OVERRULING *DRED SCOTT*: THE CASE FOR SAME-SEX MARRIAGE

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Dred Scott v. Sandford[1] is widely acknowledged to be the worst decision ever rendered by the United States Supreme Court. Its specific holdings—that Congress had no authority to regulate slavery in the territories and that no black person, whether slave or free, was a citizen of the United States entitled to bring suit in federal courts[2]—were overruled by the Thirteenth and Fourteenth Amendments, enacted in the immediate wake of the Civil War.[3] But as we mark its 150th anniversary, it is not enough to say that the *Dred Scott* decision has been overruled. It is not enough to say that slavery has been abolished by the Thirteenth Amendment and that African Americans have been acknowledged as United States citizens by the Fourteenth Amendment. We must ask whether these two amendments, taken together, did more than overrule the specific holdings of *Dred Scott*. We must ask whether there was a deeper meaning to the reversal of this decision in order to determine whether the underlying assumptions of *Dred Scott* have truly been repudiated in our constitutional realm.

In fact, the Thirteenth and Fourteenth Amendments did more than simply overrule the specific substantive rulings in the *Dred Scott* case. The amendments were aimed, more fundamentally, at overruling the Supreme Court's underlying rationale for adopting these specific rules about slavery and black citizenship.[4] This underlying rationale was stated by Chief Justice Taney in the following passage: black people, he said, were "beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man

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[1] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[2] *Id.* at 427, 452.

[3] U.S. CONST. amend. XIII, § 1 (ratified December 18, 1866); U.S. CONST. amend. XIV, § 1 (ratified July 28, 1868).

[4] ROBERT A. BURT, THE CONSTITUTION IN CONFLICT 206-11 (1992).

was bound to respect."[5] Taney thus clearly understood that the losing parties in his Court were not simply disfavored or unpopular, but were excluded from common bonds of humanity as "beings of an inferior order."[6] By abolishing the very status of "involuntary servitude," the Thirteenth Amendment signaled the wrongfulness of treating anyone as "beings of an inferior order." The Fourteenth Amendment expanded upon this understanding, not only by extending citizenship to "all persons born or naturalized in the United States," but by guaranteeing "equal protection of the laws" to "any person," not just to blacks and not just to United States citizens.[7] The two amendments were aimed at accomplishing what Abraham Lincoln had identified at Gettysburg as the "unfinished work" of the Civil War—to bring forth "a new birth of freedom."[8] The two amendments thus wholeheartedly embraced the declaration that "all men are created equal."[9]

The guarantee of "equality" is, of course, not self-defining. Each of us differs in various ways from one another, and state recognition of some difference is not an automatic violation of the rule that all of us are created equal. Inequality as such—state treatment of some people as simply different from and less favored than others—is not forbidden. The constitutional wrong is inequality that marks its subjects as a different order of humanity, that they are outside the bonds of human connection, "so far inferior, that they had no rights which [others are] bound to respect."[10] This is the basic conception of human equality—of equal dignity—that was dishonored by *Dred Scott.*

How then should courts give specific content to this basic conception so as to avoid the error of *Dred Scott*? There are two dimensions to this question—a substantive dimension (what content should courts give to the definition of "equality"?) and a process dimension (how should courts work their way toward this definition?). To explore these two dimensions, I will focus

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[5] *Dred Scott*, 60 U.S. at 407.

[6] *Id.*

[7] U.S. CONST. amend. XIV, § 1.

[8] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

[9] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[10] *Dred Scott*, 60 U.S. at 407.

attention on contemporary claims for state recognition of same-sex marriage.

SAME-SEX MARRIAGE: THE SUBSTANTIVE DIMENSION

The specific words of the Constitution are important. Life-tenured federal judges have essentially unchecked power to impose their vision of the Constitution on the rest of us. The only restraint on their power is the requirement that their rulings have some strong basis in the words of the Constitution. And if we look at the text of the Constitution, we cannot find any specific reference to marriage, sex, or homosexuals. Some people—Justices Scalia and Thomas preeminently among them—quickly assert that this is the end of the enterprise.[11] They would say that the Constitution does not deal with the subject of same-sex sodomy or same-sex marriage; therefore, states are free to do whatever they want. But the problem with this narrow literalism is that it is not a true reading of the obvious intent of the people who wrote the words of the Fourteenth Amendment. It is as clear as any claim about a historical fact can be; the framers of the Fourteenth Amendment had an expansive conception of "equality" that they meant to protect and they envisioned future judges would give expanding content to that word, to that ideal.[12] The Scalia/Thomas narrow literalism is simply not true to the meaning of the words that their authors, the framers, clearly had in mind.

But does this leave judges entirely at large in defining "equality"? Does this leave them free simply to impose their own personal, moral judgments loosely dressed up in fancy constitutional verbiage? I do not think so. I think it is possible to read the document in a responsibly constrained way—and I think this is particularly true about an issue like the constitutional claim for same-sex marriage.

This is, however, an impossible definitional task if we simply focus on the single word "equality." Looked at in isolation, it is truly impossible to decide whether same-sex marriage is equal to

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[11] *See* Lawrence v. Texas, 539 U.S. 558, 586, 603 (2003) (Scalia, J., dissenting); *id.* at 605-06 (Thomas, J., dissenting).

[12] For a discussion of the framers' views, see Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 84-86, 89-95 (1969).

or different from mixed-sex marriage. In some ways it is the same because a loving couple, whether of mixed gender or the same gender, wants to make a long-term, publicly recognized, and officially enforceable commitment to one another; and in some ways, it is different because two men are not the same as one man and one woman. So if we just stare at the word "equality," we have no basis for deciding whether the similarities outweigh the differences or vice versa.

But it makes no sense to view a word like "equality" in isolation, as if that word were simply self-defining. As with all words in any language, a single word only takes on meaning when it is presented in the full context of its social usage. And so we must read this word in the Fourteenth Amendment as it was used in its social and historical context.

The "equality" word came into our Constitution when the Fourteenth Amendment was ratified in 1868.[13] That amendment immediately followed the ratification in 1865 of the Thirteenth Amendment, which proclaimed that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[14] The Fourteenth Amendment was clearly adopted as part of the implementation project following from the abolition of slavery.[15] The first sentence of the Fourteenth Amendment itself unmistakably refers to the abolition of slavery.[16] That first sentence provides that "[a]ll persons born . . . in the United States, . . . are citizens of the United States,"[17] thus directly overruling the Supreme Court's 1857 holding in the *Dred Scott* case that no black person, whether slave or free, could be a citizen of the United States.[18] The second sentence of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person . . . the equal protection of the laws."[19] There is thus a clear contextual linkage between the abolition of slavery and this "equality" guarantee.

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[13] U.S. CONST. amend. XIV, § 1.
[14] *Id.* amend. XIII, § 1.
[15] BURT, *supra* note 4, at 206-07.
[16] U.S. CONST. amend. XIV, § 1.
[17] *Id.*
[18] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422-23 (1857).
[19] U.S. CONST. amend. XIV, § 1.

But the meaning of this linkage is itself not self-defining. At least two alternative readings are possible. One reading is that because slavery had become essentially racialized by the time of the Civil War—since blacks, that is, were considered the quintessential slaves—the "equality" guarantee in the Fourteenth Amendment applies principally, perhaps even exclusively, to blacks. It is true, of course, that the second sentence of the Fourteenth Amendment extends its protection to "persons" rather than to blacks as such; however, the first sentence speaks of the citizenship rights of "persons" rather than blacks, but the unmistakable reference in this first sentence is not to any or all persons but specifically to black people excluded from citizenship by the *Dred Scott* ruling.

But a very different reading is equally plausible, and I would say this different reading is more plausible, especially based on the statements made by the draftsmen of the Fourteenth Amendment in the congressional debates of 1866, just six months after the Thirteenth Amendment was ratified.[20] The draftsmen made clear that by explicitly speaking of the rights of "people" rather than "freed slaves" or "black people," the Fourteenth Amendment intended to generalize for all political relations the lessons drawn from the abolition of slavery.[21] Read in this way, we can see how the Fourteenth Amendment embodies the principle that Lincoln drew on when insisting on the moral wrongfulness of slavery; that the ideal expressed in the Declaration of Independence, that "all men are created equal," applied most clearly to white men struggling against colonial oppression by Great Britain, but that this ideal was intended by the founders, even in 1776, to extend in due course to all men, black as well as white.[22] From this

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[20] CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1866).

[21] *Id.* at 2542. Thus, Representative John Bingham, the principal draftsman of the Fourteenth Amendment, stated in the congressional debates, "[T]his amendment takes from no State any right that ever pertained to it. No State ever had the right . . . to deny to any freeman the equal protection of the laws . . . although many of them have assumed and exercised the power, and that without remedy." *Id.*

[22] *See* Burt, *supra* note 12, at 84-87; *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

perspective, the Thirteenth and Fourteenth Amendments were the fulfillment of the generalized promise of the American Revolution.

To give full content to the meaning of "equality" in the Fourteenth Amendment, we must explore the connection between the Thirteenth and Fourteenth Amendments. We must ask ourselves, that is, what was truly wrong about slavery; this will lead us to a richer understanding of the meaning of the guarantee that all persons in the United States must be treated as equals rather than as "masters" and "slaves."

The status of being a slave carried with it many deep indignities. Perhaps the first attribute that comes to mind is "slave labor." But the evil in this practice was not the absence of compensation for labor. In fact, as Southern plantation owners tirelessly insisted, slaves were compensated for their labor by the provision of food, housing, and clothes. Indeed, Southern slaveholders drew a favorable comparison with their provision of lifetime support for their slaves even when they were no longer productive, in contrast with the Northern industrial practices of so-called wage slavery, where the capitalist owners would simply fire any unproductive worker no matter how long he had served his capitalist master.[23] It is more to the point that the evil of slave labor was not lack of compensation, but lack of choice about employment. But even here, the Southern slave owners observed that Northern industrial workers were deprived of choice about whether or where to work by impersonal market forces with the same practical impact as the personalized deprivation of choice imposed on plantation slaves.[24]

But whatever the significance of forced labor for defining the core evil of slave status, whatever the differences may be between "free labor" and "slave labor," there is one attribute of slave status that is radically and undeniably different from freedom. That attribute is the legal recognition of family relationships.[25] Slaves

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[23] ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR ix-xxxix (1995) (with a new introduction).

[24] *Id.* at 66-67.

[25] *See* ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH 296-97 (1988).

were not simply forbidden by law to marry;[26] because they were the property of their masters, slaves had no legally recognized relationship with anyone else.[27] They had biological connections with their children, they had loving connections with one another, but none of these connections were approved or permitted by law.[28] So far as the law was concerned, nothing impeded masters from selling their slaves to far-away purchasers, breaking the slaves' bonds of love and biology with their mates and their children.[29] And the law affirmed the morality of such heartbreaking actions. As the anthropologist Orlando Patterson has described it, slavery was a status of "social death"; and slaves were, he said, "natally alienated"—that is, even worse than dead, they were alive but not part of the human species.[30] Their forced labor was not the hallmark of this dehumanized status; the law's disregard for their bonds with other beings, its refusal to recognize their family relationships, and their inability to marry in the eyes of the law was much more at the core of the social degradation inflicted on them.

Free blacks—the small number who had been released from slavery by their masters, or the even smaller number who had never been enslaved—were legally authorized to marry before the Civil War.[31] But a special disability was imposed on them in a few states that prohibited marriages between blacks and whites and, even more, imposed criminal penalties on violators—not just the interracial couples themselves, but anyone who performed the marriage ceremony itself.[32] In the *Dred Scott* decision, Chief Justice Taney cited the existence of these miscegenation statutes to demonstrate that interracial intermarriages "were regarded as unnatural and immoral," and accordingly, "this stigma, of the deepest degradation, was fixed upon the whole [Negro] race."[33]

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[26] FOX-GENOVESE, *supra* note 25.

[27] *Id.*

[28] *Id.*

[29] *Id. See also* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 6 (1982).

[30] PATTERSON, *supra* note 29, at 51.

[31] *Id.* at 241.

[32] *Id.* at 409 n.25.

[33] *Dred Scott*, 60 U.S. at 409.

Taney did not say this with any regret but as support for the proposition that it would be equally "unnatural and immoral" to regard black people as citizens, as members of the American political community.[34] And the implication of this exclusion from citizenship was even deeper; the implication was that, so far as the United States Supreme Court was concerned, blacks generally (whether slave or free) were excluded from, were inherently alien to, the human race.[35]

After the Civil War, the liberated slaves were permitted to marry one another.[36] But miscegenation laws prohibiting interracial marriage were then enacted in every Southern state.[37] The expanded reach of these laws reflected a new fear of blacks among Southern whites. Before the Civil War, the predominant Southern white fear was that slaves would rebel against and slaughter their white masters.[38] After the Civil War, white fear of blacks took a new turn; the fear became much more avowedly and intensely sexualized.[39] Black males in particular were transformed, in the feverish imagination of Southern whites, from potential political rebels to sexual predators.[40] Underlying these miscegenation laws, a new Southern white practice arose of lynching mobs, whipped into an especially murderous rage against black men accused of raping (or, in the same key, simply having sexual intercourse with) white women.[41]

Miscegenation laws remained in effect in many states for a full century after the end of the Civil War and the abolition of slavery. It was not until 1967 that the United States Supreme Court ruled that Virginia's miscegenation law violated the Constitution.[42]

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[34] *Dred Scott*, 60 U.S. at 409.

[35] *Id.*

[36] Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1013 n.267 (2000).

[37] Loving v. Virginia, 388 U.S. 1, 6 & n.5 (1967).

[38] JOEL WILLIAMSON, A RAGE FOR ORDER: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION 84 (1986) (abridged edition of THE CRUCIBLE OF RACE: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1984)).

[39] *Id.*

[40] *Id.* at 84, 186-91.

[41] *Id.* at 189.

[42] *Loving*, 388 U.S. at 11-12.

In an opinion by Chief Justice Warren, the Court relied on two grounds for invalidating the law. First, the Court ruled that the law wrongly relied on a racial classification that was demeaning to blacks and an expression of white supremacy.[43] This ground was not at all surprising in light of the Court's 1954 ruling in *Brown v. Board of Education* that racial classification of schoolchildren was unconstitutional.[44] But more surprisingly, the Court set out a second, independent ground for invalidating Virginia's miscegenation law.[45] The Court proclaimed that the law violated the fundamental right to marry.[46] "The freedom to marry," the Court said, "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[47]

This second ground was not necessary to the Court's holding; the first ground, regarding the wrongfulness of racial categorizations, was quite sufficient to dispose of the case. Moreover, this second ground was essentially unprecedented. Though prior cases had mentioned marriage as a "basic civil right," no Supreme Court decision had ever struck down restrictions imposed by state marriage laws regarding who was entitled to marry whom. The Court thus reached out in this 1967 Virginia case for a novel legal formulation to identify the constitutional evil in state miscegenation laws. The Court did not explain why it had done this. Indeed, this second ground in its ruling came at the very end of the Court's opinion and was stated in only two short paragraphs.[48] But, I believe, this novel second ground was enunciated because the Court understood—perhaps consciously, perhaps only intuitively—that there was a crucial linkage between slavery and legal barriers to marriage. The Court understood that enslavement was not simply the subordination of black people by white people, but the dehumanization of blacks—a degradation that found the clearest expression not simply in the invidious use of racial classifications, but in the denial to black people of their fundamental right to marry.

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[43] *Loving*, 388 U.S. at 11.
[44] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
[45] *Loving*, 388 U.S. at 12.
[46] *Id.*
[47] *Id.*
[48] *Id.*

This is the framework in which we should approach state refusal to recognize same-sex marriages. The basic question is not whether separate classifications for heterosexual and same-sex relationships are rationally plausible or based on long-standing moral or social traditions. The basic question is whether state prohibition of same-sex marriage reflects the same underlying attitude toward gays and lesbians that legal prohibition of interracial marriages signified toward blacks. This question was clearly answered by Chief Justice Taney in the *Dred Scott* case. As I noted earlier, Taney observed that interracial marriages "were regarded as unnatural and immoral . . . [and a] stigma, of the deepest degradation, was fixed upon the whole [Negro] race."[49] State laws forbidding same-sex marriages are equally based on a judgment that they are "unnatural and immoral" and fix a "stigma of the deepest degradation" upon all gays and lesbians.

Taney relied on the miscegenation laws to deduce that black people, as such, were not eligible for United States citizenship. Here too, we can see a direct parallel in contemporary legal regulations. Current law provides that openly, self-identified gays and lesbians are not eligible for service in the United States military.[50] This categorical exclusion from the very hallmark of United States citizenship is, as with the exclusion of blacks from citizenship, not simply a formalistic disability; the exclusion denotes a "stigma of the deepest degradation," an alienation from a common status not simply of citizenship but of shared humanity.[51]

The Supreme Court's proclamation in *Loving v. Virginia* of a "fundamental right to marry" recognized the centrality of legally authorized marital status in social acknowledgment of shared membership in the human race. More recently, in *Lawrence v. Texas*,[52] overruling the Texas criminal sodomy law, the Court has taken the first step—but only the first step—toward the same embrace of gays and lesbians as acknowledged members of the

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[49] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 409 (1857).

[50] 10 U.S.C. § 654(a)-(b) (1993).

[51] The constitutionality of this categorical exclusion from the military has been upheld in *Thomasson v. Perry*, 80 F.3d 915, 928-29 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996) and *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998). The Supreme Court of the United States has not yet addressed the issue.

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

human community. One next step would be—and should be—to undo the exclusion of gays and lesbians from human status by recognizing their right to marry one another in the same way that the marriage of heterosexual couples are publicly celebrated under the aegis of state law. I believe this result is not simply morally correct, but it is constitutionally required by the conjunctive force of the Thirteenth Amendment abolishing slavery and the Fourteenth Amendment guaranteeing every person—not just African Americans freed from slavery, but every person—equal protection of the laws.

SAME-SEX MARRIAGE: THE PROCESS DIMENSION

We now come to the "remedial" question—that is, once we have defined the most plausible meaning of the word "equality" in the Constitution, how should a court go about enforcing this defined meaning on officials and citizens who disagree with this definition? To identify this as a separate question might seem confusing, even wrong. One might say, if the judges have decided—on whatever basis—the true meaning of a word in the Constitution, then they should simply enforce that meaning on everyone. But this conception of judicial authority is as narrowly literalist, as isolated from any social and historical context, as the literalist reading of the words of the Constitution. If the words of the Constitution are nothing but a collection of readily determinative dictionary meanings, then a kind of authoritative, even dictatorial, reading of the document seems not only permissible, but even logically—one might say, lexically—required. But if, as I maintain, the words of the constitutional document only come to life through a richer understanding of its social and historical meanings, then it follows that a richer, more contextualized conception of the interpretive process is also necessary to give recognizable content to the bare words of the Constitution.

From this contextual perspective, the proposition that the definitive meaning of the Constitution should be unilaterally announced by nine or five supreme oracles in black robes—as if they were simply the impersonal, authoritative vehicles for the transmission of God's word from Mount Sinai—is incoherent, a

mistaken conception of the process by which constitutional meaning becomes recognized. Constitutional interpretation in a contextual perspective is more interactive than authoritative. It must proceed consultatively, not dictatorially; and for this purpose, the interpretive process must take place over time rather than at one fixed moment in time. This process must involve many different actors whose views must be respectfully solicited. Most of all, the interpretive process must depend on persuading people with divergent views to come to some harmonized perspective, rather than commanding the defeat, the utter surrender, of one contestant by another.

This, in final analysis, is the precise meaning of the "equality" guarantee in our Fourteenth Amendment; the way in which "equality" is translated from an abstract word into a living reality. This reliance on persuasion over time, rather than command and control at a fixed moment in time, is the way that judicial authority can become harmonized with the democratic principles at the core of our constitutional enterprise.[53]

This is a somewhat abstract statement about the constitutional interpretive process. Let me put these abstractions in a concrete context—the context of giving meaning to the constitutional right to state recognition of same-sex marriages. It is easy to understand how that right comes into recognition via an oracular, dictatorial conception of Supreme Court authority—the Court simply defines the right and that is that. It may have seemed that I was engaging in this dictatorial enterprise in my contextual reading of the Thirteenth and Fourteenth Amendments. But what would it mean to say that the right which I have deduced from this contextual reading comes into recognized authoritative status only through a consultative, interactive, and persuasive process presided over by nine judges in black robes?

To illustrate this interactive process, I want to return to the linkage that I have already drawn between the degradation of slavery and deprivations of marital and familial status.[54] I want to

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[53] For an elaboration of this statement, see generally ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992) (addressing the concept of judicial supremacy in constitutional interpretation).

[54] *See supra* notes 25-33 and accompanying text.

show—in a very abbreviated, summary fashion—how issues of marriage, family, and sexual expression generally lurked in the background of the judicial decisions of the mid-twentieth century that led to *Brown v. Board of Education* in 1954 (regarding public school segregation) and then, thirteen years later, to *Loving v. Virginia* (overturning state miscegenation laws). The story does not begin with *Brown* in 1954. The story that I want to tell begins in the late 1930s, when Thurgood Marshall, then chief counsel of the NAACP Legal Defense Fund, was charting the litigation strategy that ultimately led to *Brown* and then to *Loving*.

The Jim Crow regime of racial segregation and subordination rested on a false promise that separate facilities could be "equal"—a promise endorsed by the Supreme Court's 1896 decision in *Plessy v. Ferguson*.[55] Marshall's strategy for unmasking the true, subjugative meaning of race segregation was to demonstrate in litigation that separate was inherently unequal.[56] But where should he begin this demonstration—with racially segregated water fountains, public bathrooms, public busses, elementary schools, or with all of the above? Marshall carefully, even surgically, chose a single target—racially segregated graduate school education in public universities.[57]

There were many reasons that led Marshall to avoid a wholesale assault on all race segregation, or even on all public school segregation, and to choose this specific target of graduate school education; but I want to focus on one specific reason that Marshall himself gave many years later in an informal interview. Though he did not say this in any formal pleadings that he filed in court, Marshall later said:

> Those racial supremacy boys somehow think that little kids of six or seven are going to get funny ideas about sex and marriage just from going to school together, but for some equally funny reason youngsters in law school aren't supposed to feel that way. We didn't get it but we decided that if that was

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[55] 163 U.S. 537, 544-45 (1896).

[56] MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 170-72 (1994).

[57] *Id.* at 11-14.

> what the South believed, then the best thing for the moment was to go along.[58]

In other words, Marshall understood that in the 1930s and '40s the prospect of race mixing among young adults in graduate schools was less provocative to Southern whites—less sexually provocative—than the racial mixing of elementary schoolchildren. Marshall says this differentiation seemed utterly irrational to him, that he "didn't get it."[59] But I want to offer some quick speculations about this apparent irrationality and the strategic wisdom of Marshall's choice to "go along for the moment"[60] with this irrational differentiation between graduate students and young schoolchildren.

I have already noted the fantasies of sexual predation by black men unleashed among white Southerners by the abolition of slavery after the Civil War. These fantasies were only one expression of a widespread fear immediately after the Civil War among Northerners, as well as Southerners, that the War itself had somehow unleashed dangerous, destructive, and seductive sexual behaviors and that this disruptive conduct must be brought under control.[61] For a parallel expression of this fear, consider the post-Civil War federal campaign against polygamy in the Territories.[62] In his 1871 State of the Union address, President Ulysses S. Grant referred to the Mormon practice of polygamy as "a remnant of barbarism, repugnant to civilization, to decency, and to the laws of the United States."[63] During the latter half of the nineteenth century, the federal government waged a campaign of escalating

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[58] Alfred H. Kelly, *The School Desegregation Case*, *in* QUARRELS THAT HAVE SHAPED THE CONSTITUTION 307, 318 (John A. Garraty ed., rev. ed., Harper Torchbooks 1987) (1962).

[59] *Id.*

[60] *Id.*

[61] *See supra* notes 39-42 and accompanying text.

[62] *See* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 62-65 (1997).

[63] President Ulysses S. Grant, State of the Union Address (Dec. 4, 1871), *available at* http://www.thisnation.com/library/sotu/1871ug.html.

severity through criminal prosecutions and seizure of Mormon Church assets to stamp out this reprehensible practice.[64]

For another example of this fear of unleashed sexuality, consider the new statutes which swept the country between 1860 and 1880 criminalizing abortion; before the Civil War, abortion was freely and legally available during the first trimester of pregnancy.[65] Consider the post-Civil War enactment of so-called Comstock laws banning the sale or use of contraceptives.[66] Consider the new state laws regulating who may become married. In the pre-Civil War days, no prior state license was required for any couple who wanted to get married.[67] If the couple found a preacher, or even if they just lived together and said that they were married, that was enough under the law.[68] But the new post-Civil War laws required a prior state license for everyone. These new license laws not only prohibited interracial marriages and polygamy, but they forbade so-called "mentally defective" people, people with sexually transmitted diseases, and people with supposed inheritable diseases (such as epilepsy) from marrying.[69]

Two themes lay beneath all of these instances of new post-Civil War state laws regulating marriage and sexual conduct: First, the need to assert firm social control over marital and sexual conduct (in response, I would say, to the extraordinary turmoil that the country had just experienced in the shattering of social order and bonds of shared citizenship in the waging of the Civil War

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[64] *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (finding that Congress' enactment of legislation caused the charter of the church to be annulled and the assets of the church to escheat to the government); Reynolds v. United States, 98 U.S. 145 (1879) (upholding bigamy conviction).

[65] *See* JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 200 (1978).

[66] *See* NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 36-37 (1997).

[67] Dubler, *supra* note 36, at 970.

[68] *Id.* at 970-71.

[69] Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 IND. L. REV. 273, 278-80 (1995). *Cf.* Dubler, *supra* note 36, at 970-72.

itself[70]). Second, not simply to suppress socially undesirable behavior, but also to establish a new set of norms of socially desirable behavior, norms of "purity" embodying "sanctified" marital and sexual conduct that were rigidly differentiated from "impure" or "dirty" or "defiled" activities. As President Grant had disparaged polygamy, so too marriage between whites and blacks, marriage with diseased or defective people, and the practices of abortion and contraception were viewed as acts of "barbarism, repugnant to civilization [and] to decency."[71]

Race segregation laws were equally concerned with protecting "purity"—in this case, the imagined "purity of the White race"—from contamination. Thus the obsession with segregating shared physical space between blacks and whites—guarding against drinking from the same water fountains, sitting side by side in public busses or railway cars, or using the same bathroom facilities. Segregated education was equally understood as protecting zones of "white purity" from "black contamination." This obsession with "purity" is the key to understanding the beliefs among the "racial supremacy boys," as Marshall mockingly observed, that "little kids of six or seven" were much more likely than law students "to get funny ideas about sex and marriage just from going to [mixed-race] school together."[72] It was precisely because these young children were viewed as still untouched by sexual feelings, still "pure," not yet "sullied" as compared to already-fallen law students that the Southern whites viewed race segregation in elementary schools with so much greater intensity, so much greater resistance to any change.[73]

There are deep irrationalities here. But there is an internal logic to these irrationalities that, when they are at full tide, make them virtually impervious to rational persuasion. The internal logic has been compellingly described by anthropologist Mary Douglas

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[70] *See generally* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 (David Donald ed., 1967) (describing the economic, political, and social turmoil during the years following the Civil War).

[71] Grant, *supra* note 63. *See also supra* notes 64-70 and accompanying text.

[72] Kelly, *supra* note 58, at 318.

[73] *Id.* at 318-23.

in her classic book, *Purity and Danger*.[74] In the very title of her book, Douglas indicates that in cultural terms the opposite of purity is not just "impurity" but something more powerful and ominous. That is, the opposite of "purity" is "danger." The very structure of human culture, of civilization—our intellectual and emotional capacity to construct intelligible meaning in a world of sensory flux, our capacity to feel safe in a world filled with threats—is built upon categorical distinctions between what is permissible and what is prohibited, between the sacred and the profane, and between what is pure and what is dangerous.[75]

As Douglas demonstrates, the specific content of these categorizations varies from generation to generation; but though the content changes, the impulse, the human imperative, remains the same to distinguish between these categories of purity and danger and to cling to them as life rafts in a turbulent sea.[76] Douglas also demonstrates that in moments of great historical upheaval, the contents of these categories suddenly appear inadequate, precisely because their observance had failed to avert the upheaval.[77] So the old contents fade but the imperative to differentiate opposed categories of purity and danger persists, and these categories are filled in with new content.[78] This is what occurred in the United States following the national trauma of the Civil War, in the new legal regime I have described to control marital and sexual conduct.

If this process of categorization is a basic characteristic of human civilization, if it is in effect "hard-wired" into our cultural self-understandings, then two questions follow: First, if the categorizations of "purity" and "danger" persist, is it nonetheless important to try to change the content of these categories through rational human choice? Second, how can this change be brought about?

It is, I think, easier to answer the first question. This is a question of normative principle, whether there are some extrinsic

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[74] MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 3-4 (1966).

[75] *Id.* at 4-5.

[76] *Id.* at 36-37.

[77] *Id.* at 37.

[78] *Id.* at 38-40.

standards for judging the goodness of these categories; whether, one might say, some kinds of "purity" are intrinsically more "pure" than others; and whether some kinds of "danger" categorizations are more dangerous than others. Many different kinds of content can fill in these opposed categories (contents, for example, about what and what not to eat or to wear or to pray for). Of these many different kinds of contents, I would say that the most dangerous—the most normatively unjustified—is the categorization of some human beings as "pure" and others as "contaminated." The traditional caste system in India exemplifies this kind of content categorization. The treatment of Jews in Europe, culminating in the Nazi Holocaust, is another example. The status of African Americans in our own culture is a third example. In our Constitution, in the document that constitutes our national identity, our own American culture has condemned this kind of categorization of human beings through the abolition of slavery in the Thirteenth Amendment and the extension of that ideal in the guarantee of equality to all persons in the Fourteenth Amendment.

This is why I said that the first question is "easier" for us to answer than the second question, which is, how do we proceed to change the content of the categorizations when some people are defined as "contaminated" as compared to others who are "pure"? Here is where I see a special role for the judiciary and where I see the judicial actions in addressing the status of African Americans during the half-century between the late 1930s and the mid-1980s as the model for implementing this moral imperative of attempting to remove the stigma of "contamination" imposed on a scorned, vulnerable group of people.

There are three essential steps in this process. The first step is for the judiciary to take the initiative in identifying, in publicly acknowledging, the factual existence of this stigmatization of some specific group and the fact of its moral wrongfulness. By taking this first step, the judiciary offers its moral recognition to the stigmatized group. The judges' actions, in themselves, tell the members of this group that they are no longer excluded and alone, that there is now a new witness, a morally salient public witness, who sees and condemns the indignities and humiliations that the oppressed people had previously endured in enforced silence.

The second step in this remedial process is that the members of the oppressed group are encouraged by, emboldened by, the unprecedented visibility and moral recognition that the judges have offered to them. The members of the oppressed group step away from their accustomed acquiescent posture of social silence and openly, publicly, proclaim the reality of their suffering and the injustice of it. This is the step that Rosa Parks took when she refused to give up her seat to a white man on a public bus in Montgomery, Alabama. Parks' uprising by remaining seated was a revolutionary act. And it was not coincidental that this brave act took place in 1955, just one year after the Supreme Court's ruling in *Brown v. Board of Education*.[79] Parks' action precipitated an economic boycott of the public bus system and of white businesses by virtually the entire black population of Montgomery.[80]

This boycott marked the beginning of the modern Civil Rights movement.[81] The Supreme Court's role in precipitating this public "coming out" of an oppressed and previously silenced people was made clear in the first speech that Martin Luther King, Jr. gave in a Montgomery church—the speech that marked the beginning of King's leadership of the Civil Rights movement. King said in that Montgomery church in 1955, "[W]e're going to work with grim and bold determination—to gain justice on the buses in this city. And we are not wrong . . . in what we are doing. If we are wrong—the Supreme Court of this nation is wrong. If we are wrong—God Almighty is wrong!"[82]

This second step—the coming forward, the public coming out of the oppressed group—cannot be commanded by any court, it can only be encouraged. The group must find its own voice; it must take courage from the new recognition given to them. And if this second step does indeed occur, then a third step becomes possible. The third step is that the oppressors—the socially favored

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[79] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[80] TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 132-205 (1988).

[81] *Id.*

[82] *Id.* at 140 (citing Reverend Martin Luther King, Jr., Montgomery Improvement Association Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955), *in* 3 THE PAPERS OF MARTIN LUTHER KING, JR.: Birth of a New Age, *December 1955-December 1956*, at 73 (Clayborne Carson ed., 1997)).

group, the "pure" and "normal" human beings—are led to see the suffering imposed on the disfavored group in a way that potentially inspires a sense of empathy, of fellow-feeling, of acknowledged bonds of humanity.

This third step does not come easily. The oppression of the disfavored group has been so humiliating, so totalizing, precisely because rigid maintenance of the rock-solid status of the status-differentiations has been so powerfully important to the dominant group, to the "pure" human beings, for their own sense of psychological safety and well-being. A total and frontal assault on these status-differentiations is likely to be met with more than stubborn resistance by the dominant group. Even more fatally for the success of the corrective enterprise, the assault will be met with simple incomprehension—as if some outsider from the planet Mars were raising questions about the very nature of reality. But until the dominant oppressors have been led to redefine their relationship to the oppressed group, the genuine experience of equality on the part of both the oppressed and the oppressors will remain beyond reach.

The challenge in this moral process, this social experience of "conscience" and "consciousness" raising, is not simply for some dictator—some nine or five elderly lawyers in Washington, D.C.—to announce the true dictionary meaning of "equality," as that word appears in the dusty historical document of the Constitution. The deeper, truer challenge is for those elderly lawyers, those judges, to translate that dusty word into a living reality. To accomplish this transformation, judges cannot act alone. They lack this truly transformative power, either in practical or in moral terms. For both practical and moral reasons, the judges must actively appeal to others for assistance.

This is the social process that is now under way regarding the status of gays and lesbians in American society. The Supreme Court was slow—too slow—in taking up this moral issue. The opportunity was given to the Court in 1986. But in *Bowers v. Hardwick*,[83] a Court majority blew this opportunity away when they mockingly dismissed the claim of a gay couple against their

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[83] 478 U.S. 186 (1986).

criminal prosecution for sodomy.[84] Indeed, not only on this issue, but for most of its history, the Court has taken the wrong side—the side of the socially conventional, the socially comfortable, the "pure" oppressors against "contaminated outsiders." The moments when the Court has understood and acted on its proper function as the constitutional guarantor of equality under the Thirteenth and Fourteenth Amendments have been all too rare. But *Brown v. Board of Education* was one such shining moment. The Court's 2003 decision in *Lawrence v. Texas*—explicitly overruling *Bowers*—was another shining moment.[85]

Gays and lesbians did not need this judicial decision to find the courage to step forward from their shadowed closets, to demand respect for their basic humanity. The publicly visible civil rights movements for them had already taken flight—emboldened, I believe, by the historic examples of *Brown* and Parks and King and the entire experience of the Black Civil Rights movement.[86] The Supreme Court, one might say, has finally and belatedly joined a parade already in progress. But this federal judicial action, in turn, has prompted a few state court judges to rely on state constitutions for ruling in favor of same-sex coupling.

These judges in different states have come to different conclusions about the claims for state recognition of these marriages. Some, as in Vermont and New Jersey, have said that state recognition of "civil unions" with all the practical benefits of marriage, but without the symbolic approbation of the word itself, is an adequate expression of the "equality" guarantee.[87] One state court, in Massachusetts, has disagreed with this conclusion, ruling that separate but equal is as unjust in marital status as it was in racially segregated public facilities.[88] In Connecticut and New Hampshire, the state legislatures acted on their own, without any compulsion from judges, to endorse civil unions but not "marriage"

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[84] *Bowers*, 478 U.S. at 194-95.

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

[86] *See* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION 49 (2004).

[87] *See* Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006); Baker v. Vermont, 744 A.2d 864, 886 (Vt. 1999).

[88] Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 & n.3 (Mass. 2004).

as such for same-sex couples.[89] Meanwhile, the federal courts are keeping a cautious distance from these developments, and the litigators on behalf of gays and lesbians are understandably and properly keeping an exceedingly cautious distance from filing suit in federal courts.[90]

All of this activity—the now-insistent public visibility of gays and lesbians and the new judicial interventions—have brought us toward the third step, as I have called it. The extension of empathy, of an acknowledgment of shared humanity, by the old social oppressors has not yet clearly or fully occurred. But the once-solid front of oppression is crumbling, and none of us now can avoid responsibility for our actions, either in continuing the old forms of oppression or dismantling them. None of us can any longer say, "It's not my doing. The world is just like this. You can't change human nature." We have recently seen evidence of this process at work in the turmoil introduced into the American Episcopal Church by the election of an openly gay bishop and the recognition of same-sex marital ceremonies by some of its members, which in

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[89] CONN. GEN. STAT. ANN. § 46b-38bb (West 2005); N.H. REV. STAT. ANN. § 457-A:1 (2007). Fully recognized marital status is available for same-sex couples only in Massachusetts, as a result of the Supreme Judicial Court's ruling in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003); same-sex civil unions with all state benefits except recognized marriage, as such, are available in Vermont (VT. STAT. ANN. tit. 15 §§ 1201-1207, tit. 18 §§ 5160-5169 (1999)) and New Jersey (N.J. STAT. ANN. §§ 37:1-31 (West 2006 & Supp. 2007)) in response to judicial rulings, (Baker v. State, 744 A.2d 864, 886 (Vt. 1999); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006)), and in Connecticut and New Hampshire where the legislatures acted on their own initiative, without judicial mandate. By contrast, recognition of same-sex marriage is constitutionally forbidden in twenty-seven states; in thirteen of these, constitutional restrictions were adopted after the Massachusetts ruling in *Goodridge*. *See* National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships*, *available at* http://www.ncsl.org/programs/cyf/samesex.htm (last visited Oct. 14, 2007).

[90] *See* Smelt v. County of Orange, 447 F.3d 673, 686 (9th Cir.), *cert. denied*, 127 S. Ct. 396 (2006) (approving federal court abstention to state courts in constitutional challenge to gender-restrictive state marriage law).

turn is forcing other members to take sides, to acknowledge public responsibility one way or another, in this moral reckoning.[91]

Judges interpreting the United States Constitution have an important role to play in this moral reckoning. Sometimes they have played this role with fidelity to their oaths of office; sometimes they have defaulted. But whatever the judges do or do not do, they should admit and we should all understand that our constitutional guarantees are neither self-defining nor ultimately defined by judges acting alone. This defining enterprise is a public process of moral responsibility shared among all of us—citizens, elected officials, and judges. By this shared public process, "Our constitutional ideal of equal justice under law is thus made a living truth."[92]

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[91] *See* Religious Tolerance.org, The Episcopal Church, USA and Homosexuality, *available at* http://www.religioustolerance.org/hom_epis.htm (last visited Oct. 14, 2007).

[92] Cooper v. Aaron, 358 U.S. 1, 20 (1958).