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**A RIGHT TO A WORD?  
THE INTERPLAY OF EQUAL PROTECTION  
AND FREEDOM OF THOUGHT IN THE  
MOVE TO GENDER-BLIND MARRIAGE**

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INTRODUCTION .....	554
I. SAME-SEX COUPLES UNDER THE CONSTITUTION OF THE UNITED STATES .....	559
A. <i>Legal Recognition of Same-Sex Couples under the         U.S. Constitution</i> .....	559
B. <i>The Belated Demise of Anti-Sodomy Laws</i> .....	562
C. <i>The Future for Same-Sex Couples in the U.S.         Supreme Court</i> .....	564
II. STATE CONSTITUTIONAL LITIGATION AND VOTER RESPONSES .....	566
A. <i>The “Hawaii Case” and the Defense of Marriage Act</i> .....	567
B. <i>Subsequent Cases</i> .....	568
1. Cases Ordering Marriage-Equivalent Unions .....	569
2. Cases Ordering Same-Sex Marriage .....	570
3. Cases Not Ordering Legal Recognition of Same- Sex Couples .....	571
C. <i>State Constitutional Amendments</i> .....	571
III. JUDICIAL REVIEW OF CLASSIFICATION BASED ON GENDER COMPOSITION .....	573
A. <i>Review Methodology</i> .....	573
1. Standards of Review .....	573
2. Assessing Motives .....	575

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2012]	THE MOVE TO GENDER-BLIND MARRIAGE	553
	B. <i>Context and Axis of Distinction</i> .....	577
	1. Character and Basis of Classification.....	577
	2. The Social Institution of Marriage.....	578
	3. Diversity .....	581
	C. <i>Consequences of Distinction</i> .....	583
IV.	REGULATION OF THOUGHT .....	586
	A. <i>Flirting with Thought Regulation</i> .....	587
	B. <i>Moving Beyond Conduct to Content of Speech and</i> <i>Thought</i> .....	589
	1. Decisions Interpreting State Constitutions.....	590
	2. The <i>Perry</i> Decisions Interpreting the Federal Constitution.....	600
	C. <i>The “Orwell Effect”</i> .....	607
	D. <i>Legislation Affording Legal Recognition to Same-Sex</i> <i>Couples</i> .....	609
	CONCLUSION .....	611

## INTRODUCTION

The nation is in the throes of a cultural transformation that has already dramatically improved the legal rights and social stature of same-sex couples. A decade ago, criminal punishment, including long-term imprisonment, for private consensual same-sex sodomy was constitutional.<sup>1</sup> Now<sup>2</sup> eight states and the District of Columbia allow (or will shortly allow) same-sex couples to marry, and eight other states allow such couples to enter into legally recognized unions that constitute marriage in all but name (which I refer to throughout as “marriage-equivalent unions”<sup>3</sup>).

Notwithstanding the extraordinary progress already achieved and the persuasive policy arguments in its favor, however, same-sex marriage has not set well with a majority of the American people,<sup>4</sup> and the issue hit a raw nerve in a majority of states over the past few years.<sup>5</sup> The ongoing controversy has placed stress on

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<sup>1</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 192–94 (1986) (upholding criminal penalties for consensual acts of same-sex sodomy done in private because engagement in these activities is not a fundamental right), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (holding that the Due Process Clause of the Fourteenth Amendment protects consensual same-sex sodomy from criminal punishment).

<sup>2</sup> This article reflects developments through April 3, 2012.

<sup>3</sup> In this article, the term “marriage-equivalent union” refers to legal recognition and protection (whether officially designated “civil union,” “domestic partnership,” or something else) pursuant to which same-sex couples receive, insofar as state and local law are concerned, the same rights, benefits, and protections afforded to different-sex married couples. Currently, same-sex married couples (and couples in marriage-equivalent unions) do not receive the rights, benefits, and protections afforded to different-sex married couples under federal law. See discussion *infra* Part II.A. Whether some purported marriage-equivalent union statutes actually afford same-sex couples every substantive right and tangible benefit afforded to different-sex couples under state or local law is debatable. See *infra* Part IV.B.2 and note 258; *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>. In this article, “gender” has its ordinary, non-specialized meaning, and thus refers to a person’s biological sex (rather than, e.g., role type or behavior).

<sup>4</sup> This is likely to change. During the last fifteen years, the percentage of Americans who support same-sex marriage has increased from an estimated 25 percent to an estimated 45 percent. Andrew Gelman et al., *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES, Aug. 22, 2010, at WK3. “This trend will continue. . . . As new voters come of age, and as their older counterparts exit the voting pool, it’s likely that support will increase, pushing more states over the halfway mark.” *Id.*

<sup>5</sup> Voters have rejected same-sex marriage in thirty-one states—in twenty-nine, by adopting a state constitutional amendment expressly limiting marriage

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our legal system, and the ultimate legal resolution is unclear.<sup>6</sup> The question whether the Fourteenth Amendment requires states to allow same-sex marriage is likely to be decided by the U.S. Supreme Court in the near future.<sup>7</sup>

Whether same-sex couples have a constitutionally protected right to marry involves two separate questions under the relevant constitution: (1) Must committed same-sex couples be afforded legal recognition providing the same rights, benefits and protections afforded to committed different-sex couples? (2) If so, must the official designation of such legal recognition be the same as the official designation of legal recognition of different-sex couples?

This article proceeds on the basis that the answer to the first question is “yes” (i.e., the relevant constitution entitles committed same-sex couples to receive, at a minimum, marriage-equivalent legal recognition),<sup>8</sup> and analyzes the second question, i.e., whether marriage-equivalent legal recognition of same-sex couples must be officially designated “marriage.”

Compared to the legal recognition question regarding rights, benefits and protections, the question concerning official designation has placed greater stress on our legal system, as it casts legal recognition of same-sex couples as a momentous transformation of an ancient social institution. Most important, unlike the legal recognition question, the official designation question impacts countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage.

Richard A. Posner (who is not such a proponent) has said:

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to different-sex couples; in one state, by amending the state constitution to authorize the legislature to limit marriage to different-sex couples; and in another, by overturning a same-sex marriage statute passed by the legislature. See, e.g., *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/s/same\\_sex\\_marriage/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html) (last updated Aug. 25, 2011). See also John Schwartz & Erik Eckholm, *After New York, New Look at Defense of Marriage Act*, N.Y. TIMES, June 28, 2011, at A12.

<sup>6</sup> The strong demographic trend in favor of gender-blind marriage makes the ultimate political result seem clear; the open questions regard how and when. See *supra* note 4.

<sup>7</sup> See discussion *infra* Parts I.C, II.C, IV.B.2 (discussing *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012)).

<sup>8</sup> In this article, “legal recognition” means civil marriage or marriage-equivalent union and does *not* include forms of official recognition (however designated) that are not marriage equivalents.

The most remarkable aspect of the current controversy is that it is mainly about a word, “marriage.” . . . Why so much passion is expended over the word “marriage” baffles me. After all, even today, and even more so if civil unions were officially recognized, homosexual couples can call themselves “married” if they want to.<sup>9</sup>

The issue, however, is not whether same-sex couples may call themselves married (they certainly may), but whether everyone else must do so as well. The battle over terminology concerns the “expressive function” of law.<sup>10</sup> Although same-sex marriage and marriage-equivalent union afford the same legal rights and protection, the designations “marriage” and “civil union” (or “domestic partnership”) convey different messages.

As to legal recognition of same-sex couples, I shall not rehearse the powerful supporting arguments, which have been extensively analyzed, and shall simply state my view that same-sex couples should have the right to legal recognition for basically the same reasons why different-sex couples have a fundamental right to legal recognition. The right to marry is classified a fundamental right for constitutional purposes because the legal recognition and protection afforded by marriage are deemed to be essential to the exercise of heterosexuals’ right to pursue happiness.<sup>11</sup> The Supreme Court of California described the importance of this aspect of the right to pursue happiness:

The ability of an individual to join in a committed, long-term, officially recognized family relationship with the person of his or her choice is often of crucial significance to the individual’s happiness and well-being. The legal commitment to long-term mutual emotional and economic support that is an integral part of

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<sup>9</sup> Richard A. Posner, *The Law and Economics of Gay Marriage*, THE BECKER-POSNER BLOG (July 17, 2005, 7:19 PM), <http://www.becker-posner-blog.com/2005/07/the-law-and-economics-of-gay-marriage%e2%80%9dposner.html>.

<sup>10</sup> See generally Symposium, *Law, Economics & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021–22, 2051–52 (1996) (arguing that the expressive or symbolic content of a law may be designed to reinforce existing social norms, or to advance changes in norms).

<sup>11</sup> *Turner v. Safley*, 482 U.S. 78, 81 (1987) (holding that prisoners have a constitutional right to marry); *Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978) (ruling that child support delinquents have a constitutional right to marry); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down anti-miscegenation law). The U.S. Supreme Court has not always clearly specified whether the right to marry is rooted in substantive due process or equal protection, but has suggested that it is part of both. See Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2081, 2083–84 (2005) (arguing that the right to marry should be viewed as analogous to the right to vote and therefore part of the “fundamental rights” branch of equal protection doctrine, rather than substantive due process).

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an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.<sup>12</sup>

Three attributes of this description are important. It does not include (presumed) procreative potential as a necessary component of an officially recognized family relationship. It does not specify the sex of the person an individual may choose to join in such a relationship. It focuses on substance, not nomenclature.<sup>13</sup>

The court's language displays the appropriate level of abstraction<sup>14</sup> for articulating and analyzing the question concerning legal recognition, which may be rephrased as follows: Does an individual have a constitutionally protected right "to join in a committed, long-term, officially recognized family relationship with the person of his or her choice," regardless of that person's sex and with such officially recognized relationship comprising a "legal commitment to long-term mutual emotional and economic support" identical to that of marriage?<sup>15</sup> In view of the human stakes involved, the right to be in a legally recognized and protected family should be interpreted expansively, rather than as only a right to be in a certain kind of family (that is, one comprising a man and woman).<sup>16</sup>

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<sup>12</sup> *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008).

<sup>13</sup> The phrase "that is an integral part of an officially recognized marriage relationship" simply indicates the content of "the *legal commitment* to long-term mutual emotional and economic support" that the court deems necessary to enable an individual "to invest in and rely upon a loving relationship" in a way that may be beneficial to her or him. *Id.* (emphasis added). This passage relates to substantive legal rights and responsibilities, not nomenclature. As to passages concerning nomenclature, see discussion *infra* Parts III.C, IV.B.1.

<sup>14</sup> In the decisions cited in note 11, the Supreme Court dealt only with traditional marriage comprising persons of different sex. Accordingly, treating these decisions as authority for protecting a right to something other than different-sex marriage necessarily requires some level of abstraction in articulating the constitutional interests at stake and why they are equally essential to the exercise of gay individuals' rights to pursue happiness.

<sup>15</sup> *Marriage Cases*, 183 P.3d at 424.

<sup>16</sup> Elsewhere in its opinion, the California Supreme Court conflated the questions regarding legal recognition and official designation, to less than felicitous effect.

It is important . . . that we recognize [that plaintiffs] are *not seeking to create a new constitutional right*—the right to "same-sex marriage"—*or to change [or] modify . . . the . . . institution of marriage*. Instead, plaintiffs contend that, *properly interpreted*, the state constitutional

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Simple fairness and recognition of our common humanity require that lesbian, gay, bisexual and transgender (LGBT) individuals have basically the same rights to pursue happiness that other people have. In particular, committed same-sex couples should be entitled to receive the same rights, benefits, and protections that married different-sex couples receive.

As to the official designation of such legal recognition, however, we must distinguish between voting on a public policy issue as a legislator or private citizen on one hand, and deciding a legal question, on the other. The distinction is especially important in this context because to many of us readers of law reviews, simply opening civil marriage to same-sex couples (which will not alter the rights, benefits, and protections afforded to different-sex married couples, and will not undermine the original purposes of marriage or hinder their achievement) seems so obviously the best policy result. There is great temptation to become convinced that this result is constitutionally required. This article argues against this temptation.

Unlike the legal recognition question, the question whether objectively distinguishable combinations must bear the same official designation does not concern same-sex couples' substantive legal rights, benefits, and protections, but rather a social connotation. Few questions are more ill suited to judicial resolution than this one. This article argues that, for reasons heretofore virtually ignored by proponents of court-ordered gender-blind marriage, the tempting conclusion is analytically unsound and sets a troubling precedent for regulating the content of speech and thought.

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right to marry affords same-sex couples the same rights and benefits .

. . . as this constitutional right affords to opposite-sex couples.

*Id.* at 421 (emphasis added). The court agreed with these contentions, but many Californians would find some of them disingenuous. The absence of a straightforward answer as to who is the husband and who is the wife in a same-sex marriage belies the assertion that the institution of marriage is not being changed or modified. Presumably the court meant that, since husband and wife have equal legal status, the *legal rights and obligations* that constitute marriage were not being changed, which is a highly important, but different, point. Even with no change in rights and obligations, expanding the types of couples eligible for marriage is, by itself, a modification of the institution—specifically, changing its design principle from a (presumed) potentially procreative loving binary relationship to a (presumed) loving binary relationship. I consider this a good change, but it should be achieved by winning the hearts and minds of the community—not by court order. See discussion *infra* Part IV. Claiming that no change is being made is not credible. As to whether the judges were creating a new constitutional right or not, see *infra* note 226.

Same-sex and different-sex relationships are identical in many respects and different in other respects. None of these differences justifies affording different rights. Distinct sexual combinations are not different enough to be denied equal legal rights and protections, but there are rational bases for believing they are different enough to be called by different names. Although we may not favor this way of thinking, we should not interpret the Constitution to require people to establish that their thoughts on sex and human relationships are related to a state interest. To protect personal liberty and maintain democratic legitimacy, we have drawn (albeit without uniform clarity) a crucial line between prohibiting conduct and prohibiting speech. For the same reasons, we should draw a line between court orders protecting legal rights (regulating conduct) and orders prescribing speech.

Parts I and II briefly survey the present legal landscape for same-sex couples under federal and state law. Part III examines context and consequences in reviewing the constitutionality of gender composition-based classifications in the official designation of legal recognition of committed couples. Part IV examines the expressive function of law, American opposition to regulation of thought, and why a court order that invalidates legislation affording legal recognition of committed couples solely because of its nomenclature crosses the line between regulating non-privileged conduct (which is constitutionally permissible) and regulating the content of speech and thought (which is not).<sup>17</sup>

## I. SAME-SEX COUPLES UNDER THE CONSTITUTION OF THE UNITED STATES

### *A. Legal Recognition of Same-Sex Couples under the U.S. Constitution*

One point on which all sides of the same-sex marriage controversy seem to agree is that civil marriage is, and should continue to be, governed by state law, not federal law.<sup>18</sup> This

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<sup>17</sup> Although the distinction between regulating conduct and regulating speech is not necessarily relevant (or even coherent) in all cases, it is clearly pertinent in the present context, and though government may need some minimal forms of speech regulation in order to function, in the present context there is no governmental need for judicial specification of the content of speech.

<sup>18</sup> Under the federal system outlined by the Constitution of the United States, the power to regulate civil marriage and domestic relations resides in the respective states. *See, e.g., In re Burriss*, 136 U.S. 586, 593–94 (1890) (“The

consensus is unlikely to change in the foreseeable future.<sup>19</sup>

State laws regulating marriage are, of course, subject to any requirements or limitations imposed by the Constitution of the United States. Until 2009, however, LGBT civil rights activists purposely avoided bringing the cause for gender-blind marriage before the Supreme Court of the United States—and wisely so, given their predecessors' experience forty years ago. In 1971, the Supreme Court of Minnesota held that a state statute limiting marriage to different-sex couples did not violate the First, Eighth, Ninth, or Fourteenth Amendment to the U.S. Constitution.<sup>20</sup> The losing plaintiffs exercised their then-existing statutory right to appeal the decision to the U.S. Supreme Court. The plaintiffs' appeal was not a petition for certiorari, which the Court would have full discretion to deny, but rather was taken as a matter of right, and the Court's jurisdiction was mandatory.<sup>21</sup>

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whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”). Article I, Section 8 of the Constitution does not give Congress power to regulate marriage. U.S. CONST. art. I, § 8. Even the most ardent proponents of an expansive reading of the Commerce Clause stop short of saying it authorizes Congress to enact domestic relations laws. See Nancy Kubasek et al., *Amending The Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights For Same-Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959, 972–74 (2011). The Tenth Amendment reserves the power to make such laws to the states. U.S. CONST. amend. X. Federal statutes prohibiting polygamy applied only in Territories of the United States and were not enacted pursuant to Article I, Section 8, but rather pursuant to Article IV, Section 3, clause 2, which empowers Congress to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2; *Reynolds v. United States*, 98 U.S. 145, 152 (1878).

<sup>19</sup> Some opponents of same-sex marriage want to amend the U.S. Constitution to ban same-sex marriage and deny all courts jurisdiction to determine whether the U.S. Constitution or any state constitution requires conferring the legal incidents of marriage on same-sex couples. See, e.g., James Dao, *Renewed State Efforts Made Against Same-Sex Marriage*, N.Y. TIMES, July 16, 2004, at A17. Several such proposed amendments were introduced in recent years, but none has gone anywhere, and none will because most who oppose same-sex marriage believe the people of each state should decide the issue for themselves and not be told what to do by other states or the federal government. See, e.g., Pew Research Ctr. Pollwatch, *Reading the Polls on Gay Marriage and the Constitution*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (July 13, 2004), <http://www.people-press.org/2004/07/13/reading-the-polls-on-gay-marriage-and-the-constitution>.

<sup>20</sup> *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of federal question*, 409 U.S. 810 (1972).

<sup>21</sup> 28 U.S.C. § 1257(2) (1982), *amended by* Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662, 662 (1988) (originally stating that final judgment rendered by a state's highest court may be reviewed by the U.S. Supreme Court by appeal, rather than writ of certiorari, where the validity of a state statute “is

Nevertheless, in 1972, five years after it declared that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our existence and survival,”<sup>22</sup> the U.S. Supreme Court would not dignify the concept of same-sex marriage with a written opinion and summarily dismissed the idea of a constitutionally protected right to marry someone of the same sex.<sup>23</sup> The Court dismissed the appeal “for want of a substantial federal question.”<sup>24</sup> Clearly, the Court believed that the Fourteenth Amendment does *not* require states to grant same-sex couples the right to marry.<sup>25</sup>

Subsequently, several courts have expressly held that the Fourteenth Amendment does not protect a right to marry someone of the same sex.<sup>26</sup> The California district court’s decision in *Perry v. Schwarzenegger*<sup>27</sup> in 2010 is the first to hold otherwise. In view of developments within the last decade, the current Supreme Court cannot reasonably maintain that the Fourteenth Amendment claims fail to raise “a substantial federal *question*.”

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drawn in question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity” was amended in 1988 to eliminate the Court’s mandatory jurisdiction).

<sup>22</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)) (finding state anti-miscegenation law violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

<sup>23</sup> *Baker*, 409 U.S. at 810.

<sup>24</sup> *Id.*

<sup>25</sup> *See, e.g., Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (“Votes to . . . dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . .”). Presumably the Court also believed the Fourteenth Amendment does not require states to grant marriage-equivalent unions. *Cf. Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) (holding that the state constitution requires affording same-sex couples the same substantive rights and benefits enjoyed by married opposite-sex couples); *Baker v. State*, 744 A.2d 864, 886–87 (Vt. 1999) (ruling that state constitution requires granting either same-sex marriage or marriage-equivalent unions). *See* discussion *infra* Part II.B.1.

<sup>26</sup> *See, e.g., Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306–07 (M.D. Fla. 2005); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974). *Accord* *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) (holding that same-sex marriage is not a fundamental right protected by the Fifth Amendment Due Process Clause).

<sup>27</sup> 704 F. Supp. 2d 921 (N.D. Cal. 2010) (striking down ban and officially designating legal recognition of same-sex couples “marriage” because ban deprives such couples of the fundamental right to marry guaranteed by the Fourteenth Amendment’s Due Process Clause and discriminates against such couples in violation of the Equal Protection Clause), *aff’d on other grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

Whether a majority would uphold any such claim, however, is another matter.

*B. The Belated Demise of Anti-Sodomy Laws*

The LGBT civil rights movement suffered a major setback in 1986, when the U.S. Supreme Court rendered its infamous decision in *Bowers v. Hardwick*,<sup>28</sup> which held that a state law making both heterosexual and same-sex sodomy a crime<sup>29</sup> (punishable by imprisonment for not less than one year, and not more than twenty years) was constitutional insofar as it applied to same-sex sodomy.<sup>30</sup> The Court specifically expressed no opinion on the constitutionality of the statute as applied to heterosexual sodomy.<sup>31</sup>

The Supreme Court rectified this injustice in 2003 with its decision in *Lawrence v. Texas*,<sup>32</sup> which expressly overruled *Bowers*.<sup>33</sup> A five-Justice majority held that a law making same-sex sodomy a class C misdemeanor (a minor offense in Texas) violates the Due Process Clause of the Fourteenth Amendment.<sup>34</sup> The statute did not pass muster, because it “further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>35</sup> Justice O’Connor did not join the majority opinion overturning *Bowers*, but concurred in the judgment on the ground that the Texas statute violated the Equal Protection Clause because the law did not prohibit heterosexual sodomy.<sup>36</sup>

A third of the Justices dissented.<sup>37</sup> In concluding that the Constitution provides no protection against the prohibition of private same-sex sexual conduct of consenting adults, the three

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<sup>28</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that statute making it a crime for two adult persons of same sex to engage in certain intimate sexual conduct in the privacy of their home was unconstitutional).

<sup>29</sup> GA. CODE ANN. § 16-6-2(a)(1) (2011) (defining sodomy as “any sexual act involving the sex organs of one person and the mouth or anus of another”); *Bowers*, 478 U.S. at 187–89.

<sup>30</sup> *Bowers*, 478 U.S. at 189, 198.

<sup>31</sup> *See id.* at 190, 195.

<sup>32</sup> *Lawrence*, 539 U.S. 558.

<sup>33</sup> *Id.* at 578.

<sup>34</sup> *Id.* at 579.

<sup>35</sup> *Id.* at 578.

<sup>36</sup> *Id.* at 579.

<sup>37</sup> *Id.* at 586.

dissenters seemed not to recognize that the prohibition constitutes an acute denial of gays' human *identity*, much less dignity. In a scathing dissent, Justice Scalia lamented the demise of all morals legislation, which he viewed as a likely consequence of the majority's opinion.<sup>38</sup> As to the state interest served by the anti-sodomy statute, Justice Scalia mentions only "further[ing] the belief of [a majority of the state's] citizens that certain forms of sexual behavior are 'immoral and unacceptable,' the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity."<sup>39</sup> In the case of an anti-sodomy law, the prohibition is intended to deter behavior that moralists believe is spiritually harmful to those who engage in it, and to alleviate (but presumably never entirely eliminate) moralists' discomfiture from "the very thought that 'it is going on' somewhere."<sup>40</sup>

Describing a legislative purpose as "furthering a belief" identifies the expressive function of law. By making same-sex sodomy a crime, the state was sending an unambiguous message: such conduct is "immoral and unacceptable." Justice Scalia viewed the Court's decision as judicial usurpation of the legislative power of the state legislature:

Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. . . . But persuading one's fellow citizens is one

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<sup>38</sup> *Id.* at 590 (Scalia, J., dissenting). Clearly, laws prohibiting consensual fornication between adults do not survive *Lawrence*, but the decision's effect on other sexual "morals" laws is not as obvious. Unlike fornication, some other prohibited activities harm third parties (e.g., betrayed spouses in the case of adultery or bigamy), Andrew D. Cohen, Note, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 633 (2010); or harm potential victims like offspring in the case of adult incest, Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1571 (2005); or involve other than consenting adults (e.g., as in the case of bestiality), William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1085 (2004).

<sup>39</sup> *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)). This is not, however, the only interest served by some "morals" laws. For example, (arguably) laws prohibiting adultery and bigamy are among the legal protections afforded by marriage, and the constraint on personal liberty is concomitant with the legal obligations voluntarily assumed by entering into marriage.

<sup>40</sup> See CHARLES FRIED, *MODERN LIBERTY AND THE LIMITS OF GOVERNMENT* 132 (2007) (arguing that such purposes do not justify prohibiting private consensual conduct).

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thing, and *imposing one's views in absence of democratic majority will* is something else. . . . What Texas has chosen to do is well within the range of *traditional democratic action*, and its hand *should not be stayed* through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.<sup>41</sup>

As to who is imposing upon whom, Justice Scalia has everything backwards. The private sexual activities of two consenting adults "impose" no "views" (or anything else) on anyone. On the other hand, moralists in the state legislature were imposing their views when they prohibited private conduct that does not conform to their views. While the majority opinion at one point seems to reflect a favorable view of the morality of same-sex sodomy,<sup>42</sup> invalidating the prohibition did not impose this or any other view but rather protected a disfavored minority against the use of criminal sanctions to impose the state legislature's views.

Unlike making it a crime, decriminalizing consensual same-sex sodomy does not send an unambiguous message regarding morality, as much immoral conduct is not illegal. At most, the message is that the decriminalized conduct does not harm others.<sup>43</sup>

### *C. The Future for Same-Sex Couples in the U.S. Supreme Court*

The Supreme Court's willingness to overrule *Bowers* raises the obvious question whether the Court might now be ready to overrule its 1972 dismissal of a claim that the U.S. Constitution protects a right to marry a person of the same sex. Although overruling *Bowers* was a necessary precondition to upholding

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<sup>41</sup> *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting) (emphasis added).

<sup>42</sup> *Id.* at 567. "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." *Id.* Whether regarding gay or straight persons, the naïveté of this statement is striking. Cf. Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004) (noting that the record does not indicate that defendants were in a relationship).

<sup>43</sup> Cf. *Lawrence*, 539 U.S. at 583. "After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Id.* (internal quotation marks omitted) (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996) (quoting *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987))). This is problematic, of course, only if the defining conduct does not harm others. Outlawing murder and theft does not unfairly discriminate against the class of murderers or thieves, for instance.

such a right, it is not clear that striking down anti-sodomy laws will be a sufficient condition. In view of the substance of the claim<sup>44</sup> and its political sensitivity,<sup>45</sup> pursuing a federal claim for the right to marry someone of either sex runs a substantial risk that the Supreme Court will hold that the Constitution does not protect such a right.

After the California Supreme Court upheld Proposition 8 in 2009,<sup>46</sup> however, and despite serious misgivings within the LGBT community, some proponents of gender-blind marriage challenged Proposition 8 in the U.S. District Court for the Northern District of California. In 2010, Chief Judge Walker held that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>47</sup> In February 2012, a two-to-one majority of a panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's judgment.<sup>48</sup> I analyze key aspects of these decisions by Chief Judge Walker and the Ninth Circuit panel in Parts III and IV.

Proponents of Proposition 8 filed a petition for review in the Ninth Circuit en banc.<sup>49</sup> If rehearing en banc is denied, the

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<sup>44</sup> Clearly, the 39th Congress, which proposed the Fourteenth Amendment in 1866, and the state legislatures that ratified it by 1868, did not think the Equal Protection Clause required states to enact same-sex marriage or marriage-equivalent unions. But, of course, back then, racial segregation was deemed not to violate the clause. U.S. CONST. amend. XIV.

<sup>45</sup> See, e.g., Calvin Massey, *Public Opinion, Cultural Change, and Constitutional Adjudication*, 61 HASTINGS L.J. 1437, 1437, 1451 (2010) (warning against the institutional risks to the Court of redefining marriage to include same-sex unions "in opposition to popular understanding of long-held and deeply entrenched cultural practices"). "As a predictive matter, the Court is unlikely to embrace same-sex marriage as a constitutional right unless it is reasonably satisfied that public opinion comports with that judgment." *Id.* at 1449. *But see* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 755 (2011) (criticizing "consensus" constitutionalism as reflecting inferior historical interpretation and underrating, and possibly undermining, the Supreme Court's countermajoritarian capabilities).

<sup>46</sup> *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (ruling that Proposition 8 is a validly adopted "amendment" of the state constitution and not a "revision" subject to more arduous adoption requirements). Proposition 8 amended California's constitution to provide: "Only marriage between a man and a woman is valid or recognized in California." CAL. CONST. art. I, § 7.5, *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd on other grounds sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>47</sup> *Perry*, 704 F. Supp. 2d at 1004.

<sup>48</sup> *Perry*, 671 F.3d at 1096. As discussed in Part IV.B.2, the court of appeals' grounds for striking down Proposition 8 differ from those of the district court.

<sup>49</sup> *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en*

proponents are expected to file a petition for certiorari. If rehearing en banc is granted, it is expected that whichever side ultimately loses in the Ninth Circuit will file a petition for certiorari. If it grants the petition,<sup>50</sup> the U.S. Supreme Court may or may not address the legal recognition question or the official designation question. The three-judge panel of the Ninth Circuit, however, did not address either question in striking down Proposition 8.<sup>51</sup> If the Court does not address these questions in this case, it is likely to do so in another case within a few years.

## II. STATE CONSTITUTIONAL LITIGATION AND VOTER RESPONSES

Litigating state constitutional claims can have certain advantages over other approaches. Some states take pride in providing more rights and greater protections than those provided by the U.S. Constitution. Also, raising only state constitutional issues assures that, whatever their outcome, these cases will never involve any federal question for the U.S. Supreme Court to review. Convincing a majority of judges on a state court that same-sex couples have a right to marry may consume less time and money than persuading a majority of risk-averse state legislators to establish such a right. Moreover, the legislature can easily repeal a statute, but overturning a high court's interpretation of the state constitution is more expensive and time consuming because amending the constitution often involves a more rigorous legislative process or a constitutional convention and always entails a vote of the state's citizens.<sup>52</sup>

However, state constitutional challenges to laws limiting marriage to different-sex couples have had mixed results in court, succeeding in some states and failing in others. Moreover, the decisions invalidating this limitation generated a strong public backlash, which resulted in half of these decisions being

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*banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>50</sup> Technically, the Ninth Circuit panel's decision in *Perry* did not create a circuit split. In *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit ruled that the Fourteenth Amendment does not require a state to grant gender-blind marriage or marriage-equivalent unions for same-sex couples, but the Ninth Circuit panel avoided those issues and instead held that once a state has granted the official designation "marriage" to all gender combinations, the Equal Protection Clause prohibits taking it away only from same-sex couples. *Perry*, 671 F.3d at 1096.

<sup>51</sup> *Id.* at 1095.

<sup>52</sup> See, e.g., CONN. CONST. art. XII; IOWA CONST. art. X; MASS. CONST. amend. art. XLVIII, cl. IV.

overturned by constitutional amendment and prompted preemptory amendments in twenty-eight states.<sup>53</sup>

*A. The “Hawaii Case” and the Defense of Marriage Act*

In 1993, the Supreme Court of Hawaii held that limiting marriage to different-sex couples violated the equal protection clause of the state constitution.<sup>54</sup> In 1998, the electorate ratified an amendment to the Hawaii constitution to provide that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>55</sup>

In 1996, in response to the possibility that one or more states might legally recognize committed same-sex couples either by legislative action or as a result of judicial rulings that a state constitution requires such recognition, the Defense of Marriage Act (DOMA) was passed by Congress and signed by President Clinton.<sup>56</sup> The statute has two different components. First, the “horizontal federalism” component provides that:

No 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.<sup>57</sup>

The purposes of this provision are to allow each state to set its own policy regarding legal recognition of same-sex couples and to prevent any one state from effectively setting the rules for all other states.<sup>58</sup> Whether this provision violates the Full Faith and Credit Clause<sup>59</sup> has been the subject of academic debate.<sup>60</sup> The

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<sup>53</sup> See discussion *infra* Part II.C.

<sup>54</sup> Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

<sup>55</sup> HAW. CONST. art. I, § 23.

<sup>56</sup> Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7 (2006)).

<sup>57</sup> 28 U.S.C. § 1738C. For purposes of this provision, a marriage-equivalent union appears to be “a relationship between persons of the same sex that is treated as a marriage,” even though not officially designated “marriage.” *Id.*

<sup>58</sup> H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

<sup>59</sup> U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”).

<sup>60</sup> Compare, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1532–35 (2007) (contending DOMA provision is constitutional), with, e.g., Stanley E. Cox, *Nine Questions About Same-Sex*

only reported case addressing the issue held that DOMA's horizontal federalism provision does not violate the Full Faith and Credit Clause or the Fourteenth Amendment's Due Process or Equal Protection Clause.<sup>61</sup>

The second component of DOMA defines marriage, for all federal law purposes, as the "union of one man and one woman as husband and wife."<sup>62</sup> In 2010, the U.S. District Court in Massachusetts held that this provision violates the equal protection principles of the Fifth Amendment's Due Process Clause and granted summary judgment for same-sex married couples that were denied federal benefits that are granted to similarly situated different-sex couples.<sup>63</sup> Detailed analysis of DOMA is outside the scope of this article.<sup>64</sup>

### *B. Subsequent Cases*

The mixed results in state constitutional challenges to laws limiting marriage to different-sex couples fall into three categories.

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*Marriage Conflicts*, 40 NEW ENG. L. REV. 361, 408 (2006) (contending the opposite).

<sup>61</sup> *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1301–09 (M.D. Fla. 2005).

<sup>62</sup> 1 U.S.C. § 7 (2006).

<sup>63</sup> *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Oct. 13, 2010). In a companion case, the court held that DOMA's second component intrudes on a state's sovereignty over marital status in violation of the Tenth Amendment and is not a valid use of Congress's spending power. *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 248–49 (D. Mass. 2010), *appeal docketed*, No. 10-2204 (1st Cir. Oct. 13, 2010). Constitutional challenges also are pending in other courts. *See Pedersen v. Office of Pers. Mgmt.*, No. 310-1750 (D. Conn. filed Nov. 9, 2010) (seeking declaratory and injunctive relief); *Windsor v. U.S.*, No. 10-8435 (S.D.N.Y. filed Nov. 9, 2010) (seeking refund of estate taxes).

In 2011, the Obama Administration announced its conclusion that the federal definition of marriage is unconstitutional and its decision to no longer defend the provision's constitutionality. *See* Press Release, Dep't of Justice, Office of Pub. Affairs, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-222.html>.

<sup>64</sup> If the Fourteenth Amendment requires states to provide gender-blind marriage, both components of DOMA are invalid. If marriage-equivalent unions are the minimum required by the Fourteenth Amendment, DOMA's second component is invalid and, for purposes of federal law, "marriage" should include gender-blind marriage and marriage-equivalent unions (however designated), and the "horizontal federalism" component should be amended to provide only that a state may use its domestic official designation in recognizing out-of-state same-sex marriages and marriage-equivalent unions.

### 1. Cases Ordering Marriage-Equivalent Unions

In 1999, the first decision of a state's highest court since the Hawaii case,<sup>65</sup> the Supreme Court of Vermont unanimously held that the state constitution's Common Benefits Clause<sup>66</sup> requires the state to extend to same-sex couples the benefits and protections incident to marriage under state law.<sup>67</sup> The court said the legislature has the prerogative to decide whether to extend such benefits and protections by expanding the institution of marriage or by establishing a parallel system for same-sex couples.<sup>68</sup> In 2000, the Vermont legislature enacted a civil union law granting same-sex couples the rights and protections afforded to different-sex married couples.<sup>69</sup>

In 2006, the Supreme Court of New Jersey reached a similar result under the equal protection provision of the New Jersey constitution, ordering the legislature either to amend the marriage statutes or enact a statutory structure affording same-sex couples the same rights and benefits enjoyed by married couples.<sup>70</sup> The New Jersey legislature passed a statute providing for different-sex marriage and same-sex civil unions.<sup>71</sup>

By holding that same-sex couples must be afforded equal legal rights but leaving determination of the official designation to the legislature, the Vermont and New Jersey high courts assured

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<sup>65</sup> See discussion *supra* Part II.A.

<sup>66</sup> VT. CONST. ch. 1, art. 7 ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . .").

<sup>67</sup> Baker v. State, 744 A.2d 864, 882, 886 (Vt. 1999).

<sup>68</sup> *Id.* at 886.

<sup>69</sup> An Act Relating to Civil Unions, Pub. Act No. 91, § 3 (2000), 2000 Vt. Acts & Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201–1207 (2001) (repealed in operative part upon authorization of same-sex marriage in 2009)) (establishing requirements for a civil union; parameters for who can be parties in a civil union; benefits, protections, and responsibilities of parties to a civil union; modifications to and dissolutions of civil unions; and the licensing and record keeping of civil unions). In 2009, Vermont enacted same-sex marriage. See *infra* Part IV.D.

<sup>70</sup> Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

<sup>71</sup> An Act Concerning Marriage and Civil Unions, 2006 N.J. Laws 975 (codified in part at N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (West 2008 & Supp. 2011)) (defining the rights of individuals in civil unions; requirements for establishing civil unions; the legal benefits, protections, and responsibilities of civil unions; validity of civil unions in foreign jurisdictions; guidelines to follow in reply to form questions; and establishment of the New Jersey Civil Union Review Commission).

that same-sex couples are not denied the equal protection of the laws<sup>72</sup> and avoided the pitfalls described in Part IV. This, it seems to me, is exactly the right *legal* result.<sup>73</sup> The current U.S. Supreme Court reaching a similar result under the Fourteenth Amendment seems (both substantively and politically) more likely than it mandating same-sex marriage.<sup>74</sup>

## 2. Cases Ordering Same-Sex Marriage

In 1998 an Alaskan court raised the prospect of same-sex marriage, but the decision was promptly overturned by state constitutional amendment.<sup>75</sup> Beginning with Massachusetts in 2003,<sup>76</sup> then California<sup>77</sup> and Connecticut<sup>78</sup> in 2008, and Iowa in 2009,<sup>79</sup> the highest state court held that the state constitution requires gender-blind marriage and that providing marriage-equivalent unions was insufficient. I analyze central aspects of these decisions in Parts III and IV.

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<sup>72</sup> See, e.g., *Lewis*, 908 A.2d at 224.

<sup>73</sup> As a policy matter, I favor a single inclusive designation, i.e., gender-blind marriage, but these courts correctly concluded that “if the age-old definition of marriage is to be discarded, such change must come from the crucible of the democratic process.” *Id.* at 221. While the two courts rightly addressed concerns regarding democratic legitimacy and separation of powers, the official designation issue also directly implicates paramount personal liberty interests that ground these concerns. See discussion *infra* Part IV.

<sup>74</sup> Setting marriage-equivalent unions as the constitutional minimum would have a strong legal foundation, but (as this article endeavors to show) imposing gender-blind marriage would not. Also, it is reasonable to expect that negative public reaction to a marriage-equivalent union minimum would be milder than public reaction to court-ordered gender-blind marriage.

<sup>75</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Feb. 27, 1998), *superseded by* ALASKA CONST. art. I, § 25. The Superior Court of Alaska granted same-sex couple plaintiffs’ motion for summary judgment that limiting marriage to different-sex couples is subject to “strict scrutiny” under the privacy and equal protection provisions of the state constitution, and ordered further hearings to determine whether the state can show a “compelling state interest” necessitating such limitation. *Id.* In response, the legislature proposed, and Alaska voters approved, a constitutional amendment limiting marriage to different-sex couples. ALASKA CONST. art. I, § 25 (which took effect on January 3, 1999).

<sup>76</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); see also *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (holding that a bill prohibiting same-sex marriage but allowing civil unions violated the equal protection and due process requirements of the state constitution).

<sup>77</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>78</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008), *rev’g sub nom.* *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006).

<sup>79</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

### 3. Cases Not Ordering Legal Recognition of Same-Sex Couples

The highest courts in New York,<sup>80</sup> Maryland,<sup>81</sup> and Washington,<sup>82</sup> and lower courts in Arizona<sup>83</sup> and Indiana<sup>84</sup> have held that legally recognizing only different-sex couples does not violate their respective state constitutions.

#### *C. State Constitutional Amendments*

Thirty-nine states, twenty-nine by state constitution and ten by statute, expressly limit marriage to the union of one man and one woman.<sup>85</sup> Of the twenty-nine state constitutions limiting marriage to different-sex couples, seventeen also expressly prohibit any legal recognition of same-sex couples that is similar to marriage, and twelve are silent on this issue and presumably do not prohibit legal recognition of same-sex couples so long as such recognition is not officially designated “marriage.”<sup>86</sup>

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<sup>80</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006). In 2011, New York enacted legislation establishing gender-blind marriage. Marriage Equality Act, 2011 N.Y. Sess. Laws 725 (McKinney) (codified as amended at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 11, 13 (McKinney 2010 & Supp. 2012)).

<sup>81</sup> *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007). In 2012, Maryland enacted gender-blind marriage. Civil Marriage Protection Act, S. 241, 430th Sess. (Md. 2012) (codified at MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (LexisNexis 2012)) (effective Oct. 1, 2012).

<sup>82</sup> *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006). In 2012, Washington enacted gender-blind marriage. An Act Relating to Providing Equal Protection for All Families in Washington, S. 6239, 62d Sess. (Wash. 2012) (codified at scattered sections of title 26 of WASH. REV. CODE) (effective June 7, 2012).

<sup>83</sup> *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003).

<sup>84</sup> *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

<sup>85</sup> John Schwartz, *After New York, New Look at Defense of Marriage Act*, N.Y. TIMES, June 28, 2011, at A12; Andrew M. Francis et al., *The Effects of Same-Sex Marriage Laws on Public Health and Welfare*, NAT'L BUREAU OF ECON. RES., at 11, [http://www.nber.org/public\\_html/confer/2011/HES11/Francis\\_Mialon\\_Peng.pdf](http://www.nber.org/public_html/confer/2011/HES11/Francis_Mialon_Peng.pdf) (last visited Jan. 7, 2012). As permitted by DOMA, thirty-eight of the thirty-nine states expressly do not recognize same-sex marriages performed in other states. See Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 84 n.44 (2011). (Numbers of states in this note and the accompanying text reflect the enactment of gender-blind marriage in Maryland and Washington in February 2012.)

<sup>86</sup> Francis et al., *supra* note 85. The California Supreme Court interpreted Proposition 8 as limiting the designation “marriage” to different-sex couples, but not repealing the “right of same-sex couples to enter into an officially recognized and protected family relationship.” *Strauss v. Horton*, 207 P.3d 48, 76 (Cal. 2009) (emphasis in original).

These state constitutional provisions differ from the provision struck down in *Romer v. Evans*,<sup>87</sup> where the U.S. Supreme Court invalidated a state constitutional amendment in Colorado that precluded *all* legislative, executive, and judicial action at any level of state or local government designed to afford protected status to persons based on their “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>88</sup> The Court concluded that the overbroad amendment, which literally even banned official policies designed to protect gay individuals from actual wrongful harm, violated the Equal Protection Clause of the Fourteenth Amendment.<sup>89</sup>

Although the Colorado constitutional provision affected substantive rights and protections and California’s provision did not,<sup>90</sup> the Ninth Circuit relied on *Romer* to strike down Proposition 8.<sup>91</sup> The court emphasized that both states’ provisions withdrew existing rights only from a specified class.<sup>92</sup> The Ninth Circuit’s decision does not affect the other twenty-eight states’ constitutional provisions—not even the seventeen that impinge on substantive rights by prohibiting marriage-equivalent recognition of same-sex couples, because, unlike California’s Proposition 8, all of those provisions were preemptive and did not *withdraw* any *existing* right from same-sex couples.<sup>93</sup> The Ninth Circuit’s decision is discussed further in Part IV.B.2.

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<sup>87</sup> 517 U.S. 620 (1996).

<sup>88</sup> *Id.* at 624 (quoting COLO. CONST. art. II, § 30b).

<sup>89</sup> *Id.* at 635.

<sup>90</sup> *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012). *See also supra* note 86 (discussing *Strauss*).

<sup>91</sup> *Perry*, 671 F.3d at 1095.

<sup>92</sup> *Id.* at 1093.

<sup>93</sup> *Cf. id.* at 1087 n.20. Hawaii, however, which is in the Ninth Circuit, may have a problem with its state constitutional provision empowering the legislature to “reserve marriage to opposite-sex couples,” HAW. CONST. art. I, § 23, inasmuch as that provision was adopted in order to supersede *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), in which the Hawaii Supreme Court held that limiting marriage to different-sex couples violated the state constitution. *See supra* Part II.A.

### III. JUDICIAL REVIEW OF CLASSIFICATION BASED ON GENDER COMPOSITION<sup>94</sup>

#### A. Review Methodology

##### 1. Standards of Review

In ruling that affording equal rights and legal protection was insufficient and that legal recognition of same-sex couples must be designated “marriage” because legal recognition of different-sex couples is so designated, the highest state courts in California, Connecticut, Iowa, and Massachusetts, and the U.S. District Court for the Northern District of California utilized the full gamut of the traditional standards of review.<sup>95</sup> California applied strict scrutiny.<sup>96</sup> Connecticut and Iowa applied intermediate scrutiny.<sup>97</sup> Massachusetts purportedly applied rational basis review.<sup>98</sup> The federal district court in California applied strict scrutiny under the Due Process Clause<sup>99</sup> and rational basis review under the Equal Protection Clause.<sup>100</sup> For a

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<sup>94</sup> As noted earlier, the rest of this article assumes that, under the relevant constitution, same-sex couples are entitled to legal recognition providing the same rights and protections afforded to different-sex couples.

<sup>95</sup> Unlike the courts mentioned, the Ninth Circuit panel (which affirmed the district court’s judgment on other grounds) did not rule on the official designation question. *Perry*, 671 F.3d at 1093–96. See *infra* Part IV.B.2.

<sup>96</sup> *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008).

<sup>97</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 904 (Iowa 2009).

<sup>98</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (“For *no rational reason* the marriage laws . . . discriminate against a defined class.” (emphasis added)).

<sup>99</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994 (N.D. Cal. 2010), *aff’d on other grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012). This differs from all Fourteenth Amendment Due Process Clause decisions concerning same-sex marriage, which applied rational basis review. See *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 460–61 (Ariz. Ct. App. 2003); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

<sup>100</sup> *Perry*, 704 F. Supp. 2d at 997. Chief Judge Walker intimated that, if Proposition 8 had survived rational basis review, strict scrutiny would have been the appropriate standard under the Equal Protection Clause, notwithstanding that all Fourteenth Amendment decisions directly on point applied rational basis review. See *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006); *Wilson*, 354 F. Supp. 2d at 1308; *Standhardt*, 77 P.3d at 460–61; *Baker*, 191 N.W.2d at 187; *Singer*, 522 P.2d at 1195.

statutory classification to withstand “strict scrutiny” under the California constitution’s equal protection clause, the state must establish that the differential treatment is *necessary* to serve a *compelling* state interest.<sup>101</sup> The same standard under the federal Equal Protection Clause is generally considered impossible to satisfy.<sup>102</sup>

For a statutory classification to withstand “heightened” (intermediate) scrutiny under the Connecticut constitutional equal protection clause, the state must show that the statute’s differential treatment is *substantially related* to an *important* state objective.<sup>103</sup> The standard under the Iowa constitution is similar.<sup>104</sup> Normally a statutory classification will withstand “rational basis review” if it bears a rational relation to some legitimate end.<sup>105</sup> Courts that have upheld the constitutionality of non-recognition of same-sex couples have applied rational basis review.<sup>106</sup>

Typically, the factors courts consider in deciding whether to apply “strict scrutiny,” “intermediate scrutiny,” or “rational basis review” have been limited to whether the right in question is or is not a “fundamental right” and whether the classification is “suspect,” “quasi-suspect,” or neither.<sup>107</sup> Application of this procrustean judicial construct does not work well in various circumstances.<sup>108</sup> Detailed analysis of its deficiencies is beyond

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<sup>101</sup> *Marriage Cases*, 183 P.3d at 401. Although Proposition 8 overturned its result, the court’s decision that classifications based on sexual orientation are subject to strict scrutiny remains the law in California and has continuing importance. See Recent Case, *State Constitutional Law—California Supreme Court Declares Prohibition of Same-Sex Marriages Unconstitutional—In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), 122 HARV. L. REV. 1557, 1559 (2009).

<sup>102</sup> WALTER SINNOTT-ARMSTRONG & ROBERT J. FOGELIN, UNDERSTANDING ARGUMENTS: AN INTRODUCTION TO INFORMAL LOGIC 413 (Clark Baxter ed., 8th ed. 2010); see Matthew Coles, *Same-Sex Couples: Defining Marriage in the Twenty-First Century: Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL’Y REV. 23, 26 (2005).

<sup>103</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 476 (Conn. 2008).

<sup>104</sup> *Varnum v. Brien*, 763 N.W.2d 862, 897 (Iowa 2009).

<sup>105</sup> *Perry*, 704 F. Supp. 2d at 997.

<sup>106</sup> Jay Weiser, Foreword, *The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 58 (2004).

<sup>107</sup> See Sonja Seehusen, Comment, *Same Sex Marriage: Does the Constitution or State Constitution Support Same-Sex Marriages?*, 14 UDC/DCSL L. REV. 133, 135–36 (2011).

<sup>108</sup> See Coles, *supra* note 102, at 24. For some purposes, the U.S. Supreme Court may be moving away from this kind of construct and following a more flexible “balancing” approach. *Id.*

the scope of this article. For present purposes, it is sufficient to observe that, in determining the standard of review to apply and the methodology for applying that standard in particular circumstances, the construct ignores the substantive context and the character and consequences of the differential treatment.

Classifications affecting substantive rights should bear some rational relation to a legitimate end, and certain such classifications warrant closer scrutiny in view of the material consequences arising from substantive legal disparities.<sup>109</sup> In contrast, a nominal classification (i.e., one that does not affect substantive rights) involves no such legal disparities and should only be required to have a rational basis that is relevant to the subject matter of the classification.<sup>110</sup> So long as they have a rational basis for using, or not using, a particular word in a specific context,<sup>111</sup> the people and their elected representatives should not be required to demonstrate that using (or not using) such word is related to a legitimate state interest, much less substantially related to an important state objective or necessary to serve a compelling state interest.<sup>112</sup>

It is difficult to see how any such demonstration could ever be made, but, whether possible or not, none should be required. Where people have a rational basis for thinking as they do, and speech reflecting their thoughts does not affect anyone's substantive rights and is not disrespectful or undignified, governmental inquiry (judicial or other) into how their thoughts are connected or related to the interests of the state has no place in our constitutional system.

## 2. Assessing Motives

The four-to-three majority of the Connecticut Supreme Court concluded that, notwithstanding their "significant advances in obtaining equal treatment under the law," gay individuals continue "to suffer the enduring effects of centuries of legally sanctioned discrimination."<sup>113</sup> In the majority's view, the court's

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<sup>109</sup> *Id.* at 24–25.

<sup>110</sup> In addition, the language used may not be disrespectful or undignified. See discussion *infra* Part IV.B.1.

<sup>111</sup> For discussion of the rationality (as opposed to desirability) of distinguishing between different gender compositions, see *infra* Part III.B.2.

<sup>112</sup> For discussion of how community views impart significance to language used in legislation, see *infra* Part IV.B.

<sup>113</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 432 (Conn. 2008).

role in these circumstances is “to ensure that those laws [that single out gay individuals for disparate treatment] are not the product of such historical prejudice and stereotyping.”<sup>114</sup>

By thus casting the issue, the court set itself an impossible task: establishing whether the basis for drawing a nominal distinction between objectively different biological pairings is the result of certain ideas, opinions, or ways of thinking deemed to be invidious, and therefore not permitted bases for such a distinction.<sup>115</sup> The court labeled these kinds of thoughts “prejudice,” “antipathy,” and “stereotyping,” but did not indicate how to distinguish these from other bases for drawing a nominal distinction or even acknowledge that other bases may exist.<sup>116</sup> Is moral disapproval of same-sex sexual relations the product of “an adverse opinion or leaning formed without just grounds or before sufficient knowledge”?<sup>117</sup> Is a sincere, non-judgmental belief that distinct sexual combinations are meaningfully different the result of applying “a standardized mental picture . . . that represents an oversimplified opinion, prejudiced attitude, or uncritical judgment”?<sup>118</sup>

In view of its ugly history, it is naïve to believe that prejudice against homosexuals has played no role in the controversies over legally recognizing same-sex couples and officially designating such recognition. As to the official designation issue, however, it seems unjustifiably severe to start with the presumption that the same people who enact full legal recognition and protection for same-sex couples without being compelled to do so by court order,<sup>119</sup> and who have actively supported state anti-discrimination laws protecting gay individuals, are acting from prejudice and antipathy in drawing a nominal distinction between objectively different biological pairings. A presumption

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 461, 479, 481.

<sup>116</sup> *See id.* at 448–52, 461, 481.

<sup>117</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 919 (10th ed. 1997) (defining *prejudice*).

<sup>118</sup> *Id.* at 1153 (defining *stereotype*).

<sup>119</sup> In 2005, the Connecticut legislature was the first to enact marriage-equivalent unions, without being ordered to do so. Act Concerning Civil Unions, 2005 Conn. Acts 13 (Reg. Sess.), *repealed and amended by* Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, 2009 Conn. Acts 78 (Reg. Sess.) (converting civil unions into marriages by operation of law) (codified as amended at CONN. GEN. STAT. ANN. §§ 46b-38aa to 46b-38pp (West 2009)); *see Kerrigan*, 957 A.2d at 412 (requiring gender-blind marriage).

of guilt with respect to a majority's adverting to gender composition, which they believe to be important and salient to the foundation of the particular social institution involved,<sup>120</sup> does not accord the majority sufficient respect.

The court's methodology yielded dubious inferences. The legislature's comprehensive treatment of gay individuals as a protected class in multifarious contexts was cited as a factor weighing *against* the validity of the statute, which is ironic, since the state's record in this regard suggests that the nominal distinction drawn by the legislature was not the result of "prejudice and antipathy—a view that . . . [homosexuals] are not as worthy or deserving as others,"<sup>121</sup> but rather a result of the context in which the distinction was being drawn.<sup>122</sup>

### *B. Context and Axis of Distinction*

#### 1. Character and Basis of Classification

Because marriage-equivalent union and marriage are separate legal categories, courts that have required a single gender-blind category have compared having more than one legal category to the long-discredited "separate but equal" doctrine regarding racial segregation.<sup>123</sup> But that infamous doctrine involved actual

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<sup>120</sup> See discussion *infra* Part III.B.2.

<sup>121</sup> *Kerrigan*, 957 A.2d at 491.

<sup>122</sup> Cf. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

[I]f all other distinctions based on sexual orientation have been removed from statutes and case law, their retention in marriage law can be seen as the final vestiges of longstanding hostility [to] the social group at issue. . . .

Of course, it is also possible that the exclusionary law's survival in the face of other changes demonstrates not that some failure requiring judicial intervention has occurred, but rather that the interaction of marriage [law] and same-sex couples is somehow different from all other law related to sexual orientation. But if that is the claim, it ought to be defended.

*Id.* at 2021. I agree—and believe this claim can readily be defended. In at least two important respects, marriage law differs substantially from those areas where distinctions based on sexual orientation have been eliminated. Unlike official designations in the marriage law area, the distinctions in other areas deprived gay individuals of substantive rights, and eliminating the distinctions in order to provide equal legal protection did not change an ancient institution or impose required speech misrepresenting community values. See *infra* Part IV.B.

<sup>123</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v.*

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physical separation, which usually led to facilities and services that were in reality anything but equal. Moreover, imposing physical separation created daunting barriers to interracial interactions that foster empathy and reduce bias, and thereby exacerbated and prolonged the multifarious cultural, economic and social ills of racism.<sup>124</sup>

Most important, even supposing the inequality of segregated schools was eliminated by sustained moral commitment and dedication of sufficient funding and human resources, segregation still could not possibly be sustained because racial identity has no rational connection to the educational process or its purposes.<sup>125</sup> Education has nothing to do with race.<sup>126</sup>

But marriage has everything to do with sex.

## 2. The Social Institution of Marriage

The social institution of marriage predates our legal system by millennia. Although legal rights conferred and obligations imposed by civil marriage have changed over the centuries, sexuality remains the vital core, and many of the central messages and expectations of the institution have remained largely constant.<sup>127</sup> For example, a man should not seduce another's wife; a woman should not seduce another's husband; each spouse should be faithful to the other. Even today (albeit less so than in the past), sex outside marriage is viewed differently from sex within marriage. Although norms vary among different cultures and may vary within a single culture over time (and thus any universal definition of "marriage" will lack specificity), at a minimum, from an anthropological

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Bd. of Educ., 347 U.S. 483, 494–95 (1954).

<sup>124</sup> In contrast, no actual separation results from having more than one category of legal recognition of committed couples. Gay citizens and straight citizens are free to intermingle unencumbered by segregation. Having separate social institutions reflect a conceptual differentiation, but when properly implemented, involves no disparity of rights, protections, and obligations.

<sup>125</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003). To the extent that classroom diversity may provide a broader range of experiences and greater learning opportunities, the racial composition of a class may have some bearing on the learning process, although not in a manner that would support segregation, but rather the exact opposite. *Id.* at 330, 343.

<sup>126</sup> Separate public schools for black children and white children signified otherwise and implied that black Americans were inferior to white Americans. *Brown*, 347 U.S. at 494.

<sup>127</sup> See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1837–38 (1987).

standpoint, “marriage seems to have an empirically based definition: It is a socially approved union between unrelated parties that gives rise to new families and, by implication, to socially approved sexual relations.”<sup>128</sup>

Opponents of same-sex marriage emphasize that civil marriage was initially instituted primarily for the protection of women and children.<sup>129</sup> Obviously, these protections continue to be important attributes of the institution of marriage. They are not, however, the institution’s only benefits to society in general or to married persons in particular.<sup>130</sup> Indeed, for many married couples, these original objectives are of little, if any, practical or emotional significance.

Nevertheless, there is no denying that, in our cultural heritage, the fundamental structure of marriage, which heretofore has always included at least one man and at least one woman, was founded on the nature (biology) of procreation.<sup>131</sup> Whatever the sexual orientation of some married individuals may be,<sup>132</sup> heretofore the orientation of the institution has always been heterosexual.<sup>133</sup>

Unlike relatively superficial classifications such as race and ethnicity, which do not have well-defined boundaries (and will tend to blend over time), gender creates an unambiguous and enduring biological divide.<sup>134</sup> Recognizing that men and women are different in important ways (beyond having completely different genitalia and somewhat different glandular and neural

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<sup>128</sup> *Id.* at 1838.

<sup>129</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010), *aff’d on other grounds sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>130</sup> See *Perry*, 704 F. Supp. 2d at 932–33.

<sup>131</sup> See *id.* at 931. There are no requirements regarding different-sex couples’ ability or willingness to procreate because any such requirement would be impossible to enforce. Even if enforcement were possible, the procedures and invasion of privacy required would be unacceptable in a free society. Over-inclusiveness in this regard is not itself unconstitutional. See *generally* *Vance v. Bradley*, 440 U.S. 93, 108 (1979); *Dandridge v. Williams*, 397 U.S. 471, 484–85 (1970).

<sup>132</sup> Obviously, gay citizens’ existing right to different-sex marriage does not address their legitimate concerns and desires. See *Perry*, 704 F. Supp. 2d at 932–33.

<sup>133</sup> See *id.* at 927–28. Historical forms of recognition of same-sex relationships are rare, marginal and of no significance in our culture.

<sup>134</sup> A few find themselves in a physical body on one side of the divide and a psyche on the other. Transgender individuals are the relatively rare exceptions that prove the rule.

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systems) neither denies their common humanity nor implies that one sex is better, worthier or more deserving than the other or that either sex should have greater rights than the other. Nor does it imply that various stereotyping generalities are accurate or appropriate or that various gender roles are necessary or fair.

In many important respects, committed relationships between two persons of the same sex are identical or very similar to relationships between married different-sex couples. Ideally, both are founded on mutual love and affection and involve a life-long commitment. There are, however, entirely unrelated to procreative potential, authentic differences between relationships between persons of different sex, on one hand, and relationships between persons of the same sex, on the other, because persons of the same sex have biological commonalities and experiential bonds that persons of different sex do not. Also, pairing two men differs from pairing two women because men and women are different biologically and experientially.<sup>135</sup> Differences between the three kinds of adult pairings inhere in both sexual and non-sexual relationships.

Judging the relative significance of the similarities and differences enters conceptual (and spiritual, *not* necessarily religious) domains where general agreement regarding a hierarchy of qualitative values does not exist. Opponents do not want gender-blind marriage because they believe gender composition is fundamental to the character of the institution, which they wish to preserve. Proponents of gender-blind marriage emphasize that marriage is not only about sex (the nature of which is necessarily gender composition-dependent), but also about romantic love and human need for companionship (the nature of which, they believe, is not gender composition-dependent), and believe that, insofar as civil marriage is concerned, these psychological commonalities among committed binary relationships outweigh differences in sexuality and concomitant psychological and behavioral differences.

Are different-sex and same-sex relationships essentially the

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<sup>135</sup> Whether specific behavioral differences are innate or learned is often unclear. Nature-versus-nurture questions bear on the extent to which certain gender differences may or may not change (or be changed) over time, but such questions do not make psychological and behavioral differences between men and women less real. If these differences were not real, not only would much literature and art (and life itself) be less colorful, numerous academics and other professionals would be out of business.

same? There is no definitive “correct” answer—which answer you favor will depend upon how you think about sex and about various psychosocial differences and similarities between relationships comprising distinct sexual combinations. Do the mutual commitments undertaken by two adults constitute the essence of marriage, or is bridging the biological divide an essential element of this social institution? There is no “correct” answer to this question—which answer you favor will depend upon how you think about marriage.

For many opponents of gender-blind marriage, an essential part of marriage is “about combining maleness and femaleness. . . . [And] two different sexual natures . . . becom[ing] united as one new entity.”<sup>136</sup> While I do not believe this conceptualization is the best way to think about marriage, arguing that it is “suboptimal” or “misguided” is one thing, but asserting that distinguishing between different gender combinations is “irrational” is quite another: such an assertion is intellectually indefensible because it unjustifiably ignores that marriage is and has always been a sexual institution.<sup>137</sup>

### 3. Diversity

The idea that drawing distinctions necessarily creates or reflects an inherent inequality or adverse value judgment undermines openly accepting and valuing diversity, which necessarily rests on a “different but equal” principle. An increasingly diverse society should learn that there is no shame in being different and often no virtue in insisting that situations that are manifestly different are actually the same.<sup>138</sup>

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<sup>136</sup> Cox, *supra* note 60, at 370.

<sup>137</sup> See Goldberg, *supra* note 122, at 2016–18, 2021. This does not mean marriage concerns only sex, but clearly sex is a central institutional component. (Thus, even if race were as objectively determinable as gender, same-sex unions would still not be analogous to interracial unions, because marriage is not a *racial* institution.)

<sup>138</sup> Again, acknowledging that situations are different is not necessarily to say that one is “better” than another. In the context of childrearing, it may be reasonable to suppose that, *if all other factors were equal*, the greater diversity of perspectives provided by different-sex parents would be advantageous to a child’s development. This is, however, mere supposition and impossible to prove or disprove; all other factors are *never* equal. Obviously, numerous same-sex couples are vastly better parents than many different-sex couples. Parenting skills, which depend on the capacity and willingness to nurture, teach, protect and support, seem unrelated to sexual orientation. Empirical studies indicate that children reared by same-sex couples do as well as other children. See

Not all distinctions reflect moral judgments. In real life, there are three basic kinds of psychophysical relationships between two adults, and each is unique to one of the three possible biological combinations: woman/woman, woman/man, and man/man. Distinguishing three different biological combinations is based on an objective criterion and need not involve any moral judgments at all. For many (both religious and non-religious) who do not view the norms of the Ancient Near Eastern authors of Leviticus as reliable guides for civilized conduct today, a committed same-sex couple relationship is not morally different from a committed different-sex couple relationship.<sup>139</sup> Nevertheless, notwithstanding moral equivalency and many shared or similar attributes, the three types of biological combinations inherently have authentic differences.<sup>140</sup>

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Norman Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. OF PSYCHOL. 335, 335 (2002). Discussion of rights to adopt or have children through surrogacy arrangements is beyond the scope of this article; there is no reason why the official designation of a couple's legal recognition should affect the character or scope of such rights.

<sup>139</sup> Homosexuality has been considered "unnatural" because the sex drive is manifestly for propagation of the species. Heterosexual activity is necessary for continuation of human life; same-sex sexual activity is not. This seems likely why, historically, most societies generally valued the former more highly than the latter. But survival of the species does not require every individual to participate in the reproductive process. As a species' population increases, the reproductive imperative becomes less critical. Indeed, excessive reproduction can be detrimental to the relevant eco-system and the species.

<sup>140</sup> See *supra* Part III.B.2. From the outset, some in the LGBT community have thought the quest for same-sex marriage would unjustifiably valorize marriage (which they view as sexist patriarchy), supplant more transformative change, homogenize couple relationships, and repress distinctively gay culture. See, e.g., Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, reprinted in SAME-SEX MARRIAGE: PRO AND CON A READER 118, 118-24 (Andrew Sullivan ed., 1997); *The Argument for Same-Sex Marriage*, 159 U. PA. L. REV. PENNUMBRA 13, 28 (2009), available at <http://www.pennumbra.com/debates/pdfs/Marriage.pdf> (rebuttal of Shannon Gilreath, *Arguing Against Arguing for Marriage*); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1541, 1549-50 (1993); Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN'S RTS. L. REP. 283, 312-13 (1997); Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 619 (2004); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 530 (1994); Frank Browning, *Why Marry?*, N.Y. TIMES, Apr. 17, 1996, at A23; Tammy Bruce, *Respecting Marriage and Equal Rights*, FRONT PAGE MAG. (Nov. 21, 2011), <http://archive.frontpagemag.com/readArticle.aspx?ARTID=14020>. In addition, some in the LGBT community opposed the quest for the designation "marriage"

Recognizing this does not, of course, answer the question whether any of these differences are relevant to anything with which the law is, or should be, concerned. Indeed, none of the differences justifies affording different legal rights and protections. But whether the law must assign the same official designation to objectively distinguishable combinations is a separate question, the answer to which directly affects freedom of thought, as discussed in Part IV.

### *C. Consequences of Distinction*

The Supreme Court of California expressed several reasons why officially designating legal recognition of same-sex couples by a term other than “marriage” impinged upon those couples’ rights.

[A]lthough the *meaning of the term “marriage” is well understood* by the public generally, the status of domestic partnership is not. While it is true that this circumstance may change over time . . . the *unfamiliarity of the term “domestic partnership” is likely, for a considerable period of time, to pose significant difficulties and complications* for same-sex couples, and perhaps most poignantly for their children, that would not be presented if . . . same-sex couples were permitted access to the established and well-understood family relationship of marriage.<sup>141</sup>

Did the court actually believe it likely that the citizens of California will have sustained difficulty understanding that their state’s domestic partnership law provides the legal equivalent of marriage for same-sex couples? The judges apparently based their gloomy assessment of the public’s intelligence on special commission reports in two other states with marriage-equivalent unions.<sup>142</sup> But all of the legal burdens and much of the frustration and inconvenience cited in such reports resulted from

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as being impolitic. See Camille Paglia, *Connubial Personae*, 10 PERCENT, May–June 1995, reprinted in SAME-SEX MARRIAGE: PRO AND CON A READER, *supra*, at 138. Where having one gender-blind institution are currently not feasible politically, (arguably) having three, rather than two, institutions are more consistent with acknowledging diversity.

<sup>141</sup> *In re Marriage Cases*, 183 P.3d 384, 445–46 (Cal. 2008) (emphasis added).

<sup>142</sup> *Id.* at 446. See NEW JERSEY CIVIL UNION REVIEW COMM’N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW (2008), available at <http://www.state.nj.us/lps/dcr/downloads/CURC-Final-Report-.pdf> [hereinafter CIVIL UNION REVIEW]; OFFICE OF VT. LEGISLATIVE COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION (2008), available at [http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP\\_Report.pdf](http://www.leg.state.vt.us/WorkGroups/FamilyCommission/VCFRP_Report.pdf) [hereinafter VT. COMMISSION].

non-recognition of a state licensed same-sex relationship under federal law and the laws of most other states, *not* from the state's official designation of that relationship.<sup>143</sup> Each negative in-state situation involved a third party who was either ignorant or a scofflaw, or both.<sup>144</sup> This suggests a need for better public education and dissemination of information to employers, healthcare providers and others, and more active enforcement of existing rights. There is no evidence that enacting same-sex marriage would substantially reduce this need. Finally, to the extent that some children taunt or spurn the children of same-sex couples, bigoted remarks most likely will target their parents' sexual orientation rather than marital status.

The California Supreme Court cited the protection of privacy interests as another reason for requiring that legal recognition of same-sex couples be officially designated "marriage" because having a different designation could result in premature or involuntary disclosure of sexual orientation "in the numerous everyday social, employment, and governmental settings in which an individual is asked whether he or she 'is married or single' . . ." <sup>145</sup> The privacy issue is clearly legitimate and important and must be addressed. Most risks to privacy, however, are neither created nor exacerbated by separate official designations, and the remaining risks can be avoided through minimal regulation.

In governmental settings, official designation is largely irrelevant to privacy risks because in virtually all cases where marital status is relevant, identification of the individuals constituting the legally recognized relationship is required, and such identification will reveal apparent sexual orientation, regardless of whether the union is designated "marriage" or something else.<sup>146</sup> In employment settings, wherever inquiring as

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<sup>143</sup> See CIVIL UNION REVIEW, *supra* note 142, at 9, 40; VT. COMMISSION, *supra* note 142, at 7-8. Both reports advocate legislatively moving to same-sex marriage. VT. COMMISSION, *supra* note 142, at 28; CIVIL UNION REVIEW, *supra* note 142, at 45. Since same-sex marriages and marriage-equivalent unions are substantively identical, presumably, if the Fourteenth Amendment does not require legal recognition of same-sex couples, the Equal Protection Clause would nevertheless require each state to accord out-of-state same-sex marriages and out-of-state marriage-equivalent unions the same treatment, i.e., a state could choose to recognize both or neither.

<sup>144</sup> See generally sources cited *supra* note 142.

<sup>145</sup> *Marriage Cases*, 183 P.3d at 446.

<sup>146</sup> Currently, under DOMA, the state's official designation is not relevant for federal purposes. See *supra* Part II.A. If this changes, official designation will

to sexual orientation is prohibited but an inquiry as to marital status is not, any such inquiry should be required to treat marriage and marriage-equivalent union as a single category (e.g., the alternative to “single” should be “married or in a civil union”). If asking for the identity of a spouse is legal and such a request is made then, as in governmental settings, official designation of the relationship will be of no consequence insofar as privacy interests are concerned.

In most social settings, the designation “marriage” will not protect the privacy of someone in a same-sex relationship. Normally after answering that one is married, questions regarding one’s spouse soon follow (in American society, often concerning occupation). Members of different-sex couples will refer to “my husband”/“he” or “my wife”/“she.” If someone attempted to conceal her orientation by refusing to discuss her spouse, or by using only genderless terms (e.g., “my spouse”) and avoiding pronouns, the obvious awkwardness would induce the same presumption that referring to “my wife” would.<sup>147</sup>

Most equal protection cases involve situations in which distinctions have material tangible consequences, such as where parents may send their children to school.<sup>148</sup> Drawing a nominal

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still not pose privacy risks if identification of the individuals in the recognized relationship is required (which is almost always the case).

<sup>147</sup> The court’s opinion seems to imply that the only accurate response to the “married or single” question is the pedantic statement that one is in a domestic partnership, if such is the case. But people do not always speak legalistically in social settings, and for someone in a marriage-equivalent union the answer should be “married.” A generic non-legal definition of “marriage” is “an intimate or close union,” which a marriage-equivalent union certainly is. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 117, at 713. Moreover, the state’s official designation is irrelevant to the substance of the question, which is: “Are you legally attached?” Using “married” to mean being in either a civil marriage or a marriage-equivalent union, regardless of its official designation, could become commonplace, not just because there are no felicitous adjectival forms of “civil union” or “domestic partnership,” but also because the demographic classes strongly favoring same-sex marriage will continue to grow, while the others continue to shrink. Although clearly not a substitute for having “marriage” as the official designation, using the term in its generic sense might somewhat diminish the symbolic importance of a different official designation. Being voluntary, such usage should engender relatively little resistance and could facilitate social acceptance and adoption of “marriage” as the official designation. See *infra* Parts IV.B–C (discussing mandatory usage and its consequences).

<sup>148</sup> See Joseph P. Viteritti, *Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL’Y 657, 660–61, 686 (1998) (discussing constitutional issues arising from the lack of federal funding for parochial schools).

distinction between objectively different biological combinations, however, has no comparable tangible consequences.<sup>149</sup>

Transitional “difficulties and complications” and ongoing privacy issues are not the real issues in the quest for gender-blind civil marriage. The real issues are gaining social acceptance and approbation and using the expressive function of law in the effort to achieve that goal.

#### IV. REGULATION OF THOUGHT

Numerous governmental actions influence speech and thought to some extent.<sup>150</sup> Often this influence is unavoidable.<sup>151</sup> But the American ideal, at least, is to limit such influence to the extent possible and to avoid direct regulation of speech and thought.<sup>152</sup> Although this ideal does not abjure all use of the expressive function of law to alter social norms, it does emphatically reject governmental regulation of thought.<sup>153</sup>

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<sup>149</sup> Regardless of the official designation of legal recognition of same-sex couples, religious organizations are, by virtue of the First Amendment, free to perform religious marriages, whether licensed as civil marriage or marriage-equivalent union by the state, and to treat marriage-equivalent unions as marriages ecclesiastically. Conversely, these organizations also are free not to perform same-sex marriages and free not to treat them and marriage-equivalent unions as marriages ecclesiastically. Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1404 (2010). Discussion of religious aspects of marriage is outside the scope of this article, which concerns only civil marriage.

<sup>150</sup> See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (discussing instances where social meanings are changed by the action of individuals or groups).

<sup>151</sup> For instance, whatever a state government does (or does not do) regarding committed same-sex couples, it is expressing a view. Denying any legal recognition, granting civil marriage in all but name (i.e., marriage-equivalent union) and granting civil marriage (in that name) each sends a different message.

<sup>152</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“[A state may not] so conduct its schools as to ‘foster a homogeneous people.’” (citing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923))); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .”); *Schneiderman v. United States*, 320 U.S. 118, 144 (1943) (“If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and especially that of freedom of thought contained in the First Amendment.”); *United States v. Schwimmer*, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought.”).

<sup>153</sup> See *infra* Parts IV.B–C. Obviously, religious beliefs have influenced how

*A. Flirting with Thought Regulation*

A noteworthy step in the direction of thought regulation was accepting the notion, which took root in earnest with the enactment of Title VII of the Civil Rights Act of 1964,<sup>154</sup> that the state may declare certain ideas “invidious” and prohibit private persons from acting in accordance with those ideas and impose civil liability for such prohibited actions, even if such actions have none of the normal attributes of prohibited conduct or conduct giving rise to civil liability.<sup>155</sup> Nevertheless, such prohibited actions cumulatively produce substantial adverse consequences for numerous individuals and for society as a whole, which is, of course, why they are prohibited.

Formally, Title VII outlaws only conduct, rather than ideas or speech, and courts have considered the impact on speech to be incidental.<sup>156</sup> It may be incidental, but the impact on speech is not negligible.<sup>157</sup> This approach is perilous—but considered worth the risks in view of the problems it is intended to address. The constraints on personal liberty seem innocuous in comparison to the scourge of racial discrimination.

The creation of hate crimes was another step in the direction of thought regulation. Violent crimes motivated by racial or ethnic bias are thought to be “more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”<sup>158</sup> One may question whether spotlighting

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many people think about same-sex marriage and marriage-equivalent union, and religious liberty is one aspect of freedom of thought. But the arguments in this article do not specifically concern this aspect, and instead concern all domains of thought. Religious, philosophical, ethical, cultural, and political thoughts often are not clearly distinguishable or easily categorized.

<sup>154</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2006)).

<sup>155</sup> *See id.* For example, denying a job application is not violent; does not take, harm or threaten anyone’s property, health or safety; and does not create a disturbance or public nuisance.

<sup>156</sup> *See, e.g.,* *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (holding that Title VII does not infringe constitutional rights of expression or association).

<sup>157</sup> For example, avoiding vicarious liability for discriminatory acts of employees creates substantial incentives for employers to establish a record of affirmative anti-discrimination measures, such as creating, disseminating, and enforcing written policies that prohibit discriminatory practices and conducting mandatory “diversity training,” which usually constitutes (presumably benign) indoctrination.

<sup>158</sup> *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (holding that penalty enhancement pursuant to state “hate crimes” statute does not violate defendant’s First Amendment right to freedom of speech).

hate crimes will produce lasting social benefits, or whether the concomitant popular hype will have the opposite effect. But, however one views the desirability or effectiveness of penalty-enhancement laws, the Supreme Court's characterization of their impact on freedom of speech as only "attenuated"<sup>159</sup> and "speculative"<sup>160</sup> seems, on balance, substantially correct. Moreover, the Court has drawn a line, holding that directly prohibiting hate speech is unconstitutional.<sup>161</sup>

At each step, the goals were worthy and seemed to justify any incidental constraints being imposed on speech and thought. Most important, each measure was enacted by elected representatives of the people, and there was a national consensus regarding the basic messages these statutes expressed.<sup>162</sup> Although many opposed Title VII on the ground that it imposed undue restrictions on personal liberty, few argued that the kind of discrimination being prohibited was meritorious or fair, or should not be discouraged.<sup>163</sup> Some opposed hate crimes legislation on the ground that it would be arbitrary or counterproductive or constitute thought regulation, but few argued that the kind of hatred that motivates enhanced-penalty crimes had any redeeming virtue or should not be discouraged.<sup>164</sup>

At present, however, there is no such consensus regarding the message expressed by designating legal recognition of same-sex couples "marriage."<sup>165</sup> When judges start telling people what words they must use, *beware*. The proverbial slope is now a cliff, and we are slipping over the edge as courts move beyond conduct to regulating the content of speech so as to regulate thought.

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 489.

<sup>161</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 391, 393 (1992) (holding that prohibiting fighting words that arouse "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" is not content-neutral and violates the First Amendment).

<sup>162</sup> *See id.* at 379; *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2006)); *Mitchell*, 508 U.S. at 480 (discussing the penalty enhancement provision of a Wisconsin statute).

<sup>163</sup> *See, e.g.*, George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 563-64 (2007) (arguing that Title VII does not adequately protect religious freedoms).

<sup>164</sup> *See* Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 53-54 (1997).

<sup>165</sup> *See Same Sex Marriage, Civil Unions, and Domestic Partnerships*, *supra* note 5.

*B. Moving Beyond Conduct to Content of Speech and Thought*

Ordering that equal rights, benefits, and protections be afforded to committed relationships comprising distinct sexual combinations is regulating conduct,<sup>166</sup> but ordering that they be called by the same name is something else.<sup>167</sup> An obvious expressive function of anti-discrimination laws is to advance certain ways of thinking and speaking about people and discourage other ways, but these laws regulate *conduct* in an effort to prevent or redress tangible inequities.<sup>168</sup> In contrast, an identical designation requirement does not concern redressing legal inequities; that goal is achieved by establishing and appropriately implementing marriage-equivalent unions.<sup>169</sup> The requirement directly regulates legislative speech of the people's elected representatives and thus regulates everyone's speech.<sup>170</sup> It does not regulate conduct. It specifies how people are to speak and write. It directly regulates how they think.

To demonstrate the overstepping by the courts that declared marriage-equivalent union insufficient, we further examine what they said as to why legal recognition of committed same-sex couples must be called "marriage" to pass constitutional muster.

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<sup>166</sup> Legal recognition regulates the couple's conduct and third parties' conduct *vis-à-vis* the couple.

<sup>167</sup> See *supra* note 17.

<sup>168</sup> See 18 U.S.C. § 245 (2006).

<sup>169</sup> Appropriate implementation includes effective dissemination of pertinent information and enforcement of same-sex couples' rights *vis-à-vis* third parties. See *supra* Part III.C. Supplementary anti-discrimination measures also may be needed (e.g., requiring employers to provide to marriage-equivalent union families the same insurance and other benefits provided to married employees' families).

<sup>170</sup> Legislation designating legal recognition of same-sex couples "marriage" effectively prescribes how people are to refer to such relationships. See, e.g., N.H. REV. STAT. ANN. § 457:46 (2010) (merging civil unions into marriage by operation of law); see also 2011 N.Y. Sess. Laws 723 (McKinney) (expressing the legislative intent to construe all provisions of law, referring to parties in marriage, in gender-neutral terms). If enacted in accordance with the will of the community, such legislation is effectively requiring everyone to speak a certain way because the legislature had to pick *some* designation, and it chose the one most people wanted. When a court orders this designation, however, it is requiring everyone to speak a certain way because that way communicates what the judges believe people should think. See *In re Marriage Cases*, 183 P.3d 384, 444–45 (Cal. 2008). Legislation using the designation "civil union" or "domestic partnership" may have less effect on ordinary conversation, because "marriage" in the generic sense is a ready substitute for the official designation. See *supra* note 147.

## 1. Decisions Interpreting State Constitutions

We start with three passages by the Supreme Court of California.

Even when the state affords [the same] substantive legal rights and benefits . . . the state's assignment of a different name to the couple's relationship *poses a risk that the different name itself will have the effect of denying* such couple's relationship the *equal respect and dignity* to which the couple is constitutionally entitled.<sup>171</sup>

It is true that, unlike a private individual's freedom of speech, elected representatives' freedom of speech in the text of legislation is subject to certain limitations inherent in the concepts of "due process of law" and "the equal protection of the laws."<sup>172</sup> But saying these concepts entitle everyone to "respect and dignity" requires clarifying what is meant by those words in this context. Government must respect each person's rights by giving them due consideration and protecting and not violating those rights. Government must respect each person's autonomy as a human being and not treat the person in a manner that is demeaning or offensive to human dignity. Due process and equal protection involve "respect" and "dignity" only in their limiting or passive sense, in the way "respecting" a person's wishes means not interfering with them, and "respecting" a person's privacy means not intruding upon it. These concepts do not entail bestowing social esteem or approbation.

Affording respect and dignity in the narrow sense referred to above sets standards of conduct for government so as to protect people from arbitrary, disproportionate, and abusive treatment. There is nothing disrespectful or undignified about the term "civil union" or "domestic partnership" that poses any plausible risk that government personnel will deprive such relationships of due process of law or deny to them the equal protection of the laws.

[B]ecause of the long and celebrated history of the term "marriage" and the widespread understanding that this term describes a union *unreservedly approved and favored by the community*, there clearly is a considerable and undeniable *symbolic importance* to this designation. . . . [A]ffording access to this designation exclusively to opposite-sex couples, while providing same-sex couples access to only a novel alternative designation, realistically

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<sup>171</sup> *Marriage Cases*, 183 P.3d at 444 (emphasis added).

<sup>172</sup> See CAL. CONST. art. 1, § 7(a).

must be viewed as constituting *significantly unequal treatment* to same-sex couples.<sup>173</sup>

The court is correct that the designation “marriage” has “considerable” symbolic importance, although the question whether maintaining the traditional scope of that designation constitutes “significantly unequal treatment” may be more debatable.<sup>174</sup> Be that as it may, however, the fundamental problem, which the judges do not acknowledge, is that they cannot speak for the community as to what is “unreservedly approved and favored.”<sup>175</sup> If judges impose the designation “marriage” against the will of the community, the designation no longer describes “a union unreservedly approved and favored by the community.”<sup>176</sup> The court’s order misrepresents community views and regulates speech so as to regulate thought in an effort to change those views.

[T]here is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships . . . inevitably will cause the new parallel institution . . . to be *viewed as of a lesser stature* than marriage and, in effect, as a mark of second-class citizenship.<sup>177</sup>

The traditional institution and the new parallel institution clearly have equal *legal* stature, but their relative *social* stature depends on community views. Social reality comprises three categories of unions—different-sex (presumably heterosexual), female (presumably lesbian), and male (presumably gay). Official nomenclature may well influence how the community views these different categories, but it does not directly determine their relative social stature.<sup>178</sup>

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<sup>173</sup> *Marriage Cases*, 183 P.3d at 445 (emphasis added).

<sup>174</sup> Such treatment *is different* from the treatment of different-sex couples, and the difference *is significant* in the sense that having more than one form of legal recognition signifies something different from what is signified by expanding the designation “marriage.” But since the substantive legal treatment afforded by a marriage-equivalent union is identical to that afforded by marriage, there is at least a question whether such treatment can be fairly characterized as “significantly *unequal*.” (The current unequal treatment of different-sex and same-sex unions under DOMA is not affected by a same-sex union’s official designation. *See supra* Part II.A.)

<sup>175</sup> *See Marriage Cases*, 183 P.3d at 445.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> Although an individual can intellectually distinguish among these distinct sexual combinations, notwithstanding that they are officially designated one and the same, judicial regulation of speech and thought is not acceptable simply because an individual is able to resist its intended effect.

The Supreme Court of Connecticut also highlighted the symbolic significance of the designation “marriage.” “Although marriage and civil unions do embody the same legal rights under our law, they are by no means ‘equal.’ . . . [T]he former is an institution of *transcendent historical, cultural and social significance*, whereas the latter most surely is not.”<sup>179</sup>

There is undoubtedly different historical significance in our cultural heritage since different-sex marriage has flourished in various forms for millennia and legal recognition of same-sex couples came into being near the end of the twentieth century. The relative cultural and social significance of these institutions, however, are determined by what members of the community *think* about them.

The Connecticut high court also asserted: “A primary reason why many same sex couples wish to marry is so that their children can *feel secure in knowing* that their parents’ relationships are as valid and *as valued as* the marital relationships of their friends’ parents.”<sup>180</sup> But judicially imposed same-sex marriage can provide only a false sense of security regarding the relative values the community assigns to committed relationships of same-sex and different-sex couples because a court is not competent to speak for the people as to how they value biologically distinct relationships.

In discussing some of the disadvantages and problems suffered by committed same-sex couples as a result of their exclusion from marriage, the Supreme Court of Iowa mentioned a variety of legal rights enjoyed only by married couples (all of which rights could be afforded by establishing marriage-equivalent unions). Then, the court stated: “Yet, perhaps the ultimate disadvantage expressed in the testimony of the plaintiffs is the *inability to obtain* for themselves and for their children the personal and *public affirmation that accompanies marriage*.”<sup>181</sup>

All of these observations illustrate why same-sex couples do *not* have a constitutional *right* to have their legally recognized relationships officially designated “marriage.” There is no constitutionally protected right to moral or social approbation. Due process and equal protection require according each person a level of passive respect and dignity, but *not* esteem or

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<sup>179</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008) (emphasis added).

<sup>180</sup> *Id.* at 474 (emphasis added).

<sup>181</sup> *Varnum v. Brien*, 763 N.W.2d 862, 873 (Iowa 2009) (emphasis added).

approbation. Indeed, the concept of a *right* to moral or social approbation is not coherent. Such a right would entail a correlative obligation of the government that would destroy its ability to confirm genuine approbation as a *bona fide* reflection of the free will of the community. Any approbation a court purports to confer or orders a legislature to confer is widely—and correctly—recognized as not being genuine and, as discussed in Part IV.C, is readily perceived as an attempt to alter social meanings in disregard of community values and beliefs.

Social stature within a community comprises the thoughts of people in that community.<sup>182</sup> The “equal protection of the laws” requires equal *legal* stature, not *social* stature.<sup>183</sup> Courts cannot force people to bestow social esteem outright. They can, however, shape how people think by directing how they speak. In the present context, courts have no legal foundation for doing so.

Declaring marriage-equivalent union statutes unconstitutional prohibits legislative speech reflecting the majority’s views (thoughts) and requires speech contradicting those views and expressing a message a minority wants to hear, not because it is necessary to protect the minority’s substantive rights, but because members of the minority want to have certain feelings

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<sup>182</sup> See generally *Marriage Cases*, 183 P.3d 384; *Kerrigan*, 957 A.2d 407. The courts’ words “unreservedly approved and favored by the community,” “symbolic importance,” and “viewed” in *Marriage Cases*, 183 P.3d at 445, “transcendent . . . cultural and social significance” in *Kerrigan*, 952 A.2d at 418, “valued” in *id.* at 474, and “public affirmation” in *Varnum*, 763 N.W.2d at 873, all refer to what people think.

<sup>183</sup> *The Civil Rights Cases*, 109 U.S. 3, 59 (1883) (Harlan, J., dissenting) (“[G]overnment has nothing to do with social, as distinguished from technically legal, rights of individuals.”). My assertion that the Equal Protection Clause does not require equal social status in no way conflicts with the notion that the Constitution has “a demand for equality of social status, a demand that exists even though it cannot be achieved by legal means alone.” J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2343 (1997). Proponents of this “egalitarian demand” infer its existence from tenets of the American Revolution reflected in the Declaration of Independence, together with the constitutional provisions abolishing slavery, establishing birthright citizenship, prohibiting so-called class legislation, religion-based preferences, bills of attainder and titles of nobility, and guaranteeing to each state a republican form of government. *Id.* at 2342–73. If this interpretation can overcome evidence that the Constitution has never embodied ideals requiring a commitment to social egalitarianism, I would agree that this egalitarian demand “requires us to engage in an ongoing reflection on what forms of hierarchy are just and unjust, and how best to dismantle [the unjust forms] . . . given the always limited and imperfect tools at our disposal.” *Id.* at 2344. Indeed, this article’s mission is to influence reflection on the latter question.

(thoughts) about themselves and their families.<sup>184</sup> Ruling that they are entitled in such circumstances to hear a specific message (even if it is a judicial fabrication that misrepresents community views) raises troubling questions as to what other speech may be prohibited or prescribed and on what grounds.<sup>185</sup>

If social approbation is not bestowed willingly and freely, it is not authentic and is worthless in itself. Courts have neither the constitutional power *nor the moral authority* to bestow social approbation. Social approbation is within the competency of a legislature only if and to the extent that the people's representatives act with sufficient community support. Legislatures can never *confer* social esteem; they can only reflect and confirm it.<sup>186</sup>

Just as courts are powerless to confer genuine social approval or "allocate" social value,<sup>187</sup> they are also powerless to deny access

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<sup>184</sup> The desire for such feelings is understandable and clearly deserves empathy; no one normally likes being excluded or singled out (unless for something positive). Appreciating the natural human desire to fit in socially argues powerfully in favor of gender-blind marriage as a matter of social policy. But less than complete fulfillment of this desire does not form a basis for a cognizable constitutional claim.

<sup>185</sup> Given such a precedent for judicial regulation of speech, it is not hard to envision someone petitioning a court to mandate that textbooks in government-supported educational institutions use the term "different-sex" in lieu of "opposite-sex" on the ground that the latter term inappropriately highlights that women and men have complementary reproductive systems biologically structured for specific physical interaction, or might imply that female and male are "opposite" in ways that valorize pairing them and reinforce gender stereotyping. Although such a mandate seems far-fetched (perhaps), it would entail far less intrusive regulation of speech than its precedent does. Unlike the identical designation requirement, this mandate would not impose a dramatic change in the long-accepted meaning of a symbolically significant word so as to misrepresent community values and would not prescribe legislative speech in a manner that effectively regulates everyone's speech.

Potential targets, of course, extend well beyond perceived hetero-supremacist or sexist language. Thus, since the Due Process and Equal Protection Clauses protect both citizens and non-citizens, someone could seek a similar mandate to use "undocumented immigrant" in lieu of "illegal alien" on the ground that the latter is inherently disparaging. Similarly, the term "Indian" offends many Native Americans. The list of ways courts could alter language to "equalize" social stature or social value is potentially quite long.

<sup>186</sup> Legislative confirmation does, of course, foster social esteem by promoting a certain way of thinking (thus exemplifying a majority—or an influential minority—using the law's expressive function to spread a change in norms within the community).

<sup>187</sup> People who oppose same-sex marriage may try to avoid using marital terms in reference to such marriages or will signal "air quotes" when doing so.

to either.<sup>188</sup> Refraining from imposing bogus social approval does not inhibit efforts to build authentic social approval. In 2006, New York's highest court not only (correctly) refused to impose gender-blind marriage, it (incorrectly) failed to set marriage-equivalent legal recognition of same-sex unions as a constitutional minimum requirement.<sup>189</sup> Five years later, New York became the most populous state to enact gender-blind marriage democratically.<sup>190</sup>

It is reasonable to presume that marriage entails social approbation.<sup>191</sup> But, even if this presumption were incorrect, court-ordered same-sex marriage would still regulate thought. As discussed in Part III.B.2, there is no general agreement concerning the relative importance of the similarities of same-sex and different-sex couples relationships, on one hand, and the differences between them, on the other. These varying characteristics are weighed not only in making value judgments but also in conceptualizing personal and social reality. A court ordering that legislation speak so as to indicate that the existential similarities outweigh the existential differences among distinct sexual combinations is regulating how people are to think about sex and human relationships.

The relative significance of the similarities, *vis-à-vis* the differences, depends upon context and purpose. I agree with the Connecticut high court that the legislature recognized the numerous similarities when "it granted same sex couples the same legal rights that married couples enjoy."<sup>192</sup> I would also agree that these similarities are sufficient to make same-sex and different-sex couples similarly situated for purposes of an equal protection challenge to a denial of legal recognition. But they are not sufficient for purposes of an equal protection claim to identical official designation, because they do not make the three distinct sexual combinations actually or conceptually the same;

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<sup>188</sup> People who do not oppose same-sex marriage are likely to use marital terms (without quotation marks) in reference to marriage-equivalent unions (many people already do). *Cf. supra* note 147.

<sup>189</sup> *Hernandez v. Robles*, 855 N.E.2d 1, 34 (N.Y. 2006).

<sup>190</sup> Marriage Equality Act, 2011 N.Y. Sess. Laws 725 (McKinney) (codified as amended at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 11, 13 (McKinney 2010 & Supp. 2012)). Similarly, Maryland and Washington each enacted gender-blind marriage within a few years after the state's highest court ruled that the state constitution did not require any legal recognition of same-sex couples. *See supra* text accompanying notes 81 and 82, and *infra* text accompanying notes 267, 268.

<sup>191</sup> *See supra* text accompanying note 128.

<sup>192</sup> *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424 (Conn. 2008).

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gender composition is too relevant to the nature of human relationships for someone reasonably to presume that drawing a distinction is necessarily irrational, arbitrary, or invidious, especially in an institutional context so thoroughly imbued with sexual meaning.

The messages expressed or implied by not drawing a distinction are unambiguous. If same-sex marriage and different-sex marriage are literally the same thing, then the differences between same-sex and heterosexual conduct and relationships are irrelevant to the character of the institution of marriage. The clear implication is that same-sex and different-sex committed relationships are “basically” or “essentially” the same. In short, we call a same-sex union and different-sex union exactly the same thing because they *are*.

In contrast, drawing distinctions in granting legal recognition expresses two messages, only one of which is unambiguous. The first message is clear: all binary sexual combinations are entitled to the same legal rights and protections and have the same legal obligations and responsibilities.<sup>193</sup> The second message is that different sexual pairings are not identical. This message may convey a moral or value judgment, but not necessarily. It may simply reflect that a man/man or woman/woman combination is not a man/woman combination, which is no more sinister than saying a man is not a woman, or saying heterosexuality and homosexuality are not the same thing, which obviously are true, but which are *not* to say that one sex or orientation is better or worthier than another. The second message of differentiation has the virtue of apparent agnostic ambiguity.

Although they may concede that the message is agnostic on its face (provided the official designation’s terminology is not disrespectful or undignified), many argue that, given the history of discrimination suffered by gay individuals, the message’s unspoken implications are necessarily negative. Proponents of court-ordered gender-blind marriage maintain that calling distinct gender combinations by different names sends an

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<sup>193</sup> *Id.* By asserting that same-sex relationships are worthy of legal recognition, even if a majority of the community believes otherwise, a court-ordered marriage-equivalent union law entails some thought regulation, but only as an unavoidable incident of protecting substantive legal rights. Since marriage-equivalent union is only the *minimum* required, the community is free to enact gender-blind marriage instead, and judicial regulation of speech is negligible.

impermissible message, as “[t]here can be no plausible, non-arbitrary explanation” for doing so “other than to express that same-sex couples are not worthy of the status of marriage even if they are otherwise worthy of equal treatment.”<sup>194</sup> Given the (suboptimal, but not irrational) conception of marriage held by many who oppose gender-blind marriage,<sup>195</sup> this allegation seems as dubious as asserting that not calling a man a woman is to express that a man is not worthy of being called a woman. Nevertheless, prominent advocates of court-ordered gender-blind marriage argue that “the only plausible explanation for the different marriage rules and their differential allocation of status can be hostility, discomfort, or, perhaps, pure arbitrariness. On this point, the law is well settled. None of these is a legitimate basis for government action.”<sup>196</sup> In each of the cases cited for this proposition, however, the relevant governmental action regulated conduct and had a material effect on substantive rights.<sup>197</sup> Of course, hostility and arbitrariness are also not appropriate bases for purely nominal distinctions, but discomfort is qualitatively different in this context.

With regard to sexual institutions, distinguishing between couples on the basis of hair color would be arbitrary. But, distinguishing on the basis of gender composition is hardly arbitrary, inasmuch as such composition determines the nature of sexual relations constituting the vital core of each institution, and the gender composition-dependent differences in the nature of sexual relations are neither trivial nor superficial.

That brings us to hostility or discomfort. Although I contend that these are by no means the only remaining plausible explanations for opposition to gender-blind marriage,<sup>198</sup> let us assume, for the sake of argument, that they are. It is highly likely that, unless they are being devious (in a be-careful-what-you-wish-for kind of way), most people who are hostile to gay

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<sup>194</sup> Brief for National Gay and Lesbian Task Force Foundation et. al. as Amici Curiae Supporting Plaintiffs at 6, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>195</sup> See Cox, *supra* note 60, at 370 (see quotation therefrom *supra* text accompanying note 136).

<sup>196</sup> Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1416 (2009) (footnote omitted).

<sup>197</sup> *Id.* at 1416 n.73.

<sup>198</sup> See *supra* Parts III.B.2–III.B.3.

individuals oppose gender-blind marriage. But this does not necessarily mean most opponents of gender-blind marriage are hostile to gay individuals, although undoubtedly many are. An absence of approval, however, may reflect not so much hostility or active disapproval as incomprehension. In this regard, I believe that Professor Martha C. Nussbaum misinterprets the following statements of Professor Charles Fried:

Gay marriage—unlike civil unions . . . is a kind of civil blessing asked of the population as a whole, and though people may (and perhaps should) be willing to give that blessing to gays as well as straights, I balk at courts forcing them to do that. . . . [T]his extension of the institution of marriage. . . should be [effected] only by people's vote . . . .<sup>199</sup>

Professor Nussbaum presumes this means “the state has a legitimate interest in banning same-sex marriage on the grounds that it offends many religious believers,” which she argues is problematic under the Establishment Clause.<sup>200</sup> Professor Fried can speak for himself, but I do not interpret his argument as particularly concerning religious beliefs. His discussion of straights' difficulty in comprehending “the attractions and couplings of gays” given that gays and straights have biologically distinct sexual natures, and his contention that straights should make “an effort of imagination” to recognize the spiritual similarities of these different natures,<sup>201</sup> regard more immediate existential concerns which suggest that courts should not force people to bless something they do not understand.

Although rarely, if ever, a legitimate reason for denying substantive rights, mental discomfort (which includes incomprehension, but also much else) often constitutes perfectly legitimate grounds for withholding social approval. A person is not morally, much less legally, obligated to approve a source of mental discomfort. Indeed, social approval necessarily subsumes the absence of such discomfort.

Mental discomfort is complex. Its nature and intensity vary considerably, and the salience of potential causes and effects can differ among individuals. In many instances, the relevance of particular experiences, mental states, motivations or external factors may be unclear. Sitting in judgment of other people's

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<sup>199</sup> FRIED, *supra* note 40, at 141.

<sup>200</sup> Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 681 (2010).

<sup>201</sup> FRIED, *supra* note 40, at 140.

mental discomfort is a delicate and thorny enterprise, fraught with condescending tendencies to underestimate the difficulty of reading the hearts and minds of others, trivialize sincerely held beliefs or concerns, and disregard the analytical flaws of inferring, and potential unfairness of implying, that someone is driven by prejudice.

Same-sex couples must concede that using an official designation other than “marriage” does not alter their legal rights and responsibilities, but they can assert that drawing a distinction causes “expressive harm” to them because it leaves open the possibility that their legal recognition may be viewed as having less social stature than that of different-sex couples.<sup>202</sup> But the equal protection of the laws concerns equal rights and protections that allow people to be who they are and live as they choose, *not* equal social stature, which requires other members of the community to think of them in certain ways.<sup>203</sup>

Those who oppose same-sex marriage must concede that judicial expansion of the official designation “marriage” to include same-sex couples does not alter the legal rights and responsibilities of legally recognized different-sex couples, but they can assert that *not* drawing a distinction causes “expressive harm” to them because the unambiguous message that different biological pairings are essentially the same contravenes and suppresses views held by a majority of the community.

Although hopelessly misdirected in the context of anti-sodomy laws, the excerpt from Justice Scalia’s dissent in *Lawrence* quoted in Part I.B<sup>204</sup> is squarely on target in the context of same-sex marriage. A court’s insistence that the legal recognition of same-sex couples be designated “marriage” imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply “a brand-new ‘constitutional right’”<sup>205</sup> but a disquieting new breed—

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<sup>202</sup> As discussed earlier, many go further, arguing that marriage-equivalent union will necessarily have less social standing than civil marriage. Such arguments, however, are premised on conceptualizations of sex and human relationships that imply that differentiation based on gender composition is the result of invidious thinking. But other rational conceptualizations of sex and human relationships do not imply that such differentiation is invidious; indeed, some of these have been espoused within the LGBT community. *See, e.g., Ettelbrick, supra* note 140, at 118–24.

<sup>203</sup> *See supra* note 183.

<sup>204</sup> *See supra* text accompanying note 41.

<sup>205</sup> *Lawrence v. Texas*, 539 U.S. 558, 603 (2003) (Scalia, J., dissenting).

a “right” to a *word*, an unprecedented notion having inauspicious potential for regulating speech and thought.<sup>206</sup> As Cass R. Sunstein has understatedly noted, “[c]ertainly efforts at norm management are more legitimate if they have a democratic pedigree.”<sup>207</sup>

## 2. The *Perry* Decisions Interpreting the Federal Constitution

Chief Judge Walker’s decision that limiting marriage to different-sex couples while affording marriage-equivalent unions to same-sex couples violates the Due Process and Equal

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<sup>206</sup> Official designation involves “more than just a word,” of course, which merely confirms that creating a “right” to a specific designation necessarily regulates thought.

<sup>207</sup> Symposium, *supra* note 10, at 2052. *See also* Sunstein, *supra* note 11, at 2113–14 (arguing that, as a matter of institutional prudence, courts should not impose gender-blind marriage at this time, notwithstanding that, in principle, banning same-sex marriage “raises serious equal protection concerns and is not simple to defend in constitutionally acceptable terms”). Unlike Sunstein’s, this article argues that only the legal recognition issue raises equal protection concerns, and that the official designation issue raises concerns regarding not only democratic legitimacy but also fundamental personal liberty interests, including freedom of thought and related First Amendment rights.

Some in Massachusetts have taken umbrage at out-of-state criticism of the Supreme Judicial Court’s decree that legal recognition of distinct biological combinations must have the same name and have argued that the citizenry’s apparent acquiescence in the decree and in the legislature’s decision not to put the question to a vote of the electorate shows that same-sex marriage was not imposed on the people of Massachusetts. *See, e.g., Cox, supra* note 60, at 362–65. Although the legislature and electorate were not powerless to undo the court’s decision, we shall never know whether the legislature would have enacted same-sex marriage if it had not been ordered to do so. We know only that, although they may constitute a majority, most citizens who would vote for a different designation do not feel strongly enough about it to undertake an expensive, time-consuming campaign to amend the state constitution. *Of course*, the court’s action did not abolish democracy in Massachusetts or present cause for federal action under the Guarantee Clause. U.S. CONST. art. IV, § 4. But it did distort the democratic process in a manner having real consequences and on grounds fraught with troubling implications for freedom of thought. (If the two-to-one majority of the Ninth Circuit panel in *Perry v. Brown* could have its way, the Supreme Judicial Court’s decision would not have simply distorted the democratic process with respect to gender-blind marriage, it would have stopped the process altogether. Even if people (directly or through the legislature) had succeeded in having a state constitutional amendment to supersede the decision placed on the ballot, an overwhelming majority of the electorate voted in favor of the amendment, and in all other respects the amendment was valid under Massachusetts law, the two Ninth Circuit judges would nevertheless say the Fourteenth Amendment prohibits the people from undoing the Supreme Judicial Court’s decision. *See infra* Part IV.B.2.)

Protection Clauses of the Fourteenth Amendment<sup>208</sup> gives rise to the same problems engendered by the state constitutional decisions discussed in Part IV.B.1. Hence, the preceding critique applies with equal force to his decision. This part, however, will focus primarily on some other aspects of the district court's opinion. This part will also discuss the Ninth Circuit panel's decision affirming the district court's judgment on other grounds.<sup>209</sup>

Three preliminary observations are in order. First, the district court's opinion is written as if the question presented was one of first impression and fails to mention any of the prior decisions directly on point, all of which have held that the Fourteenth Amendment does not protect a right to marry someone of the same sex.<sup>210</sup> Also, although its holding effectively nullifies DOMA, the opinion does not discuss this federal statute or the decision's effect thereon.<sup>211</sup> (The "findings of fact" mention DOMA only in passing.) Second, many of the pertinent "findings of fact" are actually opinions, interpretations or beliefs based on anecdotal testimony of four plaintiffs and four other lay witnesses and "opinion testimony" of two historians, two economists, three psychologists, a social epidemiologist, and a political scientist.<sup>212</sup> Third, some "findings" are counterfactual. One example is: "The evidence shows *conclusively* that moral and religious views form the *only* basis for a belief that same-sex couples are different from opposite-sex couples."<sup>213</sup> This assertion disregards the views of those within the LGBT community (among others) who believe that same-sex and different-sex couples *are* different, and whose beliefs in this regard do not appear to be based on moral or religious views.<sup>214</sup> Addressing other doubtful factual findings is

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<sup>208</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994–95, 997, 1003 (N.D. Cal. 2010), *aff'd on other grounds sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>209</sup> *Perry*, 671 F.3d 1052.

<sup>210</sup> *See* cases cited *supra* notes 20 and 26. The district court refused to issue a stay pending appeal. *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, 1135 (N.D. Cal. 2010). But, the Ninth Circuit issued a stay when it ordered an expedited appeal schedule. *Perry v. Schwarzenegger*, No.10-16696, 2010 WL 3212786, at \*1 (9th Cir. Aug. 16, 2010).

<sup>211</sup> *Perry*, 704 F. Supp. 2d at 971.

<sup>212</sup> *See id.* at 938–44 (discussing each witness's credibility or qualifications as an expert together with a brief synopsis of their testimony).

<sup>213</sup> *Id.* at 1001 (emphasis added).

<sup>214</sup> *See, e.g., Ettelbrick, supra* note 140.

unnecessary for present purposes.

We turn now to certain aspects of the district court's analysis. In discussing plaintiffs' due process claim, the opinion quotes from several decisions stating that the right to marry is a fundamental right, and then states "[t]he parties do not dispute that the right to marry is fundamental. The question presented here is whether plaintiffs seek to exercise the *fundamental right to marry*; or, because they are couples of the same sex, whether they seek recognition of a new right."<sup>215</sup>

The opinion's discussion of this question frequently conflates different meanings of "gender." For example, it states: "Gender no longer forms an essential part of marriage; marriage under law is a union of equals."<sup>216</sup> Although the second clause is true, the first clause is not true in more than 80 percent of the states if "gender" has its ordinary meaning. Here, however, Chief Judge Walker was using "gender" in a specialized academic sense so as to mean: "legally mandated gender roles" no longer form an essential part of marriage.<sup>217</sup> Yet, equalizing a husband and wife's marital rights and obligations does not transform gender (biological sex) from institutional constitutive principle to

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The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices. As a lesbian, I am fundamentally different from nonlesbian women. That's the point.

*Id.* at 124–25.

<sup>215</sup> *Perry*, 704 F. Supp. 2d at 992 (emphasis added). The parties may not dispute that the right to marry is fundamental, but clearly they dispute the character and scope of such right. Where the issue is official nomenclature, as it is here, using "marriage" in this manner, rather than using the appropriate level of abstraction, confounds analysis. See discussion *supra* note 14. The right to be in a legally recognized and protected family, which constitutes the substance of different-sex couples' fundamental right to marry, should also extend to same-sex couples. Declaring it a "*fundamental right*" for same-sex couples may be a stretch analytically given that term's standard definition (see next sentence), but even if a stretch, it is one that can and should be made. Saying, however, as Chief Judge Walker did, that same-sex couples have a fundamental right to the official designation "marriage" because that is the designation for different-sex couples goes too far, since such a "right" is neither "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 385 U.S. 784 (1969), nor "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled by Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>216</sup> *Perry*, 704 F. Supp. 2d at 993.

<sup>217</sup> *Id.* at 998.

irrelevant detail. Eliminating gender *roles* does not eliminate *gender*. Nevertheless, the opinion implies that the former inexorably leads to the latter:

[T]he exclusion [of same-sex couples from marriage] exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed.<sup>218</sup>

Proposition 8 . . . enshrines . . . a gender restriction that the evidence *shows* to be *nothing more than* an artifact of a foregone notion that men and women fulfill different roles in civic [society]. . . . Proposition 8 . . . mandates that men and women be treated differently based *only* on antiquated and discredited notions of gender.<sup>219</sup>

These assertions by the district court manifest a failure to appreciate that there is a great deal more to gender than simply gender roles.<sup>220</sup>

The opinion also asserts that “[r]ace and gender restrictions . . . were never part of the historical core of the institution of marriage.”<sup>221</sup> While this is certainly true of race restrictions and perhaps true of state-mandated gender roles, it is surely not true of the restriction limiting marriage to different-sex couples.

Nevertheless, the Chief Judge declared:

Plaintiffs do not seek recognition of a new right. To characterize plaintiffs’ objective as “the right to same-sex marriage” *would suggest* that plaintiffs seek *something different* from what opposite-sex couples across the state enjoy—namely, marriage. Rather, plaintiffs ask California to *recognize their relationships for what they are: marriages*.<sup>222</sup>

Which is simply to say: people are not to think of same-sex and opposite-sex unions as being different.

The Chief Judge stated that plaintiffs “seek recognition from the state that their union is ‘a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.’”<sup>223</sup> Various social phenomena (including, among others, high divorce rates) indicate that marriage has lost much of any cachet it previously had for being “for better or for worse,

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<sup>218</sup> *Id.* at 993.

<sup>219</sup> *Id.* at 998 (emphasis added). In the first sentence of this quotation, “gender” has its ordinary meaning, i.e., biological sex; in the second sentence, “gender” has a specialized meaning referring to gender roles.

<sup>220</sup> See discussion *supra* Part III.B.2.

<sup>221</sup> *Perry*, 704 F. Supp. 2d at 993.

<sup>222</sup> *Id.* (emphasis added).

<sup>223</sup> *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

hopefully enduring.”<sup>224</sup> In any event, the substance, depth and duration of a couple’s mutual commitment do not depend upon its legal designation. As for a union being “intimate to the degree of being sacred,”<sup>225</sup> “sacred” can have no religious connotations in the context of civil marriage and thus simply denotes being secure from attack, assault or trespass and not liable to doubt or question. In this respect, state recognition and protection of marriage-equivalent unions afford the same validation of inviolability afforded to marriage. But such validation does not accomplish plaintiffs’ objective of having the state say that different-sex and same-sex unions are the same thing, and gender composition is irrelevant to the institution of marriage.

Chief Judge Walker concluded that marriage-equivalent unions “do not fulfill California’s due process obligation” because they (a) “are distinct from marriage and do not provide the same *social meaning* as marriage” and (b) “were created specifically” to provide marriage-equivalent legal rights and protection “while explicitly withholding marriage from same-sex couples.”<sup>226</sup>

The Chief Judge also concluded that “excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest” and therefore violates the Equal Protection Clause.<sup>227</sup> Proponents of Proposition 8 presented several arguments that distinguishing between same-sex and different-sex couples is rationally related to a legitimate state interest.<sup>228</sup> Not surprisingly, none was very convincing. That the Proposition 8 proponents had to present any such arguments,

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 994 (emphasis added). Whether Chief Judge Walker was creating a new constitutional right or not might seem largely a matter of semantics. He was either creating a new right (which he denied) or dramatically changing an existing one. *Id.* at 993. A gay man has always had the right to marry a woman; he would now also have the right to marry a man. Has he been granted a valuable new right, or has the pre-existing right, which had little or no value for him, been expanded so as to become valuable? Plaintiffs, however, seek more than a legally recognized family with the person of their choice. *Id.* Conflating the legal recognition and official designation issues transforms the fundamental right to establish a legally recognized family, with all the rights and privileges other families have, into a fundamental “right” to establish such a family *and* have the community speak so as to give the impression that people think of that family in the same way they think of other families. This “right” to a *word* (in this case, one which has traditionally reflected social approval) is not only new; its character and scope are unprecedented.

<sup>227</sup> *Id.* at 997.

<sup>228</sup> *See id.* at 935, 998–1001.

however, acutely demonstrates one of the shortcomings of the judicial construct regarding standards of review in equal protection cases.<sup>229</sup>

While it is true that “[t]radition alone . . . cannot form a rational basis for a law”<sup>230</sup> insofar as most laws affecting substantive rights and responsibilities are concerned,<sup>231</sup> this maxim should not necessarily apply to purely nominal classifications reflecting rational concepts<sup>232</sup> and using terms that are neither disrespectful nor undignified.

It is true that “[t]he state cannot have an interest in disadvantaging an unpopular minority group simply because the group is unpopular,”<sup>233</sup> but people have diverse views regarding sex and human relationships, and courts should not presume that distinguishing between different gender combinations is the result of invidious intent.<sup>234</sup> So long as the language used to express their views is not disrespectful or undignified, and such views have a rational basis and do not affect anyone’s substantive rights and responsibilities, the people and their representatives should not have to justify their intellectual and social views regarding sex and human relationships by establishing some relation to a state interest.<sup>235</sup>

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<sup>229</sup> See discussion *supra* Part III.A.1.

<sup>230</sup> *Perry*, 704 F. Supp. 2d at 998.

<sup>231</sup> The only case cited in support of this proposition involved substantive rights. *Williams v. Illinois*, 399 U.S. 235, 238–39 (1970) (holding certain longstanding practice regarding the length of imprisonment for involuntary non-payment of fines violates the Equal Protection Clause). The opinion also quotes an obiter dictum from *Heller v. Doe*, 509 U.S. 312, 333 (1993) (upholding different requirements for involuntary commitment of mentally ill and mentally retarded persons).

<sup>232</sup> For discussion of the rationality (as opposed to desirability) of distinguishing between different gender compositions, see *supra* Part III.B.2.

<sup>233</sup> *Perry*, 704 F. Supp. 2d at 998 (citing *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that Food Stamp Act eligibility requirement intended to exclude “hippies” violates the equal protection component of the Fifth Amendment Due Process Clause)).

<sup>234</sup> See *supra* note 214 and accompanying text.

<sup>235</sup> Advocates of court-ordered gender-blind marriage have not acknowledged the radical character of any such requirement.

In the event that the Supreme Court should use *Perry* as a vehicle to validate a right to same-sex marriage, it seems plausible that consensus constitutionalists would . . . attribut[e] [the decision] to “an emerging national consensus” regarding marital equality. In reality, though, the decision would more accurately be understood as arising from a deeply contested constitutional landscape. In other words, the decision would constitute judicial business as usual.

In affirming the judgment of the district court, the Ninth Circuit panel did not embrace Chief Judge Walker's holdings, and it "expressed no view on" the questions "whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so."<sup>236</sup> Instead, in an ironic twist, the two-to-one majority took the position that California's narrowly focused disavowal of court-ordered expression of social approval—while leaving all substantive protections for same-sex couples intact—was "even more suspect"<sup>237</sup> than what the U.S. Supreme Court struck down in *Romer v. Evans*, i.e., was more suspect than the imposition of "a broad and undifferentiated disability"<sup>238</sup> that denied gay people in Colorado substantive legal protections "across the board."<sup>239</sup> Asserting that "*Romer* compels that we affirm the judgment of the district court,"<sup>240</sup> the majority ruled that, where a state grants marriage-equivalent legal recognition to same-sex couples, and thereafter the state's highest court decides that the *state* constitution requires that such recognition be officially designated "marriage," the Equal Protection Clause of the Fourteenth Amendment prohibits amending the state constitution to supersede that decision and apply the official designation "marriage" only to legal recognition of different-sex couples.<sup>241</sup> And this is so even if the Fourteenth Amendment did not require the state to grant gender-blind marriage ab initio.<sup>242</sup>

Detailed analysis of the majority's interpretation of *Romer* is outside the scope of this article, which concerns a question the two judges expressly did not address.<sup>243</sup> Unlike the district court, which created a "right" to official expression of social approbation, the court of appeals panel created a "right" to suppress disavowal of court-ordered expression of approbation. The Ninth Circuit

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Driver, *supra* note 45, at 831. But, even assuming it fell in line with a long history of controversial countermajoritarian Supreme Court holdings, such a decision would hardly be "judicial business as usual." Altering the meaning of our culture's oldest social institution would constitute the Court's first foray into directly regulating legislative speech so as to regulate thought.

<sup>236</sup> *Perry v. Brown*, 671 F.3d 1052, 1082 (9th Cir. 2012), *petition for rehearing en banc*, *Perry v. Brown*, Nos. 10-16696 & 11-16577 (9th Cir. Feb. 21, 2012).

<sup>237</sup> *Id.* at 1081.

<sup>238</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996). See discussion *supra* Part II.C.

<sup>239</sup> *Romer*, 517 U.S. at 633.

<sup>240</sup> *Perry*, 671 F.3d at 1081.

<sup>241</sup> *Id.* at 1075–81.

<sup>242</sup> *Id.* at 1085.

<sup>243</sup> See generally *id.*

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panel's approach not only poses problems similar to those discussed in Part IV.B.1, it also gives state courts a "gotcha" brand of countermajoritarian power that injects unwholesome incentives into the lawmaking process: it establishes a regime in which the status of certain state law rights of minorities will in some cases depend solely upon whether the state's judiciary or its citizens (directly or through their elected representatives) win the race to be first to act in a manner that preempts the other.

In concluding Part IV.B, I should like to put the "withdrawal" situation aside and return to the official designation question that is the central focus of this article.

Absence of majoritarian approval is not a sufficient basis for criminal punishment of same-sex sexual activity or for denying gay individuals the legal recognition and protection necessary to pursue happiness and live as they choose. But such absence of approval must necessarily be a legitimate basis for not bestowing official expression of social approval, unless we are to pretend that counterfeit is as good as genuine, are to ignore that denying the people the power and right to dismantle a social hierarchy democratically is no way to build a "democratic culture" or "democratic equality" actually worthy of those names,<sup>244</sup> and are to accept that the state may impose a purportedly benign form of incipient Newspeak.

### C. The "Orwell Effect"

The unprecedented rash of state constitutional amendments

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<sup>244</sup> Elite groups can, and presumably should, take part in identifying which social status hierarchies are unjust and in educating the public about unjust hierarchies and the best way to dismantle them (see *supra* note 183). There is, however, no small irony in an elite status group (legal academicians) urging another such group (judges) to dictate how the non-elite majority must dismantle their social superordination over a lower status group—all in the name of "democratic culture" and "democratic equality." At least one proponent of court-ordered same-sex marriage seems to admit this (albeit somewhat begrudgingly): "The idea of an energetic multi-institutional effort against relations of hierarchy, carried on under the banner of the Constitution's commitment to democratic equality, means at least taking seriously the possibility that working through political institutions might sometimes be preferable, even if frustratingly slow." Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1411 (2011). Even assuming that democratic political means are preferable only "sometimes," one of those times must be when effecting a cultural transformation of such fundamental significance as that entailed in moving to gender-blind marriage.

between 2003 and 2008 following the Massachusetts decisions constitutes a vivid manifestation of a well-known phenomenon, which Lawrence Lessig has called the “Orwell effect.”

Relatively well established . . . within our political and social tradition is a strongly negative social meaning associated with the efforts of anyone to change social meaning. . . . So firm is this “antibrainwashing” ideal that to defeat an attempt to change social meaning in many contexts, one need only identify it as an attempt at social meaning management. . . . [W]henever we can see that the message being delivered is a message from the government, we are extremely suspicious of its content, and watchful about its effect. . . .

Call this the Orwell effect: when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation.<sup>245</sup>

Professor Lessig has noted that, as a result of the Orwell effect, “government will have an incentive to minimize[ ] the extent to which its messages seeking change seem to be messages from it.”<sup>246</sup> In the case of judicially mandated same-sex marriage, however, the source, purpose and method are obvious and readily perceived as an undemocratic “attempt at social meaning management,”<sup>247</sup> which has exacerbated the powerful political backlash against same-sex marriage.<sup>248</sup>

In addition to breeding resentment, this approach undermines public faith in our legal system. To the extent that a court purports to confer social approbation it is falsifying the legal process. By ordering the legislature to use words signifying approbation, the court is commanding the legislators to bestow approbation—or at least pretend to do so. But legislatures have no more power to *confer* approbation than courts do, and

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<sup>245</sup> Lessig, *supra* note 150, at 1016–17.

<sup>246</sup> *Id.* at 1017.

<sup>247</sup> *Id.* at 1016–17.

<sup>248</sup> For an interesting study of the disparity between this powerful backlash and the virtually nonexistent backlash to the California Supreme Court’s groundbreaking decision striking down the ban on interracial marriage over sixty years ago in *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948), see Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1197–98 (2009). Professor Schacter’s analysis of the reasons for the disparity omits, however, two key factors: (1) marriage is a sexual, not racial, institution, and (2) in general, even those who oppose interracial marriage understand the sexual attractions of (at least some) interracial unions, whereas most heterosexual opponents of gender-blind marriage have no such understanding regarding same-sex unions.

legislatures can *confirm* (and thereby foster) approbation only with sufficient support of the community. As Professor Deborah Hellman has correctly advised:

Our country is made up of people with different values, beliefs, cultures, and experiences. Moreover, real people are going to apply constitutional principles. Our constitutional doctrines ought not strive to evade the limitations inherent in these constraints by offering a false sense of security or rectitude. . . .

Constitutional doctrine cannot be a panacea for the deep divisions among us. It can, however, provide a vehicle to understand each other better.<sup>249</sup>

By the same token, a doctrine that entails compelled speech hinders rather than facilitates mutual understanding.

#### *D. Legislation Affording Legal Recognition to Same-Sex Couples*

California,<sup>250</sup> Delaware,<sup>251</sup> Hawaii,<sup>252</sup> Illinois,<sup>253</sup> Nevada,<sup>254</sup> New Jersey,<sup>255</sup> Oregon<sup>256</sup> and Rhode Island<sup>257</sup> currently grant marriage-equivalent unions to same-sex couples.<sup>258</sup> In each of these states, except New Jersey,<sup>259</sup> the legislature established such unions without being compelled to do so by court order.

But marriage-equivalent unions are not the LGBT movement's ultimate goal. The goal is the designation "marriage" for the same reason it is not constitutionally required: it goes beyond providing equal legal protection to confirming a kind of social equality.<sup>260</sup> A court order mandating the official designation

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<sup>249</sup> Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 69 (2000).

<sup>250</sup> CAL. FAM. CODE §§ 297–297.5 (West 2007).

<sup>251</sup> DEL. CODE ANN. tit. 13 §§ 201–217 (LEXIS through 2012 legislation).

<sup>252</sup> HAW. REV. STAT. ANN. §§ 572B-1 to 572B-11 (LEXIS through 2012 legislation).

<sup>253</sup> Illinois Religious Freedom Protection and Civil Union Act, 750 ILL. COMP. STAT. ANN 75/1–7/5 (West 2011).

<sup>254</sup> Nevada Domestic Partnership Act, NEV. REV. STAT. ANN. §§ 122A.010–122A.200 (LexisNexis 2010).

<sup>255</sup> N.J. STAT. ANN. § 37:1-28 (West Supp. 2011).

<sup>256</sup> Oregon Family Fairness Act, OR. REV. STAT. §§ 106.300–106.340 (2009).

<sup>257</sup> R.I. GEN. LAWS ANN. § 15-3.1-6 (West 2011).

<sup>258</sup> To the extent any of these states has failed to establish a complete one-to-one correspondence between the substantive rights and tangible benefits afforded to same-sex couples and different-sex couples, its legislature should be required to eliminate any gaps.

<sup>259</sup> See *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006) (compelling equal rights and benefits for same-sex couples).

<sup>260</sup> See Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and*

“marriage” can neither *confer* nor *confirm* equal social stature.<sup>261</sup> This official designation can genuinely confirm such social stature only if the designation is made democratically.<sup>262</sup>

Such democratic action seemed impossible a short while ago, but since 2009 events show that it is possible. In 2009, after nine years of civil unions, the Vermont legislature overrode the governor’s veto and made Vermont the first state to expand marriage to include same-sex couples without being compelled to do so by judicial order;<sup>263</sup> after two years of civil unions, New Hampshire became the first state to expand marriage to include same-sex couples without having been compelled by judicial order to afford them *any* legal recognition;<sup>264</sup> and the District of Columbia also enacted same-sex marriage without any court order.<sup>265</sup> Most noteworthy, the State of New York did the same in 2011.<sup>266</sup> And in 2012, after more than two years of marriage-equivalent domestic partnerships,<sup>267</sup> the State of Washington also enacted gender-blind marriage without any court order; and Maryland also enacted gender-blind marriage without any court order.<sup>268</sup>

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*Law’s Social Meanings*, 97 VA. L. REV. 1267, 1314 (2011).

<sup>261</sup> Shannon Price Minter, *The Great Divorce: The Separation of Equality and Democracy in Contemporary Marriage Jurisprudence*, 19 S. CAL. REV. L. & SOC. JUST. 89, 119 (2010).

<sup>262</sup> *Id.*

<sup>263</sup> An Act to Protect Religious Freedom and Promote Equality in Civil Marriage, 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis) (codified at VT. STAT. ANN. tit. 15, § 8 (2010)).

<sup>264</sup> An Act Relative to Civil Marriage and Civil Unions, 2009 N.H. Laws 60 (codified in scattered sections of ch. 457 of N.H. REV. STAT. ANN.).

<sup>265</sup> Religious Freedom and Civil Marriage Equality Amendment Act of 2009, ch. 43, sec. 1283, § 46-401.01, D.C. Law 18-110 § 2(b) (codified as 57 D.C. CODE 27 (2010)).

<sup>266</sup> Marriage Equality Act, 2011 N.Y. Sess. Laws 725 (McKinney) (codified as amended at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 11, 13 (McKinney 2010 & Supp. 2012)).

<sup>267</sup> WASH. REV. CODE ANN. §§ 26.60.010–26.60.901 (West Supp. 2009), amended by An Act Relating to Providing Equal Protection for All Families in Washington, S. 6239, 62d Sess. (Wash. 2012) (codified at scattered sections of title 26 of the WASH. REV. CODE) (effective June 7, 2012).

<sup>268</sup> S. 6239, 62d Sess.; Civil Marriage Protection Act, S. 241, 430th Sess. (Md. 2012) (codified at MD. CODE ANN., FAM. LAW §§ 2-201, 2-202 (LexisNexis 2012)) (effective Oct. 1, 2012). (As of this writing, it appears that some opponents of gender-blind marriage in Washington wish to continue the political process regarding this issue. Since Washington is in the Ninth Circuit, however, that process is effectively over, if the court of appeals denies a rehearing en banc in *Perry* or, upon such rehearing, sustains the original panel’s decision, unless the U.S. Supreme Court reverses the court of appeals’ decision in *Perry*.)

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In 2009, the Maine legislature passed a statute granting same-sex couples the right to marry, but the statute was overturned by public referendum<sup>269</sup>—a stark reminder that the only way to gain true social equality is winning the hearts and minds of the community.

#### CONCLUSION

The official designation of legal recognition of same-sex couples is of no substantive legal consequence and little (if any) practical consequence. At stake instead are the intangible benefit (to one side) and the intangible detriment (to the other) resulting from the message implicitly expressed by such designation. The stakes are not insignificant or unimportant, but they do not concern same-sex couples' legal rights or responsibilities and are therefore outside the judicial power of the courts (which also have no moral or social authority to direct how people must think about sex and human relationships).

The judicial approach has produced same-sex marriage in a handful of states, but overall it may be counterproductive, if one views the cause in a wider geographical context and seeks to shorten the timeline for achieving existentially authentic social acceptance. This is *not* my principal point, however; the LGBT civil rights movement includes plenty of savvy people who have no need or desire for tactical advice from me. My principal concern is protecting personal liberty and, as means to that end, preserving separation of governmental powers and eschewing legal processes that distort social reality.

The question concerning official designation of legally recognized relationships comprising distinct sexual combinations elicits such strong reactions because views on this question are so closely tied to an individual's concepts and thoughts regarding gender, sexuality, sexual identity, self, the Other, romantic love and the nature of human relationships. Some of these thoughts might reflect prejudice, antipathy or stereotyping, especially if their logical conclusion is to deny legal recognition, but if, taken together, these thoughts lead a person to conclude that same-sex couples should receive equal legal rights and protections, that person still has a right to think and say that distinct sexual

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<sup>269</sup> Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOS. GLOBE, Nov. 4, 2009, at 1.

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combinations are not identical. And, if a majority wishes to express this by assigning different official designations that are neither disrespectful nor undignified, they have a right to do so. Distinct sexual combinations are not different enough to be denied equal legal rights and protections, but they are different enough to be called by different names. There are rational bases for believing they are meaningfully different. Although we may not personally favor this way of thinking, we should not interpret the Constitution to require the people and their representatives to establish that their thoughts on sex and human relationships are related to a state interest.

We need not abandon countermajoritarian judicial protection of disfavored minorities or all judicial actions endorsing specific sides in cultural controversies. On the contrary, same-sex couples should have a protected right to marriage-equivalent legal recognition, regardless of majority sentiment, and setting such recognition as the minimum necessary to pass constitutional muster is itself taking a prominent lead in the culture war. Admittedly, this constitutional minimum is second best for those of us who want gender-blind marriage and for those who oppose any legal recognition that might be a stepping-stone to gender-blind marriage. Nevertheless, the differences between leading and imposing are real, readily discernible by the American people, and consequential.

To protect personal liberty and maintain democratic legitimacy, we have drawn (albeit without uniform clarity) a crucial line between prohibiting conduct and prohibiting speech. For the same reasons, we should draw a line between court orders protecting legal rights (regulating conduct) and orders prescribing speech.