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Belonging in America: How to Understand Same-Sex Marriage

Robert A. Burt[*]

The idea of "belonging" in America is not what it once was. For most of our national life, it was possible to identify a social group of "insiders'" who were sharply and self-consciously different from, and enjoyed a higher status than, "outsiders." The very existence of this "power elite" was often viewed as inconsistent with the ethos of equality supposedly enshrined in our founding national document, the Declaration of Independence. But like it or not, and inconsistent or not with our professed national creed, the existence of a high status elite—a White Anglo-Saxon Protestant male Establishment (hereinafter "WASP")—was unmistakable.[1]

This WASP male Establishment did not simply rule over American society. The WASP male Establishment *was* American society. There was a single unified conception of the American mainstream, and the WASPs were it. They owned America and the non-WASPs were, at most, resident aliens or tenants at will.

This social imagery was given powerful, poignant expression by an African-American attorney arguing in the Supreme Court against the constitutionality of court-enforced racial restrictive covenants in *Shelley v. Kraemer*.[2] "Now I've finished my legal argument," he said, "but I want to say this before I sit down. In this Court, this house of the law, the Negro today stands outside, and he knocks on the door, over and over again. He knocks on the door and cries out, 'Let me in, let me in, for I too have helped build this house."[3]

The door to the American house has indeed opened since the Court decided *Shelley*, but the single-family house that had been behind the door in 1948 is no longer there. It is not simply that the post-World War II idealized domestic relationship of a married, heterosexual couple with 2.4 children has lost its exclusive hold on American

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[1] *See* E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA (1964).

[2] 334 U.S. 1 (1948).

[3] NORMAN SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN 193 (Ann Arbor: Univ. Michigan Press, 2004).

society.[4] More importantly, the social image of the American community is no longer monolithic, no longer a single national family.

There are still white, Anglo-Saxon Protestant men living in America, but during the last half-century the WASP male Establishment has virtually disappeared as a ruling force in the country. In 1960, when I graduated from college, it was beyond belief that fifty years later, the United States would be governed by a black President, a Catholic Vice-President, and—perhaps most startling of all—a Supreme Court with not even one Protestant Justice, but comprised entirely of six Catholics and three Jews (including three women and one black man).

This bit of data strongly suggests not only that the WASP male dominance has disappeared from American society but, more fundamentally, that the very idea of a single dominant American identity has substantially weakened, if not entirely vanished. But, like the grin of the Cheshire Cat, the idea of an American mainstream—of a unified socially inclusive identity—lingers on.

This shadow of an idea plays an important role in the contemporary debate about state recognition of same-sex marriage. Proponents of this recognition continue to insist that there is a mainstream—a core sense of communal identity, of "belonging"—from which same-sex couples have been hurtfully and wrongfully excluded. These proponents see themselves as storming the bastions of heteronormativity, demanding to be let inside. Ironically, this belief in the existence of a heterosexual mainstream is also shared by many of the opponents of same-sex marriage, who see themselves as defenders of the traditional but endangered bastion of normality.

If, however, we understand that the old embodiment of the American mainstream—the solid phalanx of the WASP male Establishment—not only has dissolved but that nothing comparable has taken its place, then this struggle between the advocates and opponents of legalized same-sex marriage takes on a very different character. To borrow Matthew Arnold's formulation from the mid-nineteenth century, both advocates and opponents of same-sex marriage find themselves "wandering between two worlds, one dead / The other powerless to be born."[5] Put in more prosaic terms, advocates for same-sex marriage are demanding access to a mainstream identity which is no longer available as a solid cultural construct and the opponents are not so

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[4] *See Number of People in a Family*, *available at* http://hypertextbook.com/facts/2006/StaceyJohnson.shtml; ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERIC TODAY (2009).

[5] Matthew Arnold, *Stanzas from the Grand Chartreuse*, lines 85-86 (1855), *available at* http://rpo.library.utoronto.ca/poem/106.html.

much confident in asserting their own status as "insiders" as they are struggling to bolster the already weakened "insider" social status in American society.

By demanding access to the supposed mainstream, the proponents of same-sex marriage can identify a goal through which their sense of exclusion and marginalization might be remedied. At the same time, the opponents of same-sex marriage insist that there is an American mainstream constituted in part by restriction of marital status to mixed-sex couples; these opponents can thereby deny their concern about themselves being marginalized, homeless, because of the dissolution of the very idea of the American mainstream. The battle has such intensity, even ferocity, because both sides suspect—though they may not want to acknowledge this suspicion, even to themselves—that no real victory is available to either of them, that the battle for inclusion in an American mainstream is lost before it is begun because the prize, the promised Holy Grail, no longer exists.

Between these two antagonists—the same-sex couples demanding admission to the honorific status of marriage and the traditionalists fervently resisting this demand—there is thus a deeper, if ironic, common bond. This bond is the shared, though unacknowledged suspicion that there no longer is a centered social identity in American life and the shared, though unacknowledged hunger for the resurrection of this cultural ideal: a shared longing for "belonging."

We can see this hunger for a spiritual sense of belonging in the changing terms of the debate over the status of same-sex couples. For the past fifty years at least, the rallying cry for those outside conventional sexual preferences has been the "right to privacy": a claim that the sexual practices of consenting adults in the privacy of their own home was no one's business but their own.[6] The principle targets for this right on behalf of same-sex couples were state laws criminalizing so-called homosexual sodomy. In 1986, the U.S. Supreme Court by a five-to-four vote in *Bowers v. Hardwick*,[7] declined the opportunity to overturn these laws. In 2003, the Supreme Court reversed this ruling, going so far as to say that the 1986 holding was "not correct when it was decided, and it is not correct today." In this 2003 ruling, *Lawrence v. Texas*, the Court's opinion by Justice Kennedy invoked the right to privacy, but it did not rigorously restrict itself to this ground for overturning *Bowers*.[8] Instead, the Court explicitly drew a connec-

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[6] *See* MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 68-77 (2010).

[7] 478 U.S. 186 (1986).

[8] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

tion between the spiritual and emotional significance of mixed-sex and same-sex amorous relationships and then stated that the continued precedential force of *Bowers* "demeans the lives of homosexual persons."[9]

Even so, the *Lawrence* opinion insisted that its ruling had no bearing on claims for same-sex marriage.[10] Justice Scalia, in his customary acerbic mode, mocked this obiter dicta: "Do not believe it," he said.[11] I do not believe, however, that the Court was acting disingenuously to create a stalking horse for an ultimate ruling in favor of same-sex marriage. In my view, the Court sensed the psychological and sociological thinness of the privacy principle and felt impelled to add some rhetorical weight to it.

The privacy principle is too thin because it rests on the premise that individuals can adequately define themselves without regard to others' approval or disapproval of them. The privacy principle diminishes individuals' need for a sense of "belonging" almost to the vanishing point. The only social connection that the privacy principle acknowledges is a shared communal commitment to leave one another alone.[12] One might imagine a community that defines itself entirely in these terms; that the only conviction they share, the only principle that unites them as a social group, is a commitment to leave one another alone. But there is not much connectedness here. To call this assemblage of isolated individuals a "group" is more like an oxymoron than a psychologically rooted depiction of a bonded community.

It may be, of course, that this wary distance from one another is the best one might hope for in a deeply divided community, in a community engaged in or on the verge of civil war. But the right to be let alone is not relevant to the claim for state recognition of same-sex marriage. To the contrary, advocates for same-sex marriage want the state to be involved in their lives; they want the affirmative approval that is conveyed by the state's award of a license to marry. These advocates cast their claim in the vocabulary of constitutionally guaranteed equality. They maintain that withholding the benefit of marriage from same-sex couples while awarding it to mixed-sex couples is an

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[9] *Id.* at 575.

[10] *Id.* at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

[11] *Id.* at 604 (Scalia, J., dissenting).

[12] This was the core of Justice Louis Brandeis' assertion in 1928 when he introduced the idea of a right to privacy into our constitutional jurisprudence. It is, he said, "the right to be let alone" which was "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

invidious discrimination.[13] But these advocates are quite clear that they are not primarily seeking financial advantages or other objectively measurable state benefits that typically accompany marriage. "Civil union," which promises no discrimination between same-sex and mixed-sex couples in provision of resources, is not enough to satisfy same-sex marriage advocates. To borrow a familiar phrase, these advocates view equal financial resources with separately designated statuses as demeaning in the same way race segregation insulted African-Americans; in marriage as in public schools, they say, "separate is inherently unequal."

The campaigns for same-sex marriage and for the elimination of racial segregation thus have a common underlying premise; but more than this, these two campaigns share a common difficulty. The difficulty comes into sharpest focus when these two campaigns turn to the courts to remedy the inequality that they perceive. Consider the problem in *Brown v. Board of Education*.[14] If the *Brown* plaintiffs had been content with obtaining equal financial resources while remaining in race-segregated facilities, it is easy to imagine an adequate judicial remedy: a court would have an objective measurement of equality and could readily order state provision of equal resources based on that measurement. But if, as the *Brown* plaintiffs maintained, the injury was not the absence of identical financial resources but was more fundamentally the absence of respect for the equality of blacks and whites, the possibility of remedy becomes much more complicated. In particular, this dignitary injury cannot be remedied by imposing a permanent state of martial law in the schoolhouse. Admitting African-American children only when they are accompanied by armed militia does not erase the insult, the demeaning separate treatment, at the core of their prior exclusion from attending school with white children. Perhaps forced racial integration can be understood as a temporary way station toward full acknowledgment of the equal status of blacks and whites. But unless the white segregationists ultimately acknowledge that they were wrong, unless the white population extends a communal relationship based on their respect for blacks' equal status, the blacks' claims for equality cannot be satisfied. The plaintiffs in *Brown*, that is, didn't want to be left alone. They wanted to be acknowledged partners in a shared communal relationship.

This is at its core the same remedy that advocates for same-sex marriage are seeking. They seek more than equal financial advantages available through "separate but equal" civil unions. But they also seek

[13] Nussbaum, *supra* note 6, at 154-56.

[14] 347 U.S. 483 (1954).

more than a judicial order commanding state officials to marry same-sex couples in the same formal terms now provided for mixed-sex couples. Advocates for same-sex marriage want more than a piece of paper to pin on their lapels. They want this piece of paper to be more than a formality. They want this certificate to have communal meaning. They want a communal acknowledgment—as Justice Kennedy put it in *Lawrence*—that a same-sex relationship may serve the same goals of "personal dignity and autonomy" that heterosexual couples pursue in their relationships.[15]

In typical litigation, if a court finds that a complainant's rights have been violated, a coerced remedial order against the defendant provides adequate redress. But equality claims do not fit this conventional model; the core of the plaintiffs' complaint is that they have not been treated or respected as an equal. If a judge agrees with this complaint, she cannot provide an effective remedy unless she persuades the defendant to honor the plaintiffs as equals.

But how can this happen, especially in a case as polarized and contentious as the current dispute about same-sex marriage? Here's my answer: if we understand the underlying stake in this dispute for both parties in the way suggested at the beginning of this article, we can see a way that the currently opposed parties could ultimately come into a mutually respectful agreement. The antagonists are currently framing their disagreement in mutually exclusive, polarized terms. If we understand, however, that both parties—both the advocates for and against same-sex marriage—are responding to the unaccustomed weakness of the sense of belonging in the American community, we can see a basis for ultimately leading both parties toward a true vindication of the equality ideal.

The very intensity of the opposition to same-sex marriage ironically confirms this understanding; the stakes feel so high to the opponents because they sense the fragility of their communal bonds generally and thereby elevate the importance of maintaining the conventional boundaries of marriage, the special sense of belonging which that status has traditionally implied. What the opponents fail to see is that the advocates for same-sex marriage are investing that status with new strength on two scores. First of all, the advocates are not asking for communal approval of their right to have sexual relations with whomever they might want. The advocates are asking for an opportunity to bind themselves to a life-long commitment to a marital partner—in Justice Kennedy's words in *Lawrence*, "a personal bond

[15] 539 U.S. at 574.

that is more enduring" than "intimate sexual conduct" as such.[16] The same-sex partners seek to obligate themselves to one another, to create a strong bond of belonging between them. This faithfulness has always been at the core of the marital status for mixed-sex couples, though in recent years the existence of a permanent (or even a long-term) commitment has considerably frayed, and this weakening of the marital bond has itself contributed to the diminution of the sense of belonging in our culture generally.

Second, the advocates for same-sex marriage are asking to embed their mutual commitment to one another in the context of a communal recognition. They might have isolated themselves from the broader community by simply living together and negotiating private contractual obligations between themselves (or seeking the financial advantages of the marriage status through civil unions, but without the solemnity of the mutual commitment that marriage has traditionally represented). There is thus a two-fold commitment that same-sex couples are seeking: a binding commitment to one another and a mutual commitment of the couple, a promise of faithfulness, to the community in which they live, notwithstanding the past indignities that this community had heaped on them.

Fully understood, this effort by same-sex couples to achieve legally recognized marriage is an act of forgiveness, a wish to honor and affiliate with the community that had once condemned them. If the opponents of same-sex marriage could see the proponents' claims in this light, they might also see how their own deepest desires—for binding commitment to their families and to their community—could find new strength.

But how can the disputing parties be led from their polarized opposition to understand that they are seeking the common goal of a strengthened community? In particular, is there a proper judicial role in bringing about this reconciliation of opposed parties? *Brown v. Board of Education,* the progenitor of all modern efforts to achieve equality for scorned groups, most clearly reveals such a role.

Brown might look like a conventional case where the Court declared a winner (the African-Americans who had been denied equal treatment) and ordered compliance by the loser (the white segregationists). In fact, the remedial process was much more complicated and much more subtle in its effectuation than this conventional account. In the first *Brown* decision, in 1954, the Court declared that the existing segregated relationship subordinated African-Americans and denied

[16] *Id.* at 567.

them equal treatment and equal dignity. But the Court purposely withheld any dictate about what might constitute a future relationship of recognized equality.[17] In *Brown II*, decided in 1955, the Court persisted in this silence about the future, delphically announcing only that the future must arrive "with all deliberate speed."[18]

So far as the Court was concerned, the future began to arrive only a decade later, when the nationally elected officials in Congress and the Presidency overwhelming approved the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These laws were enacted over the continued opposition of the white segregationists in Congress and in most Southern statehouses. But these Southerners were by now morally isolated—not simply or even primarily because the black-robed Nine Old Men in Washington had ruled against them, but because the national community now opposed them and embraced the cause of African-Americans, who were increasingly vocal on their own behalf in both the North and South. The Court set the stage for this public activity by endorsing and giving high visibility to the grievances of African-Americans; but the Court did not and could not order the voluntary recognition extended to African-Americans by nationally elected officials.[19]

In choosing enforcement delay in *Brown II*, and then essentially waiting for a decade until Congress had voluntarily stepped forward, the Justices may have been motivated more by politics, more by a practical sense of their institutional limitations, than by a well-formulated, principled judgment about the necessity and the proper technique for soliciting popular ratification of the Court's moral impulse. In retrospect, however, we can understand the Court's path as both innovative and deeply principled. The Court's chosen path in effect recognized that the equality guarantee cannot be commanded but must ultimately be based on voluntary, mutual consent. The Court did not, however, deduce from this premise that there was no possible or proper judicial role in pressing the opposed parties toward this mutual respect.[20] It recognized instead that judicial initiative is sometimes constitutionally mandated in order to bring the parties into a relationship honoring the norm of equal protection of the laws.

During the past seven years, since the Court's 2003 ruling in

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[17] *See* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 275-85, 293 (1992).

[18] Brown v. Bd of Educ., 349 U.S. 294, 301 (1955).

[19] *See* Burt, *supra* note 17, at 294-303.

[20] This was the *non sequitur* endorsed by the Court in *Plessy v. Ferguson*, that because "social equality . . . must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals . . . the constitution of the United States cannot put them upon the same plane." 163 U.S. 537, 551 (1896).

Lawrence v. Texas, we can see this same judicially assisted process, a demarcated pathway, toward a new communal relationship between gays and straights (to use the colloquial referents). The Court took the first step in *Lawrence,* with the same effect as the Court's initial ruling in *Brown I*: that is, in both cases the Court ruled that the existing relationship of subordination and disrespect by the majority toward the minority was a violation of constitutional principle. But in both cases, the Court did not specify what the terms of a new relationship might be. Following *Lawrence*, as with *Brown*, the Court fell silent; and on the issue of relations between gays and straights, the Supreme Court still remains silent. As with *Brown II,* this may not seem to be a principled stance but instead the result of political calculation. In the post-*Lawrence* world, the calculation is less from the Court itself than from reform-minded litigators who, sensing that their cause will not be welcomed in the Supreme Court, have turned instead to state courts and to reliance on state constitutions. As a principled matter, in my judgment, this is exactly where the reform-minded enterprise should be.[21]

For consideration of the same-sex marriage issue, there are three great virtues in principle for state rather than federal court adjudications. The first virtue is that any decision on the constitutional issue, whether for or against the availability of same-sex marriage, does not automatically apply to the entire United States. Any one state court is a participant in an on-going deliberation among the states, with no one court authorized to pronounce the final word in these deliberations, unlike the U.S. Supreme Court's conventional role in interpreting the federal Constitution. The second virtue of state courts is the relative ease with which their constitutions can be amended, compared to the federal Constitution which is almost impossible to amend. Accordingly any state court adjudication—whether for or against the availability of

[21] A federal court ruling, *Perry v. Schwarzenegger*, 704 F. Supp. 921 (N.D. Cal., 2010), endorsing the right to same-sex marriage under the United States Constitution is now pending in the Ninth Circuit; as a matter of principle, however, the federal courts should refuse to adjudicate this constitutional issue. There are different doctrinal routes to this result: abstention and ripeness are the most promising. *See generally*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 127-156 (1962). Federal courts could abstain from adjudication on the ground that regulation of marital status is a matter primarily for state rather than national regulation and that federal courts should therefore defer to the extended deliberative processes in various state courts. *See Smelt v. County of Orange*, 447 F.3d 673 (9th Cir.), *cert. denied*, 127 S.Ct. 396 (2006) (approving federal court abstention to state courts in constitutional challenge to gender-restrictive state marriage law); cf. *United States v. Morrison*, 529 U.S. 598, 599 (2002) ("marriage, divorce and childrearing" are constitutionally protected "areas of state regulation.") The issue is not ripe on the ground that federal constitutional adjudication should be preceded by state courts' deliberations from which, over time, the federal courts can gauge the "accumulated weight of opinion" as the Supreme Court has done in ultimately overturning the application of the death penalty to minors or mentally retarded people. *See In re Stanford*, 537 U.S. 968 (2002); *Atkins v. Virginia*, 536 U.S. 304 (2002).

same-sex marriage—is not the last word within that state but is subject to some form of popular reconsideration. It follows from this fact that the failure of any effort to amend a state constitution in response to a judicial ruling can be understood as popular acquiescence in, if not explicit ratification of, that ruling.

The third great virtue of state court adjudications is their multiplicity. A federal court adjudication can move quickly from district court to court of appeals to the Supreme Court, and that's it. State court adjudications can go on and on, from one state to the next. The very existence of this iterative process continuously reenacts the dispute between the proponents and opponents of same-sex marriage. By dint of its repetition from one state to the next—even where there are different results in the state court proceedings—the adversaries, and the general public witnessing media coverage of the proceedings, keep running into one another. From this repeated contact, the possibility emerges that the adversaries and the public witnesses will see one another in a new light: as recognizable human beings rather than moral abstractions or demonic forces.

Some groundwork can thus be laid for recognition on both sides of the common bond that I have tried to identify in this article: the shared wish to establish a sense of belonging in a mutually supportive community; the shared feelings of vulnerability that arise from the contemporary unraveling of the traditional sense of community; and the shared hope to find a new sense of stability by entering into binding, communally recognized, long-term marital relationships. Judges can set the stage for the possibility of this kind of mutual recognition. It is, however, up to us—individually and as members of a community—to decide whether this possibility becomes an actuality.