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IN DEFENSE OF MARRIAGE: PRESERVING MARRIAGE IN A POSTMODERN CULTURE

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INTRODUCTION

This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man." For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh. The man and his wife were both naked, and they felt no shame.
(Genesis 2:20-25)

"*Gender no longer forms an essential part of marriage; marriage under law is a union of equals.*"[1]
(U.S. District Judge, Vaughn Walker)

On May 15th, 2008, a watershed event occurred in California history. Four justices of the state Supreme Court ruled in an appeal to a lower court case that the language of Proposition 22, an initiative statute duly passed by the people and which limited marriage to opposite-sex couples, violated the state's Constitution.[2] Coupled with an earlier and similarly favorable opinion in Massachusetts,[3] proponents of same-sex marriage now had two established beachheads. With bi-coastal victories, attention turned to erecting a legal bridge that would span the nation and redefine the time immemorial meaning of marriage. The strategy appeared sound as only five months later Connecticut's high court also ruled in favor of same-sex marriage.[4] Yet in the most expensive and hotly contested battle over a state ballot measure that has ever been fought, the steam roller-like momentum of same-sex marriage was suddenly halted, at least temporarily. Proposition 8, a California initiative which mirrored the language of Proposition 22, but which amended the state's constitution in hopes of immunizing it from further state judicial review, passed by a 52% to 48% margin.[5] With similar measures passing that year in Florida and

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[1] Perry v. Schwarzenegger, 704 F.Supp.2d 921, 993 (N.D. Cal. 2010).

[2] *In re* Marriage Cases, 43 Cal.4th 757 (2008).

[3] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 344 (2003).

[4] Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135 (2008).

[5] *Campaign Digest*, CHI. TRIB., Oct. 27, 2008, § C, at 10. ("Ten days before the vote on Proposition 8, campaign finance records show that total contributions for and against the measure had surpassed $60 million, according to an analysis by The Associated Press.").

Arizona,[6] the legal war over marriage had begun. Less than a week after Proposition 8's passage the California Supreme Court consented to hear a flurry of hastily constructed challenges. Most of these relied on the dual presumptions that 1) a "fundamental right" to same-sex marriage existed, and 2) that merely amending the state's constitution to deny such a right was inadequate. Proposition 8's effect was so offensive, challengers claimed, that a "revision" would be necessary. But this would require a complete re-writing of the state's constitution, which in turn necessitated passage in the state legislature by two-thirds of its members instead of the simple majority vote required by the initiative process.[7]

In the face of such tenuously constructed legal grounds, an otherwise sympathetic court had little choice but to uphold the will of California's voters - over seven million of them.[8]And thus, the traditional definition of marriage was enshrined in the California constitution as Article I, Section 7.5.

Not to be deterred, challengers decided to press their case at the federal level. Until now this had been deliberately avoided. Same-sex marriage advocates were concerned about getting ahead of public opinion and they feared the repercussions a defeat in federal court would bring to future state litigation.[9] Besides, public opinion was changing and same-sex

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[6] Emannuella Grinberg, *Mixed results on measures banning same-sex marriage*, (Nov. 5, 2008, 8:18 AM), http://edition.cnn.com/2008/POLITICS/11/04/state.laws/index.html (Florida's Proposition 2, which passed by over 62%, amended the state's constitution [with the words, "Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." article 1, section 27] [Arizona's Proposition 102 language reads similar to California's Proposition 8: "Only a union of one man and one woman shall be valid or recognized as marriage in this state." article 30, section 1.] The measure passed by over 56%).

[7] Proposition 8 amended article 1, section 7.5 of California's Constitution to include the Declaration: "Only marriage between a man and a woman is valid or recognized in California."
See generally Petitions to the California Supreme Court, Case Numbers: S168047, S168066, S168078 (Petitioners argued the effect of Proposition 8 entailed a "revision" to California's constitution which would require that the measure be passed by a 2/3 margin in the state Legislature, as well as in a subsequent ballot measure before the people).

[8] *See* Strauss v. Horton, 46 Cal. 4th 364 (2009).

[9] A sampling of same-sex marriage advocacy groups include, among others: National Center for Lesbian Rights (NCLR), American Civil Liberties Union (ACLU), Lambda Legal (the nation's oldest and largest LGBT legal advocacy organization), Equality California (EQCA), Equality Federation, Freedom to Marry, and Gay & Lesbian Advocates & Defenders (GLAD).

marriage proponents saw their chances improving at the ballot box.[10] Even so, and proving that passions can transcend political affiliation, ex-Republican Solicitor General Ted Olsen joined with David Boies, opposing counsel in *Bush v. Gore*,[11]in challenging Proposition 8 based on the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.[12] In an even more bizarre twist of political alliances, Republican Governor Arnold Schwarzenegger and Democrat Attorney General Jerry Brown repudiated their oaths of office by refusing to defend Article I, Section 7.5 of the California Constitution against the federal challenge. It was hardly surprising then, when on August 4th, 2010 U.S. Northern District of California Judge, Vaughn Walker, in *Perry v. Schwarzenegger* (2010) struck down the voters' will and permanently enjoined Proposition 8. At this writing Judge Walker's decision is stayed pending an appeal to the 9th Circuit.

So the conflict over marriage wages on, as it undoubtedly will, in state and federal contests for years to come until the U.S. Supreme Court finally decides its fate. It is a conflict, however, that symbolizes much more than marriage alone. Same-sex marriage represents a sort of metaphorical final act in a long struggle to reject Natural Law[13]as the basis for moral truth

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[10] Chuleena Svetvilas, Challenging Prop 8: The Hidden Story, CALIFORNIA LAWYER (Jan. 2010), http://www.callawyer.com/story.cfm?eid=906575&evid=1. ("Nine LGBT legal and advocacy organizations spelled out their evolving strategy in a statement entitled, 'Make Change, Not Lawsuits.' 'We were encouraging people to continue to work in the states…and to not think that the federal courts were going to be a quick route to success.' The six-page joint statement specifically warned same-sex couples against filing federal cases, or suing 'their home state or their employer'…until there is a 'critical mass of states recognizing same-sex relationships.'").

[11] *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000); *See also*, Bush v. Gore, The OYEZ PROJECT http://www.oyez.org/cases/2000-2009/2000/2000_00_949/.

[12] Perry v. Schwarzenegger, 704 F.Supp.2d 921, 993 (N.D. Cal. 2010).

[13] Gerard V. Bradley, Christian Perspectives on Legal Thought 277-278 (Michael W. McConnell et al. eds., 2001) ("Natural law refers to principles and norms that have prescriptive force for human choosing, norms and principles that do not depend for their existence or validity upon human choice or decision. Natural law refers to what reason can discover about rectitude in human choosing; these discoveries are not the product of revelation or the decrees of authority. Natural moral law might simply be called reason; observing it is a matter of doing what is "reasonable." …But God is also attendant to all human choosing….The natural moral law can be, and is, known apart from revelation or religious authority, save in the extended sense of revelation indicated by the notion of its being "written on their hearts." This sense is that God is the author (creator) of all there is, including what humans discover "on their hearts" by using their (created) capacity to reason….The natural moral law is objective; it is categorical, universal. Because its prescriptions are knowable by unaided reason, they are accessible to all persons as rational creatures, and bind persons as rational creatures.").

and by extension, Western civilization. This is an astonishing development given that Western civilization has enabled the greatest liberty to the greatest number of people the world has ever witnessed.

Nature, however, abhors a vacuum and it is inevitable that something will eventually step in to govern civic behavior and fill the void that the loss of Western values will create. In the interim has emerged *Postmodernism*. A reaction to the brutality of two world wars and the failure of human rationality (or *Modernism*) to explain the world, with its "meta-narratives," Postmodernism responds by denying God, morality, or even reason as a basis for reality. As Protagoras in Plato's dialogues exclaimed, anything "is to me such as it appears to me, and is to you such as it appears to you."[14]Truth is servant to context and perception. It "is simply whatever promotes my (or my groups) will or interests. So there is a 'political agenda' in whatever we claim to be true."[15] In practice, Postmodern society is animated by little more than personal passions, the shared views of the popular media, and the influence of any number of small, yet highly influential, special interest groups.[16]

One alarming effect of Postmodernism has been the multiplication of invented "rights". Relevant examples include the *right* to kill one's unborn children, the *right* to have others respect a person's "perceived" versus actual gender,[17] and the *right* of same-sex couples to enjoy "the

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[14] Plato, Theaetetus Section 152a (360 B.C.E), *quoted in* Paul Copan, *What is Postmodernism?* (Jun. 29, 2010, 9:01 AM), http://truthsayer.org.za/index2.php?option=com_content&do_pdf=1&id=67.

[15] *Id*. at 3.

[16] Well known examples include: ACORN, American Civil Liberties Union (ACLU), the Gay, Lesbian, Transgender Alliance (GLTA), Human Rights Campaign, Planned Parenthood, Americans United for Separation of Church and State, The Feminist Majority, MoveOn.org, National Gay and Lesbian Task Force, National Organization for Women, and The Freedom From Religion Foundation. *See* Freedom from Religion Found., Inc. v. Obama, 705 F.Supp.2d 1039, 1069 (W.D. Wis. 2010) (The latter group was the plaintiff in the April 15, 2010 ruling against President Barack Obama in the U.S. District Court, Western District of Wisconsin, wherein the National Day of Prayer was found to be a violation of the First Amendment Establishment Clause).

[17] The California Student Safety and Violence Prevention Act of 2000 (CAL.EDUC. CODE §§ 200 et seq.) (Prohibits gender-based discrimination in all California schools receiving state funding. The Act defines gender as "a person's actual sex or perceived sex, and includes a person's perceived identity, appearance, or behavior, whether or not that identity, appearance or behavior is different from that traditionally associated with a person's sex at birth.") (Title 5, California Code of Regulations, § 4910(k) (This definition includes transgender students. It also includes students who do not conform to gender stereotypes or whom others perceive as such, regardless of whether the student

same respect and dignity accorded a union traditionally designated as marriage."[18] If the Employment Non-Discrimination Act (ENDA) becomes law these *rights* will expand further to make outlaws of private employers who are found to have discriminated on the grounds of sexual orientation or gender identity.[19]

While some, mainly older, members of society stand in awe of these seismic shifts in culture, they have been decades in the making. Particularly within academia and among the nation's jurists, the mid-twentieth century witnessed a strong resurgence of Enlightenment philosophy. With the economic prosperity that followed World War II, attentions turned naturally to earth-bound pursuits and a questioning of the prevailing civic order, especially among the young. The 1960's campus cataclysm against political authority was both connected to and hastened a broader rebellion against established moral authority, such that by the 1980's, Chicago University Professor Allan Bloom remarked of the majority of his students:

> They are unified only in their relativism and in the allegiance to equality. And the two are related in a moral intention. The relativity of truth is not a theoretical insight but a moral postulate, the condition of a free society, or so they see it. They have all been equipped with this framework early on, and it is the modern replacement for the inalienable natural rights that used to be the traditional American grounds for a free society.[20]

The desire for liberation from conventional norms, especially those that bear on human sexual relationships, is served by the Postmodern belief that moral values are relative. But this is opposite from that which has informed Western civilization, the conviction that moral truth is immutable. And it is in this regard that same-sex marriage poses an existential threat. Same-sex marriage signals an already massive cultural transformation and the promise of even more extreme consequences to follow.

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self- identifies as transgender or gender nonconforming.).

[18] *In re* Marriage Cases, 43 Cal.4th 757, 781 (2008).

[19] *See* Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011) at http://hostmaster.hrc.org/laws_and_elections/enda.asp.

[20] ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 25 (1987).

It is not the intent of this article to examine the larger issues of Postmodernism, Relativism, Secularism, or any other "ism" that has paved the road for the redefining of marriage, but simply to argue that marriage, as between one man and one woman, is the only model that comports with both reason and nature.

I. THE MODERN DEVELOPMENT OF SAME-SEX MARRIAGE

Though the practice of homosexuality is as old as humanity, the same cannot be said for same-sex marriage. Though some have tried,[21] before the late twentieth century one is hard pressed to find any credible example of a society that considered, let alone encouraged, same-sex marriage. Historical examples of same-sex marriage - as a normative component of family life - simply do not exist.[22] In her book *Male and Female*, Margaret Mead found that "[w]hen we survey all known human societies, we find everywhere some form of the family, some set of permanent arrangements by which males assist females in caring for children while they are young."[23] The celebrated anthropologist, Bronislaw Malinowski, remarked:

> In all human societies the father is regarded by tradition as indispensable. The woman has to be married before she is allowed legitimately to conceive…. This is by no means only a Christian prejudice; it is the attitude found amongst the most barbarous and savage people as well…. The most important moral and legal rule concerning the physiological side of kinship is that no child should be brought into the world without a man – and one at that – assuming the role of sociological father, that is, of guardian and protector, the male link between the child and the rest of the community. [T]his generalization amounts to a *universal sociological law*…and is indispensable for the full sociological status of

[21] *See generally* JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (Villard Books 1994).
[22] GLENN T. STANTON & DR. BILL MAIER, MARRIAGE ON TRIAL: THE CASE AGAINST SAME-SEX MARRIAGE AND PARENTING 48 (2004).
[23] MARGARET MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 188, 195 (William Morrow, 1949), *cited in*GLENN T. STANTON&DR. BILL MAIER, MARRIAGE ON TRIAL: THE CASE AGAINST SAME-SEX MARRIAGE AND PARENTING 49 (2004).

the child as well as of its mother.[24] (emphasis mine)

Edward Westermark, the renowned Finish sociologist, adds: "[T]he functions of the husband and father are not merely the sexual and procreative kind, but involve the duty of protecting the wife and children, is testified by an array of facts relating to peoples in all quarters of the world and in all stages of civilization."[25]
Until very recently, this "universal sociological law," as society's sanctioned means of sexual fulfillment, procreation, and protection of the weak has survived with only negligible and undisturbed variation throughout the human story.

The legal genesis of same-sex marriage can be traced to the Netherlands and the early 1990s.[26] A model of Postmodern thought, there the "Equal Treatment Act" was enacted, which prohibited discrimination on the basis of sexual orientation. Following this act "Registered (same-sex) Partnerships" were legalized and in 2001 full rights for same-sex marriage were guaranteed. Afterwards the number of countries that either performed same-sex marriage directly, or at least recognized the union, accelerated at a furious pace. According to the Pew Forum, not including the United States, the current list includes the Netherlands, Belgium, Spain, Norway, Sweden, South Africa, and Canada. Further, a dozen other nations have taken the first step toward same-sex marriage through the legal recognition of same-sex civil partnerships.[27]

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[24] BRONISLAW MALINOWSKI, SEX, CULTURE, AND MYTH 62-63 (Harcourt, Brace & World, 1962), *cited in* GLENN T. STANTON & DR. BILL MAIER, MARRIAGE ON TRIAL: THE CASE AGAINST SAME-SEX MARRIAGE AND PARENTING 50 (2004).
[25] EDWARD WESTERMARK, THE HISTORY OF HUMAN MARRIAGE 27-28 (Allerton, 1922), *cited in* GLENN T. STANTON & DR. BILL MAIER, MARRIAGE ON TRIAL: THE CASE AGAINST SAME-SEX MARRIAGE AND PARENTING 48 (2004). Britannica Encyclopedia, *Edward Westermarck* (2011), http://www.britannica.com/EBchecked/topic/640476/Edward-Westermarck. (Westermarck was a "Finnish sociologist, philosopher, and anthropologist who denied the widely held view that early humans lived in a state of promiscuity and instead theorized that the original form of human sexual attachment had been monogamy. He asserted that primitive marriage was rooted in the needs of the nuclear family, which he considered to be the fundamental and universal unit of society.").
[26] David Coolidge, *Same-Sex "Marriage" in Holland: Is the Sky Falling?*, ETHICS AND PUBLIC POLICY CENTER (Apr. 1, 2001), http://www.eppc.org/news/newsID.389/news_detail.asp (The Netherlands was also among the first nations to legalize drugs, prostitution, and euthanasia).
[27] *See* David Masci, *Gay Marriage around the World*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (Jul. 9, 2009), http://pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World.aspx#ahead.

In the United States the impetus for same-sex marriage originated from Berkeley, California. In 1978 the nation's first anti-discrimination ordinance based solely on sexual orientation was passed there. One year later Tom Brougham, a gay city employee, conceived the idea of legal unions for homosexuals. It was Brougham who first coined the term "domestic partnerships." The moniker was intended to describe an entirely new category of legal unions. At first blush the motive was to offer gay couples legal benefits similar to marriage, but another objective was to *deconstruct marriage* into its component parts. Later on the parts could be re-bundled, but without the opposite-gender element.[28] Following six years of persistent lobbying, Berkeley adopted the policy in 1984. West Hollywood, California followed but a few months later.

Together these victories provided encouragement for same-sex marriage proponents to mobilize. By the 1990's, corporations were being pressured into formally recognizing ad hoc partnerships and offering benefits similar to those conferred upon married couples. In 1993 the Hawaiian Supreme Court applied strict scrutiny to a state law that refused marriage licenses to same-sex couples (remanding the case to a lower court for further review).[29] Observing with alarm the gathering momentum around homosexual "rights," in response Congress enacted, and President Clinton signed into law, the federal Defense of Marriage Act (DOMA) in 1996.[30] In pertinent part the statute reads:

> "[T]he word *marriage* means only a legal union between one man and one woman as husband and wife, and the word *spouse* refers only to a person of the opposite sex who is a husband or a wife."

At the federal level, natural marriage remains the only form recognized for issues pertaining to tax returns, social security, veteran and survivor's benefits; although within certain federal agencies these distinctions are already facing scrutiny.[31] DOMA has another objective, however, which is

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[28] *See* Leland Traiman, *A Brief History of Domestic Partnerships,* GAY & LESBIAN REVIEW WORLDWIDE (July 1, 2008), http://glreview.com/article.php?articleid=635.
[29] *See* Baehr v. Lewin, 74 Haw. 530, 582 (1993).
[30] 1 U.S.C. § 7 (1996), 28 U.S.C. § 1738 (c) (1996).
[31] Laura Meckler, *Gay Couples Get Equal Tax Treatment,*WALL ST. J. (June 5, 2010), http://online.wsj.com/article/SB10001424052748704080104575286931017169308.html ("The Internal Revenue Service has ruled that same-sex couples must be treated the same as heterosexual couples under a feature of California tax law… The IRS ruling has

to protect states and other legal entities within U.S. Territories from having to recognize same-sex marriages from other jurisdictions based on the Full Faith and Credit Clause (Article IV, Section I of the U.S Constitution).[32] What DOMA (as a federal act) cannot do, however, is insulate states against actions taken by their own courts. State court justices may still disavow marriage laws from the legislature or the people, as had happened in Hawaii. For this reason many states, either through the legislative process or by constitutional referendum, began passing their own Defense of Marriage Acts. Today, all but five states have adopted these measures.[33]

It is anything but certain whether the federal DOMA or its state progeny will prevail in offering safe harbor against courts intent on advancing, in the words of Robert Bork, "…the anarchical spirit of extreme personal and group autonomy..."[34] In July of 2010, Boston Federal District Judge Joseph Tauro ruled in two companion cases (*Massachusetts v. U.S. Dept. of Health and Human Services* and *Gill v. Office of Personnel Management*) that the federal DOMA violates the 10th Amendment and the 5th Amendment Equal Protection Clause.[35] Later that year in November, two additional cases challenging DOMA were filed in the 2nd Circuit (*Pederson v. OPM and Windsor v. United States*). More recently United States Attorney General, Eric Holder, announced that the Department of Justice would not defend DOMA because the Obama

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detractors. It doesn't appear to square with the Defense of Marriage Act…said David Herzig, an expert in tax law at Valparaiso University School of Law. That law, he said, means the IRS should not be recognizing these unions, even if state law directs otherwise.").

[32] 28 U.S.C. § 1738 (c) (1997) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

[33] *See Issues by State*, DOMA Watch (last visited July 19, 2011) http://www.domawatch.org/stateissues/index.html (follow "Select a State From the Map or the Drop-Down Menu").

[34] Robert H. Bork, *The Necessary Amendment*, FIRST THINGS (August – September 2004), http://www.firstthings.com/article/2007/01/the-necessary-amendment--27.

[35] *See*Massachusetts v. U.S. Dept. of Health and Human Services,698 F.Supp.2d 234 (2010); *See also*Gill v. Office of Personnel Management, 699 F.Supp.2d 374 (2010); Denise Lavoie, *Feds Appeal Mass. Rulings Against US Marriage Law*, BOSTON.COM (Oct. 12, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/10/12/feds_appeal_mass_rulings_against_us_marriage_law/ (Decisions stayed pending appeal by the Department of Justice filed October 12, 2010).

Administration believes that "classifications based on sexual orientation should, for equal protection purposes, be treated the same as those involving race and should be subject to strict scrutiny,"[36] a status that the Supreme Court has itself refused to recognize.

While the Supreme Court has yet to rule on same-sex marriage, that it will appears inevitable in light of the mounting DOMA challenges, *Perry*, or some other lower court decision that will ultimately force its hand. Indeed, the Court's own prior opinions invite such an outcome.

In *Goodridge v. Department of Public Health* (2003),[37] the Massachusetts high court repealed that state's ban on same-sex couples wanting to marry, making it the first jurisdiction in the United States to legalize same-sex marriage. How did the court justify such a momentous, precedent defying decision? The court's reasoning was based largely on the Supreme Court's decision in *Lawrence v. Texas* (2003),[38] a case that dealt with the enforcement of sodomy laws. The Court in *Lawrence* had, in turn, relied on the earlier reasoning in Planned *Parenthood v. Casey* (1992),[39] a case which dealt not with sodomy, but abortion rights. When the court in *Goodridge* was asked to decide whether the Commonwealth of Massachusetts had any authority to bar same-sex marriage it responded by noting:

> It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence*, … where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner.[40]

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[36] *See* David B. Rivkin Jr. & Lee A. Casey, *In Defense of the Defense of Marriage Act*, WALL ST. J. (Mar. 2, 2011), http://online.wsj.com/article/SB10001424052748704615504576172790625101046.html. *See also*, *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, THE U. S. DEP'T OF JUSTICE (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.

[37] Goodridge v. Dep't. of Pub. Health, 440 Mass. 309, 313 (2003).

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

[39] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[40] *Goodridge*, 440 Mass. at 313.

Yet the Massachusetts court did not wait for either the United States Supreme Court or the people to decide that question. In a split 4-3 decision, it ruled that the state's constitution could not; despite an unquestioned statutory history[41] to the contrary, ban same-sex marriage. Five years later California's Supreme Court, in the case of *In Re Marriage Cases* (2008), relied on virtually identical reasoning to come to the same legal conclusion.

Similar to Canada, in United States jurisdictions where same-sex marriage is legal, the chief vehicle to achieve that result has been narrowly divided courts.[42] By design, before the contest over Proposition 8 there had been very little public debate on the issue. Proponents correctly surmised that same-sex marriage was too extreme to garner anything close to majority acceptance and, as a result, chose to pursue their aims in what they saw as a much more hospitable venue - the courts. But sentiments change, and sometimes with surprising speed, as the tight election results of Proposition 8 revealed.[43]

Is marriage, as the Massachusetts majority in *Goodridge* declared, a "wholly secular institution"?[44] What benefits does marriage provide? Should the definition of marriage be subject to society's ever shifting trends? To help answer these questions, it is first necessary to explore

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[41] *Id*. at 320 ("We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man.").

[42] A notable exception is New York, where the state legislature legalized same-sex marriage by a vote of 33 to 29. *See* Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES (June 24, 2011), http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

[43] *State Ballot Measures*, CA SECRETARY OF STATE (2000), http://www.sos.ca.gov/elections/sov/2000_primary/measures.pdf (In 2000 Proposition 22 in California passed by a 61% margin); *See* Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop8*, WALL ST. J. (November 5, 2008, 10:59 PM), http://online.wsj.com/article/SB122586056759900673.html (Eight years later Proposition 8, using the exact same wording in the initiative, passed by 52%, or nine percentage points lower).

[44] *Goodridge*, 440 Mass. at 321 ("We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution"). *See* Commonwealth v. Munson, 127 Mass. 459, 460-466 (1879) (noting that '[i]n Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth,' and surveying marriage statutes from 1639 through 1834) ("No religious ceremony has ever been required to validate a Massachusetts marriage… ").

what marriage is.

II. THE NATURE AND MEANING OF MARRIAGE

Marriage is mankind's first and oldest institution. By God's design it was established before governments, nations, kingdoms, and courts. Marriage is seen throughout the ancient world, from the Egyptian dynasties to the Greek and Roman empires and into the medieval period as forming a contractual, monogamous, and enduring union between a man and a woman.[45] This is not to say that marriage was always uniform in its application. Among the pagan and polytheistic cultures especially, marriage was highly variable and the history of these societies – *res ipsa loquitar* – are self-evident. By contrast the Biblical model of marriage was adopted by the nation-states comprising "Western civilization"[46] where the meaning of marriage is taken directly from the creation account as recorded in *Genesis*: "*So God created man in his own image, in the image of God he created him; male and female he created them. And God blessed them. And God said to them, "Be fruitful and multiply and fill the earth…*" (*Genesis* 1:27-28).That the man and woman were married is seen in the following passage:

> *But for Adam no suitable helper was found. So the LORD God caused the man to fall into a deep sleep; and while he was sleeping, he took one of the man's ribs and closed up the place with flesh. This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man." For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh. The man and his wife were both naked, and they felt no shame*. (*Genesis* 2:20-25)

Whether meant literally, or as a figurative description of the creation account, these passages clearly define marriage as an institution within

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[45] *See* ERWIN J. HAEBERLE, THE SEX ATLAS (Continuum Publ'g Co. 1983) (1983), *available at* http://www2.huberlin.de/sexology/ATLAS_EN/html/history_of_marriage_in_western.html.

[46] BRIAN TIERNEY ET AL., INTRODUCTIONTO GREAT ISSUES IN WESTERN CIVILIZATION, at xi. (McGraw-Hill, 1992) (Western civilization is distinguished from other cultures by three main distinctions: "[G]rowth of a tradition of rational scientific inquiry, the persistence of a tension between Judaeo-Christian religious ideals and social realities, the emergence of constitutional forms of government.").

which life-long companionship and sexual intimacy achieve their intended fulfillment. A union between one man and one woman, marriage is heterosexual in its essential nature. The genders were created to be complimentary to one another, physically and psychologically, and within the permanency and confines of this opposite-gender union there is a complete absence of shame or guilt.

That the New Covenant endorsed this model is seen in an exchange between Jesus and the Pharisees:

> *Haven't you read," he replied to them, "that at the beginning the Creator made them male and female,' and said, 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh'? So they are no longer two, but one. Therefore what God has joined together, let man not separate.*(*Matthew* 19:4-6)

Here Jesus emphasizes the covenant nature of marriage.[47] Solemn promises are shared between the marriage partners regarding love and fidelity. The enabling agent of the *covenant* is the Creator ("*what God has joined together*"), and by virtue of his active role marriage assumes a sacred character. While it is true that God suffered polygamous marriages for a time, it was never the ideal and nearly always led to conflict.[48] By the first century leaders of the early church were expressly prohibited from taking more than one wife.[49] Divorce was permitted only for the most serious of marital offenses, most notably, adultery.

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[47] Richard Hooker, *The Hebrews: A Learning Module*, JEWISH VIRTUAL LIBRARY (2011), http://www.jewishvirtuallibrary.org/jsource/Judaism/berit.html. (Covenant, or *berith* in Hebrew, translated means "a coming together."); *Technical Meaning of Covenant*, PRESENT TRUTH MAGAZINE, *available at* http://www.presenttruthmag.com/archive/XXVIII/28p1-3.htm. (The term appears throughout the Old Testament to describe contractual arrangements between individuals, peoples, and kingdoms. Abraham "cut a covenant" with God to obey him in consideration of the promise to give over the land of Israel. The agreement was solemnized by cutting animals in two and the parties walking between them as if to say, "may the violator of the covenant suffer the same fate". The translators of the Old Testament into the Greek Septuagint chose the Greek word *diatheke* in place of the Hebrew *berith* which is translated "testament" (as in "Last Will and Testament")).

[48] *See generally* WAYNE GRUDEM, POLITICS ACCORDING TO THE BIBLE 219 (Zondervan, 2010).

[49] *See1Timothy* 3:2.

That marriage is a sacred union is seen not only by the fact that it derives from a holy God, but because it serves as an illustration of his own uniquely intimate relationship with his chosen people, Israel.[50] The illustration is carried over and made even more powerful under the New Covenant, where marriage is mysteriously figurative of the union Christ has with his church, a union that will never end.[51]

Since marriage is defined exclusively by opposite-gender unions and is the only institution within which intimate sexual unions are blessed, it is not surprising that Scripture prohibits homosexual intimacy. "You shall not lie with a male as with a woman. It is an abomination" (*Leviticus* 18:13). The pejorative is the Hebrew noun *Tow' ebah*, which alternately means abhorrent or morally detestable.[52]

Within Western civilization, the Biblical understanding of marriage has been the predominant model. In keeping with this shared understanding, and as evidenced by the religious ceremony still attached to it,[53] marriage in Western civilization was elevated historically to the level of a *sacrament*, sanctioned and blessed of God.

III. SAME-SEX MARRIAGE IS A REPUDIATION OF REASON IN AGREEMENT WITH NATURE

Natural Law stands for the general proposition that moral truths, because they are established by God, are universally effectual and rationally self evident. As Cicero declared in *The Republic*, "True law is right reason in agreement with nature. It is of universal application, unchanging and everlasting."[54] This line of thought, "reason in agreement with nature,"

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[50] *See* MERRILL UNGER, THE NEW UNGER'S BIBLE DICTIONARY 697-700 (Moody Press, 1964). (Marriage is illustrative of Jehovah's relationship with Israel (*Isaiah* 54:5; 62:4-5; *Jeremiah* 3:1; *Hosea* 2:16-20). In the New Testament the image of the bridegroom is transferred from Jehovah to Christ (*Matthew* 9:15; *John* 3:29) and that of the bride to the church (2 *Corinthians* 11:2; *Ephesians* 5:23-24, 32; *Revelations*19:7; 21:2, 9; 22:17)).

[51] *See id.* at 225.

[52] *See* EXHAUSTIVE STRONG'S NUMBERS AND CONCORDANCE WITH EXPANDEDGREEK-HEBREW DICTIONARY (1994). (OT:8441; tow` ebah (to-ay-baw'); or to` ebah (to-ay-baw'); feminine active participle of OT:8581; properly, something disgusting (morally), i.e. (as noun) an abhorrence; especially idolatry or (concretely) an idol). *See also Leviticus* 20:13 and *Romans* 1:27.

[53] The custom of bride and groom standing before a minister and vowing fidelity before God is demonstrably religious in character and still practiced even among secular participants.

[54] *See* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER, 108 (Regnery Gateway, 1992).

flows from Aristotle to Cicero, from Aquinas to Locke, and from Blackstone to Thomas Jefferson, and has provided the philosophical scaffolding for virtually all of Western law. As Russell Kirk noted:

> Man's modern laws are declaratory of Natural Laws; that teaching was affirmed repeatedly by Blackstone and by his American disciples (Joseph) Story and (James) Kent. All looked upon the common law as the nearest approach (however imperfect) to Natural Law, because it had grown out of the experiences of wise men, and had been tested repeatedly for its conformity to natural justice.[55]

"This law of nature," William Blackstone wrote,

> ….being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, and all countries, and at all times; no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately from this original.[56]

Jefferson's sentiment in the *Declaration*, that: "all men are created equal… and are endowed by their Creator with certain inalienable rights,"[57] was borrowed from the Natural Law apologist, John Locke.

Applying Natural Law to sexuality and the family structure, both the universality of basic human anatomy and the requirement of opposite-

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[55] *Id*. at 371.

[56] *Id*. at 370. *See also* HAROLD J. BERMAN, LAW AND REVOLUTION, THE FORMATION OF WESTERN LEGAL TRADITION 254 (Harvard University Press, 1983). ("[N]atural law was justice, equity, what was right; it was the ideal law, the law not of the state but of nature itself, to which the law of the state might or might not conform…Natural law was not an ideal law standing outside the existing legal systems but rather the morality of the law itself standing within the legal systems. It was a kind of constitutional principle, or Grundgesetz, a Due Process Clause." Blackstone wrote "Commentaries on the Laws of England," which formed a basis for U.S. common law).

[57] Powell v. Pennsylvania, 127 U.S. 678 (1888) (The Supreme Court recognized the importance of the divine influence in early U.S. law, stating that the "right to pursue happiness is placed by the Declaration of Independence among the inalienable rights of man, not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by the Creator."; *See also* The Federalist No. 43 (James Madison) (Madison appeals to "the transcendent law of nature and of nature's God.").

gender copulation to procreate argue convincingly against intimate same-sex relationships, let alone the redefining of marriage. To state the obvious, according to both the creation account and the manifest law of nature, the male sexual organs are made perfectly and exclusively for that of the females.' The female sexual organs are made perfectly and exclusively for that of males.' Thus, both *a priori* and *a posteriori*, the homosexual act is un-*natural*.

Plato (c. 429 – 347 BC), in the midst of pagan Athens, declared in his *Laws*: "When male unites with female for procreation, the pleasure experienced is held to be due to nature, but contrary to nature when male mates with male or female mates with female, and those…guilty of such enormities were impelled by their slavery to pleasure."[58]Josephus (AD 37 –c. 100) held the homosexual act to be "monstrous and unnatural." Likewise, the Greek historian Plutarch (c. AD 50-c. 120) deduced that such conduct was "contrary to nature" and "indecent."[59]

While many today would excoriate these views and their proponents as bigoted, they are the logical and historic conclusion of Natural Law. Opposite-gender marriage comports *prima facie* with Natural Law whereas same-sex marriage is contrary to it. Indeed, the success of same-sex marriage in the courts is made possible only because fealty to Natural Law has largely collapsed among a large body of its members. Secularism, a world-view intimately tied to Postmodernism has largely replaced Natural Law.[60] "To call someone secular means that he is completely time-bound, totally a child of his age, a creature of history, with no vision of eternity.…Moral standards, for example, tend to be merely those commonly accepted by the society in which he lives, and he believes that everything changes, so that there are no enduring or permanent values….The only recognized morality is that which emerges from continuous human experience. There are no moral absolutes."[61]

Not surprisingly, the "wholly secular" view of marriage expounded by the court in *Goodridge* has become the enabling dynamic to redefine marriage. The empiricism of human anatomy and procreation is subordinated to the subjective and evolving demands of "personal dignity

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[58] WAYNE GRUDEM, POLITICS ACCORDING TO THE BIBLE 218 (Zondervan, 2010) (quoting Plato).
[59] *Id.* (quoting Josephus and Plutarch).
[60] The word secular is derived from the Latin "*saeculum*" which means "time" or "age."
[61] JAMES HITCHCOCK, WHAT IS SECULAR HUMANISM 10-11, 13 (Servant Books, 1982).

and autonomy"[62], where "[g]ender no longer forms an essential part of marriage..."[63] Having rejected non-secular sources, the moral and legal justification for same-sex marriage resorts, principally, to shared feelings.

IV. MARRIAGE IS ESSENTIAL TO A CIVIL SOCIETY

> "*In human records there is no instance of a society retaining its energy after a complete new generation has inherited a tradition which does not insist on prenuptial and post nuptial continence*."[64]
> British Anthropologist, J.D. Unwin, 1934

When marriage means anything it arguably means nothing. Same-sex marriage eviscerates the meaning of marriage at a time when that institution is already under unprecedented assault. And when fidelity to marriage fails, one may still have what can loosely be referred to as a society, but it is questionable whether it can remain civil.

In June of 2006 the Witherspoon Institute, a body composed of over thirty prominent scholars from science, law, economics, and culture published a treatise entitled *Marriage and Public Good: Ten Principles*.[65] Its analysis of the effects of marriage on civil society yielded the following intuitive yet important conclusions:

- Marriage is a personal union, intended for the whole of life, of husband and wife.
- Marriage is a profound human good, elevating and perfecting our social and sexual nature.
- Ordinarily, both men and women who marry are better off as a result.
- Marriage protects and promotes the well-being of children.
- Marriage sustains civil society and promotes the common good.
- Marriage is a wealth-creating institution, increasing human and social capital.

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[62] *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. at 852 (1992).
[63] Perry v. Schwarzenegger, 704 F.Supp.2d 921,993 (N.D. Cal. 2010).
[64] GRUDEM, *supra* note 58, at 217 ("Continence" referring to sexual abstinence outside marriage).
[65] THE WITHERSPOON INSTITUTE, MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2006).

- When marriage weakens, the equality gap widens, as children suffer from the disadvantages of growing up in homes without committed mothers and fathers.
- A functioning marriage culture serves to protect political liberty and foster limited government.
- The laws that govern marriage matter significantly.
- "Civil marriage" and "religious marriage" cannot be rigidly or completely divorced from one another.[66]

It is not necessary to probe these statements deeply to judge their veracity. That work has already been done by any number of fine researchers.[67] More to the point for this discussion is that in addition to its benefits, the Institute identified four principle threats to marriage: divorce, illegitimacy, cohabitation, and same-sex marriage.

No speculation is needed as to the first three of these, as the effects are already being widely experienced. The divorce rate overall has doubled in the United States since the 1960's, from 20% of first time marriages to around 45% today.[68] Illegitimacy has soared from 5% to 35%.[69] Cohabitation has risen nine-fold in roughly the same period.[70] "Recent estimates suggest that 40% of children will spend some time growing up with one or both parents in a cohabitating union."[71] This is an especially

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[66] *Id*. at 5-8.

[67] *E.g.*, ANDREW K.J. CHERLIN, *The Deinstitutionalization of American Marriage*, J. MARRIAGE AND FAMILY (November 2004). *See also* DAVID BLANKENNHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1996). *See also* DAVID BLANKENNHORN, THE FUTURE OF MARRIAGE (2007). *See also* JAMES Q. WILSON, THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES (2002). *See also* ISABEL V. SAWHILL, "Families at Risk," SETTING NATIONAL PRIORITIES (H. Aaron & R.D. Reischauer eds., 2009). *See also* M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED (2009). *See also* LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE (2000). *See also* MAGGIE GALLAGHER, *(How) Will Gay Marriage Weaken Marriage as a Social Institution*, 2 U. ST. THOMAS. L.J. 33 (2004). *See also* GLENN T. STANTON & DR. BILL MAIER, MARRIAGE ON TRIAL 48 (2004). *See also* MICHAEL E. LAMB, THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (1997). *See also* MONTE NEIL STEWART, *Marriage Facts*, 31 HARV. J.L.& PUB. POL'Y 313 (2008). *See also* M.V. BADGETT, WHEN GAY PEOPLE GET MARRIED (2009). *See also* WILLIAM J. DOHERTY, ET AL., RESPONSIBLE FATHERING (1998).

[68] WITHERSPOON, *supra* note 65 at 17.

[69] *Id*.

[70] *Id*. at 18.

[71] *Id*. (citing LARRY BUMPASS AND HSIEN-HEN LU, *Trends in Cohabitation and Implications for Children's Family Contexts in the U.S.*, 54 POPULATION STUDIES J. 29-41 (2000)).

unwelcome development as adults in these relationships "face higher rates of domestic violence, sexual infidelity, and instability compared to couples in marital unions."[72]

Regarding same-sex unions, Stanley Kurtz of the Hudson Institute maintains that the granting of marriage rights to gays and lesbians "has *further* undermined the institution" of marriage: "Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable."[73] (emphasis mine)

Worse still, the decay of natural marriage impacts society at its most elemental level, namely, children.

Children Need a Mom and a Dad

> "*Proponents of same-sex marriage believe love is all children really need. Based on that supposition, they conclude it's just as good for children to be raised by loving parents of the same sex, as by loving parents of the opposite sex. But that basic assumption – and all that flows from it- is naively simplistic and denies the complex nature and core needs of human beings.*"[74]

Lesbian partners in same-sex unions claim that men don't matter as fathers. Male partners in same-sex unions say that women don't matter. Of course they can't both be right but they can both be wrong. As one researcher put it, "How can two loving, homosexual men teach a young boy to care for and love a woman? How will the boy observe this in a home where it doesn't exist?...Can you imagine two [adult] men guiding a young girl through her first menstrual cycle or helping her through the awkwardness of picking her first bra"?[75]For that matter, how can two loving lesbians teach a girl to love and care for a man? Or how can two lesbians teach a young boy, let alone model, masculinity in the same way

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[72] *Id*. (citing W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS, TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (Institute for American Values, 2nd ed. 2005); LORAINE BLACKMAN ET AL., THE CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS(Institute for American Values 2005).

[73] Stanley Kurtz, *The End of Marriage in Scandinavia*, WEEKLY STANDARD, Feb. 2, 2004, at 26.

[74] Trayce Hansen, *Same-Sex Marriage: Not in the Best Interests of Children*, THE THERAPIST, 21 (May/June 2009).

[75] STANTON, *supra* note 22, at 71.

a father can?[76]

Of course millions of parents raise children without the benefit of a spouse. Yet, until recently, society has eschewed public policies that celebrate single parenting on the grounds that children are psychologically integrated and benefit most from being raised in homes with their two biological parents, or loving and mature adoptive parents of opposite genders. Such policies are warranted because children are not abstract objects in a study, but fragile human beings in need of the love and protection of a mother and a father. Same-sex marriage forever deprives children brought into these relationships of this birth-right. As Stanley Kurtz writes:

> In setting up the institution of marriage, society offers special support and encouragement to the men and women who together make children. Because marriage is deeply implicated in the interests of children, it is a matter of public concern. Children are helpless. They depend upon adults. Over and above their parents, children depend upon society to create institutions that keep them from chaos. Children cannot articulate their needs. Children cannot vote. Yet children *are* society. They are us, and they are our future. That is why society has the right to give special support and encouragement to an institution that is necessary to the well being of children – even if that means special benefits for some, and not for others. The dependence intrinsic to human childhood is why unadulterated libertarianism can never work.[77]

Even the celebrated atheist, Bertrand Russell, acknowledged that: "But for

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[76] Defendant-Intervener-Appellants'Opening Brief at 98-105, Perry v. Schwarzenegger 702 F.Supp.2d 1132 (2010) (No. C09-2292 VRW) ("Professor Michael Lamb, a witness for the Plaintiffs in Perry agrees that '[t]he increase in a father's absence is particularly troubling because it is consistently associated with poor school achievement, diminished involvement in the labor force, early child bearing, and heightened levels of risk-taking behavior.' Also, '[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child.' And '…Professor Lamb admits that the research has consistently shown that children raised by heterosexual parents generally fare best when raised by their married, biological parents' …[and] that 'on average, children being raised by two, married heterosexual parents do better than children being raised by single or divorced heterosexual parents'… [and that] '[c]hildren clearly benefit when they have two parents, both of whom are actively involved.'").

[77] GRUDEM, *supra* note 58, at 222 (citing Stanley Kurtz, Deathblow to Marriage (2004)).

children, there would be no need of any institution concerned with sex." "[I]t is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution."[78]

Mothers and fathers are not interchangeable. "Overall, having a relationship with both a male and female parent increases the likelihood that a child will have successful social and romantic relationships during his or her life," according to the conclusion released by the California Association of Marriage and Family Therapists.[79] And despite same-sex proponents' claims to the contrary, "…existing research on children reared by homosexuals is not only scientifically flawed and extremely limited but some of it actually indicates that those children are at increased risk for a variety of negative outcomes. Other studies find that homosexually parented children are more likely to experiment sexually, experience sexual confusion, and engage in homosexual and bisexual behavior themselves. And for those children who later engage in non-heterosexual behavior, extensive research reveals they are more likely to suffer from psychiatric disorders, abuse alcohol and drugs, attempt suicide, experience domestic violence and sexual assault, and are at increased risk for chronic diseases, AIDs, and shortened life spans."[80]

Same-sex marriage advocates allege that gay and lesbian unions are no less stable than natural marriages. Aside from the fact that the instability of opposite-sex marriage relationships is irrelevant as an argument for same-sex marriage, the evidence actually "indicates that *committed* homosexual relationships are radically different from married couples in several key respects: relationship duration, monogamy vs. promiscuity, relationship commitment, number of children being raised, health risks, (and) rates of intimate partner violence."[81] As researcher Timothy J. Dailey reported in *Comparing the Lifestyles of Homosexual Couples to Married Couples*:

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[78] Defendant-Intervener-Appellants' Opening Brief at 20, Perry v. Schwarzenegger, 702 F.Supp.2d 1132 (2010) (No. C09-2292 VRW), (citing Bertrand Russell, MARRIAGE & MORALS 77 (1970)).
[79] HANSEN, *supra* note 74.
[80] *Id.*
[81] Timothy J. Dailey, *Comparing the Lifestyles of Homosexual Couples to Married Couples*, FREE REPUBLIC (July 8, 2005, 8:15 AM), http://www.freerepublic.com/focus/f-news/1439159/posts.

For natural marriages:

- A 2001 National Center for Health Statistics study on marriage and divorce statistics reported that 66 percent of first marriages last ten years or longer, with fifty percent lasting twenty years or longer.[82]
- A 2002 U.S. Census Bureau study reported 70.7 percent of women married between 1970 and 1974 reaching their tenth anniversary and 57.7 percent staying married for twenty years or longer.[83]
- A 1997 national survey appearing in *The Social Organization of Sexuality: Sexual Practices in the United States* found that 75 percent of husbands and 85 percent of wives never had sexual relations outside of marriage.[84]

Contrast this to the data relating to same-sex unions:

- A study of homosexual men in the Netherlands published in the journal AIDS found that the "duration of steady partnerships" was 1.5 years.[85]
- In *Male and Female Homosexuality*, Saghir and Robins found that the average male homosexual live-in relationship lasts between two and three years.[86]
- In their study of the sexual profiles of 2,583 older homosexuals published in the *Journal of Sex Research*, Paul Van de Ven *et al*. found that "the modal range for number of sexual partners ever [of homosexuals] was 101-500." In addition, 10.2 percent to 15.7 percent had between

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[82] *See id*. (*citing* William D. Mosher, *First Marriage Dissolution, Divorce and Remarriage: United States*, ADVANCE DATA, May 31, 2001, at 1).
[83] Dailey, *supra* (citing Rose M. Kreider & Jason M. Fields, *Number, Timing, and Duration of Marriages and Divorces*, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS, February 2002, at 70-80).
[84] Dailey, *supra* note 81 (citing E. O. Laumann et al., The Social Organization of Sexuality: Sexual Practices in the United States 216 (1994).
[85] *See* Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection among Homosexual Men in Amsterdam*, 17 AIDS J. 1029, 1031 (2003) (discussing the mean duration of steady partnerships to account for the uncertainty factor in baseline parameters), *as reprinted in* Timothy J. Dailey, *Comparing the Lifestyles of Homosexual Couples to Married Couples*, FREE REPUBLIC (July 8, 2005, 8:15 AM), http://www.freerepublic.com/focus/f-news/1439159/posts.
[86] Dailey, *supra* note 81 (citing M. Saghir et al, Male and Female Homosexuality 225 (1973)).

> 501 and 1,000 partners. A further 10.2 percent to 15.7 percent reported having had more than one thousand lifetime sexual partners.[87]

As Dailey notes, "homosexuals...are taught by example and belief that marital relationships are transitory and mostly sexual in nature. Sexual relationships are primarily for pleasure rather than procreation. And they are taught that monogamy in a marriage is not the norm [and] should be discouraged if one wants a good 'marital' relationship".[88]

The incidence of sexually transmitted disease among active homosexuals is particularly troubling, not only for those suffering with these diseases but also for their families. Data recently reported by the Centers for Disease Control (CDC) reveals that, "…the rate of new HIV diagnoses among men who have sex with men (MSM) is more than 44 times that of other men and more than 40 times that of women… The rate of primary and secondary syphilis among MSM is more than 46 times that of other men and more than 71 times that of women….[T]his analysis shows just how stark the health disparities are between this and other populations..."[89]

Dailey also discovered that the number of homosexual couples that actually take advantage of official civil unions or registered partnerships, which afford virtually all of the same protections and rights as marriage, is less than 30%. In Vermont, for instance, where according to the U.S. Census the homosexual population is estimated at around 2.5% (a national average), a USA Today study found that in 2004 only 936 couples had entered into civil unions, or about 21% of the homosexual population. In Sweden and the Netherlands, where the bloom of civil unions has long since worn off, the figures are far lower: 2% and 2.8% respectively.[90] Similar findings were reported in a study completed from the *Institute for Marriage and Public Safety*: "The highest estimate to date of the

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[87] Dailey, *supra* note 81 (citing Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 J. of Sex Research 354 (1997)).
[88] Dailey, *supra* note 81 (citing Bradley P. Hayton, *To Marry or Not: The Legalization of Marriage and Adoption of Homosexual Couples*, THE PACIFIC POLICY INSTITUTE 9 (1993)).
[89] CDC, NCHHSTP Newsroom, Press Release, *CDC Analysis Provides New Look at Disproportionate Impact of HIV and Syphilis Among U.S. Gay and Bisexual Men*, CDC (Mar. 10, 2010, 4:30 PM), http://www.cdc.gov/nchhstp/Newsroom/msmpressrelease.html.
[90] Dailey, *supra* note 81.

proportion of gays and lesbians who have married in any jurisdiction where it is available is 16.7% (Massachusetts). More typically, our survey of marriage statistics from various countries that legally recognize same-sex unions suggests that today between 1% and 5% of gays and lesbians have entered into a same-sex marriage. In the Netherlands, which has had same-sex marriage as a legal option for the longest period, between 2% and 6% of gays and lesbians have entered marriages in the first five years."[91]

A former practicing homosexual, William Aaron, offered an explanation why even men involved in "committed" relationships do not esteem monogamy: "In the gay life, fidelity is almost impossible. Since part of the compulsion of homosexuality seems to be a need on the part of the homophile to 'absorb' masculinity from his sexual partners, he must be constantly on the lookout for [new partners]. Consequently the most successful homophile 'marriages' are those where there is an arrangement between the two to have affairs on the side while maintaining the semblance of permanence in their living arrangement."[92]

The incidence of violence among homosexual partners is also reported to be significantly higher when compared with heterosexuals. In a survey of 1,099 lesbians, the *Journal of Social Service Research* found that slightly more than half of the lesbians reported that they had been abused by a female lover/partner. The researchers found that "the most frequently indicated forms of abuse were verbal/emotional/psychological abuse and combined physical-psychological abuse."[93] In their book, *Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence*, Island and Letellier postulate that "the incidence of domestic violence among gay men is nearly double that in the heterosexual population."[94] The U.S. Department of Justice reported that the percentage of "Intimate Partner Violence" committed by lesbians was 11.4% compared to .26%

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[91] Maggie Gallagher & Joshua K. Baker, *Demand For Same-Sex Marriage: Evidence From The United States, Canada, and Europe*, 3 INST. FOR MARRIAGE AND PUB. POLICY 1 (2006).
[92] *Id.*
[93] Dailey, *supra* note 81 (citing Gwat Yong Lie & Sabrina Gentlewarrier, *Intimate Violence in Lesbian Relationships: Discussion of Survey Findings and Practice Implications*, 15 J. OF SOCIAL SERVICE RESEARCH 46, (1991).
[94] Dailey, *supra* note 81 (citing David Island et al., Men Who Beat the Men Who Love Them: Battered Gay Men and Domestic Violence 14 (1991)).

for naturally married women. For homosexual men it was 15.4% compared to .05% for naturally married men.[95]

In light of the apparent laissez-faire attitude toward sexual fidelity, it is reasonable to infer that gays and lesbians might have other reasons for pursuing same-sex marriage. According to Paula Ettelbrick, a former legal director of the Lambda Legal Defense and Education Fund, "Being queer is more than setting up house, sleeping with a person of the same gender, and seeking state approval for doing so....*Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society*." (emphasis added). [96]

But any *transforming…of society*[97] that further imperils its most vulnerable citizens, whether directly or by compromising the family structure, is of deep concern. Because, statistically, children of broken or dysfunctional homes face a storm of debilitating consequences:[98]

- A survey of 108 rapists undertaken by Raymond A. Knight and Robert A. Prentky revealed that 60% came from female-headed homes.
- 70% of those described as "violent" came from female-headed homes. 80% of those motivated by "displaced anger" came from female-headed (single-parent) homes.[99]
- Of the juvenile criminals who are a threat to the public, three-fourths came from broken homes.[100]
- Children of divorce are about two to three times more likely to grow up with a parent who struggles with alcoholism than children from an intact marriage.[101]

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[95] Dailey, *supra* note 81 (citing Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence* NATIONAL INSTITUTE OF JUSTICE 30 (2000); Shannan Catalano, *Intimate Partner Violence*, BUREAU OF JUSTICE STATISTICS 11 (2007)).

[96] Dailey, *supra* note 81 (citingWilliam B. Rubenstein, Lesbians, Gay Men, and the Law 398-400 (1993)).

[97] *See id.*

[98] *See generally Broken Families*, HIS HOLY CHURCH (July 21, 2010, 8:09 AM), http://www.hisholychurch.net/ministries/families/broken.php.

[99] *See generally* A. Knight & R. Prentky, *The Developmental Antecedents and Adult Adaptations of Rapist Subtypes,* 14 CRIMINAL JUSTICE AND BEHAVIOR 403, 403-26 (1987) (*as reprinted in, No-Fault Divorce: Proposed Solutions to a National Tragedy*, 2 J. LEGAL STUD.19, 19 (1993)).

[100] DANIEL AMNEUS, THE GARBAGE GENERATION 3 (1990).

[101] *See generally Psychiatric Disorders in America: The Epidemiologic Catchments Area*

- Children of divorced parents are roughly two times more likely to drop out of high school than their peers who benefit from living with parents who did not divorce.[102]
- Girls from a broken family are twice as likely to become teen mothers as girls living with biological parents who have not divorced.[103]
- Seventy percent of long-term prison inmates grew up in broken homes.[104]

These are but a sampling of the grim outcomes inflicted upon a society with a low view of marriage.

Notwithstanding the above, because same-sex marriage is relatively new data as to its specific effects on children is anecdotal. As noted in the Witherspoon report, "The current research on children reared by same-sex couples is inconclusive and underdeveloped – we do not yet have any large, long-term, longitudinal studies that can tell us much about how children are affected…. Yet the larger empirical literature on child well-being suggests that the two sexes bring different talents to the parenting enterprise, and that children benefit from growing up with both biological parents. This strongly suggests that children reared by same-sex parents will experience greater difficulties with their identity, sexuality, attachments to kin, and marital prospects as adults, among other things."[105]

Yet there remain even deeper concerns about the institutional consequences of same-sex marriage itself. Same-sex marriage would further undercut the idea that procreation is intrinsically connected to marriage. It would undermine the idea that children need both a mother and a father, further weakening the societal norm that men should take responsibility for the children they beget. Finally, same-sex marriage would likely corrode marital norms of sexual fidelity, since gay marriage advocates and gay couples tend to downplay the importance of sexual fidelity in their definitions of marriage… For instance, Judith Stacey,

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Study 103 (L. Robins & Darrel Regier eds., 1991).

[102] *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 41 (1994).

[103] *Id.* at 53.

[104] *Id*. at 41.

[105] *Marriage and the Public Good: Ten Principles*, THE WITHERSPOON INSTITUTE 18 (2006).

professor of sociology at New York University and a leading advocate of gay marriage, hopes that same-sex marriage will promote a "*pluralist expansion of the meaning, practice, and politics of family life in the United States"* where "*perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages…*" (emphasis added).[106]

These concerns are reinforced by the fact that in all of the countries where same-sex marriage is legal, the fertility rates are "well below the replacement level of 2.1 children per woman."[107] "These are societies in which child-centered marriage has ceased to be the organizing principle of adult life. Seen in this light, same-sex marriage is both a consequence of and further stimulus to the abolition of marriage as the preferred vehicle for ordering sex, procreation, and child-rearing in the West. While there are surely many unknowns, what we do know suggests that embracing same-sex marriage would further weaken marriage itself at the very moment when it needs to be most strengthened."[108]

V. SAME-SEX MARRIAGE DENIES NATURAL SELECTION

The most vociferous advocates of same-sex marriage are typically committed to a secular world-view and dismiss moral objections to homosexual conduct because they stem from religion. Believing it friendly, or at least neutral, to their cause many look to Natural Selection to explain the origin and continuation of human development. The irony is that, by its very nature, Natural Selection must repudiate same-sex relations.

Natural Selection advances the rigid belief that nature promotes only that which can efficiently reproduce, and this is impossible in a purely homosexual relationship. Homosexual couples must rely on non-homosexual relations in order to produce children. Even non-natural means of procreation depend on the union of a female egg with a male sperm. For this reason it is a virtual certainty that homosexuality is not genetically programmed.

Indeed, the larger scientific community has been mostly silent in recent years as to the existence of a gay gene, perhaps because early claims have

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[106] *Id.* at 18-19.
[107] *Id*. at 19.
[108] *Id*.

all been discredited. The American Psychiatric Association as recently as 2009 stated that, "there is no replicated scientific studies supporting any specific biological etiology for homosexuality."[109] "[T]here is currently no scientific or popular consensus on the exact constellation of experiences that definitively 'qualify' an individual as lesbian, gay, or bisexual."[110] The "more carefully researchers map these constellations-differentiating, for example, between gender identity and sexual identity, desire and behavior, sexual versus affectional feelings, early-appearing versus late-appearing attractions and fantasies, or social identifications and sexual profiles – the more complicated the picture becomes, because few individuals report uniform inter-correlations among these domains."[111]

Simon LeVay, a gay pioneer of these studies, has admitted: "It's important to stress what I didn't find. I did not prove that homosexuality was genetic, or find a genetic cause for being gay. I didn't show that gay men are born that way, the most important mistake people make in interpreting my work."[112]

Lesbian author, Dr. Camille Paglia, is more emphatic: "Homosexuality is not normal. On the contrary it is a challenge to the norm…. Nature exists whether academics like it or not. And in nature, procreation is the single relentless rule. That is the norm. Our sexual bodies were designed for reproduction… No one is born gay. The idea is ridiculous… Homosexuality is an adaptation, not an inborn trait."[113]

Far from aiding proponents of same-sex marriage, Natural Selection arguably presents the most compelling and dispassionate case against it.

VI. MORAL CONSIDERATIONS IN VIEW OF MARRIAGE

Disapproval of homosexual intimacy is bigoted, it is claimed, because it is based on a primitive, mainly religious, understanding of human nature from which we have since evolved. "[R]eligion is the chief obstacle for gay and lesbian political progress."[114] There is no moral difference, it is

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[109] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 92.
[110] *Id.* at 71 (citing Lisa M. Diamond & Rich C. Savin-Williams, Gender and Sexual Identity, in HANDBOOK OF APPLIED DEVELOPMENTAL SCIENCE 101, 102 (Richard M. Lerner et al. eds., 2003).
[111] *Id.* at 72.
[112] *See* Stanton, *supra* note 22, at 135.
[113] *Id*. at 138.
[114] Defendant-Intervener-Appellants' Opening Brief, *supra* note 77, at 101.

argued, between hetero and homosexual relations.

Yet it is necessary to ask upon what objective basis such statements are made? Anti-religious proponents of same-sex marriage frequently argue that withholding marriage to homosexual couples is an *injustice*. But since the appeal to justice is essentially a moral one, this creates a problem; because moral arguments based on Materialism lack persuasive power.[115] However deeply *felt*, what is intended to pass for moral persuasion is, arguably, nothing more than the individual's or group's subjective preference. Or it is the result of genetic programming and therefore detached from any freedom of the will. But how a lot of people feel about an issue cannot be dispositive of moral rightness. If it was, then opponents of California's pro-natural marriage propositions (22 and 8) would not have contested their outcomes on moral grounds since such a clear majority of Californians voted for them.

That proponents do, in fact, rely upon objective moral principles is betrayed by the appeals to value concepts like *tolerance* and *equality*. Moreover, those who rely on a Materialist world-view to justify their own denial of religiously informed moral convictions cannot, at the same time, argue that it is immoral to deny same-sex couples the right to marry. Since for the strict Materialist there is no superintending authority to arbitrate the "rightness" of one person's moral opinions over another's, all such appeals can be little more than "…a tale told by an idiot, full of sound and fury, signifying nothing."[116]

In the words of prominent atheist Michael Ruse: "Now you know that morality is an illusion put in place by your genes to make you a social cooperator, what's to stop you behaving like an ancient Roman? Well, nothing in an objective sense."[117]

Rejecting Same-Sex Marriage is Morally Defensible

"*I WILL not act so disagreeable a part, to my readers as well as myself, as*

[115] *See generally*, *Materialism*, MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/materialism (last visited July 20, 2011) (materialism is a theory that physical matter is the only or fundamental reality and that all being and processes and phenomena can be explained as manifestations or results of matter).
[116] WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5.
[117] Michael Ruse, *God is Dead: Long Live Morality*, GUARDIAN (Mar. 15, 2010, 5:00 PM), http://www.guardian.co.uk/commentisfree/belief/2010/mar/15/morality-evolution-philosophy.

to dwell any longer upon a subject, the very mention of which is a disgrace to human nature."[118]
Sir William Blackstone

That people cannot help but appeal to an objective moral authority is itself strong evidence that it exists.[119] And if true, then how this authority has been understood throughout human history is relevant to the issue of marriage.

Except for adherents of the pagan religions and their many variants sexual acts that fall outside male-female relations have, with near universality, been understood to be morally deviant. Natural Law emphatically supports this conclusion as do the prominent mono-theistic religions: Judaism, Christianity, and Islam. The world's third largest religion, Hinduism, is somewhat silent on the practice, though in the *Laws of Manu* there is a verse in one of the *Dharmasastra* texts that refers to homosexuality as an "unnatural offense."[120] Together, followers of these religions comprise

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[118] 4 WILLIAM BLACKSTONE, COMMENTARIES *165.

[119] *See generally*, C. S. LEWIS, MERE CHRISTIANITY (Harper Collins Pub.1980).

[120] *See, e.g., Bereshit* 19:1-9. *See also Genesis* 19:1-9. *See also Vayiqra* 18:22. *See also Leviticus* 18:22 (the new nation of Israel is forbidden to practice the ways of Egypt including homosexual relations "You shall not lie with a male as with a woman. It is an abomination."). *See also Romans* 1:24-27 ("God also gave them up to uncleanness, in the lusts of their hearts, to dishonor their bodies among themselves, who exchanged the truth of God for the lie, and worshiped and served the creature rather than the Creator, who is blessed forever. Amen. For this reason God gave them up to vile passions. For even their women exchanged the natural use for what is against nature. Likewise also the men, leaving the natural use of the woman, burned in their lust for one another, men with men committing what is shameful, and receiving in themselves the penalty of their error which was due."). *See also* 1 *Corinthians* 6:9 ("Or do you not know that the wicked will not inherit the kingdom of God? Do not be deceived: Neither the sexually immoral nor idolaters nor adulterers nor male prostitutes nor homosexual offenders"). *See also1Timothy* 1:9-10. *See also Qur'an* 7:80-82 ("We also sent Lut: He said to his people: Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds. And his people gave no answer but this: they said, "Drive them out of your city: these are indeed men who want to be clean and pure!""). *See also Qur'an* 27:55-58 ("Would ye really approach men in your lusts rather than women? Nay, ye are a people (grossly) ignorant! But his people gave no other answer but this: They said, 'Drive out the followers of Lut from your city: these are indeed men who want to be clean and pure!' But We saved him and his family, except his wife; her We destined to be of those who lagged behind. And We rained down on them a shower (of brimstone): and evil was the shower on those who were admonished (but heeded not!"). *See also* Brendan Koerner, *Do Hindus Decry Homosexuality?*, Slate (June 15, 2004, 3:58 PM), http://www.slate.com/id/2102443/ (discussing the Laws of Manu).

well over four billion people.[121] In no way does this suggest that numbers alone validate one moral position over another. It does, however, testify to an ancient and resilient conviction that the *practice* of homosexuality is a moral wrong. In the absence of any persuasive scientific, philosophical, or theological argument that would alter the view that the homosexual act is, if not sin, then at least against nature, Postmodernism's embrace of homosexuality has been largely an anti-intellectual one.

If neither facts nor reason can account for the widespread shift in popular perception, what does? Certainly, one factor is the audacious diet of sexually charged entertainment served up by the mass media. Same-sex identification and relationships are now routinely idealized in movies, on TV, in print, and on the stage. Another, as Allan Bloom observed, is the hegemony of moral relativism in the nation's public schools and higher centers of learning and which in turn has spilled into the professions.[122] A further contributing cause is the growing, and arguably menacing, intolerance against competing belief systems to Materialism and its morally neutral variants. Combined, these factors not only predict a change in moral persuasion, they make it all but inevitable.

Responses To Moral Arguments In Support Of Same-Sex Marriage

A common argument for same-sex marriage is that homosexuals deserve equality and that the denial of same-sex marriage deprives them of this right. The answer to this charge depends on what is meant by *equality*.

As discussed, for the Materialist, appeals to moral concepts are illusory because they are either personally subjective or deterministically pre-programmed, leaving as the only remaining rationale the Darwinian maxim: "might-makes-right" where moral equality is imposed upon society either through the courts, collective brow-beating or political compulsion.

Contrast this to the Biblical world-view, which declares that all people are created *Imago Dei* (in God's image) and thus share in a fundamental dignity. Homosexuals possess intrinsic equality under God, and with a durability that Materialism can never offer. That homosexuals also possess equality under the law will be addressed later, though in brief there is no

[121] Michael J. Vlach, *Classical World Religions List*, THEOLOGICAL STUDIES.ORG http://www.theologicalstudies.org/classicalreligionlist.html. (last visited July 21, 2011).
[122] *See generally* BLOOM, *supra* note 20, at 25.

distinction between how marriage laws operate between heterosexuals and homosexuals. Both are treated identically under the prevailing conditions of existing statutes. While it is true that these statutes only recognize unions of opposite-gender couples, this is a property of the definition of marriage itself and no more a denial of equality than it is to refuse men access to the women's public restroom. Existing marriage laws merely acknowledge the intrinsic gender differences essential to the marriage union.

If, however, what is meant by equality is that society, through its laws and institutions, must give moral ascent to the homosexual lifestyle then society has every right, if not responsibility, to resist. Justice necessarily requires that government draw distinctions between different kinds of human behaviors. Judge Walker's statement in *Perry* that "moral views are an insufficient basis upon which to enact a legislative clarification"[123] is simply false. For at the root of every law is a moral verdict. Whether controlling parking, regulating financial markets, or protecting life, laws are moral judgments about what ought, and ought not, to be. That such judgments are frequently animated by religious understandings is in no sense disqualifying. As Barack Obama correctly pronounced in his *Call to Renewal Keynote Address* (June 28, 2006):

> "[S]ecularists are wrong when they ask believers to leave their religion at the door before entering into the public square. Frederick Douglas, Abraham Lincoln, Williams Jennings Bryan, Dorothy Day, Martin Luther King – indeed, the majority of great reformers in American history – were not only motivated by faith, but repeatedly used religious language to argue for their cause. So to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity. *Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.*"[124] (emphasis mine)

Thus, as regards to same-sex marriage, the burden is on advocates to advance a reasonable basis for altering the testimony of either Natural Law, Biblical revelation, or any other standard of moral truth upon which

[123] Defendant-Intervener-Appellants' Opening Brief, *supra* note 77, at 130.
[124] Defendant-Intervener-Appellants' Opening Brief, *supra* note 77, at 128 (quoting Barack Obama's Call to Renewal Key Note Address (June 28, 2006)).

an objective judgment can be made. So far proponents have failed.

The second common argument same-sex marriage proponents make is that denying same-sex marriage to homosexuals is wrong because it unfairly discriminates. According to *Webster's* dictionary the word *discriminate* means to "make a distinction" or "to use good judgment."[125] The responsible society must engage in this practice. It must make a distinction, for example, between a definition of marriage that has proven itself essential for a thriving culture over one that carries such potential for harm. But there is another definition of discriminate that is likely what same-sex marriage proponents have in mind, which is to treat people on a basis other than personal merit, as in respect to their nationality or color. Of course this is a legitimate objection. It is misapplied, however, because same-sex marriage involves - at its essence - an *act*, whereas nationality and color do not. There is nothing *intrinsic* to one's place of origin or skin color that in any way raises a moral question.

One might ask those who make the discrimination charge if there is any marriage arrangement that they would deny society - polygamous, polyamory, incestuous - so long as it was between consenting partners? If the answer is no, then at least the subjects are being consistent, though it is fair to question their wisdom. If the answer is yes, then the charge of "bigot" applies with no less force than it does for same-sex marriage opponents, and arguably more.

Meaningless slogans are neither helpful nor persuasive to the marriage debate. Every rational person, on both sides of the argument, is entitled to make distinctions based on what is best for themselves, society, their families, and the larger community around them.

VII. SAME-SEX MARRIAGE IS AN OFFENSE TO THE AMERICAN LEGAL TRADITION

"*The law is the witness and external deposit of our moral life*."[126]
Oliver Wendell Holmes, Jr.

"Law is justice," summarized Frederic Bastiat.[127] But what defines justice

[125] *Discriminate*, MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/discriminate (last visited Aug. 1, 2011).
[126] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 459 (1897).

if not "that which conforms to *righteousness*," or alternatively, "the practice of *virtue* to others?"[128] As applied to marriage, when courts render decisions based on what is culturally expedient instead of what is virtuous, can it ever be said that justice has been served?

One result of Postmodernism is the neutering of the etymology of certain words. The Ninth Edition of *Black's Law Dictionary*, for instance, defines justice simply as: "The fair and proper administration of laws."[129] Yet even allowing for this emasculated meaning the question persists: by what objective authority is *fairness*, or *properness*, determined?

Prior to *Griswold v. Connecticut* (1965)[130] where, based on a right of privacy, it was held that a state could not withhold contraceptives to artificially limit procreation among married couples, one is challenged to find anything in the prior two centuries of U.S. legal history that could even remotely have predicted a basis for same-sex marriage. "Marriage between two persons of one sex could have no validity, as none of the ends of matrimony could be accomplished thereby. It has always, therefore, been deemed requisite to the entire validity of every marriage…that the parties should be of different sex."[131]

However, the opinions of the Supreme Court reveal a gradual rejection of Natural Law that occurred decades in advance of the popular culture. Moreover, a review of the Court's application of the Due Process Clause tells the story of how Postmodern legal thought has made same-sex marriage not only possible, but *just*.

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[127] FREDERIC BASTIAT, THE LAW: A CLASSIC BLUEPRINT FOR A JUST SOCIETY 71 (2d ed. 1998).

[128] MERRIAM WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1228 (Phillip Babcock ed., 3d. ed. 1986) (Justice comes from the Latin word for just and is defined as "conformity to such principle or ideal [righteousness]. …the practice of virtue toward others. …the quality of conforming to positive law and also to divine or natural law. …[C]onformity to truth…").

[129] BLACK'S LAW DICTIONARY 942 (9th ed. 2009) (additionally the root word, just, is defined simply as "Legally right; lawful; equitable." with any moral righteous connotation excluded).

[130] Griswold v. Connecticut, 381 U.S. 479 (1965).

[131] Defendant-Intervener-Appellants' Opening Brief, *supra* note 77, at 71 (citing Joel Prentiss Bishop, Commentaries on the Law of Marriage & Divorce, § 225 (1852)).

The Due Process Clause of the Fourteenth Amendment

> "*… nor shall any State deprive any person of life, liberty, or property, without due process of law.*"[132]

From this compact expression has emerged a ponderous weight of law which has served to protect individuals against unwarranted government intrusion and alternatively *justify* abortion, sodomy, domestic partnerships, and the disconnection of marriage from its ancient roots.

It is needful, however, to first recognize what the Due Process Clause does not say. It does not say that a state can never deprive any person of life, liberty, or property. States regularly do all three. The Fourteenth Amendment to the Constitution says rather that a state cannot do so without "due process of law." By its very language then, the Fourteenth Amendment does allow for the conditional curtailing of one's liberty interests including rights seen as fundamental. The more relevant question is whether the Fourteenth Amendment, or any provision of the United States Constitution, compels states to adopt a definition of marriage that "may weaken [that] vital institution…or its ability to further the important interests it has traditionally served?"[133]

The idea of a *fundamental* right, as something weightier than ordinary rights and liberties, stems from the incorporation of the Bill of Rights to the states beginning with the Fifth Amendment's guarantee against self incrimination in *Twining v. New Jersey* (1908).[134] Today most of the

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[132] U.S. CONST. amend. XIV, § 1.

[133] Defendant-Intervener-Appellants' Opening Brief, *supra* note 77, at 120.

[134] Twining v. New Jersey, 211 U.S. 78 (1908) (where incorporation of the Fifth Amendment to the states was raised but denied explaining. "But it is argued that this privilege is one of the fundamental rights of national citizenship, placed under national protection by the 14th Amendment, and it is specifically argued that the 'privileges and immunities of citizens of the United States,' protected against state action by that Amendment, include those fundamental personal rights which were protected against national action by the first eight Amendments; that this was the intention of the framers of the 14th Amendment, and that this part of it would otherwise have little or no meaning and effect."); *see also* Gitlow v. New York, 268 U.S. 652 (1925) (where it was held incorporation of the 1st amendment to the states applied explaining that "For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

rights in the first eight amendments to the United States Constitution have been deemed "fundamental," including: the right of assembly, the right of association, the right to an attorney in capital cases, the right to be secure in one's person, house, papers and effects, the right to freedom of speech, and freedom of the press.[135]

Fundamental rights are distinguished from others in part because they raise the specter of strict scrutiny, which by reason of the Due Process Clause "forbids the government to infringe [upon]... 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[136] As a side note, while it is perhaps comforting that the Bill of Rights are held to such an unyielding standard of review, the "incorporation" doctrine has not been without controversy. In *Walz v. Tax Commission* (1970)[137] the Court, interpreting its earlier decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), noted that it had applied the First Amendment as *against* the states when it restricted their freedom to endorse Judeo-Christian behaviors over competing world-views, specifically, tolerance for school prayer. The Court noted that the incorporation doctrine had created an unintended "revolution" by "reversing the historic position that the foundations of those liberties rested largely in state law."[138]

More recently the Court has employed the Fourteenth Amendment's Due Process Clause to develop an entirely new class of protected liberties. Under the moniker of *Substantive Due Process* the evolving belief is that the Due Process Clause, in addition to securing *procedural* safeguards against government intrusion can preclude interferences altogether against rights deemed particularly significant, rights which although nowhere

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[135] *See Bill of Rights in Action*, CONSTITUTIONAL RIGHTS FOUNDATION (Spring, 1991), http://www.crf-usa.org/bill-of-rights-in-action/bria-7-4-b.html.

[136] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 303 (1993)).

[137] Walz v. Tax Commission, 397 U.S. 664 (1970).

[138] *Walz*, 397 U.S. at 701 (Douglas, J., dissenting) ("In affirming this judgment the Court largely overlooks the revolution initiated by the adoption of the Fourteenth Amendment. That revolution involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in state law."); *see also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments….").

enumerated in the Constitution are held constitutionally *substantive*.

Having firmly established the doctrine,[139] in the last half century the Court has employed Substantive Due Process to elevate an assortment of once controversial behaviors to the status of protected "liberty interests." This has only been possible, however, through a denial of the Court's own longstanding legal history. The serpentine path Postmodern courts have travelled in order to find that same-sex marriage is a protected liberty interest is but the latest example.

Marriage: The Foundation of Family, Society, and Civilization

In *Goodridge*, same-sex couples were denied marriage licenses by the Massachusetts Department of Public Health, an agency charged by state statute to enforce all laws "relative to the issuance of marriage licenses and the keeping of marriage records."[140] Similarly, in the California case *In Re Marriage Cases*, same-sex couples were denied marriage licenses by application of Section 308.5 of the state's Family Code, enacted through state initiative Proposition 22, and which provided in full: "Only marriage between a man and a woman is valid or recognized in California."[141] In both cases, plaintiffs claimed that the denial of marriage licenses violated the states' respective constitutions on federal Substantive Due Process grounds (as well as Free Speech and Equal Protection).[142]

To prove a Substantive Due Process violation the Supreme Court, in

[139] *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).
[140] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 314.
[141] *In re* Marriage Cases, 43 Cal.4th 757, 796 (2008).
[142] *Id*. at 809 ("Plaintiffs contend that by limiting marriage to opposite-sex couples, California's marriage statutes violate a number of provisions of the California Constitution. In particular, plaintiffs contend that the challenged statutes violate a same-sex couple's fundamental "right to marry" as guaranteed by the privacy, free speech, and due process clauses of the California Constitution (CAL. CONST., art. I, §§ 1, 2, 7), and additionally violate the equal protection clause of the California Constitution (CAL. CONST., art. I, § 7). Because the question whether the challenged aspect of the marriage statutes violates or impinges upon the fundamental right to marry may be determinative in deciding the appropriate standard of review to be applied in evaluating plaintiffs' equal protection challenge, we first address the question whether the challenged statutes independently infringe a fundamental constitutional right guaranteed by the California Constitution."); *see also Goodridge*, 440 Mass. at 320 ("The plaintiff's claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner?").

Washington v. Glucksberg (1997) established a two-fold test:

> First, … the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, '*deeply rooted* in this Nation's history and tradition,' (emphasis mine)… ('so rooted in the traditions and conscience of our people as to be ranked as fundamental'), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest… As we stated recently in Flores, the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at *all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.[143]

As to which rights are worthy of the tag "fundamental," the Court applied a test similar to the language of *Glucksberg*.

> [J]udges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]… as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The inquiry is whether a right involved is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'…"[144]

Whether marriage itself qualifies as a fundamental right under this or any other legal test has not been seriously challenged. That marriage is

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[143] *Glucksberg*, 521 U.S. at 720-721.

[144] Powell v. Alabama, 287 U.S 45, 67 (1932); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("The commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Twining v. New Jersey, 211 U.S. 78, 106; Rogers v. Peck, 199 U.S. 425, 434; Maxwell v. Dow, 176 U.S. 581, 604; Hurtado v. California, 110 U.S. 516; Frank v. Mangum, 237 U.S. 309, 326; Powell v. Alabama, 287 U.S. 45, 67).

"essential to ordered liberty" has deep Constitutional support. Yet this recognition, rather than aiding the argument for same-sex marriage, does the opposite. For beginning in the nineteenth century the Court's opinions universally tied the definition of marriage to the ancient, and arguably religious, understanding that: 1) it is exclusively for opposite-gender couples, and 2) it is inextricably coupled to procreation and the raising of families. On the issue of whether the territory of Utah could punish those who defiled marriage through bigamy the Court in *Murphy v. Ramsey* (1885) wrote:

> For certainly no legislation can be supposed more wholesome and necessary…, than that which seeks to establish it on the basis of *the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.* And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[145] (emphasis mine)

Similarly, in *Maynard v. Hill* (1888), the Court said:

> While marriage is often termed by text writers and in decisions of courts as a civil contract…, it is something more than a mere contract…. *It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.*[146] (emphasis mine)

In *Meyer v. Nebraska*, (1923), the Court recognized, "the right of the individual …to *marry, establish a home and bring up children*."[147] More

[145] Murphy v. Ramsey, 144 U.S. 15, 45 (1885).
[146] Maynard v. Hill, 125 U.S. 190, 211 (1888).
[147] Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (Meyer is also the seminal case to ground the right to marriage in the Due Process Clause. Subsequent cases to follow the trend include Griswold v. Connecticut, 381 U.S. 479, 485 (1965), Loving v. Virginia, 388

recently in *Zablocki v. Redhail* (1978), a case often touted by same-sex marriage proponents, the Court affirmed "the fundamental character of the right to marry."[148] However, this right assumes opposite-sex marriage as it is the only kind that naturally results in procreation. As the Court asserted in *Skinner v. Oklahoma*, (1942) (and repeated in *Zablocki*): "*[M]arriage and procreation* are fundamental to the very existence and survival of the race."[149] The Court in *Zablocki* also tied the right to marriage to a "traditional family setting."[150]

This understanding of marriage, as a "holy estate," and the "foundation" of society by means of natural procreation within stable and traditional families remained unaltered throughout two centuries of American jurisprudence. Even during the moral maelstrom of the 1960's, the Court in *Griswold*, albeit reluctantly, acknowledged that, "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being *sacred* (emphasis mine)."[151]

With *Goodridge* (2003), the linkage between marriage and its time honored meaning was summarily severed. Abandoning the historical record, the Massachusetts court advanced a technical argument, that simply because no religious ceremony was "required to validate a Massachusetts marriage," marriage itself was therefore a "wholly secular institution."[152] The court in *Goodridge* not only separated the meaning of marriage from its previously "sacred" judicial character, it rejected any religiously informed moral objections to expanding its definition. And because marriage had already been deemed a fundamental right under

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U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978), and Turner v. Safley, 482 U.S. 78 (1987)).

[148] *Zablocki*, 434 U.S. at 386 ("By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry."); *see* Califano v. Jobst, 434 U.S. 47 (1977) (The court upheld an Act terminating social security benefits to a dependent child upon marriage to an individual not qualified to receive benefits under the Act. The court determined the Act did not directly interfere by virtue of legal obstacles with the freedom to make marital decisions).

[149] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[150] *Zablocki*, 434 U.S. at 386.

[151] *Griswold*, 381 U.S. at 486.

[152] Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 321.

Substantive Due Process, the court concluded there was no longer any legal reason to omit same-sex unions from its meaning.

So contrary is the holding in *Goodridge* to the understanding of marriage that the court itself was forced to admit: "…[O]ur decision today [establishing same-sex marriage] marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries."[153]

While *Goodridge* signaled a bold rejection of Stare decisis and Natural Law precedent, subsequent court decisions in other jurisdictions have exercised restraint. The Court of Appeals (Ninth Circuit) in *Smelt v. County of Orange* (2005) held that: "The history and tradition of the last fifty years have not shown the definition of marriage to include a union of two people regardless of their sex."[154] The Hawaii Supreme Court, likewise, while acknowledging a fundamental right to marriage said it was now being asked to establish something that did not yet exist under law:

> Therefore, the precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a *new fundamental right*.[155](emphasis mine)

In addition to the opinion of *Smelt* and *Baehr*, today all but seven states have either enacted Defense of Marriage Acts or amended their state constitutions defining marriage as opposite-sex unions.

Thus, the long narration of both statutory and American case law has established that marriage, with or without the protection of Substantive Due Process, is a fundamental liberty interest. But apart from, and in opposition to, the reasoning of *Goodridge* or its federal progeny, *Perry*, there is no basis in either history or law that this liberty includes within its definition same-sex marriage.

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[153] *Id*. at 337.
[154] Smelt v. County of Orange, 374 F. Supp. 2d 861, 878 (C.D. Cal. 2005).
[155] Baehr v. Lewin, 852 P.2d 44, 56-57 (1993).

Privacy: The Right Above All Other Rights

> "*This effectively decrees the end of all morals legislation*". Justice Scalia in *Lawrence v. Texas* (2005)

Same-sex marriage advocates draw close attention to the fundamental right to marry while deliberately sidestepping what marriage means. "Contrary to Plaintiff's understanding, the reservation of marriage to opposite-sex couples is not a limitation on who can marry, but is the principal defining characteristic of what marriage is – the union of a man and a woman."[156]

To escape the obvious, same-sex marriage advocates have employed a two-pronged strategy. The first prong involves abstracting, or deconstructing, marriage into component parts. Akin to the approach developed by Tom Brougham to establish domestic partnerships in Berkeley, the procreation and child-rearing dimensions of marriage are de-emphasized and relegated to non-essential ingredients. What is then left is merely the contractual *partnership* between consenting partners. Using this reasoning Judge Walker, in *Perry*, could define marriage merely as, "…the state recognition and approval of a couple's choice to live with each other…form a household… join in an economic partnership and support one another and any dependents."[157]

The second prong of the strategy focuses legal arguments on court rulings that interpret the right to marriage as coming from, and subordinating it to, the broader right to privacy.[158] As a legal strategy this has proven shrewd. For while even modern courts have shown reluctance in breaking with centuries of legal history they've exhibited something akin to enthusiasm for expanding the right and meaning of *privacy* and challenging laws that are seen to interfere with it, especially those that bear on sexual relationships.

In its now notorious abandon of words the Court in *Griswold* declared,

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[156] Brief for The Family Research Council as Amici Curiae Supporting the Intervening Defendants-Appellants, Perry v. Schwarzenegger, 704 F. Supp. 2d 921(2010) (No. 10-16696).

[157] *Perry*, 704 F.Supp.2d at 961.

[158] *See generally* Zablocki v. Redhail, 434 U.S. 374, 386 (which tied the fundamental right of marriage to privacy under the Due Process Clause).

"… the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance…". From this it was discovered that, "[v]arious guarantees create zones of privacy."[159] Eight years later the Court in *Roe v. Wade* (1973) pronounced that although "[t]he Constitution does not explicitly mention any right of privacy… [it] has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution… (and) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[160]

That a right based on a concept of privacy could be found to justify abortion was a harbinger. For if the killing of unborn children could be justified certainly other acts, once considered abhorrent, could also be brought under the umbrella of privacy's protection.

In a surprising, if not short lived, bucking of the trend the Court in *Bowers v. Hardwick* (1986) upheld a Georgia law criminalizing sodomy between consenting adults. Applying the Due Process test later adopted by *Glucksberg*, the Court found that: "Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."[161]

As to whether sodomy was a protected right…

> There should be, therefore, great resistance to expand the substantive reach of [the Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. *Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.* The claimed right pressed on us today falls far short of overcoming this resistance.[162] (emphasis mine).

In his concurring opinion Justice Burger wrote:

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[159] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).
[160] Roe v. Wade, 410 U.S. 113, 152-53 (1973).
[161] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
[162] Bowers v. Hardwick, 478 U.S. 186, 195 (1986).

> *…[I]n constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy…* [T]he proscriptions against sodomy have very "ancient roots." Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization... Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named."[163] (emphasis mine)

Subsequent courts have considered *Bower's* linkage of American legal history to "ancient roots" and "Western Christian Tradition" an anachronism. This became starkly evident when only six years later the Court in *Planned Parenthood v. Casey* (1992)[164] significantly elevated the privacy right as a means to justify the now appurtenant right to abortion. *Casey* also further separated marriage from procreation and the nuclear family by specifically identifying them as elements that were not necessarily linked.

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education… Our cases recognize the *right of the individual, married or single,* to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. [165](emphasis in original)….
>
> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human

[163] 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16 (*construed in* Bowers v. Hardwick, 478 U.S. 186, 196-197 (1986) (Burger, C.J., concurring)).
[164] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992).
[165] Eisenstadt v, Baird, 405 U.S. 438, 453 (The court in *Eisenstadt* expanded the *Griswold* right to use contraceptives to individuals outside of marriage).

life.[166] (emphasis mine)

In addition to justifying the killing of unborn children, the privacy right would now provide for proponents of non-traditional lifestyles the legal basis to re-define marriage according to a person's unique "concept of existence" and sense of "personal autonomy."[167] Where the founders and earlier Courts understood liberty as the freedom to pursue one's personal, yet noble, ambitions because they were in accord with the laws of the created order, in a stunning reinterpretation the Court in *Casey* defined liberty as the freedom to behave in accord to one's own "personal autonomy" within "zones" that were authorized by the Constitution.

With *Casey* the die was cast. The Due Process Clause's heralded right of privacy was suddenly the right above all other rights, and where liberty became license insofar as sexual matters were concerned. So it was hardly surprising when eleven years later, relying on *Casey*, the Court in *Lawrence v. Texas* (2003) renounced *Bowers* and distanced itself from the legal reasoning in that opinion, and which was grounded in Western civilization. Concerning the Texas law that, similar to *Bowers*, criminalized sodomy the Court said:

> [T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family… These considerations do not answer the question before us, however.... '*Our obligation is to define the liberty of all, not to mandate our own moral code*.'[168](emphasis mine)

The Court in *Lawrence* struck Texas' anti-sodomy law on the grounds that it "…furthers no legitimate state interest which can justify its intrusion

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[166] *Planned Parenthood*, 505 U.S. at 852.

[167] *Id.* at 865 (Declaring itself first among equals, the court declared: "The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court.... The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.").

[168] Lawrence v. Texas, 539 U.S. 558, 570 (citing Planned Parenthood of Se. Pa. *v.* Casey,505 U. S. 833, 850 (1992)).

into the *individual's personal and private life*."[169] (emphasis mine) Yet the Court relied not upon the history and legal traditions of American jurisprudence, but on the authority of recent European philosophy and law to ground this holding. As it candidly admitted:

> The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. *A committee advising the British Parliament* recommended in [the] 1957 repeal of laws punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, §1… Of even more importance, almost five years before *Bowers* was decided the *European Court of Human Rights* considered a case with parallels to *Bowers* and to today's case… The court held that the laws proscribing the conduct were invalid under the *European Convention on Human Rights.Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) ¶; 52. *Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.*[170](emphasis mine)

Apparently, the fact that the Postmodern legal culture of Europe is a renouncement of Western civilization, not a member of it, was lost on the Court. More relevant, and as Justice Scalia noted in his dissent, was what *American* jurisprudence had believed about the practice: "Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights."[171]

To achieve the desired result, however, the Court in *Lawrence* had to accentuate foreign law and very recent legal decisions to overcome America's own "deeply rooted" history. As the majority argued: "The Nation's laws and traditions *in the past half century* are most relevant

[169] *Id*. at 560.
[170] *Id*. at 572-73.
[171] *Id*. at 596.

here. They show an *emerging awareness* that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[172] (emphasis mine) But this "emerging awareness", as Scalia observed,

> [I]s by definition 'not deeply rooted in this Nation's' history and tradition[s], as we have said 'fundamental right' status requires… The Court's discussion of these foreign [European] views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court… should not impose foreign moods, fads, or fashions on Americans'[173]

On the Court's finding that the state of Texas had no rational basis to proscribe sodomy, Scalia also observed,

> The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers.*…the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual…[emphasis added]. The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that 'the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,'… *This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational-basis review.*[174] (emphasis mine).

In a bow to prevailing public sensitivities the majority in *Lawrence*

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[172] *Id*. at 559.
[173] *Id*. at 598 (citing Foster v. Florida, 537 U.S. 990, n. (2002)).
[174] *Id*. at 599.

stopped short of declaring homosexual sodomy a fundamental right: "Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion, '[R]espondent would have us announce ... a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.'"[175]

Yet by elevating sodomy as a protected liberty interest under the 14th Amendment the Court was inviting the argument for same-sex marriage, as the Massachusetts court in *Goodridge* and its progeny have forcefully noted. As Judge Walker expressed in *Perry*:

> The arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence*, when the Court asked whether a majority of citizens could use the power of the state to enforce "profound and deep convictions accepted as ethical and moral principles" through the criminal code. The question here is whether California voters can enforce those same principles through regulation of marriage licenses. They cannot.[176]

Lawrence notwithstanding, many lower courts continue to show restraint. The Arizona Court of Appeals held in 2003: "Although same-sex relationships are more open and have garnered greater societal acceptance in recent years, same-sex marriages are neither *deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty*."[177] (emphasis mine) Likewise, the Court of Appeals of New York in 2006 held: "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state…would, to a certain extent, *extract some of the deep roots* that support its elevation to a fundamental right."[178] (emphasis mine)

In the United States, legal arguments for re-defining marriage often turn on the ever expanding super-right of privacy and the Court's gratuitous paean to sexual "personal dignity and autonomy." The irony here should not be overlooked. For, by definition, privacy speaks to that which is done

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[175] *Id*. at 586.
[176] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1001 (N.D. Cal. 2010).
[177] Standhardt v. Superior Court, 77 P.3d 541, at 459 (Ariz. Ct. App. 2003).
[178] Brief for the Family Research Council *supra* note 153(citing Samuels v. New York State Dep't of Health, 811 N.Y.S.2d 136, 141 (2006)).

in secret - hidden from the observation of others.[179] Though the private sexual act forms an essential aspect of marriage, marriage itself is laid bare to all the world. As "the foundation of the family and of society,"[180] marriage has a profoundly *public* character. Anything less misapprehends what marriage is. As the Court in *Maynard v. Hill* (1888) wrote, marriage is "an institution regulated and controlled by *public* authority…for the benefit of the *community*."[181] (emphasis mine).

Moreover, prior to the decision in *Lawrence* there were few legal prohibitions left against private homosexual conduct, and those that did exist were rarely enforced. It is likely then, that concern over private conduct is not what is at issue. The underlying objective is understandably emotional and more humanly elemental. It is that society *value* same-sex relationships in the same way it does opposite-sex relationships, and proponents see marriage as the last public statement standing in the way of that goal. Same-sex marriage is, ironically, a fight for moral approval. As Judge Walker wrote in *Perry*, "Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less *valuable* than opposite-sex relationships."[182] (emphasis mine)

But note; the effect of *Perry*, whether or not intended, is to require the community to acknowledge the moral value of same-sex marriages while simultaneously denying the community's moral reservations against it. ("… [M]oral disapproval of homosexuality…is not a proper basis on which to legislate."[183]). Notwithstanding the inherent contradiction, relying on a right of privacy to justify this aim is disingenuous and logically incorrect. The government's issuance of the marriage license, the ceremony and open celebration that frequent weddings, the wearing of rings to announce one's marital status and intention of fidelity, and the civic commitments joined by married partners in regards to contracts, health, and family all speak to the enduringly public nature of marriage. That it should be redefined to include same-sex unions on the grounds of

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[179] *Privacy*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/privacy (Defines privacy as the quality or state of being apart from company or observation,seclusion, freedom from unauthorized intrusion, one's right to privacy, a place of seclusion, secrecy, a private matter, and secret) (last visited July 25, 2011).

[180] Maynard v. Hill, 125 U.S. 190, 211 (1888).

[181] *Id*. at 213.

[182] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 935 (N.D. Cal. 2010).

[183] *Id*. at 1002.

privacy is a specious twist of meaning, unsupported by reason.

As regards the Due Process Clause, there can be no conclusion reached but that same-sex marriage fails in light of any legal insight "*deeply rooted in this Nation's history and tradition*,"[184] whether according to Natural Law, or otherwise known to Western civilization.

Equal Protection And The Establishment Clause

Certainly, the Due Process Clause is not the only legal ground upon which proponents of same-sex marriage rely. The Establishment Clause and especially the Equal Protection Clause are frequently corollary arguments in any related contest. Yet the super-right of privacy under the Due Process Clause undergirds both and will likely form the nucleus of any future Supreme Court decision. In *Lawrence*, although petitioners based their case primarily on the Equal Protection Clause, the Court chose rather to support its decision on Due Process grounds: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[185]

As discussed, despite the holding in *Lawrence* the Court has yet to find a *fundamental* right to homosexual sodomy.[186] Nor has homosexual identity been shown by the Court to be an *immutable* human characteristic for purposes of strict scrutiny.[187] Aside from the curious statement in *Perry* that homosexuals "appear" to be a suspect class[188], at least ten federal circuit courts have ruled that they, in fact, are not.[189] "[H]omosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny…."[190] Recent evidence, in fact, suggests that

[184] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
[185] Lawrence v. Texas, 539 U.S.558, 575 (2003); *Id*. at 558 (" [T]he case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty interest under the Due Process Clause of the Fourteenth Amendment to the Constitution.").
[186] *Id*. at 586.
[187] Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (the Court found that heightened scrutiny only applied to groups defined by "[A]n immutable characteristic determined solely by the accident of birth.").
[188] Perry v, Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) ("All classifications based on sexual orientation appear suspect….").
[189] Defendant-Intervener-Appellants' Opening Brief, *supra* note 78, at 88.
[190] High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990).

sexual identity, at least in part, is a product of environment and sexual experience, a phenomenon referred to by some as "erotic plasticity" and which especially affects women.[191] In support, researcher Walter Schumm found, in a recent study published by the National Institutes of Health, that gay parents are "far more likely" to raise gay children than heterosexual ones.[192] "[E]vidence is presented from three different sources, contrary to most previous scientific opinion, even most previous scientific consensus, that suggests intergenerational transfer of sexual orientation can occur at statistically significant and substantial rates, especially for female parents or female children."[193]

And, as discussed, there is no consensus among the scientific community on the experiences and attributes that would "qualify" someone as "lesbian, gay, or bisexual."[194] Sexual attraction, behaviors, and gender identity are observed to ebb and rise with social circumstance and "few individuals report uniform inter-correlations among these domains."[195]

Unlike the empirically verifiable classifications the Court has previously identified for heightened scrutiny, the distinguishing characteristics of homosexuality are essentially behavioral in nature. There exists no relevant analog between the essential character of homosexuality and a person's race, gender, or place of origin. For this reason *Loving v. Virginia* (1967)[196] and other related cases that deal with these classes are

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[191] Leonard Sax, *Why Are So Many Girls Lesbian Or Bisexual*, PSYCHOLOGY TODAY (April 3, 2010), http://www.psychologytoday.com/node/40583. (Article cites evidence that historically the percentage of lesbians or bisexuals in society is 2%, but that in highly sexualized cultures the percentage is seen to rise. The percentage of young women who reported they were either lesbian or bisexual was 14.4%. The percentage of young men who identified themselves as homosexual in a Cornell study was 5.6%. "Twenty years ago, when I opened my practice in a suburb of Washington DC, it was rare to find 14-year old boys who were looking at pornography every day. Today it's common; in fact it's becoming the norm. When I meet with a group of 14-year old boys and I ask them, "how many of you guys subscribe to a porn site? All hands go up.").

[192] *See* Walter Schumm, *Children of Homosexuals More Apt to be Homosexuals*, PUBMED (July 20, 2010), http://www.ncbi.nlm.nih.gov/pubmed/20642872.

[193] *Id.*; *See also* Paul Kix, *Study: Gay Parents More Likely to Have Gay Kids*, AOL NEWS (Oct. 17, 2010, 4:14 PM), http://www.aolnews.com/science/article/study-gay-parents-more-likely-to-have-gay-kids/19668089.

[194] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 89.

[195] *Id*. at 72, 90.

[196] Loving v. Virginia, 388 U.S. 1 (1967). (Ordered a federal ban on anti-miscegenation (inter-racial marriage) statutes based on Due Process and Equal Protection. Also established marriage as a "fundamental" right); *see also* Turner v. Safley, 482 U.S. 78 (1987) (The Court there struck down a prison regulation prohibiting inmates from

distinguished. Gays and lesbians, furthermore, have shown a political strength vastly disproportional to their numbers, a fact which necessarily disqualifies them for heightened scrutiny under *City of Cleburne v. Cleburne Living Center* (1985), and as was also decided under *High Tech Gays* (1990).[197]

Neither can it be shown that existing marriage laws have a discriminatory *intent*. Rather, they reflect the historical and self-evident recognition that marriage is, by definition, an opposite-gender institution. A union of any different character cannot be marriage. The mere fact that homosexuals do not desire such a union raises no Equal Protection objection.[198]

Since gays and lesbians have yet to be deemed a protected class by the Court, then according to the holding in *Cleburne* a state needs only a rational basis to uphold marriage as between opposite-gender couples. Furthermore, legislation enjoys a "strong presumption of validity" and "cannot run afoul of the [Fourteenth Amendment] if there is a rational relationship between disparity of treatment" among certain groups "and some legitimate government purpose."[199]

The Court's decision in *Heller v. Doe* (1993) puts the rational basis burden squarely, "on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it, whether or not the basis has a foundation in the record."[200] (emphasis mine). *Perry*, however, turns *Heller* on its head by requiring the people of California to defend their passage of Proposition 8, instead of requiring its opponents to justify their opposition by negating "every conceivable purpose" of the legislation. Judge Walker cited as "findings of fact" eighty instances of opponent's oral testimony supporting same-sex marriage, while denying the

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marrying without a warden's permission.).

[197] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (See generally regarding strict scrutiny. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest… The general rule gives way, however, when a statute classifies by race, alienage, or national origin).

[198] Baker v. Nelson, 409 U.S. 810 (1972) (Five years after the decision in *Loving*, the Court unanimously rejected a gay's couples Due Process and Equal Protection challenges to Minnesota's traditional marriage laws for want of a federal question).

[199] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 76 (citing Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867 And because "the institution of marriage has always been, in our federal system, the predominate concern of state government…rational basis review be particularly deferential.").

[200] *Id*. at 33.

admissibility of even a single occasion of proponents' testimony. The court in *Perry* failed to distinguish any evidence from the prodigious case history, scholarly writings, academic studies, or the record of state and federal legislative analysis that uniformly support traditional marriage. *Perry's* distaste for Proposition 8 and its supporters reasoning was summarily dismissed with the conclusion: "The evidence at trial…uncloaks the most likely explanation for its passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples."[201]

The basis for traditional marriage, however, as expressed by the United States Congress, is as legislatively rational as it is enduring: "At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children."[202]

Obviously, the fact that males and females are able to perform many of the same roles in society cannot mean, as the court in *Perry* seems to suggest, that they *are* the same. Apart from the court's breathtaking assertion that "[t]he gender of a child's parent is not a factor in a child's adjustment,"[203] the "[r]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents…"[204] "To fail to acknowledge even our most basic biological differences…risks making the guarantee of equal protection superficial, and so disserving it."[205] Just because the genders are legally equal cannot mean that they are literally equal.

Despite *Perry's* liberal reliance on *Lawrence* to undergird its holding, Justice O'Conner was careful to distinguish the decision in *Lawrence* striking down anti-sodomy laws from what the Court considered valid rational basis prohibitions against same-sex marriage:

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[201] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).
[202] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 77.
[203] *Perry*, 704 F.Supp.2d at 980.
[204] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 92 (citing Kristen Anderson Moore, et' al., Marriage From A Child's Perspective, Child Trends Research Brief 6 (June 2002)).
[205] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 80 (*citing* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 471(1981)).

> Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations - the asserted state interest in this case - *other reasons exist* to promote the institution of marriage beyond mere moral disapproval of an excluded group.[206] (emphasis mine)

Earlier, in *Baker v. Nelson* (1972),[207] the Supreme Court dismissed on the merits "for want of substantial federal question" an appeal from the Minnesota Supreme Court that dealt with the same question the court in *Perry* was presented with, whether that state's "refusal to authorize same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment."[208] Likewise, the Ninth Circuit in *Adams v. Howerton* (1982)[209] found that Congress's decision to confer spouse status…only upon the parties to heterosexual marriage has a rational basis and therefore comports with the due process clause and its equal protection requirements.[210]

In fact, the holding in *Perry* conflicts with "every other state or federal appellate court to address the validity of the traditional opposite-sex definition of marriage under the Federal Constitution…"[211]

Such views will face withering assault as public support for natural marriage continues to wilt, especially with the Court itself taking an active role in fostering these changing perceptions. In *Romer v. Evans* (1996),[212] a case in which a Colorado Amendment precluded towns in the state from *specially* protecting homosexuals, "the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection

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[206] Lawrence v. Texas, 539 U.S. 558, 585 (2003).
[207] Baker v. Nelson, 409 U.S. 810 (1972).
[208] Defendant-Intervener-Appellants' Opening Brief, *supra* note 76, at 44 (*citing Baker*, 409 U.S. at 810 (1972)).
[209] Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).
[210] *Id*. at 1042-43.
[211] Defendant-Intervenors-Appellants' Opening Brief, *supra* note 78, at 46.
[212] Romer v. Evans, 517 U.S. 620, 636 (1996) (The case struck down a Colorado amendment that would have prevented a town in the state from specially protecting homosexuals against discrimination. Justice Scalia, in his dissent, wrote: "Amendment 2 is a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of laws. That objective, and the means to achieve it, are… unimpeachable under any constitutional doctrine hitherto pronounced....").

Clause… We concluded that the provision was 'born of animosity toward the class of persons affected' and further that it had no rational relation to a legitimate governmental purpose."[213] More recently, and despite the unanimity of federal courts to the contrary, adventurous state courts have deemed homosexuals to be a "suspect" class for purposes of Equal Protection.[214]

And profoundly influencing public opinion has been the near universal adoption of domestic partnership laws. Except for certain federal benefits, these unions differ from marriage in name recognition only, a fact not lost on same-sex marriage proponents arguing under Equal Protection. How is it, they argue, that marriage is denied same-sex couples when same-sex domestic partnerships are already legally recognized? As along the slippery slope, domestic partnerships have served more to advance the cause of same-sex marriage than any other single factor.

Proponents of same-sex marriage also argue that because the identification of marriage with opposite-gender unions stems from religious, mainly Judeo-Christian beliefs, prohibition against same-sex unions violates the Establishment Clause of the First Amendment.[215] DOMA legislation is under attack on similar grounds.[216] Domestic partnerships are offered up as purely secular examples of unions which, unlike natural marriage, meet the *Lemon v. Kurtzman* (1971)[217] and other Establishment Clause tests.[218]

Yet it is unlikely that the Court will rule that the traditional understanding of marriage violates the First Amendment. In *McGowan v. Maryland* (1961) the Court established that the Constitution supports laws "whose

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[213] Lawrence v Texas, 539 U.S.558, 574 (2003) (citing Romer v. Evans, 517 U.S. 620, (1996)).

[214] *See generally*, *In re* Marriage Cases, 43 Cal.4th 757 (2008) (which considered homosexuals a suspect class); *see also* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (imposed Intermediate Strict Scrutiny law, that discriminates is struck down unless shown it substantially furthers an important government interest, to find that a Connecticut law banning same-sex marriage violated the state's constitution).

[215] U.S. CONST. amend. I (The Establishment Clause of the First Amendment says simply: "Congress shall make no law respecting an establishment of religion.").

[216] *See* James M. Donovan, *DOMA:An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 338 (1997).

[217] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (i.e., (1) it has a bona-fide secular purpose, (2) it neither advances nor inhibits religion, (3) nor does it excessively entangle religion and government).

[218] *See, e.g.,* Agostini v. Felton, 117 S.Ct 1997 (1997); s*ee also* County of Allegheny v. ACLU, 492 U.S. 573 (1989).

reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[219] This makes imminent sense. For if government sanctioned institutions, and the laws that support them, must be redefined simply on the grounds that they enjoy religious support, then virtually any organization or statute that is not of anti-religious origin is imperiled, including the nation's own system of representative government, since that too has strong, historical, Judeo-Christian roots.

Furthermore, if the Court were to engage in the kind of hyper-technical interpretation that would be necessary to redefine marriage under such a theory, it would find that the Establishment Clause cuts both ways. In *Torcaso v. Watkins* (1961)[220] the Court conferred upon Secular Humanism (in addition to other belief systems) official religious status. Indeed, the definition of *religion* encompasses a "cause, principle, or system of beliefs held to with ardor and faith."[221] Atheism, with its prolific periodicals, ubiquitous books, celebrity prophets, and ardent followers certainly qualifies under this meaning.[222] Any law, in fact, that was found to be supported by a strongly held belief system would fall under the scrutiny of the Establishment Clause, including atheist inspired legislation that seeks to dismantle time honored institutions. Thus, whether marriage is supported by the western religious traditions or as the court in *Goodridge* professed, it is deemed a "wholly secular institution," a hyper interpretation of the Establishment Clause would render it doomed.

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[219] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[220] Torcaso v. Watkins, 367 U.S. 488 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); *see also* Malnak v. Yogi, 592 F. 2d 197 (3rd Cir.1979) ("Similarly, 'Secular Humanism,' however broad the term may sound, appears to be no more than a reference to the group seeking an exemption in *Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673, 315 P.2d 394 (1957) which, although non-Theist in belief, also met weekly on Sundays and functioned much like a church. In any event, the Court was willing to concede that these groups, 'and others' were religious for constitutional purposes."); *see also* Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir.1985) ("Secular humanism may be a religion.) *See* Rhode Island Federation of Teachers v. Norberg, 630 F.2d 850, 854 (1st Cir.1980).

[221] *Religion*, MERRIAM-WEBSTER DICTIONARY http://www.merriam-webster.com/dictionary/religion (last visited July 25, 2011).

[222] *E.g.*, Atheist Periodicals include American Atheist, Free Inquiry, The Humanist, Philo, Secular Nation, Skeptic Magazine. Prominent Atheists include Christopher Hitchens, Richard Dawkins, and Sam Harris.

VIII. MARRIAGE IN THE BALANCE

> "*Once upon a time, marriage made sense*."[223]
> Newsweek Magazine, June 2010

If the nation's culture war was not ignited by the Supreme Court it has certainly helped to fuel it. "Liberty finds no refuge in a jurisprudence of doubt" it declared in *Casey*.[224] And beginning with *Griswold*, it has stretched the bounds of federalism with its decisive repudiations of state laws that mirrored its citizens' opinions on what constitutes virtuous civic behavior. The Court has been encouraged in this regard by the popular media, higher academia, and of course the legal profession which, beginning in law school, actively promotes a "progressive" worldview.[225]

The values polarization that exists in American culture is manifestly reflected in the Court. How it rules on same-sex marriage, therefore, will turn almost certainly on the composition of its members versus the objective merits of a particular legal theory. On one side of the Court are those members who, if not venerating the values implicit in Western civilization, are at least predisposed to them, including those that are "objectively, *deeply rooted* in this Nation's history and tradition…."[226](emphasis mine) On the other side are those who lean toward Postmodern ideas, ideas grounded mainly in Materialism and which predominate in Europe, Canada, and (with the exception of the Muslim nations) much of the rest of the world. When faced with moral

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[223] Jessica Bennett & Jesse Ellison, *I Don't, The Case Against Marriage*, NEWSWEEK (June 11, 2010). (An article by two twenty something authors who assert that recent socio-economic factors favoring women, favorable tax policy for singles, a high divorce rate, the easy availability of sexual fulfillment and the lost stigma against procreation outside marriage militate against it. "Healthy partnerships are possible, for sure—but the permanence of marriage seems naive, almost arrogant.")

[224] Planned Parenthood of Se. Pa. v. Casey, 505 U.S.833, 844 (1992).

[225] Lawrence v. Texas, 539 U.S. 558, 602 (2003) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school must seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct.); *see* Romer, *supra*, at 653, 116 S.Ct. 1620 ().

[226] Washington v.Glucksberg, 521 U.S. 702, 721 (1997).

questions this faction of the Court is seen to look to "emanations," "personal autonomy," and "emerging awareness" to guide their course.[227]

At this writing the Court is evenly split between these extremes, with the inscrutable Justice Anthony Kennedy temporarily serving in the role of swing vote. Yet if Holmes' observation is correct, that the "law is the witness and external deposit of our moral life," then the future of marriage cannot be encouraging. For never in the Republic's history has the nation been more intolerant of its own Western legacy.[228]

Because it represents such uncharted territory, the ultimate consequences of same-sex marriage cannot be fully known, except that they will be far-reaching. Some results, however, seem certain. One is a further erosion of the meaning and importance of marriage, which is ominous in a culture already obsessed with sexual and personal gratification at the expense of competing concerns, including children. Another expected outcome is an increase in the enactment and enforcement of so called "hate crimes" legislation.

Member nations of the Organization for Security and Cooperation in Europe (OSCE) report that anywhere from 10-20% of reported hate crimes involve sexual orientation.[229] The day these words were written it was reported in England that a Christian couple was henceforth banned from serving as foster parents because of their religious stance against the gay lifestyle. "The judges underlined that, in the case of fostering arrangements at least, the right of homosexuals to equality "should take precedence" over the right of Christians to manifest their beliefs and moral values. [T]he judges said Britain was a "largely secular", multi-cultural country in which the laws of the realm "do not include Christianity."[230]

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[227] Griswold v Connecticut, 381 U.S. 479, 484 (1965); *Casey*, 505 U.S. at 857; *Lawrence*, 539 U.S. at 570.

[228] Sax, *supra* note 191 (Though anecdotal, there is evidence of mounting hostility toward anti-gay lifestyle bias. In Mississippi, for example, U.S. District Court Judge, Glen Davidson, ruled that Constance McMillen's civil rights were violated when the principal at Itawamba High School refused her request to bring her lesbian girlfriend to the prom. The school board was forced to cancel the prom as a result).

[229] *See 2008 Hate Crime Survey*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/our-work/fighting-discrimination/2008-hate-crime-survey/2008-hate-crime-survey-lgbt/the-response-of-governments-toviolence-on-the-basis-of-sexual-orientation-and-gender-identity/ (last visited July 25, 2011).

[230] Tim Ross, *Foster parent ban: 'no place' in the law for Christianity, High Court rules*, THE TELEGRAPH (Mar. 2, 2011), http://www.telegraph.co.uk/news/newstopics/religion/8353496/Foster-parent-ban-no-

Earlier in Britain a man was arrested for simply discussing with a passerby that homosexuality "went against the word of God." The man had run afoul of the "Public Order Act."[231]

In Canada, clergymen have been prosecuted for preaching against homosexuality, and even for suggesting that homosexuals can "reorient" themselves."[232] Documented instances of similar kinds of prosecution have occurred throughout the United Kingdom, Sweden, and New Zealand[233].

A harbinger for the United States is Canada's "hate crimes" law, C-250. It states in part: "Everyone who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group [including homosexuals] is guilty of … an indictable offense and is liable to imprisonment for a term not exceeding two years."[234] In one reported case a printer, Scott Brockie, "refused to print business cards and other material for the Canadian Lesbian and Gay Archives, contending that he would be abetting sin if he did so. In February 2000, the Ontario Human Rights Tribunal ruled that Brockie had violated the ban on "sexual orientation" discrimination in the Ontario Human Rights Code. He was ordered to pay $5,000 in damages to the president of the Archives and to "henceforth print materials for any homosexual individual or group on the same basis as all other clients."[235] The case ultimately went to the Ontario Court of Appeal where Brockie was forced to pay legal costs of $40,000 in addition to $100,000 in fees he had already amassed in his defense.

In 2009, the Quebec government published its "Quebec Policy Against Homophobia – Moving Together Towards Social Equality." It states in part: "An inclusive society such as ours must take the necessary steps to combat homophobic attitudes and behaviour patterns, and move towards

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place-in-the-law-for-Christianity-High-Court-rules.html.

[231] Heidi Blake, *Christian preacher arrested for saying homosexuality is a sin*, THE TELEGRAPH (May 2, 2010, 1:05 PM), http://www.telegraph.co.uk/news/religion/7668448/Christian-preacher-arrested-for-saying-homosexuality-is-a-sin.html.

[232] *Senate Passes Bill C-25- A Chill is in the Air*, CATHOLIC CIVIL RIGHTS LEAGUE, http://www.ccrl.ca/index.php?id=58 (last visited July 25, 2011).

[233] Robert Knight and Lindsey Douthit, *'Hate Crime' Laws Threaten Religious Freedom*, CONCERNED WOMEN FOR AMERICA (Dec. 12, 2005), http://fp.users.fast.net/InfoQuest/HC4_CWA_Hate_Crimes_Article.pdf.

[234] *Id*. at 4.

[235] *Id*. at 5.

full acceptance of sexual diversity… One of the objectives is to transform institutional cultures to eradicate the heterosexist attitudes and behaviour patterns… Individual citizens must become involved in the fight against homophobia. The general population must be encouraged to reject and denounce homophobic behaviour patterns and attitudes."[236]

In Canada, when sexual "equality" clashes with freedom of speech, sexual equality wins. Should same-sex marriage prevail in the United States, citizens who hold traditional views of gender roles and marriage could face similar kinds of political repression. Already thirty states and the District of Columbia provide for "enhanced penalties for offenses motivated by sexual orientation bias."[237] The proposed Employment Non-Discrimination Act (ENDA) will further engender this trend by mandating that special rights be given homosexuals in the workplace, including church related organizations at the expense of First Amendment freedoms, if passed.

A third expected outcome is future legalization of additional forms of unconventional relationships. It is naïve to think that redefining marriage is likely to stop with the inclusion of same-sex couples. Under the logic of *Perry* et al, few grounds would be left to deny marriages that are comprised of various combinations of consenting adults. Already, in British Columbia, a man is defending his right to have nineteen wives based on Canada's existing gay-marriage laws.[238]

In his dissent of *In Re Marriage Cases*, which he termed an "exercise in legal jujitsu," California Supreme Court Justice Baxter wrote:

> [T]he majority insists that, though same-sex couples are included within the fundamental constitutional right to marry, the state's absolute bans on marriages that are incestuous, or nonmonagamous are not in danger… The bans on incestuous and polygamous marriages are ancient and deep-rooted, and, as the majority suggests, they are supported by strong considerations of social policy. Our

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[236] *Quebec Policy Against Homophobia, Moving Together Towards Social Equality*, JUSTICE.GOUV 5, 30, 34 (Dec. 2009).cc http://www.justice.gouv.qc.ca/english/publications/rapports/pdf/homophobie-a.pdf.

[237] *2008 Hate Crime Survey: Lgbt*, *supra* note 229.

[238] Gloria Galloway & Robert Matas, *Defence to Invoke Gay Marriage As Polygamy Trial Begins in B.C.*, THE GLOBE AND MAIL (Jan. 21, 2009 3:16 AM),http://www.theglobeandmail.com/news/national/article967926.ece.

> society abhors such relationships, and the notion that our laws could not forever prohibit them seems preposterous. Yet here, the majority overturns, in abrupt fashion, an initiative statute [Proposition 22] confirming the equally deep-rooted assumption that marriage is a union of partners of the opposite sex. The majority does so by relying on its own assessment of contemporary community values, and by inserting in our Constitution an expanded definition of the right to marry that contravenes express statutory law. That approach creates the opportunity for further judicial extension of this perceived constitutional right into dangerous territory.[239]

Considered unthinkable not many years ago, such outcomes are likely if same-sex marriage is normalized. Postmodern reasoning has already stretched the Due Process Clause and "ordered liberty" to the breaking point. Unless renounced, that same reasoning will bend and expand marriage until that institution is broken beyond repair.

IX. ON VIRTUE AND FREEDOM

> "*When a people's religion is destroyed, doubt invades the highest faculties of the mind and half paralyzes all the rest… Such a state inevitably enervates the soul, and relaxing the springs of the will, prepares a people for bondage. Then not only will they let their freedom be taken from them, but often they actually hand it over themselves.*"[240]
> Alexis de Tocqueville

In the time between the writing of the Constitution and its ratification a year later there ensued vigorous public debate. To convince a wary populace of the merits of the proposed charter, founders John Jay, Alexander Hamilton, and James Madison published a series of eighty five articles that together comprise what we know as the *Federalist Papers*. Here is made plain the founders' motive behind the Constitution's critical inclusion of *federalism* and *separation of powers*; namely, the inherent conflict in human nature between man's higher reason and his baser instincts. "Why has government been instituted at all? Because the

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[239] *In re* Marriage Cases, 43 Cal.4th 757, 871 (2008).
[240] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 444 (Doubleday 1969).

passions of men will not conform to the dictates of reason and justice without constraint."[241] "And making the proper deduction for the ordinary depravity of human nature, the number [of Judges] must be still smaller of those who unite the requisite integrity with the requisite knowledge." [242]

> "As there is a degree of depravity in mankind which requires a degree of circumspection and distrust, so there are other qualities which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these [other] qualities in a higher degree than any other form."[243]

Such expressions were offered with full confidence that they would resonate with the educated, *liberal*, class of that period. Revolutionary Americans understood that political liberty was fragile, largely foreign in the annals of nations and for democratic nations especially, utterly dependent on civic virtue. Among the prominent polemical writings of that era two theorists were cited more than any other. One of these was Sir William Blackstone. But even he was not cited as frequently as Montesquieu,[244] who in *The Spirit of the Laws*, warned:

> "There is no great share of probity necessary to support a monarchical or despotic government. The force of laws in one, and the prince's arm in the other, are sufficient to direct and maintain the whole. But in a popular state, one spring more is necessary, namely, *virtue*."[245](emphasis mine)

History provides ample evidence that political freedom is incompatible with a society where passion is unrestrained by reason and virtue. The educated class of eighteenth century America understood this, having just witnessed the Revolutionary cataclysm in France that was so different in its fundamental character from their own. In Europe, the Jacobins emphasized equality over liberty and public virtue. In America, it was the opposite and the results still reverberate, however faintly.

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[241] THE FEDERALISTNO. 15 (Alexander Hamilton).
[242] THE FEDERALIST NO. 78 (Alexander Hamilton).
[243] THE FEDERALIST NO. 55 (James Madison).
[244] JACK P. GREENE, MODERATION AND LIBERTY: MONTESQUIEU AND THE AMERICAN FOUNDING 535 (The Johns Hopkins Univ. Press, 1989).
[245] CHARLES DE SECONDAT & BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., Public Domain ed., 1914) (1748).

For most of its history, political philosophy in America has been based on the belief that virtue and liberty are crucially linked and that *rights* come from God, not man. There is a reason why the expression "democracy" is not found in any of the nation's important emblems.[246] The founders considered it to be a contemptible form of government. The reason, notes Walter Williams, is that in democracies, "the law is whatever the government [through majority vote] determines it to be. Laws do not represent reason. They represent force."[247] A democracy is, therefore, little more than mob rule where the mob is the majority, but which renders it the most fragile and unstable form of government there is. "…[D]emocracies have ever been spectacles of turbulence and contention…and have in general been as short in their lives as they have been violent in their deaths."[248]

Partly to avoid such a result, America was established as a *republic* where, as John Adams declared: "You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe."[249] In a republic, rights can neither be rescinded nor invented since they are given by God alone.

Some forty years after the ratification of the Constitution another political thinker, Alexis de Tocqueville, wrote of the difference between the domestic lives of Europeans still reeling from the secular (democratic) philosophy of the French Revolution and that of Americans, "In Europe almost all the disorders of society are born around the domestic hearth and not far from the nuptial bed. It is there that men come to feel scorn for natural ties and legitimate pleasures and develop a taste for disorder, restlessness of spirit, and instability of desires. Shaken by the tumultuous passions which have often troubled his own house, the European finds it hard to submit to the authorities. When the American returns from the turmoil of politics to the bosom of the family, he immediately finds a perfect picture of order and peace. There all his pleasures are simple and

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[246] Declaration of Independence, Constitution, Pledge of Allegiance, or Battle Hymn of the Republic.

[247] Walter Williams, *Democracy Versus Liberty*, NEW AMERICAN (Feb. 23, 2011), available at http://www.thenewamerican.com/index.php/opinion/walter-williams/6430-democracy-versus-liberty.

[248] THE FEDERALIST NO. 10 (James Madison).

[249] *Democracy or a Republic*, IDEAS ON LIBERTY (Mar. 2007), http://econfaculty.gmu.edu/wew/articles/fee/democracy.htm.

natural and his joys innocent and quiet, and as the regularity of life brings him happiness, he easily forms the habit of regulating his opinions as well as his tastes. Whereas the European tries to escape his sorrows at home by troubling society, the American derives from his home that love of order into affairs of state."[250]

Certainly, America today is very far removed from the idyllic, perhaps hyperbolic, picture of domestic tranquility observed by de Tocqueville in the 1830's. Yet the redefining marriage signals a severing of any residual ties with our cultural past and portends an even more dangerously disconnected future. Judith Stacey's hope for same-sex marriage serves as a warning, in that its aim is to bring about a "pluralist expansion of the meaning, practice, and politics of family life in the United States" where "perhaps some might dare to question the dyadic limitations of Western marriage and seek some of the benefits of extended family life through small group marriages…."[251] Or, as Paula Ettlelbrick admits: "Being queer means pushing the parameters of sex, sexuality, and family, and in the process transforming the very fabric of society."[252]

Fidelity to marriage is indispensible to future generations and symbolizes a deeper commitment to virtue without which genuine liberty cannot survive. And virtue, as "conformity to a standard of right,"[253] is itself reliant on fidelity to a transcendent moral order. From the founding of the nation until the mid-twentieth century that moral order was acknowledged to stem from Biblical and Natural Law sources. Postmodernism is hostile to both, such that were it to ultimately prevail, if what Americans once held to as *virtue* is collectively exchanged for "personal autonomy," then not only is marriage in jeopardy but our future as a free people. As Madison warned in Federalist No. 55, "In all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[254]

As Western civilization fades into the twilight of its receding history, will

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[250] DE TOCQUEVILLE, *supra* note 236, at 291-92 (Doubleday 1969).
[251] ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY, 117, 128-29 (M.A. Mason et al eds., Oxford Univ. Press 1998).
[252] LESBIANS, GAY MEN, AND THE LAW, 398-400 (William B. Rubenstein ed., The New Press, 1993).
[253] *Virtue*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/virtue (last visited July 25, 2011).
[254] THE FEDERALIST NO. 55 (James Madison).

marriage be defined by reason in harmony with nature, or the mob? The people's virtue will ultimately answer.