Marriage and Civil Rights: The Anatomy of a Social Institution from a Constitutional Perspective

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ABSTRACT: The Iowa Supreme Court’s 2009 decision in Varnum v. Brien, declaring eligibility for marriage licenses to be a state-protected constitutional right for same-sex couples, addresses profound issues of law and policy. The Varnum ruling touches on the meaning of marriage as a social institution, the formation of civil rights in a democracy, and the role of the courts in extending civil rights protection. Several new cases, involving same-sex marriage claims brought under the Federal Constitution, are headed towards the United States Supreme Court. This Article analyzes the Varnum decision and explores the questions it raises in the federal context.

The Article criticizes the Iowa Supreme Court for, among other faults, failing to find any suitable secular purpose for limiting marriage status to opposite-sex unions, for rejecting the need for democratic buy-in when determining which personal claims merit public recognition as civil rights, and for regarding the judiciary as qualified to settle the social, scientific and political questions involved in a marriage-definition case. The Article then turns from a critical analysis of the latest state court decision to recognize same-sex marriage to the larger scope of federal constitutional policy, making an affirmative case for why the federal courts should allow tradition and public opinion to continue to dictate the legal definition of marriage as the union of the sexes.

The Article argues that there is no reasonable expectation of public affirmation for same-sex unions, and that marriage’s institutional purpose can be rationally rooted in a secular appreciation of sexual difference, moving beyond the procreation rationale. The unity-building nature of the opposite-sex union uniquely commends its recognition and promotion in furtherance of the state’s “E pluribus Unum” interest. The Article then asserts that given the institutional nature of civil rights, an individual rights claim should not gain civil rights status without democratic approval. In light of the democratically-rooted opposition to same-sex marriage, there is no abstractly conceived civil right of equal protection that guarantees marital status for all comers. The Article next contends that the judiciary is ill-equipped to second-guess the public’s endorsement of traditional marriage. The Article briefly examines the 2010 federal trial court decisions on marriage in light of the foregoing analysis and concludes that the United States Supreme Court should reject a same-sex marriage constitutional claim.
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I. Introduction.

When the Iowa Supreme Court struck down a state law defining marriage as the union of one man and one woman in *Varnum v. Brien*, 1 the debate over defining marriage reached a pivotal point in the United States. For the first time, a judicial ruling mandating that state recognition of a promise to marry be treated as a civil right for same-sex couples was issued by a unanimous panel of last resort, sitting in a jurisdiction located far from either of this country’s coasts, and was handed down in a case that may be the last of its kind, at least for the foreseeable future, to be decided by a state supreme court in favor of same-sex marriage. 2 The marriage definition issue is moving to the federal plane and headed to the United States Supreme Court.

The *Varnum* decision may be lost eventually in the shadows of actions filed in the federal courts the same year it was issued (2009), as complaints in *Perry v. Schwarzenegger,* 3 *Gill v.

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1 763 N.W.2d 862 (Iowa 2009). The plaintiffs, six same-sex couples, filed a civil action against the Polk County (Iowa) Recorder and Registrar for refusing to issue marriage licenses because each of the couples did not include both sexes as required by law, and the Polk County Attorney defended the state’s marriage policy throughout the litigation. *Id.* at 872-73.


Office of Personnel Management, Massachusetts v. United States Department of Health & Human Services, Bishop v. United States, and Dragovich v. United States Department of the Treasury may prompt the United States Supreme Court to weigh in on the same-sex marriage debate. But Varnum should not be forgotten due to the comprehensive range of important issues the Iowa Supreme Court considers in its analysis. Besides the topics usually found in constitutional litigation, such as the appropriate dispersion of powers between the judicial and legislative branches and level of judicial scrutiny, one finds language touching on the meaning of marriage and consequent purpose of laws dealing with the institution, how civil rights are formed, and the judicial power to change deeply rooted social institutions.


6 Plaintiffs’ First Amended Complaint at 8-9, Bishop v. United States (N.D. Ok. filed Aug. 10, 2009) (No. 04-CV-848-TCK-TLW) (alleging that denials of marriage license applications based on state constitutional amendment and federal DOMA violate Fourteenth Amendment guarantees of due process and equal protection).

7 Complaint at 17-20, Dragovich v. United States Dep’t of Treasury (N.D. Cal. filed Apr. 13, 2010) (No. 10-CV-01564) [hereinafter “Dragovich v. USDOT Complaint”] (alleging that federal refusal to recognize marital and spousal status of same-sex couples for purposes of qualifying for tax-sheltered long-term care insurance program violates the Fifth Amendment (as applied to the federal government) and the Fourteenth Amendment (as applied to the state agency responsible for administering the federal program) guarantees of due process and equal protection).

8 No federal issues were raised in the Varnum complaint. Varnum, 763 N.W.2d at 878 n.6.

9 Id. at 874-76.

10 Id. at 885-97.

11 Id. at 883-84 (determining that same-sex couples are similarly situated with opposite-sex couples when considering the marital institution in that both types of couples can involve “committed and loving relationships,” and the decision to raise a family, and society benefits when the law provides both with a “stable framework” for “defining . . . fundamental relational rights and responsibilities”).

12 Leaving the specific references and citations to the Varnum opinion to later portions of this Article, the civil rights understanding of the Iowa Supreme Court can be summarized as follows: The Iowa Constitution mandates equal access to social institutions when access affects the legal status of individuals, making entry into the social institution of marriage and consequent civil recognition of membership a civil right. This civil right to equal access guarantees the extraordinary help of judges to individuals barred by public officials from entering the desired social institution if the complainants have suffered social and legal discrimination in the past and regardless of their current
This article takes issue with the Iowa Supreme Court’s conclusion that marriage must be redefined to allow same-sex couples to apply for marriage licenses.\textsuperscript{14} The \textit{Varnum} opinion makes remarkable assertions about the supposedly expansive original purpose of marriage licensing laws, the supposed equivalence between laws that indirectly affect and those that target particular groups, the supposed need for extraordinary judicial protection for gays and lesbians, and the supposed power of just one individual, acting in concert with the judiciary, to redefine what is right and just and thereby change longstanding social institutions.\textsuperscript{15}

With the prospect looming that the United States Supreme Court ultimately may agree to hear a marriage definition case, the article offers not only a critique of the \textit{Varnum} approach but also presents several reasons in favor of permitting the federal and state governments to continue adhering to the status quo understanding of the marital institution. Specifically, the article will argue that 1) the prevailing social consensus that defines marriage as the union of one man and one woman rationally relies on uniquely integrative aspects of the opposite-sex relationship,\textsuperscript{16} 2) in a democracy the people play an essential role when it comes to creating and shaping civil rights,\textsuperscript{17} and 3) the judiciary is ill-equipped to change the social institution of marriage.\textsuperscript{18}

\textsuperscript{13} 763 N.W.2d at 878, 904 (acknowledging that the legislative definition of marriage is based “on a fundamental, deep-seated traditional institution,” and the changing of which to include same-sex couples is rejected by “much of society”).
\textsuperscript{14} \textit{Id.} at 906.
\textsuperscript{15} See infra Section II.
\textsuperscript{16} See infra Section III.A.
\textsuperscript{17} See infra Section III.B.
\textsuperscript{18} See infra Section III.C.
The article argues that opposite-sex relationships enjoy a reasonable expectation of public affirmation not shared by same-sex relationships.\(^{19}\) In making its case for retaining the traditional definition of marriage against federal challenge, the article proposes a justification for the opposite-sex requirement that differs in a key respect from the procreation-focused justifications offered by the State of Iowa in *Varnum*\(^{20}\) and, for that matter, other proponents of traditional marriage.\(^{21}\) Iowa officials argued that the procreative potential of opposite-sex coupling sufficed as the qualifying basis for marital eligibility and provided a constitutionally suitable rationale for barring same-sex couples from applying for marriage licenses.\(^{22}\) The article focuses instead on sexual difference considered in its entirety as the source of the core meaning of traditional marriage. It is not just that (most) opposite-sex couples can and will have babies that explains the secular contours of traditional marriage.\(^{23}\) The key is rather that all couples consisting of both a man and a woman offer, through the reality of sexual difference, a

\([^19\) See *infra* Section III.A.1.\(^{20}\) See *infra* note 135 and accompanying text.\(^{21}\) See e.g., DEFENSE OF MARRIAGE ACT, H.R. REP. NO. 104-664, at 13 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2917 (“At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.”); Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L. Q. 653, 655 (2004) (summing up his argument by concluding that “As it is proposed to be remade, the redefining of marriage is subversive of the state objective in sustaining the national population by responsible procreation”); Testimony of Peter Sprigg, Vice President for Policy, Family Research Council, before the Judiciary Committee of the Maryland House of Delegates (Feb. 28, 2008), available at http://www.frc.org/get.cfm?i=TS08B03 (last visited Aug. 13, 2010) (“Marriage arose as a fundamental social institution for two reasons. The first is because society needs to reproduce itself, and such reproduction takes place almost entirely through the sexual union of a man and a woman; and the second is because children need the mother and father who produce them to cooperate in raising them.”).\(^{22}\) 763 N.W.2d at 901-02\(^{23}\) In response to those who “point[] out that some heterosexuals don’t have children, yet society doesn’t prevent them from marrying” one author asserts that “[t]his is a bad argument that misunderstands the nature of social rules. Consider this: you have to be 16 years old to drive and 18 years to vote. The reason for the rule is that driving and voting require a certain level of maturity. True, some adults don’t have such maturity, yet we don’t exclude them. True, some minors could probably drive and vote effectively, but we don’t let them. The point is that rules are general propositions based on a presumed connection between the established criteria and the behavior that is desired, even though the result is not always be favorable. And so it is with marriage.” Dinesh D’Souza, “Redefining Marriage?” (Aug. 7, 2003), available at http://www.tothesource.org/8_7_2003/8_7_2003.htm (last visited Aug. 13, 2010). The argument to be made in this article posits that the institution of marriage is based on more than just a “presumed connection between established criteria and . . . [desired] behavior” in that every opposite-sex coupling requires representatives of the two most fundamental sectors of society to interact.
fundamental and unique social diversity that society and the law should celebrate. Adopting the
traditional definition of marriage furthers the governmental interest in bridging differences
generally, described herein as the state’s E pluribus Unum interest.\textsuperscript{24}

Another basic issue is whether there is a general, “equal-access” civil mandate that
requires the courts to view with suspicion even deeply-rooted and democratically-endorsed limits
on access to marital status. Are such limits “suspect” forms of discrimination because they
impinge upon some hypothetically conceived, unlimited civil right to marry? The article asserts
that the constitutional guarantee of equal protection as interpreted by the United States Supreme
Court calls for judicial deference towards any well-established limits on access, and counsels
heightened scrutiny only if the challenged limits conflict with tradition or democratically-
approved civil mandates. Accordingly, the federal courts should presume that limits grounded in
tradition and democracy are rational because of their popular support, and the judges must refer
to such limits, instead of a theoretical model of unlimited access, when determining the extent of
the right to marry for equal protection purposes. Civil rights are created and shaped by
democracy, which also determines the specific application of general guarantees such as equal
protection. Reshaping rights without democratic warrant will expose citizens to unfair threat of
punishment and other disadvantages. For this reason, the people should be allowed to vote on
whether to recognize personal claims as civil rights and, in particular, whether to redefine the
civil right of marriage.\textsuperscript{25}

Yet another important concern is the capacity of the judiciary to resolve the debate over
marriage’s definition. The article asserts that in the face of widespread democratic support for

\textsuperscript{24} See infra Section III.A.2.
\textsuperscript{25} See infra Sections III.B.2., -3.
traditional marriage policy, the courts lack adequate grounds for determining that the traditional
definition of marriage is irrational or unjust and should therefore exercise judicial humility. The
judicial precedents in the areas of racial discrimination and segregation, by upholding and not
overturning democratically instituted mandates, comport with this view of the judiciary’s limited
role.

Rulings in 2010 by federal district courts in Massachusetts and California declared that a
governmental refusal to recognize same-sex relationships as eligible for marital status violates
the Fifth and Fourteenth Amendments to the United States Constitution. The article reviews
these decisions briefly in light of the foregoing analysis, and argues that the approach taken by
these courts suffers from defects similar to those identified by the article in the Varnum
opinion.

The article concludes that the United States Supreme Court should decide, if and when it
is asked to rule on a same-sex marriage constitutional claim, that 1) the government may rely on
the uniquely unitive social significance of bridging sexual differences as a basis for establishing
a dividing line when defining marriage for civil and legal purposes, and 2) the courts lack the

26 See infra Section III.C.
that denial of federal marital benefits pursuant to the federal DOMA to same-sex couples obtaining marriage
licenses in Massachusetts violates Fifth Amendment guarantees of due process and equal protection); Massachusetts
(finding that federal DOMA requires Massachusetts to “violate” the Fourteenth Amendment guarantee of equal
protection by conditioning its acceptance of federal funding on its promise to administer federal marital benefits in a
manner that denies access to same-sex couples obtaining marriage licenses in Massachusetts); Perry v.
Schwarzenegger, No. C 09-2292 VRW, slip op. at 117, 135 (N.D. Cal. Aug. 4, 2010) (finding that Proposition 8
violates the Fourteenth Amendment’s guarantees of due process and equal protection).
28 See infra Section IV.
institutional capacity and necessary democratic warrant to declare same-sex marriage to be a
civil right.²⁹

II. Reading Varnum v. Brien.

The unanimous decision by the Iowa Supreme Court in Varnum v. Brien,³⁰ authored by Justice Mark S. Cady, is tightly written. The tone is confident and direct as the court dispatches important factual and legal questions with commanding conclusions that deftly maneuver between competing arguments and data with judicial aplomb. With a poetically nautical touch, the Supreme Court of the landlocked State of Iowa describes itself as skimming “at the forefront in recognizing individuals’ civil rights . . . navigat[ing] with the compass of equality firmly in hand, constructed with a pointer balanced carefully on the pivot of equal protection.”³¹ What excels as poetry, however, fails as constitutional law, in this author’s opinion. The following read-through, while not exhaustive, highlights the most troubling aspects of the Varnum opinion, using the opinion’s own headings as a roadmap.

A. Background Facts & Proceedings.

The Iowa Supreme Court characterizes the lawsuit before it as a “civil rights action” involving plaintiffs, the court explains, who differ from most other Iowans by virtue of the object of their sexual and romantic attraction.³² The judicial conjunction between rights and personal desire is important. From the start of its analysis, the Iowa Supreme Court ties the civil right of marriage to personal preference, a factor disassociated from institutional history and tradition.³³ This opens the door for validating other novel claims of right of access based on the variety and

²⁹ See infra Section V.
³⁰ 763 N.W.2d 862 (Iowa 2009).
³¹ Id. at 877 n.4.
³² Id. at 872.
³³ As the court observed later in its opinion, “the specific right sought in this case has largely lacked any extensive political support and has actually experienced an affirmative backlash.” Id. at 895
forms of relationships that a static, tradition-bound definition of legal marriage might be deemed to thwart.\textsuperscript{34}

The Iowa Supreme Court notes that the plaintiffs seek the government’s marriage-based benefits, protections and what the opinion describes as the “ultimate” marital advantage, the state’s public affirmation.\textsuperscript{35} When denied marriage licenses, the plaintiffs “turned to the courts” as others have done “when faced with the enforcement of a law that prohibits them from engaging in an activity or achieving a status enjoyed by other Iowans.”\textsuperscript{36} The Iowa Supreme Court ponders no further any distinction between a prohibition and a refusal to affirm. No law forbids or otherwise treats as an infraction a same-sex couple’s decision to wed. Instead, Iowa marriage policy declined to bestow a public status with accompanying legal benefits on private same-sex relationships. Does this make and should it make a constitutional difference? Is a governmental failure to extend legal marital status and benefits similar in constitutional terms to

\textsuperscript{34} See Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships (2006) [hereinafter “Beyond Same-Sex Marriage”] (advocating for extending legal, marital-type public recognition to other relationships including senior citizens living together, adult children living with parents, grandparents and grandchildren, threesomes and other multiple arrangements, single parent households, extended families, siblings, and caregivers and those receiving care), available at http://www.beyondmarriage.org/full_statement.html (last visited Aug. 13, 2010). Additionally, domestic relationships, whether sexual or non-sexual in nature, present only a subset of a universe of possible associations that under the Iowa Supreme Court’s analysis might be deemed similarly situated and thereby detrimentally affected by a law that affirms only one relationship, or some but not all relationships, as marriage. See John Hiski Ridge, A Philosophical Analysis of the Fundamental Law of Marriage in American Jurisprudence at 7-9 (2004) (unpublished dissertation on file with author) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (HarperPerennial Ed. 1988) to the effect that “‘Americans of all ages, all stations in life, and all types of dispositions are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute,’” and observing that these associations “provide a sense of personal meaning and personal value,” “a sense of belonging, and in many cases, a position of legal standing,” and like marriage “unite individuals together,” “bind them to the communities in which they live” and “benefit both the individual and society”).

\textsuperscript{35} 763 N.W.2d at 872-73.

\textsuperscript{36} Id. at 872.
a governmental refusal to affirmatively fund abortions, for example?\textsuperscript{37} The Iowa Supreme Court leaves these questions unexplored.

The Iowa Supreme Court expresses in this section its high regard for evidence submitted by plaintiffs that, in the court’s opinion, “has repudiated the commonly assumed notion that children need opposite-sex parents or biological parents to grow into well-adjusted adults.”\textsuperscript{38} The court made it a point to characterize dismissively the Polk County Attorney’s countering evidence as being “in the form of opinions by various individuals” including “two college professors” and a “retired pediatrician.”\textsuperscript{39} The unstated but implied question the court seems to intend for the reader must be this: How could such testimony against same-sex parenting possibly outweigh the statements of “leading” professional organizations “who have studied the issue” and have “indicat[ed that] children are not harmed when raised by same-sex couples, but to the contrary, benefit from them”?\textsuperscript{40} The court asserts that, according to the plaintiffs’ evidence, “sexual orientation and gender have no effect on children” and that therefore “same-sex couples can raise children as well as opposite-sex couples.”\textsuperscript{41}

Is the judiciary the proper venue within which to so conclusively choose favorites in a hotly contested social and scientific debate on the comparisons between opposite-sex and same-sex parenting?\textsuperscript{42} Does the Iowa Supreme Court’s confidence exceed its competence? The court

\textsuperscript{37} See, e.g., Maher v. Roe, 432 U.S. 464, 475-77 (1977) (recognizing a constitutional distinction for equal protection purposes between the governmental prohibition and punishment of an activity such as abortion or private schooling and the government’s failure to encourage that activity through government subsidies and other forms of support to the same degree as provided to alternatives such as childbirth or public schooling).

\textsuperscript{38} 763 N.W.2d at 873-74.

\textsuperscript{39} \textit{Id.} at 873.

\textsuperscript{40} \textit{Id.} at 874.

\textsuperscript{41} \textit{Id.} at 873-74.

\textsuperscript{42} See, e.g., Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, (Mass. 2003) (Sosman, J., dissenting) (“Conspicuously absent from the court’s opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far produced inconclusive and conflicting results.”).
fails to offer any detailed, substantive explanation of exactly how the evidence submitted in support of same-sex parenting so clearly trumped the competing evidence.

B. Constitutional Separation of Powers.

The Iowa Supreme Court offers in this section a primer on constitutional theory that betrays confusion about the role of the judiciary. The court refers to the need to recall the responsibilities of each of the branches of government “when individuals seek recognition of rights”. Then the court professes its role to be one of “interpret[ing] the law and resolv[ing] disputes.” A few paragraphs later, the court touts the judiciary as “better suited to protect individual rights” but then quotes a delegate’s remarks during a debate of the Iowa Constitutional Convention to the effect that the courts are the place “we go . . . to have our dearest rights decided”. Two different and competing characterizations of the judicial duty emerge from these references. Are the courts a source of new civil rights that may go unrecognized until brought into existence by judicial decree or are the courts neutral arbitrators charged only with enforcing and protecting already existing rights created through other, non-judicial means? Before describing how in the following section of its opinion the court resolves the confusion, this article notes other themes introduced by the court at this stage of its opinion.

The Iowa Supreme Court characterizes the existing statutory definition of marriage as a law that “excludes gay and lesbian people from the institution of civil marriage.” This is an important reference to marriage as an institution. What is the meaning and significance of

43 Id. at 874.
44 Id. at 875.
45 Id.
46 Id. at 876.
47 Id. at 875. As discussed infra, see notes 91-95 and accompanying text, describing the definition of marriage as excluding gays and lesbians is misleading. Excluded are couples consisting of two men or two women irrespective of their sexual orientation.
possessing the character of being an institution? Though the court does not contemplate this question, it is one that needs to be addressed in any constitutional analysis of civil rights.

The question of civil rights vis a vis the impact on social institutions is a critical one given the consequence of constitutionalizing a particular personal claim. As noted by the Iowa Supreme Court, establishing constitutional rights is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials” by putting them into the hands of the courts. Absent the input of those same majorities and officials on whether to construct a particular constitutional right in the first place, that is, to willingly impose constitutional duties on themselves and future generations through the promulgation of specific constitutional provisions, is it fair for the judiciary to bypass the consent of the governed altogether?

The Varnum opinion evidences the belief among members of the Iowa Supreme Court that it is indeed fair to rule without reference to some pre-existing majoritarian consensus, when the opinion asserts that it is the judiciary’s “responsibility” to vindicate personal civil rights.

48 Id. at 875 (quoting West Virginia State Bd of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). It is ironic that the Iowa Supreme Court would quote from the Barnette opinion. In Barnette, the United States Supreme Court struck down a law requiring students to participate in a daily ceremony involving a salute and the recitation of a pledge of allegiance to the American flag partly on the ground that such requirement constituted an “involuntary affirmation.” 319 U.S. at 633. Is not this also an issue in the same-sex marriage context, where individuals seek to impose through the courts the obligation on government, and by virtue of the government’s role as agent to the sovereign people, on the people themselves the obligation to affirm same-sex relationships? Moreover, within the same paragraph containing the language quoted by the Iowa Supreme Court, the Barnette opinion stated that “it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.” 319 U.S. at 638. The Iowa Supreme Court fails to account for the same vagueness in the equal protection clause in the same Fourteenth Amendment as well as in the Iowa Constitution. See 763 N.W.2d at 875 (prefacing the Barnette language about withdrawing constitutional questions from the vicissitudes of political controversy with a reference to “the very purpose of limiting the power of elected branches of government by constitutional provisions like the Equal Protection Clause”). This begins to touch on problems created by using a general constitutional guarantee of equal protection to squelch political debate on a specific but textually unmentioned topic such as same-sex marriage.
claims “even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.” \(^{49}\) At this stage the Iowa court quotes from \textit{Lawrence v. Texas} \(^{50}\) to the effect that previous generations can be blinded to truths that later generations will uphold, and that laws once deemed necessary may then be rejected by future generations after their oppressive nature is laid bare. \(^{51}\) But in a democracy how does this generational shift in understanding manifest itself and thereby acquire normative constitutional force? Should the courts wait for changes in generational perspectives to arise through the democratic process? Or do judges serve as generational oracles that are empowered to impose changes for which they believe the time has come? \(^{52}\) In the next section of its \textit{Varnum} opinion, the Iowa Supreme Court adopts the oracular model of constitutional change.

\textbf{C. Equal Protection: Background Principles.}

The Iowa Supreme Court moves from general constitutional considerations to a discussion of the specific constitutional guarantee of equal protection by first asserting that “our nation has struggled to achieve a broad national consensus on equal protection of the laws when it has been forced to apply that principle to some of the institutions, traditions, and norms woven into the fabric of our society.” \(^{53}\) The court’s reference to “institutions, traditions, and norms woven into the fabric of our society” highlights an important characteristic of marriage—its

\footnotesize{\textsuperscript{49} 763 N.W.2d at 876. \\
\textsuperscript{50} 539 U.S. 558 (2003) (invalidating a Texas law penalizing sexual conduct between persons of the same sex). \\
\textsuperscript{51} 763 N.W.2d at 876 (quoting from \textit{Lawrence}, 539 U.S. at 578-79). \\
\textsuperscript{52} See 539 U.S. at 603-04 (Scalia, J., dissenting) (“What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change. It is indeed true that ‘later generations can see that laws once thought necessary and proper in fact serve only to oppress,’ ante, [539 U.S.] at 579; and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.”). \\
\textsuperscript{53} 763 N.W.2d at 877.}
predominate definition as the union between the sexes is a product of the thinking and acceptance of an extensive collection of persons and groups that stretches back into time and extends across a broad variety of cultures.  

Against this collective opinion and its socially reinforced standard of acceptable classification, the Iowa Supreme Court posits the remarkable power of even just one individual to substitute a new equal protection standard that rejects the old. According to the court, “A classification persists until a new understanding of equal protection is achieved. The point in time when the standard of equal protection finally takes a new form is a product of the conviction of one, or many, individuals that a particular grouping results in inequality”. In the court’s view, the guarantee of equal protection “looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure.” This supposed constitutional feature, the court argues, empowers the judiciary to impose changes on even “deep-seated” legal and social policy based on singular reconceptualizations of what equality demands.

Of course any equal protection case brought to the courts must involve at least one individual who complains of discrimination. Under the Iowa Supreme Court’s equal protection

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54 See, e.g., EDWARD WESTERMARCK, A SHORT HISTORY OF MARRIAGE 2-3 (1930) (“As for the origin of the institution of marriage, I think that it has most probably developed out of a primeval habit. We have reason to believe that, even in primitive times, it was the habit for a man and a woman (or several woman) to live together, to have sexual relations with one another, and to rear their offspring in common... The habit was sanctioned by custom, and afterwards by law, and was thus transformed into a social institution.”); G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS 2 (1988) (“Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.”); JOHN Q. WILSON, THE MORAL SENSE 158 (1997) (“And in virtually every society, the family is defined by marriage; that is, by a publicly announced contract that makes legitimate the sexual union of a man and a woman.”).

55 763 N.W.2d at 877.


57 Id. at 878.

58 Id. at 877-78.
jurisprudence, the mere filing of a complaint by a single plaintiff could alone provide the
evidence needed to demonstrate that an existing understanding of what equal protection requires
has shifted. This approach puts tremendous power into the hands of judges.\textsuperscript{59}

D. Legal Tests to Gauge Equal Protection.

In this section, the Iowa Supreme Court describes the various tests and levels of scrutiny
typically employed by the courts to weigh the competing state and individual interests at issue in
constitutional challenges.\textsuperscript{60} In noting that federal precedents are instructive but not
determinative when interpreting Iowa’s state constitutional provisions, the court errs when it
writes that “[t]he United States Supreme Court has not resolved the broad question of whether an
absolute ban of marriages between persons of the same sex violates the Federal Equal Protection
Clause . . . . Nor has the [United States Supreme] Court resolved many of the narrower legal
questions presented by this lawsuit.”\textsuperscript{61}

In fact, in 1972 the United States Supreme Court summarily dismissed\textsuperscript{62} an appeal from a
decision of the Minnesota Supreme Court\textsuperscript{63} upholding Minnesota’s refusal to issue a marriage
license to a same-sex couple.\textsuperscript{64} The Minnesota court rejected claims of federal constitutional
violations brought under the First, Eighth, and Ninth Amendments\textsuperscript{65} as well as the due process
and equal protection clauses of the Fourteenth Amendment.\textsuperscript{66} These federal claims were raised

\textsuperscript{59} Contrast this exceeding regard for an individual’s novel opinion as a potential and prevailing counterbalance to
the collective opinion evidenced in pre-existing social institutions with the Iowa Supreme Court’s apparent disregard
for the individual opinions of witnesses when compared with the collective opinion of professional organizations.
See supra notes 39-40 and accompanying text.
\textsuperscript{60} Id. at 878-880.
\textsuperscript{61} Id. at 878 n.6.
\textsuperscript{63} Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).
\textsuperscript{64} 191 N.W.2d at 187.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 186-87.
on appeal\textsuperscript{67} and the summary dismissal by the United States Supreme Court remains as precedent that binds the lower courts.\textsuperscript{68}

The Iowa Supreme Court explains that heightened judicial scrutiny of state actions interfering with asserted personal claims pertains “when reasons exist to suspect ‘prejudice . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.’”\textsuperscript{69} In one of the oddities of constitutional jurisprudence, heightened judicial scrutiny that is intended to ferret out prejudice itself assumes a prejudicial stance. The requisite analysis requires the courts to prejudge the motives of lawmakers by subjecting their handiwork to a presumption of invalidity that the state and its defenders must rebut.\textsuperscript{70}

\textbf{E. Determination of Constitutional Facts.}

The Iowa Supreme Court decides in this section to review all of the record evidence and thereby overturn a ruling by the trial court to exclude some of the testimony submitted by the government.\textsuperscript{71} The court discusses the difference between “adjudicative” and “legislative” or “constitutional” facts, and in so doing expounds the view that the judiciary is empowered to “craft[] rules of law based on social, economic, political, or scientific facts” that are not “predicated solely on a finding of facts relating to the parties and their particular circumstances”


\textsuperscript{68} Mandel v. Bradley, 432 U.S. 173, 176 (1977). \textit{See also} Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 870-71 (8th Cir. 2006) (citing Baker v. Nelson in concluding that state law defining marriage as union of man and woman does not violate federal constitutional guarantees); Hernandez v. Robles, 855 N.E.2d 1, 16 n.4 (N.Y. 2006) (same). The Supreme Court is at liberty to reassess and reverse its own precedents, and the chances that the Supreme Court will revisit the questions involved are increased, given the initial lack of argument by the Supreme Court in its \textit{Baker} ruling, the subsequent changes in make-up of the Supreme Court, the eventual judicial or legislative authorization of issuing marriage licenses to same-sex couples in Massachusetts and other states, and the denial of federal marital benefits to individuals granted the legal status of marriage in those states.

\textsuperscript{69} 763 N.W.2d at 880 (citation omitted).

\textsuperscript{70} \textit{Id.} (explaining that classifications subject to strict scrutiny are “presumptively invalid”).

\textsuperscript{71} \textit{Id.} at 880-81.
subject to the rigorous trial rules of evidence. In other words, by dispensing with “formal rules of evidence” the court is free to act more as a legislature in “adapting law to a volatile social-political environment.” Yet the device of going beyond the record of expert and other testimony submitted at trial, rather than providing the judiciary with the means illegitimately to remake the law by “adapting” it to conform to judicial tastes, serves instead, for example, as a legitimate means for determining whether a rational basis for the law in question exists independently from what the parties may decide to offer in evidence.

F. Similarly Situated People.

The Iowa Supreme Court rejects the Polk County Attorney’s threshold equal protection argument that the inability to naturally procreate differentiates the class of same-sex couples from the class of opposite-sex couples and thus the former class is not similarly situated with the latter class. The court asserts that the purpose of Iowa’s marriage laws must be the measure by which the initial question of whether the two classes are similarly situated is resolved. Selectively quoting from earlier rulings, including an Iowa decision limiting the scope of who can enjoy marital rights, the Varnum court pieces together an open-ended description of the official purposes it deems must apply at this stage of the analysis. According to the court, Iowa’s marriage laws are intended to a) define the rights and responsibilities of persons and b) recognize

72 Id. at 881.
73 Id.
74 See Heller v. Doe, 509 U.S. 312, 320 (1993) (noting that because a state “has no obligation to produce evidence to sustain the rationality of a statutory classification,” the search for a rational basis “is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data”).
75 Id. at 882-83.
76 Id. at 883.
77 The Varnum court refers repeatedly (id. at 883, 884) to a selective quote (“providing an institutional basis for defining the fundamental rights and responsibilities”) from the opinion in Laws v. Griep, 332 N.W.2d 339, 341 (Iowa 1983), which refused to extend the marital right of spousal consortium to unmarried plaintiffs (332 N.W.2d at 341), even though the plaintiffs maintained a “stable and significant relationship” and were raising children. Id. at 340. As a result, the Varnum court changes a previously exclusionary understanding of the Iowa marriage regime into a potentially all-encompassing one.
the commitment of persons by giving their relationships legal status.\footnote{763 N.W.2d at 883-84.} Under this expansive construction, the court finds that the two classes of opposite and same-sex couples are similarly situated.\footnote{Id. at 884.} Both classes consist of persons in committed relationships, and the relationships, as personal commitments, are equally capable of being granted an institutionalized status with associated legal rights and responsibilities.\footnote{Id. at 883-84.} This analysis is striking in its abstractness and disregard for context. It posits the existence of some theoretical, unlimited status open to all would-be applicants, and ignores the actual, historically shaped contours of public affirmation.

To assert that the purpose of marriage licensing is to recognize and institutionalize personal commitments, thus rendering all personal commitments similarly situated for “equal access” purposes is as meaningless as declaring that the reason for issuing hunting licenses is to recognize and institutionalize personal decisions to track down and kill so as to render all decisions to hunt as also similarly situated. Describing hunting licenses in such abstract terms eliminates as unnecessary any circumstantial reference to what is being hunted and thus allows for the analytical conclusion that all who seek to hunt should be treated as similarly situated regardless of whether the hunter’s intended targets are wild animals or other people. To avoid such absurdity, the purpose of establishing a system of issuing hunting licenses must be conceived in terms that reference actual history and current practice. The same regard for historical and present-day context should apply when determining the purposes of marriage licensing and associated laws. The context surrounding marriage licenses portrays a limiting rather than expansive objective.

\footnote{763 N.W.2d at 883-84.} \footnote{Id. at 884.}
A full historical examination is beyond this Article’s scope but suffice it to say that marriage licensing laws emerged for reasons other than to begin installing some supposedly expansive governmental scheme for creating new public institutions out of a myriad of possible personal commitments. Rather, the purposes of making private agreements subject to the strictures of a “public institution” had more to do with discouraging “secret” marriages and giving public authorities the power to prevent the recognition of marriages in circumstances deemed to be undesirable.81 Further, a singularly natural, and private, social pattern pre-existed

81 In the West, according to John Witte, the social institution of marriage first acquired the status of a “public institution” in the sixteenth century through the canonical reforms of Martin Luther and the subsequent enactments by civil authorities incorporating those reforms into civil law. JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 58 (1997). The religious and civil reforms, starting in Germany, established parental consent, witnesses and church registration and solemnization as requirements of entering marriage in order to “deliberately discourage[] the secret marriages that the canon law had recognized (though not encouraged).” Id. See also id. at 59-61 (describing civil law changes). The Roman Catholic Church followed suit by reforming its canon law at the Council of Trent, issuing a decree in 1563 that instituted the practices of mandating parental consent for minors, having parish priests announce banns in local churches on three successive feast days to inform parishioners of an intended marriage, requiring weddings “to be contracted in the church” before a priest and at least two other witnesses, and obligating pastors to record marriages in and update the parish public registry in order to “curb the ‘evil’ of clandestine marriages.” Id. at 38, 61. In 1545, John Calvin and others in Geneva drafted a marriage ordinance that introduced for the first time the requirement that betrothed couples had to register not only with church authorities but also with the local civil magistrate, who then furnished the couples with a signed marriage certificate to be presented to the minister before the magistrate and minister published the banns. Neither the announced betrothal nor the civil certificate of marriage constituted the marriage, as the wedding had to take place within three to six weeks after the couple was betrothed. Id. at 84-85. Thus the innovations of “the mandatory publication of banns by both magistrates and ministers” and “the dual requirements of state registration and church consecration to constitute marriage” that were introduced “came to have a formidable influence on the Western legal tradition.” Id. at 91. “The consent of the broader state and church community” thus began to play a greater role, and “[s]uch widespread notice was an open invitation for fellow parishioners and citizens alike to approve of the match or to voice their objections.” Id. at 84. Officials were given “wide discretion” in determining whether the marriage should take place or be denied, based on such objections as the alleged incompetency of either party due to such factors as being perceived as having a “wild spirit,” or the alleged incompatibility of the couple “because of differences in age, religion, social rank, or economic status.” Id. The New England Puritans were among those inspired by these Calvinist reforms. Id. at 126. In 1604, English law was changed to alter the Calvinist mechanism of requiring all couples to obtain a civil registration and the other public requirements of publishing banns and announcing the vows in church. Couples could avoid the requirement of public banns and consecration by securing a marriage license from the local ecclesiastical official, the chancellor. Id. at 161 & n. 132. This issuance of a marriage license was initially conceived as a narrow exception to the rules, to be granted only where some necessity, such as “imminent travel or military service, demanded an abbreviated engagement.” Id. at 161. Over time, the process devolved from a strictly limited exception into an out-of-control practice involving the proliferation of licensing officials, eroded requirements, and increase in false licenses, such that it “came to be treated as an attractive alternative method of marrying without the involvement of church, family or community.” Id. The resulting “problem of secret and premature marriages,” creating public dangers of exploitation of young persons, the social costs of “inaptly formed marriages that would be impossible to dissolve,” and “parents’ loss of control over their children and properties” prompted Parliament in 1753 to reinstitute the original narrow limits of the marriage license exception as well as again mandating formal banns, church
the creation of marriage’s public, civil status.\textsuperscript{82} In the United States, “[t]he requirement of a license as a prerequisite to marriage did not gain wide acceptance until the mid-1800’s, after meeting with some open resistance. . . . Parents, then as now, were upset over clandestine or runaway marriages, especially of their daughters and sought to introduce measures to prevent them.”\textsuperscript{83}

In short, the practice of civil marriage licensing arose to limit the discretion of individuals by requiring couples to document their private expression of commitment to enter into marriage as well as their eligibility to marry and not for the purpose of initiating a social experiment designed eventually to expand marital status to any and all private agreements. The judiciary would stand on firmer ground if, when determining the purposes of giving civil status to marriage, it recognizes marriage’s actual historical association with the union of man and woman and acknowledges the concern expressed in the historical record about allowing marital

\textsuperscript{82} The primitive and mediaeval marriage whose development has thus been traced to the thirteenth century was not ‘civil’ marriage in the strict sense of the word; that is, a marriage contracted under sanction of the civil authority, as opposed to one solemnized by authority of the church and according to ecclesiastical forms. It was a civil marriage only as being a lay marriage. There is no trace of any such thing as public license or registration; no authoritative intervention of priest or other public functionary.” \textit{George Elliot Howard, I A History of Matrimonial Institutions} 285 (1904). See also \textit{Witte, supra} note 81, at 31, 32 (noting that under Roman Catholic canon law, which between the thirteenth to the sixteenth centuries was “the supreme law of marriage in much of the West,” marriages could be entered without formality or approval, in that “[n]o authorities (whether parental, feudal, political or ecclesiastical) were required to approve or to preside at the marriage”); Meister v. Moore, 96 U.S. 76, 79 (1877) (holding that private agreements to marry constituted valid “common law” marriages even if they did not conform to statutes requiring licensing, solemnization or other forms of publicity, and observing that “Whatever directions [statutes] may give respecting [marriage’s] formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes unless [the statutes] contain express words of nullity”). See generally Joseph A. Pull, \textit{Questioning the Fundamental Right to Marry}, 90 MARQ. L. REV. 21, 68-72 (2006) (providing concise summary of the rise of marriage’s civil regulation).

\textsuperscript{83} Thomas P. Monahan, \textit{State Legislation and Control of Marriage}, 2 J. FAM. L. 30, 32 (1962). See also \textit{A Marriage License Law: Opinions of Judges and Clergymen Upon Its Necessity}, N.Y. TIMES, Mar. 10, 1886, at 2 (reporting on a meeting of the New York Bar Association wherein a proposal by a bar association subcommittee was approved to recommend legislation creating a marriage licensure system, and wherein it was recognized that “The mere purpose of a marriage license law should . . . be to prevent hasty marriages of minors without the knowledge of their parents, and to interpose a bar to ‘the fraudulent establishment of marriages claimed to have been entered into without publicity or any ceremonial observance.’”); Pull, \textit{Questioning the Fundamental Right to Marry, supra} note 82, at 69, 72 (noting evidentiary concerns of both church and state about clandestine marriages).
agreements, with all of their sociological and generational consequences, to be created without public documentation.

History and practice also provide grounds for second-guessing the view, posited by the Polk County Attorney in *Varnum*, that the two classes in question are not similarly situated by virtue of the incapacity of same-sex couples to procreate naturally. Nature and experience substantiate that an opposite sex couple past a certain age cannot naturally procreate. Yet the only age restrictions that currently exist in marriage licensing laws establish minimum and not maximum age limits. Thus, due to their advanced age some married opposite-sex couples are

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84 763 N.W.2d at 882.

85 See, e.g., Tom Kelly, *HRT Could Have Triggered Pregnancy in World’s Oldest Mom*, Mail Online, Sept. 8, 2007, available at http://www.dailymail.co.uk/news/article-480591/HRT-triggered-pregnancy-worlds-oldest-mum.html# (last visited Aug. 13, 2010) (reporting on British woman, Dawn Brooke, who gave birth at 59 in 1997 while not taking fertility treatment, but whose pregnancy, occurring “well beyond the average for the menopause of 51,” experts believe may be attributed to the fact that she was undergoing hormonal therapy at the time she conceived); RICHARD E. JONES & KRISTIN H. LOPEZ, HUMAN REPRODUCTIVE BIOLOGY 176, 182 (3rd ed. 2006) (indicating that average age of menopause in the United States is 52, with a normal range of 45-55, while women even in their sixties have been able to become pregnant using donated eggs).

86 The day after this sentence was first written, a story in the New York Times reported on a recent court hearing involving an exchange raising the same issue. The exchange took place between the trial judge and an attorney defending against a federal constitutional challenge of Proposition 8, the California ballot question adding language to the California Constitution to define marriage as the union of one man and one woman. Adam Liptak, *In Battle Over Gay Marriage, Timing May Be Key*, N.Y. TIMES, Oct. 27, 2009, at A14:

In the courtroom, Mr. Cooper’s arguments seemed to fall of their own weight. The government should be allowed to favor opposite-sex marriages, Mr. Cooper said, in order “to channel naturally procreative sexual activity between men and women into stable, enduring unions.”

Judge Walker appeared puzzled. “The last marriage that I performed,” the judge said, “involved a groom who was 95, and the bride was 83. I did not demand that they prove that they intended to engage in procreative activity. Now, was I missing something?”

Mr. Cooper said no.

“And I might say it was a very happy relationship,” Judge Walker said.

“I rejoice to hear that,” Mr. Cooper responded, returning to his theme that only procreation matters.

Later in the argument, Mr. Olson added his own observation. “My mother was married three years ago,” he said. “And she, at the time, was 87 and married someone who was the same age.”

87 Legal Information Institute, Marriage Laws of the Fifty States, District of Columbia and Puerto Rico (undated) (containing chart listing, among other elements of marriage laws, minimum age of allowable consent for marriage),
as incapable as same-sex couples of conceiving and bearing children naturally. In order for the
state’s dissimilarly-situated argument to work as a threshold bar against an equal protection
challenge, there must be some defining characteristic other than natural ability to procreate that
distinguishes the two classes of couples across the board.

That is, to survive the threshold “not similarly situated” test, the line of demarcation
employed by the state’s classification would have to correspond to the claim that every male
differs from every female in some relevant personal respect such that a partnership involving
both sexes necessarily differs from a partnership excluding either sex. The man-woman
differences would have to pertain at every stage of life, since marriage is a life-long partnership
that can be entered into at any time during one’s majority.

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at http://topics.law.cornell.edu/wex/table_marriage (last visited Aug. 13, 2010). In her book examining the
treatment of older persons during the era of the Roman Empire, Karen Cokayne notes that old age was considered a
ground for divorce and that, based on “scattered and diverse” documentation, “it appears . . . that the Romans did not
see much point in a marriage when procreation was no longer possible—as in old age. A marriage between two
older people might therefore incur criticism and be considered inappropriate or unwarranted, but probably not
and women were required to marry and bear children in order to qualify for full inheritance and legacy rights. The
law barred unmarried persons over the age of 20 for women and the age of 25 for men from receiving any
inheritance and reduced the amount that childless married couples could obtain. Marriages entered into for men
after the age of 59 and for women after the age of 49 did not qualify them for even the reduced allowable amount.
The upper age limits corresponded to the presumed biological limits of procreative capacity. TIM G. PARKIN, OLD
AGE IN THE ROMAN WORLD: A CULTURAL AND SOCIAL HISTORY 193-96 (2003). In Arizona, an age-related inability
to reproduce strengthens rather than weakens an individual’s eligibility to marry in one category of cases. First
cousins are not allowed to marry unless they are both over the age of sixty-five or, if they are younger than sixty-five,
a court determines that one or the other is unable to reproduce. ARIZ. REV. STAT. ANN. § 25-101B (2007).
Some commentators have proposed the establishment of age limits on eligibility to obtain marriage licenses to
reinforce a connection between procreation and marriage. See Richard Stith, On the Legal Validation of Sexual
Friendships at 18-20 (2009) (unpublished draft presented at the Symposium on the Jurisprudence of Marriage and
Other Adult Intimate Relationships, Boston College School of Law, Mar. 13, 2009), available at
AMERICA: ON THE PUBLIC PURPOSES OF MARRIAGE 18-19 (2006). The fact that the prevailing marriage licensing
scheme lacks an upper-age eligibility limit indicates that procreative capacity, while still relevant in most cases, is
not the sole criterion of eligibility. As will be argued throughout the course of this article, the unique unity-building
aspects of a relationship that brings both sexes together provides a rational basis for the current scheme in its
entirety.
Identifying differences between the sexes and asserting their relevance to state policy on marriage obviously would invite substantial challenge and debate.\textsuperscript{88} To defeat an equal protection claim at this early stage of constitutional analysis, there would have to be some overriding societal consensus about what the relevant differences might be, and there is no consensus.\textsuperscript{89} But that lack of agreement does not dictate the awarding of ultimate constitutional victory to proponents of same-sex marriage at this preliminary point, even before progressing to other stages of the constitutional analysis. There is no societal consensus that both sexes are identical in every potentially relevant respect.\textsuperscript{90}

G. Classification Undertaken in Iowa Code 595.2.

In this section the Iowa Supreme Court acknowledges that Iowa law defining marriage as the union of man and woman\textsuperscript{91} does not “expressly” discriminate on the basis of sexual orientation or attraction.\textsuperscript{92} This is correct as under the marriage law’s classificatory scheme, a man and a woman can obtain a license to marry each other even if they are both homosexually oriented while two men or two women cannot even if each of them is heterosexual. Nor are persons of the same sex who are in a committed sexual relationship with each other differently situated from persons in other marriage-ineligible arrangements who also possess, in the court’s

\textsuperscript{88} For an excellent survey of the debate over the existence, nature and relevance of sexual difference, see THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed. 1990).

\textsuperscript{89} For example, “Not only do most of the books currently in print about girls and boys fail to state the basic facts about innate differences between the sexes, many of them promote a bizarre form of political correctness, suggesting that it is somehow chauvinistic even to hint that any innate differences exist between female and male.” LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 6 (Broadway Books Paperback Ed. 2006).

\textsuperscript{90} For example, “It is only the legal discourse, not society, that is now formally Mother purged. The very gendered and Mothered lives most women live continue. Equality rhetoric successfully neutered Mother as a unique legal construct, but has failed to erase Mother on the societal level, nor has it removed the material manifestations of the institution of Motherhood.” MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 89 (1995).

\textsuperscript{91} IOWA CODE § 595.2(1) (2009) (“Only a marriage between a male and a female is valid.”).

\textsuperscript{92} Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009).
words, a “deeply felt need for a committed personal relationship,”93 albeit one of a non-sexual character, such as that which may exist between family members. The marriage law prevents multiple categories of relationships regardless of sexual orientation or attraction from “gaining the civil status and attendant benefits”94 of marriage.95

Thus it is difficult to credit the Iowa Supreme Court’s declaration that “the ban on civil marriages between two people of the same sex classifies on the basis of sexual orientation.”96 If persons with same-sex attraction bear no greater burden than a host of other classes barred from acquiring state marital affirmation of their intimate relationships, then how can it be, in the court’s words, “apparent the law is targeted at gay and lesbian people as a class”?97

The Iowa Supreme Court attempts to bridge this difficulty by arguing that the marriage law’s opposite-sex requirement leaves persons with same-sex attraction only the “unappealing” choice of marrying someone of the opposite sex, an option that is not “realistic” since these persons would have to “negat[e] the very trait that defines gay and lesbian people as a class—their sexual orientation.”98 However, this description of the practicalities points to a barrier that is not imposed by the government but has its source only in causes occurring outside the state’s direction. At issue in Varnum therefore is a law that fails to act to alleviate or compensate for whatever differences in capacity exist as a result of factors not of the government’s doing, in this case the particular pattern of sexual orientation found within a class of persons left outside the state’s licensing scheme. This type of law is conceptually different from a law that not only

93 Id.
94 Id.
95 See supra note 34 listing potentially eligible relationships.
96 Id. at 884.
97 Id. at 885.
98 Id.
renders non-conforming marriages as legally null and void but also subjects a named class to the intrusive threat of punishment.  

The Iowa Supreme Court employs two United States Supreme Court decisions, both involving laws of a character entirely different from the Iowa law, to assist in its attempt to reconceptualize the marriage law into something that it is not. First, the court cites to Justice Sandra Day O’Connor’s concurring opinion in *Lawrence v. Texas* where she wrote that Texas’s “sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.” The statute at issue in *Lawrence* expressly referred to sexual conduct between persons of the same sex in order to criminalize the conduct and thus, unlike Iowa’s marriage law, singled out those who engage in such conduct by threatening direct governmental interference with their privacy and personal liberty.  

To the extent that there is any “targeting” in Iowa’s marriage definition, it is a positive targeting that affirms the union of one man and one woman. The law leaves same-sex relationships, and indeed any other non-qualifying personal

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99 Laws in Delaware and Wisconsin, for example, employ language “prohibiting” certain marriages and then go further than merely voiding or invalidating the prohibited relationships by authorizing the fining or imprisonment of those who attempt to enter the forbidden marriages. Del. Code Ann. tit. 13, §§ 101 & 102 (2009) (declaring certain marital relationships to be prohibited, including but not limited to same-sex relationships, and authorizing fine of $100 or imprisonment for up to 30 days for individuals found “guilty” of entering prohibited marriage); Wis. Stat. § 765.30 (2009) (authorizing fine of up to $10,000 or imprisonment for up to nine months “for marriage outside the state to circumvent the laws” by “[a]ny person residing and intending to continue to reside in this state who goes outside the state and there contracts a marriage prohibited or declared void under the laws of this state”). On the other hand, Hawaii’s marriage law expressly allows same-sex relationships to be solemnized privately as marriage without threat of punishment. Haw. Rev. Stat. § 572-1.6 (2009) (“Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of Hawaii.”). The former category of statutes raises constitutional questions that the latter category does not.  

100 539 U.S. 558 (2003).  

101 Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009) (quoting *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring)).  

102 The plaintiffs were arrested, held in custody, charged and convicted after police officers, responding to a disturbance call, entered the home of one of the plaintiffs and observed plaintiffs engaging in the then-criminalized sexual activity. *Lawrence*, 539 U.S. at 562-63.
arrangement, entirely unimpeded. There is no state-created threat of invading privacy and liberty rights through governmental penalties should those ineligible for a marriage license nonetheless declare themselves married or otherwise commit themselves to each other in a private ceremony.

Second, the Iowa Supreme Court refers somewhat mystifyingly to the opinion in Romer v. Evans, asserting that its outcome “can be read to imply that sexual orientation is a trait that defines an individual and is not merely a means to associate a group with a type of behavior.” This appears to mean that if the marriage law “targets” homosexual conduct, then it is really targeting the persons who typically engage in such conduct. Again, however, the provision struck down in Romer differed in a key respect from Iowa’s marriage law. The Colorado ballot amendment expressly withdrew or withheld “protected status based on homosexual, lesbian or bisexual orientation” while leaving all other classes of individuals free to maintain or acquire such status through the enactment and enforcement of non-discrimination measures. To be equated to the form of legislation struck down in Romer, marriage laws would have to be drafted in such a manner as to refer expressly to persons with a homosexual, lesbian or bisexual orientation. Then the laws would have to ban this named class of individuals from obtaining a marriage license, while empowering all others, including those in non-sexual committed relationships such as siblings, parents and children, as well as groups of multiples and other associations outside the domestic relations category, to acquire the status of legal marriage. Only

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103 See supra note 34 listing other private relationships that persons are still free to enter.
105 763 N.W.2d at 885 (citing Romer, 517 U.S. at 632).
106 517 U.S. at 624 (from title of Amendment 2).
107 Id. at 635-36.
then would the *Varnum* court’s charge of negative targeting in the marriage context make sense in *Romer*’s light.

The Iowa Supreme Court strains to hammer a round peg into a square hole when it writes that “[b]y purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex marriages differentiates implicitly on the basis of sexual orientation.”108 What does it mean to “purposefully plac[e]” in order to “differentiate[] implicitly”? 

Perhaps the Iowa Supreme Court is trying to say that Iowa’s lawmakers were fully aware of the adverse effects that affirming only the traditional definition of marriage would have on those with same-sex attraction and adopted that definition because and not in spite of those effects. That is, according to one reading of the *Varnum* opinion, maybe the court believes that the lawmakers did not view the disparate impact as incidental but rather embraced it as central to the law’s intended outcome. However, at this initial stage of its equal protection analysis, the court neglects to identify any overt evidence indicating that lawmakers endorsed the adverse impact on a specific class and thereby exhibited legislative animus.109 Given that the marriage law adversely affects a range of classes denied the opportunity to obtain marriage licenses, the charge of even “implied” bias against a single class lacks evidentiary foundation.

Perhaps instead members of the Iowa Supreme Court believe that no proof is required of actual intent to target someone and that mere probable knowledge on the part of lawmakers of any adverse effects is enough to transmute a law with collateral consequences into a law that

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108 763 N.W.2d at 885.
109 The Iowa court intimates that animus is a motivating factor behind Iowa’s legal definition of marriage when it parenthetically describes the *Romer* ruling as “holding [that] an amendment to a state constitution pertaining to ‘homosexual . . . orientation’ expresses ‘animus toward the class that it effects’”. *Id.*
targets. This alternative reading of the court’s opinion, if accurate, suggests that in Iowa, post-
Varnum, a constitutional duty now exists that requires state government to eliminate all known
residual disparities, no matter their cause, when it legislates in any way that classifies, in order to
avoid the charge that it was targeting any of the classes adversely affected. This duty would
place extraordinary limits on legislative powers since it would be extremely difficult to fashion
laws that eliminate all differential treatment, thus forcing lawmakers as a practical matter to
abandon most forms of lawmaking.\textsuperscript{110} A slightly less onerous, but still exceedingly difficult duty
to shoulder would require the state to eliminate even incidental adverse effects of any
classificatory laws to the extent that “protected” classes happen to be included within their
detrimental sweep or else refrain altogether from legislating so as not to risk disfavoring any
protected class.

\textbf{H. Framework for and Determination of Appropriate Level of Scrutiny.}

The next two sections of the Varnum opinion argue that, by disadvantaging gays and
lesbians among other classes, the marriage laws do indeed discriminate against a protected class.
The Iowa Supreme Court determines that persons with same-sex attraction constitute a protected
class such that “laws singling them out for disparate treatment are subject to heightened judicial
scrutiny to ensure that those laws are not the product of . . . historical prejudice and
stereotyping.”\textsuperscript{111} Once again the court reaches this stage of the constitutional analysis only after
somehow concluding that a law publicly affirming only the union of man and woman as eligible
for civil marriage status apparently employs “a sexual orientation-based classification” that

\textsuperscript{110} The court acknowledges variously that “Most statutes, one way or the other, create classifications,” and
“Classification is the essence of all legislation.” \textit{Id.} (quoting Clements v. Fashing, 457 U.S. 957, 967 (1982)).
\textsuperscript{111} \textit{Id.} at 896 (quoting Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008)).
targets gays and lesbians precisely in order to impose on them the supposedly unique burden of being unable to obtain marriage licenses.  

The Iowa Supreme Court determines that gays and lesbians deserve special constitutional protection partly by employing an analysis that inconsistently relies upon or rejects democratic input depending on what that input conveys. The court points to the enactment by Iowa’s government of regulations and laws barring sexual orientation discrimination in numerous contexts as authoritative evidence, emanating from democratic processes, of the heightened need to protect gays and lesbians as a class under the state constitution. Such “legislative judgment” is reliable and trustworthy, the court asserts.

Why then does the Iowa Supreme Court discount the authority of the same legislative judgment when it reflects a consensus that marriage should be defined as the union of man and woman? The court notes that at the same time legislative bodies have been approving laws protecting against sexual orientation discrimination, they have also been “taking affirmative steps to shore up the concept of traditional marriage[.]” Instead of finding this democratic input on marriage authoritative as a recognition that invidious discrimination is not involved, the court describes it as part of “an affirmative backlash” that reflects the lack of political power.

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112 Id. at 885.
113 The court identifies four factors that will determine whether under the Iowa Constitution a class deserves special protection: 1) whether the class has been subject to invidious discrimination, 2) whether the characteristics that distinguish the class bear any relevance to the ability to contribute to society, 3) whether the distinguishing characteristic is immutable, and 4) whether the class lacks political power.  Id. at 886.
114 Id. at 889-90, 891-92. See e.g. id. at 892 (explaining that governmental mandates not to discriminate based on sexual orientation “reflect at least some measure of legislative and executive awareness that discrimination based on sexual orientation is often predicated on prejudice and stereotype”).
115 Id. (indicating that “we [the court] rely on the legislative judgment underlying chapter 216 [the state’s non-discrimination law governing public accommodations, housing, education and credit practices] to determine the appropriate level of scrutiny”).
116 Id. at 895. Here again the court mischaracterizes these efforts as “specifically excluding gays and lesbians” (emphasis added).  Id.
117 Id.
of gays and lesbians to garner support for the right to marry.\textsuperscript{118} One would think that those governmental bodies that have exhibited trustworthy enlightenment by expending so much effort to protect against sexual orientation discrimination when they recognize its presence in so many other contexts would know such discrimination when they see it and would redress it if they saw it in the marriage context.\textsuperscript{119}

The Iowa Supreme Court shows its impatience with what it apparently regards as an insufficiently enlightened branch of government in dire need of court supervision when it complains that “no legislature has secured the right to civil marriage for gay and lesbian people without court order.”\textsuperscript{120} Yet after the court handed down its \textit{Varnum} ruling, state legislatures began to enact laws approving same-sex marriage without being held at judicial gunpoint in Vermont,\textsuperscript{121} Maine,\textsuperscript{122} and New Hampshire,\textsuperscript{123} and the District of Columbia’s City Council similarly adopted measures recognizing same-sex marriages entered outside and within the District.\textsuperscript{124} These developments suggest that the legislative process is not entirely hostile to those seeking public marital affirmation of same-sex relationships.

\begin{itemize}
\item 118 Id. at 894-95.
\item 119 The Iowa legislature, as noted by the Iowa Supreme Court (id. at 791), included a section in its sexual orientation non-discrimination law to the effect that the law “shall not be construed to allow marriage between persons of the same sex.” IOWA CODE § 216.18A (2009). The Massachusetts General Court approved a similar provision as part of its sexual orientation non-discrimination law. 1989 Mass. Acts 516 § 19 (“Nothing in this act shall be construed so as to legitimize or validate a ‘homosexual marriage’, so called, or to provide health insurance or related employee benefits to a ‘homosexual spouse’, so-called.”).
\item 120 763 N.W.2d at 894.
\end{itemize}
Of course this legislative movement towards granting same-sex couples the right to marry is only a trickle compared with the torrent of popular enactments of state constitutional provisions limiting marriage to the union of man and woman. As the Iowa Supreme Court correctly observes, “the specific right sought in this case has largely lacked extensive political support” at the grassroots level. Does this electoral deficit in the narrower context of defining marriage justify treating sexual orientation as a suspect classification generally, as if the marriage debate alone proves that gays and lesbians are a powerless minority deserving special judicial protection?127


127 The Iowa Supreme Court reckons that “the political powerlessness factor of the level-of-scrutiny inquiry does not require a showing of absolute political powerlessness” but instead should turn on whether the group is powerful enough to “bring a prompt end” to discrimination, apparently in whatever form the court deems it to exist. 763
There is no evidence that the marriage amendment losses for the gay rights movement are due to some supposedly insular incapacity to attract the sympathy of powerful allies in their bid to enter into and engage in the political process. Gay rights advocates have enjoyed broad financial and institutional support in their efforts opposing the ballot questions. Taking into account the monetary contributions garnered for all marriage referenda in the United States held between 2004 and 2009, ballot committees supporting the marriage amendments have raised at least 67 million dollars while the gay rights campaigns in opposition have been far more successful, collecting at least 96 million dollars. Many in the political establishment and the media have opposed the marriage amendments, and the ballot defeats for the gay rights


128 "The stars seemed aligned for supporters of gay marriage. They had Maine's governor, legislative leaders and major newspapers on their side, plus a huge edge in campaign funding. So losing a landmark referendum was a devastating blow, for activists in Maine and nationwide.” Crary, supra note 125.
movement have taken place in parts of the country not known for reactionary and intolerant attitudes, such as California and Maine.\textsuperscript{130}

According to one gay rights political strategist in a debriefing on why the opposition failed in California to defeat Proposition 8, defining marriage as the union of man and woman:

The loss in California is a particularly apt case study because it took place in our nation’s largest state and because the opposition made it a national campaign from the start. . . . The LGBT movement needs to develop new models and strategies for engaging with communities that oppose same-sex marriage. These models must extend beyond the limited tonal range of either conversion or condemnation. They must, instead, feature authentic engagement about real differences of belief, ideology and theology. In campaign seasons, we must also use more nuanced messaging to conflicted swing voters. . . . Too often, we answer the difficult question of why we lose by pointing to the robust funding of the other side and to the enduring forces of bigotry. The hard truth is that we fail our national community if we let the analysis stop there.\textsuperscript{131}

\textsuperscript{130} For example, in California: “We need to face the fact that Prop 8 passed because a lot of liberal people voted for it—swing voters who should have known better, if only they had the right message. These swing voters like to think of themselves as ‘tolerant.’ They believe they support gay rights, but are not always comfortable thinking much about the issue. They have a ‘live-and-let-live’ approach, and don’t appreciate any group of people indoctrinating their worldview on the rest of society.” Paul Hogarth, \textit{Why We Lost Prop 8: When Reactive Politics Become Losing Politics}, HuffingtonPost.com, Nov. 5, 2009, \textit{available at} http://www.huffingtonpost.com/paul-hogarth/why-we-lost-prop-8-when-r_b_141390.html (last visited Aug. 13, 2010). And in Maine: “[G]ay marriage lost in Maine because proponents were unable to persuade ‘middle Maine’—the somewhat suburban voters who were probably able to be convinced on the subject, but were simply not won over. These are people who are hardly ‘anti-gay’, but still remained (at least during this vote) opposed to an extension of marriage rights to homosexual couples.” Matthew Gagnon, \textit{Where Gay Marriage Really Lost}, PineTreePolitics.com, Nov. 7, 2009, \textit{available at} http://www.pinetreepolitics.com/2009/11/07/where-gay-marriage-really-lost/ (last visited Aug. 13, 2010).

Injury to the strategic interests of the gay rights movement in its efforts to find a winning message is not the only harm that would result if the campaign to reaffirm marriage as the union of man and woman is mischaracterized as just another instance of aggression intended to hurt a politically helpless class. 132 Ruling that gays and lesbians qualify as a protected class despite their political success in other areas because they have ended up, so far, on the losing end of a political and social debate over the meaning of marriage, and so ruling precisely in order to subject the winning side on the marriage question to greater judicial scrutiny, distorts the test for determining whether the aggrieved class is a “discrete and insular minority.” 133

In practical terms, the Iowa Supreme Court’s definition of a suspect classification would be reduced to any unfavorable policy classification that opponents have failed to overturn in the legislature or at the ballot, regardless of the effectiveness and influence of the aggrieved class in other policy areas. Even those groups generally powerful in the political arena could then always rely on the extraordinary assistance of the courts to increase their chances of achieving total victory by filing a lawsuit and being declared a suspect class every time they happen to fail to achieve their political aims in some limited circumstance. Rather than aiming at compensating for deficient democratic processes, this bypasses democracy altogether—regardless of whether the processes are found deficient—in order to render emergency constitutional care according to

132 “When will it occur to supporters of same-sex marriage that they do their cause no good by characterizing those who disagree with them as haters, bigots, and ignorant homophobes? It may be emotionally satisfying to despise as moral cripples the majorities who oppose gay marriage. But after going 0 for 31—after failing to make the case for same-sex marriage even in such liberal and largely gay-friendly states as California, Wisconsin, Oregon, and now Maine—isn’t it time to stop caricaturing their opponents as the equivalent of Jim Crow-era segregationists? Wouldn’t it make more sense to concede that thoughtful voters can have reasonable concerns about gay marriage, concerns that will not be allayed by describing those voters as contemptible troglodytes?” Jeff Jacoby, Wedded to Vitriol, Backers of Gay Marriage Stumble, Boston.com, Nov. 11, 2009, available at http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/11/wedded_to_vitriol_backers_of_gay_marriage_stumble/ (last visited Aug. 13, 2010).

133 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (articulating the factors that may necessitate heightened judicial scrutiny, and including “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).
judicial estimations of which side deserves to win or lose on particular issues. This reformulation of the “discrete and insular minority” test abandons the goal of providing greater constitutional protection to groups lacking any long-term opportunity for adequate democratic recourse.\footnote{134}

I. Application of Heightened Scrutiny.

The Iowa Supreme Court considers each of the Polk County Attorney’s proffered justifications for defining marriage as the union of man and woman and finds them all constitutionally wanting under an intermediate level of scrutiny.\footnote{135} This result comes as no surprise since, once the court determines that a suspect classification is at issue, a rejection of the state’s reasoning is almost pre-ordained. Heightened scrutiny is perhaps better labeled “the fix is


\footnote{135} Varnum v. Brien, 763 N.W.2d 862, 904 (2009). The Polk County Attorney argued that the purposes of the marriage law were to 1) preserve the integrity of the institution of marriage as found in American culture by affirming the tradition’s definitional reference to both sexes, 2) recognize the uniqueness of opposite-sex relationships due to their naturally procreative nature, and promote opposite-sex relationships as optimal child-rearing units and encourage their stability by creating a legal status with associated public benefits. Final Brief of Defendant-Appellant at 15, 20-22, Varnum v. Brien, 763 N.W.2d 862 (2009) (No. 07-1499), available at http://www.iowacourts.gov/wfData/files/Varnum/appellantbrief.pdf (last visited Aug. 13, 2010). The County Attorney asserted that same-sex couples, as “a matter of common knowledge,” are incapable “of procreating naturally and are not similarly situated to opposite sex couples who can naturally procreate.” Final Brief of Appellant-Defendant at 24. Any finding of over- or under-inclusiveness is irrelevant, the County Attorney submitted, as “it proceeds from the wrong burden of proof allocation and ignores the presumption of constitutionality. The question is whether it is rational for the legislature to think that opposite sex marriage promotes the interest of procreation, not whether precluding gays or lesbians from marrying promotes heterosexual marriage.” Id. at 22. The Iowa Supreme Court rejects the state’s position by employing heightened scrutiny, assigning the burden of persuasion to the state, and finding that the state failed to carry its burden by not explaining why, if promoting procreation and the well-being of children are the purposes at issue, the definition of marriage 1) includes childless opposite-sex couples and yet excludes childless same-sex couples who thereby present no threat to children, and 2) allows heterosexual parents whose behavior demonstrates they are less than optimal parents to marry while refusing the same opportunity to parents with same-sex attraction who otherwise are permitted in Iowa to raise children. Varnum, 763 N.W.2d at 899-902. Further, according to the court, the state did not show how the exclusion of same-sex couples from marital status would increase procreation and stability among opposite-sex couples, promote the well-being of all children including those being raised by same-sex couples, and guarantee lower state expenditures. Id. at 901-03.
in” scrutiny given the prejudicial stance it requires courts to take with respect to the state action so scrutinized.136

The Iowa Supreme Court demands that the state’s justifications be “exceedingly persuasive.”137 While the answer to the question of “persuasive to whom?” may be obvious as a practical matter, since it is the court itself which looks to be persuaded, a larger issue emerges here. Why should the Polk County Attorney have to persuade the seven justices sitting on the Iowa Supreme Court when countless other people, generations and societies already have been and remain persuaded that it is reasonable to define marriage as the union of man and woman? The court’s answer to this query, as addressed supra,138 is that a change in understanding about what equal protection requires, and hence mandating marriage’s redefinition, may pop up at any time. This constitutionally enforceable enlightenment need only manifest itself through one individual.139 That condition was more than satisfied when twelve individuals filed their complaint to initiate the Varnum litigation.140

At this stage of its constitutional analysis, the Varnum opinion’s confident tone of finality—indicating that the social, political and legal debate over marriage’s definition should now end in favor of those who seek to alter it—reaches its apex. No doubt clouds the judicial temper and thus, as the court says in so many words, of course the law defining marriage as the union of man and woman must be struck as obviously unjust.141

136 See supra note 70 and accompanying text.
137 763 N.W.2d at 897 (citing United States v. Virginia, 518 U.S. 515, 532-33 (1996)).
138 See supra notes 55-59 and accompanying text.
139 Id. at 877.
140 Id. at 872.
141 Id. at 906 (holding that Iowa’s marriage statute violates the Iowa Constitution and asserting that “[t]o decide otherwise would be an abdication of our constitutional duty”).
To arrive at this result the Iowa Supreme Court applies various devices to handicap the state and bolster the plaintiffs’ claim for marital recognition. First, the court places the burden of persuasion on the state and rules inadmissible any alternate secular objectives not specifically raised by the Polk County Attorney. Second, the court rejects as unimportant the wide-spread support that the opposite-sex definition of marriage enjoys in society, history and tradition. Third, the court asserts that “[t]here is no legitimate notion that a more inclusive definition of marriage will transform civil marriage into something less than it presently is for heterosexuals.” Fourth, the court dismisses what it refers to as the “reasoned opinions that dual-gender parenting is the optimal environment for children” by asserting without further analysis that these opinions are “unsupported by reliable scientific studies,” and then concludes that the “traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else.” Fifth, the court deems the degree of over- and under-inclusion it finds in the marriage-eligible class of opposite sex-couples to be fatal to the state’s case for linking the law’s marriage definition to its asserted ends. Sixth, the court continues to insist that the class excluded from the state’s opposite-sex definition of marriage consists of “gays and lesbians” rather than more generally all relationships

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142 Id. at 897 & n. 24 (asserting that “[t]he burden of justification is demanding and it rests entirely on the State,” and therefore limiting judicial review only to those objectives actually articulated by the state and excluding “alternative justifications . . . not offered to support the Iowa statute”).
143 Id. at 897-99 (asserting that “[a] specific tradition sought to be maintained cannot be an important governmental objective for equal protection purposes . . . when the tradition is nothing more than the historical classification currently expressed in the statute being challenged”).
144 Id. at 899 n.25.
145 Id. at 899 & n. 26.
146 Id. at 897-904.
consisting of two men or two women,\textsuperscript{147} making it easier for the court to infer an underlying prejudice against or stereotyping of persons based on their sexual orientation.\textsuperscript{148}

After rejecting each of the Polk County Attorney’s justifications, the Iowa Supreme Court offers what it believes to be the actual source of the law’s historical understanding of marriage: “religious sentiment.”\textsuperscript{149} In a head snapping turn from an argument that repeatedly raises the possibility that supporters of traditional marriage are motivated by prejudice and animus, the court admits that even “those people who may accept gay and lesbians,” i.e., harbor no hate, may nonetheless “find the notion of same-sex marriage unsettling” because of their religious convictions.\textsuperscript{150} The court assures readers that “religious doctrine” will be unaffected by its decision, by which “civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law.”\textsuperscript{151} Even after acknowledging that “religious objections to same-sex marriage are supported by thousands of years of tradition and

\begin{itemize}
  \item[(\textsuperscript{147})] Id. at 897 (“categorical exclusion” of gays and lesbians), 899 (“classification based on sexual orientation”), 900 (“statutory exclusion of gay and lesbian people” & “denies civil marriage to all gay and lesbian people” (emphasis added)), 904 (“the sexual-orientation-based classification”); but see also more accurate descriptions at 903 (“Exclusion of all same-sex couples” & “The two classes created by the statute—opposite-sex couples and same-sex couples”). See also Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 953 n.11 (“We use the terms ‘same sex’ and ‘opposite sex’ when characterizing the couples in question, because these terms are more accurate in this context than the terms ‘homosexual’ or ‘heterosexual’. . . . Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex.”).
  \item[(\textsuperscript{148})] Id. at 900 (finding that because the marriage statute “does not exclude from marriage other groups of parents—such as child abusers, sexual predators, parents neglecting to provide child support, and violent felons,” this “tends to demonstrate that the sexual-orientation-based classification is grounded in prejudice or ‘overbroad generalizations about the different talents, capacities, or preferences’ of gay and lesbian people, rather than having a substantial relationship to some important objective”), 901 (asserting that “a careful analysis of the over- and under-inclusiveness of the statute reveals it is less about using marriage to achieve an optimal environment for children and more about merely precluding gay and lesbian people from civil marriage” & “Consequently, a classification that limits civil marriage to opposite-sex couples is simply not substantially related to the objective of promoting the optimal environment to raise children . . . suggest[ing] stereotype and prejudice, or some other unarticulated reason, could be present to explain the real objectives of the statute”).
  \item[(\textsuperscript{149})] Id. at 904.
  \item[(\textsuperscript{150})] Id.
  \item[(\textsuperscript{151})] Id. at 906.
\end{itemize}
biblical interpretation,” the court refuses to allow that tradition to be incorporated into the law due to the bare fact that seven members of the judiciary could discover no secular justification that they considered “exceedingly persuasive.”

J. Summary and Segue.

The Varnum opinion touches on fundamental issues concerning the nature of marriage, the source and function of civil rights, and the role of the courts with respect to changing social institutions. A summary of the Iowa Supreme Court’s thoughts regarding these issues provides a helpful segue into a fuller discussion of these issues and how they might be addressed in a federal constitutional challenge against laws defining marriage as the union of man and woman.

With respect to the nature of marriage, the Iowa Supreme Court characterizes the institution as having two meanings, one formed by laws and court decisions and the other rooted in private understandings, so as to be delineated either as civil marriage or as traditional or religious marriage. The essence of civil marriage, according to the court, is the partnership and commitment between the spouses, entered into “for the purpose of [their] labor and support” as well as for their “comfort and happiness.” In dictating the redefinition of civil marriage by eliminating any reference to the inclusion of both sexes, the court determines in effect that the opposite-sex requirement is premised only on a religious idea or belief possessing no secular purpose. Any insistence on including the opposite-sex requirement when defining civil marriage therefore suggests, per the Varnum opinion, an underlying animus against gays and lesbians that causes harm by failing to publicly affirm their same-sex relationships.

152 Id. at 904.
153 Id. at 906.
154 The court refers repeatedly in its opinion to “civil” marriages (see id. at passim but especially id. at 905, 906), when referring to the status sought by plaintiffs, while differentiating this legal status from “religious marriages.” Id. at 906 & and more generally id. at 904-06.
155 Id. at 883.
Concerning civil rights, the Iowa Supreme Court rejects any dependence upon legal tradition, democratic consensus or long-standing social practices when determining what personal claims rise to the level of civil rights. Rather, the “doctrine of equal protection,” in and of itself and abstractly conceived, forms a substantive basis for giving civil status to individual assertions of right.\textsuperscript{156} What equal protection requires must be decided exclusively by the courts, empowered by and thus “bound to interpret” applicable constitutional guarantees, and resolved according to the judges’ own estimation of “the standards of each generation.”\textsuperscript{157} Indeed, “the judicial system [must] perform its constitutional role free from the influences that tend to make society’s understanding of equal protection resistant to change.”\textsuperscript{158} It appears in effect that the \textit{Varnum} court prefers change for change’s sake over tradition for tradition’s sake, with no detectable middle ground, as if the question of what is a constitutional right turns only on what norm is adjudged to be the most fresh and malleable. According to this jurisprudence, the more novel a claim the greater will be its constitutional rank. Civil rights so conceived, therefore, function less with the character of law that aims towards stability and more as declarative trend setters having all of the permanence of fads. Corresponding and always shifting civil duties must then be imposed by judicial decree on a resistant citizenry even if that citizenry has rejected giving civil status to the particular claim at issue.

Finally, the Iowa Supreme Court regards the judiciary as more than qualified to settle critical social, scientific and political questions and therefore ably equipped to exert authority over deeply entrenched social institutions for the purpose of altering their scope, shape and function. The court views its constitutional power as sufficient to second-guess a definition of

\textsuperscript{156} \textit{Id.} at 877.
\textsuperscript{157} \textit{Id.} at 876.
\textsuperscript{158} \textit{Id.} at 877.
marriage embraced by society and around which a deeply rooted social institution has formed, simply because a statute was enacted that incorporated the institutional definition, giving the court its jurisdiction to rule in the matter.\textsuperscript{159} The court flatly asserts that redefining marriage would not in any way harm the marital institution.\textsuperscript{160} The court also confidently declares that, based upon the justices’ review of the scientific evidence, there is no negative difference between opposite-sex and same-sex parenting,\textsuperscript{161} and emphatically dismisses the argument that children need both a father and a mother.\textsuperscript{162} The seven justices in \textit{Varnum} thus conclude that “[t]here is no material fact, genuinely in dispute, that can affect [their constitutional] determination.”\textsuperscript{163} As a result, per judicial dictate, same-sex couples in Iowa must be granted “full access to the institution of civil marriage.”\textsuperscript{164}

How might the federal courts, and more importantly the United States Supreme Court, handle a federal complaint for relief regarding same-sex couples’ access to marriage licenses? How will they deal with the associated questions concerned with changing the meaning of marriage, bestowing civil rights protection, and determining the authority of the courts to act contrary to the popularly endorsed dictates of a basic social institution? The next section moves the discussion beyond Iowa, anticipating a federal appeal to our nation’s highest court to redefine marriage.

\textsuperscript{159} \textit{Id.} at 875 (noting that plaintiffs challenged a marriage statute that, as a statute, is subject to constitutional review).
\textsuperscript{160} \textit{Id.} at 899 n.25.
\textsuperscript{161} \textit{Id.} at 873-74, 899.
\textsuperscript{162} \textit{Id.} at 899 n.26.
\textsuperscript{163} \textit{Id.} at 906.
\textsuperscript{164} \textit{Id.} at 907.
III. Marriage, Civil Rights and the Judiciary.

In this section, the article turns from a critical analysis of the latest and likely the last state supreme court ruling in a while to recognize same-sex marriage\textsuperscript{165} and moves to the larger scope of federal constitutional policy. Several federal lawsuits are challenging various laws and policies defining marriage as the union of one man and one woman under the United States Constitution.\textsuperscript{166} The litigants’ goal is to secure final relief—an injunction requiring federal and state authorities to recognize same-sex marriage—from the United States Supreme Court.\textsuperscript{167}

Defenders of limiting marriage to opposite-sex unions have history and the prevailing support of the American public on their side. In thirty-one states, voters have approved constitutional amendments endorsing the traditional definition of marriage and/or overturning judicial decisions or legislation requiring the recognition of same-sex marriage.\textsuperscript{168} In nine additional states, where no constitutional provisions have been adopted, the legislatures have passed statutes defining marriage as the union of one man and one woman.\textsuperscript{169} To the same end at the federal level, Congress has enacted the Federal Defense of Marriage Act.\textsuperscript{170} Thus the democratic processes in four-fifths of the states and at the national level have delivered a resounding verdict against redefining marriage.

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\textsuperscript{165} See supra note 2
\textsuperscript{166} See supra notes 3-7 (citing cases).
\textsuperscript{167} For example, David Boies and Ted Olson, attorneys for the plaintiffs filing a federal challenge against California’s Proposition 8, “see the high court as the only place to go. Waiting [for the states to recognize same-sex marriage on their own], they say, would be inappropriate—and they see the high court as the appropriate arbiter of the issue.” Gloria Borger, *The Odd Couple*, CNN, Mar. 25, 2010, available at http://campbellbrown.blogs.cnn.com/2010/03/25/the-odd-couple/ (last visited Aug. 13, 2010).
\textsuperscript{168} See supra note 125 (listing states). It should be noted that in many of these states, the legislatures also enacted statutory definitions and/or voted to place the proposed amendments on the statewide ballots.
The following discussion presents an affirmative case for why the federal courts should allow tradition and its supporting public consensus to continue to dictate the legal definition of marriage. First, the article will argue that marriage’s public nature, however changeable in the past, and a governmental understanding of marriage’s institutional purpose, can rationally be rooted in a secular appreciation of sexual difference.  

Second, the article asserts that given the democratic nature of the origin of civil rights, an individual rights claim cannot, and in a democracy should not, gain civil rights status if the claim’s recognition would reshape an institution that enjoys democratic support and its proposed enforcement fails to garner democratic approval. Third, the article contends that a sufficiently reasonable doubt exists as to whether there is a constitutionally cognizable injury requiring judicial redress when the state abides by a democratically endorsed tradition, and it submits that the judiciary is ill-equipped to second-guess the public’s endorsement of traditional marriage.

A. Marriage’s Nature and Secular Purpose.

Should the United States Supreme Court agree to render an opinion about the definition of marriage and its constitutionality, it will not be composing on a blank screen. Marriage has prompted sustained reflection on its nature and meaning by philosophers, scientists, poets and jurists, along with probably just about every individual ever capable of forming an opinion, thus affording the Supreme Court with ample first drafts in history and culture upon which to work. The Court will be confronted with something that is, by virtue of the plenary input already elicited, institutional in substance and thus deeply political in character. As observed by Neil

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171 See infra Section III.A.
172 See infra Section III.B.
173 See infra Section III.C.
Monte Stewart, “[u]se of the law to reinforce, alter, or extinguish the shared public meanings that constitute a social institution is a political act.”\textsuperscript{175} The political quality alone of the question of defining marriage might give the Supreme Court great pause in second-guessing the institutional definition prevailing in history and among the world’s cultures.\textsuperscript{176} Yet supporters of same-sex marriage, with varying degrees of confidence to be sure,\textsuperscript{177} are prepared to urge the Court to mandate the redefinition of marriage because it is “the right thing to do.”\textsuperscript{178}

The case for constitutionalizing same-sex marriage depends on two critical arguments. First, proponents contend in effect that intimate relationships enjoying a reasonable expectation of privacy\textsuperscript{179} also enjoy (or should enjoy) as a corollary what might be called a reasonable

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\textsuperscript{176} For example, commentators have suggested that the Supreme Court’s decision in the \textit{Newdow} case bodes ill for same-sex marriage advocates. See See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11, 13, 17-18 (2004) (declining on prudential grounds to decide case involving “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,” particularly when domestic relations are at issue, given “the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government”); Meredith Johnson Harbach, \textit{Is the Family a Federal Question?}, 66 Wash. & Lee L. Rev. 131, 177 (2009) (opining that pursuant to the ruling in \textit{Newdow}, it is “possible that the Court could carve out marriage regulation—as opposed to other domestic relations—as peculiarly within the domain of the states. The context in which \textit{Newdow} came down is telling: The \textit{Newdow} decision was announced during congressional debate over the Federal Marriage Amendment, and the example [given by the majority opinion in \textit{Newdow}] of a ‘rare case’ justifying federal review was \textit{Palmore v. Sidoti}—a race case—rather than any of the Court’s sex discrimination cases involving state marriage laws”); Mary Ann Case, \textit{Marriage Licenses}, 89 Minn. L. Rev. 1758, 1791 (2005); Dale Carpenter, \textit{Federal Marriage Amendment: Yes or No? Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept}, 2 U. St. Thomas L. J. 71, 84 n.58 (2004); Cass R. Sunstein, The Right to Marry, 26 Cardozo L. Rev. 2081, 2113-14 (2005).


\textsuperscript{179} The test for determining whether an individual has a constitutionally protected expectation of privacy in the context of Fourth Amendment searches and seizures was first articulated in \textit{Katz v. United States}, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (describing “two-fold requirement” for determining the existence of a protectable
Second, proponents assert in effect that extending public affirmation to opposite-sex couples but not to same-sex couples is, at least on the secular level, inherently inexplicable or patently unjustifiable. Both arguments rely on erroneous assumptions about the nature and secular purposes of the marital institution.

1. Is There a Reasonable Expectation of Public Affirmation?

privacy interest: “first that a person has exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable”); see Peter Winn, Katz and the Origins of the “Reasonable Expectation of Privacy” Test, 40 McGeorge L. Rev. 1, 40 (2009) (noting that “[w]ithin a decade, Harlan’s test became so familiar that the Court officially recognized it as the essence of the Katz decision”).

Varnum v. Brien, 764 N.W.2d 892, 873 (Iowa 2009) (“Yet perhaps the ultimate disadvantage expressed in the testimony of the plaintiffs is the inability to obtain for themselves and for their children the personal and public affirmation that accompanies marriage.”); Perry v. Schwarzenegger Complaint, supra note 3, at 6 (“The inability to marry denies gay and lesbian individuals and their children the personal and public affirmation that accompanies marriage”); Respondents’ Supplemental Brief at 25, In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999) (“Lesbian and gay couples also yearn for the public affirmation and support that only marriage gives. ‘Gays and lesbians seek not only the tangible benefits that would accompany a recognition of same-sex marriage, but also the societal acknowledgment of the humanity and normative goodness that they believe inheres in . . . their relationships.’”) (quoting Carlos A. Ball, Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism, 85 Geo. L.J. 1871, 1930 (1997)), available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/08Rymer_Supplemental_Brief.pdf (last visited Aug. 13, 2010); Evan Wolfson, Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique 567 580 (1994) (“Lambda [Legal Defense & Education Fund] and my co-counsel Daniel R. Foley argued [in the Hawaii same-sex marriage litigation, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)] what many lesbians and gay men feel: marriages between two men or two women can fulfill the same mix of interests as marriages between a man and a woman [including] a public affirmation of emotional and financial commitment and interdependence[,]”). After the United States Supreme Court issued its ruling in Lawrence v. Texas, 539 U.S. 558 (2003), recognizing the entering of sexual relationships to be a liberty and privacy interest that is constitutionally protected against government interference, id. at 578-79, commentators immediately envisioned the constitutional possibilities for recognizing an affirmative, and affirming, right to government recognition of same-sex marriage. See, e.g., Laurence H. Tribe, Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1945-51 (2004) (arguing that the constitutionalization of same-sex marriage by the Supreme Court is inevitable after Lawrence); Carlos A. Ball, The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas, 88 Minn. L. Rev. 1184, 1186 (2004) (arguing that “proponents of same-sex marriage can use the Court’s reasoning [in Lawrence] to support arguments that the State has substantive due process obligations to recognize such marriages”); Mark Strasser, Lawrence and Same-Sex Marriage Bans—On Constitutional Interpretation and Sophistical Rhetoric, 69 Brook. L. Rev. 1003, 1004 (2004) (arguing that “Lawrence makes even clearer that the Constitution protects same-sex marriage, even if the current Court is unlikely to recognize that”).

See, e.g., Perry v. Schwarzenegger Complaint, supra note 3, at 9 (“The disadvantage Prop. 8 imposes upon gays and lesbians is the result of disapproval or animus against a politically unpopular group.”); Gill v. Office of Personnel Management Complaint, supra note 4, at 16 (“At root, DOMA, 1 U.S.C. § 7, is motivated by disapproval of gay men and lesbians and their relationships, an illegitimate federal interest.”); Massachusetts v. USDHHS Complaint, supra note 5, at 2 (“In enacting DOMA, Congress . . . codified an animus towards gay and lesbian people.”).
Establishing a corollary between a protectable expectation of privacy and a protectable expectation of public affirmation would have to deal with the second “fold” of the “two-fold” test for determining whether an expectation of privacy is reasonable: is the personal expectation “one that society is prepared to recognize as reasonable”?\(^{182}\) For advocates to succeed in demonstrating a reasonable expectation of public affirmation for same-sex marriage, either the second part of the expectation of privacy analysis would have to be eliminated as somehow unnecessary for testing whether an expectation of public affirmation is reasonable, since according to history and tradition society has not, as of yet, accepted same-sex marriage. Or in the alternative, if the second requirement involving a search for objective factors is retained, then for same-sex marriage advocates to succeed they would have to find an objective basis to counter the deep-rooted status of marriage’s definition as the union of man and woman.

Because an expectation of “public” affirmation would necessarily concern factors public in nature, it makes little logical sense to base any right to public affirmation on purely private considerations, such as a personal desire for such affirmation. One might argue instead that the moment that society recognizes a freedom to act in private, thus creating an objectively reasonable expectation of privacy, then this recognition should automatically be regarded as also creating an objectively reasonable expectation of public affirmation.\(^{183}\) However, assuming

\(^{182}\) Katz, 389 U.S. at 361 (Harlan, J., concurring).

\(^{183}\) This way of approaching the question is exemplified by those who assert that because the United States Supreme Court struck down laws penalizing intimate sexual conduct, and did so as a measure of respect for the dignity of persons and out of a regard for the intimate relationships they desire to enter, then it necessarily follows that these relationships merit public affirmation. See, e.g., Tribe, \textit{supra} note 179, at 1948 (arguing that if the right to privacy protects persons in intimate same-sex relationships against criminal prosecution for sexual conduct, as found by the Supreme Court in \textit{Lawrence} v. Texas, 539 U.S. 558 (2003), then considerations of respect demand the “affirmative and public state blessing of such unions”); Robert C. Post, \textit{Fashioning the Legal Constitution: Culture, Courts, and Law}, 117 HARS. L. REV. 4, 104 (2003) (“\textit{If Lawrence} believes that the function of the Due Process Clause is ‘to demand respect for conduct protected by the substantive guarantee of liberty,’ if the constitutional guarantee of liberty attaches to homosexual relationships, and if legislation denying homosexual relationships official recognition relegates them to second-class status, state discrimination against the public dimensions of homosexual relationships would seem to violate the very essence of the constitutional guarantee.”) (citations omitted).
without proving that society is actually prepared to publicly affirm one’s desire to marry a person of the same sex—especially in the face of a history and tradition that have rejected same-sex marriage—would really be no different from basing a claim of public expectation solely on private personal expectations.\textsuperscript{184}

Is there a way to address the second test for objectivity other than abandoning it altogether? Advocates for same-sex marriage might argue instead that the nature of marriage itself, in the view of some asserted to be mutable in character,\textsuperscript{185} makes an expectation of public affirmation for relationships currently considered non-marital to be objectively reasonable. Suppose it is true, in the memorable words of the Massachusetts Supreme Judicial Court, that “[as] a public institution and a right of fundamental importance, civil marriage is an evolving paradigm.”\textsuperscript{186} If in the past and over time society and the law have altered various parameters of marriage, then perhaps there is a reasonable expectation of further change that reaches an

\textsuperscript{184} See Post, supra note 183, at 104-05 (noting that though “[t]he logic of Lawrence . . . has exceedingly far-reaching implications,” the Supreme Court appeared to hedge any bets about the inevitability of constitutionally mandating the public affirmation of same-sex relationships by referring to a “public-private distinction” and thus, “[i]f the public becomes inflamed by the implications of the Court’s intervention, refusing to ameliorate its deep-seated opposition to same-sex marriage and therefore adamantly resisting the logic of Lawrence’s reasoning, the Court retains the option of invoking the public-private distinction as a rationale for further inaction”).

\textsuperscript{185} See, e.g., Charles P. Kindregan, Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions, 41 SUFFOLK U. L. REV. 19, 48 (2007) (“If the brief analysis in this article stands for anything, it is that lawyers should appreciate the lessons history teaches about the evolution of modern civil marriage in the law and the reality that law will change from time-to-time and in different places. These changes need to be both understood and accommodated.”); Linda C. McClain, The Evolution—Or End—Of Marriage?: Reflections on the Impasse Over Same-Sex Marriage, 44 FAM. CT. REV. 200, 203 (2006) (describing “dramatic legal transformation” of marriage in the past involving the removal of sexual distinctions from various legal aspects of marriage and adopting the argument that in light of this prior transformation “one result of allowing gay couples to marry would be to finish the project of removing sex-based distinctions from that area of law”) (quoting Nan D. Hunter, The New Law of Marriage, 14 THE GOOD SOCIETY 11, 12 (2005)).

\textsuperscript{186} Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003). See also Plaintiffs’ and Plaintiff- Intervenors’ Joint Opposition to Defendant-Intervenors’ Motion for Summary Judgment at 47, Perry v. Schwarzenegger, No. 09-CV-02292-VRW (N.D. Cal. Joint-Opinion filed Sept. 23, 2009) (informing court that “Plaintiffs’ experts will testify that civil marriage has never been a static institution and has changed over time, sometimes dramatically, to reflect the changing needs, values, and understanding of our evolving society” in order to “refute, among other things, the contention of Defendant-Intervenors that the ‘central purpose of marriage . . . ha[s] always been to promote naturally procreative sexual relationships and to channel them into stable, enduring unions for the sake of producing and raising the next generation’”).
objective level, even despite the so-far unyielding tradition of requiring marriage to include both sexes. In short, the argument here would be that an objectively reasonable expectation of public affirmation for same-sex marriage exists precisely because further social and legal permutations in marriage are inevitable.\footnote{Futurists Tom and Jeanne Lombardo presented their ideas on what new forms marriage might take in times to come at the 2007 annual meeting of the World Future Society, including the prospect of a triadic conception of marriage, “for example, of everyone being bisexual and having both a female and a male mate,” marriages involving “virtual spouses” existing only in electronic, digital form, and cyber-marriages between humans and robots. The Lombardos envision the possibilities and impact of bio-re-engineering, such as increasing the two biological sexes to three or more sexes, creating the biological capacity to “switch back and forth between the sexes so that each partner can be male of female at different times,” or using cloning methods to create partners of the same or opposite sex so that you could enter a “solipsistic marriage . . . with another version of you.” Thomas J. Lombardo & Jeanne Belisle Lombardo, \textit{The Evolution and Future Direction of Marriage}, in \textit{Seeing the Future Through New Eyes} 85, 96, 97 (Cynthia Wagner ed. 2008).}

same-sex marriage advocates were dampened, if not dashed, by a string of defeats.\textsuperscript{191} The speculative nature of such an enterprise—assessing the inevitability of a future democratic acceptance for a highly controversial proposition amidst a continually shifting political and social debate—transforms constitutional jurisprudence into a ritual of throwing eagle feathers into the wind.\textsuperscript{192}

Moreover, there is the risk that the relationship between the phenomenon of historical development with respect to marital norms generally and the specific marital norm of requiring the involvement of both sexes is being misread by those advocating for change. What if the deeply rooted public affirmation for marriage is due to a cultural appreciation of the ability of the marital institution to force men and women to work out social, political and cultural problems that arise precisely because the two sexes are different in certain fundamental ways even beyond procreative capacity, and this process of navigating the differences through a unique institution that requires both sexes to learn to live together is the very mechanism that has lead to changes


\textsuperscript{192}Futurists Tom & Jeanne Lombardo caution that even though “as cultures mix and create new versions and synthesies of different practices, marriage should diversify even further” nonetheless “it is possible for there to be cultural regressions or historical oscillations” as “can be seen in the recent conservative push back toward ‘traditional marriages.’” Lombardo & Lombardo, \textit{supra} note 187, at 96.
over the years in society’s understanding of that institution? Imagine that sexual difference is not just another institutional attribute to jettison in the progressive journey of reshaping a vital public institution, but is instead the hub around which socially critical changes, whether deemed progressive or regressive, are made possible.

The next section will discuss more fully the element of sexual difference, but for present purposes it is enough only to ask whether society is prepared to recognize as reasonable an expectation of public affirmation that eliminates sexual difference from the marital institution, and by doing so, makes sexual difference presumably less relevant and perhaps altogether irrelevant to any considerations of improving social existence. Will such a change compromise the state’s ability to take into account differences between males and females and to promote marital policies based on any unique benefits and challenges that those differences might present to society? What if the union of man and woman contributes something in the nature of an original setting for acquiring basic, socially important, skills?

The fact that men and women are found in every human social strata recommends the union between members of both sexes as a far-reaching modality of teaching, experience and human insight if indeed there are social attributes and dynamics that arise only from interactions and commitments between the man and the woman. Unless society has concluded that such unique attributes and dynamics are either non-existent or socially irrelevant, and that proposition will be examined in the next section, then it would be difficult to argue that society is prepared to recognize as reasonable a form of public affirmation that requires the government to dismiss sexual difference as entirely of no social consequence.

The Iowa Supreme Court asserts in *Varnum* that the opposite-sex limit on marital eligibility is rooted in religious sentiment and lacks adequate secular justification.\(^{193}\) Because of the resulting extent of perceived over- and under-inclusion in the defined class, the court rejects the state’s position that the procreative potential and parenting qualities of opposite-sex relationships suffice as suitable grounds for its definition of civil marriage.\(^{194}\) The plaintiffs in most of the pending federal challenges raise similar objections to this procreation/parenting defense of the status quo.\(^{195}\) In the following discussion on marriage and sexual difference, this article contends that the line-drawing found in the traditional understanding of marriage comports with more fundamental premises concerning all communities consisting of both sexes, and thus avoids the over-inclusion/under-inclusion critique. The underlying reasoning of the state interests to be proposed here is constitutionally cognizable and secular in nature and the fit between purpose and classification is snug.

The United States Supreme Court has recognized that “‘the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both,’” and thus the “‘[i]nherent differences’ between men and women . . . remain cause for celebration[].”\(^{196}\) If a representative of either sex is excluded from the community in question—

\(^{194}\) *Id.* at 897-904.
whether the community is a military school,\textsuperscript{197} a jury\textsuperscript{198} or, as this article will argue, a marriage—then, in the words of the Supreme Court, “a flavor, a distinct quality is lost.”\textsuperscript{199} All that the state defending the status quo in the marriage context should have to be required to do (if required to do anything)\textsuperscript{200} is to show that the public affirmation at stake, the “cause for celebration,”\textsuperscript{201} is based on public benefits uniquely derived from involving members of both sexes in a marriage.\textsuperscript{202}

\textsuperscript{197} 518 U.S. at 519.
\textsuperscript{198} Ballard, 329 U.S. at 189-90.
\textsuperscript{199} 329 U.S. at 193.
\textsuperscript{200} Unless plaintiffs can show that a statute implicates a fundamental right or employs a suspect classification, the statute enjoys a strong presumption of constitutionality in federal jurisprudence and the plaintiffs, not the state, bear the burden of proof, requiring them to negate every conceivable basis, even one not articulated by the state, which might support the statute. FCC v. Beach Communications, 508 U.S. 307, 313-15 (1993); Heller v. Doe, 509 U.S. 312 (1993).
\textsuperscript{201} Virginia, 518 U.S. at 533.
\textsuperscript{202} Appealing to the integrative importance of sexual difference with respect to the public interest in defining marriage as the union of the sexes is not unprecedented in the marriage debate. See Section C, “Integrating Gender Difference: A Keystone of the Jurisprudence of Marriage,” in Lynn D. Wardle, The Jurisprudence of Marriage and the Uniqueness of Marriage 25-29 (2009) (unpublished draft paper presented at the Symposium on the Jurisprudence of Marriage and Other Adult Intimate Relationships, Boston College Law School, Mar. 13, 2009), available at http://www.law2.byu.edu/organizations/marriage_family/past_conferences/mar2009/drafts/Draft%20Jurisprud%20ofMarriage%20Rep.pdf (last visited Aug. 13, 2010). Moreover, as noted by Courtney Megan Cahill, in various marriage definition cases defenders of traditional marriage have cited to Justice Ruth Bader Ginsburg’s majority opinion in United States v. Virginia to support the claim that the union of man and woman is uniquely important as a public policy matter because it involves both sexes. Courtney Megan Cahill, Celebrating the Differences That Could Make a Difference: United States v. Virginia and a New Vision of Sexual Equality, 70 Ohio St. L.J. 943, 990-92 (2009). Cahill asserts that Justice Ginsburg’s opinion instead bolsters the case for same-sex marriage because, in recognizing that the differences between the sexes should be celebrated, the opinion stands for the proposition that differences generally should be celebrated, including differences in sexual orientation. See, e.g., id. at 1001 (quoting Brief of Amici Curiae OneIowa et al. at 25, Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499)) (“[S]ex-based difference is something that the [United States] Supreme Court has already embraced in Virginia, thus setting a precedent for courts to do the same with respect to sexual orientation-based difference. ‘Just as we celebrate the differences between the genders . . . so we can recognize and celebrate the different experiences that same-sex and opposite-sex relationships contribute to the . . . tapestry of our community.’”). Cahill acknowledges however that “Virginia might be read to indicate that [Virginia Military Institute] would gain something by integrating and by becoming a duel-sex institution (and, by extension, that marriage would lose something by becoming a single-sex community) . . . [thereby] suggesting that same-sex marriage lacks the ‘flavor’ and ‘distinct quality’ that all institutions—including, of course, marriage—enjoy by virtue of having both sexes in them.” Id. at 992. She also notes that the earlier Ballard jury selection case cited by Justice Ginsburg included language to the effect that “‘The exclusion of one [sex] may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.’” Id. at 984 n.214 (quoting Ballard v. United States, 329 U.S. 187, 194 (1946)). This gets to the heart of the cause for targeted celebration most relevant to the marriage definition context: the community of one man and one woman is more representative of the larger society than a community consisting only of members of one sex or limited to even smaller demographic sectors such as only gays or lesbians. It is precisely this representative capacity, connecting the integrative commitment
The content of the differences between males and females or between opposite-sex and single-sex communities need not be specified at this stage of the analysis. Nor does the inclusion of both sexes through a definitional requirement indicate or mandate any particular role to be played or power arrangement to be accepted by either sex. As long as federal jurisprudence receives as a given that a community consisting of both sexes is different from a community lacking either sex, and that the differences, whatever they may be, are inherent and worthy of celebration, then the only thing that need be shown is that it is reasonable for the state to take that given fact of inherent difference into account when deciding which relationships merit public status.

At least three state interests present themselves. First, the state could assert that there is a unique political and symbolic value to upholding a community that exclusively represents the entire human race because it includes representatives from each of humanity’s two most fundamental sectors, one sector consisting of persons who are male and the other consisting of those persons who are female. Second, the state could posit that due to the basic differences between the sexes there is a uniquely compelling interest—what might be called its “E pluribus Unum” interest—in promoting the union between a man and a woman as the most fundamental means of bridging social differences. Third, the state could argue that it is vital to recognize that legal doctrines alone cannot resolve the issue of whether, or exhaust the possibilities of how, the two classes are different. Even when the law treats men and women as identical in any particular context, publicly recognizing the most basic human community precisely as the primordial source of human differentiation expresses the state’s respect for the nearly universal societal

between the sexes to the political community at large, and not differentness, per se, that provides the “flavor” and “distinct quality” commending the opposite-sex union for public recognition.
conviction that men and women are different, and are different in ways that the law cannot or need not comprehend.

Characterizing the state’s interests in this manner reveals the connection between the classification employed—favoring opposite-sex relationships—and the state’s ability to meet any of its asserted objectives. Removing any institutional reference to the marital union between man and woman breaks the connection and would thwart the state from promoting the connection between the unity-building characteristics of the opposite-sex relationship and social unity in general.

a. The State’s Interest in Preserving Marriage’s Political and Symbolic Value as the “First Society” Because It Includes Both Sexes.

The union of man and woman has been described as the “first society,” and this recognizes that the community that exists in the relationship between one man and one woman reflects in miniature the totality of the larger community since in both settings men and women constitute the two most fundamental sectors of persons. When there is a man and a woman involved in the marital relationship, one can see in the smaller setting the possibilities and challenges that arise when considering male-female interactions in the larger societal setting. The navigation that is required and lessons learned within the single relationship with respect to maneuvering through the dynamics of sexual difference can be conveyed through various media, including philosophical reflection, political statements, and general opinion, and thereby made

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applicable to the larger setting. For this reason, “the marriage relation,” understood as the union of one man and one woman, is “an institution more basic in our civilization than any other.”

This “resemblance” between the marital opposite-sex relationship and society at large owes its existence to the fact that the first human society recapitulates the larger human society and vice versa, a linkage due only to the common element that both settings reflect a social and political totality because they both involve men and women. Thus the “first society” carries with it great public potential for conveying political and symbolic meaning to the society at large precisely because it involves members of both sexes. Publicly affirming as marriage only the commitment between a man and a woman upholds the importance of maintaining community between the two most fundamentally different sectors of society.

The state thus could argue that it has an interest in retaining the definitional reference to both sexes in order to preserve the institution’s capacity to serve as the most vitally relevant social model for bridging differences. Requiring marriage to be redefined as the union of persons regardless of their sex will directly interfere with this interest. The redefined marital institution will lose its connection to the totality of the human community once the institutional

205 As noted by John Adams, “the foundations of national Morality must be laid in private families. . . . How is it possible that Children can have any just sense of the sacred Obligations of Morality or Religion if, from their earliest Infancy, they learn that their Mothers live in habitual infidelity to their fathers, and their fathers in as constant Infidelity to their Mothers.” Entry of June 2, 1778, in 4 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 123 (Lyman H. Butterfield ed. 1962), quoted in NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 21 (2000). See also Lynn D. Wardle, The Bonds of Matrimony and the Bonds of Constitutional Democracy, 32 HOFSTRA L. REV. 349 (2003) (discussing historical and contemporary views about the linkage between the marital and political institutions).

206 If it is correct that there are inherent and non-fungible differences between men and woman, and if marriage is redefined in such a way as to render the institution indifferent to such differences, then society at large will be left without any public institution, manifesting itself at the most basic level—in the home—that is designed to take into account the social significance of such differences.
reference to man and woman is erased.\footnote{207} Similarly, the institution’s new meaning will convey the view that no differences relevant to society exist between men and women; therefore the marital union between man and woman necessarily will be regarded as offering no special meaning, value or lessons to the larger society, as if it really is not true that sexual difference provides cause for celebration.


The words “E pluribus Unum,” translated as “Out of many, one,” are emblazoned on the national seal of the United States of America.\footnote{208} According to W.C. Harris, in discussing its impact on early American writers, the motto is:

\begin{quote}
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a phrase that, despite its not being in English, summed up what the United States was all about: America was a composite entity, a whole made up originally of thirteen colonies and now of fifty states. That simple phrase was the essence of the federal project, the paradox of how many things could become one and yet still be different things, how my home state of Tennessee could belong to a Union and my state congressman to a national Congress. . . .

E pluribus unum represents the problem of the one and the many as a central problem of American social and literary formation. Meaning literally “from many, one,” this Latin phrase implies, as an official motto of the United States, the creation of an integrated whole from disparate, independent elements. . . .

Although writers like Poe, Whitman, Melville, and James may differ in where they situate value (in unity or variety) and may offer very different solutions to the one-and-the-many problem, what each confronts is the inexorableness of the logical contradiction embodied both in e pluribus unum and in the founding documents. [With respect to slavery, i]n Congress, calls were raised for federal regulation on the one hand and popular sovereignty on the other, delineating the as yet unreconciled tension at the heart of American social formation—the tension of federal prerogative and states’ rights, between the good of the one and the interests of the many. Since these authors [Poe, Whitman, Melville, James, etc.] are involved also in the theorization of totalized states of affairs (the construction of cosmological and epistemological as well as social wholes), they come to view the American attempt to construct unity upon the basis of a difference-requirement as a specific instance of a more general and fundamental
contradiction between an epistemological imperative to unity and the
representational inevitability of differentiation.\textsuperscript{209}

The state reasonably could seek to further its interest in promoting greater social
cohesiveness, to encourage the formation of “unity upon the basis of a difference-
requirement,”\textsuperscript{210} by publicly affirming as the epitome of “E pluribus Unum” the most basic
relationship in which unity is sought between representatives of the two most fundamentally
different sectors of humanity. Relationships that do not involve this elemental sex-based
difference stand outside the “E pluribus Unum” scope or are otherwise differently situated with
respect to the comparative depth and reach of the differences at stake.\textsuperscript{211} The state may assume
that while all individuals are equal in dignity, the relationship between the sexes involves a
degree of difference and requires a level of work to address the difference not found in same-sex
relationships. In other words, in pursuing its interest in achieving “E pluribus Unum” generally,
the state may reasonably regard as exceptional the unity-building character of the opposite-sex
union, along with the accompanying difficulties of bridging sexual difference, not on grounds of
personal dignity, but by virtue of the reality of the sexual divide.

Historian Nancy Cott notes how in our nation’s history, society has noted the unique
sociological capacities of the union between man and woman with respect to bridging
differences:

\textsuperscript{209} WILLIAM CONLEY HARRIS, E PLURIBUS UNUM: NINETEENTH-CENTURY AMERICAN LITERATURE AND THE
CONSTITUTIONAL PARADOX 1-2, 3 (2005).
\textsuperscript{210} Id. at 3.
\textsuperscript{211} Carlos Ball asserts that “[d]ifferences based on sexual organs and gender attributes pale in comparison to the
differences in interests, sensibilities, motivations, and aspirations among human beings.” CARLOS A. BALL, THE
MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY 123-24 (2003). But Christopher Roberts
observes that “[t]here are many types of human relationships, many types of encounters between different human
subjectivities, but there is always this one. Sexual difference is the most primordial of the distinctions between
different modes of being human and it is the only distinction that implicates everyone.” CHRISTOPHER C. ROBERTS,
CREATION & COVENANT: THE SIGNIFICANCE OF SEXUAL DIFFERENCE IN THE MORAL THEOLOGY OF MARRIAGE
From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, . . . Political and legal authorities endorsed and aimed to perpetuate a *particular* marriage model: lifelong, faithful monogamy, formed by the mutual consent of a man and a woman, . . . Public preservation of marriage on this model has had tremendous consequences for men’s and women’s citizenship as well as for their private lives. Men and women take up the public roles of husbands and wives along with the private joys and duties. These roles have been powerful, historically, in shaping both male and female citizens’ entitlements and obligations. Molding individuals’ self-understanding, opportunities, and constraints, marriage uniquely and powerfully influences the way differences between the sexes are conveyed and symbolized. So far as it is a public institution, it is the vehicle through which the apparatus of state can shape the gender order. . . . Turning men and women into husbands and wives, marriage has designated the ways both sexes act in the world and the reciprocal relation between them. It has done so probably more emphatically than any other single institution or social force. The unmarried as well as the married bear the ideological, ethical, and practical impress of the marital institution, which is difficult or impossible to escape.\(^{212}\)

\(^{212}\) COTT, *supra* note 205, at 2-3. Cott notes that the marriage model initially incorporated into our nation’s public policy bore “the impress of the Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, his wife the dependent partner.” *Id.* at 3. This particular arrangement with its associated role expectations is not determined by the presence of both sexes but is rather one way that society has worked out relations between the sexes. See *infra* note 226.
Several distinct features of the public “E pluribus Unum” interest in integration amidst differences recommend its constitutional recognition as a rational basis for limiting marriage to opposite-sex relationships. The goal of creating unity out of difference without abolishing differences has roots in the American founding and existing political structure. It is conceived as an entirely secular interest, depending on no religious or theological premises. It can explain why all opposite-sex couples stand in a different relation to the state’s asserted objectives from that presented by other personal communities not involving both sexes, since no line other than sexual difference—and irrespective of, for example, age-related procreative incapacity or whether the couples are parents—marks the perimeter of the state’s classification. Thus there is no under-or over-inclusion involved between the ends at stake and dividing line chosen.

213 According to an exhaustive historical inquiry into the origin of the E pluribus Unum motto, its provenance can be traced backward from Benjamin Franklin who served on the congressional committee charged with recommending a national seal, to a popular English publication of which Franklin was familiar and which used the phrase as part of its cover page heading to represent the publication’s collection of articles and stories from many sources, to the publication’s original publisher’s familiarity with the Roman poet Horace, and ultimately to a loose translation of a phrase found in a secular work of Horace. Monroe E. Deutsch, E Pluribus Unum, 18 THE CLASSICAL J. 387 (1923). Deutsch considered and then dismissed the possibility that theological sources played a role in the creation of the motto. Id. at 391 (noting one theory that posited the source as being from the writings of Saint Augustine, “but we have not the slightest evidence that any one of the four [from whom the suggestion to use the phrase in the national seal most likely came, referring to Benjamin Franklin, John Adams, Thomas Jefferson, and the official artist Du Simitiere] had the phrase [from Augustine] in mind at that time or, indeed, at any other”). Religious reflection mirrors the secular, political idea of E pluribus Unum when theologians refer to the biblical idea of the man and the woman becoming “two in one flesh” precisely because the differences between and complementarity of the sexes capacitate personal and sacramental unity. See, e.g., Manhattan Declaration: A Call of Christian Conscience 6 (Nov. 20, 2009) (joint statement by representatives of different Christian denominations avowing, among other things, their belief that “marriage is made possible by the sexual complementarity of man and woman”), available at http://manhattandeclaration.org/read.aspx (last visited Aug. 13, 2010).

214 Defining the class only according to the procreative nature of the opposite-sex relationship may miss the deeper ontological significance of the sexes, as would defining the relationship only as an intimate union, for it is the entire reality of man and woman, not just procreation or relational unity with each considered separately or exclusively, which in this author’s opinion provides the source of the classification’s substance. Rather than saying that the union of man and woman is eligible for marriage because the man and woman are uniquely capable of engaging in the type of sexual acts that, given the right conditions, could result in procreation, which opens itself to intense debate and confusion with respect to any situation involving octogenarians, for example, this author finds it easier and more understandable to point to the very presence of the man and woman who, because their sexual differences transcend their physical capacities, are capable of bridging the most fundamental human divide even past their reproductive years. This author discovered the potential for confusion during a conversation with a close acquaintance who asked the author why he opposed the legalization of same-sex marriage. After the author explained that only the union of man and woman brought together the two halves of the human community, the acquaintance replied that she thought the author was going to refer only to the raising of children as the essence of
The removal of the opposite-sex requirement directly threatens the state’s ability to pursue its E pluribus Unum interest, and the detrimental impact is immediately apparent, requiring no evidentiary substantiation. That is, if the state cannot rely upon sexual difference to define the class it seeks to publicly affirm, it cannot promote opposite-sex relationships as the epitome of “E pluribus Unum” even though only these relationships involve the most elemental human difference. Short of using sexual difference as the dividing line, there is no other “least restrictive” means available to accomplish the state’s interest in promoting what it can reasonably regard as the most fundamental unity-building mechanism there is in society.215

If the effort “to form a more perfect union” serves as one of the preeminent functions of our national polity,216 then bridging whatever basic social differences that exist between the sexes lies at the heart of government’s concern. In order for “We the People” of this nation to create a more perfect union on the macro scale, it seems vital to the task that we have the ability to form more perfect unions on the micro scale. This brings marriage as a political phenomenon, if considered as a micro society of two fundamentally diverse persons, into focus. A vibrant, healthy union between the opposite sexes furthers the state’s interest in political unity more than any other relationship because only this union, joining not only one to one but two halves of the human community, reaches across the greatest human difference there is.

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215 Obliging the state to expand its public affirmation to other relationships on the basis of intimacy, romantic attraction, privacy or other criteria eliminates difference as a constitutionally relevant consideration and thus prevents the state from preferring in any way unions bridging the most fundamental human difference. As a result, the marital relationship will no longer bear any necessary connection to encouraging the bridging of differences generally.

216 U.S. CONST. pmbl.
No other communal difference is as deep or as extensive as sexual difference. Yet no stronger bond can exist than that which binds the greatest difference. The deeper the divide, the more difficult it is to bridge it. Once the divide is bridged, however, that bond will be very strong. Thus, while it is important for men to get along with other men in society, and women to get along with other women, nothing is more conducive to lasting social unity than men and women learning to get along with each other. When the two halves of the human community unite in the home, this helps to perfect unity everywhere. When that domestic unit breaks down, all of society suffers.

The unity-building value of opposite-sex relationships flows to the larger society even when the married couples do not or cannot have children. That's why there are no upper age limits on marriage licenses, and no legal requirement to sign papers documenting the desire and ability to have children. When a man and a woman commit themselves to each other, no matter their age or fertility, the benefits to society begin to flow immediately from the commitment to bridge the sexual divide. When children are involved, they become society's first witnesses, students and beneficiaries of the marital love between opposites.217

Characterizing as an “E pluribus Unum” interest the state’s interest in defining marriage to be the union of opposite sexes provides substance and context to those rulings by the United States Supreme Court that have recognized the social, civic and political importance of

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217 This premise, holding that all marital opposite-sex relationships warrant the state’s special regard and concern regardless of whether children are involved, modifies the view expressed in the congressional report accompanying the federal Defense of Marriage Act, opining that “Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship.” H.R. REP. NO. 104-664, at 14, reprinted in 1996 U.S.C.C.A.N. 2905, 2918. The public significance of marriage, and hence the root of the state’s interest in retaining marriage’s definition as the union of opposite sexes, arises from the decision to enter a relationship not just by any two citizens but by two citizens that happen to represent both halves of the human race.
Marriage means more than just the procreative replenishing of society’s membership, as important as that may be. It is the place where the first society, bridging the most basic human divide, is created and renewed from generation to generation. As Margaret Mead observed, “[t]he differences between the two sexes is one of the most important conditions upon which we have built the many varieties of human culture that give human beings dignity and stature.” The state may reasonably take this historical, anthropological and sociological experience into account when it considers which, if any, human relationships to publicly affirm.

From this perspective, the argument is that same-sex couples cannot exemplify the difficulties and benefits of creating unity out of difference in the same manner or to the same degree as opposite-sex couples can. This casts a new light on the political ramifications of recognizing same-sex marriage. Affirming as marriage those relationships that are based on an inability to unite with the opposite sex relativizes, and diminishes the regard for, the social importance of bridging the most fundamental difference there is.

Redefining marriage by eliminating any reference to the sexual divide locks into place a new political principle, which could be stated as follows: it is of no special public consequence

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218 See, e.g., Reynolds v. United States, 98 U.S. 145, 165-66 (1878) (describing marriage between one man and one woman as “this most important feature of social life” because “[u]pon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal”); Murphy v. Ramses, 114 U.S. 15, 45 (1885) (asserting that “no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony”); Maynard v. Hill, 125 U.S. 190, 205, 211-12 (1888) (referring to marriage as “creating the most important relation in life[,] having more to do with the morals and civilization of a people than any other institution,” as “an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress,” as “the true basis of human progress,” and as “the most elemental and useful of all the social relations”) (citation omitted). The E pluribus Unum interest encompasses but does not depend solely upon the connection between procreation and the replenishment of society and education of future generations. Regardless of whether the population is shrinking or burgeoning, opposite-sex couples exemplify the difficulties and benefits of creating unity out of difference.

to society whether men and women, in the most intimate of settings, can learn to coexist with each other. Sexual integration will have to be regarded as not bearing any special connection to social unity generally. The law thus will teach citizens to celebrate opposite-sex unions solely because they are the product of attraction and desire, and not because they create communities with distinctive, socially-integrating qualities. In the eyes of the law as redrawn, it will be unjustifiable for the state to extend any greater reward for bridging sexual differences or to afford any greater assistance when those bridges break down.

In sum, giving preferential legal treatment to marital opposite-sex unions will have to be viewed as a product of animus, rather than the fruit of a common-sense appreciation for the special unity-building aspects and peculiar difficulties associated with bridging sexual difference. Hence, forcing the state to redefine marriage thwarts its efforts to promote, and to bolster, the unity-building potential found in opposite-sex unions.

c. The State’s Interest in Respecting the Universal Societal Conviction that Men and Women are Different, Especially in Ways that Fall Outside the Law’s Comprehension or Concern.

Linda McClain argues that basing the defense of defining marriage as an opposite-sex union on an assertion that men and women are different ignores “the transformation of marriage brought about by family law reforms and contemporary Equal Protection jurisprudence” which “bars government from legislating about the roles of husbands and wives based on archaic stereotypes and fixed notions about their capacities.” 220 Implicit in this argument is a belief that the legal professionals responsible for family law reforms and for conducting the “science” of law as it applies to equal protection concerns have cornered the market on exhausting human

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knowledge and achieving wisdom. If legal professionals such as judges cannot detect any differences they believe to be relevant to the law or to society, or they declare the idea of there being significant differences to be disturbingly old-fashioned, then the rest of the world must simply acquiesce to this enlightened perspective. Perhaps the legal academy is on to something even more fundamental: the very idea of sexual identity must be erased. In short, because lawyers have deemed it necessary to change laws that once depended on older understandings of sex-based roles, society needs to drop sexual difference from the marital definition because some lawyers are convinced that it is an outdated, socially irrelevant artifact having no basis in reality, and thus no longer provides cause for special celebration.

Margaret Mead offers this countering cross-cultural assessment:

In every known society, mankind has elaborated the biological division of labour into forms often very remotely related to the original biological differences that provided the original clues. Upon the contrast in bodily form and function, men have built analogies between sun and moon, night and day, goodness and evil, strength and tenderness, steadfastness and fickleness, endurance and vulnerability. Sometimes one quality has been assigned to one sex, sometimes to the other. . . . Whether we deal with small matters or with large, with the frivolities of ornament and cosmetics or the sanctities of man’s place in the universe, we find this great variety

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221 See, e.g., Stevi Jackson, Gender and Heterosexuality: A Materialist Feminist Analysis, in (HETERO)SEXUAL POLITICS 11, 14-15 (Mary Maynard & June Purvis eds. 1995) (summarizing strain of feminist thought controversial even among feminists, that envisages as a political goal “not the raising of women’s status, nor equality between women and men, but the abolition of sex differences themselves. . . . To be biologically male or female would no longer define our social or sexual identities. This does not mean women becoming like men ‘for at the same time as we destroy the idea of the generic ‘Woman’, we also destroy the idea of ‘Man’. . . . The difference denoted by these terms derives from hierarchy, so that the destruction of sexual hierarchy requires the destruction of difference’

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of ways, often flatly contradictory one to the other, in which the roles of
the two sexes have been patterned.

But we always find the patterning. We know of no culture that has said,
articulately, that there is no difference between men and women except in
the way they contribute to the creation of the next generation; that
otherwise in all respects they are simply human beings with varying gifts,
o no one of which can be exclusively assigned to either sex. We find no
culture in which it has been thought that all identified traits—stupidity and
brilliance, beauty and ugliness, friendliness and hostility, initiative and
responsiveness, courage and patience and industry—are merely human
traits. However differently the traits have been assigned, some to one sex,
some to the other, and some to both, however arbitrary the assignment
must be seen to be . . . , it has always been there in every society of which
we have any knowledge. 222

The skein of recent ballot contests defining marriage as the union of one man and one
woman may simply reflect the influence of an ongoing human awareness of all sorts of
meaningful differences tied to sexual difference that cannot always be comprehended or

222 Mead, supra note 219, at 6-7. “Sexual difference, as a natural biological given, furnishes a general, differential
structure that all cultures will translate, each in its own way. Nature creates difference, and the reading of this
difference produces the universal, symbolic alphabet of the masculine/feminine couple with which each culture
‘makes sentences.’ In other words, each society invents cultural constructions and social organizations that combine
the masculine and feminine in different ways. I can only echo [French anthropologist Françoise] Héritier on this
point: beginning from its biological ‘anchoring,’ the masculine/feminine difference universally constitutes a model
that structures societies, although the values and contents given to this difference vary according to the culture.”
Sylviane Agacinski, Parity of the Sexes 8 (Lisa Walsh trans. 2001).
appreciated in the legal realm.\textsuperscript{223} Despite changes in the law regarding specific instances of sex-based discrimination determined to be outdated, perhaps the public believes that the marital institution should continue to provide the place-holder for the widely accepted proposition that men and women are different in important ways even if we do not always get it right about what that difference means or should entail.\textsuperscript{224}

At the root of the foregoing analysis is the distinction between a bias that fails to see any \textit{similarities} between men and women (such as to deny the existence of equal personal dignity) and a bias that fails to see any \textit{differences} (such as to assert that the sexes are identical in every relevant respect).\textsuperscript{225} The state could reasonably conclude that men and women are different in a

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\textsuperscript{223} Public opinion may also reflect the concern that 1) any assertion that men and women are identical is itself a stereotype, is not based in reality, and overlooks subtle but important differences between the sexes, and that 2) interaction between the sexes should be promoted as a means for correcting this misunderstanding. For example, in the context of the debate over single-sex education, and pursuant to a desire for avoiding a form of education that stereotypes at the other end of the scale, holding that men and women must assume rigidly defined, sex-based roles due to their differences, the American Civil Liberties has argued that “coeducation may better prepare students for adult interpersonal relationships and interactions in the work world, including how to avoid falling into gender-stereotyped roles. Women and men live and work together in a coed world, and schools are reflections of and preparation for the larger society. The two sexes have to deal with each other on a daily basis; single-sex education distorts reality by not preparing students to interact and compete with the opposite sex and by depriving students of the richness that comes from a diverse student body.” Laura W. Murphy et al., Washington, D.C. Legislative Office, American Civil Liberties Union, Letter to Kenneth L. Marcus, United States Department of Education on Single-Sex Proposed Regulations Comments (Apr. 23, 2004), \textit{available at} http://www.aclu.org/womens-rights/aclu-letter-department-education-single-sex-proposed-regulations-comments/ (last visited Aug. 13, 2010). The same criticism leveled against single-sex education might be leveled against the compelled demotion of the opposite-sex union done in order to force the law to ignore the possibility of significant sexual difference in every facet of life. This leveling distorts reality (by denying sexual difference altogether) and deprives society of the richness that comes from upholding diversity in the most fundamental of human relationships.
\textsuperscript{224} From this perspective it is not irrational for voters in California, for example, to insist that the legal definition of marriage remain limited to the opposite-sex union even though other laws are on the books requiring same-sex unions to be granted all of the legal rights, except the title, already afforded to married couples. How the unmarried are to be treated generally under the law with respect to public benefits is a separate question that can be decided without forcing the state to abandon the view that only the union of man and woman deserves to enjoy the deep social regard accompanying the word marriage because this union alone bridges the most fundamental human divide.
\textsuperscript{225} Compare, for example, the statement made in Bradwell v. Illinois, 83 U.S. 130, 132 (1872), opining “[t]hat God designed the sexes to occupy the different spheres of action, and that it belonged to men to make, apply, and execute the law, was regarded as an almost axiomatic truth,” with another statement made in Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 965 n. 28 (Mass. 2003), describing the view holding that “the mother and father setting for child-rearing” is “optimal” as a perspective resting on “stereotypical premises” because it purportedly “hews perilously close to the argument . . . that men and women are so innately and fundamentally different that their respective ‘proper spheres’ can be rigidly and universally delineated.” Both statements, one rejecting the possibility
myriad of ways still found to be socially significant and that a relationship bridging the
difference is cause for celebration of a particularly noteworthy social magnitude. The definition
of marriage as the union of the two different sexes does not dictate roles or expectations for those
within the marital relationship. All it requires is the presence of both sexes. Thus no conflict
exists between defining marriage as an opposite-sex institution and the efforts by society and the
law to continue to readjust their sights on what constitutes appropriate treatment by, on behalf of,
and between the sexes.\textsuperscript{226}

d. Summary of Marriage’s “E pluribus Unum” Significance.

Elevating opposite-sex relationships by making them eligible for recognized marital
status, precisely because they provide the opportunity for bridging a fundamental human
difference, furthers the state’s E pluribus Unum interest in a manner and to a degree that
affirming same-sex relationships, lacking the different-sex element, cannot. This comparative
distinction is due not to any public assessment of individual dignity, worth or personal merit

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\textsuperscript{226} Supporters of same-sex marriage argue that including both sexes in marriage’s institutional definition itself somehow necessarily imports an implicit, static, and outmoded structuring of and ordering among the sexes. See McClain, supra note 220, at 334-36; Susan Freligh Appleton, Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate, 16 STAN. L. & POL’Y REV. 98, 131-32 (2005); Deborah A. Widiss et al., Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence, 30 HARV. J. LAW & GENDER 461, 487-505 (2007). However, the rationality of defining marriage as only the union of man and woman neither stands nor falls on some pre-determined vision of social and personal complementarity, as different understandings of what sex-based complementarity means and requires have been proposed throughout history. See PRUDENCE ALLEN, THE CONCEPT OF WOMAN: THE ARISTOTELIAN REVOLUTION 750 B.C.-1250 A.D. (1997); PRUDENCE ALLEN, THE CONCEPT OF WOMAN: THE EARLY HUMANIST REFORMATION (1250-1500) (2002); Prudence Allen, Man-Women Complementarity: The Catholic Inspiration, LOGOS, Summer 2006, at 87, 87-88 (summarizing and updating the author’s historical research on complementarity, and containing a chart (table 1) identifying the different philosophical understandings of personal ordering between the sexes, including gender unity or unisex, traditional gender polarity, reverse gender polarity, fractional gender complementarity, integral gender complementarity, and gender neutrality). Even if one “admit[s] that until now sexual difference, both always and everywhere, has taken on the meaning of a hierarchy” where “the masculine is always said to be superior to the feminine,” AGACINSKI, supra note 222, it remains true that “each society, in every age, gives its particular version of the universal difference of the sexes” where “the only constant is the principle of differentiation itself. As for the hierarchy, it has been so destabilized over the past century that it cannot be held as an immutable law, and difference, of course, is not necessarily hierarchy.” \textit{Id} at 13.
since the only requirement for the public affirmation of the relationship in question is that both sexes be present. The policy preference stands on the claim that the union of opposite sexes possesses an overarching public value, the significance of which is supplied by the domestic opportunity for bridging the most fundamental human divide that only the opposite-sex relationship provides.

What is it about the difference between the sexes that makes the opportunity for building a bridge between them so important? The state could reasonably conclude that no other difference besides sexual difference is as challenging to bridge or as beneficial to society if successfully bridged. Because men and women constitute the two most basic and thus most basically different sectors of society, improving domestic relations between representatives of each sector, simply from a mathematical standpoint alone given the enormity of the class of opposite-sex unions, offers the most far-reaching prospect for greater social tranquility, broader in scope and reach than any other rapprochement between any other less pervasive social division. Redefining marriage to make the institution indifferent to the absence in the home of one or the other sex—and giving equal affirmation to relationships where sexual difference is not a factor—prevents the marital institution from signifying the importance of bridging sexual difference specifically. Thus the institution loses its capacity to reinforce the fundamental social value of E pluribus Unum generally.

As touched on already, by not referring to procreative potential or parenthood, but to the integrative significance of sexual difference, the foregoing argument responds to what is probably the stiffest popular objection to the status quo. Objectors contend that, by allowing opposite-sex couples who are unable to procreate and who are not parents to qualify for marital

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See supra note 214 and accompanying text.
eligibility, the status quo unjustly discriminates against same-sex couples. If the prevailing definition of marriage is defended solely as a means for promoting procreative potential or parenthood, then the supposed looseness of the fit between the asserted ends and the perimeters of the eligible class provides objectors with an influential debating point. However, when the state interest is characterized in terms of recognizing the connection between sexual difference and E pluribus Unum, then the fit between purpose and classification is perfect. All opposite-sex couples are similarly situated with respect to both the asserted end of E pluribus Unum and the corresponding dividing line, regardless of whether these eligible couples are still able to bear children or whether they have children already. Defining the circle in any other way eliminates the E pluribus Unum connection.

Framing the state’s classificatory interest in this manner does not, of course, end the marriage definition debate. It does, however, change the field of battle. The constitutional dispute would no longer focus on whether the play between the dividing line of marital eligibility and an asserted purpose for drawing the line is so loose as to suggest arbitrariness and unfairness. Rather, a deeper question comes into focus: is the “cause for celebration” premise still valid, holding that a community consisting of both sexes adds something constitutionally cognizable and socially significant that is not found in communities consisting of only one or the other sex? If it is concluded that this premise is reasonable, then because it is secular in nature it offers a suitable basis for allowing the public’s resistance to redefining the marital institution to continue to influence the shape of civil marriage. As the next section will argue, a legal definition of

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228 Focusing on the broader characteristic of sexual difference rather than just on procreation or parenting reveals an underlying order between the entire set of all opposite-sex couples and the two subsets consisting of such couples in their child-bearing years and such couples with children. Procreation and parenting become critical concerns with respect to these two subsets because sexual difference makes procreation possible and affords children with the opportunity to learn how to handle fundamental differences by witnessing the interactions of their opposite-sex parents.
marriage that flows from this common-sense premise should not be rejected by any process other than through democratic means. Or to state it differently, absent democratic approval, the recognition of same-sex marriage should not be enforced as if it were a civil right.

B. Civil Rights in a Democracy.

Those who support same-sex marriage employ a powerful refrain: marriage is a civil right and refusing to recognize same-sex marriage is a denial of civil rights. A variation on this theme, used in objecting to marriage-defining referenda, contends that civil rights or their content should not be put to a vote. In his opening statement at the trial in Perry v.

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230 See, e.g., Chad Griffin, President, American Foundation for Equal Rights, in Margaret Talbot, A Risky Proposal: Is It Too Soon to Petition the Supreme Court on Gay Marriage?, THE NEW YORKER, Jan. 18, 2010, available at http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot (last visited Aug. 13, 2010) (“One’s fundamental constitutional rights should never be subject to a majority vote”); News: Legislators Deliver Blow to Equal Marriage in Massachusetts, UUA.Org, Jan. 2, 2007, available at http://www.uua.org/news/newssubmissions/14015.shtml (last visited Aug. 13, 2010) (“Crowds of marriage equality supporters waved signs, banged on drums and chanted ‘Gay, straight, black, white, we don’t vote on civil rights.’”); Matt Foreman, Let the People Vote! Not, TheTaskForce.org, Jan. 5, 2007, available at http://www.thetaskforce.org/node/1923/print (last visited Aug. 13, 2010) (Foreman was the then-executive director of the National Gay and Lesbian Task Force) (“[P]utting the rights of the minority up for a popular vote is always wrong; indeed it’s immoral.”); Kathleen M. O’Connor, Civil Rights Need No Vote, BOSTON HERALD, Nov. 4, 2006, at 15 (O’Connor was the then-president of the Massachusetts Women’s Bar Association) (“Our constitutional system—with its independent judiciary—understands that the civil rights of minorities are likely determined by our courts and not by the changing winds of public opinion and prejudice.”); Wayne Besen, End the Popular Vote on Civil Rights, 365GAY.COM, Nov. 5, 2008, available at http://www.365gay.com/opinion/besen-end-the-popular-vote-on-civil-rights/ (last visited Aug. 13, 2010) (“No matter what happens [with ballot questions on marriage] in Florida, Arizona and in California with Proposition 8, the entire process is a travesty. What kind of nation lets a majority of citizens vote on the most basic rights of a minority? Perhaps, we should drive this point home in the next election cycle by sponsoring ballot initiatives that ban Mormon marriage or Evangelical marriage. We could air millions of dollars of ads discussing polygamy or snake handling in churches. I think these bullies would be shocked to learn
Schwarzenegger, plaintiffs’ attorney Ted Olson began with the words “This case is about marriage and equality. Plaintiffs [in same-sex relationships] are being denied both the right to marry and the right to equality under the law” by California’s voter-approved Proposition 8, defining marriage as the union of one man and one woman. The reference to “rights” is played like a trump card. Same-sex couples seek to enforce a prioritization of interests in their favor that outranks and sweeps away any official policy, no matter how popular or deeply rooted, that refuses to recognize their marital eligibility or status. Importantly, the claimants assert their rights as limits against democratic action.

Rights are dictatorial. They demand recognition and command obedience. The greater the popular resistance to the underlying claim, the more powerful civil rights status becomes in protecting that claim against interference. It is precisely when the political numbers are most heavily stacked against the effectuation of a personal desire that this desire’s status as a right proves most useful in securing its vindication. Thus the resort to “rights talk” by same-sex marriage advocates makes practical sense because the general public has proved quite resistant to affirming same-sex relationships as legal marriage. The advocates trade on the dictatorial nature of rights in their efforts to 1) convince judges to override public opinion by overturning the


232 This term was coined in MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).
offending policies, as occurred in the Varnum case, and 2) persuade legislators to deny voters the opportunity to reaffirm or restore these policies at the ballot. 233

The subject of civil rights raises a cluster of interesting questions. How do civil rights come to be in democracy and what gives them their dictatorial power? Does the general, democratically endorsed guarantee of equality override the specific, democratically endorsed marriage limitations? What is to be done when there is a conflict in viewpoints issued from direct democracy and representative democracy over what is to be treated as a civil right? Why should civil rights be rooted in democracy, and ultimately, direct democracy? All of these questions feed into the main issue: what makes marriage eligibility a civil right for same-sex couples and who in a democracy should determine this?

The Iowa Supreme Court’s opinion in Varnum v. Brien stands for the idea that same-sex marriage emerged in Iowa as an enforceable civil right precisely at the moment that a few plaintiffs filed their lawsuit in the case. This event supposedly indicated to the world that somehow a mystical shift has occurred in humanity’s understanding of equality. 234 Taking in turn each of the above questions, this article submits that in a democracy civil rights are not born through or shaped by such magical means. Rather, if something is to be protected from democratic encroachment as a civil right, it is only through democracy that such protection arises. 235

233 For example, the Massachusetts legislature, the General Court, denied the people the opportunity to vote on the definition of marriage by defeating in 2007 a proposed ballot measure that would have defined marriage as the union of man and woman and, by amending the state constitution, reversed the decision in Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003). See Phillips, Legislators Vote to Defeat Same-Sex Marriage Ban, supra note *.

234 See supra notes 55-59 and accompanying text.

235 Because the topic of direct versus representative democracy raises a host of important sub-issues, for space considerations it will only be asserted here without resorting to the full extent of substantiating arguments that
1. How Civil Rights and Their Power to Dictate are Born.

A personal claim acquires the status of an enforceable civil right within our nation’s political system through the backing of a democratic consensus. This consensus reflects an affirmative social resolution of a debate over the public significance of the claim at issue. Civil rights are born through social means and their legal enforcement functions as a societal statement about the public importance of the private claim at issue. A right’s power to dictate in a democracy therefore arises when, through democracy itself, the people agree to be dictated to through the giving of their own consent on a matter deemed by the people to be so important as to demand their obedience. The sort of broad political consensus required to achieve this compact takes time to develop, and the procedures to be utilized are cumbersome. This reflects the solemnity of the task and the enormity of the stakes, involving a choice by a free people to limit their own freedom for the sake of some good determined by the people to be higher in merit. In view of the political limits to be imposed on freedom, an individual conviction about what is a civil right should not assume the power to dictate if that conviction is not accepted democratically.236

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236 “letting the people vote” via direct democracy, i.e., through an initiative or referendum, offers the best means of finally resolving whether to alter marriage’s civic definition and extend civil rights protection to claims of access brought by same-sex couples. Placing public policy questions on the ballot “give[s] citizens a voice” and “demonstrate[s] devotion to democracy, not to bias, discrimination, or prejudice.” James v. Valtierra, 402 U.S. 137, 141 (1971). “Under our constitutional assumptions, all power derives from the people,” and “the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.” City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672 (1976). The referendum and initiative process provides “a means for direct political participation, allowing the people the final decision” (426 U.S. at 673), and thus represents “a basic instrument of democratic government[.]” Id. at 679. See also Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994) (positing that majoritarian sovereignty lies at the heart of our system of government, and that constitutional changes, and even the repeal of, and creation of an entirely new constitutional system, legitimately can be accomplished by plebiscite).

236 Acquiring civil rights status does not transform individual claims into human rights and democracy does not guarantee against error in attribution, whereby true human rights might actually be denied or otherwise thwarted through the creation of new civil rights. However, such elevation in status does make it practically more difficult for those who disagree with a personal claim’s newly bestowed civic regard to convince others that an error has resulted.
As one commentator wrote just a few years after the ratification debate on the proposed Fourteenth Amendment to the United States Constitution:

The whole body of rights can no more come forth complete in a single moment than can the nation itself. And the individual subjective conception can in no moment assume to be the law or the measure of this advance. It is manifested always in the development of the spirit of the organic people, and no single age can apprehend or attain a final and perfect embodiment of rights. . . .

There is a tendency . . . to forget that rights are and can be real, only as they are established in the civil and political organization. They are slowly, and only with toil and endeavor, enacted in laws, and moulded in institutions. It is only with care and steadiness and tenacity of purpose that those guarantees are forged which are the securance of freedom, and they are to be clinched and riveted to be strong for defense and against assault.237

There are different types or descriptions of rights—such as natural, human, fundamental, inherent, inalienable, substantive, positive, customary, personal, communal, procedural, and contractual.238 For the purposes of discussion here a “civil” right is one that the citizenry adopts through some civic process in order to direct civil authorities to protect it. “Civil” rights may or may not be rooted in or correspond to natural, human, fundamental, or inherent rights, which

may exist or emerge apart from government. But even rights regarded today as fundamental, such as the freedoms of religion, speech, assembly, and so forth, to be enforceable as “civil” rights in a democracy, had to be ratified initially through civil democratic means, the form by which our system of self-government operates. Such rights, or more properly their civil status, are voted into being as part of constitutional documents or amendments, or enshrined in legislation. Either the people directly at the ballot or the people’s elected representatives at the statehouse reach a consensus about what the law will protect as a civil right, and formalize this consensus in a new amendment or statute. Popular enactments are the official recordings, so to speak, of a majority’s backing for a particular rights claim.

Thus, for example, the people, acting through Congress and constitutional conventions in the states, had to approve our nation’s Bill of Rights and successive additions such as the Fourteenth Amendment before the rights declared therein became legally binding. The rule at work here is, of course, “the consent of the governed.” At the root of our system of democracy is the individual or representative vote, the mechanism by which citizens exercise or withhold their consent. To gain civil status, therefore, a claimed right must be consented to, that is voted on, by the people directly or through their elected representatives. A necessary link exists, therefore, between a right’s civil status and democracy’s approval.

Based on a careful historical and legal analysis of the creation of our current Constitution, Akhil Reed Amar affirms this connection between constitutional rights and majoritarian democracy, writing that “the U.S. Constitution is a far more majoritarian and populist document than we have generally thought; and We the People of the United States have a legal right to alter

\[239 \text{The Declaration of Independence para. 2 (U.S. 1776) (recognizing “That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”).}\]
our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum.”

If this reading of the record is correct, according to Reed Amar, then individual rights in our system are, and should be, the products of ultimately majoritarian processes. . . . Historically, many of the most important rights in the federal Bill of Rights and its state counterparts have been majoritarian rights of the people. Through majoritarian processes, We the People have also recognized rights of individuals and minorities, and extended the right to be part of We the Polity to formerly excluded elements of society like black men and women of all races.

Notwithstanding the few jurisdictions that have democratically recognized same-sex marriage by legislation, there is no generalized civil mandate in this country, born in

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240 Reed Amar, supra note 235, at 457. In his article Reed Amar explores the debate surrounding the 1798 implementation of the United States Constitution, wherein opponents claimed that its ratification would be illegal because it would alter the Articles of Confederation and state constitutional provisions through a process not authorized by these documents. He recounts the responding argument of the Federalists that the sovereign power of the people was not limited by whatever “ordinary” measures for constitutional change were spelled out in these documents, and uses this argument as a springboard for concluding that Article V of the present Constitution should not be read as setting forth an exclusive mechanism for constitutional amendment or repeal. Article V instead provides an ordinary, “government-driven” mechanism for change that supplements but does not replace the power and right of the people, acting by majority rule, to alter and even repeal the Constitution in part or in total by plebiscite. See, e.g., id. at 458-59 (“My proposition is that We the People of the United States—more specifically, a majority of voters—retain an unenumerated, constitutional right to alter our Government and revise our Constitution in a way not explicitly set out in Article V. Specifically, I believe that Congress would be obliged to call a convention to propose revisions if a majority of American voters so petition; and that an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate.”).

241 Id. at 503-04.

democracy, to extend marital eligibility to same-sex couples as a civil right. Nonetheless, some argue that no one should be allowed to vote on anyone else’s civil rights and therefore the duty to recognize same-sex marriage should be imposed upon the majority at the same time that all paths to democratic resolution of the issue are blocked.\textsuperscript{243} Yet those who oppose letting legislators or the people vote to ratify or to reject same-sex marriage claims oppose the very processes required in a democracy for bestowing on personal interests a civil status. It is not enough to shrink in horror at the thought of putting civil rights to a vote or seeing the majority determine the rights of the minority, when allowing the people or their representatives to vote is itself the only legitimate mechanism in a democracy by which personal claims can gain dictatorial power.

This civics lesson is understood even by same-sex marriage advocates who acknowledge the critical role that democracy plays in establishing civil status for individual rights claims. They caution that without democratic backing an otherwise imposed duty to recognize and accommodate same-sex marriage will not be secure.\textsuperscript{244} For example, a coalition of national organizations advocating for same-sex marriage has warned that

\begin{quote}
Neither court decisions nor legislatures can make effective, enduring change in a democratic republic as diverse as this one unless people either come to agree with the change or to accept that it is required by an important higher principle. That
\end{quote}

\textsuperscript{243} See supra note 230 and references listed therein.

\textsuperscript{244} See Warren Richey, \textit{For Gay Marriage Backers, Rulings Portend Long Road}, \textit{CHRISTIAN SCIENCE MONITOR}, July 28, 2006, available at http://www.csmonitor.com/2006/0728/p02s02-ussc.html (last visited Aug. 13, 2010) ("‘Whether you start this in a court or you start this in a legislature, ultimately to succeed we have to convince Americans that it is wrong to exclude same-sex couples.’") (quoting Matthew Coles, ACLU’s Lesbian Gay Bisexual Transgender Project); Mary L. Bonauto, \textit{Goodridge in Context}, 40 HARV. C.R.-C.L. L. REV. 1, 22 (2005) ("[A]s Rev. Dr. Martin Luther King, Jr. explained, no minority can succeed without the assistance of the majority.") (Bonauto, the lead attorney for the plaintiffs in the \textit{Goodridge} case, cited Martin Luther King’s “I Have a Dream” speech for this proposition); Jack M. Balkin, “What Brown Teaches Us About Constitutional Theory,” 90 VA. L. REV. 1537, 1554 (2004) (“In short, African Americans made progress in the 1960s because a majority of white Americans wanted them to.”).
was true with racial segregation, it was true with sex discrimination, and it will be true with discrimination against same-sex couples in marriage.\textsuperscript{245}

In the next section, the article considers whether, even though a specific democratic endorsement of same-sex marriage is lacking, a general, democratically endorsed guarantee of equality can serve as a substitute, thus providing the necessary democratic basis for recognizing a civil right to marital recognition as a cognate of the civil right to equality.


No one can dispute that the guarantee of equal protection has acquired democratic backing as a general matter, gaining the status of a civil right primarily through the enactment of the Fifth and Fourteenth Amendments to the United States Constitution. But using this general guarantee as a basis for implementing a particular mandate still avoids the necessary democratic input on determining what specific claims deserve civil rights protection. Assertions about what general guarantees require in specific circumstances, if such assertions lack a democratic pedigree and instead contradict democratically endorsed policies, cannot be anything other than substitutions for rather than reflections of the people’s sovereign will. Democracy remains a critical component in fashioning the specific shape of generally described civil rights such as the right to equal protection, and thus democracy should not be evaded.

Nelson Tebbe and Deborah Widiss propose that once the government decides to recognize and support marriage as a public status for any subset of applicants, it must make that

\textsuperscript{245} American Civil Liberties Union et al., \textit{Make Change, Not Lawsuits} 5 (May 2009), \textit{available at} http://www.aclu.org/files/pdfs/lgbt/make_change_20090527.pdf (last visited Aug. 13, 2010). Organizations joining the ACLU in issuing this joint advisory include Gays & Lesbians Advocates & Defenders (GLAD), Lambda Legal, National Center for Lesbian Rights, Equality Federation, Freedom to Marry, Gays & Lesbians Alliance Against Discrimination, Human Rights Campaign and the National Gay and Lesbian Task Force. \textit{Id. at} 1.
public status available evenhandedly for all potential applicants. 246 They describe the general civil right at stake as one guaranteeing “equal access” to any important institution that has acquired public status or to certain affirmatively-provided public services. 247 Their proposal “emphasizes that everyone presumptively has a right to marry once a state decides to offer civil marriages. This right of evenhanded access is not limited to a particular group.” 248 They argue that any selective refusal to allow entry for any particular class of persons must be presumed to be in violation of the civil right of equal access. 249 This presumption can only be overcome by burdening the state with the responsibility of demonstrating to some neutral party, such as the judiciary, that there is a “sufficiently strong” reason, whatever that phrase means, for denying access. 250 They also forthrightly recognize the far-reaching implications of their characterization of the generalized right supposedly at stake when they acknowledge that the presumption of having a right to equal access would extend to people who seek public affirmation of incestuous or polygamist relationships, 251 as well as to “people who wish to marry, for example, their cars.” 252

The proposal by Tebbe and Widiss is noteworthy because it goes to the heart of the approach taken by the Iowa Supreme Court 253 in Varnum v. Brien 254 and urged upon the federal courts by the plaintiffs 255 in Perry v. Schwarzenegger. 256 In their article, Tebbe and Widiss

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247 Id. at 1377.
248 Id. at 1382.
249 Id. at 1432, 1436.
250 Id. at 1436.
251 Id.
252 Id. at 1433 n.244.
253 See supra notes 75-80 and accompanying text (discussing how the Iowa Supreme Court begins its analysis by presuming that opposite-sex and same-sex couples are similarly situated with respect to qualifying for a public status).
254 763 N.W.2d 862 (Iowa 2009).
255 See supra note 231 and accompanying text.
capture the essence of the equal access legal theory and supply a sophisticated argument for preferring this approach over more traditional due process and equal protection doctrines.\textsuperscript{257} Their article helps one to understand the radical scope and import of the Iowa Supreme Court’s marriage ruling and the legal theory pursued by the plaintiffs challenging Proposition 8.

In light of the analysis of Tebbe and Widiss, if the equal-access approach as they conceive it is adopted by the federal courts, then civil marriage must be shorn of any historically accepted or democratically rooted content that limits its availability. Instead, the institution must be viewed abstractly as an intrinsically unlimited public status or affirmatively guaranteed public service, a public accommodation so to speak, that presumably must be open to all comers once it is offered to any comers. Any determination of who ultimately can be denied entry, based on a weighing of reasons for and against,\textsuperscript{258} becomes the responsibility of some neutral decision-maker, such as a judge or panel of judges, other than the citizens themselves. If individual claimants want to marry their cars, for example, then they presumably have just as much a right to official recognition as any other groups seeking marriage access, and regardless of what the public thinks.\textsuperscript{259}

\textsuperscript{256} No. CV-09-2292-VRW (N.D. Cal. filed May 22, 2009).
\textsuperscript{257} Id. at 1377 (explaining that their “concept of equal access” differs from the substantive due process and suspect classification legal theories, and thus is not bound by the same considerations that would apply in determining whether a claim is protected as a fundamental right or a plaintiff is a member of a historically disfavored class).
\textsuperscript{258} Id. at 1436 (referring to “Interest Balancing”). Thus, for example, Tebbe and Widiss suggest that the balance of interests might be found to favor the exclusion of some polygamous relationships and yet allow the inclusion of other polygamous relationships as eligible for marital recognition, based on whether the relationships “eschew hierarchy and are truly consensual.” Id. at 1436 n.257.
\textsuperscript{259} Tebbe and Widiss attempt to blunt the radical implications of their proposed “equal access” right with respect to people marrying their cars. They suggest that the government’s reasons for denying marriage licenses to this class would not have to be as strong as the reasons that might be required to survive scrutiny if the license applicants were part of a group identified on some basis other than the fact that its members desire to marry cars. Thus, governmental denials of marital recognition that affect members of groups that have experienced animus, that have initiated a “longstanding or wide-spread social movement,” or that have “organized around common lifestyles or cultural attributes” or “share a particular level of social respect or esteem” would have to be shown to be denials based on more urgent or weighty concerns. Id. at 1433 n.244. Besides the ad hoc nature of the analysis governing this point, these supposedly limiting factors are not that much limiting at all. If those who want a license to marry
Tebbe and Widiss assert that their proposed right of equal access, whereby a general right of access to marriage must be conceived independently from any shaping of the right by democratic input, is doctrinally grounded in prior rulings of the United States Supreme Court. Yet the cases they refer to concerning voting in state and presidential elections, the ability to access the courts and procedural safeguards, and civil marriage itself, cannot be read as broadly as Tebbe and Widiss would like them to be read. In these rulings, the Supreme Court did not look to abstractly conceived, unlimited “rights” but instead began with the actual shape of rights that democracy already had recognized when considering claims of unequal exclusion.

With respect to voting, and as quoted by Tebbe and Widiss, the Supreme Court has explained that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one’s person’s vote over that of another.” There is a condition precedent: a voting discrimination claim arises only if the people or their elected
representatives have initially “granted the right to vote on equal terms.” Rather than positing as an initial matter some abstract, unlimited right to vote, the Court takes into account the actual democratic implementation of a generally applicable right. Accordingly, there is a significant difference between the access-to-voting cases and the marriage definition cases. As an initial matter, the people in this country have never granted eligibility for marital status to all relationships and on equal terms. Even if one can imagine an abstract marital status open to all relationships, such status has never been endorsed and given civil recognition through democratic action. Thus, unlike in the voting cases, there is no democratically established guarantee of unlimited eligibility against which to measure a claim of unequal access.

With respect to access to the courts, in *Griffin v. Illinois*, a leading case dealing with criminal appeals and cited by Tebbe and Widiss, the Supreme Court ruled that when a state extends the right of appeal to criminal defendants, the state must provide “aid for convicted defendants who have a right to appeal and need a transcript, but are unable to pay for it.” The Court found that the guarantee of equal protection affirmatively required the provision of financial assistance in situations where lack of such assistance would prevent otherwise eligible but indigent defendants from meaningfully accessing procedural protections already and

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266 Bush, 531 U.S. at 105.
267 As Tebbe and Widiss correctly note, “[t]he Constitution is not commonly thought to guarantee a right to vote in presidential or state elections.” Tebbe & Widiss, *supra* note 246, at 1417.
268 Circumstances in California are no exception. By adopting Proposition 8, the California voters reversed the California Supreme Court’s expansive, constitutional interpretation of the state’s equality guarantee as applied to same-sex marriage, but in amending the Constitution through Proposition 8 to define marriage as the union of man and woman, the voters restored the traditional, democratically endorsed limitations on marital eligibility that existed prior to the court’s interpretative action. There was therefore no taking away of some democratically endorsed, open-to-all-groups marital status.
270 Tebbe & Widiss, *supra* note 246, at 1419 n.194.
271 351 U.S. at 19.
specifically promised to them by the laws.272 Unlike the civil right of appeal in criminal cases, which democracy has extended to all persons,273 the right to marry has been limited from the beginning by democracy to opposite-sex unions. Same-sex couples are thus not in the same position as indigent criminal defendants. They do not now possess and never have been granted a democratically endorsed civil right of access to marital eligibility.274

Finally, with respect to “marriage” as addressed in Zablocki v. Redhail,275 a decision that Tebbe and Widiss describe as a “key precedent to our equal access approach,”276 the Court appeared to understand that term as referring only to what the law and the people traditionally recognized as marriage and not to some abstract status granting unlimited access. 277 Both Justice Thurgood Marshall’s lead opinion, joined by three other Justices, and a concurring opinion by

272 Id. at 17-19. The same is true of the right of counsel. In Douglas v. California, 372 U.S. 353 (1963) (also cited by Tebbe & Widiss, supra note 246, at 1419 n.195), the Court observed that, as an initial consideration, California law granted to all criminal defendants, rich and poor alike, a mandatory right to a first appeal from a criminal conviction. 372 U.S. at 356.
273 Griffin, 351 U.S. at 18 (“All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.”).
274 Tebbe and Widiss also refer to case law recognizing the procedural rights of indigent parties in civil cases concerning marriage, divorce and parental determinations. Tebbe & Widiss, supra note 246, at 1419-20 (citing Boddie v. Connecticut, 401 U.S. 371 (1971) (access to divorce court), Little v. Streater, 452 U.S. 1 (1981) (blood test to determine paternity), M.L.B. v. S.L.J., 519 U.S. 102 (1996) (right to appeal civil termination of parental status)). The aggrieved civil litigants in this line of cases, like the criminal defendants in the Griffin line of cases, also already enjoyed a democratically endorsed right to utilize the courts and related procedures, which right was found by the Supreme Court to have been rendered meaningless by the state’s failure to waive costs or otherwise compensate impoverished parties for needed litigation-related services. See Boddie, 401 U.S. at 386 (Douglas, J., concurring) (“While Connecticut has provided a procedure for severing the bonds of marriage, a person can meet every requirement save court fees or the cost of service of process and be denied a divorce.”); Little, 452 U.S. at 4 (“For ‘financial reasons,’ no blood grouping tests were performed even though they had been authorized.”); M.L.B., 519 U.S. at 108 (“Mississippi grants civil litigants a right to appeal, but conditions that right on prepayment of costs.”).
276 Tebbe & Widiss, supra note 246, at 1415.
277 See, e.g., 434 U.S. at 377, 379 (Marshall, J., joined by Burger, C.J., & Brennan, White & Blackmun) (referring to “lawful” marriage or being “lawfully” married); id. at 404 (Stevens, J., concurring) (referring to “lawful” marriage). See also id. at 392 (Stewart, J., concurring in judgment) (describing interest in marrying as “more accurately, that privilege” that is, “under our federal system, peculiarly one to be defined and limited by state law”); id. at 399 (Powell, J., concurring in judgment) (noting that “a State ‘has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created’”) (citation omitted).
Justice Lewis Powell associated the “right to marry” with the “traditional family setting.”\textsuperscript{278} Powell also asserted that “[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.”\textsuperscript{279} But, he continued “‘when the government intrudes on choices concerning family living arrangements’ in a manner which is contrary to deeply rooted traditions,” then the Constitution “requires a showing of justification.”\textsuperscript{280}

The Wisconsin statute struck down by the Supreme Court in the \textit{Zablocki} case imposed, in effect, a novel condition on the democratically granted civil right to enter a lawful, traditionally recognized marriage.\textsuperscript{281} Any persons obliged by court order to pay support for children not in their custody had to get court permission to marry after certifying that they were providing the necessary support.\textsuperscript{282} As a practical matter this requirement barred otherwise democratically determined marriage-eligible indigent persons who were financially unable to keep up their support payments from obtaining marriage licenses.\textsuperscript{283} The statute therefore conflicted with the prevailing institutional understanding of marriage by adding a new and further limiting legal prerequisite. This conflict with tradition created the constitutional issue in \textit{Zablocki} since tradition itself vested the personal interest in entering traditional marriage with its fundamental character.\textsuperscript{284}

\textsuperscript{278} 434 U.S. at 386 (Marshall, J., joined by Burger, C.J. & Brennan, White & Blackmun, JJ.); \textit{id.} at 396 (Powell, J., concurring in judgment).
\textsuperscript{279} \textit{id.} at 399 (Powell, J., concurring in judgment).
\textsuperscript{280} \textit{id.} (citation omitted).
\textsuperscript{281} \textit{id.} at 375 (Marshall, J., joined by Burger, C.J., & Brennan, White & Blackmun) (describing Wis. Stat. §§ 245.10(1), (4), (5) (1973)).
\textsuperscript{282} \textit{id.} at 375.
\textsuperscript{283} \textit{id.} at 387.
\textsuperscript{284} See \textit{id.} at 383-86 (discussing cases that “make clear that the right to marry is of fundamental importance”).
Tebbe and Widiss agree that the Zablocki decision is “backward looking” in that the Court was able to find that marriage is a fundamental interest possessed by the male plaintiff in the case who desired to marry a woman, and that the particular claim before the Court was protected as a fundamental right for equal protection purposes because tradition has affirmed the opposite-sex relationship as marriage-eligible.\textsuperscript{285} Tebbe and Widiss admit that their “equal access” approach “then departs from backward-looking analysis and asks separately whether excluding gay and lesbian couples from civil marriage can be justified. At this second stage, we believe the analysis should no longer look to tradition, but instead should invoke the forward-aspects of equal protection doctrine. This approach sidelines the fact that, historically, same-sex couples have not been permitted to marry.”\textsuperscript{286} In short, their approach “is oriented toward tradition in its recognition of marriage’s importance to individuals and to society, but it is also progressive in its insistence that marriage presumptively should be extended to same-sex couples on equal terms.”\textsuperscript{287}

This “progressive” aspect takes on critical importance in view of the insistence by Tebbe and Widiss that their equal-access “approach requires courts to interrogate the way that lines have traditionally been drawn around that institution.”\textsuperscript{288} In Zablocki, however, the Supreme Court determined that the need for judicial “interrogation” arose upon a finding of a statute’s non-conformance to the lines of fundamentality that tradition had drawn. Under the equal access approach as proposed by Tebbe and Widiss, a statute’s conformance with tradition would trigger

\begin{footnotes}
\textsuperscript{285} Tebbe & Widiss, supra note 246, at 1427 (“The Supreme Court has never made clear precisely what standard should be used to determine which interests are protected as fundamental for equal protection purposes. Even if that assessment is made with reference to tradition, however, it is easy to establish a backward-looking claim that marriage meets this standard, at least with respect to unions between one woman and one man. In fact, the Court has already held as much in Zablocki.”).
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 1429.
\textsuperscript{288} Id. at 1428.
\end{footnotes}
judicial suspicion if democracy has granted civil rights recognition only to some and not all theoretically eligible claims.

The analytical shift away from the approach actually taken by the Supreme Court in the various equal protection cases discussed by Tebbe and Widiss and towards the abstractly-conceived equal access approach they propose would be far-reaching. A one-size-fits-all template for equal rights, theoretical in substance and unlimited in scope, would replace whatever has been established by tradition and endorsed through democracy as the starting point of inquiry. Rather than looking to see if democracy already has shaped the outside parameters of public status or affirmation, and using those parameters to determine whether a claim fits within what the people have already granted, the equal access approach assumes that all claims of access are protected, regardless of what democracy has decided, at the moment government recognizes any particular claim.

To maintain consistency with prior Supreme Court decisions, the equal protection guarantee should start with what the democratic processes have already affirmed as a public status, rather than looking beyond the actual to the theoretical. Otherwise, all yet-to-be-recognized personal claims then would have to be considered civil rights even without democratic approval, and often despite democratic disapproval. Any attempt by the majority to continue existing limits on marital access would then be characterized and condemned as writing "discrimination" into the law. In the next section, the article considers various problems raised by this approach and argues that, in light of these problems, same-sex marriage should not be treated as a civil right unless and until democracy wills it.

3. As Long as It Lacks Democratic Endorsement, Same-Sex Marriage Should Not Be Treated as a Civil Right.
Advocates argue that the legalization of same-sex marriage would be, in effect, a victimless act. Massachusetts Congressman Barney Frank, when testifying in 2004 before the United States Senate Judiciary Committee against a proposed amendment to the United States Constitution defining marriage as an opposite-sex union, stated that “extend[ing] marriage to same-sex couples... is not a case of abolishing traditional marriage, but of extending its reach to people who are not now eligible for it.”

“I have to ask,” he continued, “who are we hurting? How does the fact that I or someone else wants to express love for another human being in the same way as the overwhelming majority of my heterosexual friends and relatives—how does that hurt you? Why is this considered somehow an infringement or an assault?” If same-sex marriage is treated as a civil right without ever gaining majoritarian endorsement, and recognition of this new status is enforced through public policies despite democratic opposition, then one can identify at least four different problematic consequences directly impinging on the interests of others.

First, treating same-sex marriage as a civil right without seeking majoritarian democratic backing would deny every citizen his or her equal right to exercise sovereignty by allowing a minority to dictate public policy. According to Reed Amar, “simple majority rule... is the only workable voting rule that treats all voters and all policy proposals equally” because “it does not (1) favor one individual over another, (2) favor one alternative over another, (3) fail to generate a definite result in some situation, or (4) fail to respond positively to individual preferences[.]”

“Once majority rule is abandoned,” he continues, “there is no logical stopping between, say, a


290 Id.

291 Reed Amar, supra note 235, at 503 & n.167 (citing and summarizing Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 ECONOMETRICA 680, 683 (1952)).
50% plus two rule, and a 99.9% rule. And the latter, of course, surely is not rule by the people." At the time of our nation’s founding, it was generally understood that “first principles required that a simple majority of the people be empowered to alter or abolish.” Thomas Jefferson, for example, “believed majority rule to be a logical corollary of equality.” Thus, altering the legal and social institution of marriage by minority rule to enforce unlimited equal access violates the guarantee of equal sovereignty.

Second, extending eligibility for civil status in a way that disregards institutional understandings of marriage—while denying democratic input—will implicate the interests of various stakeholders without providing them with an opportunity to be heard. Perry Dane, who supports giving civil status to same-sex relationships, observes that a primary objection to allowing traditional institutional standards to govern the civil definition of marriage is that those standards are rooted in religious, moral and ethical considerations held to be irrelevant to civil policy. Moreover, some claim that there is an impermeable wall between religious and civil marriage such that changes to the latter will not affect the former. Dane criticizes these positions for attempting “to wave a controversy away just by explaining it.” He describes the

292 Id. at 503.
293 Id. at 482.
294 Id. at 483 & n.90 (indicating that in a June 13, 1817 letter to Baron F.H. Alexander, Jefferson wrote: “The first principle of Republicanism is, that the lex majoris partis [law of the majority] is the fundamental law of every society of equal rights. To consider the will of the society enounced by the majority of a single vote as sacred as if unanimous is the first of all lessons of importance”).
295 Perry Dane, A Holy Secular Institution, 58 EMORY L. J. 1123, 1184-85 (2009) (“I still believe that ‘civil unions’ are a conceptually coherent alternative to same-sex marriage. On the fourth hand, so to speak, the religious dimension of civil marriage also makes clear why this perfectly coherent compromise might not suffice as a response to the powerful argument for equal access to the benefits of marriage.”).
296 Id. at 1125-29.
297 Id. at 1127-28.
298 Id. at 1128. See also id. at 1156 (“When the Goodridge court stated that civil marriage is a ‘wholly secular institution’ [Goodridge v. Dep’t of Public Health, 798 N.E.2d 951, 954 (Mass. 2003)], it might also have been claiming that arguments about the meaning and limits of civil marriage have no direct implications for larger debates about the understanding of marriage simpliciter. This sort of claim, in fact, would be the quintessential Emily Litella counter move [a character played by Saturday Night Live’s Gilda Radner], an exasperated suggestion that if
many historical and legal connections between religious and civil marriage, and concludes that while “[c]ivil marriage in the United States is a secular institution[. . .] it is not a ‘wholly secular institution.’”

Dane observes that “in light of the genuinely religious meaning and dimension of American civil marriage,” there are “religious believers” who are “what I want to call legitimate stakeholders in the same-sex marriage debate.” Changing the definition of civil marriage will implicate the interests of these stakeholders:

[E]ven if American civil marriage were an institution entirely without its own religious meaning, it would still participate in—and influence—a larger conversation, across national boundaries and across the boundaries between church and state, regarding the meaning and boundaries of marriage as such. Therefore, when opponents argue that recognizing same-sex marriage would threaten traditional marriage, they are not, as the caricature would have it, suggesting that any particular heterosexual married couples would find their marriages in trouble if their gay neighbors were able to wed. Rather, they are arguing that the web of meanings associated with the idea of marriage, understood as a cultural resource crossing boundaries of space, time, and jurisdiction, would be affected if the legal boundaries defining the institution were altered in any given jurisdiction. Such an effect might be a good thing. I am inclined to think

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299 Id. at 1145-56, 1159-72 (examining the historical interrelationship between religious beliefs and practices and legal doctrines concerning marriage).
300 Id. at 1172 (quoting Goodridge, 798 N.E.2d at 954).
301 Id. at 1175.
that it would be. But it would be unrealistic and rigidly narrow-minded to deny
that it would occur.\textsuperscript{302}

Third, resolving the marriage debate through non-democratic means elevates unfairly in a
democracy one moral vision above another.\textsuperscript{303} When normative value claims sit at both ends of
the see-saw, the democratic process is best equipped to find the balance.\textsuperscript{304} Only through
democracy can the collective wisdom of society, in both its public and private forms, be brought

\textsuperscript{302}Id. at 1158.

\textsuperscript{303} Carlos Ball has provided the fullest account of the substantive clash between competing moral values in the
marriage definition context. He writes: “Now that lesbians and gay men in large numbers are seeking to marry and
become parents, it is no longer possible to avoid normative evaluations about the value, goodness, and implications
of same-gender intimate relationships and of families headed by lesbians and gay men.” BALL, supra note 211 at 4.
Thus, “[w]e should make it clear (loudly and often) that in the specific context of gay rights, the disagreements
between opponents and proponents are not the result of one side raising moral issues while the other seeks to avoid
them [by characterizing their position as one of moral neutrality because it is grounded in equality]; rather, the
debate is (and should be) about two (admittedly very different) moral perspectives conflicting with one another.” Id.
at 30. Central to the “gay rights” substantive moral ethic as characterized by Ball is the assertion that “human needs
for sexual satisfaction are in and of themselves worthy of moral respect.” Id. at 104. To be satisfactory, sexual
activity must involve a partner that a person finds attractive. Otherwise, the activity “is not a meaningful or
effective opportunity to satisfy basic human needs for physical intimacy.” Id. Given that some persons are attracted
only to others of the same sex, the fact that “the person at the other end of those needs and capabilities is someone of
the same gender” is therefore “a morally irrelevant point.” Id. at 105. This marks the precise locus of disagreement
between the competing sides in the same-sex marriage debate. Ball argues that the law should be indifferent to
whether both sexes are involved in the relationship because, for some individuals, the opposite sex is not a source of
subjective attraction. Supporters of the status quo argue that the element of sexual difference is precisely what
provides the objectively unique social character of the marital relationship. See, e.g., Richard Thompson Ford, Hate
and Marriage: Same-Sex Marriage Setbacks May Not Be All Bad News for Gay Rights, Slate.com, July 12, 2006,
marriage has less to do with hating same-sex couples than with a deep psychological attachment to a powerful
symbol of sex difference: the tulle-covered bride and the top-hat-and-tails-groom? No one clearly admits this,
perhaps because most people aren’t sufficiently self-aware to name their deep anxieties—if they were,
psychotherapists would be out of work. But you can hear the longing for secure gender identity in some of the
comments of same-sex-marriage opponents. After San Francisco’s same-sex marriage experiment, one observer in a
red county nearby complained: ‘God made marriage for Adam and Eve; not Adam and Steve.’ It’s telling that this
objection to same-sex marriage doesn’t rely on moral condemnation of same-sex couples but instead on the most
primordial account of natural sex difference.”); Avila, Sexual Difference and Marriage: An Urgent Need for New
Studies, supra note 6, at 443 (“In sum, from the [Roman Catholic] Church’s perspective, the exclusive and
permanent sexual love that two individuals of opposite sex have for each other differs in essence and dignity from
all other personal bonds. Only this love, the Church teaches, is capable of stabilizing families and securing the
family institution, because only through this love can the well-being of the spouses and their children be fully
realized. Thus, it is only on this exclusive and permanent love, the love between the sexes, that the institution of
marriage could be based.”).

\textsuperscript{304} It is no response to argue that the Constitution obliges the state to avoid mandating any one particular moral code
if in fact the creation of marital recognition for same-sex couples conforms to moral convictions about the good of
those relationships. Official endorsement of one or the other competing moral vision is unavoidable whichever way
the law on marriage’s definition is crafted.
to bear on important debates about which social values to prefer.\textsuperscript{305} Preferring one value choice over another through any mechanism that bypasses the deliberation that accompanies the creation of social institutions and civil rights themselves is not only short-sighted, but it ignores a basic political assumption about democracy. When weighing competing moral values, the people collectively, as imperfect as we humans are, know best.\textsuperscript{306}

Fourth, if a personal claim garners civil rights status, then government actors must adjudge any intentional interference with or discrimination against that claim to be wrong and unjust. Consequently, collateral negative judgments, officially imposed, undoubtedly will ensue against those who oppose and impede the claim at issue.

For example, there is already a belief among many who support the legalization of same-sex marriage that resistance to such a change is “unenlightened,”\textsuperscript{307} “ignorant,”\textsuperscript{308} “biased” or

\textsuperscript{305} See Sunstein, The Right to Marry, supra note 176, at 2106 (suggesting “that traditions are likely to be wise, simply because they represent the judgment not of a single person, but of countless people over a long period of time,” and further, that “traditions have some of the advantages of markets, reflecting the assessments of many rather than few. To say this is not to say that longstanding practices are always justified. They might reflect prejudice or unjustified inequalities in power rather than wisdom. But perhaps practices are likely to be longstanding only if they serve important social interests; if so, there should be a presumption in their favor. It is certainly not senseless to say that if American states have generally refused to recognize certain marriages, there is reason to think that the refusal has some sense to it”).

\textsuperscript{306} “We accept in the fullest sense of the word the settled and persistent will of the people. All this idea of a group of super men and super-planners, such as we see before us, ‘playing the angel,’ as the French call it, and making the masses of the people do what they think is good for them, without any check or correction, is a violation of democracy. Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time; but there is the broad feeling in our country that the people should rule, continuously rule, and that public opinion, expressed by all constitutional means, should shape, guide, and control the actions of Ministers who are their servants and not their masters.” 444 PAR. DEB., H.C. (5th ser.) (1947) 206-07 (statement of Winston Churchill).

\textsuperscript{307} “I consider gay marriage to be a human rights issue, which I feel supersedes the voting abilities of unenlightened people. Gays shouldn’t have to sit around waiting for everyone to ‘get it.’” Ryan F., online comment, Truthdig.com, May 19, 2008, available at http://www.truthdig.com/report/item/20080519_the_gay_marriage_paradox/ (last visited Aug. 13, 2010).

\textsuperscript{308} “Many people don’t realize they’re being ignorant and bigoted by being against same-sex marriage, and that’s thanks in large part to some kind of ‘sanctity of marriage’ argument—which somehow only applies to heterosexuals—that the religious right has foisted on the rest of us. Unfortunately, it’s seeped into the mainstream, and must be flushed.” Willie Brown, Mayor of San Francisco, quoted in Davina Kotulski, Willie Brown Interview,
“prejudiced,” “mean-spirited,” “bigoted,” or “hateful.” Once the law treats same-sex marriage as a civil right, then these private assessments will influence official assessments of what is to be regarded as a public evil. Policies and conduct deemed or suspected to be motivated by “hate” or similarly disfavored attitudes will be targeted as public threats to the common good and become candidates for mandatory eradication or isolation. The adoption of newly normative value judgments will lead to the implementation of norm-reinforcing policies, reflecting the institutional character of the rules newly put into place.


309 Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 968 (Mass. 2003) (suggesting that “the marriage restriction is rooted in persistent prejudices” and “‘private biases’” against persons with or regarded as having same-sex attraction) (citation omitted).


312 “I’ve heard the reasons for opposing civil marriage for same-sex couples. Cut through the distractions, and they stink of the same fear, hatred, and intolerance I have known in racism and in bigotry.” Congressman John Lewis, quoted in Human Rights Campaign, FAQs: Questions About Same-Sex Marriage, HRC.org (undated), available at http://www.hrc.org/issues/5517.htm (last visited Aug. 13, 2010). When United States Senator John Kerry (D. Mass.) objected to the inclusion of a plank in the Massachusetts Democratic Party platform endorsing same-sex marriage, saying that he opposed same-sex marriage, Joshua Frank from dissidentvoice.org responded that “Kerry’s statement is the kind of hate speech we were hearing from racist Democrats down South during the civil rights struggles.” Joshua Frank, John Kerry’s Hate Speech, May 7, 2005, available at http://www.dissentvoice.org/May05/Frank0507.htm (last visited Aug. 13, 2010).

313 See generally SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds. 2008), and note Laycock’s observation that “[a]ll six contributors—religious and secular, left, center and right—agree that same-sex marriage is a threat to religious liberty.” Id. at 189.

314 How the law treats racism and those who espouse racist policies provides the starting point for determining how individuals and organizations opposed to same-sex marriage might fare, once opposition to same-sex marriage is equated to racism. The government opposes racism in a variety of situations, thus providing the conceptual framework in the marriage context. For example, public policies against racism have caused public and private institutions, such as schools (see Brown v. Bd of Educ. of Topeka, 347 U.S. 483 (1954) (public schools); McCrory v. Runion, 427 U.S. 160 (1976) (private non-religious schools); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (private, faith-based schools)), as well as private individuals (Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding award of civil damages against private individuals found liable for discriminating on the basis of race in the sale of property)) to abandon their race-based policies or conduct, pay civil and criminal damages, or forgo government benefits, such as tax-exemptions and public funds. The societal impact of treating opposition to same-sex marriage as a public evil may be just as broad and deep if not more so. “[W]here church and state apply
Thus there are significant social consequences when a personal claim is turned into a civil right and disagreement is transformed into a civil offense. Before the state employs its police powers to mandate official and to encourage private conformity, threatening to intrude upon the interests of those holding private stakes in the institution of marriage, there should be democratic buy-in, a plebiscite before punishment. If any segment of society is to be treated by the law as if akin to racial bigots, then the collective opinion of the public should be heard in advance. Democracy is not perfect, so it is not always sufficient, but democratic debate and majoritarian endorsement are always necessary when the punishment of people is implicated.

In sum, on such fundamental institutional questions as the meaning of marriage, the scope of civil rights, and the degree to which citizens are to be sanctioned as though they are promoting a public evil, it is the people that should possess the ultimate power to declare a judgment. Entirely circumventing the popular will, leaving it to the unchecked discretion of judges or even legislators to pronounce what is a marriage, a civil right, or bigotry, is the worst of all options.

C. The Judiciary Does Not Create Civil Rights, and Lacks the Authority to Second-Guess Democratically Endorsed Practices and Beliefs.

Once it is established that in a democracy civil rights are sovereign pronouncements created through democratic means, it is a necessary corollary to hold that the federal judiciary, an

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different definitions of ‘marriage,’ there will be church-state conflicts in every area where legal relations are determined according to whether parties are ‘married.’ And these areas are just too numerous to count, because changing the legal meaning of marriage doesn’t just change one law, it changes thousands, all in one stroke.” Anthony Picarello, Marriagedebate.com, May 9, 2006, available at http://www.marriagedebate.com/2006/05/marriage-matters-i-agree-with-jonathan.htm (last visited Aug. 13, 2010); See also Marc D. Stern, Same-Sex Marriage and the Churches, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 1 (Douglas Laycock et al. eds. 2008); Jonathan Turley, An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 59 (Douglas Laycock et al. eds. 2008); Robin Fretwell Wilson, Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77 (Douglas Laycock et al. eds. 2008).
appointed body that is not answerable to the electorate (except in the sense of being obliged to implement democratically approved laws), cannot and should not be expected to bestow civil rights status on individual claims. The next two sections touch briefly on the role of the federal judiciary.

First, the article will argue that one does not have to oppose the recognition of same-sex marriage in principle in order to oppose the judicial redefinition of marriage and to call for judicial humility. As long as a substantial majority of the American public insists that marriage is the union of the sexes and has not endorsed through democratic means an institutional redefinition, the federal courts lack an adequate basis for dictating that same-sex marriage must be recognized as a civil right. Second, the article briefly examines the role of the courts in the public debates over racial discrimination and civil rights protection for minority racial groups, which some argue provide precedent for present-day litigation to redefine marriage. The actions taken then by the courts with respect to racial justice do not compare to the actions sought today with respect to same-sex marriage. The former cases were backed by democratic mandates while the present cases seek to overturn democratic consensus.

1. The Case for Judicial Humility.

When the Massachusetts Supreme Judicial Court ruled in its 2003 decision in *Goodridge v. Department of Public Health*\(^\text{315}\) that the Commonwealth’s refusal to issue marriage certificates to same-sex couples violated the state constitution,\(^\text{316}\) Mark Mason, an officer of the Massachusetts Bar Association, defended the ruling:

> Many criticize the majority decision for exercising what they deem to be judicial activism. To the contrary, the *Goodridge* decision represents the type of decision

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\(^{316}\) 798 N.E.2d at 968.
which is best left to the debate, deliberation and legal analysis of our appellate courts. On the other hand, the debate which we might envision in the Legislature will undoubtedly involve reflexive discrimination as well as arguments which, although born of emotional sentiment, are not helpful in analyzing the merits of same-sex marriage.\textsuperscript{317}

In other words, only the judiciary can be trusted with resolving fundamental social policy questions, because the people and their elected representatives are supposedly much too prone to “reflexive discrimination” and supposedly too “emotional” to handle policy-making, the quintessential task of self-government. This view evidences an autocratic hubris that should ring alarms in all ideological precincts.

Indeed, calls for judicial humility have issued not only from opponents of same-sex marriage but also from those supporting marriage’s redefinition. The foremost examples of the latter include Cass Sunstein, Richard Posner, and Michael Perry.

Even though he believes that bans on same-sex marriage are “not easy to defend . . . in constitutionally acceptable terms,”\textsuperscript{318} Sunstein observes that “judicial modesty” in addressing same-sex marriage constitutional claims is called for “in the face of strong public convictions” due to “excellent institutional reasons” relating to “the courts’ limited fact-finding capacities, their weak democratic pedigree, their limited legitimacy and their likely ineffectiveness as frequent instigators of social reform.”\textsuperscript{319} Perry too is not persuaded by arguments against the recognition of same-sex marriage and predicts that social acceptance of redefining marriage is

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\textsuperscript{318} Sunstein, The Right to Marry, supra note 176, at 2112.

\textsuperscript{319} Id. at 2113.
\end{flushright}
inevitable.\textsuperscript{320} Perry nonetheless counsels for judicial deference that favors the political process, even when that process ratifies the definition of marriage as the union of the opposite sexes.\textsuperscript{321} Posner likewise admits that “the arguments against gay marriage do not strike me as compelling,” but states nonetheless that “I don’t think it’s the business of the courts to buck public opinion that is as strong as the current tide of public opinion running against gay marriage.”\textsuperscript{322} Posner continues that “because the basis in conventional legal materials for creating a constitutional right . . . to gay marriage is extremely thin, opponents cannot be persuaded that the creation of these rights by courts is anything other than a political act by a tiny, unelected, unrepresentative, elite, committee of lawyers.”\textsuperscript{323}

Perry refers to an influential 1893 law review article of Harvard Professor James B. Thayer, which “[e]ven now, over a hundred years later, . . . remains the locus classicus of the argument that in enforcing constitutional norms, the courts—including the Supreme Court—should proceed deferentially.”\textsuperscript{324} Thayer’s analysis provides an excellent framework for determining the legitimate scope of judicial powers when constitutional recognition is sought for a same-sex marriage claim.

According to Thayer, the judicial act of invalidating a law on the grounds that it is inconsistent with constitutional provisions involves the court in “taking a part, a secondary part, in the political conduct of government” and thus requires judges to “apply methods and

\textsuperscript{321} Id. at 239-43.
\textsuperscript{323} Id.
principles that befit their task.”

The power to determine legislation to be in conflict with constitutional guarantees, Thayer explains, differs from other judicial powers by calling on the judge to do more than exercise “the mere and simple office of construing two writings and comparing one with another, as two contracts or two statutes are construed and compared when they are said to conflict.” Instead of involving “a pedantic and academic treatment of the texts of the constitution and the laws” that proceeds as if “the constitution were a private letter of attorney, and the court’s duty under it were precisely like any of its most ordinary operations,” the exercise of constitutional review must take into account that it is the work product of the sovereign’s elected representatives (or in the enactment of a ballot measure, the sovereign people themselves) that such review targets.

Thayer therefore advises that the courts should presume that “the people are wise, virtuous, and competent to manage their own affairs.” This presumption should restrain judges from interfering with legislation in all cases where the constitutional conflict is not “so clear and palpable as to be perceptible to any mind at first blush.” Thayer explains that “very early” in this country’s history the courts began deferring to the legislative branch, staying their

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325 Thayer, supra note 324, at 152.
326 Id. at 138.
327 Id.
328 Id. at 139.
329 Id. at 130-31 (noting that before the American revolution, the colonial courts were charged with enforcing laws “proceeding from the English Crown,” acting as “an external sovereign,” but then after the revolution the people assumed the internal role of sovereign, which meant that “the new constitutions . . . were not so many orders from without, backed by an organized outside government, which simply performed an ordinary function in enforcing them; they were precepts from the people themselves who were to be governed, addressed to each of their own number, and especially to those who were charged with the duty of conducting the government”).
330 Id. at 149 (citation omitted).
331 Id. at 148 n.3 (citation omitted). See also Sunstein, supra note 176, at 2107 (noting that “even if we believe that judicial decisions have some advantages, we might agree that in the face of doubt, democratic judgments, especially in a federal system, deserve a measure of respect, in part because self-government is one of the rights to which people are entitled”).
hand so as not to declare a law void “unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.” 332

The voter-approved measures adopted in numerous states across the country to reaffirm the traditional definition of marriage amply demonstrate that, at the very least, the supposed constitutional conflict found by the courts in Iowa, California, Connecticut and Massachusetts is not ‘‘so clear and palpable as to be perceptible to any mind at first blush.’’ 333 The citizens supporting these measures clearly are not of the same mind with same-sex marriage supporters or the judges who back their claims of constitutional violation.

Moreover, the courts declaring same-sex marriage to be a constitutional right do so even after acknowledging presence of key factors in the cases before them that, again at the very least, point to the existence of reasonable doubt about whether a constitutional violation actually exists. For example, the Iowa Supreme Court admits in Varnum that “reasoned opinions” support the claim that “dual-gender parenting is the optimal environment for children” but dismisses these opinions not because they were proven beyond a reasonable doubt to be arbitrary or invidious but because, in the court’s opinion, they were “largely unsupported by reliable scientific studies.” 334 The California Supreme Court in the Marriage Cases simply disregards as altogether irrelevant the issue of “whether or not the state’s interest in encouraging responsible procreation can be viewed as a reasonably conceivable justification for the statutory limitation of marriage to a man and a woman for purposes of the rational basis standard.” 335 The Connecticut

332 Thayer, supra note 316, at 140.
333 Id. at 148 n.3 (citation omitted).
335 In re Marriage Cases, 183 P.3d 384, 432 (Cal. 2008).
Supreme Court in Kerrigan makes it a point to express its appreciation for “the fact that same sex marriage is a subject about which persons of good will reasonably and sincerely disagree.”

By favoring one side in the marriage definition debate despite the existence of voter disagreement they acknowledge is reasonable, these courts have arrogated to themselves the exclusive role of sovereign. They employ a constitutional balancing test different from the one described by Thayer, refusing to accept that the people are wise enough, sufficiently virtuous, or adequately competent to choose between two admittedly rational arguments. They cast the burden of persuasion onto the states’ shoulders, requiring defenders of the status quo to convince the judges that the state’s reasons (and by extension, the public’s reasons) for refusing to recognize same-sex marriage are not only true but also truly overriding. For these courts, demonstrating mere plausibility is not enough. Shifting the burden of persuasion from the plaintiffs to the state in this manner allows the courts to abandon their typical deferential pose and, in the guise of enforcing the neutral constitutional principle of equality, frees them to dictate new policy choices that impose rival moral principles.

According to Alicia Ouellette:

336 Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 477 n.79 (Conn. 2008). Three other rulings have concluded otherwise. The Massachusetts Supreme Judicial Court in Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003) could find no rational basis whatsoever to support the limiting of civil marriage to opposite-sex couples. Id. at 961-68, and see particularly id. at 968 (referring to the state’s asserted interests as “purported justifications” and suggesting that “persistent prejudices” and “private biases” were behind the state’s refusal to recognize same-sex marriage). Federal district Judge Joseph L. Tauro ruled similarly in Gill v. Office of Pers. Mgmt, Slip op. at 21-38 (D. Mass. July 8, 2010) (No. 1:09-11156-JLT) with respect to federal recognition of same-sex marriages, finding that in enacting DOMA’s classification of marriage as including only opposite-sex couples “Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage of group of which it disapproves.” Id. at 38. See also Judge Vaughn R. Walker’s decision in Perry v. Schwarzenegger, Slip op. at 123-32 (N.D. Cal. Aug. 4, 2010) (No. C 09-2292 VRW), in which, regarding Proposition 8, a similar finding of irrationality was reached: “In the absence of a rational basis, what remains of proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. . . . Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.” Id. at 132.

337 Ouellette, a law professor at Albany School of Law, served as lead counsel for a group of New York law professors who submitted a brief urging the New York Court of Appeals to recognize same-sex marriage as a state
While pro-[same-sex] marriage judges claim to bracket moral judgment from judicial decision-making, a close look at their opinions reveals that the decisions are far from morally neutral. Pro-marriage judges engage in moral reasoning of a different sort than their traditional-marriage colleagues. These judges decouple marriage from sex to distill a value in marriage, a public good, which can be realized by gay and lesbian relationships in the same way that it can be realized by heterosexual relationships. Having made the normative case [that] honoring same-sex relationships in marriage promotes the public good, pro-marriage judges conclude that excluding them from the institution is irrational.\textsuperscript{338}

When Ted Olson, an attorney for the plaintiffs challenging California’s Proposition 8, argues that the measure should be struck down by federal judicial decree because recognizing same-sex marriage is “the right thing to do,”\textsuperscript{339} this pinpoints the problem of moral substitution. The American public has declined to endorse an abstractly conceived, all-comers-welcome, marriage guarantee and, as argued in this article, could make this limiting value choice for reasons having everything to do with considerations of self-rule. Our form of government was adopted with the hope of securing a more perfect union, and associating marriage to the union of representatives from the two most fundamentally different sectors of society can rationally be considered necessary to the promotion of public unity generally.


\textsuperscript{339} Olson, \textit{supra} note 178; see also \textit{Goodridge}, 798 N.E.2d at 973 (Greaney, J., concurring) (asserting that regardless of moral and religious convictions to the contrary, “[s]imple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do”).
As this article has also asserted, the state’s interest in defining marriage can be grounded in more than just an interest in accommodating private religious or ethical norms. Reinforcing the public goal of E pluribus Unum can make the civil adoption of the traditional design of marriage “the right thing to do” from the standpoint of political philosophy regardless of religious teaching. Resolution of the question of what is “right” in the marriage definition context, since it is directly and uniquely connected to the government’s political task of encouraging social unity, thus should be for the people to decide. Without any invitation to the courts from the people to take over the process of determining how best to achieve a more perfect union in this context, the courts have no institutional basis for imposing a counter judgment. Non-democratic in nature, the courts are ill-equipped to second-guess what is true and right with respect to civil marriage’s structure and design in light of the state’s E pluribus Unum interest.

Furthermore, the device employed by the Iowa, California, and Connecticut courts to override the democratic process, declaring that gays and lesbians are a protected class and that the traditional marital classification is therefore suspect, transforms the requisite constitutional test from one employed only in extraordinary circumstances, where a breakdown in the political process is proven, to a test guaranteeing favorable policy outcomes for judicially-favored minorities, regardless of political potency. This replaces democracy rather than repairs it.

2. The Role of the Courts Generally with Respect to Racial Civil Rights.

Those who make the federal case for the judicial redefinition of marriage despite a countervailing democratic consensus might refer to our nation’s experience with racial

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341 See supra notes 111-134 and accompanying discussion of this point.
discrimination and point to the role of the courts in the battle for racial equality as a supposedly instructive precedent. They might claim that the courts played a crucial role with respect to the abolition of slavery and racial segregation, as if civil rights originate or at least are shaped by the judiciary. Thus, it might be argued, there is precedent for recognizing the power of the courts to alter the legal parameters of the institution of marriage by granting the civil right of access for same-sex couples despite popular resistance. This historical analogy fails, however, to withstand scrutiny.

Chief Justice Margaret Marshall, author of the Massachusetts Supreme Judicial Court’s same-sex marriage ruling in Goodridge v. Department of Public Health, once boasted in an interview that the courts have the power to stamp out various practices they deem to be evils “with one stroke of the pen of a judicial opinion.” Marshall mentioned as proof an early Massachusetts court proceeding referred to as the “Quock Walker case” and reputed to have abolished racial slavery in the Commonwealth.

Yet, as her interviewer noted, “most of the historians who have studied the [Walker] case have concluded that the Massachusetts court didn’t end slavery with a righteous bang. Instead, the practice lost popular support and gradually withered away. Slaves simply wandered off, won their freedom from sympathetic juries, or were given it by their masters. No grand stroke of the judicial pen was necessary.” Also, Marshall’s interviewer continued, “[m]uch of the [Goodridge] opinion’s moral weight is borne by a historical analogy between gay marriage and interracial unions.”

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345 Bazelon, supra note 343.
346 Id.
Marshall referred in *Goodridge* to a 1948 California Supreme Court decision, *Perez v. Sharp*, that struck down a state ban on interracial marriage. Yet,

The parallel between *Perez* and *Goodridge* is not a perfect one, however. Behind the California decision stood the equal protection clause in the 14th Amendment, which Congress passed to ensure full citizenship for black Americans after the Civil War. The Massachusetts Declaration of Rights, with its ringing statement that ‘All people are born free and equal,’ has strong guarantees of liberty and equality. But no state or federal law passed expressly to guarantee gay people full rights stands behind *Goodridge*.348

Contrary to Marshall’s grandiose perspective, the national history of civil rights for racial minorities necessarily begins not with the courts but with the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, abolishing slavery and barring government discrimination on the basis of race. Other landmark major civil rights enactments by Congress include the Civil Rights Acts of 1871349 and 1964.350 These laws constituted democratic endorsements of particular rights claims and penalized private racial discrimination in a host of contexts including public accommodations.

347 *Goodridge*, 798 N.E.2d at 953, 957, 958, 966 (citing *Perez v. Sharp*, 32 Cal.2d 711 (1948)).
348 Bazelon, *supra* note 343. In the *Perez* decision, the California Supreme Court noted that “Race restrictions must be viewed with great suspicion, for the Fourteenth Amendment ‘was adopted to prevent state legislation designed to discriminate on the basis of race or color’... and expresses ‘a definite national policy against discriminations because of race or color.’... Any state legislation discriminating against persons on the basis of race or color has to overcome the strong presumption inherent in this constitutional policy.” 32 Cal.2d at 719 (citations omitted). Unlike the hotly debated issue of race at the time of the Fourteenth Amendment’s adoption, the issue of same-sex marriage was never debated during the colonial period of the Declaration of Rights’ adoption.
349 Civil Rights Act of 1871, ch. 22, 16 Stat. 44.

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As described by the U.S. Supreme Court in the first ruling to apply the Fourteenth Amendment, the primary intent behind the Amendment was “to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.” A similar objective lies behind the legislative adoption of civil rights legislation guaranteeing to racial minorities, among other designated classes, equal treatment by various private actors. As vehicles for the democratic endorsement of a civil right not to be discriminated against on the basis of race, these enactments handed the courts their marching orders.

In the 1954 ruling in *Brown v. Board of Education*, the U.S. Supreme Court struck down racial segregation in the public schools of Topeka, Kansas. Supporters of same-sex marriage argue that if one rejects same-sex marriage rulings such as those issued in the cases of *Goodridge* or *Varnum* as instances of judicial activism that override or otherwise bypass the will of the people, then one also must reject the *Brown* ruling on racial segregation. Both the desegregation and same-sex marriage rulings were unpopular at the time they were issued.

Yet the *Brown* ruling was rooted in a prior exercise of democracy directly bearing on the value choices confronting the judiciary. Although general in its terms, the Fourteenth

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351 Strauder v. West Virginia, 100 U.S. 303, 306 (1880).
Amendment was debated, adopted by Congress, and ratified by the states in the nineteenth century precisely as a response to racial discrimination. The Supreme Court rightly observed in Brown that the Fourteenth Amendment “was primarily designed” to protect persons of color against state-imposed racial inequality.357

The democratic process creating the Fourteenth Amendment had imposed on the government a civil rights duty binding on the courts and applicable to the racial segregation context. Once the Supreme Court found in Brown that the segregation policies before it were race-based and exacted unequal burdens on persons of color, then it was authorized to act, not by the dictate of the Court’s own opinion of what is right and decent, but by the mandate of the people’s elected representatives who enacted the Fourteenth Amendment.358

As a result, while the Brown decision may have been unpopular when it was issued, it was not undemocratic. The ruling in 1954 had its roots in a political consensus, albeit one achieved a century before and misconstrued by the judiciary since the Plessy v. Ferguson case.359 This original consensus was enshrined democratically in the fundamental law of the land, the federal Constitution, through the Fourteenth Amendment. The political debate which produced the Fourteenth Amendment focused squarely on the propriety of using race as a discriminating factor.

357 Brown, 347 U.S. at 490 n.5 (quoting Slaughter-House Cases, 16 Wall. 36, 67-72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307-308 (1880)).

358 The Brown ruling has been defended on “originalist” grounds against the charge of judicial activism concerning the specific issue of whether desegregation in the public schools was constitutionally intended. That is, did the framers of the Fourteenth Amendment contemplate, and would they have supported the Brown ruling in the context of educational segregation? For two excellent articles by those answering in the affirmative based on an exhaustive examination of the historical record, see Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947 (1995) and Kenyon Bunch, If Racial Desegregation, Then Same-Sex Marriage? Originalism and the Supreme Court’s Fourteenth Amendment, 28 HARV. J. L. & PUB. POL’Y 781 (2005).

359 163 U.S. 537 (1896).
The resulting civil right not to be subjected to official discrimination based on race, a right whose civil status originated from the deliberative exercise of democracy precisely in a political context focusing on racial discrimination, was appropriately within the power of the judiciary to protect at the time of the Brown litigation. Thus, when striking down the Topeka schools’ segregation policy, the Supreme Court did not usurp the people’s sovereignty but instead voted to uphold it. In the same-sex marriage context, no constitutional promulgation has been produced by the political processes whereby the American people have declared that marriage should not be limited to opposite-sex couples or that the denial of official recognition to same-sex couples must be treated by the law as an evil. That difference in context makes Brown distinguishable from the more recent judicial rulings finding a constitutional right to same-sex marriage.360

IV. The 2010 Rulings in Massachusetts and California on DOMA and Prop 8.

The federal district court opinions in Gill v. Office of Personnel Management,361 Massachusetts v. United States Department of Health & Human Services,362 and Perry v. Schwarzenegger363 exhibit the same undue confidence in the judiciary’s purported capacity to resolve intensely debated social questions that one finds in the Iowa Supreme Court’s opinion in Varnum v. Brien.364 A brief, non-exhaustive analysis of the trial court rulings in these cases, striking down laws defining marriage as an opposite-sex union, is instructive. The analysis will focus on the issues relating to the meaning of marriage, the source of civil rights, and the

360 For additional analysis of the difference between the two categories of cases, see Dwight G. Duncan, How Brown is Goodridge?: The Appropriation of a Legal Icon, 14 PUB. INT. L. J. 27 (2004).
364 763 N.W.2d 862 (Iowa 2009).
institutional capacity of the courts to resolve social debates and override democratically accepted policies without clear democratic warrant.

With respect to the nature and meaning of marriage, Boston Judge Joseph L. Tauro (author of both the Gill and Massachusetts companion rulings) and San Francisco Judge Vaughan R. Walker (author of the Perry ruling) considered procreation to be non-essential or irrelevant. This overlooks the real social concerns that arise when relationships are formed between individuals who are capable of accidentally procreating precisely because they are a man and a woman of suitable procreative age and capacity. While procreative potential is not the sole basis for promoting marriage as the union of the sexes, it remains a relevant consideration generally.

Judge Walker also opined that civil marriage ceased to have any necessary connection to gender difference once the law abandoned “gender roles mandated through coverture”. The practice of excluding same-sex couples from marital eligibility, Judge Walker continued, “exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage” and, he stated emphatically, “[t]hat time has passed.” Now that men and women are regarded as equals, Judge Walker concluded, “[g]ender no longer forms an essential part of marriage”.

Judge Walker’s analysis confused roles with participation. No marriage-definition law dictates the roles to be assumed by either sex within a marriage; the only requirement of DOMA

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365 Gill, slip op. at 24-25 (asserting that “the ability to procreate is not now nor has it ever been, a precondition to marriage in any state in the country” and “the federal government has never considered denying recognition to marriage based on an ability or inability to procreate”); Perry, slip op. at 111 (asserting that “[n]ever has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse”).

366 As already discussed, historically marriage became a public institution precisely because of this concern. See supra note 81.

367 Perry, slip op. at 112.

368 Id. at 113.

369 Id.
is that the marital relationship must involve both sexes in furtherance of state interests not necessarily tied to any one concept of role-related duties. One need not subscribe to any particular theory of role division or relational power structuring to see the value of having both sexes represented, such as the value of promoting greater social unity by bringing both sexes into an alliance.\textsuperscript{370}

In the same manner, a jury acquires a socially significant character, representing the entire community of peers, by virtue of having both men and women serving on the panel, even though the fact-finding “role” to be played is the same for all jurors regardless of whether they are male or female. Legal equality among the membership does not erase the existence or benefits of compositional diversity. More specifically, a community consisting of both sexes, because of its integrative and symbolic characteristics, offers something publicly significant that is missing in single-sex settings, aside from whatever roles are assumed.\textsuperscript{371}

With respect to the relation between democratic affirmation (or the lack thereof) and the creation of civil rights, the rulings of Judges Tauro and Walker would bypass democracy in favor of judicial estimations of what is rational to promote as a civil right. They considered themselves free and empowered to substitute new value choices to override democracy and extend marital recognition to same-sex couples.

At the outset, both Judges appeared to abide by a premise that an abstractly-conceived guarantee of equality mandated public affirmation of private relationships for all comers deemed

\textsuperscript{370} See \textit{supra} notes 220-226 and accompanying text.

\textsuperscript{371} Although the parties defending Proposition 8 in \textit{Perry} argue primarily that the traditional definition of marriage promotes responsible procreation, they also assert that one “universal function” of the marital institution is “[b]ringing men and women together for both practical and symbolic purposes,” a characterization very similar to this article’s description of the E pluribus Unum interest in promoting social unity generally by encouraging the integration of the sexes specifically. Defendant-Interveners’ Proposed Findings of Fact (Including Citations) at 2-3, Perry v. Schwarzenegger (N.D. Cal. filed Feb. 26, 2010) (No. CV-09-2292-VRW). Thus, due to the prompting of Proposition 8’s proponents, Judge Walker had the opportunity to conceive of a state interest different in scope from the real or purported interests involving procreation, role expectations, or bias.
to have formed consensual partnerships, and that it was incumbent upon defenders of traditional marriage to justify any limits on that general guarantee. For example, in *Gill* Judge Tauro faulted Congress for treating same-sex couples with marriage licenses issued in Massachusetts differently from opposite-sex couples with marriage licenses issued therein or anywhere else, presumably and supposedly impermissibly in order “to make heterosexual marriage appear more valuable or desirable.”

This congressional preference conflicted with Judge Tauro’s view that both categories of couples were similarly situated with respect to federal laws providing benefits based on marital status generally.

Judge Walker asserted likewise in *Perry* that “Plaintiffs do not seek recognition of a new right” but “[r]ather, plaintiffs ask California to recognize their relationships for what they are: marriages.” Moreover, according to Judge Walker, “Because California has no interest in

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372 *Gill*, slip op. at 25. Judge Tauro equated this value choice with animus, a desire to punish or harm same-sex couples. *Id.* at 25-26, 37. This negative judicial characterization directly conflicts with the majority view in Congress that, as expressed in the words of the House Judiciary Committee’s section-by-section analysis of DOMA, “[i]t would be incomprehensible for any court to conclude that traditional marriage laws . . . are motivated by animus towards homosexuals.” DEFENSE OF MARRIAGE ACT, H.R. REP. NO. 104-664, at 33 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2937. Charges and rebuttals of bigotry, discrimination or animus and their variants were raised throughout the congressional debates, indicating that DOMA supporters in Congress had amply considered, and rejected, the claim that defining marriage as the union of one man and one woman constituted illegitimate bias. See, e.g., 142 CONG. REC. H7447 (daily ed. July 11, 1996) (statement of DOMA sponsor Rep. Charles Canady) (“Mr. Chairman, the gentlemen from Massachusetts have congratulated themselves on the tone and quality of the debate in opposition to this bill. We have heard in opposition to this bill the following words. We have heard that it is a joke. We have heard it is based on prejudice. We have heard that it is mean-spirited, that the bill is cruel, that those who support it are bigoted, despicable, hateful, ignorant. Those are words that have been uttered here tonight. I believe the American people can make their own judgment about that. I believe that those words are an insult to the American people, 70 percent of whom or more oppose same-sex marriages. Seventy percent of the American people are not bigots. Seventy percent of the American people are not prejudiced. Seventy percent of the American people are not mean-spirited, cruel, and hateful. It is a slander against the American people to assert that they are.”); 142 CONG. REC. at S10116 (statement of Sen. Conrad Burns) (“Though I am fully aware that a vote for the Defense of Marriage Act will provide a reason for some to label me as intolerant, a bigot or uncompassionate—which I might add is not true—I am going to vote to send this bill to the President. I strongly urge my colleagues in the Senate to do the same.”).

373 *Gill*, slip op. at 34-35, 38. See, however, H.R. REP. NO. 104-664, at 10, 1996 U.S.C.C.A.N. at 2914 (indicating that before the judicial developments on marriage, “there was never any reason to make explicit what has always been implicit,” and asserting that “it can be stated with certainty that none of the federal statutes or regulations that use the words ‘marriage’ or ‘spouse’ were thought by even a single Member of Congress to refer to same-sex couples”).

374 *Perry*, slip op. at 114.
discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.\textsuperscript{375}

Judge Walker correctly observed that the constitutional test for finding fundamental rights turns on “whether the [claimed] right is rooted ‘in our Nation’s history, legal traditions, and practices.’”\textsuperscript{376} He then admitted that “[t]he evidence at trial shows that marriage in the United States traditionally has not been open to same-sex couples.”\textsuperscript{377}

But Judge Walker danced around this reality by changing the constitutional test. According to his re-engineered fundamental rights analysis, it is not whether the extant social understanding of marriage incorporating the opposite-sex requirement has always been and continues to be upheld in the law by virtue of democratic choice, but instead whether the definitional element in question is “consistent with the core of the history, tradition and practice of marriage in the United States.”\textsuperscript{378} This subtle shift, adding to the standard constitutional test a new reference to “the core,” provided Judge Walker with the opportunity to innovate.

Rather than accepting the actual history, tradition and practice in their totality as a bar against judicially elevating the claim at issue to the level of a fundamental civil right because it lacks any democratic pedigree, Judge Walker could deem the underlying democratic consensus about what marriage “is” with respect to the sexes to be inconsistent with what he felt free to qualify, abstractly, as marriage’s core elements as a fundamental right.\textsuperscript{379} Once Judge Walker

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{375} Id. at 135 (emphasis added).
\item \textsuperscript{376} Id. at 111 (citation omitted).
\item \textsuperscript{377} Id. at 112.
\item \textsuperscript{378} Id. at 113 (emphasis added).
\item \textsuperscript{379} Hence Judge Walker’s references to the historical dismantling of coverture and the recognition of gender equality allowed him to opine about the wisdom of maintaining the traditional definition of marriage, leading him to characterize “the exclusion [of same-sex couples] . . . as an artifact of a time when the genders were seen as having distinct roles in society and in marriage.” Id. By changing the constitutional test for finding fundamental rights and
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dismissed democracy’s input insisting that marriage is the union of the sexes as purportedly relating only to a non-core element of marriage, it was a simple task to hold that same-sex marriage, exhibiting the supposedly “core” requirements of involving two parties in a consensual and stable relationship, \(^{380}\) enjoys constitutional protection as a fundamental civil right that cannot be stripped by the vote of the people.\(^{381}\) As argued earlier in this article, this is not how civil rights are created.\(^{382}\)

Finally, the Boston and San Francisco rulings raise concerns related to the limited institutional capacity of the judiciary to override democratically-approved value choices to resolve social debates by substituting their own ideas of what is reasonable and fair.\(^{383}\) Both Judges abandoned any deference towards the political process and proceeded more as legislators than as judges.

Judge Tauro, for example, applied what only can be described charitably as snap judgments that dismissed any possibility that Congress had at least an arguable basis for enacting offering such an opinion about the tradition itself, this marked the exact point where Judge Walker exceeded his judicial authority in our nation’s democratic system.

\(^{380}\) Id. at 111.
\(^{381}\) Id. at 116-17.
\(^{382}\) See supra notes 236-245 and accompanying text.
\(^{383}\) The competency of the courts to resolve the marriage definition debate was of direct concern to Congress. See H.R. REP. No. 104-664, at 16-18, 1996 U.S.C.C.A.N. at 2910-12. According to the Committee Report on DOMA, “It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage.” Id. at 18, 1996 U.S.C.C.A.N. at 2912. As for maintaining the traditional definition of marriage in federal policy, DOMA supporters saw their congressional vote as protecting the sovereign interests of their constituents from interference by courts “involv[ing] themselves far beyond any plausible constitutionally-assigned or authorized role.” Id. at 16, 1996 U.S.C.C.A.N. at 2910. See also, e.g., 142 CONG. REC. at H7484 (statement by Rep. Charles Canady) (“When Congress voted on Federal laws that conferred benefits on married persons, I do not think that Congress ever contemplated their application to same-sex couples. I do not think the American people did either. Should we not let the American people and their elected Representatives, as opposed to a sharply divided Hawaii court, decide whether we should alter the fundamental definition of marriage recognized by civilizations for thousands of years and always presumed by the U.S. Congress?”) (referring to a decision by the Hawaii Supreme Court preliminarily recognizing a federal equal protection right to marital recognition for same-sex couples in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); id. at H7499 (statement of Rep. James Sensenbrenner) (“I believe in the power of the people and the power of the Congress to make the right decisions and to do the right thing. And we ought to have an open debate on the issue of whether Federal benefits should be expanded to couples who get involved in gay marriages. The place for that debate, I would submit, is in the forum of public opinion, and the greatest deliberative legislative body in the world, the Congress of the United States, rather than having judges that are not elected and judges that are not responsible to the people bootstrap a decision in one State to national policy.”).
DOMA. His ruling conveyed a tone of unquestioning certainty as to the unconstitutionality of the congressional act, such as when he wrote that “[t]his court can readily dispose the notion . . .”\(^{385}\), “[s]uch denial [of federal recognition] does nothing to promote stability in heterosexual parenting[,]”\(^{386}\) “DOMA cannot possibly . . . ,”\(^{387}\) “denying marriage-based benefits to same-sex couples certainly bears no reasonable relation to any interest the government might have . . . ,”\(^{388}\) “the government’s argument assumes that Congress has some interest in a uniform definition of marriage for purposes determining federal rights, benefits, and privileges. There is no such interest[,]”\(^{389}\) “utterly unpersuasive,”\(^{390}\) “[i]t strains credulity,”\(^{391}\) “this Court is soundly convinced,”\(^{392}\) “the proffered rationales . . . [are] clearly and manifestly implausible,”\(^{393}\) and “this court can conceive of no way in which such a difference might be relevant.”\(^{394}\) The Gill ruling amounts to constitutional dictate by adjective and adverb.

Judge Walker also overreached by finding, in effect, that theological and moral teachings of the major religions on same-sex relationships constituted a public harm. He asserted that “[r]eligious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians,”\(^{395}\) and cited to official statements from the Vatican, and from Orthodox, Lutheran, Southern Baptist and other religious dominations as examples.\(^{396}\) He

\(^{384}\) Compare how Judge Tauro dismissed out of hand the main argument of Congress referring to procreation and parenting on the basis of a string cite listing various professional statements with Justice Martha B. Sosman’s dissenting opinion addressing the same evidence in Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 978, 979-80 (2003).

\(^{385}\) Gill, slip op. at 23.

\(^{386}\) Id. at 24.

\(^{387}\) Id. at 25.

\(^{388}\) Id.

\(^{389}\) Id. at 28.

\(^{390}\) Id. at 36.

\(^{391}\) Id. at 37.

\(^{392}\) Id.

\(^{393}\) Id. (citation omitted).

\(^{394}\) Id. at 38.

\(^{395}\) Id. at 101.

\(^{396}\) Id. at 101-03.
accepted as true “that religious hostility to homosexuals [plays] an important role in creating a social climate that’s conducive to hateful acts, to opposition to their interest in the public sphere and to prejudice and discrimination.”  

He characterized Proposition 8 (and by extension all similar DOMA measures at the federal and state levels) as “plac[ing] the force of law behind stigmas against gays and lesbians.”

He also noted evidence indicating that eighty percent of weekly church goers voted in favor of Proposition 8, and listed the ballot outcomes in other states, approving marriage-definition measures similar to the California provision, as supposedly substantiating that religiously-inspired hostility leads to the denial of marriage rights for gays and lesbians.

These determinations, styled as factual findings, were instead value-laden pronouncements about what henceforth is to be regarded in the law as legally cognizable harms. Judge Walker declared, for example, that “Proposition 8 harms the state’s interest in equality, because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender,” and also claimed that “the state has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality.”

Nothing in the law of the United States or California provided the source for these judicial dictates.

Instead of applying the law as promulgated through democratic processes, Judge Walker crafted new law to override existing law. He assumed the legislative role of evaluating and

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397 Id. at 103.
398 Id. at 85.
399 Id. at 102 (referring to CNN exit polling).
400 Id. at 103-05.
401 Id. at 124.
402 Id. at 125.
403 As “factual” findings, their only source was “evidence” consisting of the opinion testimony of witnesses. See e.g. id. at 125 (“Plaintiffs presented evidence showing conclusively that the state has no interest in preferring opposite-sex couples to same-sex couples or in preferring heterosexuality to homosexuality.”) (emphasis added).
weighing personal claims of harm in order to establish what constitutes an actionable public
offense. Despite the contrary democratic consensus, he asserted in effect that the practice of
limiting marriage to opposite-sex unions is a product of religious and moral attitudes deemed by
the Judge to be injurious to the common good. That connection between democratic action and
supposedly illegitimate motivation, according to Judge Walker, made the practice of ratifying
those limits at the ballot or in the legislature itself a public harm.\(^{404}\) Thus, he substituted his own
opinion as to what personal grievances warrant the legal remedies that accompany the creation of
civil rights, and treated his own views on the matter as the rule of law.

Finally, notwithstanding the substantial public support for limiting marriage to opposite-
sex unions, Judges Tauro and Walker concluded that they could conceive of no rational basis
whatsoever for why the government might legitimately take this consensus into account when
shaping public policy on marriage.\(^{405}\) This judicial failure of imagination ensued even though
Judge Tauro acknowledged that “a court applying rational basis review may go so far as to
hypothesize about potential motivations of the legislature, in order to find a legitimate
government interest sufficient to justify the challenged provision.”\(^{406}\) Thus both Judges
somehow determined that a deeply rooted legal tradition that continues to enjoy strong
democratic support was entirely devoid of rationality and thus failed to survive even the
minimum level of judicial scrutiny.

\(^{404}\) See e.g. \textit{id.} at 132 (“Many of the purported interests [in enacting Proposition 8] identified by proponents are
nothing more than a fear or unarticulated dislike of same-sex couples.”).
\(^{405}\) \textit{Gill}, slip op. at 21 (“[T]his court is convinced that ‘there exists no fairly conceivable set of facts that could
ground a rational relationship’ between DOMA and a legitimate government objective.”); \textit{Massachusetts}, slip op. at
27 (relying on the conclusion in \textit{Gill} that DOMA lacked any rational basis to assert that DOMA “plainly conditions
the receipt of federal funding on the denial of marriage-based benefits to same-sex couples” and therefore “induces
the Commonwealth to violate the equal protection rights of its citizens”); \textit{Perry}, slip op. at 135 (“Proposition 8 fails
to advance any rational basis in singling out gay men and lesbians for denial of a marriage license.”).
\(^{406}\) \textit{Gill}, slip op. at 21.
If the findings of no rational basis by both Judges are upheld on appeal, it would mark a
dramatic change in the course of federal jurisprudence. Is the United States Supreme Court
prepared to strike down laws as “irrational” that are backed by deeply rooted traditions and that
continue to garner broad public endorsement? Based on precedent, the answer is most likely
negative. None of the relevant Supreme Court decisions cited by either Judge invalidated on
grounds of utter irrationality a law that comported with a social consensus of a magnitude
comparable to that existing in the marriage context. Instead, the laws in these cases were
unusual, qualifying as exceptions to the prevailing legal norm, or simply were the product of last
minute political machinations leading to their enactment without much public scrutiny or
debate. Marriage definition laws have emerged from a long course of political, social,

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407 The Supreme Court has acknowledged that popular support, in and of itself, does not insulate a policy from
constitutional scrutiny and will not justify interference with duly recognized constitutional rights. See, e.g., West
Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (“One’s right to life, liberty, and property . . . and
other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.”). The
question remains, however, whether a “fundamental right” is at issue and as this article has argued at length,
personal claims that have not garnered majoritarian democratic backing at any point in history should not be held to
enjoy civil rights status and thereby considered as overriding public policies that in fact enjoy such backing.

408 Considerations of relevancy would exclude any precedents applying heightened scrutiny to ostensibly rational
policies because fundamental rights or suspect classifications were determined to be at stake. While Judge Walker
found that the claim at issue was protected as a fundamental right that extended to same-sex couples and that the law
at issue employed a suspect classification, he cited to no Supreme Court precedent reaching the same conclusions.
Perry, slip op. at 110-13, 119-21.

409 See United States Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 & n.6 (1973) (indicating that invalidated
 provision first surfaced late in the legislative process “bare of committee consideration” and was accompanied by
 scant legislative history explaining its purpose outside of reference of one legislator to an intent to disadvantage
 “hippies,” thus situated in a context in no way mirroring the extended social debate found in the marriage context);
City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (declining to decide whether a zoning
 ordinance requiring special use permits for facilities for “feeble-minded persons” was unconstitutional on its face,
 but determining on rational basis grounds that the ordinance was unconstitutionally applied by virtue of a 3-1 city
council vote to deny a permit for a group home for persons with mental retardation, a judicial determination of
irrationality based on evidence of negative attitudes expressed by neighbors at council hearings, a source of public
sentiment pertaining to the matter at issue considerably less extensive than the social consensus at stake in
definition-of-marriage cases); Romer v. Evans, 517 U.S. 620, 633 (1996) (describing invalidated law as
“unprecedented in our jurisprudence”); Lawrence v. Texas, 539 U.S. 558, 568 (2003) (noting that “there is no
longstanding history in this country” of enacting laws of the type invalidated in this case). The Supreme Court
rarely overturns laws under the rational basis test, and the few recent decisions where the Court found that the laws
in question failed to satisfy even minimum rational basis scrutiny should be considered outliers in constitutional
jurisprudence. See Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term
Through Romer v. Evans, 32 IND. L. REV. 357, 357 (1999) (finding that only ten out of one hundred Supreme Court
cases decided on rational basis grounds between 1971 and 1996 resulted in a law’s invalidation).
philosophical and religious debate, reflecting a history of democratic discourse that has been renewed and intensified in the present day. The continuing force of the supportive public consensus should bar the courts from questioning the rationality of laws limiting marriage to the union of both sexes.

V. Conclusion.

This article examined the opinion of the Iowa Supreme Court in *Varnum v. Brien* and critiqued the court’s handling of the issues concerning the nature and meaning of marriage, the origin of civil rights, and the role of the courts in a democracy. This article next offered a description of comprehensive state interests in defining marriage as the union of the sexes, which interests promote the bridging of sexual differences to further the goal of creating one nation out of many factions, and which account for the lack of upper age limits or the allowance for childlessness when determining eligibility for marriage licenses. This article then asserted that civil rights emerge from democratic processes that thoroughly test general intuitions about what is just and deserving of civil rights status, and that the federal courts are ill-equipped to substitute one social orthodoxy for another absent any democratic warrant.

In light of the foregoing, this article submits that, if asked to decide whether eligibility for marital recognition is a constitutional right for same-sex couples and contrary to the trial court rulings in the federal cases making their way upwards, the United States Supreme Court should rule that it is constitutionally permissible for the government to deny such recognition by adopting for legal and civil purposes the deeply rooted and majoritarian-backed definition of marriage. This outcome is warranted because: 1) the status quo definition of marriage, while rooted in religious and moral considerations, reasonably and from a secular perspective
celebrates the public, unitive significance of a domestic community consisting of both sexes, the formation of which uniquely conduces greater social unity generally by virtue of the commitment between members of each sex to bridge the gender gap in the marital relationship; 2) democracy has never endorsed a right to marry that guarantees equal access to all comers, including same-sex couples; and 3) the Court lacks the capacity to second-guess democracy’s judgment as to what deserves civil rights status in the marriage context.410

410 How the Court will rule will depend, of course, on how each Justice will address the related issues, and that will depend very much on the Justices’ individual judicial philosophies. The Justices’ testimony before the United States Senate as nominees for appointment to the Court provides one intriguing source for predicting how each Justice might approach a case raising a same-sex marriage constitutional claim. For a summary and analysis of the confirmation hearings of the sitting members of the Court, see Reading the SCOTUS Tea Leaves With Respect to Deciding a Case Involving a Same-Sex Marriage Constitutional Claim (Aug. 2010), available at https://sites.google.com/site/marriageatthesupremecourt/home/confirmation-hearings (last visited Aug. 13, 2010).