Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right

Vincent J Samar, Chicago-Kent College of Law

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THROWING DOWN THE INTERNATIONAL GAUNTLET: SAME-SEX MARRIAGE AS A HUMAN RIGHT

By Vincent J. Samar*

Introduction................................................................. 2
I. How the U.S. Supreme Court Incorporated Some of the Protections of the Bill Of Rights Against the Federal Government to Also Apply Against the State Governments ........................................... 6
II. Justifying the Right to Marry Without Regard to Gender ............................................ 12
A. Constitutional Justifications and Their Limitations when Applied to International Law .......... 12
B. Seeing Human Action as the Independent Variable Behind Moral Evaluation ..................... 16
C. Tracing the Path from Human Freedom and Well-Being to the Social Institution of Marriage .... 20
D. Same-Sex Marriage as but Another Instance of Legal Marriage ....................................... 22
III. The Gewirthian Human Rights Approach as a Legitimating Doctrine for Same-Sex Marriage even if It Were Not Thought to Provide the Final Justification on the Matter ........................................... 27
A. The Idea of Human Dignity ................................. 27
B. How Same-Sex Marriage Affirms Human Dignity ........ 29
C. Can We Normatively Distinguish Opposite-Sex Marriage from Same-Sex Marriage Based on the External Goods Achieved? .......................... 33
IV. The Constraints on Groups Opting-Out of the Protections Afforded by Universalist Morality .... 39
A. Particularist versus Universalist Morality ............. 39
B. How International Human Rights Law Is Implicated by this Analysis .............................. 43

* Vincent J. Samar is Adjunct Professor of Law at the Illinois Institute of Technology, Chicago-Kent College of Law and Adjunct Professor of Philosophy at Loyola University Chicago and Oakton Community College. Professor Samar wishes to thank Mark Strasser of Capital University Law School for his encouragement.
C. Incorporating Same-Sex Marriage Recognition into Domestic Law Via International Customary Law Principles ........................................ 48
Conclusion ................................................... 55

INTRODUCTION

Do nations who do not recognize same-sex marriage have an obligation to recognize same-sex marriage, when such marriages have been consummated abroad? Is the right to such recognition a human right? If so, what obligations exist for the domestic courts of various nations to incorporate the right to same-sex marriage for their own people? Must international law recognize a right to same-sex marriage as a human right, especially if other nations have already begun a move towards that recognition? These questions are moving to center stage as an increasing number of countries in the European Union and elsewhere are being forced to address claims to various rights, particularly by lesbian, gay, bisexual, and transgendered communities. At their core, these questions are troublesome because they draw attention to a deeper set of problems concerning the relationship between domestic and international human rights law. What are the similarities and differences between these two areas of law? Is there a hierarchy in which one area of law dominates the other? Do international human rights norms arise from various domestic constitutional provisions? What are the duties of courts (especially domestic courts) in declaring the law? Can local traditions, religious beliefs, or constitutional requirements justifiably stand in the way of extraterritorial recognition of international human rights law?

Consider an “instantiation doctrine” that would operate as the reverse of the Fourteenth Amendment “incorporation doctrine” of the United States Constitution. The latter, in the name of the sovereignty of the people, binds the states to principles formerly only relegated to the federal government. The former, in the name of partial orderings, finds authorities such as the U.S. Constitution, in the fact that its current provisions are not inconsistent with broader international human rights principles. The latter involves a principle of justification (ratio essendi) in Hume’s secondary sense of the term. The former operates by a principle of legitimacy (ratio cognoscendi) as defined by Jeremy Waldron.¹ There has been a transformation in legal thought from seeing the

¹ Jeremy Waldron would want to extend the principle of legitimacy, as Rawls and Habermas describe it, from a mere exercise of political power based on social consent to include
Constitution (and the Supreme Court’s interpretations of it), as a primary rule of recognition to seeing it as a secondary rule (in H.L.A. Hart’s sense) instantiating a particular set of human rights; this occurs, at least in part, because: (a) worldwide relationships of all sorts are becoming commonplace, (b) the problems facing the world community are now recognized as distinctively interrelated in kind as human problems, and (c) there is a growing philosophical recognition that any solution for human problems can only occur through a robust rebuttal to cultural relativism without exclusion of all differences related to local histories and traditions. The last of these can be seen to advance self-esteem to levels otherwise unobtainable through strict adherence to formal rules. Still, the need for transformation in legal thinking has led to a tenuousness between wanting to affirm a set of universal human rights (for instance the United Nation’s Universal Declaration of Human Rights\(^2\) and the International Covenant on Civil and Political Rights\(^3\)), and actually defending a particular right such as the right to same-sex marriage. Part of the trouble, no doubt, is the failure to achieve consensus over what human rights do exist and how they are justified. Indeed, one interpretation of current tensions between traditionalists, modern-
ists, and post-modernists finds its genesis here. This article addresses the question of how this tension can be comfortably resolved in the context of the global same-sex marriage debate, and, if it can be, what such a resolution might look like.

Part I will briefly overview the history of the Fourteenth Amendment to the U.S. Constitution. This post-Civil War reconstruction Amendment was seemingly designed to grant the full rights of citizenship to former Negro slaves, but was eventually read to guarantee every citizen rights against state authorities which were formerly held only against the federal government (incorporation). If these “same rights of citizens” are also the rights guaranteed to all persons by the Equal Protection Clause, then the right to marry the person of one’s choice, regardless of the gender of either party, would seem to be consonant with that broader reading. However, the issue is more complex because the United States, like most countries, does not declare the right to marry in any specific constitutional provision, let alone implicate the right to same-sex marriage in its national laws.

Part II will investigate various possible foundations for a substantive human right to same-sex marriage. It will argue that some variation on the philosopher Alan Gewirth’s rationalist approach to justifying human rights, while not without its detractors, would likely see same-sex marriage as but another variant on the privacy the Constitution already affords to opposite-sex marriage. The Gewirthian position also has the advantage of detailing a view of why secular societies may value the institution of marriage as arising out of a general human rights conception without limiting the idea to its historical opposite-sex applications (“instantiation”).

Part III argues that, should the Gewirthian view not find wide-ranging support for its stringent claims, it would still provide a formable basis for recognizing rights such as same-sex marriage in a world in which inherent human dignity can be seen as a limit to the legitimacy of state authority. Here it is hoped that even if a Gewirthian justificatory basis for same-sex marriage were not apodictic, there remains good normative ground for affording human dignity to such relationships based on their ontological connection to an important form of purposive ac-

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tion that many societies already recognize in relation to opposite-sex relationships.

As a complement to the perspective in Part III, Part IV will show how such respect, when incorporated into domestic constitutional law, need not prevent, but in fact must support, individual and group choices to opt out of such recognition (based on religious or other values), provided only that they do not directly impinge upon the equal rights under law of others to marry a same-sex partner. In this way, the system of human rights that emerges contemplates a means to accommodate people with incompatible beliefs and attitudes. It is highly improbable that any one view will be able to gain universal acceptance. One exception may be the freedom to hold contending views does, because it enhances maximal individual self-fulfillment. At the same time, this view recognizes that when certain highly desired institutional prerogatives are legally afforded to one group of people, they cannot then be withheld from another group absent proof of serious non-belief mediated harm to others.

Because this Article adopts principles that on their face may appear as tenets of Western liberalism, its neutrality will no doubt be questioned. Still, the view articulated is not constrained either by the origin of this idea or by any cultural assumptions about what constitutes a self-fulfilled life, other than that it is founded on a theory of human dignity, the focus of which must always be the individual decision-maker whose purposes determine what actions will be taken. In this sense, any more particular moral view that emerges in either domestic or private international law—including various communitarian views—must respect minimal constraints imposed by universal human rights, and must be articulated in a common language which affirms the rights of all people to dignity and respect. While on the one hand the view expressed in this paper harkens back to an earlier correspondence view of truth associated with the natural law tradition in international law, it clearly deviates from that tradition without disassociating itself from an ultimate justification in the purposive nature of individual human action and the normative meaning that signifies the individual himself as a thing of value. In this sense, the theory afforded is properly one of human rights, as opposed to natural law or natural rights.

Finally, notwithstanding the practical problems in the acceptance of this theoretical framework, particularly by those who hold especially strong religious or metaphysical beliefs, the position is worth pursuing
given the realities of communal life and the limits of human understanding. These arguments accommodate associations that may be less tolerant of the rights of others so long as they do not infringe those rights. Hence, for example, the Catholic Church can continue to refuse to marry same-sex or previously divorced partners, but a country such as France should not be afforded in law the same luxury.

I. How the U.S. Supreme Court Incorporated Some of the Protections of the Bill of Rights Against the Federal Government to Also Apply Against the State Governments

On June 13, 1866, the United States Congress proposed to the several states, the adoption of the Fourteenth Amendment to the U.S. Constitution as the second of three post-Civil War amendments. The Fourteenth Amendment was subsequently ratified on July 9, 1868. Following adoption of the Thirteenth Amendment, which ended legal slavery in the United States, the Fourteenth Amendment was viewed as guaranteeing the privileges and immunities of full citizenship to the former Negro slaves. The specific wording of the amendment reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.5

In a series of Supreme Court cases from the 1940s to the 1960s, the Amendment was interpreted to apply many of the Bill of Rights limitations on federal power to the state governments. Initially, it may have been thought that these protections should have been applied through the Privileges and Immunities Clause. However, the Supreme Court effectively narrowed the scope of the Privileges and Immunities Clause to cover very few privileges in the Slaughterhouse Cases.6 Thus, advocates for the expansion of substantive individual rights had to find a different basis for any further protection of rights; that new basis was

5 U.S. Const. amend. XIV, § 1.
6 83 U.S. 36 (1873).
the Due Process Clause. Under the Due Process Clause, the Supreme Court found many rights including: just compensation for property appropriated by a state, protection of freedom of speech, press, assembly, petition for redress of grievances, most of the procedural protections today provided criminal defendants in the United States such as no unreasonable searches and seizures, a warrant requirement, protection against double jeopardy, self-incrimination, the right to a speedy and public trial with an impartial jury in criminal cases, notice of accusation, assistance of counsel in criminal cases, mandatory Miranda warnings by law enforcement, and no excessive fines or cruel or unusual punishment. In effect, the Fourteenth Amendment can be considered a constitution in itself, as it puts very definite limits on state governmental authority. Still, notwithstanding the Court's decisions, deeper theoretical issues remain concerning how these changes could actually be justified. Justification here means not merely that these applications might be accepted as legitimate by a free people, but that they have the force of moral authority behind them.

One view, held by Justice Black, was that the Privileges and Immunities and Due Process Clauses themselves authorized incorporating provisions of the Bill of Rights against the states. This view is supported by some legislative history regarding congressional intent and thereby plays on the social contractarian idea of a society's agreement. A very

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7 Chicago, Burlington & Quincy Railway Co. v. City of Chicago, 166 U.S. 226 (1897).
17 In re Oliver, 333 U.S. 257 (1948).
25 According to John Rawls, "[o]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens
different view, held by Justice Frankfurter, was to interpret the Due Process Clause in light of traditional understandings of "natural law" or a "shocks the conscience" test.\(^{26}\) In other words, it was not that many parts of the Bill of Rights were being incorporated against the states contrary to their will, but rather that certain practices which "shock the conscience" would everywhere be condemned.\(^{27}\) Still another view, held by Justice White, was that the Fourteenth Amendment selectively incorporates against the states only those provisions of the Bill of Rights thought to be fundamental rights, because they might affirm "ordered liberty," or some other highly important value of a free people.\(^{28}\) Sometimes attached to both incorporation views is the idea that other non-specified fundamental rights, as suggested by the Ninth and Tenth Amendments,\(^{29}\) may also warrant incorporation.\(^{30}\) From these diverging positions one immediately finds differences in viewpoints regarding the authority of government, and from where that public authority arises.\(^{31}\)

Most notable is what remains consistent among alternative viewpoints. That is, rights can legitimately be recognized when the justification for such right is broad enough to encompass the new application, without being merely contrived.\(^{32}\) As relating to U.S. federal and state governmental authorities, the issue of concern seems to center on the liberty of the person to be free from unwanted intrusion, especially into areas likely to affect private life and behavior. This ideal is illustrated by a number of Supreme Court decisions, especially in the area of pri-

\(^{27}\) Id.
\(^{28}\) Id.
\(^{29}\) The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.
\(^{31}\) Here a distinction between power and authority is pointed out. The former presents an empirical claim regarding the power government may in fact have over some particular person or group. The latter presents a normative claim regarding the correctness of the government's exercise of that power.
\(^{32}\) Jeremy Waldron's idea of the value of democratic institutions is that they set up a recognized procedure for making "law amidst disagreement regarding the purposes and ends of laws." Roger Berkowitz, Democratic Legitimacy and the Scientific Foundations of Modern Law, 8 Theoretical Inquiries in Law 91, 93 (2007).
CONSEQUENTLY, AS NEITHER THE FEDERAL NOR THE STATE GOVERNMENTS ARE CATEROGICALLY DIFFERENT IN THIS REGARD, THE RIGHTS APPLICABLE TO THE FORMER WOULD SEEM NATURALLY APPLICABLE TO THE LATTER, ESPECIALLY AS STATE GOVERNMENTS ARE PART OF THE FEDERAL SYSTEM, THOUGH NOT WITHOUT SOME DIFFERENCES IN RESPONSIBILITIES AND JURISDICTIONAL LIMITATIONS. STILL, IF THAT IS THE CASE, THEN INCORPORATION MAKES SENSE UNLESS THERE ARE STRONGLY DISTINGUISHING REASONS FOR IT NOT TO APPLY. AND THAT IS AS TRUE WHERE

33 See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding the right of adult married persons to obtain contraceptives and doctors to prescribe their use against a state law that would criminally prohibit such action); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the right to obtain contraceptives to unmarried persons); Roe v. Wade, 410 U.S. 113 (1973) (upholding a woman’s right to choose to terminate a pregnancy); Carey v. Population Services International, 431 U.S. 678 (1977) (extending the right to obtain contraceptives to minors); Lawrence v. Texas, 539 U.S. 558 (2003). In Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984) Justice Brennan, while delivering the opinion of the Court upholding application of a Minnesota Human Rights law to prohibit the barring of women from admission to the Jaycees, noted:

[our decisions have referred to constitutionally protected ‘freedom of association’ in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

34 In Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 195-96 (1824) Chief Justice Marshall recognized that, while the Constitution, under Article 1, Section 8, clause 3 allows Congress to regulate commerce “among the several states,” “completely internal commerce of a state” is “reserved for the state itself.” He did note, however, that the power of Congress does not end at the jurisdictional border of the state, but suggested that Congress could regulate even intrastate commerce “if it had an impact on interstate activities.” EDWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 245 (3d ed. 2006) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW].

For example, the Eleventh Amendment states: “The Judicial Power of the United States shall not be construed to extend in any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. AMEND. XI.

35 The regulation of interstate commerce for example is clearly within the province of the Congress. Consequently, even where the Congress has not acted, state actions that place an undue burden on interstate commerce can be objected to. In this instance, Article 1, Section 8, clause 3, is seen to create a “dormant commerce or negative clause.” CHEMERINSKY, CONSTITUTIONAL LAW, supra note 34, at 391. A different but related objection concerns where a state attempts to interfere with Article 4, Section 2, providing: “The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States.” Id. Still, another
incorporation is justified under some universal natural law or human rights principle as it is of rights limiting the authority of the federal government by affirming popular sovereignty or the authority of state governments.

However, there is another clause in the Fourteenth Amendment that also must be examined: the Equal Protection Clause. This clause has been interpreted by the Supreme Court to require strict scrutiny, meaning that if a fundamental right is denied there must be a compelling governmental interest. This also applies when the affected groups can be classified as having either suffered a history of purposeful discrimination or has some immutable characteristic inconsistent with the ideals of equal protection, and as such are not politically powerful enough to remove the invidious discrimination on its own. For groups who have been subjected to a lot of stereotyping, such as gender groups and those of illegitimate birth, but who otherwise might warrant only occasional differences in treatment, equal protection requires heightened scrutiny to ensure that only important governmental interests are at stake. For most other situations, equal protection requires only that the governmental interest relate to a legitimate governmental end; this is a legitimate purpose that the government can pursue within the constitutional order. One recent exception concerns cases involving per se violations of equal protection because the classification seems

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area of reservation to the federal government is where even “[a]bsent explicit preemptive language, federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” Rice v. Santa Fe Elevator Corat, 331 U.S. 218, 230 (1947). State mandated alien registration is an example of this area of foreign policy. See Hines v. Davidowitz, 312 U.S. 52 (1941).

37 See, e.g., Troxel v. Granville, 530 U.S. 57, 96 (2000) (holding that Washington state statute that permitted any person to petition for visitation rights on the ground that it served the best interest of the child is insufficient to undercut a parent’s fundamental rights to determine visitation); See generally CHEMERINSKY, CONSTITUTIONAL LAW, supra note 34, at 241.


40 Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) (holding that a court may invalidate an act of Congress under the Commerce Clause only where “there is no reasonable connection between the regulatory means selected and the asserted ends.”).
related to nothing but animus. In such cases, the classification will not be upheld.

Given the above discussion of equal protection, it might appear that any society that already protects the rights of opposite-sex persons to marry must also protect same-sex persons' right to marry. However, the issue is far from clear, as marriage is not a basic interest in the sense of not involving any causal or institutional assumptions about how it is carried out. To the contrary, marriage may serve the well-being of those who marry as well as that of others in society who value marriage derivatively, combining a basic concern for freedom with the institutional context in which marriages are recognized. Perhaps the reason why marriage is not specifically identified as a right in the Bill of Rights is that it has inarguable connections to other important public policy concerns. Consequently, if the Fourteenth Amendment incorporates only fundamental rights, some argument must be made to show marriage to be a fundamental right. This means that a fuller status for both the freedom and well-being components of marriage must be elucidated,

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41 Romer v. Evans, 517 U.S. 620 (1996) (holding unconstitutional on the basis of mere "animus" a Colorado state constitutional amendment repealing all laws protecting gays, lesbians or bisexuals); see also Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (requiring a special use permit for a group home for the mentally disabled seems to be based on prejudice and thus violates equal protection).

42 Mark Strasser has noted that the federal Defense of Marriage Act modifies the traditional area of state regulation of marriage law in a manner that is impermissible, following the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003). See Mark Strasser, Defending Marriage in Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence, 38 CREIGHTON L. REV. 421 (2005).

43 Here one must distinguish a basic interest from which a fundamental right may apply from a derivative interest where a fundamental right may also apply on analytic grounds. Basic interests are simply those that suffer no further delineation based on cause and effect or institutional setting. In this sense, basic interests differ from derivative interests. See VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION 67-68 (1991) [hereinafter SAMAR, THE RIGHT TO PRIVACY]. Of course, basic interests include cause and effect considerations, in the sense that our bodies respond to various mental actions (called decisions) when we act voluntarily. Here however, the cause/effect relation is part and parcel of our actions because they are human actions and not by virtue of externalities over which operations we may have no control. Fundamental rights are those thought necessary to achieve the most essential of moral ends, like human freedom and well-being. In the first instance this right affirms our ability to control our own actions with knowledge of relevant circumstances by our own unforced choice. See ALAN GEWIRTH, SELF-FULFILLMENT 79-80 (1998) [hereinafter GEWIRTH, SELF-FULFILLMENT]. However, being purposive is a dynamic state. Therefore, the normative appellation of "fundamental" before rights will also include rights to some derivative interests if the ends to which these rights are directed are essential to furthering human agency and not otherwise obtainable with any reasonable ease.
which creates a unique kind of status warranting heightened protection. Presumably, the same would be true whether the marriage is between same-sex or opposite-sex partners, unless there is something about the sex of the parties that necessitates a special distinction.

II. JUSTIFYING THE RIGHT TO MARRY WITHOUT REGARD TO GENDER

A. Constitutional Justifications and Their Limitations when Applied to International Law

Although American constitutional law classifies the right to marry as a fundamental right, no single justification has consistently been adopted by the Supreme Court. As a consequence, one author has suggested that there are seven possible alternative justifications for a fundamental right to marry, including tradition, personal freedom, social practice, political health, privacy, economics, and the constitutional text; none of these has consistently been the justification followed by the Supreme Court. When looking at this matter in relation to international human rights law and not just American constitutional law, none of the aforementioned approaches would have sufficed, even if they had been consistently followed by the United States Supreme Court unless (a) other countries (at least other Western European countries) looked to American constitutional interpretations for guidance in determining the meaning of their own constitutional norms of liberty and equality, or (b) some foundation could be laid outside the constitutional jurisdiction

44 See Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (here, the Court “reaffirm[ed] the fundamental character of the right to marry”).

45 Joseph A. Pull, Questioning the Fundamental Right to Marry, 90 MARQ. L. REV. 21 (2006). Here, Pull claims that the Supreme Court’s “acceptance of some traditional aspects of marriage as fundamental in conjunction with its rejection of other aspects [as in Loving] suggests that tradition is not determinative of the boundaries of the right to marry.” Id. at 47-48. Nor is personal freedom determinative of those boundaries, “[u]nless the Court can explain why the Constitution enshrines marriage as the most important relation in life for all individuals . . . .” Id. at 48-49. Social practice fails as a justification unless one claims that democratically elected representatives reflect “society’s hierarchy of values through its official acts,” making court decisions striking down certain marriage limitations nonsensical. Id. Political health of a society also fails “just because something has a salutary effect on political freedom does not make it a fundamental right.” Id. at 53. Privacy, in the informational sense, is contradictory on its face since marriage is “anything but private.” In the procreative sense, privacy makes sense only if the state can criminalize intimate behavior, which it cannot. Id. Economics, in the sense of the benefits that attend marriage, fails if such benefits are not already fundamental rights. Id. And, in respect to constitutional text, there is no clear reason why the due process clause covers marriage. Id.
of the United States Supreme Court for believing such a right to marry ought to be more widely advanced.

In fact, other European courts previously looked to decisions of the United States Supreme Court, though it is less clear how consistently this pattern was followed. Today, European courts are more inclined to follow decisions of the European Court of Human Rights, at least in the first instance. While on the one hand this may appear to be a parochial move, it may actually represent a move to regionalism, if not greater international recognition, among European state courts. Thus, while there is some reason to believe that the circumstance specified under (a) above has historically been true, at least in the field of the discovery of new rights, (b) is by far the more intriguing question, especially as the United States is no longer ahead of—and may be well behind—some European countries in settling the question of whether there is a right to same-sex marriage. This matter is further complicated by the fact that, absent a nation’s consent to the Convention or some other form of international sovereign gaining recognition, it may not be immediately evident from where such a right would get recognition, let alone what governing body would be the authorized international authority to adopt it.

Raising a difficult issue, however, does not mean it is insolvable. At most, the conflict might mean that the method of resolution will not be obvious in the first instance. For example, it is unlikely that nations will enter into treaties recognizing such rights where the legitimacy of these same rights are domestically controversial. Nor does this sort of case fall within the common understanding of the jus cogens principles of international law because there is no international consensus on these marriage relations, especially at the level of gravity of harm that such

46 See Vernon Valentine Palmer, Insularity and Leadership in American Comparative Law: The Past One Hundred Years, 75 TUL. L. REV. 1093, 1094 (2001) (The author explained “the United States Constitution has been a prodigious influence on world constitutionalism, particularly in regard to the spread of the concept of judicial review and the notion of justiciable human rights.”). See also Bruce Ackerman, The Rise of World Constitutionalism, 83 VA L. REV. 771 (1997).

47 Hon. Earl Johnson Jr., Will Gideon’s Trumpet Sound A New Melody? The Globalization of Constitutional Values and Its Implications for A Right to Equal Justice in Civil Cases, 2 SEATTLE J. FOR SOC. JUST. 201, 210-11 (2003) (discussing Airey v. Ireland, 2 Eur. Ct. H.R. 305 (1979); where the court held that the European Convention sometimes requires states to take affirmative actions, such as providing legal representation, to ensure an indigent’s effective right to access the courts in a civil case).
principles address.\textsuperscript{48} Still, the fact that the latter has been the chief focus does not mean that lesser, but still very serious affronts, should not be examined under Customary International Law, especially if the rationale for examining such affronts is the same (in form and degree of seriousness) as the harm to be avoided.\textsuperscript{49} Indeed, in that instance, the issue might be more about who should decide and on what basis the decision should be made.\textsuperscript{50}

However, if that is the case, then the glue for joining issues resides in something that, at least initially, is less political than any forum of legislative determination (as would be required for a United Nations or bi- or multi-lateral treaty). The theory will have to encompass something that can be recognized by all human beings, because it maximizes their individual capacity-fulfillment to be the best they can humanly be.\textsuperscript{51} Such an approach was actually the custom during an earlier period of international law when it was thought that the best in human capacity-fulfillment was following some discernable order to natural inclinations via natural law. However, this approach has for some time not been the case, although the modern day concern for human rights might reflect a more mild return of jus cogens principles to this earlier concern.

\textsuperscript{48} As of this writing, only the Netherlands, Belgium, Spain, and Canada recognize a same-sex right to marry, although a number of other European countries grant recognition and some rights to same-sex unions, including Sweden, Finland, Denmark, Iceland, Germany, France, Portugal, Switzerland and The United Kingdom. Outside of Europe, such unions are also recognized in Argentina and New Zealand. Anjuli Willis McReynolds, Comment, \textit{What International Experience Can Tell U.S. Courts About Same-Sex Marriage}, 53 UCLA L. REV. 1073, 1095-96 (2006).


\textsuperscript{50} See C. L. Lim, \textit{The Constitution and the Reception of Customary International Law}: Nguyen Tuong Van v. Public Prosecutor, 2005 SING. J. OF LEGAL STUD., 218, 227-33 (noting that although normally the executive and the courts must agree on a specific customary international rule, it is not necessary where it would be unimaginable that a nation might disagree); see also Jack T. Lee, \textit{Interpreting Bills of Rights: The Value of a Comparative Approach}, 5 INT’L J. CONST. L. 122 (2007).

\textsuperscript{51} The idea being that the matter here is more appropriate for judicial than legislative determination because it involves considerations of language and reason in context to principles of justice, rather than policies aimed at securing some general social or economic advantage to society. See Ronald Dworkin’s distinction between principles and policies in \textit{Ronald Dworkin, Taking Rights Seriously} 105-30 (1977); see also Michel Rosenfeld, \textit{Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court}, 4 INT’L J. CONST. L. 618 (2006).
SAME-SEX MARRIAGE AS A HUMAN RIGHT

for moral justification. Bearing this in mind, a less grandiose, but still non-culture-based morality can be proposed that serves the needfulness for human action as the most basic determinant of all moral and legal obligations, especially in the international arena.

As it stands, international customary law is too open to the selective judgments of State decision-makers who decide whether to adopt a certain international practice, thus making that practice customary for themselves. However, this choice means that a number of good practices—not merely good as a matter of convenience or economic policy, but as ways to secure basic human rights—may get left out in the process. As a consequence, it would help to find common language for how determinations of rights might be made. However, since the matters at stake for human rights require more of a cross-cultural reflective and moral evaluation, rather than a mere utilitarian efficiency evaluation, the language game needs to provide for a philosophical analysis, specifically one that engages questions of metaethics and political morality.

See, e.g., 2 Hugo Grotius, The Rights of War and Peace 817-47 (2005) (arguing that the foundations of a just war are found not in treaties but in immutable principles of natural law that apply to all nations). The natural law theory in question is St. Thomas Aquinas' view where following the order of natural inclinations is both the foundation of the natural law and of human morality. One theoretical problem with the theory is that the word "natural" seems to be doing all the important work of the theory. However, that means if the word "natural" is meant to be synonymous with "moral" and "unnatural" with "immoral," then the theory offers no independent justification of morality but only begs the question of what is morality. In contrast, if being natural is propositionally related to being moral (and unnatural to immoral), the problem that arises is how one bridges the is/ought gap. Aquinas simply provides no valid way in which this could be done within his scheme, nor is any such way obvious. See Vincent J. Samar, Justifying Judgment: Practicing Law and Philosophy 8-12 (1999).

See Richard Posner, The Problems of Jurisprudence 353-92 (1990) (arguing that economic analysis came into tort law when courts began to realize that paying attention to the likely economic consequences of a decision would better serve society's overall wealth-maximization than the (then) current approach of case-by-case determinations that were only constrained by precedent).

As Ronald Dworkin has understood, "[a]ny successful interpretation of our legal practice must recognize and justify the common assumption that law can compete with morality and wisdom and sometimes override them." Steven J. Burton, Law as Practical Wisdom, 62 S. Cal. L. Rev. 747, 771 n.91 (1989). This statement suggests that law is not outside morality but uses morality and institutional fit as a common denominator. That is fine when the two might be different and one looks for overlap. When, however, the two norms are at odds, or one is arguably weaker than the other because it fits better within a scheme of universal morality, then the stronger should override the weaker. See Ronald Dworkin, Law's Empire 285 (1986).

In her article, Traditional and Modern Approaches to Customary International Law, 95 Am. J. Int'l L. 757, 791 (2001), Anthea Roberts uses Rawls's idea of "reflective equilibrium" in which
B. Seeing Human Action as the Independent Variable Behind Moral Evaluation

Every moral theory (as well as every legal theory) must rely on individual choices to meet specific ends, whether it seeks to promote the collective good, equal rights for all or a communitarian corporatist ideal. This means, however, that every moral theory presupposes the possibility of individual human actions being both voluntary and purposive. Along with this presupposition follows at least minimal assumptions about the nature of human voluntariness and purposiveness, as all human actions concerned with moral theories are directed by a pur-

intuitions and moral principles are bounced back and forth against one another to arrive at similar balancing conclusion to Burton. For Roberts, reflective equilibrium should provide:

the most coherent explanation [and justification from both directions] of state practice and opinio juris, rather than simply giving preference to one and discounting the other. For this reason, conflicting state practice should never be discounted as irrelevant to interpretation, because it may contain the seed for a new custom. It also clarifies how customs change over time in light of new state practice, opinio juris, and moral considerations.

*Id.* The criticism made about conflicting norms in reference to Burton's view fits equally well with Robert's view.

55 According to Beyleveld and Brownsword:

(1) The *Legal Enterprise* can only be explained in terms of a particular model which defines it. [In our case, the model is set by the Constitution and methods that the Supreme Court has adopted for its interpretation.] The model is a constellation of conditions and interests which we may refer to "as the human social condition under a problem of social order." This model may be thought of as being bounded, on the one side, by a perfectly consensual model in which personal interests and facts of human finitude are absent and, on the other side, by a perfectly coercive model in which moral interests are missing. The perfectly consensual model is incompatible with the nature of the *Legal Enterprise* because this presupposes a problem of social order which is inconceivable without facts of human finitude and personal interests. The purely coercive model is incompatible with the *Legal Enterprise* because the possibility of knowledge of social phenomena, and thus of knowledge of phenomena constituting the *Legal Enterprise*, presuppose the possibility of moral interests—specifically specified by the PGC. (2) The model of the human social condition under a problem of social order manifests an ideal-typical case in which all interests are idealistically transformed by relations of consistency with the PGC. Only in this case can coherent reasons be given. Such reasons are based upon real interests which provide self-sufficient explanations of actions guided by them. In non-ideal-typical cases all real interests are present, but awareness of some real interests or the ability to act on the basis of real interests is missing. In general, departures from the ideal-typical case are to be explained by citing causal mechanisms which explain why essential human nature is not manifest in action. The ideal-typical case, and the ethical ideal which it grounds, is thus a necessary yardstick for ethical evaluation, description, and explanation of activities which constitute the *Legal Enterprise*.

pose.\(^{56}\) Thus, voluntariness and purposiveness are indefeasible predicates for having a moral theory, which is evidenced by the fact that moral theories make prescriptive, as well as descriptive, claims regarding human actions.\(^{57}\)

From this meager beginning, the American philosopher Alan Gewirth believes that because every rational agent acts for a purpose, he must, at least implicitly, claim rights to freedom and well-being as necessary conditions that make his ability to act possible,\(^{58}\) or otherwise the agent would contradict himself merely by acting.\(^{59}\) The agent's choice to act is itself an affirmation of his own belief that he should have the freedom to act for purposes he initially assumes are good.\(^{60}\) To this point, Gewirth's argument shows, only that the agent, as a matter of prudence and consistency, must make certain definite rights claims to freedom and well-being from his own perspective as an agent.\(^{61}\) What translates the agent's strictly prudential rights claims into an entitlement

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\(^{56}\)See Aristotle, Nicomachean Ethics, bk. 3, sec. 1 (discussing voluntary from involuntary actions as originating from the person with relevant knowledge); Aristotle, De Anima iii 10, 433a9-16 (arguing that it takes both reason and desire to move humans and non-human animals toward a purposive end).

\(^{57}\)See Alan Gewirth, Reason And Morality 25 (1978) [hereinafter Gewirth, Reason And Morality].

\(^{58}\)The argument proceeds as follows: "I do X for purpose E." From this, it can be derived that "E is good," whereby "good" implies as a pro-attitude or positive motivation to act. It follows that "My freedom and well-being are necessary goods." Here, freedom comes in with voluntariness and well-being with purposiveness. Together the two constitute the generic features of all human action. From this, Gewirth says the agent claims, "I have rights to freedom and well-being." This latter claim is justified because if the agent denied he had rights to freedom and well-being then since these are claim-rights with correlative duties assigned, he would simultaneously be denying that all other agents ought (at least) to refrain from removing or interfering with my freedom and well-being. However, this means that the agent would have to accept he might not have freedom and well-being. Since that acceptance contradicts his need for freedom and well-being as established by saying they were "necessary goods," it must be the case that his denial of rights was the error. Thus, an agent must prudentially accept from his own point of view that he has rights to freedom and well-being or suffer an internal inconsistence. See Gewirth, Reason And Morality, supra note 57, 52-61; see also Alan Gewirth, The Basis and Content of Human Rights, in 23 NOMOS: Human Rights 122-31 (1981) [hereinafter Gewirth, Human Rights].

\(^{59}\)See Gewirth, Reason And Morality, supra note 57, at 47.

\(^{60}\)The ascription of motivation to the agent is not in the first instance phenomenological. The agent may (and often is) not even aware of this feature of his action. The motivation nevertheless is a necessary part of the dialectical process by which the agent comes to justify his acting for a purpose. In that sense, it is agent-relative that it is based on what every agent logically must accept on pain of contradiction. See Gewirth, Self-Fulfillment, supra note 43, at 169-70.

\(^{61}\)See Gewirth, Reason And Morality, supra note 57, at 63-64.
to moral rights is the recognition that the sole basis upon which the agent claims rights is as a perspective purposive agent. Consequently, every other agent qua agent stands in the same shoes and implicitly makes the same claim. As there is nothing further in the way the claim is derived to separate one agent from another, the rights claim that results is universally moral, because it is derived from what is necessary to all purposive human actions. Moreover, the rights to freedom and well-being that arise from the derivation are equal rights, as they are generally the same in status and degree.

Of course, this is only the beginning of the story. The right to freedom manifests itself in civil society as encompassing equal rights to thought, expression, religion, tastes and pursuits, and the right to associate. The right to well-being sets out a hierarchy necessary to purpose-fulfillment, in which basic well-being reins over non-subtractive well-being which, in turn, usually reins over additive well-being. This is evident through elaboration on the three echelons of rights: the first that protects life, physical integrity, and mental equilibrium; the second that guarantees the conditions necessary for maintaining one's level of purpose-fulfillment; and the last echelon that provides, where possible, the conditions for increasing one's level of purpose-fulfillment. Thus, in the very structure of Gewirth's moral point of view the ingredients are present for resolving conflicts between rights to offset transactional inconsistencies. This inconsistency is caused, for example, when one uses the right to freedom to deny a very similar freedom or basic well-being to another. A contradiction results since such examples show the actor to be in the position of claiming greater rights than he is entitled to—because he stands in the same position as others.

At the core of Gewirth's ideas are two distinct determinations. The first is the recognition that human beings are voluntary and purposive, and that moral reasoning must afford deference to those aspects of

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62 Gewirth, Human Rights, supra note 58.
63 Id.
64 See id.
65 See id.
66 See Gewirth, Reason and Morality, supra note 57, at 308-10.
67 Id. at 54.
68 Gewirth, Human Rights, supra note 58, at 134.
69 See Gewirth, Reason and Morality, supra note 57, at 213-14.
70 Id. at 350-53 (discussing ways like justified self-defense for resolving conflicts of rights at the same level, and degree of needfulness for action for resolving conflicts at different levels of purpose-fulfillment).
human nature if one’s true obligations are to be identified independently from what persons may feel themselves obliged to do. The second is the recognition that a process of sound deductive and inductive logic can provide grounds for believing in the truth of our conclusions. The latter of these two recognitions probably precedes Plato’s Republic but is most clearly illustrated in the moral reasoning of Immanuel Kant. Here, reason reflects the highest human capacity for obtaining the truth. The former, which finds early antecedents in Aristotle and others, limits pure formal reasoning to the essential material needs of human beings who operate for purposes that are taken to be good.

This appeal to human nature is one way Gewirth’s system may be thought of as a return to traditional natural law theories, which were once thought to underlie international law. Yet, Gewirth’s system does not claim recognition of some overarching purpose which purports to place duties on human agents. To the contrary, Gewirth starts from a position where human agents make claims against one another in respect to performing actions. He then uses a human’s necessity for freedom and well-being to develop constraints on the behavior of the agents and also on the broader social—and especially governmental—institutions operating in society. In this sense, Gewirth is not claiming some “natural right” for why certain orderings are more satisfactory. Rather, the orderings arise from the very nature of human beings’ capability to

71 H.L.A. Hart made a distinction between being obliged and having an obligation. The former is related to beliefs and motives as when the gunman says, “your money or your life,” while the latter references a general command for conformity that may be inconsistent with what one wants to do. See H. L. A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958). Although Hart thought obligation to obey law need not necessarily be moral, one can see from the above analysis that a legal system not sustained by a credible moral system becomes impossible. See Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).


73 Gewirth, Self-Fulfillment, supra note 43, at 71-76.

74 See generally Aristotle, Politics 1261a10-14 (Oxford 1957) (criticizing Plato’s Republic and arguing that through purposive rational conduct humans can achieve happiness).

75 This later aspect of Gewirth’s view follows those socialcontractarians, like John Locke, who believe government was limited in the powers it could muster to protecting the rights of individuals. Compare John Locke, Second Treatise Of Government (1952) (treating the social contract creating government as a kind of trust), with Thomas Hobbes, Leviathan With Selected Variations On the Latin Edition Of 1668 (1994) (describing the social contract giving rise to government as a gift).
act for purposes.\textsuperscript{76} As such, the rights these orderings support are designated “human rights.”

C. Tracing the Path from Human Freedom and Well-Being to the Social Institution of Marriage

Gewirth’s system gets us to an interpretation of legal marriage that includes same-sex marriage, as will become apparent shortly, through the interconnection of the basic right of freedom of association combined with the social institution of marriage as a producer of a distinctively important set of purposive-goods whose benefit is to all those affected by the institution. To understand what these goods are and how they implicate our abilities as voluntary purposive human beings, a distinction Gewirth makes between capacity-fulfillment and aspiration-fulfillment must be analyzed.\textsuperscript{77} Both are essential in the proper order to achieve self-fulfillment.

Capacity-fulfillment refers to a person’s ability to act in accordance with his or her various abilities but especially that person’s ability to reason, the highest of his or her capacities, because reason can best “ascertain and preserve truth.”\textsuperscript{78} Education, good health, and disciplining our minds (when not merely a form of indoctrination) enhance our ability for capacity-fulfillment.\textsuperscript{79} Aspiration-fulfillment, in contrast, is where one desires not only some object, internal or external, but also where one can be a “certain kind of person who has and fulfills the aforementioned desire.”\textsuperscript{80} In this way, one’s aspirations may always be greater than one’s capacities to realize them.\textsuperscript{81} Still, because capacity-fulfillment at its highest level of reason can get at truth, it has a regulatory function with regard to our aspirations to keep faith with human rights.\textsuperscript{82} Once reason is granted its proper role as the highest capacity, the regulatory function is fulfilled by following a Purposive Ranking Thesis (“PRT”), in which “the relative ranking of goods or capacities is to be determined by, and so be proportional to, the purposes of the

\begin{footnotesize}
\begin{enumerate}
\item See generally \textsc{Gewirth}, Human Rights, supra note 58.
\item \textsc{Gewirth}, Self-Fulfillment, supra note 43, at 13.
\item \textit{Id.} at 72.
\item \textit{Id.} at 49.
\item See \textit{id.} at 16 (noting that capacity-fulfillment must take account of one’s aspirations and vise versa).
\item See \textit{id.} at 59-60.
\end{enumerate}
\end{footnotesize}
goods.”83 Goods or capacities that go against human rights violate the very essence of practical reason’s ability to determine human actions because, as was suggested above, they force the agent into a contradictory position.84 Even when an agent does not violate another’s rights, his goals or purposes may not always provide him the best opportunities to achieve self-fulfillment, especially if his desires are unconstrained by his capacities or abilities.85 Similarly, an agent may set his sights too low in obtaining educational, job, or other creative opportunities such that his potential for self-fulfillment is needlessly constrained.86 The PRT can serve to help us compare and rank disparate conceptions of the good to achieve the most self-fulfilling result in light of moral, aesthetic or other practical consequences.87

That being said, one realizes that furthering human self-fulfillment will often necessitate the development of voluntary associations that provide particular aids or benefits to their members exclusively.88 One important and unique example of this is the voluntary association of a married couple when the relationship is formed “for purposes of deeply intimate union and extensive mutual concern and support for the participants, purposes that enhance the partners’ general abilities of agency and thus contribute to their capacity-fulfillment.”89 As will be argued in Part II, on this ground, same-sex marriage is, on this ground, fundamentally no different than opposite-sex marriage.90 What allows for this particularistic or group-founded special moral concern is that all participants in the practice, or all those affected by it, benefit and no one suffers specifically, because the practice is allowed. This is made evident within the Gewirthian framework by the kind of justification supporting voluntary associations in general:

First, the universalist moral principle of human rights, in its freedom component, justifies the general moral subprinciple that voluntary associations as defined above may be established. Second, this sub-principle justifies the formation of families with their special purposes.

83 Id. at 71.
84 See supra Part II.B.
85 GEWIRTH, SELF-FULFILLMENT, supra note 43, at 51 (distinguishing aspiration-fulfillment from mere desire-fulfillment).
86 See id. at 59-60.
87 See id. at 124-25.
88 See id. at 142.
89 Id. at 143.
90 See infra Part II.D.
Third, these purposes in turn, justify the particularistic, preferential
cconcern that family members have for one another’s interests. Thus,
through the universal right to freedom, persons have rights to form
families and to have the concomitant preferential concerns.91

D. Same-Sex Marriage as but Another Instance of Legal Marriage

It is at this point in the analysis of the substantive legal right of
marriage that it is asked whether same-sex marriage is but another form
of marriage. Here the answer masquerades as one of equality in the first
instance, but that is not quite right. If the claimed right to opposite-sex
marriage and the claimed right to same-sex marriage reflect no more
than subjective valuations or histories steeped in variant religious or cul-
tural meanings, then the freedom to choose either form of marriage
should be the same for the PRT. One would not be able to separate the
two rights along any dimension of substance recognized by the PRT.
On the other hand, if the substantive difference between the two right
claims is one that the PRT can objectively determine to yield a priority
difference in the respect due them, then the two claims will not be equal
under universal morality, nor should they be equal under general law.
First, it must be determined if the two rights are the same in all relevant
senses or if they are different. This analysis requires an initial discussion
of the criteria necessary to make this judgment.

In judging whether the two rights are substantively different or
really the same, one approach starts from a description of the social
institution of marriage as a place where a variety of society’s family-spun
goals are meant to take place. That being said, one can then imagine in
the first instance a utilitarian cost/benefit analysis arising from the ques-
tion and, to some extent, an argument protecting marriage in light of
the social goals to be reached.92 But an alternative approach views mar-
riage not as the repository of society’s policy choices, but as one place
where human self-fulfillment gets worked out.93 The value of this ap-

91 Gewirth, Self-Fulfillment, supra note 43, at 143.

92 Typically arguments that treat the good of marriage as its ability to create stable families
for the raising of children suggest this sort of consequentialist concern. See, e.g., Hernandez v.
Robles, 7 N.Y.3d 338, 359 (2006) ("[O]ther things being equal, it was better for children to
grow up with a mother and father.").

native theory for achieving self-fulfillment could lead to “polygamous or endogamous” mar-
rriages), aff’d and modified by Lewis v. Harris, 188 N.J. 415, 908 A. 2d 196 (N.J. 2006)
proach is that it is not fundamentally antithetical to the rights approach in the way utilitarian cost/benefit analyses inherently are. That is because self-fulfillment fits within the principled scheme by which freedom justifies the right to marry. On the other hand, one could say that individuals have the right to associate with whomever they want, provided they are of competent maturity, but that the state’s allocation of specific entitlements should serve a utilitarian policy purpose. However, this argument is really a fallacy akin to arguing that affirmative action is there to ensure minority communities are adequately represented as opposed to correcting certain inheritable wealth benefits that should never have been allowed in the first place. This does not mean that one cannot offer utilitarian-laced benefit packages to doctors who start out their practices in low income neighborhoods, but rather means that the practice of so-called reverse-discrimination cannot be justified by such offerings absent individual choice.

Applying the same analysis to marriage, if the effects for individual self-fulfillment are the same for both opposite-sex and same-sex couples, then an equality approach should be applied under the PRT. The question then becomes, what are these effects and how can they be determined? The effects are the internal goods of a practice like marriage, operating to benefit all involved with the practice and harming no one. The effects are determined by viewing marriage as a self-con-
tained practice supported by a principle of equal freedom in which all

can participate if they wish. This latter view reflects an external con-
dition that makes the practice morally acceptable; the former idea reflects
an internal condition that enhances the character of all those

participating.

In the case of the latter, Gewirth’s human rights principle for free-
dom and well-being, the Principle of Generic Consistency (hereinafter
“the PGC”),\(^9\) provides that everyone should have the same freedom as
long as it does not interfere with anyone else’s similar freedom. It is a
stretch (even by the standards of the most zealous traditional advocates)
to say allowing two men or two women to marry somehow endangers
the well-being of their opposite-sex married neighbors. More likely, if
such same-sex marriages encourage any negative attention, it could
rather be attributed to the partners having been raised with similar cul-
tural trainings regarding gender; this allows the same-sex couple to stand
out as having possibly found a way to make the marriage work with less
role-modeling and more equal decision-making.\(^9\) So, it can be said that
the right to same-sex marriage, unlike, say, the right to own slaves, con-
flicts with no other human rights.

But the real benefit to not preventing same-sex marriage is the op-
portunities it affords couples and those concerned for marriage to obtain
the real benefits of marriage, which are not just the tax breaks or other
outside amenities, although these are important.\(^1\)\(^0\) The real benefit is

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\(^9\) Gewirth, Human Rights, supra note 58.


\(^1\)\(^0\) One example of the amenities is found in Vermont’s statutes. See, e.g., VT. STAT. ANN. tit.15, §§1204(e)(1)-(24) (2003) which extends, under subsection (e), the same legal rights as apply to marriage to the following nonexclusive list of legal areas:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver
of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter
vivos or at death, of real or personal property, including eligibility to hold real and
personal property as tenants by the entirety. . . .

(2) causes of action related to or dependent upon spousal status, including an action
for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or
actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;
what it allows the participants to become, which absent the institution of marriage, would be either unavailable or only available by difficult and costly means. This can be likened to a corporate entity that furthers the mutual, social, psychological and moral benefit of its participants with no negative effect to anyone outside the practice. That mutual benefit which comes about when one begins to speak of “us” versus “me” is the essence of community and the beginning of a social identity.\textsuperscript{101} Such benefits are not reducible to what the legal engagement permits; although without the identity, it is difficult to see just how such decisions that may affect one spouse’s health or economic well-being could be managed as easily as with a single legal document called a “marriage license.”\textsuperscript{102} Instead it is the intangible benefits that spring out of situations where one’s self-concern is replaced, without economic

\begin{itemize}
\item[5] group insurance for state employees . . . and continuing care contracts;
\item[6] spouse abuse programs . . . ;
\item[7] prohibitions against discrimination based upon marital status;
\item[8] victim’s compensation rights . . . ;
\item[9] workers’ compensation benefits;
\item[10] laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient’s Bill of Rights . . . and the Nursing Home Residents’ Bill of Rights . . ;
\item[11] advance directives . . . ;
\item[12] family leave benefits . . . ;
\item[13] public assistance benefits under state law;
\item[14] laws relating to taxes imposed by the state or a municipality;
\item[15] laws relating to immunity from compelled testimony and the marital communication privilege;
\item[16] the homestead rights of a surviving spouse . . . and homestead property tax allowance . . . ;
\item[17] laws relating to loans to veterans . . . ;
\item[18] the definition of family farmer . . . ;
\item[19] laws relating to the making, revoking and objecting to anatomical gifts by others . . . ;
\item[20] state pay for military service . . . ;
\item[21] application for earlier voter absentee ballot . . . ;
\item[22] family landowner rights to fish and hunt . . . ;
\item[23] legal requirements for assignment of wages . . . ; and
\item[24] affirmation of relationship . . .
\end{itemize}

\textit{Id.} (citations omitted).\textsuperscript{101} Its opposite is equally noteworthy, as heard in the lyrics of the well-known Carpenters song, “Breaking Up Is Hard to Do.”\textsuperscript{102} As the previous footnote indicates, the benefits and rights attached to marriage are many and varied and would be quite expensive if one had to try to do by separate legal documents what marriage does by way of a single license. Additionally, some benefits, like social security benefits under federal law, military service benefits under state or federal law, and spousal immunity under both state and federal law (along with many others, including the right to an
incentive, by a concern for the other or for their mutual selves. Corporations and limited partnerships do this in a far narrower fashion from the way spouses do it as a matter of course. Those are just the inklings of the intangible benefits of marriage, yet they are the basis of an institution rich with possibilities if only for those who are allowed to marry. And they are in substance no different where the spouses are same-sex or opposite-sex, since nothing going to the gender of the partners distinguishes the internal goods obtained.

Even on matters of children and family support, as soon as society awoke to the recognition of the need for a better policy than placing unwanted children in foster homes, and as soon as the courts awoke to the rights of women and men to control aspects of their reproductive lives, the outcome was inevitable. In every important way under the law, same-sex marriage would be identical to opposite-sex marriage. The failure of governments to recognize the self-fulfillment that marriage would make possible for same-sex couples appears less related to a failure to acknowledge the individual self-worth of those already committed to a long-term same-sex relationship as it is to maintain the status quo that treats marriage as a strictly heterosexual institution. This is not good law; even less does it reflect deep moral wisdom.

\[\text{immigration preference for a married spouse) may not be available by any means short of legislative action at the appropriate level of government.}^{103}\]

The pattern of reproductive rights that the courts have recognized beginning with the United States Supreme Court’s recognition of abortion rights to various states that allow surrogate motherhood or adoption by same-sex couples. See generally Thomas Jacobs, 1 Children and the Law § 4.67 (database updated May 2006).

\[\text{Emily J. Sack, The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause, 38 Creighton L. Rev.}^{507, 511}(2005).\ The author argues that:

\[\text{the constitutionality of same-sex marriage may be inevitable in the wake of Goodridge. However, that decision may come in the form of a Full Faith and Credit issue.}^{104}\]

The constitutionality of the 'public policy exception' to interstate recognition of marriage, as well as the limits of congressional power to legislate under the Full Faith and Credit Clause, may be the issues on which the Court focuses when considering same-sex marriage.
III. THE GEWIRTHIAN HUMAN RIGHTS APPROACH AS A LEGITIMATING DOCTRINE FOR SAME-SEX MARRIAGE EVEN IF IT WERE NOT THOUGHT TO PROVIDE THE FINAL JUSTIFICATION ON THE MATTER

A. The Idea of Human Dignity

Here, the focus shifts from rights to the freedom and well-being that every agent qua agent must logically admit if they are to engage in any purposes they consider good, to an explanation of why each agent assigns basic human dignity to himself and to others as well (because, in the relevant aspects, she is no different from all other agents). The idea does not derive from the argument for human rights but rather supervenes upon it.105 That is to say, each agent positively regards her own actions, at least, in part, because they are her actions, and thus she necessarily values herself.106 This is true even when the agent feels dismay at having to perform some action because she thinks it is beneath her dignity or because she believes she could do better.107 Obviously, if the agent thought the action completely unworthy of her performance, she would not undertake it.108 The fact that she does, even when she is coerced to do so for fear of losing her life or perhaps the lives of significant others, suggests a positive evaluation, at least of herself, as agent.

An exception occurs when the action is totally outside the agent's control insofar as it is a product of mental disease or physical or psychological addiction.109 In that instance, the action would not properly be attributable to the agent's responsibility, but, at most, be causally con-

105 Gewirth, Self-Fulfillment, supra note 43, at 173 ("Properties of type A are supervenient on properties of type B if and only if two objects cannot differ with respect to their A-properties without also differing with respect to their B-properties"); The Cambridge Dictionary of Philosophy 778 (2d ed. 1995).
107 No contradiction is implied by saying an action one performs is beneath one's dignity because the sense in which some action may be beneath one's dignity is not that the agent cannot own it, but rather that it does not elevate her with respect to being a productive individual, at least to her current level of capacity-fulfillment. See id. at 99. This, of course, is different from being able to improve oneself to being able to better one's current level of capacity-fulfillment. See id.
108 This follows Hume's point that human actions require passion (or motivation) that cannot be obtained simply by the process of cold reasoning. See David Hume, Treatise on Human Nature 413-18, 462-63, 468-70 (1888).
109 Actions that fall under an insanity defense either because they are the products of a mental disease that prevents the agent from determining right from wrong ("M'Naughten rule") or because the agent was unable to control certain impulses leading to her conduct (the "irresistible impulse test").
nected to the agent’s presence. Of course, this does not mean that the agent may not bear some responsibility for being in such a state, if, at some prior time, she knowingly set forth a sequence of events that led to this result. If, for example, the agent suffers an addiction that takes over her life as a result of prior misjudgments over which she had control, then to the extent that she affirmed herself in those misjudgments, she is responsible for having placing herself in a position where she could foresee possible harms to others. And so, when we treat self-worth, we need to keep distinct two separate forms of evaluation.

The first concerns only the psychological sense of self-esteem that the agent attaches to her ability to perform some function, perhaps because the task took great effort at investigation or study or because it revealed a uniquely creative insight or approach to resolving some issue that the agent confronted. No moral evaluation attaches to the particular action undertaken, but a prudential one might. The self-esteem the agent affords oneself may be similar whether the agent were a bomb-maker figuring out how to inflict the most damage on the greatest number of people, or if the agent were a medical doctor trying to discern the best course of treatment for persons suffering from a particularly virulent strain of some virus. Indeed, at this level of the analysis, no moral evaluation need yet be present as the bomb-maker’s efforts might be drawn toward saving innocent hostages held captive by some group planning their death just as it may be the case that the doctor is seeking to keep alive persons who would then have the opportunity to continue to enslave others.

This suggests that a second level of evaluation is needed where there are consequences for the freedom or well-being of other persons. It may also involve an evaluation of actions that promise to evoke less serious consequences, especially if they are part of an overall trend that suggests some long-term disregard for the plight of others. Indeed, even if the only consequence is to the agent herself, as when the agent attempts to harm herself, the question arises whether she is using herself

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110 An example of such a situation developing is where knowing that alcohol made her physically aggressive toward others, the agent nevertheless consumed significant amounts of alcohol while in the company of others.

111 Self-esteem is a particularly psychological level of evaluation that may attend some person or group’s efforts to be successful at a particular task notwithstanding its moral worth. See Gewirth, Self-Fulfillment, supra note 43, at 95.

112 The idea here is that self-esteem reflects a power of the agent herself to achieve the aspirations she sets for herself.
merely as a tool contrary to the respect she is due as a person.\textsuperscript{113} These considerations suggest that in any final evaluation by the agent of her own self-worth, there needs to be a normative as well as a psychological side to her own assessment of worthiness.

This conclusion means that the agent needs to be continuously tuned to the implicit worthiness of her own existence that her status as an agent entails.\textsuperscript{114} As a rational being, she is always capable of reflecting on her own purposes and, in that sense, bringing them into accord with what morality in the form of universal human rights requires.\textsuperscript{115} Only where the agent purposely fails in that effort, or perhaps where she knowingly puts herself in a position to fail, is her self-worth diminished. Even then, to whatever extent possible, the agent, so long as she is alive, is in a position to do something to at least acknowledge the normative situation and to begin to amend, if not to resolve it. Because this capacity can never be lost so long as the agent remains alive, the sense of dignity it engenders stays with her even in the context of having violated someone else's basic human rights.

\textbf{B. How Same-Sex Marriage Affirms Human Dignity}

This section focuses specifically on marriage as a means to affirm human dignity. This can be attributed to two causes: first, it is generally accepted that opposite-sex marriage, when practiced without the baggage of gender discrimination, is affirming of human dignity; and second, and perhaps most importantly, there will be little to say with regard to same-sex marriage from the point of view of the participants that will not also apply to opposite-sex marriage. The points of view external to those of the participants will be addressed in the next section except to the extent necessary to differentiate the internal viewpoints of the parties.

The analysis begins by noting that the married person's self-affirmation of her own identity is a product of two distinct recognitions.

\textsuperscript{113} Kant interprets his "categorical imperative" to prohibit suicide when taken in the name of self-love. It is less clear whether the imperative would bar suicides where the person had an incurable disease causing her great pain and suffering with no hope of relief. See Feldman, Introductory Ethics 97-99, 101-17 (1978).

\textsuperscript{114} As a prospective purposive agent, she already claims self-worth in acting for purposes of her own.

\textsuperscript{115} This latter condition is an illustration of Kant's point that "ought implies can," or in its contrapositive form, "cannot implies ought not." Immanuel Kant, Critique of Judgment Werner S. Pluhar trans. 345 n.48 (1987).
The first is society's external recognition that the couple has a unique identity that is different from their individual self-identities. The second is the internal positive affirmation the parties to the marriage give to their marital roles because of the opportunities it affords for aspiration-fulfillment.

The first, when set in law and custom, affirms the possibility of transformation where each party agrees to accept a certain amount of responsibility for the other's well-being. It occurs by choice because the responsibilities attending the marriage relationship are not imposed on the parties, but rather agreed to by the parties. However, having entered into the agreement, those responsibilities cannot be ignored without the possible attendance of legally-enforced consequences. This is the contract aspect of the matrimonial relationship that the legal system will enforce. It is also what allows spouses to make certain—even life-determining—decisions for the other when the other cannot make them for themselves. And it is what allows spouses to enter into certain forms of commitments, such as real estate commitments and the obligations of child rearing, which would otherwise be very difficult and, in some cases, impossible to enter into absent the marriage relationship.

Moreover, its importance to family stability is socially recognized; one such example is that one spouse may not be forced to testify against the other. All of this is separate from whether some other name or statutory framework might have been used to establish a legally recognized marriage. They could all have been called unions, for example, and par-

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117 See Edward I. Rubin, Sex, Politics, and Morality, 47 WM. & MARY L. REV. 1, 47-48 (2005) (arguing that our politics on individual behavior has become contentious because of a transformation occurring in our moral thinking from the higher-ordered views originating in the natural law views of the middle ages to the self-fulfillment view that began to gain credence in the modern period).
118 For an interesting discussion on how to make legal marriage fit different expectations and arrangements between people, see Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage, 89 CA. L. REV. 1479 (2001).
120 Vermont and New Jersey allow same-sex couples the right to unionize. Why is it that all marriages, to the extent that they are recognized by the state, cannot be treated as unions? Indeed, could the state even abolish legal marriage so long as it did not abolish private marriage ceremonies? For an interesting discussion on this right to marry, see Cass Sunstein, The Right to Marry, 26 CARDOZO L. REV. 2081 (2005).
ents, rather than the parties themselves, could have arranged them, as has been done historically. Some of these determinations are more a product of tradition, but others are related to our developing understanding of human psychology and the importance of self-chosen relationships to further psychological well-being. This observation brings us full circle to the positive affirmation that the parties enter the marital relationship for the sake of their own self-worth. It does not mean that people could not obtain self-worth through other relationships; it only means the self-worth associated with the marital relationship is a unique class. It cannot be dissolved, for example, in the same way that other human relationships get dissolved because the interests involved here are often too personal and immediate.

To the parties inviting the marriage, the design of its external structure is less significant than the meaning society attaches to marriage. The latter is important because it significantly affects the decision to enter the marriage by asking what this choice will mean, as opposed to merely living together. The answer to this question of the meaning of marriage, although it largely originates in the attitudes of the culture, is as material to the development of the parties’ own self-fulfillment as any internal good would be. Therefore, it should be treated normatively as if it were an internal good of the practice, notwithstanding that it originates outside the institution.

We could, for example, imagine that it was the green light and not the red light that caused the driver to stop at an intersection. This could have practical consequences, as the wavelength of red is longer than

122 See id. at 215 (arguing that if the disestablishment marriage model thesis were correct, public authorities would have given “the same imprimatur to every kind of couple’s marriage.” But as Congress’ passing of the 1996 federal Defense of Marriage Act and Personal Responsibility and Work Opportunity Reconciliation Act proves, this has not been the situation.).
123 See generally JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE (1994).
124 One cannot just walk away from a marriage. Because rights of the parties—especially respecting property ownership—as well as rights of third parties (e.g., children and creditors) are often intertwined in the married couple’s relationship, the intervention of courts is necessary to sort out the various responsibilities involved.
125 “The meanings attached to American marriage are found in both the public ceremonies affirming its claims to duration and in the numerous private narratives of renewal told by Americans to one another and dipped in the tincture of American experiment.” Mae Kuykendall, Emerson Family Values: Claims to Duration and Renewal in American Narratives of Divorce, Love and Marriage, 18 Hastings Women’s L.J. 69, 91 (2007). “Marital duration and renewal stand for the conversation of intimate connection and for consent in marriage and in the American scheme of political legitimacy.” Id. at 113.
green and thus conveys the message to stop at a further distance. But that aside, it is the message to stop combined with the driver's accept-
ance of the validity of that message that gives a person a reason to stop regardless of which color is used.\textsuperscript{126} This internal aspect is made further evident by the fact that if one only considered external consequences of stopping—such as the lack of presence of police, other cars, or pedes-
trians in the intersection—the driver might have very well sped through the light. It is the acceptance by the driver as determining his behavior of the social meaning of the light turning red that explains his willingness to stop even when no other traffic or police car is present.

Similarly, it is the parties' acceptance of the social meaning attending the marriage relationship that provides them a means for securing their own self-worth. For it is the acceptance of the obligation to stand in for one's spouse—perhaps because the spouse is very ill—and have that be more than just an act of kindness but a constituent part of the relationship itself that defines the responsibility the person has freely undertaken. And by that process, the agent is transformed, at least, for purpose of the marriage obligation, into the "concerned other" who ful-
fills other-based responsibilities in the best way the agent can. This transformative process is strictly an outside veneer if the parties are not truly faithful to the marriage commitment as defined, nor is it correct to describe the process as just fulfilling some societal imposed obligation. For in the transformative process, each mature party to the relationship realizes the centrality of his or her responsibilities. In so doing, they open the possibility that their capacity-fulfillment can be made the best at serving in this new role as spouse.

That transformative ability is why marriage is a practice in Alasdair MacIntyre's definition of the term. Marriage creates the possibility of a new set of internal goods that all who are associated with the practice, even if only by caring about it, benefit from it. It is not like the external good of profit-making where the more one has, the less there is to dis-
tribute elsewhere within the firm. Marriage provides the possibility of internal goods that can benefit everyone who is affected by the marriage. It is a "complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the

course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity."\textsuperscript{127}

Marriage allows for the self-development of the moral virtues of justice, beneficence, temperance, and courage based on the excellence by which one participates intimately in the marital relationship. Marriage is not just a collection of rights or a celebration of events, but rather a form of daily living encompassing the mundane and the extraordinary of the people whose bond it is. Its contribution to human self-fulfillment thus sets it out as a unique practice among existing social institutions. Marriage exhibits no difference when the institution is formed between persons of the same-sex as against persons of opposite-sex.

This is no mere assertion. Marriage reflects the deep reality that from the point of view of the parties to the relationship, no fundamental difference exists between them and their same-sex counterparts. That is to say, the self-fulfillment one achieves in regard to being significantly important to the other’s life and of making them equivalently important in one’s own life is the same. The parenting potential does not alter this state of affairs as same-sex partners can parent through a variety of methods, from gaining custody over a child from a prior opposite-sex relationship, to surrogate parenthood, or adoption.\textsuperscript{128} Even in those instances where parenting is legally restricted only to opposite-sex couples,\textsuperscript{129} such instances invoke the outside authority of the state—as opposed to the internal point of view of the parties. Thus, such limitations on one’s self-fulfillment cannot be viewed as originating with the couple. For all these reasons, it must be found that at least from the internal point of view of the parties, the self-fulfillment found in a same-sex relationship compared to an opposite-sex relationship is fundamentally no different in kind.

**C. Can We Normatively Distinguish Opposite-Sex Marriage from Same-Sex Marriage Based on the External Goods Achieved?**

This article has been discussing the issue of internal goods and how they may or may not be different between same-sex and opposite-sex

\textsuperscript{127} MacIntyre, \textit{supra} note 97, at 187.

\textsuperscript{128} The admission by the New York Court of Appeals that denied a right to same-sex marriage nevertheless found that many same-sex couples were legally raising children in New York. Hernandez v. Robles, 7 N.Y.3d 338 (2006).

\textsuperscript{129} Florida is the only state in the United States to prohibit gay adoption by statute. See Florida Statutes Annotated § 63.042 (2003).
couples, concluding that they are no different at all. The analysis now turns to external goods, using the following argument made by John Finnis:

The underlying thought is on the following lines. In masturbating, as in being masturbated or sodomized, one’s body is treated as instrumental for the securing of the experiential satisfactions of the conscious self. Thus one disintegrates oneself in two ways, (1) by treating one’s body as a mere instrument of the consciously operating self, and (2) by making one’s choosing self the quasi-slave of the experiencing self which is demanding gratification. The worthlessness of the gratification, and the disintegration of oneself, are both the result of the fact that, in these sorts of behavior, one’s conduct is not the actualizing and experiencing of a real common good. Marriage, with its double blessing—procreation and friendship—is a real common good. Moreover, it is a common good that can be both actualized and experienced in the orgasmic union of the reproductive organs of man and woman united in commitment to that good.

Finnis’ argument is interesting because it sounds like he is arguing that parties to a same-sex marriage would be denying themselves a certain set of internal goods. But on closer examination, it becomes apparent that it is the external, and not the internal, goods that concern Finnis. Specifically, he shows his real concern where he runs the two types of goods together:

The deliberate genital coupling of persons of the same sex is repudiated . . . sterile and disposes the participants to an abdication of responsibility for the future of humankind. Nor is it simply that it cannot really actualize the mutual devotion that some homosexual persons hope to manifest and experience by it; nor merely that it harms the personalities of its participants by its disintegrative manipulation of different parts of their one personal reality. It also treats human capacities in a way that is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage [even one that happens to be sterile] in the understanding that it’s sexual joys are not mere instruments or accom-

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paniments to, or mere compensation for, the accomplishments of marriage's responsibilities, but rather are the actualizing and experiencing of the intelligent commitment to share in those responsibilities. . . .”

Here it appears as though Finnis is talking about internal goods when he describes the same-sex couple as being incapable of “actualizing and experiencing of the intelligent commitment to share in those responsibilities.” But note, what determines their failure to “actualize and experience” is the so-called intellectual commitment to share in responsibilities to (a) the future of humankind—i.e., procreation, and (b) “marriage’s responsibilities,” by which he seems to mean rearing offspring in a stable home situation. Of course, many same-sex couples do this already as was noted in the last section. Finnis’ real internal concern seems to be that the goal of sexual connection, if not connected at least in theory to the possibility of natural procreation, can only be the very superficial, hedonistic view, of pleasure for pleasure’s sake. But that view is contradicted by the actual biographies of many same-sex couples. As Martha Nussbaum notes in the same piece: “[a] sexual relationship may create, quite apart from the possibility of procreation, a community of love and friendship which no religious tradition would deny to be important human goods.” This latter point follows from what was mentioned earlier regarding what the purposive ranking thesis provides as a means of evaluating different goals in terms of their ability to maximize human self-fulfillment.

If the ranking of the rewards that the couple experiences is greater than they would experience in an opposite-sex relationship or as celibate individuals, and no one else’s human rights are harmed, then the performance of the activity is consistent with human dignity. Remember that the purposive ranking thesis is not based on the aggregate contributions that might be made, but on “the relative contribution that persons make to attaining the purpose of that project.” In this sense, the

131 Finnis, supra note 130, at 12 (emphasis in original).
132 Such biographies exist not only as testimonial evidence, presented by couples before legislative committees considering same-sex marriage related laws, but also as historical evidence. See Boswell, supra note 123, at 53-107, 147-61, 218-61.
134 See supra II.C.
135 GEWIRTH, SELF-FULFILLMENT, supra note 43, at 71.
thesis does not follow the utilitarian principle of the greatest good for the greatest number, because it follows a rights theory that allows each person to define their own good because they see it as self-fulfilling provided they do not harm others in the process. But that is its strength, since it recognizes that self-worth, including individual moral integrity, is sometimes lost when there is too strong an emphasis for achieving the good of others.\(^{136}\) Such a conclusion brings me then to evaluate what is Finnis'—and other opponent's—real argument against same-sex marriage: a concern for the external goods of marriage.

Even assuming, for the sake of argument, that there may be certain external goods not achieved by same-sex sexual relations, the following question arises: should this deficiency limit the rights of same-sex couples to marry? This is a backhanded way of asking whether a being allowed to have a formally state-recognized same-sex sexual relationship attacks anyone else's human rights. The arguments that Finnis put forth to suggest that it might are: (a) a concern for the future of human-kind, and (b) that such relationships treat "human capacities in a way that is deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to real marriage." The former of these two arguments fails because same-sex couples often do raise children by a variety of methods previously mentioned. Even in contexts where they do not reproduce, there is good reason to believe—based on anthropological reports from earlier societies—that this fact need not be a hindrance to procreation, but rather serves to further the survival of offspring by those in the society who do procreate.\(^{137}\)

Turning now to the second of Finnis' arguments regarding the effect that recognizing same-sex relationships have on their opposite-sex counterparts, it seems that Finnis makes two mistakes. The first is that the parties to opposite-sex relationships do not find enough internal rewards from the relationship itself to offset any concern with what others outside the relationship might be doing.\(^{138}\) The second is the implicit

\(^{136}\) There are a plethora of examples and I will not burden the reader except maybe to note that too strong an emphasis for the good of the majority could allow for even the framing of an innocent person. *See* Bernard Williams and J. J. C. Smart, *Utilitarianism: For and Against* 97-99, 101-103, 112-18 (1973).

\(^{137}\) *See* William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1435-84 (1993) (discussing anthropological and ethnographic evidence for same-sex marriage in both Western and non-Western cultures).

\(^{138}\) Interestingly, the New York Court of Appeals in Hernandez v. Robles, 7 N.Y.3d 338 (2006), noted that the legislature might have justified limiting marriage, under the state consti-
suggestion that recognizing a same-sex relationship is somehow a violation of the human rights of opposite-sex couples. The response to the first of these two claims is fairly easy and does not warrant much attention. It is enough to say that if an opposite-sex couple’s relationship is undermined by mere knowledge of what a same-sex couple might be allowed to do down the block, then the opposite-sex couple might need to rethink, using the purposive ranking thesis, whether what they are getting out of the relationship outweighs what they contribute to staying in the relationship. It has little to do with what is happening outside the relationship.

The more important objection to Finnis second objection goes to the difference between public and private activities. Viewing a private action as one that on its face does not impinge the basic interests of another, one can argue that what a same-sex couple does within its relationship should not impinge the basic human right to individual autonomy. A perhaps more questionable example that still illustrates this point is to allow a person the freedom to travel wherever they want even once it had been learned that a deadly, non-airborne virus had infected them. In this instance, the protection of the basic interest, the right to health of those with whom the person may come into contact, does not outweigh the privacy interest of the infected individual in freedom of movement provided they pose no harm to others. Only where the infected individual’s interest in freedom of movement cannot be advanced without infringing upon a basic right of others, perhaps because the virus is airborne, would there be an argument for limiting privacy, and then only to the minimum necessary to protect everyone’s individual autonomy.

When the formal recognition of gay marriage is considered, the concept of “recognition” must be included in this analysis. Even so, social meaning is not decisive of whether a practice is public or private.
Therefore, if a practice is truly private in the sense that no one else's basic interests really are affected, objections based on infringements of the human rights of others do not square. Social meaning does bear, however, on how the practice is performed. The social meaning of a practice is often related to how individuals evaluate their success within the practice. An individual's evaluation is often determined by how co-practitioners evaluate their success. If the social meaning of the practice of medicine, for example, changed from "doing no harm" to "causing the least pain," doctors would have to reevaluate how well they performed within the practice from how they now evaluate it. This is distinct from any external good that may be associated with freedom from liability and so forth. The purpose of the recognition of gay marriage is to facilitate individual self-fulfillment, and though this involves a social meaning, it does not infringe upon the rights of others. Therefore, Finnis' second objection to gay marriage does not apply.

The question then arises as to whether the social meaning of gay marriage ought to be extended to encompass the private sexual activity. Here a different, but related, privacy concern is invoked: the idea of a private state of affairs where private acts may occur. This state of affairs exists "where there is a convention, recognized by the members of the [society], that defines, protects, preserves, or guards that state of affairs for the performance of private acts." ¹⁴³ States of affairs come about for a variety of reasons, some of which may be related to tradition, culture or history. ¹⁴⁴ More pressing is the question whether a state of affairs must come about if the freedom to perform the private acts would be hindered if not considered to be a private state of affairs. This is an intriguing question; it might be that a private state of affairs has arisen through public recognition even though the same underlying actions could have been performed even without that public recognition. It can be argued that this is not the case for gay marriage recognition, in which the necessary elements to its existence include certain claims that can only be sanctioned through public statutory legislation such as stepparent adoption or being a spousal dependent for social security or veterans benefits. The social meaning of marriage includes a normative aspect that assigns value to its status. This assignment of value allows for certain opportunities that are not otherwise available to a vision of the self as not being in conformity with social expectations. Consequently, if

¹⁴⁴ See Eskridge, supra note 137.
one group of people can marry but another only may unionize, a social message is sent about how society values the respective groups. Because social meaning is often correlated with self-evaluation, the difference in meaning can have a demeaning effect. For this reason, it is a serious violation of human rights to assign social meanings that suggest a normative difference of evaluation arbitrarily. The social meaning of gay marriage, therefore, ought not to be extended to encompass just any private activity.

A social evaluation should not be arbitrarily assigned. But it can be assigned to achieve certain goals, for instance giving special attention to the status of children. In such a case the evaluation protects a uniquely vulnerable group. However, the status of a vulnerable group such as children is not relevant to the argument against gay marriage recognition. It might be relevant if the argument for all marriage recognition rests upon a couple’s choice to rear children. In such a case, however, the sex of the spouses would not preclude a couple from marrying because being good parents is not characteristic particular to opposite-sex couples. Under this argument, capable child-rearing gay parents as well as capable child rearing heterosexual parents would be allowed to marry. Clearly, this is not the route followed by any state in the United States. When such arguments as would apply in the above instances are redirected as a general reason to disallow same-sex couples from marrying, and same-sex couples only, the only conclusion that can be drawn is that a fundamental aspect of human dignity is being denied a particular group for arbitrary reasons.

IV. THE CONSTRAINTS ON GROUPS OPTING-OUT OF THE PROTECTIONS AFFORDED BY UNIVERSALIST MORALITY

A. Particularist versus Universalist Morality

This section addresses the very difficult problem of how to protect human rights in a society where: (a) not everybody adopts the same view as to what human rights are, and (b) everybody has a human right not

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145 See Cass Sunstein, The Right to Marry, 26 CARDOZO L. REV. 2081 (2005) (explaining how the benefits of marriage may amount to a fundamental right under the equal protection clause of the Fourteenth Amendment).

to be forced to act contrary to their own moral outlook, at least where no harm to others would be involved by non-action. In essence, this situation is analogous to the situation that led John Rawls to speak of public reason as defining an area of consensus distinct from private metaphysical, religious or moral conceptions of the good.\textsuperscript{147} The problem in Rawls' approach is that he provides little more than wishful appeal for democratic consensus to get everyone to the table.\textsuperscript{148} His appeal only works on the assumption that pragmatist interests rule over metaphysic, religious, or "moral" interests. Even if this were the case, moralist groups would still have the ability to cooperate together in order to secure more of their own viewpoint and, once secured, do everything they can to maintain it.\textsuperscript{149}

Although principles of universal morality might be thought of as well-founded, there will always be deviant minority interests. While a moralist majority may uphold rationalist understandings, there is no guarantee of this.\textsuperscript{150} Individual self-fulfillment is too subjective an area to be tied down by any one set of principles.

\begin{itemize}
\item\textsuperscript{147} See John Rawls, \textit{Political Liberalism} 212-47 (1993).
\item\textsuperscript{148} Kent Greenawalt has noted that:
\begin{quote}
Since a person's comprehensive view is overarching for that person, it is always possible that the grounds for reaching a correct result according to the comprehensive position will override the grounds for observing the constraints of public reason. In this sense, the constraints of public reason are provisional, not conclusive, determinants of how one should act.
\end{quote}
\begin{flushright}
\end{flushright}
\item\textsuperscript{149} History is full of such examples from the failure of the German Weimar Republic to the current tensions in Iraq and much of the Middle East. It was not simply pragmatism's failure to persuade that gave rise to these societal debacles. Obviously, each situation is somewhat different and complex. Additional problems such as depleted economies, lack of education and a history of totalitarian regimes have compounded societal crises. Pure examples are unlikely, and a strong theory must be able to take that into account. One does not have to leave the domestic arena to see the adamancy of many who, on questions of abortion, the death penalty and same-sex marriage, have very entrenched positions.
\item\textsuperscript{150} Greenawalt notes that:
\begin{quote}
In \textit{Political Liberalism}, Rawls indicates that for some highly contested political issues, people might introduce comprehensive views to explain to opponents how their views support the values of public reason. He also indicates that comprehensive views could be used directly to support conclusions in an unjust society, referring to abolitionists and Martin Luther King, Jr. as examples. In his draft article, Rawls approves much wider use of comprehensive views to supplement positions that are primarily defended in terms of public reasons.
\end{quote}
\begin{flushright}
Greenawalt, supra note 148, at 1310.
\end{flushright}
\end{itemize}
Different but often consistent points of view within the framework of universal morality constitute what Gewirth labels “particularist moralities.” Gerwith believes that such moralities are justified through an indirect application of the freedom component of the PGC. In those instances, the justification does not extend to a violation of another person’s rights where the public good is involved, but it does allow for non-recognition of certain rights, provided that the non-recognition is obtained through consent and with knowledge of all relevant circumstances. So, for example, a group of ascetic monks may turn a blind eye to property ownership in the hope that such discipline might add to a deeper spiritual understanding.

The key to allowing alternative particularistic moralities to coincide with universal morality is to ensure that the rights of individuals are not infringed upon in the process. Thus, purposive ranking analysis takes into consideration level of maturity, knowledge of relevant circumstances, and individual consent as indefeasible elements to group consent to adoption of a particularist morality. If the particularistic morality appears on its face to advance the well-being of its members, determined by an application of the purposive ranking analysis, then such a morality can even be extolled, so long as it is not imposed over universal morality. So, for example, it would not be immoral, under this theory, for political and religious leaders to adopt a particularist morality to promote humanitarian efforts. Where the action’s ranking does not obviously satisfy the agent’s long-term benefits but where the rights of others are not involved (for example, the private use of alcohol to alleviate anxiety or depression), it is fair to educate against such particularist moralities and suggest alternatives. Nevertheless, Gerwith argues that such particularist moralities should be tolerated.

In the more common situation where objective evidence seems out-of-place, open discussion of, tolerance for, and understanding of alternative moralities allows individuals to choose optimal solutions. In this situation it is important that everyone be given a solid training in critical reasoning and opportunities to gain knowledge in relevant fields.

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151 One might also include in the analysis another area which could be defined as “personalist morality,” but such a detailed descent into Gewirth’s analysis is not necessary for the purposes of this article. See Gewirth, Self-Fulfillment, supra note 43, at 140-58.
152 Id. at 143.
153 Id. at 154 (discussing cultural pluralism and what the PGC is willing to tolerate).
154 See Gewirth, Self-Fulfillment, supra note 43, at 157-58 for some examples of how this ranking might manifest itself.
of science, social science, humanities, and the arts to assure valid minority group member consent. In this way, too, one gains more assurance that claims of consent reflect the deepest understandings of the individual, rather than superficial preferences the media or others might impose. Required training should not be too burdensome, however, so persons can pursue their own interests as well. The required training cutoff time may be determined by whether a person is informed to the extent that they understand what options they are giving up. Access to uncensored sources of information should, however, be maintained indefinitely.

It goes without saying that the particular system just described will be more possible for the wealthier and more economically developed nations of the world than for poorer nations. As such, the system—as a necessary outcome of universal morality—implores nations with more wealth and resources to come to the aid of poorer nations to assist each in developing political well-being in the same way that they promote economic well-being.

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156 Publicly required formal education need not be required beyond a certain age limit but certainly up to the point where one can evaluate more accurately their own interests. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court allowed Amish parents to opt-out of a local law requiring compulsory school attendance for children ages fourteen and fifteen in order ensure their children would keep to Amish religious traditions.

157 This would inhibit a state’s limitation of information that might prove to be seriously damaging to the public’s interest—such as how to make a dirty bomb—provided a review board existed independent of the executive that could evaluate the restriction.

158 Interestingly, this point is acknowledged by United Nations’ UDHR in its distinction between political and economic rights. The former include rights: to life, liberty, and security; to not be held in slavery or subjected to torture or inhumane treatment; to be treated as an equal before the law; to not be subjected to arbitrary arrest, detention, or exile; to a presumption of innocence; to a fair and public trial; to travel and asylum; to have privacy respected; to own property; to change nationality; to freedom of religion, thought, and conscience; to express opinions; to peacefully assemble, and; to the ability to take part in government. The latter include rights: to work, rest and leisure; to social security; to an adequate standard of living; to education, including compulsory primary education; to participate in the cultural life of the community, and; to a social and international order in which these rights are realized. Under this category, however, one also finds a few negative rights including the right not to be prevented from joining a labor union. See generally UDHR, supra note 2.

159 See Gewirth, Self-Fulfillment, supra note 43, at 4 (arguing that the international community is complicit in violating human rights when it pressures poor countries to use scarce resources for debt service).
The right to marry clearly falls under the freedom aspect of the PGC and most probably also falls under the personal self-fulfillment aspect of the PGC. The question arises as to whether the right to marry falls under the well-being aspect of the PGC as well. Marriage should be treated as a political right guaranteed equally to everybody. In developed societies the right to marry is attended by other rights, such as the economic right to make survivor claims for social security as well for other benefits one's spouse may have earned.\(^{160}\) A problem arises as to whether such economic benefits are available as a matter of practical recourse in poorer countries. If not, then those benefits should not be made available to opposite-sex couples either.\(^{161}\) In instances where such spousal benefits already exist, adding an appreciable number of same-sex couples to the mix might overtax the economy of a poorer state. In this instance, it would be wrong to remove benefits that are already in place, but it is necessary to make a serious effort to provide those same benefits to same-sex couples as soon as it becomes economically feasible to do so. No new benefit should be provided to opposite-sex couples until this equality is achieved. In this way, the hidden privilege of being opposite-sex will not be allowed to impede the movement toward a general equality of marital benefits.

**B. How International Human Rights Law Is Implicated by this Analysis**

Originally, international law took no account of the rights of individual human beings, notwithstanding the fact that "[b]oth international law and the domestic legal norms in the Christian world has [sic] roots in an accepted morality and in natural law."\(^{162}\) Interestingly, all have common intellectual progenitors (including Grotius, Locke, and Vattel).\(^{163}\) Indeed, it was not until the nineteenth century, when Europe (and later the United States) abolished slavery and the slave trade, that states "began to pursue agreements to make war less inhumane, to

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\(^{161}\) This is simply the principle of fairness reflecting both the equality of the people and the fundamental nature of the right involved.


\(^{163}\) See Henkin, supra note 162, at 208-9.
outlaw some cruel weapons [and] to safeguard prisoners of war, the wounded, [and] civilian populations.\textsuperscript{164}

After the First World War, concern for individual human beings began to gain at least selective attention in the League of Nations with treaties guaranteed by the League that protected ethnic, national, and religious minorities.\textsuperscript{165} Still, it was not until the post-World War II era, with the Nuremburg Trials and similar trials of Japanese “war criminals,” that a real advent in international recognition of crimes against humanity began to occur.\textsuperscript{166} This brief history suggests that contemporary notions of international human rights are still very much in their infancy. Unfortunately, with that infancy comes a lack of clear criteria for how human rights are to be recognized, understood, and respected in the international judicial arena. There is far less precedent in the international arena as to how human rights should be interpreted as compared to constitutional regimes of certain nation-states, such as the forms of interpretation recognized by the American Supreme Court.\textsuperscript{167} It is important to note that some guidelines are available to interpret international human rights standards and that theories of interpretation should still be attempted in spite of the difficulties involved.

Sources of “customary international law” include: (a) actual practices of states, as might be gleaned from newspaper reports, (b) arguments to Parliament, (c) statements to the press, (d) states’ own laws and judicial decisions, as well as (e) what state executives do.\textsuperscript{168} Such evidence of customary international law can also be found in the writings of “international lawyers, and in the judgments of national and international tribunals” as allowed for under Article 38(1)(d) of the Statute of the International Court of Justice.\textsuperscript{169} Isolated precedent may not be enough, however, to establish an international law custom, especially if the form of practice is not generally followed or is at least not followed by the state whose practice is being challenged.\textsuperscript{170} But, where a state

\textsuperscript{164} Id. at 210.
\textsuperscript{165} Id. at 209.
\textsuperscript{169} Id. at 73.
\textsuperscript{170} Id. at 73-74.
adopts a conviction that a certain form of conduct is required under international law (opinio juris), the new practice can emerge very quickly, even where the new practice was never followed before (diritto spontaneo).\textsuperscript{171}

For a practice to become a general norm of international law the norm must overcome the problem of non-universal application or abidance.\textsuperscript{172} Difficulties in recognition of international custom has led to recognition of only a very few norms as “preemptory norms,” or jus cogens, under Article 53 of the Convention of the Law of Treaties. Of these, no derogation, even by agreement will be recognized.\textsuperscript{173} The problem with jus cogens norms is that very few of them are supported by the overwhelming majority of participating states (examples of the few include: norms against genocide, slavery, gross violations of the right of self-determination, and racial discrimination). The earlier view, in comparison, was that a treaty could not override natural law.\textsuperscript{174} Some modern writers find it very difficult to accept the idea that states are legally bound to what they themselves have not denounced, or at least to what has not been denounced by an overwhelming majority of them.\textsuperscript{175} Nonetheless,

\begin{quote}
[s]ome norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), noncompliance would ‘shock[ ] the conscience of mankind’ and be contrary to ‘elementary considerations of humanity.’\textsuperscript{176}
\end{quote}

But what action is taken to “shock[ ] the conscience” of the world or violate “elementary considerations of humanity” does not easily lend itself to following the force of “natural reason,” as might be exhibited by a deterministic picture of the universe, or even by “social necessity”

\begin{footnotes}
\textsuperscript{171} Id. But see Robert Heckert, The Limits of Their World, 90 Minn. L. Rev. 1740 (2005) (critiquing the “elusive and open-endedness” of the psychological component of International Law Theory, which is based on state power and interest) (Review Essay of Jack L. Goldsmith and Eric Posner, The Limits of International Law).
\textsuperscript{172} Malanczuk, supra note 168, at 74.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{176} Id.
\end{footnotes}
under traditional natural law theory.\textsuperscript{177} Today's international courts, which have to settle "disputes between varying cultures, varying traditions, and varying conceptions of reason and justice," cannot simply follow traditions that are "historically and contextually conditioned."\textsuperscript{178} If this is the case, the question of what can be followed when specific agreements are not present and there is no general consensus among nations as to how to act still remains.

In this framework it seems both too easy and too contrary to the judicial function to simply throw up one's hands and wish for a better world. But what if that option should not be available? Here, the Gewirthian framework finds its greatest strength. Against the rabble confused by historical and contextual conditions, the proposed scheme starts from what any normative system logically must presuppose if it is to be prescriptive. This is not a mere artifact of history or context, but is the foundation of an obligation arising within any normative context. In that sense, it is already part of the structure of every moral and legal theory, notwithstanding its recognition within the theory.\textsuperscript{179} Even if a legal authority were to deny the strength of the Gewirthian justification, as suggested earlier, the theory could still operate to provide a coherent set of rights, under customary international law, based on the assumption that human dignity is a value worth preserving.

International human rights law already recognizes several aspects of human dignity and purpose-fulfillment. This recognition is most obvious in the United Nations' Universal Declaration of Human Rights ("Declaration"). Every member of the United Nations ought to be obliged to identify as immediately applicable to its citizens the Declaration's emphasis on certain crucial political rights. These rights include those to life, liberty, and security; to be treated as an equal before the law; to a presumption of innocence; to a fair and public trial; to have privacy respected; to own property; to change nationality; to freedom of religion, thought, and conscience; and to be able to take part in government.\textsuperscript{180} Also included are the rights not to be held in slavery or subjected to torture or inhumane treatment; not to be subjected to arbitrary

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} See Beyleveld & Brownsword, supra note 55, at 33.
\textsuperscript{180} See generally UDHR, supra note 2.
arrest, detention, or exile; to travel and the right to asylum; to express opinions; and to peacefully assemble.\textsuperscript{181}

Moreover, the Declaration goes beyond mere recognition of political rights. It also includes a set of social and economic rights that not every government will be able to fully effectuate due to limited resources. The Declaration acknowledges this difficulty, and so recognition of the aforementioned social and economic rights is more of an aspiration than an obligation, provided that members make reasonable efforts toward the eventual recognition of these rights. These latter rights include the right to work, to rest and leisure, to social security, to an adequate standard of living, to education, including compulsory primary education, to participate in the cultural life of the community, and to a social and international order in which these rights are realized. The category also includes some negative rights, such as the right not to be prevented from joining a labor union.

Customary international law also recognizes, without formally adopting, aspects of human dignity associated with opposite-sex marriages.\textsuperscript{182} This is evident in a decision by the European Court on Human Rights, emphasizing that Article 12 of the European Convention on Human Rights seeks to protect traditional families and children.\textsuperscript{183} In applying customary opposite-sex marriage rights to same-sex marriage, as can be suggested,\textsuperscript{184} one sees under either approach to the Gewirthian framework that the freedom to marry the person of one’s choice creates a unique form of human self-fulfillment, without sacrificing another person’s human rights in the process. This latter limitation would obviously not preclude a state from voiding a marriage if one of the parties was a minor or was psychologically unable to appreciate the nature of the relationship into which he or she was entering.\textsuperscript{185} It also

\textsuperscript{181} Id.


\textsuperscript{184} Id.

permits the voiding of marriages for fraud or incest, or when one of the parties to the marriage is no longer able to find self-fulfillment from the relationship's continued existence. Consequently, keeping in mind the goal of avoiding marriages into which parties may enter without adequate thought or preparation, it should not be seen as a violation of rights to require certain legal formalities (provided they are not too burdensome), or to culturally instill the idea that marriage is a solemn commitment. By the same token, where the parties have appropriately reflected on the emotional ties as well as family connections likely to be engaged in their union, recognition of the marriage relationship should be legally and culturally encouraged. In the latter instance, the relationship stands to promote individual well-being, even if only from the subjective standpoint of an agent.

C. Incorporating Same-Sex Marriage Recognition into Domestic Law Via International Customary Law Principles

On November 21, 2006, the Israeli Supreme Court “accepted the petition of five same-sex couples who married in Toronto, Canada and requested to be registered in the Israeli population registry as married.” The almost unanimous decision allowing registration led immediately to deep controversy, as “some conservatives urged the Israeli parliament, or Knesset, to examine the possible effect on Israeli society.” One Knesset member from the National Religious Party called the ruling, “nothing short of idolatry.” The Jerusalem Post reported:


\[187\] In Massachusetts, same-sex partners to a marriage must meet all the requisite formalities of a marriage, including a residency requirement. See In re Opinion of the Justices to the Senate, 440 Mass. 1201, (2004) (stating that proposed state Senate bill 2175, which would not allow same-sex couples to enter into a marriage but would allow them to form civil unions, continues to violate the state constitution's equal protection clause, as found in Goodridge v. Department of Public Health, 440 Mass. 309, (2003)). Vermont, for example, requires various formalities to enter a civil union analogous to those entering into a marriage. See VT. STAT. ANN. tit. 15, § 1202. Maine provides for a domestic partner registry with specific requirements for eligibility, including being domiciled in the state for the preceding twelve months. See ME. REV. STAT. ANN. tit. 22, § 2710.


\[189\] Ken Ellingwood, Court Says Israel Must Register Same-Sex Marriages, L.A. TIMES, November 22, 2006, at A4.
The ruling, in accordance with a 42-year-old judicial principle that states that the Interior Ministry clerk must register the status of applicants, whether they are citizens or new immigrants, as long as the applicant has a public document to prove his claim. In the case of the homosexual couples, each had a marriage certificate issued by the province of Ontario.²⁰⁰

The ruling followed two previous precedents: one in which a Christian woman and a Jewish man married in Cyprus based on the fact that the population registry is just a statistical database,¹⁹¹ and another requiring “registration of two mothers to a child who was adopted by his mother’s same-sex partner in California.”¹⁹² Supreme Court President Aharon Barak claimed that the ruling was essentially a technical matter derived from the proper function of the Interior Ministry rules.¹⁹³ “We are not ruling that Israel recognizes same-sex marriages [or] a new status for such marriages; we are not taking a position on whether Israel recognizes same-sex marriages conducted abroad.”¹⁹⁴ Still, given that the court’s ruling compels recording the status of “married” on a government-issued identity card, the ruling must represent some form of official recognition of these same-sex couples’ marital status by the State of Israel.

The Israeli controversy is important because it touches on similar questions raised in the United States and elsewhere regarding whether to recognize marriage, civil unions, or domestic partnerships for same-sex couples.¹⁹⁵ The issue is likely to emerge in many countries, especially those of the developed world, where cross-border travel is more economically feasible.¹⁹⁶ In the United States, for example, recognition of various rights, such as the ones discussed herein, among the various fifty state laws is achieved by state “conflicts of law” rules and Article IV,

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¹⁹⁰ Dan Izenberg, Court Orders Registration of Gay Couples Wedded Abroad. Two Men who Tied the Knot in Canada Plan to Apply Immediately for Marital Status, JERUSALEM POST, November 22, 2006, at 05.
¹⁹¹ HCJ 143/62 Funk-Schlesinger v. Minister of Interior; Gross, supra note 188.
¹⁹² HCJ 1770/99 Berner-Kadish v. Minister of the Interior; Gross, supra note 188.
¹⁹³ Izenberg, supra note 190.
¹⁹⁴ Id.
¹⁹⁵ Vermont, New Hampshire and New Jersey afford the status “union” to same-sex, but not opposite-sex, couples.
¹⁹⁶ In her article, Towards an International Judicial System, Jenny S. Martinez argues that an anti-parochial international judicial system is emerging that has the potential for solving cross-border disputes with “predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations.” 56 Stan. L. Rev. 429, 429 (2003).
Section 1 of the Constitution. The Constitution provides, “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”\(^{197}\) With respect to recognizing marriages entered into abroad, the Restatement (Third) of Foreign Relations Law is most applicable:

Comity, in the legal sense, is neither of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.\(^{198}\)

Both Article IV and the theory of comity allow for challenges where foreign law may run afoul of important government policies.\(^{199}\) It seems that public concern about comity is at stake in the debate in Israel over “ministerial” recognition of same-sex marriages entered into abroad.\(^{200}\)

\(^{197}\) U.S. Const. art. IV.
\(^{198}\) Restatement (Third) of Foreign Relations Law § 110, comment e (1987).
\(^{199}\) U.S. Const. art. IV, § 1 also says: “And Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” It is under this section that 104th Congress passed the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996), codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C. The law first provides that “[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.” Second, it defines the words ‘marriage’ and ‘spouse’ for purposes of Federal law.” \(5/96\) H.R. 3396 Summary/Analysis.

\(^{200}\) In her article Our International Constitution, Sarah H. Cleveland notes that American courts should consider the following principles when sorting out the relationship of constitutionalism to international human rights law:

(1) the receptiveness of the constitutional system to consideration of the particular international rule; (2) how well defined and universally accepted the international norm is, including whether states comply with it in practice; (3) the extent to which the international norm has been otherwise accepted or rejected by the United States; and (4) any limits that international law imposes on operation of the international rule.

\(^{31}\) YALE J. INT'L L. 1, 107-108 (2006). See also Vincent J. Samar, Justifying the Use of International Human Rights Principles in American Constitutional Law, 37 COLUM. HUM. RTS. L. REV. 48, 59 (2005) (arguing that a Gewirthian framework for interpreting American constitutional law in terms of international human rights principles provides both a common language game and a minimal threshold of existing constitutional protections beneath which we will not descend). But see Cleveland, supra at 97.
The word "recognition" is treated by its lexical meaning of "a recognizing or being recognized; acknowledgment; admission, as a fact,"\(^{201}\) notwithstanding the comment by the President of the Israeli Supreme Court that "[w]e are not recognizing a new status for marriage."\(^{202}\) This conflict may be explained by the fact that the word "recognition" has meanings in several different senses. First, there is de jure recognition versus de facto recognition. For example, the State of Israel was originally recognized as a de facto nation by the United States in 1948, only to be "one-upped" by the Soviet Union recognizing the State of Israel de jure three days later.\(^{203}\) These forms of recognition are essentially governed by the actions of the recognized state. In the former case, the State of Israel's creation of a provisional government that was willing to assert control over the state and fulfill international obligations gave rise to President Truman's original de facto recognition of Israel;\(^{204}\) in the latter case, these same actions also allowed for de jure recognition signaling full legitimacy of the right of Israel to exist as an independent state.\(^{205}\)

De facto recognition has shades of meaning as well. For example, the Israeli Supreme Court can recognize the duty of the Interior Ministry Clerk to record on state-issued identity cards, as a matter of fact, marital statuses arising abroad. This would be a very different kind of recognition from a determination by the Knesset to rewrite the marriage statutes to include same-sex marriages. The former type of de facto recognition references a kind of acknowledgement that the new status was, somewhere in the world, legally authorized. The latter is a de facto determination that Israel should recognize same-sex marriage within its own law.

This distinction is not without a difference, however, for the former clearly feeds into the latter. In Israel, the identity card is integral to the determination of the way official benefits are distributed. So, if an

\(^{201}\) Webster's New World Dictionary 1121 (3d ed. 1988).

\(^{202}\) Izenberg, supra note 190.


\(^{205}\) It is somewhat questionable among international legal experts whether there is any real difference between de facto and de jure recognition. Id. at 459. Indeed, it may be the offshoot of this concern that we see playing out among the different factions as a result of the Israeli Supreme Court's decision regarding registry of same-sex marriages conducted abroad.
identity card lists one as married, benefits will be distributed as to any married couple, without regard to sex. This is the slippery slope concern confronting religious conservatives in Israel who do not want the State to recognize same-sex marriage. Still, the two forms of de facto recognition are different in the sense that the objects being recognized are at different levels. The former is a ministerial determination that a particular event happened at a particular time and place. The latter is a normative statement of how Israel views such events. A fear that the ministerial determination may erode the normative view would be valid only if we were justified in assuming that the latter form of same-sex marriage should not be granted as a matter of customary international recognition. In this situation the interpretation of customary international law on the subject of marriage can benefit from a Gewirthian analysis.

The Israeli Supreme Court’s decision to require the Interior Ministry official to register same-sex marriages entered into abroad marks the beginning of the process of recognition across-state borders of same-sex marriages. Under the Gewirthian analysis, the state’s duty is to maximize, through its legal framework, general equality and the potential of all citizens, subject to resource constraints. International law recognizes relevant principles of political, social and economic rights in such documents as the Universal Declaration of Human Rights\(^\text{206}\) and the International Covenant on Civil and Political Rights.\(^\text{207}\) The state, through its various organs, must therefore ensure that all people have the greatest possible chance for an equal opportunity to fulfill important aspects of their individual self-worth, subject only to the constraint that they not harm others. This obligation means that if incorporation of a general right to marriage, regardless of sex, would add to peoples’ self-worth, such recognition ought to be granted. Inevitably some conceptions of “the good” will be radically opposed to recognizing same-sex marriage on religious grounds. In order to provide the greatest opportunity to fulfill each person’s self-worth, the state should provide to individuals who hold such religious beliefs the opportunity to opt out of formal recognition of same-sex marriage, provided that the option would not harm anyone else’s individual rights.

The latter limitation allows for the state to collect census data on the number of same-sex households. It also allows for laws demanding

\(^{206}\) UDHR, supra note 2.

\(^{207}\) ICCPR, supra note 2.
equal treatment of same-sex and opposite-sex couples in the granting or denial of credit, non-clerical employment, housing, insurance, and in public accommodations like hotels and restaurants. Just as ascetic monks can choose not to own property, although they have a right to property, the Catholic Church—or any other church for that matter—can choose not to remarry divorced people or marry persons of the same sex. The same holds true for Orthodox Jewish synagogues. The problem in Israel arises because an Orthodox religious view seeks to determine the laws for the whole country. But this view violates human rights when by birth or other conditions, people have no choice whether or not to accept the more particularist religious view. Thus, same-sex couples in Israel as elsewhere must be allowed to practice the ethical and religious views of their choice, subject to the condition that they do not harm others or force others to become part of their voluntary organizations. This balance of universal and particularist morality should operate across borders at the international level. The balance has the potential of aiding all citizens to reach a real recognition of their own self-worth and capacities to achieve purpose-fulfillment.

Going back to the issue of same-sex marriage in Israel, the Gewirthian framework requires the kind of built-in pressures toward equality and liberty that are discussed herein, without worrying about treading upon an individual’s particular conception of “the good.” The framework does not, however, support that any conception be affirmed where harm to the individual is likely to be a consequence, even if the harm is only belief-mediated as might involve various lifestyle choices. However, in that circumstance, tolerance, rather than affirmation, is the better choice. Under a tolerance framework, little more may be required (where the individuals are adults not harming others) than that the public be engaged in an informal educational process through the media with a view toward developing critical skills and obtaining accurate information from a variety of perspectives, along with possible ranking of the information’s value along lines set by the Purposive Ranking Thesis.

208 The requirement of dignity, though based on a per se reading of the Fourteenth Amendment’s Equal Protection Clause (rather than an international customary rule), can be found in the U.S. Supreme Court’s decision in Romer v. Evans, 517 U.S. 620 (1996) (striking down an amendment to the Colorado state constitution that prohibited the state legislature or any municipality from passing laws against discrimination based on sexual orientation).

209 JUDITH JARVIS THOMPSON, THE REALM OF RIGHTS 253 (1990) (arguing against belief-mediated distress as a basis to limit rights because one can shield oneself against such harm).
In all other cases, where children, minors, or persons with mental challenges are involved, more direct intervention by the state to set limits on parental choices or through the appointment of guardians ad litem for the mentally challenged are allowed. These latter situations only arise where existing guardians or the person himself will not or cannot provide relevant information, or establish capacities for developing the skills to make effective voluntary choices. Here too it becomes important to tread lightly, especially on matters involving only belief-mediated harm where there is no clear non-belief-mediated harm to either the participants or anyone else. For most of these cases the lighter treatment will be by way of an institutionalized compulsory educational process that includes alternative understandings of the world from those of the individual while, at the same-time, allowing the engagement of more particularist understandings as part of an ongoing inquiry of challenges to beliefs.

In the case of educating people about same-sex marriage, those who believe that such marriages are sinful or wrong should not be required to promote the practice in their own lives or the lives of those over whom they have oversight, provided alternative sources of information are available to those persons. In cases of activities in which the state is at least a passive player—such as schools and the appointment of guardians—equality must be the standard, with no special deference to religious authorities. Thus, all religious groups can set religious criteria for those whom they employ as clergy, but not for those whom they employ or what benefits they provide to the custodial staff, grounds keepers, or even teachers teaching in non-sacred areas. Nor can the realm of the sacred be allowed to enjoin all other branches of study. Here the Purposive Ranking Thesis combined with a weak disallowance of deference for belief-mediated harm requires that all state-sponsored programs affirm human dignity and equality. It also requires that state-sponsored programs not demean others or teach young people to be dogmatic, or to disrespect those who they may not understand.

In actual cases of non-belief-mediated harm a more direct form of state intervention might be allowed, provided the harm caused by the intervention is less than the harm caused by not intervening. Even

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210 Here John Stuart Mill’s Harm Principle is followed; he postulates:

[r]here are often good reasons for not always holding him to the responsibility . . .
[and] he is on the whole likely to act better when left to his own discretion, than when controlled in any way in which society have it in their power to control him; or
then, the intervention should enhance the self-fulfillment of all concerned. Arguments that equate same-sex marriage to polygamy fail to do this, for polygamy, at least as it is traditionally practiced, operates to affirm the domination of men over women economically and gives only men the power to marry more than one spouse. This distinction means that as part of the educational process, one might need to come to at least a theoretical understanding of forms of relationships that might not be traditional. Indeed, such relationships may reflect many possibilities that are not necessarily harmful and are potentially self-fulfilling.

CONCLUSION

This article has attempted to establish a relationship between constitutionalism and international human rights, specifically with respect to same-sex marriage, but with application more generally to a wide-ranging number of other matters. The goal of the article was less to produce acceptance of same-sex marriage internationally as it was to create a forum for discussions of law and human rights in which a meaningful dialogue can be held and the value of human self-fulfillment can be enhanced. Furthermore, the arguments have tried to also establish that same-sex marriage is only one small element in a much larger understanding of human self-fulfillment. Still, because same-sex marriage requires us to rethink how we guarantee individual freedom and well-being for our most intimate relationships, it opens a path to how we might consider other routes to human self-fulfillment over the years ahead. That process may now have only just begun.

because the attempt to exercise control would produce other evils, greater than those which it would prevent.