7-2011

Respecting Freedom and Cultivating Virtues in Justifying Constitutional Rights

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91 Boston University Law Review 1311 (2011)
Boston University School of Law Public Law & Legal Theory Paper No. 11-48
(October 6, 2011)

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PANELIST PAPERS

RESPECTING FREEDOM AND CULTIVATING VIRTUES IN JUSTIFYING CONSTITUTIONAL RIGHTS

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INTRODUCTION: SANDEL'S AND DWORKIN'S CONCEPTIONS OF JUSTICE

As we did a year ago, we gather here at Boston University School of Law for a symposium on justice. Last year, our topic was Ronald Dworkin's then forthcoming (and now published) book, *Justice for Hedgehogs*.[1] This year, our

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[**] Professor of Law, The Honorable Frank R. Kenison Distinguished Scholar in Law, and Associate Dean for Research and Intellectual Life, Boston University School of Law. We prepared this essay for the symposium on Michael J. Sandel's *Justice: What's the Right Thing to Do?*, held at Boston University School of Law, October 14, 2010. We thank Eric Lee for helpful research assistance. In Part V, in analyzing the California Supreme Court's decision recognizing a right to same-sex marriage, we draw from Linda C. McClain, *Red Versus Blue (and Purple) States in the Same-Sex Marriage Debate: From Values Polarization to Common Ground?*, 77 UMKC L. REV. 415 (2008); Linda C. McClain & Joanna Grossman, *The California Supreme Court Rules in Favor of Marriage for Same-Sex Couples: Why Domestic Partnerships Are Not Enough: Part One in a Two-Part Series of Columns*, FINDLAW (May 27, 2008), http://writ.news.findlaw.com/grossman/20080527.html; and Linda C. McClain & Joanna Grossman, *The California Supreme Court Rules in Favor of Marriage for Same-Sex Couples: How Conservative Reasons Led to a Progressive Result: Part Two in a Two-Part Series of Columns*, FINDLAW (May 28, 2008), http://writ.news.findlaw.com/grossman/20080528.html.

[1] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2010); *Justice for Hedgehogs: A Conference on Ronald Dworkin's Forthcoming Book*, 90 B.U. L. REV. 465 (2010).

topic is Michael Sandel's recent book, *Justice: What's the Right Thing to Do?*[2] We think Sandel chose the more intelligible title! But we do have a quibble with it. The title, *Justice: What's the Right Thing to Do?*, implies that Sandel's work is a book about personal ethics, how one ought to live one's life. In fact, it is a book about political philosophy, what we owe one another as citizens. A better title would be "Justice: What Do We Owe Each Other as Citizens?"

Dworkin, alongside John Rawls, is the leading contemporary proponent of a liberal conception of justice.[3] As Sandel interprets these liberals, they think about justice in terms of *respecting freedom* as distinguished from *maximizing welfare* or *cultivating virtues*.[4] Sandel himself is the leading civic republican critic of such liberal conceptions of justice, interpreting them as holding that: (1) law should be neutral concerning competing conceptions of virtue or the best way to live, and (2) "a just society respects each person's freedom to choose his or her conception of the good life."[5] And he is the most prominent civic republican proponent of conceiving justice in terms of cultivating virtues. Nonetheless, we want to begin by pointing out some notable and unexpected affinities between Dworkin's and Sandel's books on justice.

First, in *Justice for Hedgehogs*, Dworkin rejects neutrality and criticizes Rawls's political liberalism for bracketing conceptions of the good life in arguments about justice.[6] Instead, Dworkin defends an ethical liberalism and argues for the integration of ethics, morality, and justice.[7] So, too, Sandel criticizes Rawls's political liberalism on similar grounds and argues that we cannot separate arguments about justice from arguments about competing conceptions of the good life and of the virtues that a good society should promote.[8] Second, in *Justice for Hedgehogs*, Dworkin is concerned to articulate the right process of moral reasoning.[9] In doing so, Dworkin looks back to Aristotle for an example of a holistic approach to such reasoning and also looks to the relationship between questions of the good life and those of the good polity.[10] So, too, Sandel turns to Aristotle for a virtue-centered approach that integrates moral reasoning about justice with reasoning about moral virtues and conceptions of the good life.[11]

[2] MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO? (2009).

[3] *See* JOHN RAWLS, A THEORY OF JUSTICE 3-4 (rev. ed. 1999); JOHN RAWLS, POLITICAL LIBERALISM xiv (expanded ed. 2005) [hereinafter RAWLS, POLITICAL LIBERALISM].

[4] SANDEL, *supra* note 2, at 6-10, 19-21, 140-66.

[5] *Id.* at 9.

[6] DWORKIN, *supra* note 1, at 263-64, 267-68.

[7] *Id.* at 1-19, 117-20.

[8] SANDEL, *supra* note 2, at 140-66, 246-51.

[9] DWORKIN, *supra* note 1, at 155.

[10] *Id.* at 186-88.

[11] SANDEL, *supra* note 2, at 9, 12, 184-207.

Third, in *Justice for Hedgehogs*, Dworkin develops what he once called a narrative view of life.[12] Sandel has long criticized views like Dworkin's as forms of "voluntarist" liberalism that conceive the person as a freely choosing, "unencumbered self" who is the "author" of his or her own ends and who can stand apart from relationships and commitments.[13] Yet in *Justice*, Sandel, like Dworkin, stresses the importance of a "narrative quest that aspires to a certain unity or coherence."[14] But Sandel draws his account of narrative from Alasdair MacIntyre; Sandel's account is more resonant with the notion of the embedded self, or the self constituted by relationships with others and commitments of communities of which we are members.[15] We are, Sandel contends, "storytelling beings" and "we live our lives as narrative quests."[16] Perhaps we can encapsulate the difference here by saying that for Dworkin, we conceive ourselves as the authors of our stories, whereas for Sandel, we see ourselves as players in a story we tell.

Finally, in *Justice for Hedgehogs*, Dworkin argues not only for "taking rights seriously," but also for "taking responsibilities seriously."[17] Dworkin stands in contrast to other forms of liberalism grounded in the idea that the state must be neutral between competing conceptions of the good life and the idea that rights insulate right-holders from moral judgments about their exercise. Rather, Dworkin argues that the state may encourage people to exercise their rights responsibly, short of compelling them to do what the government thinks is the responsible thing to do.[18] Sandel, much like

[12] In the penultimate draft of the book, Dworkin referred to a "narrative view of life." Ronald Dworkin, Justice for Hedgehogs 144 (April 17, 2009) (unpublished manuscript) (on file with the Boston University Law Review). In the published book, he deleted the phrase "narrative view of life" and developed the idea in terms of the "capacity principle," stating that "living well means creating not just a chronology but a narrative that weaves together values of character – loyalties, ambitions, desires, tastes, and ideals." DWORKIN, *supra* note 1, at 244.

[13] *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 89-94, 175-83 (2d ed. 1998) [hereinafter SANDEL, LIBERALISM] (criticizing conception of the "unencumbered self"); Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 522-25, 538 (1989) [hereinafter Sandel, *Moral Argument*] (criticizing liberal conceptions of autonomy as reflecting a "voluntarist" conception of the self).

[14] SANDEL, *supra* note 2, at 221.

[15] *Id.* at 221-22.

[16] *Id.* at 221 (citing ALASDAIR MACINTYRE, AFTER VIRTUE 201 (1981)).

[17] See James E. Fleming, *Taking Responsibilities as Well as Rights Seriously*, 90 B.U. L. REV. 839, 839, 844 (2010) (analyzing RONALD DWORKIN, LIFE'S DOMINION (1993), and DWORKIN, JUSTICE FOR HEDGEHOGS, *supra* note 1); Ronald Dworkin, *Response*, 90 B.U. L. REV. 1059, 1078-79 (2010) (indicating that Dworkin carries forward the arguments about taking responsibilities seriously from *Life's Dominion* to *Justice for Hedgehogs*).

[18] Fleming, *supra* note 17, at 839-40.

Dworkin, has criticized those very liberal conceptions of neutrality and of rights as insulating right-holders from moral judgments.[19]

And so, we must ask, are Dworkin's ethical liberalism and Sandel's civic republicanism as far apart as Sandel's criticisms of liberal conceptions of justice might lead us to expect? One might hypothesize that Sandel is right in his criticisms of liberalism, and that Dworkin's movement in Sandel's direction confirms the validity of his criticisms. Or, one might hypothesize that Sandel is wrong about liberalism, and that Dworkin's form of ethical liberalism shows that Sandel's criticisms are not well-taken. We assume that Sandel would prefer the former hypothesis! And we are certain that some liberals would insist on the latter. Our aim here is not to adjudicate this matter, but merely to bring out some striking convergences between Dworkin's and Sandel's books on justice.

More generally, in what follows, we want to suggest that the contrasts between justice as respecting freedom and justice as cultivating virtues are not as stark as Sandel has put them. The work of some liberal political theorists, most prominently William Galston and Stephen Macedo, has narrowed the distance between these two conceptions. These theorists have developed attractive conceptions of civic liberalism, arguing persuasively that liberalism has a proper concern with cultivating civic virtues.[20] We too are working on this terrain of civic liberalism in our book in progress, entitled *Rights, Responsibilities, and Virtues*.[21] This piece figures in that larger project.

I. THE RIGHT OF PRIVACY IN SANDEL'S PRIOR WORK

In previous work, we have engaged with Sandel's prior work concerning the form that constitutional interpretation should take in the face of moral disagreement and political conflict about basic liberties, such as the right to privacy or autonomy.[22] Sandel argued that in interpreting constitutional freedoms like privacy, courts should move beyond liberal autonomy arguments about protecting individual choices to republican moral arguments about

[19] Sandel, *Moral Argument*, *supra* note 13, at 533-38.

[20] *See* WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE 3 (2002); WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 3 (1991); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 8-10 (2003); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 3-8 (1990).

[21] JAMES E. FLEMING & LINDA C. MCCLAIN, RIGHTS, RESPONSIBILITIES, AND VIRTUES (forthcoming) (on file with authors).

[22] JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 141-60 (2006); Linda C. McClain & James E. Fleming, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509, 518-22 (1997) (reviewing, in part, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996)).

fostering substantive human goods or virtues.[23] For this reason, Sandel was critical not only of the majority opinion in *Bowers v. Hardwick*[24] for refusing to recognize homosexuals' right to privacy in their intimate associations, but also of the dissenting opinions by Justices Blackmun and Stevens for making liberal arguments sounding in choice and toleration rather than republican arguments sounding in moral goods.[25] Furthermore, Sandel argues that, in *Lawrence v. Texas*,[26] the Supreme Court should have justified protecting homosexuals' right to privacy not on the basis of homosexuals' freedom to make personal choices, but on the ground of the goods or virtues fostered by homosexuals' intimate associations.[27]

Unlike some liberals, who reject out of hand Sandel's call for a civic republicanism that engages in substantive moral argument, we argued that in a liberal republican constitutional democracy such as our own it is appropriate to make both liberal autonomy arguments and civic republican virtue arguments.[28] Accordingly, we argued that Sandel overstates the supposed dichotomy between the liberal appeal to choice and the republican appeal to moral goods.[29] And we cautioned against his call for substantive moral argument to the extent that it, on the one hand, would jettison liberal commitments to toleration and autonomy and, on the other hand, would require more ambitious moral argument than seems likely to be successful in circumstances of deep moral disagreement and political conflict.[30]

Subsequent to our initial criticism of Sandel's analysis of the right of privacy as championed in the dissents of Justices Blackmun and Stevens in *Bowers*, we readily acknowledge that constitutional discourse, especially that concerning gay and lesbian rights, has moved in Sandel's direction. In *Romer v. Evans*[31] the Supreme Court struck down, as a denial of equal protection, an amendment to a state constitution prohibiting measures that would protect homosexuals against discrimination.[32] The Court held that the amendment was not rationally related to any legitimate governmental purpose but instead reflected "animus" or a "bare desire to harm a politically unpopular group."[33]

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[23] Sandel, *Moral Argument*, *supra* note 13, at 521-22.

[24] 478 U.S. 186, 190-96 (1986).

[25] Sandel, *Moral Argument*, *supra* note 13, at 529-31, 533-39 (criticizing not only the majority opinion of Justice White in *Bowers*, but also the dissenting opinions of Justices Blackmun and Stevens).

[26] 539 U.S. 558, 564-79 (2003).

[27] MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 142 (2005).

[28] FLEMING, *supra* note 22, at 154-60; McClain & Fleming, *supra* note 22, at 530-38.

[29] McClain & Fleming, *supra* note 22, at 530.

[30] *Id.* at 530-35.

[31] 517 U.S. 620 (1996).

[32] *Id.* at 635-36.

[33] *Id.* at 632, 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

In a vigorous dissent, Justice Scalia implicitly paid Sandel a backhanded compliment when he complained that gay and lesbian rights advocates seek "not merely a grudging social toleration, but full social acceptance, of homosexuality."[34] Sandel, in his critique of the liberal dissents in *Bowers*, had advocated moving beyond arguments for empty toleration to arguments for acceptance and appreciation of gays and lesbians.[35]

Several years after *Romer*, in *Lawrence*, the Supreme Court held that a state law criminalizing same-sex sodomy violated a homosexual's right to privacy or autonomy.[36] Justice Kennedy's opinion declared that it "demeans the lives" of homosexuals to respect the right of heterosexuals to autonomy without respecting an analogous right for homosexuals.[37] One of us (Fleming) did "a Sandel" on Kennedy's opinion,[38] going through the opinion and single-mindedly differentiating the liberal strains from the republican strains.

> Let us say that the liberal elements bespeak concern for choice, autonomy, toleration, and bracketing moral arguments and disagreement, while the republican elements bespeak concern for justifying freedoms on the basis of substantive moral arguments about the goods or virtues they promote, or on the basis of their significance for citizenship.[39]

My analysis showed that *Lawrence* reflects an intertwining of liberal and republican concerns, emphasizing respecting autonomy together with securing the status of free and equal citizenship for all.[40] I argued that my liberal republican constitutional theory "is tailor made to fit and to support arguments and decisions weaving together such strands."[41] By contrast, Sandel's civic republican theory seems to call for substantive moral arguments to the exclusion of liberal autonomy or toleration arguments.[42]

In Sandel's own analysis of Justice Kennedy's opinion in *Lawrence*, he too begins by identifying the liberal autonomy arguments sounding in choice.[43] But, Sandel clearly was heartened by Kennedy's opinion. For, according to Sandel, Kennedy's opinion not only embodied liberal strands of choice, but also "gestured toward" republican strands of moral goods, specifically that the

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[34] *Id.* at 646 (Scalia, J., dissenting).

[35] Sandel, *Moral Argument*, *supra* note 13, at 533-38. For an elaboration of the contrast between "empty toleration" and "toleration as respect," see Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond "Empty" Toleration to Toleration as Respect*, 59 OHIO ST. L. J. 19 (1998).

[36] Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

[37] *Id.* at 575, 578.

[38] I coined this term – "a Sandel" – with the greatest appreciation and respect for Michael Sandel. *See* FLEMING, *supra* note 22, at 154-60.

[39] *Id.* at 154-55.

[40] *Id.* at 160.

[41] *Id.*

[42] *Id.* at 154-60; McClain & Fleming, *supra* note 22, at 530-38.

[43] SANDEL, *supra* note 27, at 142.

statute "wrongly demeaned a morally legitimate mode of life."[44] Yet, Sandel's analysis implies that Kennedy's opinion would have been still more persuasive if it had been cast more fully in terms of republican moral goods along the lines he urges.

Goodridge v. Department of Public Health,[45] the decision of the Massachusetts Supreme Judicial Court recognizing a right to same-sex marriage under the state constitution, may be the fullest realization in a judicial opinion to date of Sandel's call for substantive moral arguments in justifying constitutional rights. Chief Justice Marshall's opinion spoke of the moral goods of marriage, most centrally "commitment," but also "the ideals of mutuality, companionship, intimacy, fidelity, and family."[46] But we hasten to add that, even in *Goodridge*, republican arguments sounding in moral goods stand side by side with liberal arguments sounding in choice, autonomy, and toleration (as Sandel acknowledges in his analysis of *Goodridge*, to be discussed below). Again, we want to suggest that this combination – synthesis of liberal arguments with republican arguments – is as it should be in a liberal republican constitutional democracy such as our own, and most certainly in circumstances of deep moral disagreement and political conflict.

II. SANDEL'S ARISTOTELIAN CONCEPTION OF JUSTICE IN TERMS OF CULTIVATING VIRTUES

For the rest of this Article, we will examine Sandel's argument about the impossibility of liberal neutrality and the unavoidability of substantive moral argument about moral goods and virtues in justifying constitutional rights. In particular, we want to examine one example Sandel offers: the definition of marriage and whether gay men and lesbians should be allowed to marry. We will focus on Sandel's articulation of Aristotle's method for addressing questions of political conflict: an inquiry into office, virtues, and purposes. Sandel proposes what he calls a third approach to justice, focusing on *cultivating virtues* instead of *maximizing welfare* or *respecting freedom*. Under Sandel's approach, questions of justice are not just about freedom or welfare but also about virtues and higher moral purposes. We think that Sandel's insight – that what is at stake in the same-sex marriage debate and many other conflicts has to do with questions of worth and status – is quite powerful.[47] His reliance on Aristotle as an exemplar of a virtue approach to justice is also very helpful. We will consider to what extent Sandel's conception is compatible with the constitutional liberal approach to the relationship among

[44] *Id.*

[45] 798 N.E.2d 941 (Mass. 2003).

[46] *Id.* at 954.

[47] "Challenged by the insights of Michael Sandel," Chai Feldblum advocates "judgmental moral arguments" in support of marriage equality for same-sex couples. Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J.L. & FEMINISM 139, 157, 159 (2005).

rights, responsibilities, and virtues that we are developing in our book in progress.

Let us begin by sketching Sandel's presentation of Aristotle's conception of justice in terms of cultivating virtues. Sandel asserts:

> Debates about justice and rights are often, unavoidably, debates about the purposes of social institutions, the goods they allocate, and the virtues they honor and reward. Despite our best attempts to make law neutral on such questions, it may not be possible to say what's just without arguing about the nature of the good life.[48]

Aristotle's approach to justice, as Sandel recounts, has two central ideas:

> 1. Justice is teleological: Defining rights requires us to figure out the *telos* (the purpose, end, or essential nature) of the social practice in question.
>
> 2. Justice is honorific: To reason about the *telos* of a practice – or to argue about it – is, at least in part, to reason or argue about what virtues it should honor and reward.[49]

This approach, Sandel argues, differs from "[m]odern theories of justice," because the latter "try to separate questions of fairness and rights from arguments about honor, virtue, and moral desert. They seek principles of justice that are neutral among ends, and enable people to choose and pursue their ends for themselves."[50] By contrast, Aristotle views questions of justice as "unavoidably" bound up with "debates about honor, virtue, and the nature of the good life."[51] Justice, for Aristotle, "means giving people what they deserve, giving each person his or her due."[52]

Thus, Sandel sets up a dichotomy between a liberal conception of justice as respecting rights and an Aristotelian view of justice as being concerned with forming good citizens. "For Aristotle, the purpose of politics is not to set up a framework of rights that is neutral among ends. It is to form good citizens and to cultivate good character."[53] Aristotle, in a passage Sandel quotes, criticizes a political association that merely was "a guarantor of men's rights against one another" for being a "mere covenant" or "mere alliance," instead of "being, as it should be, a rule of life such as will make the members of a polis good and just."[54] Sandel concludes that the "highest end of political association" for Aristotle, "is to cultivate the virtue of citizens;" "politics is about something higher" than promoting economic exchange or maximizing economic

[48] SANDEL, *supra* note 2, at 207.

[49] *Id.* at 186.

[50] *Id.* at 187.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 193.

[54] *Id.* (quoting ARISTOTLE, THE POLITICS, Book III, ch. ix, 1282b (Ernest Barker trans. & ed., Oxford Univ. Press 1946)).

welfare.[55] "It's about learning how to live a good life."[56] Another implication is that the institutions of social life should be means to the end of the good life.

We reject this dichotomy; our project is to develop a civic liberalism that both supports rights and underwrites a formative project of inculcating civic virtues of liberal citizenship. We, like other civic liberals such as Galston and Macedo, are indebted to Sandel for inspiring us to think about a liberal constitutionalism's proper formative project. In the remainder of this Article, we will elaborate some points of disagreement with Sandel. As in our prior work analyzing Sandel, we will argue that it is not necessary to take an *either/or* approach: making arguments sounding *either* in protecting freedom of choice *or* in promoting moral goods. We should combine both types of argument.

III. NOT ONLY NEUTRAL BUT ALSO NAKED: THE LIBERAL IDEA OF PUBLIC REASON

Sandel argues that liberalism aspires not merely to state neutrality concerning competing conceptions of the good life, but indeed to a naked public square denuded of religious arguments and convictions.[57] Here he criticizes Rawls's idea of public reason and conception of the Supreme Court as an exemplar of public reason.[58] Sandel quotes Rawls as providing this test for whether we are following public reason: "[H]ow would our argument strike us presented in the form of a supreme court opinion?"[59] Rawls continues: "The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views."[60] Interpreting Rawls, Sandel concludes: "Like Supreme Court justices, we should set aside our moral and religious convictions, and restrict ourselves to arguments that all citizens can reasonably be expected to accept."[61]

President John F. Kennedy accepted this ideal of liberal neutrality, Sandel argues, but President Barack Obama rejects it.[62] Sandel asserts that "[f]rom the 1960s through the 1980s, Democrats drifted toward the neutrality ideal, and largely banished moral and religious argument from their political discourse," with Martin Luther King, Jr., and Robert Kennedy being the exceptions.[63] By

[55] *Id.*

[56] *Id.*

[57] *Id.* at 248.

[58] *Id.* at 249-51. Rawls uses the formulation "exemplar of public reason." RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 236.

[59] SANDEL, *supra* note 2, at 249 (quoting RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 31).

[60] *Id.* at 249 (quoting RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 236).

[61] *Id.*

[62] *Id.* at 249-50.

[63] *Id.* at 249.

contrast, the religious right, beginning in the 1980s with the election of Ronald Reagan and the launching of the Christian Coalition, sought to "clothe the 'naked public square'" and attack the moral permissiveness of American life.[64] Liberal and Democratic response was anemic, Sandel charges; even when liberals spoke about "values," they did so awkwardly and typically meant "the values of tolerance, fairness, and freedom of choice."[65] Here, Sandel's example is John Kerry's 2004 convention acceptance speech.[66] Obama is the hero of this story, with Sandel quoting at length from an Obama speech about how "thousands of Americans" are coming to realize that:

> [S]omething is missing . . . . They want a sense of purpose, a narrative arc to their lives. . . . [I]f we truly hope to speak to people where they're at – to communicate our hopes and values in a way that's relevant to their own – then as progressives, we cannot abandon the field of religious discourse.[67]

Sandel concludes, after excerpting this speech:

> Obama's claim that progressives should embrace a more capacious, faith-friendly form of public reason reflects a sound political instinct. It is also good political philosophy. The attempt to detach arguments about justice and rights from arguments about the good life is mistaken for two reasons: First, it is not always possible to decide questions of justice and rights without resolving substantive moral questions; and second, even where it's possible, it may not be desirable.[68]

This serves as Sandel's springboard to considering several controversial "culture war" issues: the abortion and stem cell debates and the same-sex marriage debate.[69] We have sketched Sandel's criticism of the idea of public reason, not to assess it in its own right – we will leave that undertaking to Hugh Baxter's article in this symposium[70] – but to set the stage for our discussion of Sandel's analysis of same-sex marriage.

IV. SANDEL'S ANALYSIS OF *GOODRIDGE*, THE MASSACHUSETTS SAME-SEX MARRIAGE DECISION

Sandel argues that the question of whether to recognize same-sex marriage cannot be resolved within the bounds of liberal public reason, but instead requires "recourse to controversial conceptions of the purpose of marriage and

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[64] *Id.* at 250 (quoting RICHARD NEUHAUS, THE NAKED PUBLIC SQUARE (1984)).

[65] *Id.*

[66] *Id.*

[67] *Id.* (quoting Barack Obama, Keynote Address at Call to Renewal Conference (June 28, 2006), *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html).

[68] *Id.* at 251.

[69] *See id.* at 251-60.

[70] Hugh Baxter, *Sandel on Religion in the Public Square*, 91 B.U. L. REV. __ (2011).

the goods it honors."[71] Thus, arguments appealing to "liberal, nonjudgmental grounds [–] whether one personally approves or disapproves of gay and lesbian relationships, individuals should be free to choose their marital partners" – will not suffice.[72] Whether gay men and lesbians should be allowed to enter into civil marriage, Sandel argues, depends on arguments about the purpose of the social institution of marriage, which means that we must argue about "the virtues it honors and rewards."[73] He asserts: "The debate over same-sex marriage is fundamentally a debate about whether gay and lesbian unions are worthy of the honor and recognition that, in our society, state-sanctioned marriage confers. So the underlying question is unavoidable."[74]

Sandel argues this is so because the state may choose among three different policies concerning marriage:

1. Recognize only marriages between a man and a woman.
2. Recognize same-sex and opposite-sex marriages.
3. Don't recognize marriage of any kind, but leave this role to private associations.[75]

Political theorist Tamara Metz has referred to this third option as "the disestablishing of marriage," by analogy to the disestablishment of religion.[76] For completeness, we should round out these three with a modification of the first position, which we will call Policy 4: restrict marriage to opposite-sex couples, but create a parallel institution, whether domestic partnership or civil union, for same-sex couples. Sandel notes that several states have done this, but he doesn't list it among the policy options.[77]

What about Policy 3, disestablishment of marriage? Even though it is "purely hypothetical" and hardly anyone has embraced this proposal, Sandel claims, it "sheds light on the arguments for and against same-sex marriage."[78] How so? It is a "libertarian solution" to the marriage debate because it "privatizes marriage,"[79] letting people marry as they please, without state sanction or interference. To the extent that the controversy over altering the definition of civil marriage entails religious disputes about marriage's purpose, this policy would allow the state to bypass such controversies by leaving the definition of marriage to religious entities. Under Policy 3, what role would the state have instead? Proposals vary. Liberal Michael Kinsley, for example,

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[71] SANDEL, *supra* note 2, at 253.

[72] *Id.*

[73] *Id.* at 253-54.

[74] *Id.* at 254.

[75] *Id.*

[76] TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE 113-14, 119-20 (2010).

[77] SANDEL, *supra* note 2, at 254.

[78] *Id.* at 254-55.

[79] *Id.* at 255 (internal quotation marks omitted).

suggests that the state could provide domestic partnership laws to address economic and inheritance aspects of marriage.[80] Feminist Martha Fineman suggests that the economic subsidies now tied to marriage could be shifted to the caretaker/dependent relationship, stressing that adult intimate relationships could be handled by private contract.[81] Similarly, liberal feminist Tamara Metz argues for a new status, an Intimate Caregiving Union.[82] She reasons that this would get at the state's most significant contemporary interest in intimate relationships: intimate caregiving, and ensuring that dependency and vulnerability are addressed in fair and just ways.[83] But this new status, Metz argues, would avoid the problem that now exists with state establishment of marriage: because marriage is a comprehensive social institution, whose social meaning and ethical authority stem from extra-governmental sources such as religion, state regulation offends liberal principles of liberty, equality, and stability.[84]

Sandel relates the disestablishment argument to the Aristotelian virtue framework: "Since the state would no longer confer on any family units the honorific title of marriage, citizens would be able to avoid engaging in debate about the *telos* of marriage, and whether gays and lesbians can fulfill it."[85] Moreover, liberal neutrality would get a boost because this solution "does not require judges or citizens to engage in the moral and religious controversy over the purpose of marriage and the morality of homosexuality."[86] Sandel contends that considering Policy 3 shows us that neither Policy 1 nor Policy 2 can be defended within "the bounds of liberal public reason"; considering the disestablishment proposal helps us see, he contends, "why both proponents and opponents of same-sex marriage must contend with the substantive moral and religious controversy about the purpose of marriage and the goods that define it."[87]

Looking at the arguments on both sides of the issue bears out Sandel's contentions to a degree. Thus, he observes that opponents of same-sex marriage argue that "the true meaning" of marriage would be dishonored by altering marriage's definition and they are not "bashful about the fact that they're making a moral or religious claim."[88] This is Sandel's contention, but we would point out that the arguments that opponents of same-sex marriage make in court generally eschew religious language and appeal to grounds like

[80] Michael Kinsley, *Abolish Marriage: Let's really get the government out of our bedrooms*, WASH. POST, July 3, 2003, at A23.

[81] MARTHA FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 123 (2004).

[82] METZ, *supra* note 76, at 119-27.

[83] *Id.* at 124-26.

[84] *Id.* at 114-19.

[85] SANDEL, *supra* note 2, at 256.

[86] *Id.*

[87] *Id.*

[88] *Id.*.

marriage's procreative purpose, optimal childrearing for children, and the importance of preserving tradition.[89] By contrast, proponents of a right to same-sex marriage, he says, "often try to rest their claim on neutral grounds, and to avoid passing judgment on the moral meaning of marriage. The attempt to find a nonjudgmental case for same-sex marriage draws heavily on the ideas of nondiscrimination and freedom of choice."[90] But nondiscrimination and freedom of choice alone, he argues, are not enough to justify a right to same-sex marriage.[91] Here he turns to *Goodridge* to explain why.

Chief Justice Marshall's opinion in *Goodridge*, Sandel observes, begins with a disclaimer – adapted from the Supreme Court in *Casey* and *Lawrence* – about the court not taking sides in the dispute among competing moral, religious, and ethical convictions about marriage and about whether same-sex couples are entitled to marry.[92] Marshall quotes *Lawrence* (itself quoting *Casey*): "Our obligation is to define the liberty of all, not to mandate our own moral code."[93] So far, this sounds like a liberal analysis: the right to marry is a matter of autonomy and freedom of choice; to exclude same-sex couples denies them "respect for individual autonomy and equality under law."[94] In Sandel's gloss, Marshall is saying that the issue "is not the moral worth of the choice, but the right of the individual to make it."[95]

But those grounds are insufficient, Sandel contends: if the state were truly neutral, how could it draw any lines at all about who may marry, so long as the relationships were voluntary?[96] On what grounds could it prohibit polygamy? He goes so far as to suggest that if the state truly wanted to be neutral, it would

[89] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930-32 (N.D. Cal. 2010) (observing that, by contrast to arguments that proponents of Proposition 8 made in the official campaign to pass it, which "conveyed to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children," in the litigation over Proposition 8, proponents stressed that Proposition 8 promoted marriage's "central purpose" of promoting naturally procreative relationships and promoted "'statistically optimal' child-rearing households; that is, households in which children are raised by a man and a woman married to each other"). Prominent conservative opponents may also eschew religious arguments out of court. *See* Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 247 (2010) (contending that their argument for "legally enshrining" the "conjugal view of marriage" requires "no appeal to religious authority").

[90] SANDEL, *supra* note 2, at 256.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 257 (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (quoting Lawrence v. Texas, 539 U.S. 558, 571 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992)))).

[94] *Goodridge*, 798 N.E.2d at 949.

[95] SANDEL, *supra* note 2, at 257.

[96] *Id.*

have to "get out of the business of conferring recognition on any marriages" (recall Policy 3 above).[97]

Instead, Sandel argues, "[t]he real issue in the gay marriage debate is not freedom of choice but whether same-sex unions are worthy of honor and recognition by the community – whether they fulfill the purpose of the social institution of marriage." He continues: "In Aristotle's terms, the issue is the just distribution of offices and honors. It's a matter of social recognition."[98]

Sandel finds in Chief Justice Marshall's opinion a nodding toward this view of the matter. For example, in noting that the state is a third party to every marriage, Marshall brings out marriage's "honorific aspect": "Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."[99] Here, Sandel argues, she "steps outside the bounds of liberal neutrality to affirm the moral worth of same-sex unions, and to offer a view about the purpose of marriage, properly conceived."[100] What virtues or goods does marriage honor, if it is "an honorific institution"?[101] Sandel notes that many opponents of same-sex marriage argue that the purpose of marriage is procreation, and that since same-sex couples lack the natural capacity to procreate, they lack "the relevant virtue."[102] Marshall directly addresses and rejects this argument, locating marriage's primary purpose – its *sine qua non* – not in procreation, but in an "exclusive, loving commitment between two partners."[103]

Sandel next stands back to ask: "[H]ow . . . is it possible to adjudicate between rival accounts of the purpose, or essence, of marriage?"[104] Is it "simply a clash of bald assertions" or is there some way to show that one argument is more plausible than the other?[105] Marshall's opinion, he suggests, provides a "good illustration" of how to proceed in such cases of conflict.[106] Her method, he suggests, entails "an interpretation of the purpose or essence of marriage as it currently exists."[107] She shows that "as currently practiced and regulated by the state, [marriage] does not require the ability to procreate."[108] From this, Sandel extrapolates: if there are "rival interpretations of a social

[97] *Id.*

[98] *Id.* at 257-58.

[99] *Id.* at 258 (quoting *Goodridge*, 798 N.E.2d at 954).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 258-59.

[104] *Id.* at 259.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

practice, . . . how can we determine which is more plausible?"[109] He identifies two ways. One way is "to ask which account makes better sense of existing marriage laws, taken as a whole. Another is to ask which interpretation of marriage celebrates virtues worth honoring."[110] Put another way, to determine "[w]hat counts as the purpose of marriage" necessitates an inquiry about "what qualities we think marriage should celebrate and affirm."[111] This, he concludes, leads unavoidably to the "underlying moral and religious controversy": "What is the moral status of gay and lesbian relationships?"[112] On this question of moral status, Sandel argues, Marshall's opinion is not neutral, but concludes that the relationships formed by gay men and lesbians are as worthy of respect as opposite-sex relationships.[113] When the state denies same-sex couples the right to marry, it (quoting Marshall) "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."[114] Thus, concludes Sandel:

> [W]hen we look closely at the case for same-sex marriage, we find that it cannot rest on the ideas of nondiscrimination and freedom of choice. In order to decide who should qualify for marriage, we have to think through the purpose of marriage and the virtues it honors. And this carries us onto contested moral terrain, where we can't remain neutral toward competing conceptions of the good life.[115]

Sandel's analysis is illuminating in important ways, but problematic in setting up an either/or dichotomy between nondiscrimination and freedom of choice, on the one hand, and virtues and purposes, on the other. We would insist that the case for same-sex marriage does properly rest in part on "ideas of nondiscrimination and freedom of choice."[116] Sandel is right, though, to insist that it also entails inquiry into the purposes of marriage and requires interpreting marriage as a contemporary social institution.

But we want to point out that one can offer an alternative reading of *Goodridge* that does not require recourse to distinctively moral goods, much less Aristotelian teleological moral analysis, and that does not go outside the bounds of liberalism. First, conventional constitutional law doctrine concerning Due Process (liberty) and Equal Protection, both federal and state, requires an inquiry into whether laws that are challenged are rationally related

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[109] *Id.*

[110] *Id.*

[111] *Id.* at 259-60.

[112] *Id.* at 260.

[113] *Id.*

[114] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003)).

[115] *Id.*

[116] *Id.*

to a legitimate governmental purpose or end.[117] The analysis of purposes or ends required in these contexts is not peculiarly Aristotelian or teleological nor is it necessarily a moral inquiry. And there is nothing about liberalism that precludes this conventional inquiry. To the contrary, basic principles of liberal legitimacy require such an inquiry. If a law is not rationally related to a legitimate governmental purpose or end, it is not a legitimate exercise of political power in the most elemental sense. And, under conventional constitutional law doctrine, it is not constitutional. This general requirement extends far beyond the "culture war" issues like same-sex marriage implicating moral disagreement and political conflict. It applies to analyses of purposes or ends that are not moral in any ordinary sense.[118]

Second, the conclusions that laws criminalizing same-sex sodomy "demean the existence" of gays and lesbians[119] or that laws limiting marriage to opposite-sex couples "confer[] an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect"[120] are not necessarily Aristotelian and are not off limits to liberalism. One can interpret these holdings in Dworkinian terms: that the challenged laws deny equal concern and respect.[121] Alternatively, one can put them in characteristically liberal terms as denials of dignity. That is how the Court of Appeal for Ontario put it in *Halpern v. Toronto*: "[T]he existing common law definition of marriage"[122] "offends the dignity of persons in same-sex relationships."[123] And that is how Dworkin argues for a right to same-sex marriage.[124] That is also how the California Supreme Court framed its decision striking down a law limiting marriage to opposite-sex couples (as we will show below).[125] What is more, one can frame these conclusions in terms of a Rawlsian liberal concern to secure the status of free and equal citizenship for all,[126] homosexuals and heterosexuals alike. From this standpoint, one can condemn the laws at issue in *Lawrence* and *Goodridge* for denying gays and lesbians this status by demeaning their existence, by denying the equal moral worth of their relationships, or by failing to accord them the common benefits of citizenship.

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[117] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 540 (3d ed. 2006) (federal doctrine); *Goodridge*, 798 N.E. 2d at 960 (state doctrine).

[118] *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955).

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

[120] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (2003).

[121] *See* RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 72-73 (2006) (interpreting *Lawrence*); *id.* at 86-89 (arguing for a right to same-sex marriage).

[122] [2003] 172 O.A.C. 276, para. 148.

[123] *Id.* at para. 107.

[124] DWORKIN, *supra* note 121, at 86-89.

[125] *See infra* Part V.

[126] *See* RAWLS, POLITICAL LIBERALISM, *supra* note 3, at 335.

In short, all of these formulations comfortably express political liberalism's aspiration to secure the common and guaranteed status of free and equal citizenship to all. There is nothing in political liberalism that precludes such formulations. To the contrary, political liberalism requires these conclusions.

Finally, despite Sandel's suggestions, there is nothing in these formulations that entails that government is furthering a particular comprehensive conception of the good and thus that they are off limits to political liberalism or flout political liberalism's commitment to public reason. Political liberalism as Rawls formulates it precludes government from imposing or promoting a particular comprehensive conception of the good,[127] for example, that of the Catholic Church. It does not preclude government from pursuing moral goods or public values that are common to a number of competing comprehensive conceptions – for example, to recall the moral goods Chief Justice Marshall invokes in *Goodridge*: commitment, mutuality, companionship, intimacy, fidelity, and family.[128] It is one thing to say, as Rawls does, that political liberalism rules out governmental imposition of a particular comprehensive conception of the good. It is quite another to say that political liberalism rules out governmental creation of institutions like marriage that pursue moral goods like those stated above. It does not.[129] Nor does political liberalism preclude justifying constitutional rights on the basis of the moral goods promoted by protecting them.

In sum, Sandel provides a powerful and illuminating reading of the *Goodridge* same-sex marriage decision in terms of moral goods and purposes. But political and constitutional liberals can and should embrace Chief Justice Marshall's opinion. Not only does it not exceed the bounds of political liberalism or of public reason – it is, in Rawls's terms, an exemplar of public reason.

V. THE CALIFORNIA MARRIAGE CASES

Like *Goodridge*, the recent California cases (both state and federal) concerning the definition of marriage provide a valuable opportunity to explore

[127] *Id.* at 37.

[128] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003).

[129] Political liberalism holds that "the family is part of the basic structure, since one of its main roles is to be the basis of the orderly production and reproduction of society and its culture from one generation to the next." John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 788 (1997). In that sense, it recognizes reproduction and social reproduction as central tasks carried out by the family. But Rawls goes on to state that "no particular form of the family (monogamous, heterosexual, or otherwise) is required by a political conception of justice so long as the family is arranged to fulfill these tasks effectively and doesn't run afoul of other political values." *Id.* at n.60. Elsewhere, one of us builds on this framework and argues that, in addition to carrying out the vital tasks of caregiving and social reproduction, families afford the chance to realize the goods of intimate association. LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 20-21 (2006).

the promise of Sandel's proposed Aristotelian method for resolving the debate over same-sex marriage, which foregrounds questions of "competing notions of honor and virtue, pride and recognition."[130] At the same time, also like *Goodridge*, they suggest that his dichotomy between a liberal approach and a virtue approach is too stark. Although the success of the ballot initiative Proposition 8, amending the California Constitution to define marriage as the union between one man and one woman, in effect nullified the California Supreme Court decision in *In re Marriage Cases*, the court's opinion still warrants analysis as an instructive melding of rights and virtues arguments.

What distinguishes both the state and federal cases in California from prior litigation over same-sex marriage is that they raise and thoroughly address the question of whether it is constitutional to afford same-sex couples an alternative legal status – that of domestic partnership, to which the material benefits and the respective rights and responsibilities of marriage attach – while reserving the status of marriage exclusively to same-sex couples. This helps to focus attention on what Metz helpfully calls the *meaning* side of marriage, as distinct from the *material* side.[131] It is a new stage in the struggle for marriage equality. Framing the question in this way helps people to hone in on the significance of the label "marriage." Here Sandel's intuition that what is at stake is questions about worth is helpful: are same-sex unions viewed as equally worthy of official recognition as the unions of opposite-sex couples? Or is the creation of an alternative legal status based on a judgment that such relationships are inferior and not as worthy? So, too, these opinions afford examples of courts engaging in substantive moral argument and interpretive reasoning about the purposes of marriage. We focus primarily on the decision of the California Supreme Court from 2008, *In re Marriage Cases*,[132] and then conclude with a mention of the decision of the federal district court invalidating Proposition 8, *Perry v. Schwarzenegger*.[133] It is necessary briefly to give some background.

By referendum in a 2000 election, California voters adopted Proposition 22, which provides that "Only marriage between a man and a woman is valid or recognized in California."[134] Nonetheless, California had become one of the most hospitable environments for same-sex couples. Since the enactment of a law in 1999, same-sex partners have been permitted to register with the Secretary of State as domestic partners.[135] The preamble to California's domestic partner law states its goals: promoting equality for "caring and committed couples," "promoting family relationships and protecting family

[130] SANDEL, *supra* note 2, at 261.

[131] METZ, *supra* note 76, at 35-37, 41-44.

[132] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

[133] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[134] Proposition 22 (2000) (codified as CAL. FAM. CODE § 308.5 (2000)), *held unconstitutional by Marriage Cases*, 183 P.3d at 453.

[135] *Marriage Cases*, 183 P.3d at 413.

members during life crises," and reducing "discrimination on the bases of sex and sexual orientation."[136] The legislature has steadily expanded the domestic partnership law, culminating in the dramatic expansion of the Domestic Partner Rights and Responsibilities Act of 2003 (Domestic Partner Act).[137] The upshot is that, at least since 2005, domestic partnership has functioned in California as a near-equivalent to marriage.

In re Marriage Cases takes up the question of whether the state must go further, and provide same-sex couples with access to civil *marriage*. In a lengthy opinion, authored by Justice Ronald George, the California Supreme Court reached two basic conclusions: (1) that the fundamental right to marry protected by the state constitution's due process clause includes the right to marry a person of the same sex[138] and (2) that reserving the status of marriage for heterosexuals, while limiting gays and lesbians to the second-class domestic partnership status, constitutes unconstitutional discrimination on the basis of sexual orientation in violation of the state constitution's equal protection clause.[139] On the face of it, these two holdings seem to correspond to what Sandel characterizes as the insufficient arguments of freedom of choice and nondiscrimination, respectively.

Within the small number of states that have granted some kind of formal recognition to same-sex couples, there is a divide between those who grant full access to marriage and those who create an alternative legal status to provide comparable benefits. Illustrating the latter approach, Vermont's high court, in *Baker v. State of Vermont*,[140] allowed the legislature the discretion to create an alternative legal status, civil union, to provide common benefits to same-sex couples (although the legislature subsequently in 2009 extended civil marriage to same-sex couples).[141] So did New Jersey's high court, in *Lewis v. Harris*.[142] Illustrating the former approach, Massachusetts's high court, in an advisory opinion subsequent to *Goodridge*, rebuffed the state Senate when it asked whether adopting a civil union law for same-sex couples rather than allowing marriage would be sufficient. The court held that the "dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous," but rather assigns "same-sex, largely homosexual, couples to second-class status."[143]

The Supreme Court of California joined Massachusetts in believing that the name "marriage" – or at least the withholding of the name – means

[136] *Id.* at 414.

[137] *Id.* at 414-16.

[138] *Id.* at 446.

[139] *Id.* at 452.

[140] Baker v. State of Vermont, 744 A.2d 864 (Vt. 1999).

[141] Pub. Act No. 3, 2009 Vt. Acts & Resolves 33 (codified in scattered sections of VT. STAT. ANN. tit. 15 & 18 (2009)).

[142] Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[143] In re Opinions of the Justices to the Senate, 440 Mass. 1201, 1207 (2004).

something.[144] According to the majority opinion, the right to marry as protected by the state constitution is a "couple's right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families."[145] Making the name of their family relationship turn on the identity of the parties undermines that equal dignity and respect. Perhaps the state could, the majority suggests, strip all unions of the name "marriage" and call them something else[146] – that would be the disestablishment Policy 3 mentioned above.[147] As a matter of both due process and equal protection, however, the state may not maintain one status for opposite-sex couples and another for same-sex ones.[148]

The distinctiveness of the California Supreme Court's approach is manifest when compared with that of New Jersey. In *Lewis v. Harris*, the state's highest court said that the naming question does not implicate constitutional questions, but is instead best resolved in the "crucible of the democratic process."[149] The majority concluded that constitutionally requiring access to "marriage" – rather than simply to the rights and responsibilities "of marriage" – would force "social acceptance" upon the citizens of New Jersey, who may not be ready for it.[150] Any change in the longstanding definition of marriage, the majority believed, ought to come from the legislature, through "civil dialogue and reasoned discourse."[151] This reasoning seems to treat the question of who may use the name "marriage" for their relationships as a question of policy, not constitutional rights. By contrast, the California court emphatically stated that its role is not to make decisions based on policy or what is popular, but to interpret the constitution and to protect rights under it.[152]

In addition to marriage's symbolic importance, the California Supreme Court identified other reasons why a two-tier system denies same-sex couples equal dignity and respect. To begin, the entrenched bias against gays and lesbians raises special concerns about a separate-but-equal approach. Drawing the analogy to race, the court observed that California's barring interracial marriages would have been unconstitutional even if the state had made unions using "alternative nomenclature such as "transracial unions" available to interracial couples.[153] The court also pointed out the practical problem, evident from Vermont's and New Jersey's experiences with civil unions, that the public understands marriage, but does not understand alternatives like civil

[144] *See In re* Marriage Cases, 183 P.3d 384, 398 (Cal. 2008).

[145] *Id.* at 400; *see also id.* at 428, 429, 434-35.

[146] *Id.* at 400.

[147] *See supra* note 75 and accompanying text.

[148] *Marriage Cases*, 183 P.3d at 400.

[149] Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006).

[150] *Id.* at 223.

[151] *Id.* at 222.

[152] *Marriage Cases*, 183 P.3d at 398-99, 448.

[153] *Id.* at 435.

unions or domestic partnerships.[154] Finally, the court identified the risk that having separate tracks for opposite-sex and same-sex relationships may send a general message that government regards gay men and lesbians and their families as less worthy of respect.[155]

Thus, questions of worth do play an obvious and important role in the court's opinion. And the opinion seems to track Sandel's argument that the debate about same-sex marriage is "fundamentally" about whether same-sex couples' unions are "worthy" of the "honor and recognition" our society confers through state-sanctioned marriage.[156] Clearly, the court resolves this question in the affirmative.

But a critical step in being able to reach that judgment, says Sandel, is an Aristotelian inquiry into the purposes of the social institution of marriage and argument about "the virtues it honors" and rewards.[157] This requires inquiry into whether same-sex unions "fulfill the purposes of the social institution of marriage," such that including gay and lesbian couples is a matter of the "just distribution of offices and honors."[158]

How does the court resolve questions about the purposes of marriage? Is it possible to detect the two strands of argument that Sandel identifies – the liberal, nonjudgmental strand and the Aristotelian, purposive strand? Does the court rely on a strategy of liberal neutrality emphasizing freedom of choice, avoiding controversial moral and religious argument? Or does it engage in substantive moral argument? As in *Goodridge*, so in *Marriage Cases*, we contend, both strands play a part in the court's resolution of the constitutional issues.

The California Supreme Court's decision offers perhaps the richest account to date of why marriage is a vital *social institution*, significant for society as well as for those who marry.[159] Tamara Metz observes that the opinion "came closer than any other to presenting a complete and compelling constitutional defense of the establishment of marriage."[160] Marriage jurisprudence, Metz accurately says, has both an individual rights strand, which Sandel might well identify with a liberal form of argument, and an institutionalist strand, which stresses society's interest in marriage and the instrumental value of marriage as a foundational social institution.[161] She contends that the California Supreme Court moved beyond dominant "liberal discourse" about marriage by observing that protecting the right to marry requires more than merely leaving people alone, but also requires the state "to provide – define, confer, and

[154] *Id.* at 445-46.

[155] *Id.* at 445.

[156] SANDEL, *supra* note 2, at 254.

[157] *Id.* at 260.

[158] *Id.* at 257-58.

[159] *Marriage Cases*, 183 P.3d at 419-27.

[160] METZ, *supra* note 76, at 38.

[161] *Id.*

regulate – a legal framework."[162] *Goodridge* itself made this point very clearly, speaking both of "freedom from" and "freedom to" being at stake in the right to marry.[163]

In ruling that gay male and lesbian couples were entitled to marry, the California Supreme Court emphatically stressed the continuing importance of marriage both for individuals *and* for society,[164] melding an individual rights perspective with an institutionalist perspective. In doing so, it drew on many traditional arguments about why marriage matters. In this sense, the California ruling might actually be read as a conservative decision: it recognizes and seeks to preserve the important functions of marriage, in an age when many couples simply cohabit and many people choose to be single. At the same time, the court's opinion is clearly also a progressive one, for it concludes that appeals to history and tradition alone are insufficient constitutional bases for excluding same-sex couples from this fundamental institution.[165] It is also progressive in the sense that it considers and rejects a number of contemporary arguments made by the marriage movement against redefining marriage.[166]

What are the purposes of marriage? Why is it fundamental? The California Supreme Court emphasizes the unique role of marriage in providing "official recognition" to a family relationship.[167] In doing so, the court makes use of several traditional arguments typically used by opponents of same-sex marriage. Precisely because marriage is – as conservatives often have argued – unique in offering couples societal respect and dignity, the court reasoned that the state may not deny it to same-sex couples without undermining constitutional guarantees of rights to privacy, liberty, and equality.

From a long line of federal and state precedents about privacy, liberty, equality, and the right to marry, the California Supreme Court distills one basic idea: that the fundamental right to marry embraces the right of an individual to establish, with a loved one of his or her choice, an officially recognized *family* relationship.[168] Here, the court makes what Sandel might call a liberal rights argument about choice. But it is wedded to an argument about the worth of official recognition. Because civil marriage provides the institutional framework for families to secure such recognition, the state may not relegate same-sex couples to an alternative status without denying them a "core element[]" of the right to marry.[169]

The California Supreme Court elaborates upon many reasons why both society and individuals have a stake in the institution of civil marriage.

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[162] *Id.* at 39-40.

[163] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003).

[164] *Marriage Cases*, 183 P.3d at 422-26.

[165] *See id.* at 428-30.

[166] *See id.* at 430-33.

[167] *Id.* at 428.

[168] *See id.* at 398-99, 400, 418, 421, 423-27.

[169] *Id.* at 427.

Ultimately, it asks, "[w]hat is society's interest in marriage?"[170] Or, put another way, what are marriage's purposes? First, the court tells us, there is the channelling function of the family, as the "basic unit of our society."[171] Older California cases state that the family "channels biological drives that might otherwise become socially destructive," giving order to sexuality and procreation.[172] Second, civil marriage also facilitates parents' providing for "the care and education of children in a stable environment."[173] Third, society relies on marital and family relationships, which are attended by legal obligations of support, to provide crucial care for dependents and to relieve the public from, or at least share with it, the burden of support. Society favors marriage by linking many rights and responsibilities to it.[174] These are institutionalist arguments that stress what marriage does for society.

But marriage, the court insists, is also of "fundamental significance" for those who seek to marry.[175] Thus, one cannot look at marriage only from an *institutionalist* perspective – that is, how marriage "serve[s] the interests of society"[176] – and ignore the *individual rights* perspective – that marriage is also a "fundamental right," an "integral component of an individual's interest in *personal autonomy*" protected by state constitutional liberty and privacy rights.[177] Marriage "cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it."[178] In elaborating the importance of marriage to individuals, the court makes arguments sounding more in liberal themes about a right to form and act on a conception of the good life. Marriage, for example, offers "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."[179] Indeed, constitutional precedents speak of it as part of the "pursuit of happiness."[180] The court notes that, of course, people can have and raise children outside of marriage, but "the institution of civil

[170] *See id.* at 423.

[171] *Id.* at 422. On the "channelling" function of family law, see Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007).

[172] *Marriage Cases*, 183 P.3d at 422 (quoting De Burgh v. De Burgh, 250 P.2d 598, 601 (Cal. 1952)).

[173] *Id.* (quoting *De Burgh*, 250 P.2d at 601).

[174] *Id.*

[175] *Id.* at 423.

[176] *Id.* at 425.

[177] *Id.* at 426.

[178] *Id.*

[179] *Id.* at 422 (quoting Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988) (internal quotations omitted)).

[180] *Id.* (quoting Perez v. Sharp, 198 P.2d 17, 18 (Cal. 1948) (internal quotations omitted)).

marriage affords official governmental sanction and sanctuary to the family unit."[181] Civil marriage – as a public statement – affords persons a public affirmation of commitment and a form of self-expression. It also enmeshes married persons in a broader network of extended family, as well as in the "broader family social structure" that is a vital part of community life.[182] Families provide a place in which personality may be developed, intimate association pursued, and values and commitments generated that reach beyond the family.

Those who argue against extending marriage to same-sex couples often appeal to some of these traditional functions of marriage. For instance, the channelling function of the family – and of family law – provided a rationale for preserving the traditional definition of marriage in *Hernandez v. Robles*,[183] in which New York's highest court upheld the state's ban on same-sex marriage, and in Justice Cordy's dissent in *Goodridge*.[184] Opponents of same-sex-marriage argued before the California Supreme Court that because of the historical link between marriage and procreation, the constitutional right to marry should be limited to opposite-sex couples.[185] Altering the definition of marriage, they argued, would send a message that marriage no longer has to do with procreation, or with a child's needing a mother and a father.[186]

How did the California Supreme Court resolve this debate about marriage's definition and purposes? For one thing, it looked to marriage law to reject the arguments centered around procreation. It observed that, although channelling procreation may be a reason for marriage, the constitutional right to marry has never been confined only to couples capable of procreating.[187] Moreover, the court held that promoting "responsible procreation" among heterosexuals is not a constitutionally sufficient reason to deny same-sex couples the fundamental right to marry.[188] As the court saw it, the state's goal of encouraging stable two-parent family relationships could be served by extending the benefits of marriage to same-sex couples (who after all often raise children together).[189]

The California Supreme Court observed that, although providing a stable setting for procreation and childrearing is one important purpose of marriage, it

[181] *Id.* at 425.

[182] *Id.*

[183] 855 N.E.2d 1, 21 (N.Y. 2006).

[184] 798 N.E.2d 941, 995-96 (Cordy, J., dissenting) ("Paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized.").

[185] *Marriage Cases*, 183 P.3d at 430.

[186] *Id.* at 432.

[187] *Id.* at 431.

[188] *Id.* at 432.

[189] *Id.* at 433.

is not the only one.[190] The court also conceived of marriage as an adult relationship; state and federal precedents link marriage to adult happiness and to "personal enrichment."[191] The court's resistance to making marriage primarily or solely "about" children and not also about adult intimacy is a notable interpretation of the purposes of marriage that recurs in California's federal marriage case, *Perry v. Schwarzenegger*.[192] Moreover, the California Supreme Court pointed out that the U.S. Supreme Court has upheld the constitutional right of married couples to use contraception (thus preventing procreation).[193]

The California Supreme Court also considered and rejected another argument, already mentioned above, made by the marriage movement: that allowing same-sex couples to marry will "send a message" that marriage has nothing to do with procreation and child rearing, and that it is "immaterial" to the state whether a child is raised by her or his biological parents.[194] The court held that recognizing the constitutional rights of same-sex couples to marry diminishes neither the constitutional rights of opposite-sex couples nor the legal responsibilities of biological parents.[195] If anything, the court concluded, recognizing these rights "simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those being raised by opposite-sex couples."[196] As New York's Chief Judge Judith Kaye wrote in her dissent to *Hernandez*: "There are enough marriage licenses to go around for everyone."[197] The court reasoned here that the good of stability is relevant not just to households formed by opposite-sex couples, but also to those formed by same-sex couples. Implicitly, there is a moral judgment that these households not only will benefit from this recognition and support, but also that they are equally worthy of it.

We want to close by reiterating that the California Supreme Court opinion can be seen as being at once progressive and conservative. It is progressive in its unwillingness to defer completely to history and tradition when defining

[190] *Id.* at 432.

[191] *Id.*

[192] 704 F. Supp. 2d 921, 946-50 (N.D. Cal. 2010).

[193] *Marriage Cases*, 183 P.3d at 432 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)).

[194] *Id.*

[195] *Id.* at 433 ("By recognizing this circumstance we do not alter or diminish either the legal responsibilities that biological parents owe to their children or the substantial incentives that the state provides to a child's biological parents to enter into and raise their children in a stable, long-term committed relationship.").

[196] *Id.*

[197] *Id.* at 451 (quoting Hernandez v. Robles, 855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting)).

constitutional rights. Though the State of California had urged the court to embrace the longstanding definition of marriage as a union between a man and a woman, the court looked more critically at history and tradition. Drawing on its own precedents, and subjecting these arguments to critical scrutiny, the court stated that "history alone is not invariably an appropriate guide for determining the meaning and scope of this fundamental constitutional guarantee."[198] In rejecting wholesale deference to tradition, the court insisted that neither marriage nor constitutional concepts are static. In this sense, its reasoning resembles that of *Goodridge*, which spoke of marriage as an "evolving paradigm."[199] The court also invoked Justice Kennedy in *Lawrence*: "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[200]

Yet the opinion can be seen as conservative in its strong emphasis on the unique symbolic value of marriage and its invocation of the primacy of marriage. Legal scholars and activists who argue for de-centering marriage by developing domestic partnership laws and other legal statuses alternative to civil marriage[201] might criticize the majority's insistence on the inadequacy of domestic partnership as a legal alternative to marriage. The court's marshaling of traditional arguments about the importance of marriage – along with its emphasis on the risk that domestic partnership will be perceived as lesser and as inferior – may lead some progressives to lament that a real opportunity for breaking the monopoly that marriage holds on our social and legal imagination was lost. While we can argue about the society we ideally should have, for now the California Supreme Court's point is cogent: so long as marriage exists and is only open to opposite-sex couples, a marriage/domestic partnership two-track system conveys a very real and serious insult to same-sex couples, communicating that their family relationships are not worthy of equal dignity and respect.

Far from resolving the controversy over same-sex marriage, the California Supreme Court's opinion was a catalyst for the Proposition 8 campaign to amend the California Constitution by defining marriage as the union of one man and one woman.[202] These issues of worth and of the symbolic message of marriage versus domestic partnership are also central in the ongoing federal litigation concerning the constitutionality of Proposition 8, as demonstrated in *Perry v. Schwarzenegger*. There the federal district court concluded that views

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[198] *Id.* at 399.

[199] Goodridge v. Dep't of Pub. Health, 798 N.E.2d, 941, 967 (Mass. 2003).

[200] *Marriage Cases*, 183 P.3d at 451 (quoting Lawrence v. Texas, 539 U.S. 558, 579 (2003)).

[201] *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 3 (2008); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 202 (2003).

[202] *See* CAL. CONST. art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California.").

about the inferiority of same-sex couples and their families animated the campaign for the proposition,[203] and held that Proposition 8 violated both the Due Process Clause and the Equal Protection Clause of the United States Constitution.[204] The case is now on appeal before the Ninth Circuit, which recently issued an order staying further proceedings and certifying a question to the California Supreme Court concerning whether the proponents of Proposition 8 have standing to defend its constitutionality in court when the State of California has refused to do so.[205] The case may eventually end up before the U.S. Supreme Court. Chief Judge Vaughn Walker's lengthy opinion is heavily laden with findings of fact and citations to specific evidence on these findings to support his conclusions of law.[206] Whatever the ultimate outcome of the case on appeal, Chief Judge Walker's opinion provides a rich example of the intertwining of liberal and civic republican arguments – autonomy together with worth – in justifying a right to same-sex marriage.[207]

CONCLUSION

To recapitulate: as did the Massachusetts Supreme Judicial Court in *Goodridge*, so did the California Supreme Court in the *Marriage Cases* present liberal arguments sounding in freedom of choice and nondiscrimination alongside Aristotelian or civic republican arguments sounding in purposes, moral goods, and worth. Sandel may be right that the latter arguments help resolve the issue. But we maintain that both types of argument can stand side by side. And what we said above about *Goodridge* in relation to political liberalism and conventional constitutional doctrine applies as well to the

[203] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 930-32 (N.D. Cal. 2010).

[204] *See id.* at 991.

[205] *See* Order Certifying a Question to the Supreme Court of California, 638 F.3d 1191, 1192 (9th Cir. 2011).

[206] *See Perry*, 704 F. Supp. 2d at 953-91, 993.

[207] On questions of worth, see, for example, *id.* at 973 (Finding 58) ("Proposition 8 places the force of law behind stigmas against gays and lesbians, including: gays and lesbians do not have intimate relationships similar to heterosexual couples; gays and lesbians are not as good as heterosexuals; and gay and lesbian relationships do not deserve the full recognition of society."); *id.* at 974 (Finding 60) ("Proposition 8 reserves the most socially valued form of relationship (marriage) for opposite-sex couples."); and *id.* at 999-1000 ("The evidence supports two points which together show Proposition 8 does not advance any of the [state's] identified interests: (1) same-sex parents and opposite-sex parents of equal quality . . . and (2) Proposition 8 does not make it more likely that opposite-sex couples will marry and raise offspring biologically related to both parents."). On themes of marriage as an important choice, see, for example, *id.* at 961 (Finding 34) ("Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."); and *id.* at 993 ("The right to marry has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household.").

decision of the California Supreme Court. For its analysis of purposes and ends sits comfortably within conventional constitutional law doctrine with no need of Aristotle or teleological analysis to make sense of it. And its holding fits comfortably with familiar liberal commitments to equal concern and respect, dignity, and securing the status of free and equal citizenship for all.