

## Privacy and the Debate over Same-Sex Marriage versus Unions

Vincent J. Samar

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage versus Unions*, 54 DePaul L. Rev. 783 (2005)

Available at: <https://via.library.depaul.edu/law-review/vol54/iss3/6>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# PRIVACY AND THE DEBATE OVER SAME-SEX MARRIAGE VERSUS UNIONS

Vincent J. Samar\*

## INTRODUCTION

Recent decisions by several state supreme courts finding that their states' bans on same-sex marriage violates their respective state constitutions have sparked a heated and growing debate across the country.<sup>1</sup> It is fortuitous that, while I prepared this presentation, the Massachusetts Supreme Court issued an advisory opinion to its state's senate affirming part of what I say here.<sup>2</sup> This was followed by the Mayor of San Francisco issuing marriage licenses, which have now been disallowed by the California Supreme Court,<sup>3</sup> and President George W. Bush calling for a federal constitutional amendment to protect marriage as a strictly heterosexual institution.<sup>4</sup>

The issue of whether to allow same-sex marriage has many different facets and has become a very important cultural debate throughout the Western World.<sup>5</sup> In the United States, two polarized views and a number of compromise approaches have emerged from this debate.<sup>6</sup>

---

\* Adjunct Professor of Law, Illinois Institute of Technology's Chicago-Kent College of Law; Adjunct Professor of Philosophy, Loyola University Chicago and Oakton Community College. This Article is based on a presentation given at the Symposium: *Privacy and Identity: Constructing, Maintaining, and Protecting Personhood*, at DePaul University College of Law on March 13, 2004. The author gives many thanks to Mark Strasser of Capital University and Christopher Lane of Northwestern University for their helpful comments on an earlier draft of this Article.

1. See generally Andrew Jacobs, *Georgia Voters to Decide Gay Marriage Issue in the Fall*, N.Y. TIMES, Apr. 1, 2004, at A14; Dean E. Murphy, *Bid to Stop San Francisco from Letting Gays Marry*, N.Y. TIMES, Feb. 14, 2004, at A10; Tatsha Robertson, *Civil Disobedience Adds to Battle over Same-Sex Marriage*, BOSTON GLOBE, Mar. 15, 2004, at A1.

2. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

3. Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24. Without yet deciding whether its state constitution bars the legislature from prohibiting same-sex marriages, the California Supreme Court held void, as a misuse of official authority, those marriage licenses issued to same-sex couples on orders of the mayor of San Francisco. See *Lockyer v. City and County of S.F.*, 95 P.3d 459 (Cal. 2004).

4. Elisabeth Bumiller, *Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1.

5. Kathleen Harris, *Tory's Anti-Gay Rant "Venomous"*, THE TORONTO SUN, May 9, 2003, at 12; Keith B. Richburg, *Gay Marriage Becomes Routine for Dutch: Two Years After Enacting Law, Up to 8% of Weddings Are Same-Sex Unions*, WASH. POST, Sept. 23, 2003, at A20.

6. See *The NewsHour with Jim Lehrer: Gay Marriage* (PBS television broadcast, Nov. 18, 2003). *The NewsHour with Jim Lehrer's* official website, Online NewsHour, provides a tran-

One view finds such bans necessary to defend marriage as a relationship between one man and one woman from what is perceived to be a pernicious and immoral attack from outside the institution.<sup>7</sup> To this group, even adoption of a federal constitutional amendment to prohibit same-sex marriage is feasible.<sup>8</sup> The opposing view sees what some state courts have done as correcting yet another vestige of entrenched discrimination against a politically unpopular and relatively powerless group in society.<sup>9</sup> In between these poles are a number of efforts, some well-meaning, to find compromise.<sup>10</sup> Some states, for example Hawaii and California, offer some benefits but not as many as Vermont's civil union legislation.<sup>11</sup> That law was enacted after the Vermont Supreme Court held that its state's ban violated the common benefits provision of its state's constitution.<sup>12</sup> What differentiates the Vermont law from other domestic partner legislation is that, for the first time, the full panoply of private, tangible, strictly states' rights and benefits of marriage are now conveyed under the name "civil union."<sup>13</sup> Still, since civil unions are not recognizing matrimonial status—because many Vermonters, like many in the country, do not wish

---

script of the program. See *Gay Marriage*, A NewsHour with Jim Lehrer Transcript (Nov. 18, 2003), at [http://www.pbs.org/newshour/bb/law/july-dec03/gay\\_11-18.html](http://www.pbs.org/newshour/bb/law/july-dec03/gay_11-18.html). See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CJ, 1998 WL 88743 (Ak. Super. Feb. 27, 1998).

7. See *The NewsHour with Jim Lehrer*, *supra* note 6; *Goodridge*, 798 N.E.2d at 941.

8. The proposed constitutional amendment circulating in Congress reads: "Marriage in the United States shall consist solely of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." H.R.J. Res. 106, 108th Cong. (2004). At his State of the Union Address, President Bush came out in favor of a federal constitutional amendment to protect marriage. See *State of the Union; 'We Must Pass Reforms That Solve the Financial Problems of Social Security'*, N.Y. TIMES, Feb. 3, 2005, at A22 (providing a transcript of the President's speech).

9. See Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

10. Pam Belluck, *Massachusetts Weighing Deal on Gay Unions*, N.Y. TIMES, Feb. 11, 2004, at A1.

11. As part of the legislation authorizing the ballot initiative in Hawaii that allowed that state's constitution to be amended to reserve marriage only for opposite-sex couples, the legislature enacted a domestic partnership law that allows nontraditional couples to register as "reciprocal beneficiaries" with survivorship rights, health benefits, property rights, and legal standing to bring wrongful death and victims' rights claims. See HAW. REV. STAT. §§ 572C-1-7 (1999). See also David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG., May 9, 2004, at 52 (discussing changes to the laws affecting same-sex couples in Hawaii, Vermont, Massachusetts, and California).

12. VT. STAT. ANN. tit. 15, § 1204 (2003) (providing in subsection (a) that "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage").

13. *Id.*

to go beyond mere tolerance and still conceive marriage as a sacred, heterosexual institution—I question how much of a real compromise this is.<sup>14</sup>

I argue that civil unions are not a separate but equal substitute for same-sex marriage for a variety of different, though related, reasons, and that same-sex couples should not be lulled into believing otherwise. First, civil unions do not carry the same social meaning as marriage, nor are they intended to imbue such social meaning.<sup>15</sup> In fact, marriage itself will undergo a change in its social meaning once same-sex couples are admitted into it, which is what the President and some others are worried about.<sup>16</sup> Second, treating the two institutions as if they were the same overlooks important ways that culture shapes self-esteem and regulates the development of individual identities, and along with that, impedes or promotes true human autonomy.<sup>17</sup> Finally, equality requires giving same-sex couples the same opportunities to marry as opposite-sex couples and not channeling them into a less-regarded institutional status.<sup>18</sup> Here it is also worth noting that affording same-sex couples the right to marry is likely to reconstruct the institution of marriage so as to move it away from its historical connection to gender roles and female subservience and towards close-to-equal partnership.<sup>19</sup> The arguments that I make are, in the first instance, moral arguments along the lines that noted legal scholar

---

14. A notable exception is the Massachusetts Supreme Court's *Opinion of the Justices to the Senate*, 802 N.E.2d 565 (2004), in which the Massachusetts Senate asked the court whether affording Vermont-style civil unions without granting marriage would satisfy the equal protection and due process standards of that state's constitution. In expressing the opinion that it would not, the court made clear that the proposed bill would create "a separate class of citizens by status discrimination, and withhold from that class the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights and responsibilities." *Id.* at 571.

15. VT. STAT. ANN. tit. 15, § 1201 (2000) (citing Legislative Findings #10, No. 91 (Adj. Sess.), § 1 (2000)). See also Jonathan Rauch, *The Power of Two: The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, § 6, at 13.

16. Jonathan Rauch, *The Way We Live Now: 3-7-04, The Road to Gay Marriage*, N.Y. TIMES, Mar. 7, 2004, § 4, at 12.

17. See JON ELSTER, *Sour Grapes* 109–40 (1983).

18. Professor Eskridge has noted a sedimentary development in the menu of institutional forms that has developed both in Europe and the United States for recognizing different levels of relationships, both opposite-sex and same-sex. See William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition*, 31 McGEORGE L. REV. 641 (2000). Additionally, Alan Gewirth argues that a justified system of human rights requires "that all persons have effective rights to equal opportunity for their capacity-fulfillment." ALAN GEWIRTH, *SELF-FULFILLMENT* 86 (1998).

19. David B. Cruz, *Disestablishing Sex and Gender*, 90 CALIF. L. REV. 997, 1080 (2002).

Carlos Ball might recommend for gay politics.<sup>20</sup> Only after that threshold is met do the arguments turn into legal arguments.

The so-called “sacredness” of marriage view may have arisen in medieval Europe with early ties to Jewish tradition and postdating early Roman and Hellenistic property notions.<sup>21</sup> Still, its significance to today’s popular culture may be more connected to remembrances of one’s own family and media depictions of people dressed in tuxedos and gowns, walking down a church aisle.<sup>22</sup> Contrast that with the way the public generally thinks about divorce, portrayed with images of courtrooms filled with angry parties “at each other’s throats.”<sup>23</sup> While this view of marriage may be somewhat in flux, it is still the dominant cultural image of the institution.<sup>24</sup>

More important for this analysis are the wide range of other messages concerning family and intimacy that American culture has attached to the institution.<sup>25</sup> Pro-Gay, conservative (in the sense of wanting to assimilate gays and lesbians into more traditional cultural institutions rather than to reject those institutions outright), and pro-same-sex marriage advocates like Andrew Sullivan and Gabriel Rotello believe gay people who desire to inhabit a so-called “normal” identity will find entry into marriage a means to achieving this.<sup>26</sup> But other more liberal pro-gay commentators such as Judith Butler and Michael Warner worry about whether buying into institutions like marriage will co-op a part of the sexual freedom movement that envi-

---

20. See generally CARLOS BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* (2003).

21. See JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* 32–33 (1994); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 559–60 (1993). But see John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997).

22. See Bruce Bawer, *The Marrying Kind*, N.Y. TIMES, Mar. 8, 1996, at A31 (arguing that the sacredness of marriage stems not from a quality essential to marriage but from its opposition to non-marriage and homosexual sodomy). See generally Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1993).

23. Bob Thompson, *A Modern Divorce: A Family’s Unique Arrangement for Putting the Children First*, NEWSDAY, Jan. 13, 2003, at B06 (noting that the image most Americans have of divorce is a “sharp-edged collage of uncontrolled rage and pain”).

24. Just consider the number of shows on television in which marriage ceremonies are depicted. For example, each spring, *Good Morning America*, an ABC news broadcast, televises an elaborate marriage ceremony from Times Square in New York City. See, e.g., Dionne Walker, *Firefighter Wed on Good Morning America*, FIREHOUSE.COM NEWS (June 25, 2001), at [http://server.firehouse.com/news/2001/6/25\\_FHwed.html](http://server.firehouse.com/news/2001/6/25_FHwed.html).

25. See, e.g., Michael Massing, *Bishop Lee’s Choice*, N.Y. TIMES, Jan. 4, 2004, § 6, at 34 (discussing the uproar within the Episcopal Church over the decision to confirm as bishop an openly gay man, who is in a committed same-sex relationship); Gerald L. Zelizer, *Gay Marriage: A Compromise*, N.Y. TIMES, Jan. 4, 2004, § 14, at 13.

26. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 110, 142 (1999).

sions use of pornography, ownership of sex businesses, and sex outside the home.<sup>27</sup> Change is not, however, one-dimensional. It is not a matter of gays becoming more like straights, or straights becoming more like gays, notwithstanding *Queer Eye for the Straight Guy*.<sup>28</sup> Both sides miss the point of what is currently happening in American culture by failing to see the dual possibilities of change for both same-sex couples themselves and society-at-large. The only comparable alternative would be for states to get out of the marriage business altogether and simply recognize intimate unions. But, while perhaps desirable, that is unlikely to happen in today's political climate.<sup>29</sup> It may happen indirectly, however, if marriage continues to lose its distinctive identity.<sup>30</sup> Still, whatever the future of marriage will be, it is unlikely that unions for only one group and marriages for the other will afford much satisfaction if the real interest is in receiving genuine public recognition of the intimate relationships involved.

This Article was originally presented as a talk at the Luncheon for the Symposium: *Privacy and Identity: Constructing, Maintaining, and Protecting Personhood*, at the DePaul University College of Law on March 13, 2004. Consequently, it is made up of a number of short but specific arguments that have since been updated to encompass a rapidly changing political environment. Part II of this Article explains why just affording the same rights to gays and lesbians under a different institutional name other than marriage will not be enough to secure the same *status* as marriage. Part III connects the social recognition of marriage to one's own sense of self-fulfillment and self-worth. It also argues that this connection is not idiosyncratic to the individual but inherent in the social nature of the institution itself. Part IV goes on to show that this connection implicates not only law, but also culture and the kind of society in which we live. It also suggests that a way to avoid diminishing individual self-fulfillment is to make the institution of marriage available to all without encumbrance, even though this may have the effect of altering our understanding of the institution to some significant degree. Part V argues that respect

---

27. *Id.* at vii, 142.

28. *Queer Eye for the Straight Guy* (Bravo Television Broadcasts 2003). On this television show, a group of five gay men set out each week to "transform a style-deficient and culture-deprived straight man from drab to fab" with respect to "fashion, food & wine, interior design, grooming and culture." *Queer Eye for the Straight Guy*, at [http://www.bravotv.com/Queer\\_Eye\\_for\\_the\\_Straight\\_Guy/](http://www.bravotv.com/Queer_Eye_for_the_Straight_Guy/) (last visited Jan. 28, 2004).

29. Cf. Jack Layton, *Why We Must Change the Voting System*, TORONTO STAR, Aug. 29, 2003, at A25.

30. David B. Cruz, "Just Don't Call It Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 950 (2001).

for autonomy and equality, which had been foundational in the previous section, requires us to oppose any attempt to amend the Constitution to ban same-sex marriage. Finally, this Article concludes with a brief remark about the fiftieth anniversary of *Brown v. Board of Education*.<sup>31</sup>

## II. WHY JUST AFFORDING RIGHTS IS NOT ENOUGH TO DO RIGHT

In this Part, I begin to show why the private tangible rights of marriage, which include rights to property transfers, inheritance, tax benefits, and decisionmaking on both health issues and other important legal matters, are not adequate to afford individuals the social dignity that comes with the status of marriage.<sup>32</sup> The late American Civil Lib-

31. 347 U.S. 483 (1954).

32. VT. STAT. ANN. tit. 15, §§ 1204(e)(1)–(24) (2003), extends, under subsection (e), the same legal rights as apply to marriage to the following nonexclusive list of legal areas:

- (1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety . . . ;
- (2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;
- (3) probate law and procedure, including nonprobate transfer;
- (4) adoption law and procedure;
- (5) group insurance for state employees . . . and continuing care contracts;
- (6) spouse abuse programs . . . ;
- (7) prohibitions against discrimination based upon marital status;
- (8) victim's compensation rights . . . ;
- (9) workers' compensation benefits;
- (10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights . . . and the Nursing Home Residents' Bill of Rights . . . ;
- (11) advance directives . . . ;
- (12) family leave benefits . . . ;
- (13) public assistance benefits under state law;
- (14) laws relating to taxes imposed by the state or a municipality;
- (15) laws relating to immunity from compelled testimony and the marital communication privilege;
- (16) the homestead rights of a surviving spouse . . . and homestead property tax allowance . . . ;
- (17) laws relating to loans to veterans . . . ;
- (18) the definition of family farmer . . . ;
- (19) laws relating to the making, revoking and objecting to anatomical gifts by others . . . ;
- (20) state pay for military service . . . ;
- (21) application for earlier voter absentee ballot . . . ;
- (22) family landowner rights to fish and hunt . . . ;
- (23) legal requirements for assignment of wages . . . ; and
- (24) affirmance of relationship . . . .

erties Union (ACLU) gay rights attorney and activist Thomas Stoddard was fond to note that what is at stake is not marriage, but the right to marry, as a way of obtaining these rights and with these rights raising the dignity of same-sex couples to equate with society's views of opposite-sex couples.<sup>33</sup> But even though these rights may be necessary for dignity, they are certainly not sufficient if all that is transferred is just a list of favored freedoms. As renowned twentieth century philosopher John Rawls reminds us, the natural or social circumstances in which one finds oneself significantly affects any attempt at achieving human self-fulfillment.<sup>34</sup> Consequently, where civil rights derive from a social context, the social context is both generative and constitutive of the fulfillment that comes from having those rights.<sup>35</sup> Further, in close cases of interpretation, the social context may advance one interpretation over another, especially where the matter concerns legislative intent.<sup>36</sup>

For opposite-sex couples, marriage includes the state's<sup>37</sup> official imprimatur for the intimacy formed.<sup>38</sup> It also separates marriage from other, sometimes less permanent, human relationships such as family, friends, and more distant acquaintances where the same level of intimacy would not be expected nor respected.<sup>39</sup> Notably, the general culture's view about legal marriage provides no comparable institution for same-sex couples. But is this not exactly what same-sex un-

*Id.* (citations omitted).

33. Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, in *LESBIAN AND GAY MARRIAGE* 13, 17 (Suzanne Sherman ed., 1992). *But see* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *LESBIAN AND GAY MARRIAGE*, *supra*, at 20, 20-21.

34. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 72, 74, 102, 312 (1971).

35. It is important to note that the communitarian thesis being adopted here is not in contradiction to the autonomous-based individualism usually associated with rights theories. The claim is not that individuals will have no status independent of their social setting, but rather that what they seek will likely be based, at least in part, on what their social surroundings allow for them. *See* MICHAEL SANDEL, *LIBERALISM AND ITS CRITICS* 5 (1984). *See also* GEWIRTH, *supra* note 18, at 197-99 (1998) (citing SANDEL, *supra*, at 199). Much is gained by way of explanatory power in recognizing that certain ends provided by society may be more productive of human happiness writ large than others, especially when they are equally distributed. *See id.* at 198. That being the case, the communitarian thesis actually provides for discussion and debate over the value of different institutional arrangements in achieving self-fulfillment. *Id.* at 199.

36. One of the ways to determine legislative intent and meaning of the terms of an otherwise ambiguous statute is to look to the debates on the legislative floors and in the various committees. *See* MORRIS L. COHEN ET AL., *HOW TO FIND THE LAW* 174-75 (9th ed. 1989).

37. By the state's, I also mean society's.

38. Pam Belluck, *Gays Respond: "I Do," "I Might" and "I Won't"*, *N.Y. TIMES*, NOV. 26, 2003, at A1.

39. Almost every state and the federal government provides some form of spousal immunity against being forced to testify against one's spouse in a court of law. *See* Joan L. Neisser, *Lessons for the United States: A Greek Cypriot Model for Domestic Violence Law*, 4 *MICH. J. GENDER & L.* 171, 181 (1996).



ions are meant to provide?<sup>40</sup> Commentator Jonathan Rauch does not think so. In a new book, entitled *Gay Marriage*, he makes the point that “[m]arriage-lite [like ‘lite ice-cream’] is not a true substitute for marriage, because it is not the same thing.”<sup>41</sup>

In my estimation, Rauch is correct because much of the social meaning sought from a same-sex marriage is altered when the rights of marriage are transferred to same-sex unions without the status. The issue is not, however, a matter of finding the right definition for the sake of clarifying some obscure institution with different social meanings, as it may be between “civil marriage” and “sacred marriage.”<sup>42</sup> Further, it is not a matter of defining a new institution to reveal some deep-seated truth that has otherwise eluded us.<sup>43</sup> If anything, the contrary is true: Civil marriage is well-known.<sup>44</sup> The real issue is whether we should perpetuate between two groups of people a normative distinction that at its core will always say to same-sex couples, “you are not quite as good as your opposite-sex counterparts because you cannot marry.”

That being said, if society feels the same-sex couple’s relationship is inferior, or not quite as worthy as a seemingly equivalent opposite-sex relationship, then the couple’s self-worth will likely be diminished.<sup>45</sup> To a certain extent, the partners may regret what they have achieved or view it at most as the best that can be made of a bad situation, as opposed to the best that can be obtained from a potentially good

---

40. VT. STAT. ANN. tit. 15, § 1201 (2000) (citing Legislative Findings #11, No. 91 (Adj. Sess.), § 1 (2000)).

41. JONATHAN RAUCH, *GAY MARRIAGE* 46 (2004).

42. The use of definitions is most helpful where the dispute is “merely verbal” and not “obviously genuine.” See IRVING COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 120–21 (10th ed. 1998). When the dispute is really genuine in the sense of being related to attitudes and beliefs, definitions are of little help. See *id.* at 120–24 (detailing types of disputes).

43. See *id.* at 131–32 (regarding theoretical definitions).

44. All fifty states and most foreign countries that are not theocracies provide for civil marriage. See Joseph W. Hoovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 486 (1994).

45. Professor John Finnis, who follows a certain type of natural law position has argued that not only is same-sex love “sterile and disposes the participants to an abdication of responsibility for the future of humankind,” and that it fails to “actualize the mutual devotion that some homosexual persons hope to manifest and experience by it,” but also that it

is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage [even one that happens to be sterile] in the understanding that its sexual joys are not mere instruments or accompaniments to, or mere compensation for, the accomplishments of marriage’s responsibilities, but rather are *the actualizing and experiencing* of the intelligent commitment to share in those responsibilities.

John Finnis, *Disintegrity*, THE NEW REPUBLIC, NOV. 15, 1993, at 12, 12.

one.<sup>46</sup> This results because the senses of “bad” and “good” in this social context are socially constructed for the couple by the dominant culture’s determination through its marriage discourse of what is acceptable.<sup>47</sup> That discourse confronts the individual through the interplay of two related connections. The first is the public-institutional connection; the second is the aspiration-capacity connection. The first is mostly public, while the second is mostly private. It is my contention that the public-institutional connection brings about the aspiration-capacity connection when the dominant culture validates the objects of private self-fulfillment. This raises the question: Is it really fair, however, to assign to same-sex couples, compared to opposite-sex couples, the same rights and benefits of marriage without saying the relationship really is the same? This requires close examination of the underlying relationship that marriage extols.

### III. THE SOCIAL MEANING OF MARRIAGE AS A BASIS FOR INDIVIDUAL SELF-FULFILLMENT

Here, I begin by paraphrasing what the neo-Kantian philosopher Alan Gewirth says about the marriage institution generally. Marriage, when conceived as a reflection of the partners’ mutual love, serves to enhance each partner’s general ability to maximize his or her individual freedom and well-being.<sup>48</sup> It does this by contributing to their individual human capacity-fulfillment in making each partner the best that he or she can be at developing and maintaining human relationships.<sup>49</sup> The word “best” here signifies the importance of the marital relationship to each partner’s human capacity fulfillment in which “the self is viewed as a more or less ordered set of powers, abilities, or potentialities.”<sup>50</sup> It also provides the institutional space in which the cultivation of their mutual love is publicly recognized as part and parcel of their individual self-worth and dignity.<sup>51</sup> When each partner becomes the locus and source of satisfaction for the other, the individual’s dignity is enhanced, affirmed by the public’s recognition that

---

46. Although expressing some concerns, Richard Posner notes that allowing same-sex marriage would likely raise the self-esteem of gay men and lesbians. RICHARD A. POSNER, *SEX AND REASON* 311, 313 (1992).

47. The problem is analogous to the dominant culture’s view that a two-parent household is a better setting in which to raise children. See Amy L. Wax, *The Two-Parent Family in the Liberal State: The Case for Selective Subsidies*, 1 MICH. J. RACE & L. 491, 542 (1996). *Contra* Robert P. George & Christopher Wolfe, “Public Reason” and Reasons for Action by a Public Authority: An Exchange of Views, 42 AM. J. JURIS. 31, 49 n.4 (1997).

48. GEWIRTH, *supra* note 18, at 143.

49. *Id.* at 144.

50. See *id.* at 14.

51. See *id.*

their aspirations are satisfied. The dignity afforded by the marital relationship thus supervenes in a very public way on each partner's voluntary and purposeful choice to be, to some important extent, an end for the other.<sup>52</sup>

In this sense, the marriage relationship becomes more than just the rights and benefits that create the possibility of human satisfaction, for the relationship itself is now seen as an end worthy of pursuit.<sup>53</sup> The relationship opens a door to capacities one might otherwise never seek to develop.<sup>54</sup> It also creates a sense of permanency by embodying a socially recognized set of commitments and a public attestation to the significance of these commitments.<sup>55</sup> The partners affirm their mutual commitment to benefit each other, and the public, in turn, sees that act as a positive good that the couple has achieved and which was not entered into lightly.<sup>56</sup> That is the intangible social meaning of marriage generally, at least when viewed in the opposite-sex context.<sup>57</sup> It is what American culture instills in young people as a reason to marry.<sup>58</sup> And no doubt, this adds background to Yale University Law Professor William Eskridge's comment that "the value of a committed partner is incalculable."<sup>59</sup> That publicly recognized value is also what is diminished when the rights and benefits of marriage are transferred without affording the same status.<sup>60</sup>

---

52. The idea of supervenience is this: "Properties of type *A* are supervenient on properties of type *B* if and only if two objects cannot differ with respect to their *A*-properties without also differing with respect to their *B*-properties." THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 778 (Robert Audi ed., 2d ed. 1995).

53. Thomas Stoddard has noted that "[m]arriage is much more than a relationship sanctioned by law. It is the centerpiece of our entire social structure, the core of the traditional notion of 'family.'" Stoddard, *supra* note 33, at 17.

54. Alan Gewirth notes that the preferential status afforded the devotions of a married couple is justified by the ability of marriage to enhance the partners' freedom and well-being and thus by its ability to contribute to their capacity for fulfillment. GEWIRTH, *supra* note 18, at 143.

55. Even those opposed to same-sex marriage admit that an important aspect of the social meaning of marriage, notwithstanding the high divorce rate, is that marriage is assumed to be a permanent state in which one achieves human flourishing through "self-realization and self-giving . . . over an extended period of time." See *Should the Government Recognize Same-Sex Marriage?*, 7 U. CHI. L. SCH. ROUNDTABLE 1, 35 (2000).

56. See *id.* (arguing that the marriage relationship is "mutually supportive").

57. Here I simply mean that the way we feel about ourselves is often a product of the way others express their feelings about us.

58. See Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 498 (2000).

59. WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 74 (1996) (discussing the value of committed partnerships when one partner has AIDS).

60. Here, the point is that the social meaning is part of the intension of the term "marriage," not part of its extension. The intension of a term, sometimes called its connotation, refers to the characteristics or attributes the members of the term's extension share, whereas the extension is

The social meaning of marriage cannot be separated from the rights of marriage any more than the social meanings of “morning star” and “evening star” or “equilateral triangle” and “equiangular triangle” can be separated from what these terms denote.<sup>61</sup> Still, it is also true that using the phrase “morning star” in place of “evening star” and “equilateral triangle” in place of “equiangular triangle” connotes very different ideas. What the term “marriage” adds to the couple’s aspirations is normative legitimacy, which because it is a social institution, significantly affects the way the couple itself views the commitment.<sup>62</sup>

I think political commentator and author Michael Warner is wrong to think that seeking marital legitimacy might stifle other forms of sexual expression, especially by single people.<sup>63</sup> Marriage is neither a cause nor a limitation on other forms of sexual expression, although these other forms might give rise to a decision to marry. This is because these forms of expression are not more legitimate absent marriage. Moreover, as civil marriage moves further away from procreation, which has never been a requirement for marriage,<sup>64</sup> it increases the possibility of legitimate experimentation to see if marriage, with all its institutional trappings, is right for the individuals involved.<sup>65</sup> I also disagree with social commentator and author Andrew Sullivan because I am unpersuaded that marriage will not itself change or that it will constrain lesbians and gay men into following a certain style of relationship any more than the free exercise of religion constrains different people into adopting a certain style of religious faith.<sup>66</sup> The future of marriage may be uncertain, but given the real harm to those same-sex couples being denied it today, that uncertainty provides insufficient reason not to recognize same-sex marriage.

Still, those willing to compromise to resolve the issue quickly might argue that the same aspirations that may exist in a marriage could be

---

the list of those members either by name or group. See COPI & COHEN, *supra* note 42, at 137. For example, the intension of “human being” might be rational animal. Its extension includes all the humans who ever lived either by name or group, such as Americans, Asians, Europeans, and Africans.

61. See IRVING COPI & CARL COHEN, *INTRODUCTION TO LOGIC* 114–17 (11th ed. 2002) (discussing definitions of terms by intension and extension).

62. Zelizer, *supra* note 25.

63. See, e.g., Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE 259, 276–78 (Wendy Brown & Janet Halley eds., 2002) (claiming that same-sex marriage will advance efforts to make certain gay relationships “normative” while stigmatizing others).

64. See Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81, 88–89 (1996).

65. See generally Eskridge, *supra* note 18.

66. See Ettelbrick, *supra* note 33, at 21. See also Stoddard, *supra* note 33, at 13–14 (stating that marriage will limit gay people’s potential and undermine gay liberation).

brought to fulfillment in a Vermont union-like relationship. If the aspirations are only those of the individuals involved, why should it matter what the institution is called, especially if the state attaches legal consequences to the obligations of each partner to the other? Under these circumstances, would separate really be equal? It seems that to answer “yes” to this question, when taken as anything more than acquiescence to an already bad situation, is to ignore the role of culture in human capacity fulfillment. It is to believe that the choice of name is just a means to clarify a difference and not to say that the two things really are different, or even more, that the one is better than the other.<sup>67</sup> Fear of not specifying enough of a difference between traditional marriage and tolerance of other forms of same-sex relationships is what causes some on the extreme right to push for a marriage amendment.<sup>68</sup> It is also why the Vatican has put out a call for Catholics worldwide to resist attempts to create any semblance of marriage by way of either civil unions or domestic partnerships.<sup>69</sup>

But that means that culture in all its various respects (religion, legal recognition, and even institutional name) has a causal or influential role to play in this important debate. In a liberal society with a humanistic culture, wide differences in aesthetic appreciation may be assigned to the creations of various individuals and groups in the sense that differences in styles and approach will be socially accepted, although standards of excellence will exist within each creative mode. The latter reflects a constant normative element. That element has been described by Victorian Poet Matthew Arnold as “a pursuit of our total perfection by means of getting to know, on all the matters which most concern us, the best which has been thought and said in the world.”<sup>70</sup>

Here, the normative reference to “best” also suggests a causal connection to human capacity fulfillment—where one comes to knowledge of oneself by being encouraged to know and eventually to

---

67. Thomas Stoddard has noted, “Lesbians and gay men are now denied entry to this ‘noble’ and ‘sacred’ institution. The implicit message is this: two men or two women are incapable of achieving such an exalted domestic state. Gay relationships are somehow less significant, less valuable.” Stoddard, *supra* note 33, at 18.

68. In his 2004 State of the Union Address to Congress, President George W. Bush said: “If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process.” *State of the Union: President’s State of the Union Message to Congress and the Nation*, N.Y. TIMES, Jan. 21, 2004, at A19 (internal quotation marks omitted).

69. CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (July 31, 2003), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/doc\\_doc\\_index.htm](http://www.vatican.va/roman_curia/congregations/cfaith/doc_doc_index.htm).

70. MATTHEW ARNOLD, CULTURE AND ANARCHY 6 (J. Dover Wilson ed., 1969) (1869).

become the best that the world and one's abilities will allow. In such a context, any disparagement of an aspiration, even if only by assigning it to a lesser category of importance, will harm self-worth. In those who hold the aspiration, the assignment creates an alienation from what they are doing, which becomes an alienation from themselves.<sup>71</sup> This seems to be what lies behind the teaching of *Brown v. Board of Education*,<sup>72</sup> that even if we could make the schools technically equal, the mere fact that we assign blacks to "black schools" and whites to "white schools" creates in black children, as the minority group that suffers limited access to institutions, a sense of inferiority that they will carry throughout their lives.<sup>73</sup>

This feeling of inferiority develops because self-worth is not innate, although it may have a genetic antecedent.<sup>74</sup> It arises out of one's own efforts with encouragement from others to develop the requisite capacities to achieve one's aspirations and make them one's own.<sup>75</sup> Consequently, where the culture stigmatizes an aspiration, it impedes developing the capacities that might bring about self-worth. The likely impact may be to cause one to disavow, or at least lessen, one's effort to develop those capacities.<sup>76</sup>

To use a cliché, one is made to feel like a "second-class citizen" in a society that elevates the importance of equality to a high value. The value of equality—or, in this case, the departure from it—suggests that what one is aspiring to, is really not at all of equal importance as to what others aspire. Where this result occurs, it can fragment individual identity by evoking within the psyche a conflict between one's self-respect and self-esteem.<sup>77</sup>

Self-respect, as here understood, is a moral virtue in which one values living a moral life.<sup>78</sup> "Self-esteem, on the other hand, is a prudential virtue" conditioned by how effective one is in obtaining one's desired goals and aspirations.<sup>79</sup> Both virtues relate to a person's dignity by enabling one to make the best of oneself. Self-esteem serves

---

71. See GEWIRTH, *supra* note 18, at 118–19 (discussing "alienation").

72. 347 U.S. 483 (1954).

73. See *id.* at 494.

74. Christina Hardyment, *In Love with Themselves*, TIMES (London), Nov. 17, 2001, Life, at 17.

75. See GEWIRTH, *supra* note 18, at 39.

76. See generally SAMUEL J. WARNER, SELF-REALIZATION AND SELF-DEFEAT (1966) (treating the issue from a Freudian point of view).

77. See Carl F. Stychin, *Identities, Sexualities and the Postmodern Subject: An Analysis of Artistic Funding by the National Endowment of the Arts*, 12 CARDOZO ARTS & ENT. L.J. 79, 117 (1994) (discussing the fragmenting of gay identities through "performative multiplicitous roles").

78. GEWIRTH, *supra* note 18, at 94–95.

79. *Id.* at 95.

this role contingently by supporting one's sense of self-worth when the objects one seeks to obtain do not violate anyone's basic rights and reflect the best that one can become in the context of a given activity.<sup>80</sup> Self-respect does this necessarily when one's treatment of one's partner is validated by a normative system that sets out universal standards for how intimate couples should act.<sup>81</sup> Therefore, when self-respect is used to attack self-esteem, like when one says to a same-sex couple, "you have a nice friendship but you cannot really claim to be able to fulfill the obligations that attach to a marital spouse," an internal psychological struggle within the psyche of the person attacked is created. That struggle can lead to a sense of fragmentation with the life one actually has, and where it might be going.<sup>82</sup>

Now, of course, there will be those who believe that such lessening of effort is a good thing because the sexual activities of same-sex couples are immoral and the desires for them disordered.<sup>83</sup> But that presumes that one can judge in a wide variety of situations what is good for others, even where no obvious dysfunction or overt harm is present.<sup>84</sup> That situation is very tenuous in a society that affirms the dual values of liberty and equality, as the Supreme Court's recent decision in *Lawrence v. Texas* was clear to point out.<sup>85</sup> Still, I should at least respond to this claim because a significant number of people in our society will feel that same-sex sexual relations are immoral. This appears most obviously, although not without some question, from the fact that voters in ten out of eleven so-called "red states" (states where the majority voted for Bush over Kerry in the 2004 presidential

80. *Id.* at 96.

81. *Id.* at 95–96.

82. Jon Elster has noted that in such circumstances "people tend to adjust their aspirations to their possibilities." ELSTER, *supra* note 17, at 109.

83. See Congregation for the Doctrine of the Faith, Letter to Bishops on the Pastoral Care of Homosexual Persons §§ 3, 12 (Oct. 1, 1985), reprinted in 16 ORIGINS 377–82.

84. The Catholic Church claims infallibility on some moral and religious teachings, although it has never claimed any of the aforementioned as being infallible truths. See Clifford Longley, *Sex Is Not a Safe Subject for the Pope, But He Is Due to Pronounce Again*, TIMES (London), Sept. 21, 1991, at 12.

85. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003). The *Lawrence* majority quoted Justice Stevens's dissent in *Bowers v. Hardwick*:

"Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

*Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (footnotes and citations omitted)).

election) approved by wide margins amendments to their state constitutions banning same-sex marriage.<sup>86</sup>

#### IV. MARRIAGE IMPLICATES THE KIND OF SOCIETY WE WANT TO SUSTAIN

We would be well served by a broad consensus concerning what constitutes a basic human right. It is unfortunate that no such consensus exists.<sup>87</sup> Still, it is probably fair to say that most reflective people, at least in Western societies, agree that any system of human rights should afford protections and support for those freedoms of action and characteristics of well-being that not only fail to harm others, but also advance human flourishing through increased opportunities for self-realization and actualization of individual potentialities.<sup>88</sup> That being the case, one can appeal to a broad principle of equality to offset some of the more negative aspects of this debate. This resolution, I suggest, protects autonomy to the greatest extent possible and, hence, the freedom of all those for whom marriage is an important social institution. Not to do so is to beg the question of our own infallibility.

But if securing opportunities for self-fulfillment is the solution, it must not be overinclusive. Certain kinds of religious freedom, even when exhibited by large, highly organized groups, like the Roman Catholic Church, will still be assured.<sup>89</sup> No church will have to recognize same-sex marriage any more than the Catholic Church has had to recognize divorce and remarriage.<sup>90</sup> But in recognizing this principle

---

86. See Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P9. But see Pam Belluck, *Maybe Same-Sex Marriage Didn't Make the Difference*, N.Y. TIMES, Nov. 7, 2004, § 4, at 5.

87. I do, however, offer some arguments for one in the context of gays and public education in a previous article. See generally Vincent J. Samar, *Autonomy, Gay Rights and Human Self-Fulfillment: An Argument for Modified Liberalism in Public Education*, 10 WM. & MARY J. WOMEN & L. 137 (2004).

88. A good example of this is the United Nation's adoption in 1948 of the Universal Declaration of Human Rights, which specifies a variety of political rights that all people hold: life, liberty, privacy, freedom of thought and conscience, freedom of religion, and freedom to participate in government. G.A. Res. 217, U.N. GAOR, 3d Sess., at 71-77, U.N. Doc. A/Res 217A (1948). The Declaration also specifies a number of social and political rights such as the right to social security, to rest and leisure, to an adequate education, and to participate in the cultural life of the community. *Id.* All people are said to hold these rights regardless of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. *Id.* Arguably, sexual orientation, though not specifically mentioned in the Declaration, could be subsumed under the phrase "other status," especially if sexual orientation is thought to evoke a status and not just a set of activities.

89. The First Amendment continues to prohibit the state from establishing religion and guarantees the free exercise thereof. U.S. CONST. amend. I.

90. See, e.g., *Hames v. Hames*, 316 A.2d 379, 386 (Conn. 1972).



of religious freedom, especially in the context of large-scale organizations, it becomes all the more incumbent on schools and public officials, as a matter of defending equal well-being, to be cognizant of the negative psychological consequences that might follow when a sizable segment of the population, especially its younger members, confronts what these institutions teach. The way the culture should show sensitivity for these consequences is by first guaranteeing, on the legal side, complete equal access to civil marriage as a kind of check to see if the differences between same-sex and opposite-sex couples should matter at all. Next, society should, through its media and other educational institutions, encourage public debates about, and a high level of respect for, ending the psychological and sometimes physical harms caused to various groups by social institutions operating in the name of culture and religion. In this way, the positive aspects of same-sex marriage could be systematically presented to offset negative stereotypes.

Such legal protections, however, will not fully guarantee individual equality for same-sex couples. These couples would still be affected by the views of other important people in one's life—such as family, friends, and clergy—who may not support the couple's mutual aspirations.<sup>91</sup> Still, at least one important ingredient toward changing those negative views and producing feelings of self-worth would be accomplished; legalizing something has the positive influential affect on society that such behavior cannot be all that bad.<sup>92</sup> Further, it uses one normative system to dialogue with another. This is especially true where the legal protection is not qualified by limiting language, as it is, for example, when the Surgeon General places a health warning on every pack of cigarettes sold in the United States.<sup>93</sup>

The ethical and legal principle that I support is to affirm individual value choices where dysfunction or overt physical or mental harm cannot be directly shown, except by theories whose validations are generally suspect.<sup>94</sup> The issue here is not comparable to bans on polygamy that can add to misogyny or incest that—at least for those who want

---

91. GEWIRTH, *supra* note 18, at 33.

92. For a discussion of the potential effects, both positive and negative, of legalizing gay marriage, see Brad K. Gushiken, *The Fine Line Between Love and the Law: Hawai'i's Attempt to Resolve the Same-Sex Marriage Issue*, 22 U. HAW. L. REV. 149, 149–50 (2000).

93. See generally Keri L. Keller, Note, *Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133 (2002).

94. Here I am following an idea that arises out of John Stuart Mill's "harm principle." See JOHN STUART MILL, *ON LIBERTY* 68 (Gertrude Himmelfarb ed., 1974) (1859).

natural children—can harm the genetic pool.<sup>95</sup> Such a view of the situation gives meaning to John Stuart Mill's harm principle: "[T]hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection . . . . His own good, either physical or moral, is not a sufficient warrant."<sup>96</sup> But it does so in a way that does not leave the individual without any opportunities for reflection, even with regard to self-harm.

I do not wish to be misunderstood—I am not saying that one could never discover, without help, the biases that may lie behind social valuations or provide a deeper critique of their legitimacy. If that were the case, social values would never be called into question and my current efforts would not make sense.<sup>97</sup> Still, when issues like marriage are at stake, it simply is not reasonable to expect that everyone will be able to see past the cultural baggage to validate for themselves what society refuses to value.<sup>98</sup> Were this otherwise, society would have little reason to be concerned about the influence of a subculture of drugs and alcohol on the population generally, and especially on the younger population. But there is more to this position than merely seeing state recognition of same-sex marriage as an offset to those who believe same-sex sexual behavior is immoral.

The picture that I have painted should suggest that the evaluation of any important human engagement is never reducible to just the private relationships the engagement denotes. It is therefore important to recognize that opening the door to same-sex marriage will have the greatest potential impact on the future of marriage as we know it. The social conservative or fundamentalist has every reason to fear this result. Why? If two men, who have been socialized as men, or two women, who have been socialized as women, enter into the matrimonial state, the cultural baggage of who they are will likely force into marriage a level of equal respect seldom found in the past.<sup>99</sup> It will have implications beyond any claim of marital rights affecting the

---

95. For an interesting discussion of these issues, see MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 10–15 (1999).

96. MILL, *supra* note 94, at 68.

97. But it takes a lot to create a Socrates, and laws are made for the rule, not the exception. As John Austin notes, laws issue commands not to one person but to society generally. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 120–22 (2d ed. 1970).

98. ESKRIDGE, *supra* note 59, at 186–87 (suggesting that a double standard based on identity implicates loss of jobs when violated, or proneness to alcoholism or suicide when it is not).

99. Virginia Rutter & Pepper Schwartz, *Same-Sex Couples: Courtship, Commitment, Context*, in *THE DIVERSITY IN HUMAN RELATIONSHIPS* 197, 209 (Ann Elizabeth Auhagen & Maria von Salisch eds., 1996), cited in Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private*

fabric of gender roles and identifications more than may be manifested even by the social and economic realities of modern day life. This so-called “subversive” impact of changing the meaning of marriage will forever alter, as scholar and activist Tom Stoddard and distinguished law professor Cass Sunstein have noted, this most basic organizing institution of our society away from paternalism or separate sex roles for men and women and towards equality, thus becoming a standard for other institutions to imitate.<sup>100</sup> In this way, the position suggested here has the potential to become society’s dominant moral view.

In larger relief, when adapted to the case law, my arguments seem consistent with the views of legal scholar Andrew Koppelman’s interpretation of the civil rights area since *Brown*.<sup>101</sup> Take, for example, the U.S. Supreme Court’s pro-marriage decision in *Loving v. Virginia*.<sup>102</sup> In that case, the Court noted that statutory devices, like Virginia’s miscegenation statute, were not benign—even if they could be applied in the same way to blacks and whites—because they were designed to maintain the supremacy of one race of people over another.<sup>103</sup> This made them contrary to the ideals of equal protection and an evil that society had a duty to stamp out.<sup>104</sup> Similarly, in *Palmore v. Sidoti*,<sup>105</sup> the Court held that the race of a new spouse could not be used to remove a child from the custody of its natural parent:<sup>106</sup> “The Constitution cannot control such prejudices, but neither can it

---

*Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 107 n.154 (2001). Professors Rutter and Schwartz assert:

Both gay and lesbian partners will engage in the provider role, but they each prefer a coprovider situation. Gay men, like other men, do not expect that a provider will take care of them. When one gay partner is the provider, the partner who is being provided for tends to be more dissatisfied with the situation. In contrast, lesbians do not expect to support another person financially, except temporarily. Lesbians are not socialized, as many men are, to take pleasure in a paternalistic provider role. A lesbian who finds herself in the role of provider is likely to be the more dissatisfied partner.

*Id.*

100. See *id.* at 60–62. See also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 16, 20–22 (1994).

101. Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIAC L. REV. 105, 116 (1996) (noting that the law of southern states was very fact-dependent before *Loving*, always invalidating interracial marriages contracted outside the state to evade a miscegenation law, sometimes dividing on interracial marriages contracted outside the state before the couples moved into the state, and generally recognizing such marriages of out-of-state couples when relevant to litigation in the state).

102. 388 U.S. 1 (1967).

103. *Id.* at 11.

104. See *id.*

105. 466 U.S. 429 (1984).

106. See generally *id.*

tolerate them.”<sup>107</sup> When one adds into the mix the recent decisions of *Goodridge v. Department of Public Health* from Massachusetts, holding that the Massachusetts ban on same-sex marriage violates its state’s Constitution,<sup>108</sup> and *Baker v. State of Vermont*, holding similarly with respect to the Common Benefits clause of the Vermont Constitution,<sup>109</sup> one finds both courts expressing strong positive feelings about the significance of the values that marriage implicates, even with changes in the way it may evolve. This was particularly well said in *Goodridge* where the court noted, “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.”<sup>110</sup> Quoting the now famous U.S. Supreme Court privacy case, *Griswold v. Connecticut*,<sup>111</sup> the Massachusetts Supreme Court reminded us that

“[marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.<sup>112</sup>

## V. SAYING NO TO THE MARRIAGE AMENDMENT AS A MATTER OF PRINCIPLE

In light of what I have written about equality, human rights, and the significance of marriage to these concerns, I now cannot ignore the President’s proposed constitutional amendment, which I believe will ultimately fail to be ratified, especially given a *USA Today* poll showing seventy-seven percent of Americans surveyed were against its passage.<sup>113</sup> Still, even if President Bush succeeds in passing a federal constitutional amendment that effectively bans same-sex marriage, a

---

107. *Id.* at 433.

108. 798 N.E.2d 941 (Mass. 2003).

109. 744 A.2d 864 (Vt. 1999).

110. *Goodridge*, 798 N.E.2d at 954.

111. 381 U.S. 479 (1965).

112. *Goodridge*, 798 N.E.2d at 954–55 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

113. The statistical information suggested here is based on an ABC News/Washington Post Poll that was conducted in January 2004. The issue of the actual number of Americans that would support a constitutional amendment is probably in flux. See *Opinion Polls Mixed*, DETROIT NEWS, Feb. 25, 2004, available at <http://www.detnews.com/2004/politics/0402/27/a06-74178.htm>. Notably, a Christian Science Monitor/TIPP poll shows that while only sixteen percent of voters over the age of sixty-five support gay marriage, forty-one percent of voters between the ages of eighteen and twenty-four do. See Noel C. Paul & Sara B. Miller, *Politicians Hit a Hot Button*, CHRISTIAN SCI. MONITOR, Mar. 11, 2004, at 1, 2. It will be interesting to see if these

number of changes will have already occurred in the country prior to its coming into effect. Pursuant to the order of the Supreme Court of Massachusetts, same-sex marriage has been legal in that state since the spring of 2004.<sup>114</sup> The California Supreme Court and the courts of a few other states will soon decide whether, under their state constitutions, same-sex marriage bans violate equal protection.<sup>115</sup> Canada's Supreme Court has already given the go-ahead for that country's national parliament to move toward national recognition of same-sex marriages, and the parliament is considering a bill that, if passed, will make Canada the third nation, after the Netherlands and Belgium, to recognize same-sex marriage throughout the country.<sup>116</sup> This means that if a federal amendment did pass, it would create legal havoc as courts would have to decide the status of property purchased previously in tenancy by the entirety,<sup>117</sup> the legitimacy of children born to or adopted by a previously married parent,<sup>118</sup> any wrongful death or other derivative action that may be pending prior to the amendment's

---

statistics change in light of President Bush's support for a marriage amendment announced during The 2004 State of the Union Address. See *supra* note 86 and accompanying text.

114. Pam Belluck, *Governor of Massachusetts Seeks to Delay Same-Sex Marriages*, N.Y. TIMES, Apr. 16, 2004, at A12.

115. A California County Superior Court judge sitting in San Francisco found that the state's ban on same-sex marriage violates the Equal Protection Clause of the California Constitution. The tentative decision noted that the ban was a form of gender discrimination warranting suspect classification. Furthermore, because marriage is a fundamental right, strict scrutiny applies and the state must meet its burden of showing a compelling reason for the ban. Lisa Leff, *Judge Says California Can't Ban Gay Marriage*, MIAMI HERALD, Mar. 14, 2005, at 2 (citing Tentative Decision on Applications for Writ of Mandate and Motions for Summary Judgment, Judicial Council Coordination Proceeding No. 4365 (Cal. Super. Ct. Mar. 14, 2005)), available at <http://www.sftc.org/Docs/marriage.pdf>. See, e.g., Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1. In New York, the Mayor of New Platz faces charges for performing unlicensed marriages between gay couples. Christine Hauser, *Top Hats and Two Grooms on a Cake, but No Licenses*, N.Y. TIMES, Mar. 21, 2004, § 1, at 29. See also Matthew Preusch, *Oregonians Look to One Suit to Settle Gay Marriage Issue*, N.Y. TIMES, Mar. 25, 2004, at A16.

116. Clifford Krauss, *Canadian Court Clears Path for Same-Sex Marriage Law*, N.Y. TIMES, Dec. 10, 2004, at A18. See also Colin Campbell, *World Briefing Americas: Canada: Same-Sex Bill Hits Parliament*, N.Y. TIMES, Feb. 2, 2005, at A9.

117. Tenancy by the entirety is a form of joint property ownership available exclusively to married couples. WILLIAM B. STOECK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 5.5 (3d ed. 2000). The idea here is to question whether any such tenancies entered into during a term of a marriage later held to be null and void would be forcibly converted into a previously uncontested joint tenancy arrangement.

118. In the case of a marriage, the stepparent exception will often allow a child of a natural or adoptive parent to have the other spouse as a stepparent. See Karen Markey, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 746 (1998). Even that cultural arrangement is formally extinguished by declaring such a relationship null and void. *Id.*

enactment,<sup>119</sup> and the legal status of spouses of foreign dignitaries who accompanied them to the United States. All this is aside from any economic boost to the hospitality industry by the influx of a new market for wedding celebrations and honeymoon getaways.<sup>120</sup>

President Bush's attempt to write discrimination into the highest law of the land with a constitutional amendment banning gay marriage is profound precisely because it flies in the face of higher equal protection principles that the Constitution demands, at least since the adoption of the Fourteenth Amendment.<sup>121</sup> If President Bush's amendment were to pass, we should be prepared to make a higher-ordered moral argument that it would not be an unconstitutional usurpation of power—treating that phrase to encompass a system of political morality that justifies the Constitution—for a courageous Supreme Court to annul such an amendment's effect, analogous to the way the Constitution itself would annul an amendment taking away a state's representation in the U.S. Senate without its consent.<sup>122</sup> As Professor Samuel Freeman has noted, the Supreme Court may be justified in nullifying any amendment that would undermine freedom of speech or religion.<sup>123</sup> In a similar vein, the proposed marriage amendment is as abhorrent to those principles underlining the post-New Deal egalitarian state as well as recent developments in international human rights law, as it would be for the Vatican to release an infallible statement by the Pope that there is no God supporting the underlying theology of his office.<sup>124</sup> My concern here is not only conceptual but also practical about the relationship of normative and *ex post facto* law to a constitutionally just order. At least, in light of recent work by Professors Ronald Dworkin,<sup>125</sup> Alan Gewirth,<sup>126</sup> and myself,<sup>127</sup> such

---

119. In the *Littleton* case, a transsexual, born as a male, underwent gender reassignment surgery to become a female. After reassignment, the female transsexual brought a wrongful death action for the death of her husband. The district court entered summary judgment for the doctor and the court of appeals upheld the lower court's decision on the basis that Texas law does not recognize same-sex marriage and that the original birth certificate governs the question of gender. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999).

120. John Holusha, *Hotel Use Declines; Office Sector Faces Uncertainty*, N.Y. TIMES, Mar. 30, 2003, § 11, at 4.

121. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 128–29 (1991).

122. U.S. CONST. art. V.

123. See Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619, 659–67 (1994).

124. David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392, 418 (1990).

125. Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 267 n.60.

126. See generally GEWIRTH, *supra* note 18.

ideas as constitutional nullification are certainly worthy of serious intellectual exploration as the culture war on this topic intensifies.

## VI. CONCLUSION

What grounds the current debate over same-sex marriage versus unions then is a concern for true human equality in a matter most deeply affecting the private lives of many Americans. While it is not reasonable to believe that we can eliminate, in a single struggle, deep-seated negative beliefs about same-sex relationships, we should not write invidious discrimination into law. We must be motivated, as were those in the past when confronting a similar issue, to say that separate but equal is neither equal nor constitutional, and we will not tolerate it to be otherwise. What better gift to give ourselves on the year following the fiftieth anniversary of *Brown v. Board of Education* than a renewed commitment to resurge that case's deeper meaning in this cutting-edge area of civil rights law.

---

127. See generally VINCENT J. SAMAR, *JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY* (1998).