether moral, social, political, or legal, to equality is certainly not an empty vessel. If people or couples should be treated alike, the right to equality requires that they must be treated alike.

Again, the Founders recognized that "all men are created equal."[35] The implications of that powerful phrase are among the most controversial in all of political philosophy. In ways similar to Berlin's discussion of positive and negative liberty we can distinguish two senses of equality in western political theory. Positive equality tends to emphasize a more equitable allocation of wealth and resources. Many liberals have advocated wholesale redistribution on normative and theoretical grounds,[36] all the while realizing that contemporary political culture makes all but the most modest wealth reallocation impossible.[37] Negative equality, equality of opportunity, is a social value, however, to which liberals, communitarians, and conservatives share a common commitment. Whether it is a prestigious and high paying job, or the opportunity to social and legal recognition of a lasting romantic partnership, it would seem that the argumentative burden would always be on those who deny that different people should have an equal chance at the desired situation.

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33. Peter Westen, *"The Empty Idea of Equalit"y*, 95 HARV. L. REV. 537, 537-96 (1982). Harvard Law Review Reprinted in Schauer and Sinnott-Armstrong, *op. cit.*, p. 500.

34. *See Supra* note 32.

35. *See Supra* note 1.

36. *See* RAWLS, *supra* note 7 and RONALD DWORKIN, SOVEREIGN VIRTUE (Harvard Univ. Press, 2002).

37. *See* THOMAS NAGEL, EQUALITY AND PARTIALITY (Oxford Univ. Press, 1995).

VI.

> To alter a social institution by altering the shared public meanings that constitute it (whether by use of the law or otherwise) is to alter—if not immediately then certainly soon—the individual identity, perceptions, aspirations, and conduct formed by reference to the old institution. The greater the alteration to the institution, the greater the changes in the individual. Likewise, the more influential the social institution being changed, the greater the changes in the individual.[38]

A detailed analysis of the various arguments against homosexual marriage will not be proffered in the present discussion. Nevertheless, it is appropriate to state some guidelines to which those arguments may reasonably expected to adhere. It seems that there are three general complaints against the proposal that gay and lesbian couples should have the right to marriage. One is religious, the next is sociological, and the last complaint which is much more difficult to characterize, ultimately entails the notion of public offense. The religious and public offense complaints violate widely shared political values while the sociological, simply relies on bad social science.

Whether or not it is believed that the Establishment Clause demands a strict separation of church and state, the importance of some distinction between religious creed and secular public policy is recognized. Many sincerely believe that homosexuality, in general, and its legal sanction in marriage, violate fundamental theological principles. Inevitably, these folks will establish their church practices in accordance with these principles. Marriage in this culture, however, is only partly a religious institution. Specific faiths and denominations adhere to strict criteria regarding who may, or may not, marry within their churches, synagogues, mosques, etc. However, secular marriage, or marriage within more inclusive religious institutions, should never be dictated by the demands of specific religious views. To surrender to the religious view against gay and lesbian marriage is to abandon the value of religious freedom that the critics of homosexual marriage, themselves, relish in.

Cultures and institutions within cultures change over time. It is not necessary to be a professional historian or sociologist to acknowledge that obvious fact of the human condition. Abrupt changes in society can result in quite dramatic, and sometimes disruptive, changes in cultural institutions. Think of the effects of World War II

38. Stewart, Neil, & Duncan, *Marriage and the Betrayal of Perez and Loving*, BYU L. REV. 3, 555, 555-595 (2005).

and the entry of women into the labor force, or the cultural changes engendered by the civil rights and women's movements. As these very examples show, given just a little historical distance, these sudden changes in our institutions may be judged as overwhelmingly positive.

Perhaps the most often voiced criticism of homosexual marriage is that such cultural and legal changes will destroy the institution of marriage. If those words are intended as anything more than a slogan, they amount to an empirical prediction about the institution of marriage after such a change. Exactly what is being claimed here is unclear. Are Critics predicting that fewer heterosexual couples will choose to enter into relationships, that there will be more divorces, or that existing marriages will mean less to the partners? These social hypotheses are not only unsupported by any sort of social scientific research, but are intrinsically dubious. Indeed, proponents of the right to homosexual marriage might well turn the tables and predict that the protracted social battles that would result in cultural and legal change would actually strengthen the institution of marriage. After all, gay and lesbian citizens committed to marriage are willing to expend great deal of time, effort, and money to be allowed to marry. Instead of simply taking the institution for granted, in this period where many, irrespective of their politics or sexual orientation, must rethink the purpose and value of marriage.

The final argument against gay marriage is much more difficult to accurately describe. On the other hand, characterizations that beg the question are quite easy to come by. Many who defend the right of gay and lesbian couples to marry are tempted to characterize the other side as simply homophobic. It is worth mentioning that advocates for racial or gender exclusion are characterized as racists and sexists, thus focusing on attitudes of prejudice, but advocates for exclusion on the grounds of sexual preference characterized as phobic, implicating emotions that seem far more removed from the tempering of reason and fairness.

To find someone a little more rational in the widespread opposition to homosexual marriage, Justice Scalia provides a good candidate.

> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," . . . the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.[39]

39. *Lawrence,* 539 U.S. at 599, (Scalia, J., dissenting).

Many people do seem to believe that homosexuality, and particularly, homosexual marriage, are so immoral and unacceptable that democratic majorities have the right to use the power of law to discourage the behavior. Already conceded to the legal moralist the legitimacy of laws prohibiting corpse desecration, or animal abuse, on the grounds that almost everyone finds the behavior immoral and unacceptable. Why isn't that sort of simple appeal to public morality open to the critic of homosexual marriage?

Lord Devlin clearly saw that discovering public morality was more complicated than simply counting votes.

> How is the law-maker to ascertain the moral judgments of society? It is surely not enough that they should be reached by the opinion of the majority; it would be too much to require the individual assent of every citizen.[40]

It is absurd to require unanimity to determine a level of outrage and offense that would justify legislating public morality. Surely it is equally absurd to suggest that if 53% are morally offended, and only 47% are not, then the state is authorized to use its police power to further the moral interests of the majority. Devlin actually proposed a much more subtle test for the legitimacy of morally inspired legislation.

> English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. . . . It is the viewpoint of the man in the street. . . . I should like to call him the man in the jury box, for the moral judgment of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous.[41]

Hart saw over fifty years ago that many of the things Devlin seemed so concerned about, such as male homosexuality, adultery, and the like, would very likely fail the man in the jury box test.[42] Homosexual marriage would likely also fail it now. Surely it can be expected that some jury members would be opposed to gay marriage, but hardly unanimity.

VII.

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize

40. *See supra* note 12.

41. *Id.*

42. *See supra* note 13.

> that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. . . . At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. . . . The sum of the precedential enquiry to this point shows *Roe's* underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe's* central holding a doctrinal remnant.[43]

Earlier passages mention quotes from some of the significant cases in our constitutional history. The preceding argument has stressed consistent patterns in American political philosophy. Certainly the great minds on our Supreme Court have as much claim to our attention with regard to these theoretical considerations as any law professor or political theorist. At this stage, however, explicitly shifts focus and prosecutes the outlines of a legal and constitutional argument. Unfortunately, there is a very serious problem, since perhaps the central case in this doctrinal argument is one that explicitly overturned recent constitutional precedent.[44]

Justice Kennedy explicitly addresses all of this in his startlingly candid majority opinion in *Lawrence v. Texas*.[45]

> The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* JUSTICE STEVENS came to these conclusions:
> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

43. Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

44. *Lawrence*, 539 U.S. 558.

45. *Id.*

> JUSTICE STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* v. *Hardwick* should be and now is overruled.[46]

Justice Kennedy finds himself in a potentially embarrassing situation. It is not just that he is overruling a very recent constitutional precedent, a case in which some of his current colleagues had ruled for a very different outcome, but that he himself had made appeal to the need for respecting precedent as part of tri-authored majority opinion in *Planned Parenthood v. Casey*.[47]

Kennedy is at pains to distinguish the need to honor precedent in *Casey*[48] and overturn precedent in *Lawrence*[49]. What is intriguing is that the argument presented is not the simplistic one that *Roe v. Wade* was good constitutional law, and that *Bowers v. Hardwick* was bad. His strategy is to focus on those who would be directly affected by the dramatic change – the state and the individuals – by overturning relatively recent precedent.

> The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. . . . In *Casey* we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. . . . The holding in *Bowers,* however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.[50]

It is safe to assume that neither individuals, nor the state, had come to rely on the continued existence of sodomy statutes in anything like the way women had come to rely on abortion rights.

There are three very different reasons for this in the discussion. One is its intrinsic interest. Actually, there is a new consideration of principle that purports to demarcate very different thresholds that cases must meet if principles of *stare decisis* are to be controlling. This

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46. *Id.* at 579.

47. *Casey*, 505 U.S. 833.

48. *Id.*

49. *Lawrence*, 539 U.S. 558.

50. *Lawrence* at 578.

test is intriguing, and initially plausible. The second reason is Justice Kennedy himself. Although this essay is not intended as a work of political jurisprudence, and offers no concrete predictions about where the Court may be headed on the issue of homosexual marriage, it's hard to ignore the central role that Justice Kennedy plays in the current Court. Questions about honoring or overruling Equal Protection and Due Process precedent will clearly play some role, if the Court ever agrees to review a case challenging the denial of marriage rights to gay and lesbian couples. Kennedy, if nothing else, has shown himself to be a subtle and unpredictable thinker on these issues.

The last reason for muddying these jurisprudential waters is a confession of worry. Imagine defenders of exclusive heterosexual marriage rights using Kennedy's societal reliance test to their own benefit.[51] Although it is absurd to suggest that society had come to rely on the criminalization of either homosexual or heterosexual sodomy, it is not nearly as silly to consider the possibility that it had come to rely on marriage being legally defined in very conventional terms. Initial reaction to such an argumentative strategy is to take philosophical refuge in the literature on group rights. It is difficult to make sense of a strong moral or constitutional right when the alleged recipient of that right is a collective or group. It's pretty clear what is being asserted when a woman has come to rely on her right to secure an abortion, but far less clear when the state argues that it has come to rely on its right to prohibit her from marrying someone of the same sex. Expectation has a quite literal meaning when there is talk of conscious individuals, but is at best a suggestive metaphor when there is talk of groups or states.

VIII.

> The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.[52]

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51. *Supra* note 48.

52. Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 312 (2003).

The candor and economy of the Chief Justice of the Massachusetts Supreme Judicial Court's reasoning above is striking. The Massachusetts Constitution affirms the dignity and equality of all individuals. Denying gays and lesbians the right to civil marriage treats them unequally. They become second-class citizens, which certainly constitutes a gross indignity. Therefore, the State's ban on same-sex marriage is unconstitutional. There is agreement in every premise of Marshall's argument, but what is troubling is the immediate leap to the conclusion of unconstitutionality. The problem is that the argument contains a huge constitutional enthymeme.

Equal Protection jurisprudence has long confronted the following problem. Virtually every law or regulation manages to treat some citizens differently than others. Speed limits create a hardship for lead foots, but cause no inconvenience to timid drivers at all. Tax laws may advantage or disadvantage the wealthy or poor, the married or single. Certainly the Equal Protection Clause was never intended to preclude the state's authority to pass laws governing its highways or tax policies. This means that only some laws will run afoul of the Fourteenth Amendment, and some test or formula for deciding which laws transgress Equal Protection should be operative, and ideally, clearly articulated.

Our Supreme Court has quite wisely seen the dangers of having every bit of controversial legislation be open to the charge of inequality. The Court would do nothing but deal with Equal Protection cases. The judiciary's decision to let the legislative and executive branches decide the wisdom and necessity of most laws and policies, regardless of the fact that they manifestly treat their citizens differently makes practical and theoretical sense.

> All of this, of course, was clearly seen by the dissenters in the *Goodridge* case.In applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality.[53]

The rational basis test is often a bitter pill to swallow. A law may be examined and reach a reasonable conclusion that it is quite irrational. Sometimes that judgment will simply be based on the Court's assessment of the policy implications, the inherent difficulty in enforcement, the cost of implementation, that it is counter-productive to its stated purpose, and a host of other possible complaints. Other times suspicions run deep of the legislature favoring a particular religious group,

53. *Id.* at 357 (Sosman, J., dissenting).

or making a controversial moral judgment, or in the pocket of unscrupulous lobbyists. None of this is constitutionally relevant, however, if courts are going to defer to the other branches for judgments about the public's interest.

No one should infer that the Equal Protection Clause is an empty vessel. The Court recognizes that there are areas of social life where long standing attitudes of prejudice and intolerance have found their way into law and public policy. Laws implicating race, religious belief, and gender are clear examples where individuals find themselves being treated differently. The rational basis test for inequality would not only be unhelpful, but downright antithetical for purposes of the Equal Protection Clause. There is a powerful case that homosexuals should be treated as a protected class under the Fourteenth Amendment. The analogies between women, and racial and religious minorities are obvious. Gays and lesbians find themselves the victims of abhorrence and discrimination on the basis of a characteristic that was quite beyond their control. This holds true no matter where a person stands on the social or biological origins of sexual orientation. Unfortunately, the notion of a protected class is as much a product of constitutional history as it is one of theoretical defining conditions. Barring some remarkably courageous constitutional breakthrough, homosexuals do not constitute a protected class under the Fourteenth Amendment because courts heretofore have not considered them so.

Far more promising to the cause of homosexual marriage, however, is a second constitutional ground for abandoning the rational basis test for a denial of Equal Protection, and substituting the much more exacting test of strict scrutiny. The Supreme Court has shown great impatience with laws that disadvantage certain groups of people, regardless of their "protected" or "non-protected" status, with respect to certain "fundamental" constitutional rights.[54] Socio-economic class is not protected under the Equal Protection Clause, and anyone can easily see that people are treated quite unequally because of their poverty or wealth. Such inequalities will be seen by our Court, not as violations of the Equal Protection Clause, but as natural, maybe even desirable, consequences of free-market capitalism. When poverty, however, gets in the way of an individual's constitutional right to vote or have a fair trial, the Court will insist that the state show why it has a "compelling interest" in having a poll tax, or denying legal defense at the public expense.[55] It's hardly surprising, therefore, that much of the

54. *See supra* note 50.

55. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) and Gideon v. Wainwright, 372 U.S. 335 (1963).

jurisprudential discussion of same-sex marriage has focused on whether marriage is constitutionally a fundamental right.

IX.

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. . . . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications . . . [is] directly subversive of the principle of equality at the heart of the Fourteenth Amendment . . .[56]

For many of my students it was almost incomprehensible that it took until 1967 for the Supreme Court to invalidate such an obviously racist piece of legislation as the Virginia Racial Integrity Act of 1924, which reads in part:

> It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this act, the term "white person" shall apply only to the person who has no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this act.[57]

Long overdue by the middle 1960s the constitutional issue was a no-brainer, as indicated by the Court's unanimous decision.[58] The fact that the issues so perfectly fit into existing Equal Protection parameters potentially hides its significance for homosexual marriage.

If anything in contemporary constitutional law is clear, it is that race is a protected class and triggers strict scrutiny. Mildred Loving was black, and Richard Loving was white. Their marriage was illegal simply because of their races. Of course the state was doomed in its argument for a rational basis for the law. Everyone knew it was a relic of slavery and the Civil War, coupled with the eugenics craze of the 1920s. The denial of Equal Protection is so blatant that there was a temptation to focus exclusively on issues of race.

> There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes

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56. Loving v. Virginia, 388 U.S. 1, 12 (1967).

57. Racial Integrity Act, VA. CODE ANN. §§ 20-58 and 20-59 (1924) (overruled, Loving v. Virginia, 388 U.S. 1 (1967).

58. *Loving*, 388 U.S., at 11.

> proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality."[59]

And as odious as the racial issues were, and as much of a triumph for civil rights as the case was, *Loving v. Virginia*[60] was also about two other significant constitutional issues.

Almost as obvious as the issue of race was, the case was also about marriage. Quoting *Skinner v. Oklahoma*[61] marriage is reaffirmed as one of the "basic civil rights of man." Both in *Skinner*[62] and *Loving*[63] are more than rhetorical flourish. The Court was clearly saying that marriage is a fundamental right under the Constitution. If this is correct, it has tremendous significance in potential Equal Protection litigation. The fluid and controversial issue of whether sexual orientation constitutes a protected class need not be resolved. Strict scrutiny will be required in homosexual marriage cases, not because of the protected or non-protected status of the litigants, but because of the fundamentality of the right they are claiming they were unequally denied. As this whole essay has been arguing, when the burden is placed on the state to show that the laws forbidding homosexual marriage are required to have a "compelling governmental interest," they will surely fail.[64]

Less obvious, but equally valuable is the fact that *Loving v. Virginia*[65] was also a privacy case. Here is the full quote that was excerpted in the quote that began this section.

> These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also Maynard v. Hill*, 125 U.S. 190 (1888). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the

59. *Loving*, 388 U.S. at 11.
60. *Id.*
61. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).
62. *Id.*
63. *Loving*, 388 U.S. 1.
64. *Supra* note 50.
65. *Loving*, 388 U.S. 1.

> Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Thus, the state not only violates Equal Protection rights of interracial couples, or gay and lesbian couples, it violates privacy rights of the individuals that make up these couples. Again, recall the words of Justice Brennan in *Eisenstadt*.[66]

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[67]

The state may not intrude into issues fundamentally affecting a person. Decisions about bearing or begetting a child fall into this category. Decisions about medical care and euthanasia[68] fundamentally affect a person. After *Lawrence v. Texas*,[69] so do decisions about private, consenting, adult sexual behavior.[70] Marriage is a "basic civil right of man," and a fundamental right under the Constitution. The decision to marry surely counts as one of the handful of decisions that "fundamentally affects a person."

X.

> When my late husband, Richard, and I got married in Washington, DC in 1958, it wasn't to make a political statement or start a fight. We were in love, and we wanted to be married.
>
> We didn't get married in Washington because we wanted to marry there. We did it there because the government wouldn't allow us to marry back home in Virginia where we grew up, where we met, where we fell in love, and where we wanted to be together and build our family. You see, I am a woman of color and Richard was

66. *Eisenstadt v. Baird*, 405 U.S. 438, (1972).

67. *Id.* at 453.

68. *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261(1990).

69. *Loving, supra.*

70. *See Lawarence*, 539 U.S. at 566, quoting (After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.).

> white, and at that time people believed it was okay to keep us from marrying because of their ideas of who should marry whom. . . .
>
> Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.
>
> I am still not a political person, but I am proud that Richard's and my name is on a court case that can help reinforce the love, the commitment, the fairness, and the family that so many people, black or white, young or old, gay or straight seek in life. I support the freedom to marry for all. That's what Loving, and Loving, are all about.[71]

The lovely words above were penned by Mildred Loving on the occasion of the fortieth anniversary of *Loving v. Virginia*.[72] Perhaps the ultimate message here is that the words and thoughts of academics and Supreme Court justices may never match the eloquence and insight of the principles who actually find their lives defined by the laws and cases scholars analyze and evaluate.

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71. http://www.positiveliberty.com/2007/06/mildred-lovings-statement.html
72. *Loving*, 388 U.S. 1.