ARTICLES

"JUST DON'T CALL IT MARRIAGE": THE FIRST AMENDMENT AND MARRIAGE AS AN EXPRESSIVE RESOURCE

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I would like to thank the participants at the faculty workshop at USC Law School and at my presentation at the joint Asian-Pacific American Law Teachers/Western Law School Teachers of Color Conference 2000, Scott Altman, Jody Armour, Gil Carrasco, Jo Carrillo, Erwin Chemerinsky, Mary Dudziak, Steve Greene, Ariela Gross, Sam Marcosson, Ed McCaffery, Bentley McLeod, Thom Rhue, Hillary Schor, Mike Shapiro, Larry Simon, Eric Talley, and Walter Williams for reading one or more drafts of this Article, Nomi Stolzenberg and Angela Harris also for their excellent commentary at the workshop and conference, and Nicole Quintana, Pamela Hoh, and David Moran for their excellent research assistance.

INTRODUCTION

With society in "a moral crisis . . . this is hardly the time to be tinkering with the definition of marriage," said Ralph Reed of the Christian Coalition.[1]

I just can't get with gay marriage . . . . I don't care what people do . . . . Just don't call *it marriage. It can't be* marriage.[2]

In courtrooms, legislative halls, newspapers—wherever arguments are made for and against same-sex marriage—a battle rages for control of one of our society's most potent symbols: marriage—what it means, who has the right to use it, and for what purposes. Until very recently, the legal gains made by proponents of same-sex marriage—whom for ease of

1. Tom Curley, *Same-Sex Marriage Ban Rejected*, USA TODAY, Dec. 4, 1996, at 1A (alteration in original) (reacting to Hawaii trial court decision holding mixed-sex requirement for civil marriage unconstitutional).

2. Adrian Walker, *Give Partners the Right to Marry*, BOSTON GLOBE, Mar. 9, 2000, at B1 (emphases added) (internal quotation marks omitted) (quoting unnamed Boston minister).

exposition I shall sometimes call "marriage expansionists"—have been distinctly short-lived.

In 1993, the Hawaii Supreme Court held that the state's restriction of civil marriage to mixed-sex couples would violate the state constitution unless the government could prove at trial that the mixed-sex requirement satisfied heightened scrutiny;[3] in 1998, a Superior Court judge in Alaska reached the same conclusion under that state's constitution.[4] In both states, the remanded litigation was pretermitted when voting majorities amended the state constitutions specifically to authorize the mixed-sex requirement.[5] Subsequently, though, in the waning days of the twentieth century, the Supreme Court of Vermont unanimously held that the state's limitation of civil marriage to mixed-sex couples violated that state's constitution.[6] The court's opinion directed the state to enact legislation granting same-sex couples access to all the benefits and obligations that Vermont confers upon mixed-sex couples who marry. In response, unlike the Hawaii and Alaska legislatures, which promulgated state constitutional amendments to sanction the mixed-sex requirement, the Vermont legislature passed and the governor signed legislation creating "civil unions."[7]

Although all other states in the Union and the District of Columbia restrict civil marriage to mixed-sex couples, and none offers any domestic partnership status comparable to Vermont's civil unions, the question whether state or federal constitutions prohibit any jurisdiction's mixed-sex requirement for civil marriage currently divides courts, scholars, politicians, and the public at large. The scholarly and courtroom debates have generally turned upon the adequacy of the various public welfare purposes[8] commonly offered in defense of the mixed-sex requirement—

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3. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

4. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

5. *See* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

6. Baker v. State, 744 A.2d 864 (Vt. 1999). The decision is dated December 20.

7. *See infra* notes 141–50 and accompanying text.

8. I take the phrase "public welfare purposes" from Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139 (1998).

> "Bare public morality" arguments defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to goods *other than* the alleged good of eliminating or increasing, as the case may be, the behavior at issue. "Public welfare" arguments, in contrast, defend a law by asserting that the law avoids harms or realizes goods *other than* the good of eliminating or increasing the behavior or characteristic that defines the classification the law creates—for example, health, safety, or economic prosperity.

protecting the public fisc, procreation or childrearing, and so forth. Although I believe that marriage expansionists have the better of the arguments made to date,[9] this Article articulates a new argument for why the mixed-sex requirement should be adjudged unconstitutional.

Civil marriage is a unique symbolic or expressive resource, usable to communicate a variety of messages to one's spouse and others, and thereby to facilitate people's constitution of personal identity. Striking at core aspects of personhood in contemporary society,[10] the mixed-sex requirement for civil marriage deprives many lesbian, gay, and bisexual (collectively "lesbigay") people of this unique expressive resource, amplifying many heterosexually identified speakers' voices at the expense of lesbigay people and skewing public debate over issues of sexuality and sexual orientation. Thus, progressive as it may be, even Vermont's civil marriage/civil unions regime is unconstitutional because, in relegating same-sex couples to "civil unions" while allowing mixed-sex couples "marriage," the state denies same-sex couples the expressive potential of civil *marriage* both in violation of First Amendment guarantees of freedom of speech[11] as well as in violation of the Vermont Supreme Court's mandate to provide same-sex couples *all* the benefits of civil marriage.[12] It does matter whether one calls it "marriage."

Id. at 140–41.

9. Most of the recent same-sex marriage cases agree. *See generally Brause*, 1998 WL 88743, at *1; *Baehr*, 852 P.2d at 44; *Baker*, 744 A.2d at 864. Older cases might not agree, but they may have used lax scrutiny because of the definitional argument, *see infra* Part II.C.1, or some other reason. *See generally* Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974). *But see* Dean v. District of Columbia, 653 A.2d 307 (D.C. Ct. App. 1995) (post-*Baehr* case rejecting the plaintiff couple's constitutional claims on definitional and other grounds).

10. For an analysis urging caution when invoking notions of personhood, see Janet E. Halley, *The Construction of Heterosexuality*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82 (Michael Warner ed., 1993).

11. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

12. The Vermont Supreme Court's mandate may be more ambiguous than suggested, as its opinion uses varying phraseology, speaking at times of "the benefits and protections that [the State of Vermont's] laws provide to opposite-sex married couples," *Baker*, 744 A.2d at 867, and at times of "the statutory benefits and protections afforded persons of the opposite sex who choose to marry," *id.*, as well as other formulations. *See, e.g.*, *id.* at 870, 880, 881, 883, 884, 886, 887, 889 (using different phrases). One could argue that the expressive function of a civil marriage is not a "statutory benefit" because it is not enumerated in the statute; however, Vermont law clearly gives access to the expressive resource of civil *marriage* to mixed-sex couples and only mixed-sex couples. *See, e.g.*, VT. STAT. ANN. tit. 15, § 1201(4) (Supp. 2000) ("'Marriage' means the legally recognized union of one man and one woman."). Because the expressive function of civil marriage immeasurably contributes to the "significance of the benefits" of marriage, *Baker*, 744 A.2d at 879, 883, as I argue *infra* Part I.A, I

The mixed-sex requirement for civil marriage seriously disadvantages same-sex couples and distorts public discourse. Only mixed-sex couples are permitted to use the unique expressive resource that is civil marriage to make statements about their love, fidelity, or commitment and, thus, about vital facets of their identity. The mixed-sex requirement thereby privileges one set of viewpoints about those character or relationship traits: those viewpoints that hold that only mixed-sex couples are capable of those virtues or that they are superior to same-sex couples insofar as such virtues are concerned.

Moreover, the mixed-sex requirement does this in important part to preclude same-sex couples from expressing and constituting themselves via civil marriage in ways that could change "the meaning of marriage" and unsettle the sense of self of perhaps a large number of heterosexually identified persons.[13] Defenders of the civil marital status quo—or "marriage conventionalists" for brevity—relentlessly deploy a variety of arguments against civilly recognizing same-sex marriages in terms that are implicitly or expressly about the symbolism of marriage. Such expressive aims do fit the mixed-sex requirement much better than do public welfare purposes. Despite addressing what may be the biggest psychological concerns behind the mixed-sex requirement, however, these expressive purposes are deeply inconsistent with constitutional free expression principles.

Whether or not a state offers a status comparable to Vermont's civil unions, the Constitution bars government from selectively denying the unique expressive resource of civil marriage to same-sex couples, handicapping their communication and identity formation and skewing public debate, in order to preserve the current symbolic meanings of

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believe counting the expressive resource of marriage among the "benefits and protections afforded by Vermont law," *Baker*, 744 A.2d at 886, to be a sounder interpretation of the court's opinion. And even were the expressive resource of civil marriage not deemed one of "the common benefits and protections that *flow from marriage under* Vermont law," *id.* at 867 (emphasis added), its denial to same-sex couples would certainly be a strong reason why "some future case [should] establish that—notwithstanding equal [statutory] benefits and protections under Vermont law—the denial of a *marriage* license operates per se to deny constitutionally-protected rights." *Id.* at 886 (emphasis added).

13. *Cf.* Afi-Odelia E. Scruggs, *Same-Sex Marriage Not the Real Issue*, PLAIN DEALER (Cleveland), Jan. 10, 2000, at 1B ("I have to admit that I shake my head over the question of same-sex marriages. Something in the pit of my stomach roils and my muscles literally clench."); *id.* ("There's no logical reason for my reaction."); *Talk of the Nation* (National Public Radio broadcast, Dec. 21, 1999), 1999 WL 32908904 (quoting Vermont Governor Howard Dean, in response to observation that he had "been quoted as saying that same-sex marriage makes [him] uncomfortable, the same as anybody else," as stating, "there are a lot of people who are uncomfortable with the notion of same-sex marriage").

marriage.[14] The public welfare justifications commonly proffered in defense of the mixed-sex requirement fail to provide a sufficiently important and sufficiently well-tailored basis to justify the mixed-sex requirement under the heightened scrutiny that is properly due this discriminatory distribution of the unique expressive resource of civil marriage.

Part I of this Article advocates a First Amendment perspective on civil marriage, describing how it functions as a uniquely powerful symbolic or expressive resource, as well as how concerns about the expressive dimensions of marriage form a crucial part of the purpose of the mixed-sex requirement for civil marriage. In addition, Part I distills principles from First Amendment precedent and theory to articulate a framework for evaluating the constitutionality of the mixed-sex requirement. Part II then applies that framework, arguing that the mixed-sex requirement should be understood as both content- and viewpoint-discriminatory and that it fails the heightened First Amendment scrutiny that it is due. Finally, Part III briefly addresses what might follow from adoption of the arguments and conclusions of this Article, exploring the likely consequences for civil marriage in the United States and concluding that expansion to include same-sex couples is more likely than governmental disestablishment of marriage.[15]

I. THE EXPRESSIVENESS OF MARRIAGE AND THE MIXED-SEX REQUIREMENT

Marriage expansionists' most common constitutional arguments for abolition of the mixed-sex requirement for civil marriage rely on fundamental-rights doctrine and the guarantee of equal protection of the laws. The mixed-sex requirement imposes upon many lesbigay couples an absolute barrier to the fundamental right to marry[16] and cannot be justified under the heightened scrutiny mandated by the Due Process[17] and Equal

14. *Cf. Our Rights on the Line*, FRONTIERS NEWSMAGAZINE, Feb. 18, 2000, at 12 ("The real goal of the proposition [Proposition 22, specifying that "[o]nly marriage between a man and a woman is valid or recognized in California"]—plain and simple—is to exclude gay people from the symbolic as well as economic and societal benefits of marriage.").

15. By "disestablishment of marriage," I mean government withdrawal from regulating marriage or using marital status as a criterion for decision and thus elimination of civil marriage as a juridical category to the maximum practicable extent.

16. *See, e.g.*, David B. Cruz, *Same-Sex Marriage I, in* 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2307 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

17. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

Protection Clauses.[18] It also defines access to the institution of civil marriage by sex or sexual orientation, and this classification cannot withstand the ensuing heightened scrutiny under the Equal Protection Clause.[19] These arguments are correct as far as they go, and they provide important reasons to eliminate the mixed-sex requirement.[20] More needs to be said, however, to specify the entirety of the discrimination to which the mixed-sex requirement subjects lesbigay people and to articulate the range of constitutional guarantees that the mixed-sex requirement violates. In addition to many of its commonly noted features, a core component of the value of civil marriage lies in its expressive potential, and understanding civil marriage as a unique expressive resource opens the possibility of a First Amendment challenge to the mixed-sex requirement.

Even were it correct to view marriage as *an* institution (in the singular), marriage would remain a manifold institution, possessed of many different aspects;[21] people arguing in favor of governmental recognition of same-sex marriage quite properly have directed attention to many of these aspects of marriage. Marriage is, for example, an economic institution, to which attach significant financial rewards.[22] As Professors Patricia Cain, David Chambers, William Eskridge, and numerous others have noted, statutes typically guarantee government employees payment of benefits including health and life insurance and disability payments for civil spouses, and many private sector employees contractually receive similar benefits for civil spouses.[23] The dollar value of these benefits can be large, and they are triggered by civil marriage.

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18. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

19. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 62–64, 123–24 (1996) (summarizing the arguments).

20. *See id.* at 124 ("Any of these arguments would be a sufficient basis for constitutional invalidation of existing state policies.").

21. *Cf.* Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 354 (1999) ("Marriage is legal, religious, social, vocational, and personal."); Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 505 (1994) (rejecting "the illusion that marriage is a stable, unitary entity" and maintaining instead that "marriage is a place-holder for a series of idealized value judgments about our intimate lives").

22. These benefits have coexisted with the so-called "marriage penalty"—greater federal income taxes paid under U.S. law through much of the twentieth century by certain civilly married couples than those couples would have paid filing as two unmarried individuals. *See, e.g.*, EDWARD J. MCCAFFERY, TAXING WOMEN (1997).

23. *See, e.g.*, ESKRIDGE, *supra* note 19, at 66–67; Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 467–83, 493–94 (2000); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472–76, 484–85 (1996).

In addition to such purely economic bonuses for which civil marriage makes a (mixed-sex) couple eligible, the law has adopted numerous default rules that are keyed to civil marriage, providing further benefits for those who marry at law—"off-the-rack rules" in Professor Eskridge's catchy phrasing.[24] As Tom Gallanis has pointed out, in many contexts laws set default rules authorizing actions to be taken by, or inheritances to be awarded to, individuals in a specified order, usually giving priority to one's civil spouse, so that unmarried couples must incur time and expense to designate a partner as the appropriate decisionmaker or suffer the consequences of important decisions being vested elsewhere[25] or legacies being directed to someone else.[26] These default rules spare civilly married couples the costs in money and time of hiring attorneys, drafting documents, and taking whatever other steps are necessary to overcome statutory presumptions, and they protect even those civilly married couples who—as many people do—fail to adopt health-care directives or draft wills due perhaps to the entailed discomfiture of facing one's own mortality.[27]

Civil marriage confers numerous other benefits. In many jurisdictions, civil marriage allows one spouse to refuse to testify against another or to preclude one's spouse from testifying against oneself.[28] As Professor Eskridge has observed, "[s]uch immunity both recognizes and contributes to the integrity of the couple's interpersonal sharing."[29] In addition, the District of Columbia and a number of states allow civilly married couples "to invoke special state protection for intrafamily offenses."[30] The list goes on and on.[31] Not always discussed, however, is the way in which civil marriage functions as a uniquely powerful expressive resource.

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24. ESKRIDGE, *supra* note 19, at 69.

25. Consider in this regard *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991), resolving an eight-year struggle between Sharon Kowalski's parents and Karen Thompson, Sharon's partner of four years, who finally was appointed Sharon's guardian (which had become necessary due to a severely debilitating car accident).

26. *See generally* T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513 (1999).

27. *See, e.g., id.* at 1529–30 (discussing the "unnecessary transaction costs" involved).

28. *See, e.g.*, D.C. CODE ANN. § 14-306 (1981), *cited in* ESKRIDGE, *supra* note 19, at 66 n.64.

29. ESKRIDGE, *supra* note 19, at 68.

30. *Id.* at 66 (internal quotation marks omitted).

31. *See, e.g., id.* at 66–67 (cataloguing just a few of the many rights appurtenant to civil marriage). *See also* Chambers, *supra* note 23, at 454–61 (discussing marriage regulations that recognize spouses' emotional attachments). For a staggering enumeration of "1049 federal laws classified to the United States Code in which marital status is a factor," generated via online legal research database searches, see BARRY R. BEDRICK, GEN. ACCOUNTING OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT 2 (1997).

A. CIVIL MARRIAGE AS A UNIQUE EXPRESSIVE RESOURCE

It is certainly proper for scholars, litigants, and anyone else concerned about the denial of civil marriage to same-sex couples to devote attention to the economic and other legally operative aspects of marriage. Yet when many of the rights, obligations, and privileges of marriage may be enjoyed by unmarried couples—with whatever expense and forethought—the choice to marry civilly arguably takes on even greater symbolic meaning than it has in the past.[32] This shift highlights that U.S. discourses on same-sex marriage and the national understanding of the issues in this area are deficient without sustained attention to another facet of marriage: its expressivity. Civil marriage is a unique expressive resource used by people to express themselves and to constitute their identities. Without an appreciation of the expressive nature of marriage, one might miss the important First Amendment dimensions of the marriage issue.

First and foremost, civil marriage is nearly always an act and expression of commitment. Marital commitment is expressed not simply by ceremonies, rings, and gifts. It is also expressed by the act of undertaking and continuing to live under the responsibilities of civil marriage, and by letting it be known that one is living as a part of a civil marriage. One's statements of marital commitment gain additional credibility from the civil status.[33] A proposition of (civil) marriage is an invitation to a partner to join a publicly valued institution, not simply to maintain a relationship in the realm of the private.

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32. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 82, 293 (1989) (connecting heightened symbolic significance of civil marriage and diminished legal significance); Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 324 (1991) (proposing that "[i]f we eliminate marriage-dependent benefits then people can choose to embrace marriage for symbolic rather than legal or utilitarian reasons"); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 636 (1980) ("Indeed, as the legal consequences of a couple's living together come to approximate those of marriage, and as divorce becomes more readily available, marriage itself takes on a special significance for its expressive content as a statement that the couple wish to identify with each other."); Linda Williamson, Editorial, *People Don't Marry to Please Governments*, EDMONTON SUN, Mar. 15, 2000, at 11 (asserting that she and husband married after four years' cohabitation without concern about government benefits because civil marriage is "about commitment between two people, not the commitment of the government").

33. *Cf.* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1909 (2000) (arguing that "commitment norms represent a response [to the dilemma short-term self-interest poses for couples contemplating marriage] that allows the couple to make credible commitments to one another, reducing the risk of opportunistic behavior and defection"); *id.* at 1933 (arguing that the signaling function of civil marriage "facilitated a matching process, allowing those with similar intentions to accurately identify themselves and each other as good prospects for successful marriage").

In considering civil marriage, it is important to situate it within the social practices that are its context.[34] Without having conducted systematic empirical research, I nonetheless suspect that if you tell people that you are married, they probably assume first that you are civilly married, and only second, if at all, that you likely were married in some sort of religious or social ceremony.[35] Consider in this regard elopement, which is commonly understood as a way in which people get married, and which invariably involves a *civil* marriage but not often a ceremonial wedding.

This prioritization of civil marriage in social understandings of marriage might explain why a federal appellate court accepted the state of Georgia's argument that by participating in a religious wedding ceremony and holding herself out to be married, Robin Shahar had created the likelihood of public confusion about her legal marital status.[36] In U.S. culture, all or certainly most of the signs of one's status as married, such as wedding rings, mentions of anniversaries, and the like, are likely to convey a message that one is civilly married. These expressions of weddedness are importantly self-expressive and self-constitutive. When a same-sex couple tries to express comparable sentiments to those routinely expressed by civilly married mixed-sex couples, there is often cognitive dissonance, for it is widely known (although not universally[37]) that same-sex couples may not *civilly* marry, which may lead people to think that such couples must be speaking metaphorically, that they are not *really* married.[38] Civil marriage takes social priority much of the time.[39]

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34. *Cf. id.* at 1904 ("In the domain of marriage, . . . law and social norms have been intricately interwoven to form a complex scheme of social regulation.").

35. Even if I am mistaken about the order, listeners most likely do assume both.

36. *See* Shahar v. Bowers, 114 F.3d 1097, 1101 (11th Cir. 1997) (en banc) (recounting conclusions of lawyers in state attorney general's office that woman's *religious* same-sex marriage "would create the appearance of conflicting interpretations of Georgia law"); *id.* at 1107 (endorsing claim of reasonableness of office's conclusion that religious same-sex marriage would likely create "confusion in the minds of members of the public . . . about her marital status").

37. Almost every year at least one law student I teach or otherwise encounter asserts in class discussion or other conversation that same-sex couples (or, sometimes, "homosexual couples") can marry in Hawaii.

38. Thus, in *Shahar*, the en banc majority opinion purported to "use the words 'marriage' and 'wedding' (in quotation marks) to refer to Shahar's relationship with her partner" and to "use the word marriage (absent quotation marks) to indicate legally recognized heterosexual marriage," both "[f]or clarity's sake." 114 F.3d at 1099 n.1. However, since the opinion did not adduce any notion of "wedding" as a legally operative term, the use of quotation marks should be understood to represent skepticism about the bona fides of Shahar's religious ceremony, despite the majority's protestations of judicial neutrality. *See, e.g., id.* at 1099–1100 n.2 ("The advocates of polygamy, we assume, were no less sincere than the advocates of same-sex marriage . . . ."); *id.* at 1100 ("The facts are not much in dispute; but we accept Plaintiff's view when there is uncertainty."); *id.* at 1106 (disclaiming reliance on

So civil marriage, and not just marriage ceremonies or religious marriage, should be understood as expressive.[40] Access to the status

"[w]hatever our individual, personal estimates might be"); *id.* at 1110 ("We do not decide today that the Attorney General did or did not do the right thing when he withdrew the pertinent employment offer.").

See also, e.g., The Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary, 104th Cong. 22 (1996) (testimony of Gary L. Bauer, President, Family Research Council) [hereinafter Bauer] ("We are being asked to pretend that marriage is no longer about bringing the two sexes together...."); *id.* (Same-sex marriages are harmful if "they bring the law into it. Then the fiction is imposed on everyone and the counterfeit will do great harm to the special status that the genuine institution has earned."); *id.* ("[C]reating a counterfeit would be a slap in the face to millions of Americans."); 142 CONG. REC. H7480, H7487 (1996) (statement of Rep. Funderburk) (expressing "outrage[]" at prospect of "homosexuals achiev[ing] the power to pretend that their unions are marriages"); Pat Truly, *Gay "Marriage" Isn't Marriage, So Don't Use the Term*, STAR TRIB. (Minneapolis), June 9, 1996, at 25A (arguing that same-sex marriage is not marriage, it is pretending or perpetrating a fraud).

39. Thus, it would seem, those like Darva Conger, who draw a sharp distinction between religious and civil marriage and view civil marriage without religious marriage as not "really" a marriage, are the outliers. Darva Conger was the "successful" one of scores of women who purportedly wanted to marry a multimillionaire on the Fox network television special "Who Wants to Marry A Multimillionaire?" At show's end, Conger and Rick Rockwell were civilly married. Nonetheless:

> Conger said she never intended to get married.... Sure, she's legally wed to [Rockwell]—but she doesn't consider herself really married because she's a "Christian woman, which means if I'm not married in a church with a preacher, I am not married before God and I am not married in my heart."

Lisa de Moraes, *Darva Conger: With This Ring, I Thee Shed*, WASH. POST, Feb. 24, 2000, at C7. Conger subsequently successfully petitioned to have the (non)marriage annulled due to supposed fraudulent concealment of the fact that Rockwell had had a restraining order entered against him by a prior fiancee. *Judge Un-Marries a Multimillionaire: Bride Claimed TV Groom Wasn't Honest About His Past*, APB CELEBRITY NEWS, *at* http://www.apbnews.com/media/celebnews/2000/04/05/darva0405_01.html (Apr. 5, 2000).

40. Some might suspect it is *social* marriage (a state of interpersonal union as recognized by individuals and private groups), not civil marriage (a state of interpersonal union recognized by government), that really matters when it comes to marriage's communicative efficacy.

I would suggest, however, that social and civil marriage are intertwined and cannot be so easily divorced (no pun intended). *Cf.* Douglas Carl, *Counseling Same-Sex Couples*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 44, 45 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) ("In its most elaborate expression, marriage ritual involves family, friends, church or synagogue, the legal system, and a new status."); Scott, *supra* note 33, at 1905 ("Although the relative impact of law and norms in shaping expectations about marital behavior cannot be quantified, it is uncontroversial that the institution of normative marriage is defined in important ways by its legal framework."). Such governmental features as laws of inheritance have over time boosted the legitimizing power of civil marriage. Moreover, social marriage also powerfully relies on civil marriage: most people who marry civilly without any church ceremony and then hold themselves out as married are, I wager, treated socially as married largely on account of their civil marriage. As Robert Post has noted, "social practices are themselves partly the result of government action...." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1801 (1987).

My claims here are somewhat similar to observations about the interaction between law and social norms contained in Lawrence Sager's argument for congressional power to enact the civil remedy portion of the Violence Against Women Act, Pub. L. No. 103-122, § 40,302, 108 Stat. 1941 (1994) (codified at 42 U.S.C. § 13,981 (1994)) (conferring civil cause of action on victims of gender-motivated violent crime), pursuant to its power to enforce the Fourteenth Amendment. Sager notes that

relationship that is civil marriage provides couples with an important and unique expressive resource, something with which they can, if they choose, express themselves and constitute their identities. As Kenneth Karst has remarked, "[a]n intimate association may influence a person's self-definition not only by what it says to him but also *by what it says* (or what he thinks it says) to others."[41] This truth applies not only to the myriad idiosyncratic ways that a couple may hold themselves out to the world but also to whether or not they are civilly married. For this reason, denials of access to civil marriage implicate the First Amendment's guarantees of freedom of expression and should be subject to constitutional scrutiny.[42] This perspective on the debate over civil marriage and its mixed-sex requirement provides important insight into the unconstitutionality of denying same-sex couples access to civil marriage. Although scholars have debated a myriad of other issues pertaining to same-sex marriage, the symbolic value of marriage to couples has received little sustained attention.[43]

"it is impossible to gauge precisely how much our history of the legal subordination of women has contributed to the attitudes and reflexes that make women vulnerable now to family and sexual violence" but he expresses with warranted confidence that "the broad regime of unconstitutional discrimination to which women as a group were subject . . . legitimated, amplified, and gave legal force to malign impulses, and left women more vulnerable to violence and discrimination than they otherwise would have been." Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morisson, 75 N.Y.U. L. REV. 150, 155 (2000).

41. Karst, *supra* note 32, at 636 (emphasis added).

42. Meaningful constitutional scrutiny should not be reserved simply for governmental penalties for those who are religiously married or who live together and hold themselves out as married. Marriage conventionalists have tried to distinguish *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court case in which the Court held unconstitutional an antimiscegenation law, by pointing out that Richard Loving, a white man, and Mildred Jeter, a black woman, were prosecuted for living together in Virginia as married following a legally recognized marriage in the District of Columbia. Same-sex couples who challenge the mixed-sex requirement, in contrast, are said to be seeking not simply the freedom to be let alone and not criminally prosecuted for seeking to build a joint life but also affirmative governmental benefits and special legal recognition of their relationship. *See, e.g.*, David Orgon Coolidge, *Playing the* Loving *Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 219 (1998); Lynne Marie Kohm, *Liberty and Marriage*—Baehr *and Beyond: Due Process in 1998*, 12 BYU J. PUB. L. 253, 254 (1998).

43. The literature largely does not analyze the personal expressive functions of civil marriage. Craig W. Christensen discusses the systemic symbolism of belonging to the national community that civil recognition of same-sex marriages would offer lesbigay persons but does not concentrate upon same-sex couples' use of civil marriage as a mode of expression. *See* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1733, 1783 (1998). Similarly, Jennifer Gerarda Brown focuses upon the symbolic meaning of marriage from the perspective of what the state conveys rather than what individual couples express. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 795–97 (1995). *See also, e.g.*, Chambers, *supra* note 23, at 450–51 (1996) (considering "social meanings of state recognition"); Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE

While some of the literature on same-sex marriage notes marriage's importance to lesbigay self-conceptions,[44] marriage is obviously very important to many heterosexually identified individuals' personal identities.[45] In some instances, "in our culture, by just being married, a woman gains an identity, an acceptability, a legitimacy that you often don't get as a single woman."[46] While gender may make marriage especially salient for many women's identities,[47] spousal identity is also important to men.[48] "I don't know what I would do if I wasn't a husband," reports one thirty-year-old car salesman.[49] None of this should be surprising.

As a general matter, a person "comes to define herself through a history of relationships and affiliations."[50] As Kenneth Karst has observed, "[w]hether one's intimate associations be affirming or destructive or both, they have a great deal to do with the formation and shaping of an individual's sense of his own identity."[51] And marriage is potentially, and

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L. & POL'Y REV. 599, 623–26 & nn.167–68 (1997) (reviewing ESKRIDGE, *supra* note 19) (considering what the state would express by civilly recognizing same-sex marriages); Sheila Rose Foster, *The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 319, 321 (1998) (same); Thomas S. Hixson, *Public and Private Recognition of the Families of Lesbians and Gay Men*, 5 AM. U. J. GENDER & L. 501, 519–22 (1997) (same); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 991 & n.266 (1998) (same); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 81 (1998) (same); Charles J. Butler, Note, *The Defense of Marriage Act: Congress' Use of Narrative in the Debate Over Same-Sex Marriage*, 73 N.Y.U. L. REV. 841, 870–71 (1998) (same).

44. *See, e.g.*, Eckols, *supra* note 21, at 358 (setting out to "focus on a more introspective view of the potential effects of legalizing same-gender marriage on the identities of gay men and lesbians").

45. Thus, I am somewhat skeptical of Stephen Carter's preemptive protestation at a conference organized by and presenting solely marriage conventionalist views that "I come here today as a scholar, not as a person with a stake in the outcome of any of these debates." Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 HOW. L.J. 215, 215 (1998). Every heterosexually identified, married person has a stake in the same-sex marriage debates, whether he or she is conventionalist or expansionist with respect to civil marriage. *See also infra* note 178 (describing heterosexual interest in preserving gender identity).

46. Jeanne M. Eck, *The Shun Factor*, WASH. POST, Oct. 21, 1997, at D5 (focusing on power culture in Washington, D.C.).

47. *See, e.g.*, Mary Frain, *Marriage Shock: A Period of Adjustment, a Time of Challenge*, TELEGRAM & GAZETTE (Worcester, Mass.), June 20, 1997, at C1 ("Several local women who married recently said their identities changed as a result of their marriages, and adjustments were needed.").

48. *See generally* STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1998). As Professor Nock puts it, "[m]arriage . . . is part of an identity." *Id.* at 5.

49. Robin W. Simon, *The Meanings Individuals Attach to Role Identities and Their Implications for Mental Health*, 38 J. HEALTH & SOC. BEHAV. 256, 264–65 (1997).

50. MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE 222–23 (1997) (characterizing Justice Blackmun's view of the individual as reflected in his dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

51. Karst, *supra* note 32, at 635.

perhaps normatively, one of the most intimate of associations.[52] I do not wish to overstate this claim, given the high incidence of nonmarital births and childrearing,[53] but at least normatively, marriage is held out to the heterosexually identified as an appropriately important aspect of their adult identity.[54]

Professor Karst has observed that "[o]ne of the standard ways of presenting one's self to the world is to do so as a member of a 'team.'"[55] Marriage, then, may be seen as the ultimate symbol or expression of team loyalty:

> Consider the case of an unmarried couple who live together in what they regard as a trial marriage .... When the couple do marry, one common reason is that they want to have children and thus choose to adopt a formal status that will satisfy those who may disapprove of the status of illegitimacy. Another reason, often intertwined with the first, is that the couple wish to *make a statement*—to the world at large, and to themselves—about who they are and who they have chosen to be.[56]

Karst concludes that "the commitment reinforced by marriage is the foundation for the caring and self-identification that let us be who we are."[57] Similarly, Milton Regan has argued that "a self might be constituted in part by relationships with others," that "marriage is the central institution through which we express our aspirations about intimate behavior," and that marriage "has expressed . . . [a] vision of responsibility based on the cultivation of a relational sense of identity."[58]

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52. *Cf.* E.J. GRAFF, WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION (1999). Writing for the Court in *Griswold v. Connecticut*, Justice Douglas maintained that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." 381 U.S. 479, 486 (1965).

53. *See, e.g.*, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 47–48 (1993).

54. *See infra* text accompanying notes 78–80.

55. Karst, *supra* note 32, at 670 n.209 (citing ERVING GOFFMAN, THE PRESENTATION OF THE SELF IN EVERYDAY LIFE 78–82 (1959)).

56. Karst, *supra* note 32, at 661 n.171 (emphasis added).

57. *Id.* at 670 n.210.

58. REGAN, *supra* note 53, at 120. *See also* DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 173 (1999).

> Abridgment of conscience and intimate life play the role they do in inflicting this evil [i.e., denying the very moral powers in terms of which we come to understand and protest basic injustice] because they are so intimately tied up with the sense of ourselves as persons embedded in and shaped by networks of relationships to other persons with the moral powers of rational choice and reasonable deliberation over the convictions and attachments that give shape and meaning to our personal and ethical lives, as lives lived responsibly from conviction.

Id.

It is not simply the interpersonal relationship between two people in love that may form part of their identities; the formal legal status of being civilly married may do so as well. This is one way of understanding how "to make an honest woman of" someone could mean lawfully to marry her. Civil marriage carries with it numerous legal rights or privileges, reliance on which may form the backdrop of a couple's ongoing relationship and process of mutual self-constitution. In this respect, the relationship between two people who are married at law does differ from the relationship between two people who are only married before their god, with the two relationships supporting different expectations which in turn can influence one's "sense of self" differently.[59] Civil marriage is thus a means of symbolic expression, an important tool for couples to express their commitment and love—to their individual selves, to each other, and to the world at large—and thereby constitute themselves.[60] As Karst suggests, "for most people, marriage is not merely a bureaucratic hurdle but primarily *a symbolic statement* of commitment and self-identification[.]"[61] Again, it is not simply the religious aspects of marriage but the civil as well that can play these expressive roles. "[B]ecause *entry into a formal associational status* may be of great moment *as a statement* of commitment or self-identification, there are occasions when the interest in a formal status is properly regarded as constitutionally 'fundamental.'"[62] Indeed, in holding that constitutional protection of the right to marry extends to prison inmates, the U.S. Supreme Court has observed that "inmate marriages, like others, are *expressions* of emotional support and *public* commitment. These elements are an important and significant aspect of the marital relationship."[63] Thus, in important part because *civil* marriage can express emotions and commitment and is widely so understood, the Court held it constitutionally protected.

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59. *Cf.* REGAN, *supra* note 53, at 26 (discussing facilitation of "a relational sense of identity, a sense of self defined in part by one's relationships with others *and the expectations that they create*") (emphasis added). *See also* ESKRIDGE, *supra* note 19, at 11 ("In today's society the importance of marriage is relational and not procreational.").

60. *Cf.* KAPLAN, *supra* note 50, at 223 ("[C]onsensual relations among adults are both expressions of the voluntary choices of individual participants and necessary elements in the construction of intersubjectively-constituted personal identities.").

61. Karst, *supra* note 32, at 651 (emphasis added).

62. *Id.* at 652 (emphases added).

63. Turner v. Safley, 482 U.S. 78, 95–96 (1987) (emphases added). *But see* Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 968 (1992) (concluding that "[e]nhanced scrutiny based on a constitutional 'right to marry' simply cannot be defended").

True, there is variation in the range of messages that couples might use civil marriage to convey: One may marry civilly simply for instrumental reasons, such as a wish (perhaps motivated by pecuniary inducement) to help someone immigrate to the United States. The state, however, reinforces social understanding of the symbolic import of civil marriage by deeming these instrumental marriages "marriage fraud."[64] By prosecuting such marriages, government insists on a tighter connection between civil marriage and the affect and commitment thought to justify marriage.

Indeed, people do marry to express love for each other. In addition or alternatively, "[g]etting married may also be an implicit statement of devotion to the institution of traditional marriage, or a symbol of one's intention to procreate."[65] Yet neither the communicative power of civil marriage nor constitutional protection therefor is diminished by individuals' ability to use civil marriage to express diverse messages.[66] And these kinds of expression are of constitutional import. In *Zablocki v. Redhail*,[67] the U.S. Supreme Court held that the Constitution protected "something less tangible [than living together and having children] and more important: the values of self-identification and commitment."[68]

While not universally shared, and while certainly shaped by one's surrounding culture, the desire to marry civilly to express one's self and to constitute one's identity is a human desire,[69] not merely a heterosexual desire, and reflects not (or not only) biological instinct but also important values that may be the subject of rational reflection, such as love and commitment. Marrying civilly is one way in which couples might "signal[]

64. *See, e.g.*, United States v. Chowdhury, 169 F.3d 402 (6th Cir. 1999) (upholding conviction for marriage fraud for the purpose of violating immigration laws); Azizi v. Thornburgh, 908 F.2d 1130 (2d Cir. 1990) (addressing constitutionality of residency requirement of Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. §§ 1154(h), 1255(e) (1988) (current version at 8 U.S.C. §§ 1154(g), 1255(3) (1994)).

65. Karst, *supra* note 32, at 636 n.69.

66. *Cf., e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection . . . ."); *id.* at 569–70 ("[A] private speaker does not forfeit constitutional protection simply by . . . failing to edit [his or her] themes to isolate an exact message as the exclusive subject matter of the speech.").

67. 434 U.S. 374 (1978) (holding that law prohibiting remarriage by person in arrears on child support obligations violated fundamental right to marry).

68. Karst, *supra* note 32, at 670.

69. *See, e.g.*, ESKRIDGE, *supra* note 19, at 45 (invoking "the human desire for companionate relationship"). *Cf.* REGAN, *supra* note 53, at 121 (describing how same-sex couples, like mixed-sex couples who are permitted to marry civilly, experience a "desire for public support and recognition" (citing Patricia F. Singer, *Ellen and Debbie: A Lesbian Couple and Their Commitment*, WASH. POST, May 27, 1991, at C5)).

the extent of their commitment,"[70] and the very fact that same-sex couples are trying to marry civilly and undergoing years of often unfruitful litigation testifies to civil marriage's importance to some lesbigay people.[71]

The kinds of public expression enabled by civil marriage are high-value speech constitutionally protected by the First Amendment.[72] "A distinguished line of scholars has ably made the case that the 'self-fulfillment' or 'self-realization' of the individual is properly seen as a central goal of any system protecting free expression."[73] "Professor Tribe has accurately commented that the values of privacy are matched by equally important 'outward-looking aspects of self'; 'freedom to have impact on others—to make the "statement" implicit in a public identity—is central to any adequate conception of the self.'"[74] This is eminently true of the noble public expression of commitment and identity that marrying is for most people. The expressive resource of civil marriage should accordingly receive strong constitutional protection.

Indeed, in light of present and historical circumstances, same-sex couples may even have a special First Amendment claim to access to civil marriage. Invoking notions of conscientious dissent, a type of expressive activity paradigmatically protected by the First Amendment,[75] David Richards has argued that marriage between two people of the same sex is

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70. RICHARD A. POSNER, SEX AND REASON 312 (1992). Posner contends that if civil "marriage were abolished, heterosexual cohabitation would denote indifferently the briefest and the most permanent of relationships." *Id. See also* ESKRIDGE, *supra* note 19, at 71 (discussing "informational" benefit of civil marriage as a "signal[of] a significantly higher level of commitment").

71. *But cf.* Martha C. Nussbaum, *Experiments in Living*, NEW REPUBLIC, Jan. 3, 2000, at 31, 32 (reviewing MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999)) ("Warner pointedly suggests from the outset that even the intense desire of many gays and lesbians for same-sex marriage may itself be an example of [the] tyranny [of public conformity].").

72. The Supreme Court has recognized only a few categories of expression as low-value for First Amendment purposes. *See generally, e.g.*, Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995).

73. Bryan H. Wildenthal, *To Say "I Do":* Shahar v. Bowers, *Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 435 (1998) (citing THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4 (1966); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 11 (1984); Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 46–50 (1987); Brian C. Murchison, *Speech and the Self-Realization Value*, 33 HARV. C.R.-C.L. L. REV. 443 (1998)). *See also, e.g.*, Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 77 (1996) ("[The First Amendment can be regarded as] a means of protecting vital spheres of personal freedom.").

74. Karst, *supra* note 32, at 670 n.209 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 887–88 (1978)).

75. *See, e.g.*, STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA xi (1999) ("In *The First Amendment, Democracy, and Romance* [1990], I argued that dissent should be at the center of an appropriate theory of free speech.").

"itself a heightened expression of gay or lesbian identity,"[76] and that "[t]he claim to the right to marriage thus takes on a public significance . . . as a heightened expression of gay and lesbian identity protesting the traditional terms of its unjust treatment."[77]

Among the expressive functions that civil marriage can serve, providing a context for sexuality is a politically and socially important one. Civil marriage in contemporary U.S. culture is generally viewed as a sign of maturity.[78] As sociologist Chrys Ingraham has argued, "weddings have served as a symbolic rite of passage for heterosexual men and women" into a state of maturity epitomized by marriage.[79] In common understanding, "to be married is to be an adult, to accept commitment, to pledge oneself to fidelity and loyalty and devotion."[80]

Marriage, and in particular civil marriage, also communicates to the world (however accurately or not) that one's sex life is simply one facet of one's life, incorporated into a presumptively balanced whole. Indeed, one of the cultural consequences of civil marriage is the submergence of sexuality into (inter)personality (even if this may perhaps be more effective for racial groups, such as whites, not marked with a history of attributions of rampant "over-sexuality"[81]). When a married man mentions that he went to the movies or a play or a nightclub with his civil spouse, male listeners are less likely to speculate about whether he had sex afterward—"got lucky"—than if the speaker were unmarried. Even pictures of a person with her or his civil spouse and children are unlikely to cause observers to speculate about the married couple's sex life despite the high

76. RICHARDS, *supra* note 58, at 153.

77. *Id.* at 159. This argument raises floodgate concerns, as any prohibited activity could be engaged in to protect the prohibition. I address such concerns *infra* notes 269–78 and accompanying text.

78. *Cf.* Karst, *supra* note 32, at 672 ("Age restrictions, for example, can be seen as promoting the principle of associational choice, when the age of autonomy is set low enough. The choice to marry requires not only intellectual capacity but the maturity to appreciate something of the nature of the commitment one is making.").

79. CHRYS INGRAHAM, WHITE WEDDINGS: ROMANCING HETEROSEXUALITY IN POPULAR CULTURE 3 (1999). *See also* NOCK, *supra* note 48, at 7 ("[M]arriage is a *rite of passage into manhood*.").

80. Samuel A. Marcosson, Romer *and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their "First Line of Defense" in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217, 246 (1998).

81. On the hypersexualization of Blacks in America, see, for example, Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1264–67 (1992); Robert Staples, *Black Masculinity, Hypersexuality and Sexual Aggression*, *in* THE BLACK FAMILY: ESSAYS & STUDIES (Robert Staples comp., 6th ed. 1994); Paula Giddings, *Black Males and the Prison of Myth*, N.Y. TIMES, Sept. 11, 1994, at H50.

likelihood that those children resulted from sexual intercourse. Couples believed to be civilly married thus enjoy the privilege of respectful privacy, whereby their sexuality is far from the most salient feature of their relationship but instead merely one component of an integrated life. As Marc Fajer graphically put it, "[o]ur society does not perceive heterosexual identity merely as sexual acts; we certainly do not view marriage as a formalized excuse to fuck."[82]

Although my focus in this Section is on the uses to which people put civil marriage, not on the denial of civil marriage to same-sex couples, appreciating how this privilege of contextualization operates requires understanding that it is decidedly not enjoyed by same-sex couples. Instead, a "common uncritical populist assumption that homosexuality, unlike heterosexuality, is exclusively about sex"[83] manifests itself in what David Richards describes as follows:

> a dehumanizing obsession with homosexuality solely in terms of a rather bleakly impersonal interpretation of same-gender sex acts in general, or, as Leo Bersani has observed, some such same-gender sex acts in particular (e.g., sexual penetration of a man), an interpretation that deracinates such sex acts from the life of a person that is recognizably human or humane. . . .
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> . . . [S]uch objectification of sex acts crucially isolates [lesbigay persons] from any of the familiar narratives through which we normally frame our understanding of the role and place of sex acts in a human life; [meaning], of course, the narratives of romantic sexual attraction, quest, passion, and love as well as the narratives of connubial tender transparency and mutual support and nurture and those as well of patience in travail and care and solace in illness and before death. It is a mark of the astonishing injustice to homosexual life and experience that these and other humanizing narratives are, as if by fiat, not extended to homosexual eros.[84]

Same-sex couples, precluded by the mixed-sex requirement from using civil marriage to express the integrity of their sexuality, are thus subjected

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82. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 546 (1992).

83. RICHARDS, *supra* note 58, at 159 (citing Gregory M. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Intergroup Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197, 204, 206 (Gregory M. Herek et al. eds., 1996)).

84. *Id.* at 183–84 (internal cross-reference omitted). *See also* Cheshire Calhoun, *Making Up Emotional People: The Case of Romantic Love*, *in* THE PASSIONS OF LAW 217, 217–18 (Susan A. Bandes ed., 1999) (arguing that mixed-sex requirement is one cultural element heterosexualizing romantic love, denying the capacity of same-sex couples to experience that emotion).

to the "sex-as-lifestyle" presumption powerfully critiqued by Marc Fajer.[85] This differential treatment emphasizes the value of civil marriage's ability to contextualize sexuality, affording those who have access to it greater ability to control the messages they convey about their intimate relationships.[86]

In all the foregoing ways, civil marriage constitutes an expressive resource, a legal status that people can use to express a variety of messages and to shape their identities.[87] Moreover, as a result of the special position marriage occupies in our society, this expressive resource is uniquely powerful.[88] Bryan Wildenthal's observation regarding terminology applies as well to the legal status: "[T]he word 'marriage' . . . carries a uniquely intense, resonant, and emotional force in our language and culture."[89] Civil marriage allows people to express their commitment in ways not replicable by other modes of expression. "When two people marry, . . . they express themselves more eloquently, tell us more about who they are and who they hope to be, than they ever could do by wearing armbands or carrying red flags."[90] The long history of the institution of marriage[91] and "the force in

85. Fajer, *supra* note 82, at 513–14, 537–70.

86. For an example of this phenomenon, see ESKRIDGE, *supra* note 19, at 54 (citing *Lesbians Ask Court to Permit Marriage*, LOUISVILLE CHRON., Nov. 11, 1970) (quoting district attorney opinion that same-sex couple should be denied marriage license "because it represented 'the pure pursuit of hedonistic and sexual pleasure'").

It is logically possible that heterosexuality is a greater sexuality-contextualizing force than civil marriage, or that the inclusion of same-sex couples in the institution of civil marriage might destroy this function of civil marriage. Nonetheless, one can already read or hear speculation about the sex lives of a married man and woman whose ages differ significantly, so that their heterosexual identification does not fully shield their sexuality. In any event, I do believe that civil marriage serves this function, however imperfectly, and I think it is more likely that the discomfort many people seem to experience in contemplating their business and social associates and persons they meet in passing as sexual beings would allow civil marriage to continue its contextualizing function even if the mixed-sex requirement were eliminated.

87. *But see* IDK, Inc. v. County of Clark, 836 F.2d 1185, 1195 (9th Cir. 1988) (observing, in reference to claim of First Amendment protection for dating, that "[a] couple out on the town is not an overtly expressive association when compared to political parties, civil rights organizations, publishers, churches, lobbyists, labor unions, and other special interest groups").

88. *Cf.* Texas v. Johnson, 491 U.S. 397, 416 n.11 (1989) ("[T]he flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not just as forceful[l] as those conveyed with it . . . .") (internal quotation marks omitted).

89. Wildenthal, *supra* note 73, at 433–34.

90. Karst, *supra* note 32, at 654.

91. *Cf.* David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 3, 17 (1998) ("There is, after all, a deep and lasting constitutional tradition that affirms the right to marry."). This tradition is taken by some conventionalists as a reason to exclude same-sex couples. *See, e.g.*, Marvin Olasky, Editorial, *Into the Briar Patch*, AUSTIN AM.-STATESMAN, Feb. 2, 2000, at A15. "They should be brave enough to go their own way, and not attempt to gain the applause of society by latching

human life of sexual love as an end in itself that sustains intimate relations of loving and being loved that give enduring meaning to personal and ethical life"[92] ensure the superlative communicative potential of civil marriage, as courts have recognized.[93] This unique symbolic power suggests that civil marriage should not be considered constitutionally fungible with other forms of expression.[94]

B. THE MIXED-SEX REQUIREMENT AS AN EXPRESSIVE RESTRICTION

Not only is civil marriage a uniquely powerful expressive resource, but the purposes of the mixed-sex requirement are also expressive. Specifically, concern with what *the institution* of civil marriage—as distinguished from individual civil marriages—might express or be capable of expressing underwrites the mixed-sex requirement throughout the United States. Thus, it is the dual expressive character of marriage that is at the root of much resistance to allowing same-sex couples to marry civilly. Although there may be other purposes that the mixed-sex requirement partially serves, however well or poorly,[95] consideration of the mixed-sex requirement in its contemporary legal and social context reveals that government is indeed restricting access to the unique expressive resource of civil marriage in significant part on an expressive basis. Accordingly, as discussed below, the mixed-sex requirement for civil marriage must survive stringent constitutional analysis to be adjudged consistent with the First Amendment.[96]

1. *Symbolic Defenses of Mixed-Sex Civil Marriage*

Several years before the Vermont Supreme Court's landmark decision in *Baker v. State*[97] led the Vermont legislature to recognize "civil unions," the Hawaii Supreme Court sparked a national dialogue on same-sex marriage by holding that the mixed-sex requirement amounted to

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onto words that historically mean something else." *Id.* By "they," it is unclear whether Olasky means same-sex couples or what he calls "churches [that] have gone with the flow and embraced homosexuality." *Id.*

92. RICHARDS, *supra* note 58, at 162.

93. *See, e.g.*, Hardwick v. Bowers, 760 F.2d 1202, 1211–12 (11th Cir. 1985), *rev'd*, 478 U.S. 186 (1986) ("But the marital relationship is also significant because of the *unsurpassed opportunity* for mutual support and self-*expression* that it provides.") (emphases added).

94. *See, e.g.*, A Quaker Action Group v. Morton, 516 F.2d 717, 733 n.49a (D.C. Cir. 1975) (rejecting argument for alternative means of expression due to "unique quality" or "unique symbolism" of desired forum).

95. *See infra* II.C.2.

96. *See infra* Part I.C.1.

97. 744 A.2d 864 (Vt. 1999).

discrimination on the basis of sex and thus could only be justified under the equal protection clause of Hawaii's constitution if it satisfied strict scrutiny.[98] This action touched off a nationwide controversy over same-sex marriages. Congress passed and the President signed the Defense of Marriage Act[99] (DOMA) to enshrine the mixed-sex requirement in federal law, and more than thirty states adopted baby-DOMA's of their own, defining marriage as mixed-sex and attempting to forestall recognition of out-of-state same-sex marriages were there ever to be any.

In the various debates in courtrooms, law journals, legislative halls, and public fora about the propriety and necessity of civilly recognizing same-sex marriages, marriage conventionalists have recurred to a riot of reasons alleged to support the mixed-sex requirement. While some conventionalist arguments invoke public welfare purposes or the supposed immorality of sexual activity between people of the same sex, many of the arguments are expressive or symbolic in nature: the argument that marriage simply "means" a man and a woman, so that allowing same-sex couples to marry civilly would change the "meaning" of marriage; nebulous arguments that insist that the mixed-sex requirement is necessary to preserve the "specialness" of marriage; claims that the mixed-sex requirement is needed to ward off threats to the "institution" of marriage; and the insistence that the mixed-sex requirement not be abolished lest government give a "stamp of approval" to "homosexuality." These contentions primarily reflect a view of civil marriage as an important symbolic institution, one whose expressive meaning should not, in these advocates' views, be changed.

One of the most common characterizations of the mixed-sex requirement for civil marriages treats it as simply a matter of linguistic meaning. This position holds "that marriage, by definition, requires one man and one woman."[100] Jurists are not the only parties to advance this argument;[101] legal scholars,[102] politicians,[103] and members of the citizenry

98. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

99. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (Supp. III 1997)).

100. Calhoun, *supra* note 84, at 217.

101. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) ("It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."); Singer v. Hara, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974) ("Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself.").

102. *See, e.g.*, Coolidge & Duncan, *supra* note 91, at 15 (asserting that "a union between persons of the same sex is simply not a marriage"). *Cf.* Theresa Stanton Collett, *Recognizing Same-Sex*

all have argued that "marriage" simply *means* a union of one man and one woman.[104] As Andrew Koppelman has noted, "many thoughtful people believe [that] marriage is *necessarily* a relation between persons of different sexes."[105]

On a related note, one prominent theme in defense of the mixed-sex requirement is that civil marriage *ought to be* symbolically "special."[106] Thus, for example, Hadley Arkes, testifying in favor of DOMA, insisted:

> [T]he notion of marriage may not be extended to . . . gay marriage without setting off many other kinds of changes, and as a result of those changes, I think we would find that marriage would not have that special kind of significance that makes it an object right now of such craving.[107]

Marriage conventionalists lament the *Baehr v. Lewin* decision because "[m]aybe marriage isn't special to the Hawaiian Supreme Court, but it is special to millions of the rest of us."[108] Or they object to allowing same-sex couples to marry because currently married couples "have the right to know that . . . [marriage] is something special . . . that has true meaning,"[109] or because "there is something very special about the marriage of a man and a woman, and the vast majority of Americans want the law to reflect this truth."[110]

Marriage: Asking for the Impossible?, 47 CATH. U. L. REV. 1245, 1247 (1998) (characterizing as "error" "the belief that marriage is created, rather than recognized, by the state").

103. *See, e.g.*, 142 CONG. REC. S10,113 (1996) (statement of Sen. Coats) ("The definition of marriage is not created by politicians and judges, and it cannot be changed by them. . . . It is the union of one man and one woman.").

104. *See, e.g.*, Matthew Daniels, *Vermont's Supreme Court Weighs Same-Sex Marriage*, WALL ST. J., June 14, 1999, at A21 ("Public opinion polls show that most Americans regard the concept of homosexual 'marriage' as an oxymoron."); Richelle Thompson, *Gay Marriages Confront Churches: As More Homosexual Partners Push to Have Relationships Sanctioned, Denominations Face Heated Debate on Official Position*, CINCINNATI ENQUIRER, May 8, 2000, at C01 ("Marriage is by definition a relationship between a man and a woman[.]") (quoting United Methodist Rev. Greg Stover).

105. Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51, 52 (1997).

106. *Cf.* WARNER, *supra* note 71, at 82 ("They [i.e., many heterosexually identified people] want marriage to remain a privilege, a mark that they are special."); *id.* at 121 ("Extending benefits as an issue of justice, apart from marriage, reduces the element of privilege in marriage, as many conservatives fear.").

107. *The Hearings of the House Judiciary Committee on the Defense of Marriage Act* (edited remarks of Professor Hadley Arkes), *in* SAME-SEX MARRIAGE: PRO AND CON 213, 217 (Andrew Sullivan ed., 1997) [hereinafter SAME-SEX MARRIAGE: PRO AND CON].

108. Truly, *supra* note 38 (commenting on *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

109. Jon R. Perry, Editorial, *Specious Allegations*, SALT LAKE TRIB., Oct. 22, 1999, at A14.

110. Tony Snow, *Gay Union Not Marriage*, USA TODAY, Apr. 1, 1996, at 15A.

The concern with preserving marriage's "specialness" is not limited to marriage conventionalists in the United States. *See, e.g.*, *Chirac Opposes Legal Status For Gay Couples*, AGENCE FRANCE-PRESSE, June 4, 1998, 1998 WL 2295756 (reporting that President Chirac "did not want to rob marriage of its 'specialness'").

Similarly, in arguing in favor of DOMA, Representative Lipinski defended the mixed-sex requirement as providing mixed-sex couples "special privileges" to which same-sex couples are not entitled.[111] Senator Gramm spoke of "the traditional family" as "worth singling out and . . . worth giving *special status* above all other contracts in terms of a relationship among people."[112] Representative Weldon of Florida, one of the cosponsors of the Act, urged "that we protect marriage against attempts to redefine it in a way that causes the family to lose its *special meaning*."[113]

This theme about the importance of the mixed-sex requirement to preserving "the meaning" of marriage also suggests that the mixed-sex requirement is expression-related. Conventionalist law professors publish articles that invoke dictionary definitions of what marriage means in order to justify the mixed-sex requirement.[114] Conservative commentator William Bennett warns that "[r]ecognizing the legal union of gay and lesbian couples would represent a profound change in the meaning and definition of marriage."[115] Moreover, he argues, civil marriage should not abolish the mixed-sex requirement because of "the signals it would send"[116]—an explicitly expressive rationale. Senator Byrd supported DOMA at least in part to protect his view of the true definition of marriage, declared in the Bible to be a mixed-sex relationship.[117] Byrd urges his colleagues to oppose the "efforts to *subvert* the traditional *definition* of 'marriage'" reflected by the same-sex marriage movement "by going on record today against this very unnecessary *idea*."[118]

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111. *See* 142 CONG. REC. H7495 (1996) (statement of Rep. Lipinski). *Cf. Id.* at S10,114 (statement of Sen. Coats) (characterizing civil marriage as a form of "special recognition").

112. *Id.* at S10,105 (statement of Sen. Gramm) (emphasis added).

113. *Id.* at H7493 (statement of Rep. Weldon) (emphasis added).

114. *See* David Orgon Coolidge, *Same-Sex Marriage?* Baehr v. Miike *and the Meaning of Marriage*, 38 S. TEX. L. REV. 1 (1997); Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998). *See also, e.g.*, Harold W. Andersen, *Gays and Lesbians Need Another Avenue*, OMAHA WORLD-HERALD, June 2, 1996, at 11B.

115. William J. Bennett, *Same Sex Marriage? Redefining Marriage Would Be a Radical Step Toward the Deconstruction of Society's Most Important Institution*, MORNING NEWS TRIB. (Tacoma, Wash.), May 26, 1996, at D1.

116. *Id.*

117. 142 CONG. REC. S10,109, S10,111 (1996) (statement of Sen. Byrd). Of course, biblical definitions are at least a highly problematic basis for law in the United States under the Establishment Clause. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

118. 142 CONG. REC. S10,111 (1996) (statement of Sen. Byrd) (emphases added).

Arguments for freezing the meaning of civil marriage[119] are coupled with explicit definitional worries. Senator Gramm thought it important, or perhaps necessary, in the DOMA debate to "define what it is that we are here to protect."[120] Senator Byrd believed that government's countenance of same-sex marriages would "launch a further assault on the institution of marriage by blurring its definition."[121] "The drive for same-sex marriage is, in effect," he opined, "an effort to make a sneak attack on society by encoding this aberrant behavior in legal form before society itself has decided it should be legal."[122]

This rhetoric of threats was common. Representative Stearns argued that marriage expansionists "threaten the moral fiber that keeps this Nation together."[123] Representative Lipinski vowed that DOMA "would *safeguard* the rest of the country from the decision made by one State."[124] Representative Buyer virtually declared a crusade, avowing that "God-given principle is under attack."[125] Roman Catholic Bishop Kenneth Angell of Vermont explained the Church's position: "Our opposition to same-sex marriage is widely known.... We believe that redefining marriage, expanding it to include other private relationships, will ultimately attack the age-old truth that traditional marriages and stable families constitute the very foundation of our society."[126] Denver newspaper columnist Al Knight warned that "[m]arriage, as it has traditionally been defined, is under attack on a thousand fronts."[127] It may be only slight exaggeration, if even that, to say that the language of assaults and attacks has been deployed on a thousand fronts throughout the country. But why the deployment?

The martial-marital rhetoric is clarified, perhaps, by those who claim that they do not think their marriage is personally threatened by the

119. *See, e.g.*, Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 390 (1999) (criticizing "state efforts to freeze meaning along gender lines").

120. 142 CONG. REC. S10,105 (1996) (statement of Sen. Gramm).

121. *Id.* at S10,110 (statement of Sen. Byrd).

122. *Id.*

123. *Id.* at H7488 (statement of Rep. Stearns).

124. *Id.* at H7495 (statement of Rep. Lipinski) (emphasis added).

125. *Id.* at H7486 (statement of Rep. Buyer). *See also id.* ("We as legislators and leaders for the country are in the midst of a chaos, an attack upon God's principles."). *But see supra* note 117 (discussing implication of the Establishment Clause).

126. Eamonn O'Neill, *State of the Union*, SUNDAY HERALD (Boston), Mar. 5, 2000, at 13 (internal quotation marks omitted).

127. Al Knight, *Same-Sex Marriage Losing War*, DENVER POST, Mar. 11, 1999, at B7. If Knight is right, perhaps "we *are* everywhere," to quote a lesbigay-rights slogan (emphasis added).

prospect of same-sex marriage, but that the *institution* of marriage is nonetheless threatened.[128] Indeed, in response to Representative Barney Frank's brilliant questioning as to how a same-sex couple's marriage demeans his marriage, Representative Henry Hyde responded: "It demeans the institution. It doesn't demean my marriage. My marriage was never demeaned. The institution of marriage is trivialized by same-sex marriage."[129] Others as well have defended mixed-sex requirements in litigation on the ground that they seek to protect the status of the "institution" of marriage.[130]

However, as Richard Mohr incisively analyzes Hyde's explanation,[131] it is not anyone's marriage but rather what marriage will signify and the role marriage will thus be capable of playing in expressions of personal commitment and identity that are "at risk" from same-sex marriage. Thus, the concern over the "institution" of marriage is a concern over expression.

The relation between the reasons for refusing to recognize same-sex civil marriages and expression is also highlighted by the "stamp of approval" argument.[132] As Judge Posner characterizes the argument, "[t]o permit persons of the same sex to marry is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is

128. This argument, however understandably, often provokes incredulity on the part of marriage expansionists. *See, e.g.*, RICHARDS, *supra* note 58, at 168–69 ("The idea that gay marriage is a threat to marriage as such can barely be credited, as an argument, when an ethical wrong like adultery goes quite unmentioned in such ostensibly promarriage discourse. The difference, of course, is that adultery is a reasonably popular heterosexual vice . . . ."). *But see* Olasky, *supra* note 91, at A15 (marriage conventionalist observing that "[i]f a church, say, has lots of heterosexual adulterers or wannabe adulterers, it's easy for them to denounce what doesn't tempt them and in that way take the spotlight off what does").

129. *House Debate on the Defense of Marriage Act* (edited transcript of debate), *in* SAME-SEX MARRIAGE: PRO AND CON, *supra* note 107, at 225, 226 (answering Rep. Frank's question "How does anything I do in which I express my feelings toward another demean the powerful bond of love and emotion and respect of two other people?" and follow-up question, "If other people are immoral, how does it demean your marriage?").

130. *See, e.g.*, Amicus Curiae Brief of the Church of Jesus Christ of Latter-Day Saints at 2, Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05), http://www.hawaiilawyer.com/same_sex/briefs/mormons.txt ("A decision by this Court to strike down the requirement that marriage must be between a man and a woman will substantially and irreversibly weaken this venerable and indispensable institution . . . .").

131. Richard D. Mohr, *The Stakes in the Gay-Marriage Wars*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 40, at 105, 106 ("[T]he institution of marriage here has become completely detached from any actual marriage. It is only the concept or ideal of marriage—marriage wholly in the abstract—that concerns Hyde. Here we have left the realm of traditional social policy and entered the realm of cultural symbols.") *Cf.* James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY (1996), *reprinted in* SAME-SEX MARRIAGE: PRO AND CON, *supra* note 107, at 159, 161 (referring to distinction "between marriage as an institution and marriage as a practice").

132. ESKRIDGE, *supra* note 19, at 104–09.

a desirable, even a noble condition in which to live."[133] Belief in the impropriety of government expressing that message is thus taken as a weighty reason for excluding same-sex couples from civil marriage. "Unless we pass the Defense of Marriage Act," cautioned one Representative, "we will [be] putting our stamp of approval on gay marriages, forcing the rest of the Nation to follow the whim of one State."[134] Senator Gramm agreed: "To say that we should stay out of this issue is to simply endorse same-sex marriages."[135] Indeed, one law professor discussing the possibility of same-sex civil marriages has quite ominously forewarned, "I will resist to my death a public declaration that they [i.e., 'homosexual attachments'] are good and worthy of public support and encouragement."[136] At trial, Hawaii (through the state Attorney General) defended its mixed-sex requirement on the ground that "[a]llowing same-sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of nonheterosexual orientations and behaviors."[137] And after the state trial court had held Hawaii's mixed-sex requirement for civil marriage unconstitutional, the amicus brief filed by several state representatives in the Hawaii Supreme Court argued that Hawaii possessed "a compelling interest in refusing to endorse homosexuality by allowing members of the same sex to obtain a marriage license."[138]

The stamp-of-approval argument suffers grave difficulties as a constitutional defense of the mixed-sex requirement. If it is particular sex acts that ought not be stamped with approval, the mixed-sex requirement is an ineffectual way of discouraging such acts, for the sheer number of mixed-sex couples who engage in oral or anal sex far outweighs the

133. POSNER, *supra* note 70, at 312.

134. 142 CONG. REC. H7495 (1996) (statement of Rep. Lipinski).

135. *Id.* at S10,106 (statement of Sen. Gramm).

136. This message was posted in a 1999 listserv discussion of issues of law and religion; because the posting author does not think it adequately conveys his or her full position with respect to same-sex marriage, I quote it here without attribution (although the editors of the *Southern California Law Review* did review the original e-mail message). In addition, the author has suggested that the message should be given a temporal reading, suggesting that "to my death" should be read as basically "until such day as I may die." Readers of this Article may wish to consider the backdrop of violent crimes perpetrated against lesbigay persons in the United States, *see, e.g.*, David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1342–44 (1999) (discussing anti-lesbigay violence), when assessing the persuasiveness of that gloss.

137. ESKRIDGE, *supra* note 19, at 138 (internal quotation marks omitted).

138. Brief of Amici Curiae Reps. Felipe Abinsay, Jr., Michael Kahikina, Ezra Kanoho, Colleen Meyer, David Stegmaier, Romy M. Cachola & Gene Ward in Support of Appellant/Defendant at 8, Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05) [hereinafter Brief of Abinsay], http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg00801.html.

number of same-sex couples who do, and there is no persuasive secular reason to adjudge anal or oral sex proper when partners are of different sexes but improper otherwise.[139] If what is objectionable is lesbigay people making a life together, the lack of empirical basis for considering such relationships intrinsically improper renders the argument inadequately compelling to justify the mixed-sex requirement.[140] Regardless of its merits, however, what is important to note is that the stamp-of-approval argument for the mixed-sex requirement is clearly related to expression.

2. *Separate but Equal Redux: Civil Marriage vs. Civil Union*

Perhaps the most dramatic evidence that the mixed-sex requirement for civil marriage relates to expression comes from Vermont. On December 20, 1999, the Vermont Supreme Court held in *Baker v. State*[141] that the mixed-sex requirement for civil marriage violated the Common Benefits Clause of the state constitution and that the legislature had to provide same-sex couples who desired them all the rights and protections extended to mixed-sex couples who marry.[142] The ensuing debate in Vermont addressed whether to do so by extending the marriage laws to embrace same-sex couples or to adopt a comprehensive domestic partnership scheme,[143] a sort of separate-but-operationally-equal legal status.[144] Subsequently, the Vermont House of Representatives promulgated and approved a bill entitled "An Act Relating to Civil Unions,"[145] and the Governor signed it into law, thus creating a regime of separate institutions.[146]

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139. *See, e.g.*, William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 IND. L.J. 1085 (1999) (disposing of assorted variants of the stamp-of-approval argument).

140. *See* Cicchino, *supra* note 8, at 143 (arguing that such "bare" assertions of morality are not even a rational basis for legislation, let alone a compelling one).

141. 744 A.2d 864 (Vt. 1999).

142. *Id.* at 867.

143. The *Baker* decision left this matter to the legislature in the first instance, expressly disclaiming expression of any opinion on the constitutionality of such a scheme. *Id.* at 886 ("While some future case may attempt to establish that—notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.").

144. This terminology, clearly intended to suggest parallels to the scheme of racial apartheid in the South prior to the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and thereafter, will undoubtedly prove controversial due to the contrast between, on the one hand, the virtual unanimity with which de jure segregation is condemned in the contemporary United States and, on the other hand, the high percentage of people who believe in the moral righteousness of reserving civil marriage to mixed-sex couples. In addition, the reader should not be misled into thinking that Vermont's civil unions are legally equivalent to its civil marriages. *See infra* notes 148–49.

145. H. 847, 1999 Gen. Assem. (Vt. 1999) (introduced by House Judiciary Committee). The Vermont House of Representatives adopted the bill on March 16, 2000, and sent it to the state Senate

The act specifies that "[p]arties to a civil union shall have *all* the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."[147] Thus, to the extent that the incidents of civil marriage are subject to control by one state,[148] Vermont has moved to treat same-sex civil unions the same as mixed-sex civil marriages.[149] The state has adopted a separate legal status of "domestic partnership" that is virtually identical to marriage except in name, as even opponents of civil union in Vermont have recognized.[150] "Mere" symbolic or expressive difference between mixed-sex civil marriage and same-sex civil unions thus has to a degree become reality in the United States.

Similarly, during their campaigns for the Democratic nomination for the 2000 presidential election, Al Gore and Bill Bradley publicly espoused support for providing a contractual mechanism, not to be called "marriage," that would afford same-sex couples all the rights of civilly married (heterosexual) couples.[151] The coexistence of such a domestic partnership regime with civil marriage from which it differs solely in name[152] shows

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for consideration. *See Couples Are Warned of Caveat on "Civil Unions"*, L.A. TIMES, Mar. 18, 2000, at A10; Lisa Keen, *Vt. Bill Heads to Senate: More Liberal Chamber Takes Up "Civil Unions" Measure*, WASH. BLADE, Mar. 24, 2000.

146. An Act Relating to Civil Unions, No. 91 § 2(a), 2000 Vt. Acts & Resolves 71, 72–73 ("The purpose of this act is to . . . provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples'. . . .") (quoting *Baker*, 744 A.2d at 886).

147. *Id.* § 3 (codified at VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000)) (emphasis added).

148. Not all incidents of marriage are. Whether another state would recognize marriages authorized by one state is not within the authorizing state's control; neither is whether the federal government would treat one state's marriages as marriages for tax, immigration, and other purposes; nor is whether another country would recognize a marriage authorized by a U.S. state.

149. Unlike marriages, which require a license, couples obtain a certificate of civil union from a town clerk or other designated official.

150. *See, e.g.*, Carey Goldberg, *Vermont Leads Way on Rights for Gay Couples House Passes 'Civil Union' Bill*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 17, 2000, at 1A ("Complaining that it was marriage in all but name, opponents of the bill distributed small yellow plastic ducks to legislators, symbols of their ads arguing that if something looks, quacks and swims like a duck, then it is a duck.").

151. *See, e.g.*, Bob Hohler & Susan Milligan, *Mild Tone Marks Gore-Bradley Exchange*, BOSTON GLOBE, Mar. 2, 2000, at A23 ("Both Gore and Bradley said they do not support gay marriage in the traditional legal sense, but do back a 'domestic partnership' law."); Tom McGeveran, *The Courtship Continues: Gore Vows to Institute Panel on Partnerships*, WASH. BLADE, Feb. 18, 2000 ("'I do not support same-sex marriage,' said Gore. 'But I do support same-sex contracts that have the same rights as marriage.'"); *Profile: Debate Between Al Gore and Bill Bradley in Los Angeles Last Night* (National Public Radio broadcast, Mar. 2, 2000), 2000 WL 21479865 ("Like Al, I don't support gay marriage, but I do support domestic partnership legislation that would provide to gays and lesbians all the legal and financial rights that accrue to a state of marriage.") (quoting Bradley).

152. *Cf.* Carey Goldberg, *Vermont Town Meeting Turns into Same-Sex Unions Forum*, N.Y. TIMES, Mar. 8, 2000, at 18 (recounting Vermont resident's argument that "if, under the [state's Civil

that, more than any functional public welfare purpose,[153] the same-sex marriage debates are about—and a significant purpose of the mixed-sex requirement for civil marriage should be seen as based upon—symbolic expression, which may relate to concerns about personal identity. The most plausible[154] defense of such "separate but equal" regimes—setting aside, in the case of Vermont, the very real prospect of homophobia and heterosexism[155] and concomitant desire to do the bare minimum to comport with the decision of that state's Supreme Court[156]—would seem to be one relying on the importance of naming,[157] of keeping the meaning or symbolism of "marriage" as it is and distinct from institutions embracing same-sex couples, and of the connection between the symbolic meaning of "marriage" and personal identity, rather than any public welfare function.[158] These are clearly governmental purposes intimately related to expression.

Certainly in Vermont there should be no doubt that the dual regime of civil marriage for mixed-sex couples and civil unions for same-sex couples must be justified, if at all, by an expressive purpose or purposes. But a similar purpose should be understood to undergird (albeit not necessarily exclusively) the mixed-sex requirements in the other forty-nine states and the federal government. Given the ubiquity of compulsory heterosexuality,[159] one should be deeply skeptical that the people of the state of Vermont are psychologically constituted so differently from the other people of the nation.[160] In addition, Vermont pressed the same sorts of

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Union] bill, same-sex partners would go before an 'oath-giver' and get a certificate, that would be virtually no different from marriage").

153. *See supra* note 8.

154. I am not suggesting that this kind of argument is ultimately persuasive.

155. *Cf.* ESKRIDGE, *supra* note 19, at 87 ("Much of the opposition to same-sex marriage in the culture at large is inspired by antihomosexual emotions.").

156. *Cf. Talk of the Nation* (National Public Radio broadcast, Mar. 22, 2000), 2000 WL 21458901 ("Marriage would grant gay and lesbian couples a level of status which I personally think is the right thing to do but it's not politically possible at this time in Vermont, that's clear.") (remark by William Lippert, vice-chair of the Vermont House Judiciary Committee).

157. *See generally* Kuykendall, *supra* note 119. *Cf.* Jean M. Twenge, *"Mrs. His Name": Women's Preferences for Married Names*, 21 PSYCHOL. WOMEN Q. 417, 418 (1997) ("Names have long been regarded as symbols for the self, and a large body of research in psychology documents their role in the social construction of identity.").

158. *Cf.* WARNER, *supra* note 71, at 82 ("Often they [i.e., many straight people] are willing to grant all (or nearly all) the benefits of marriage to gay people, as long as they don't have to give up the word 'marriage.' They need some token, however magical, of superiority.").

159. *See generally* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).

160. Moreover, in excess of thirty states have adopted their own "definition of marriage" laws in the wake of the Hawaii Supreme Court's initial decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

justifications in the *Baker v. State* litigation[161] that marriage conventionalists have been urging generally—in Hawaii's *Baehr* litigation, in the academic literature, in public discourse, and so forth. This highlights that both public welfare justifications and symbolic justifications undergird the mixed-sex requirement, so that even in states that offer same-sex couples no domestic partnership benefits whatsoever (let alone the valuable "simulacrum of marriage"[162] offered in Vermont), the mixed-sex requirement should be understood to rest at least in significant part upon similar expressive grounds.

3. *Unsettling (Heterosexual) Identities*

When civilly recognizing same-sex marriages would not necessarily deny any economic or legal entitlements to mixed-sex couples who possess them by virtue of their being civilly married, the claim that marriage is under "threat"[163] at least at first blush seems slightly "overwrought,"[164] suggesting that something unusual and weighty is at stake here. Marriage expansionists might experience understandable bewilderment at the need marriage conventionalists have felt to ward against "[t]he *threat* that same-sex couples married in Hawaii will seek to have their marriages recognized in other states,"[165] as if same-sex couples would have been likely to import metaphoric Medflies upon their return from Hawaii, unleashing agricultural and economic devastation into the bucolic heterosexual state. One can almost *hear* the worry in commentator Betsy Hart's written reaction to the Vermont Supreme Court's decision: "[W]here is the sanctity of marriage? What is the point of marrying at all, or working hard to preserve the union?"[166]

161. State of Vermont's Motion to Dismiss, Baker v. State, 744 A.2d 864 (Vt. 1999) (No. S1009-97Cnc), http://www.vtfreetomarry.org/vtmotiontodismiss.html [hereinafter Vermont's Motion to Dismiss].

162. POSNER, *supra* note 70, at 313.

163. *See supra* notes 122–27 and accompanying text.

164. I take this adjective from Jay Alan Sekulow, who preemptively protests that the gay activist plot for interstate recognition of one state's same-sex marriages "is not a figment of an overwrought imagination." *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 104th Cong. 222 (1996) (statement of Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice). Although Sekulow says "strategy" rather than "plot," *id.*, I do not believe my usage unwarranted given Sekulow's avowed desire to "peak [sic] behind the facade of the Marriage Project's stated goal of obtaining equal marriage rights for homosexuals to [its] deeper and more disturbing motivations." *Id.* at 224.

165. *Id.* at 222 (emphasis added).

166. Betsy Hart, *An Attack on Marriage*, CHI. SUN-TIMES, Dec. 27, 1999, at 35.

What lessons might be drawn from the righteous, angst-ridden, or otherwise strongly felt (and sometimes illogical) comments that pervade the debates on same-sex marriage?[167] Certainly the conclusion that the prospect of change to a more inclusive institution of civil marriage hits close to home in some way for many heterosexually identified people. Specifically, I believe that the prospect of the elimination of the mixed-sex requirement for civil marriage threatens or unsettles the identities of marriage conventionalists who currently benefit personally from marriage's symbolism.[168]

Certainly as well, for those marriage conventionalists to whom lesbigay persons are inferior or immoral beings, being *classified at law* as being similar to lesbigay persons—which is what sex-neutral civil marriage

167. *See, e.g., Politically Incorrect* (ABC television broadcast, Feb. 18, 2000) (comments by Bill Horn) (transcript on file with the *Southern California Law Review*) ("[T]here is an agenda. They are trying to redefine marriage. We allowed homosexuals to hijack the word 'Gay.' We're not going to allow them to hijack 'Marriage.'"). Or, for a more bizarre argument perhaps to similar effect, see *id.* (comments by Traditional Family Values Coalition chairman Reverend Lou Sheldon) ("Here's the difference, very clearly. The difference is that you have a giraffe. A giraffe decides, 'I want to be called an elephant.' No, you can't do that.") (explaining (?!) what is wrong with recognizing same-sex marriages). *See also* Rev. Leonard A. Schneider, *Sex-Change Operations Are Only Skin Deep Despite Claims Otherwise*, WASH. TIMES, Feb. 7, 2000, at A14 (criticizing proposal to prohibit discrimination against transgendered persons by rhetorically querying "Will pasting horns on a horse make it a bull? I am convinced that it does not."); *infra* note 193 (illustrating more extreme rhetoric from Congress). I am at a loss as to what, other than a motive to depict queer people as sub-human, accounts for the invocation of such demented animal analogies. *See, e.g.*, Warren J. Blumenfeld, *History/Hysteria: Parallel Representations of Jews and Gays, Lesbians, and Bisexuals*, *in* QUEER STUDIES: A LESBIAN, GAY, BISEXUAL & TRANSGENDER ANTHOLOGY 146, 154 (Brett Beemyn & Mickey Eliason eds., 1996) ("The medicalization of homosexuality and the construction of Judaism as a separate and distinct racial type have contributed to the notion that members of these groups are somehow inferior and less than completely human.").

168. *See* ESKRIDGE, *supra* note 19, at 5 ("The idea of gay marriage is itself unsettling . . . ."); David L. Chambers, *The* Baker *Case, Civil Unions, and the Recognition of Our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5, 12 (2000) (suggesting that "without knowing quite why, heterosexuals feel an urge to keep the term [marriage] to themselves" and that "[w]hen two gay men or two lesbians are seen living outside of these roles, many decent heterosexuals are 'uncomfortable' for reasons they have difficulty expressing"). *See also* Posting of Laurence H. Tribe, larry@tribelaw.com, to CONLAWPROF@listserv.ucla.edu (May 12, 2000) (discussion list for constitutional law professors). In discussing a comprehensive status for same-sex couples, such as Vermont's civil union, that is parallel to civil marriage but with a different name, Professor Tribe posits:

> [It] would provide all the concrete "benefits" of marriage not only vis-à-vis the state but also vis-à-vis third parties with the sole exception of the crucial symbolic benefit of sharing the cultural and semiotic status of the marital estate and its surrounding history and ethos—a symbolic benefit deprivation of which may well still violate equal protection of the laws, but provision of which would have threatened many heterosexuals, married and otherwise, in hard to articulate ways that could be avoided by avoiding the terminology.

Id.

would express to them—would impugn their identities.[169] This conclusion need not require belief in the magic "law of contagion,"[170] but only belief in law's expressive power.[171]

The notion that same-sex couples might properly be part of the same formal relationship structure as themselves can be profoundly disturbing to some people.[172] Without endorsing his intimation of aggression, one might agree with John Finnis that intimate same-sex relationships may be *perceived as* "deeply hostile to the self-understanding of those members of the community who are willing to commit themselves to"—in Finnis's words—"real marriage."[173] Why is this so? Richard Mohr provides his view in one of the few published legal discussions of heterosexual identity in this context:

> [M]arriage, viewed now as a symbolic event, enacts, institutionalizes, and ritualizes the social meaning of heterosexuality. Marriage is the chief means by which culture maintains heterosexuality as a social identity. . . . One does not become a heterosexual by having heterosexual sex. Rather, marriage is the social essence of heterosexuality. In consequence, on the plane of symbols and identities, if one did not marry, one would not be fully heterosexual. And here's the kicker: if others were allowed to get married, one wouldn't be fully heterosexual either.[174]

Thus, as Professor Samuel Marcosson has argued, "[b]y reserving the ideal represented by marriage for itself, the heterosexual majority is attempting to define itself by reference to this lodestar."[175]

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169. *See, e.g.*, Andersen, *supra* note 114 (asserting that "a strong majority of married couples would feel adversely affected if gays and lesbians were allowed to alter the characteristics of an institution to which the traditional married couples had proudly committed themselves").

170. *Cf.* MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 3 (1966) ("Pollution ideas work in the life of society at two levels, one largely instrumental, one expressive. . . . Thus we find that certain moral values are upheld and certain social rules defined by beliefs in dangerous contagion . . . .").

171. *See generally, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Matthew D. Adler, *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577 (2000).

172. *Cf.* 142 CONG. REC. S4948 (1996) (statement of Sen. Coats) ("It is amazing and disturbing that this legislation [i.e., DOMA] should be necessary.").

173. John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1069 (1994).

174. Mohr, *supra* note 131, at 106. Mohr's rhetoric may be somewhat overblown, but his basic insight is correct.

175. Marcosson, *supra* note 80, at 246. *See also id.* ("Part of the self-definition through which the heterosexual majority idealizes itself is that being married is the epitome of heterosexuality. In our

It should not be surprising that changes to who may marry can affect marriage's symbolism and might be unsettling to people's identities. Certainly at least some of those who resisted elimination of antimiscegenation laws also felt their (racial) identities were threatened. This analogy, while useful, is limited. The prospect of miscegenation threatened white racial identity through the prospect of the elimination of white superiority not only legally but also as a practical matter from the blurring of racial boundaries and categories—if there were no adjudicable or discernible white identity, there could be no secure white superiority. I doubt, however, that the prospect of same-sex marriage threatens heterosexual identity in quite the same way. I have not seen arguments that one will not be able to distinguish the gay from the straight if queers can marry. What people complain about is the erasure of supposedly relevant moral distinctions[176] reflected in law in straight privilege.[177] Thus, although the repeal of antimiscegenation laws and of the mixed-sex marriage requirement both threatened or threaten the effacement of majority privilege, the latter would not directly threaten the social identifiability of the majority but rather would threaten the legal distinguishability of the heterosexually identified majority and the sense of superiority currently enjoyed by some of them.[178]

Nonetheless, as David Richards has argued:

> [T]he injuries inflicted on identity are very much supported, on the other side, by the sense of identity (for example, in racism, of whites as superior; or, in sexism, of conventional heterosexual men as superior). The political power of structural injustice importantly depends on its constitutive power in the formation of such identity in intimate life. Identity, thus formed in intimate relations (as sexism clearly is), has a personal intimacy that, when under attack, construes the attack as a

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culture, maintaining the institution of heterosexual marriage is a crucial component of the preservation both of heterosexual identity and heterosexual privilege . . . .") (emphasis omitted).

176. *See, e.g.*, Richard F. Duncan, *From* Loving *to* Romer*: Homosexual Marriage and Moral Discernment*, 12 BYU J. PUB. L. 239, 251 (1998) ("The dual-gender requirement, like the decision in *Loving*, is animated by a moral sense that discerns the true nature of marriage.").

177. *See, e.g.*, STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 10–11, 17–19, 35 (1996).

178. *See, e.g.*, J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2363 (1997).

> Just as whites have a stake in the preservation of their racial identity, so too heterosexuals (and particularly heterosexual men) have a stake in the preservation of their gender identity. Homosexuals undermine social meanings about gender that perpetuate male supremacy; homosexuality also threatens notions of family organized around patriarchal privilege. Demands by homosexuals for increased status—which include challenging the idea that they are immoral and deviant—undermine the superordinate identity of heterosexuals as surely as demands by blacks or women undermine the superordinate identities of whites and males.

Id.

> direct threat to self, in particular, invoking the protection of family values. . . . [T]he populist reactionary response to the case for gay rights takes the form of resisting alleged unjust aggression against a threatened sense of self, appealing, paradoxically, to family values.[179]

Even if one somehow doubted that many marriage conventionalists' heterosexual identities were likely to be *directly* affected by what legal status same-sex couples may or may not be allowed,[180] it should be nearly undeniable that a person's views about gender—perhaps especially a heterosexually identified person's gender beliefs—would shape his or her sense of self so that pressures on such persons' sense of gender could pressure their sense of self.[181] But numerous psychological studies have shown that attitudes toward lesbigay persons are strongly linked with gender or sex-role attitudes.[182] Thus, the prospect of civil marriage's expressing some basic similarity before the law between committed mixed-sex relationships and committed same-sex relationships may indirectly affect some heterosexually identified persons' identities.[183] This too, then, reflects an expressive basis for the mixed-sex requirement for civil marriage.

One possible objection to my arguments would take issue with their identification of the expressive basis for the mixed-sex requirement.[184] Under the proposed analysis for unique expressive resources,[185] the mixed-sex requirement for civil marriage is subject to demanding First Amendment scrutiny if its purpose is related to expression. "But civil marriage serves lots of nonexpressive purposes," someone might argue, "so why isn't rational basis review the appropriate kind of scrutiny?"

The response to this objection is twofold. First, to trigger heightened First Amendment scrutiny one need not show that the *only* conceivable

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179. RICHARDS, *supra* note 58, at 199–200.

180. Such doubt might arise if one took a "minoritizing view" that sees "homo/heterosexual definition" most immediately "as an issue of active importance primarily for a small, distinct, relatively fixed homosexual minority." EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 1 (1990).

181. *Cf.* Twenge, *supra* note 157, at 419–20 (recounting studies finding that women who prefer to keep their birth surnames upon marriage "have more feminist attitudes").

182. Marc Fajer and Andy Koppelman cite and discuss many of these studies. *See* Fajer, *supra* note 82, at 617–24; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 237–39 (1994).

183. *See* Chambers, *supra* note 168, at 12 (suggesting that discomfort of some heterosexually identified persons with notion of same-sex marriages may result in part because "marriage is about gender roles that most liberals consciously reject but unconsciously embrace," roles that are threatened when spouses are of the same sex).

184. *See supra* Part I.B.1.

185. *See infra* Part I.C.

justification for the mixed-sex requirement is expression-related.[186] Indeed, the Court has "often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral."[187] Thus, even though reasonable people might disagree about the precise weight to give the expressive purposes for the mixed-sex requirement for civil marriage, the requirement does have such purposes, and the fact that those aims form a significant basis for it suffices to trigger stringent scrutiny.

"But civil marriage laws were adopted long before the debate about same-sex marriage emerged," a purpose-critic might note, "so why should it matter whether there are expressive reasons today for the mixed-sex requirement?" It is important to look to the contemporary justifications or motivations for the mixed-sex requirement for several reasons. Although civil marriage has a long history in the United States, in recent years both the federal government and some thirty states have amended their marriage laws or otherwise adopted measures designed to fortify the limitation of civil marriage to mixed-sex couples.[188] So, in most instances, if a same-sex couple is denied the right to marry civilly today, it is pursuant to a modern statute in the service of whatever contemporary purposes undergird the mixed-sex requirement.

Even in states that have rebuffed or that have not yet completed the most recent attempts to define civil marriage as mixed-sex, the constitutionality of the mixed-sex requirement should be assessed by reference to its current purposes, rather than whatever justifications might have been thought to underlie the restriction when marriage began to be civilly regulated. The originary purposes of civil marriage may well have been quite religious as regulation of the institution passed from

186. By *expression-related*, I mean to include the various formulations the Court has used to trigger heightened First Amendment scrutiny: "related to expression," City of Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 585 (1991) (Souter, J., concurring in the judgment)); "related to the content of the expression," *id.* at 289; "related to the suppression of free expression," Texas v. Johnson, 491 U.S. 397, 403 (1989); and "based on the content or viewpoint of expression," City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 766 (1988).

187. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 679 (1994) (O'Connor, J., joined by Scalia, Thomas, and Ginsburg, JJ., dissenting) (citing cases). "Of course, the mere possibility that a statute might be justified with reference to content is not enough to make the statute content based, and neither is evidence that some legislators voted for the statute for content-based reasons." *Id.* at 680. But then, it is far more than merely possible that the mixed-sex requirement rests on a content-based justification, as I argue *infra* Parts II.A and II.C.

188. *See* A Historic Victory: Civil Unions for Same-Sex Couples 7, *at* http://www.lambdalegal.org/sections/library/marriage/whatsnext.pdf (last modified July 6, 2000) (enumerating states with "mini-DOMA's" as of June 20, 2000).

ecclesiastical authorities to the state.[189] As such, those purposes might be suspect under the Establishment Clause. But the Supreme Court held in *McGowan v. Maryland*[190] that it is proper for establishment analysis to disregard an original religious purpose that has attenuated and examine instead plausible contemporary justifications if any have evolved.[191] If it is proper to determine whether a Sunday-closing law violates the Establishment Clause of the First Amendment by looking at the purposes it serves at the time it is challenged, the same should be true of a mixed-sex requirement for civil marriage challenged as violating the Speech Clause of the same First Amendment. The real issue in either case is the constitutionality of a law in today's society, so current social purposes are what should be relevant to the analysis, except insofar as questions of taint might afford an independent ground for invalidation.[192] And, as this Part demonstrates, ample evidence supports the conclusion that the mixed-sex requirement rests on purposes related to expression: preserving the current symbolic meaning of civil marriage is a significant part of the contemporary purpose of the mixed-sex requirement, and the sense of self of many heterosexually identified persons is likely imbricated with the symbolic meaning of civil marriage, which helps explain the anxiety and vehemence with which marriage conventionalists resist the justice claims of same-sex couples[193] and instead insist on preserving the symbolic meaning of that institution.

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189. *See* Carter, *supra* note 45, at 217 ("[T]he common law rules [governing civil marriage] were basically the tenets of marriage as promulgated by the church.").

190. 366 U.S. 420 (1961) (rejecting Establishment Clause challenge to Sunday-closing law).

191. *See id.* at 444 ("In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character...."); *id.* at 447 ("[c]onsidering the language and operative effect of the current statutes"). *See also id.* at 433–35, 445, 448, 449 (making similar points).

192. The notion of taint may be the best way to understand the Court's holding in *Hunter v. Underwood* that a provision of Alabama's state constitution disenfranchising persons convicted of crimes involving moral turpitude violated the Equal Protection Clause because "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." 471 U.S. 222, 233 (1985). The Court summarily rejected the state's argument that, as the Court characterized it, "regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision." *Id.* at 232–33.

193. *See, e.g.*, 142 CONG. REC. H7482 (1996) (statement of Rep. Barr) ("The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."); Don Feder, Editorial, *Democracy Under Attack in Vermont*, BOSTON HERALD, Dec. 22, 1999, at 37 ("The [Vermont Supreme C]ourt has put a loaded gun to legislators' heads and said: 'You can choose barrel A (gay marriage) or barrel B (domestic partners' benefits). And, if you don't act, we'll choose for you.'").

Granted, this response does not address the fact that current precedents do not wholly illuminate the nature of the inquiry whether the statutory purpose of the mixed-sex requirement might properly be judged, in part, to be expression-related:[194]

> There is a pervasive ambiguity [in First Amendment doctrine] as to whether courts are to assess the justification for a regulation (the reasons that can be adduced for its passage) or the motivation for a regulation (the actual psychological intentions of those who enacted it). These are very different inquiries, and yet the Court has persistently equivocated as to which it means to require.[195]

This Article, however, is not the place to recapitulate, reevaluate, and resolve the debates within the immense legal literature on purpose analysis in constitutional law.[196] Rather, the analysis in this Part takes the lead of Charles Black's famous defense[197] of *Brown v. Board of Education*[198]—approved by the Supreme Court in *Planned Parenthood v. Casey*[199]—by considering the full legal and social context in which the mixed-sex requirement is being defended and entrenched. Similarly, this Article's purpose analysis accepts Charles Lawrence's proposal, originally offered in the context of equal protection and due process, to look to "cultural meaning" in constitutional purpose analysis: "The court would analyze governmental behavior much like a cultural anthropologist might: by considering evidence regarding the historical and social context in which the decision was made and effectuated."[200] The specific aim of this Article

194. *Cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) (determining government purpose and content neutrality or non-neutrality "is not always a simple task").

195. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1268 (1995) (emphasis omitted).

196. For a very small sampling, see generally Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

197. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

198. 347 U.S. 483 (1954).

199. 505 U.S. 833 (1992).

> As one commentator observed, the question before the Court in *Brown* was "whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning and can find an answer only on *the ground of history and of common knowledge about the facts of life in the times and places aforesaid.*"

Id. at 863 (quoting Black, *supra* note 197, at 427) (emphasis added).

200. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987).

is not precisely Professor Lawrence's,[201] but instead is to identify whether concern with symbolism or other expression underwrites the mixed-sex requirement for civil marriage. As with Lawrence's inquiry, "[t]his is [an] interpretive judgment."[202]

In making that judgment as to the mixed-sex requirement's purpose or purposes, one need not resolve the motivation-versus-justification debate. Whether a purpose related to expression refers to a justification for a statute or to a motivation of the lawmakers, and whether the inquiry is objective (extrapolating plausible justifications from the statute) or more subjective (looking to articulated justifications or personal motives), the mixed-sex requirement has a significant purpose related to expression. Certainly there is ample basis in the statements of legislators supporting the mixed-sex requirement, of their constituents urging exclusion of same-sex couples from civil marriage, and of states defending mixed-sex requirements to conclude that a significant motivation for the requirements is related to expression, as detailed in this Part. And, although the case is perhaps not as irrefutable, one should also conclude, in the present socio-historical context, that the justification of the mixed-sex requirement—which is so poorly served by the ostensible public welfare purposes relied on by some of its defenders[203]—is likewise related to expression.

This Article's second response to the government-purpose challenge turns upon the relative weakness of the nonexpressive purposes for the mixed-sex requirement. Even if the purpose of the mixed-sex requirement were deemed unrelated to expression, the fact that the mixed-sex requirement regulates access to a unique expressive resource should, and, under the doctrine I have proposed, does, suffice to trigger some heightened scrutiny, even if not the most strict. This is consistent with *United States v. O'Brien* and the Court's general expressive conduct jurisprudence, which holds that even where the state's purpose is not related to the content of expression, government must still show that its regulation "furthers an important or substantial governmental interest... and [that] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[204] Even if

201. Lawrence's analysis aims to identify process defects and stigmatic impositions stemming from unconscious racism. *See, e.g., id.* at 358 (illustrating functions of cultural-meaning inquiry). This Article, in contrast, need not address unconscious motivation; the evidence of conscious concern about expression in the debates over civil marriage and the mixed-sex requirement is plentiful.

202. *Id.* at 361.

203. *See infra* Part II.C.2.

204. 391 U.S. 367, 377 (1968). For a more detailed discussion of expressive-conduct doctrine see *infra* Part I.C.2.c.

"relatively lenient"[205] by comparison to "the most exacting scrutiny,"[206] this test is or certainly should be appreciably more demanding than rational basis review. Given the substantial over- and underbreadth of the various public welfare purposes offered for the mixed-sex requirement,[207] this test suffices to show that the mixed-sex requirement violates the First Amendment. And the fact that this default scrutiny turns upon the effect of the mixed-sex requirement, rather than its purpose, is justified. The First Amendment is concerned with the effects of governmental actions on expression even in situations where lawmakers' subjective intents or motivations are not shown to be bad.[208] The Court has more than once suggested as much,[209] and First Amendment scholars have reached similar conclusions.[210] And it seems particularly appropriate to look to the effects of governmental regulation where, as here, what that requirement does is to allocate a unique *expressive* resource.[211] Thus, the significant effect on expression that varies with respect to the content of the expression[212] should be regarded as raising serious First Amendment concerns.

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205. Texas v. Johnson, 491 U.S. 397, 407 (1989).

206. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

207. *See infra* Part II.C.2.

208. *But see* Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 443, 447 (1995) (discussing, with perhaps slight exaggeration, extent to which Supreme Court doctrine treats effects as irrelevant).

209. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994) (characterizing *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983), as "rejecting First Amendment challenge to differential tax treatment of veterans groups and other charitable organizations, but noting that the case would be different were there any 'indication that the statute was intended to suppress any ideas *or* any demonstration that it has had that *effect*'") (emphases added); NAACP v. Alabama, 357 U.S. 449, 461 (1958) ("[A]bridgment of [First Amendment] rights, even though unintended, may inevitably follow from varied forms of governmental action.").

210. *See, e.g.*, David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201, 231 (1997) ("First Amendment questions are raised whenever a law has a negative impact on some expression."); Ofer Raban, *Content-Based, Secondary Effects, and Expressive Conduct: What in the World Do They Mean (and What Do They Mean to the United States Supreme Court)?*, 30 SETON HALL L. REV. 551, 576 (2000) (advocating focus on effects rather than governmental purpose for construing content-neutral/content-based distinction in First Amendment law); Wendy K. Olin, Note, *Constitutional Survival Camp: What Are the Chances that the General Applicability Test Will Make It?*, 68 S. CAL. L. REV. 1029, 1042 (1995) (criticizing "general applicability" test in free-exercise context for "affording little weight to the impact of [a] law[, which might,] . . . in effect, prohibit a particular group from exercising its First Amendment rights").

211. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 54–55 (1994) (holding unconstitutional ban on most residential signs—clearly a form of expressive resource—because *effect* was to restrict too much expression).

212. *See* discussion *infra* Part II.A.

C. IMPLEMENTING THE FIRST AMENDMENT

Because civil marriage is an important, unique expressive resource by which people constitute their identities and express themselves both to their partners and to the world, the First Amendment seems obviously relevant to the debate over the mixed-sex requirement, concerned as it is with governmental regulation of expression.[213] The question then arises how First Amendment principles constraining regulation of civil marriage should be treated by courts. For litigation purposes, it would be helpful to articulate constitutional doctrine, the means by which constitutional principles are translated into judicially implementable rules, that should apply to regulations of this unique expressive resource.[214] After all, same-sex couples who have been denied access to this expressive resource have already established a litigation record over the constitutionality *vel non* of the mixed-sex requirement for civil marriage, and there is little reason to think that such efforts will cease any time soon.[215] Unfortunately, in light of the novelty of the unique expressive resource argument,[216] the Supreme Court's reticulation of First Amendment doctrine,[217] and the unique nature of the institution of marriage,[218] no ready-made doctrine is available to

213. *Cf.* Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 225 n.128 (1997) (opining that "[i]f some citizens are denied the right to this proclamation," i.e., "marriage . . . as a public proclamation of full citizenship," "it becomes difficult to see how the First Amendment could not be implicated").

214. *See generally, e.g.*, Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 56–67 (1997).

215. Even were the U.S. Supreme Court to hold strongly that the mixed-sex requirement does not violate the U.S. Constitution, couples would surely continue to argue that the requirement violates state constitutional provisions. Indeed, the at least partially successful litigation in Hawaii and Vermont presented state constitutional challenges to the denial of civil marriage to same-sex couples.

216. There are few if any direct parallels to civil marriage in U.S. law and culture, so little opportunity has existed for strongly analogous arguments to have developed.

217. The increasingly baroque character of the Court's free-expression doctrines continues to frustrate legal scholars. *See, e.g.*, Daniel T. Kobil, *Advocacy On Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 235 (2000) (referring to "the chaotic universe of First Amendment cases, an area of constitutional law about which it is notoriously difficult to make doctrinal generalizations"); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 61 (1996) ("Byzantine zoning rules render free speech doctrine of little or no use in many important settings."); Post, *supra* note 40, at 1714–16. *Cf.* Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323.

> As the 1994 term drew to a close, "tests" for the Religion Clauses were in nearly total disarray. Apart from cases of discrimination against religions, and disputes over church property, a student of the Supreme Court's jurisprudence could not formulate any general tests that a majority of the Justices clearly support. . . . [T]his state of affairs . . . is disquieting for lawyers and clients, for judges who must decide free exercise and establishment claims, and for Supreme Court Justices who aspire to stable principles of adjudication.

Id. at 323.

handle the First Amendment questions that the mixed-sex requirement raises. Nonetheless, relevant principles can be extracted from existing First Amendment doctrine and theory and combined to fashion constitutional doctrine adequate for analyzing the constitutionality of the mixed-sex requirement for civil marriage.

1. *A Proposed Doctrinal Framework*

Civil marriage should be analyzed as a unique expressive resource (or "instrumentality of communication," in Steven Gey's terminology[219]). Civil marriage is a uniquely powerful medium through which, or vocabulary with which, people may express themselves to intimate partners and to the world at large, in the process constituting their identity and informing policy debates.[220] It is important under the First Amendment that such resources be maintained in a nondiscriminatory fashion: "An important material dimension of public discourse is that there be a wide circulation of 'similar social stimuli.' This circulation creates a public communicative sphere by making common experiences available to those who would otherwise remain unconnected strangers."[221] In particular, civil marriage should be made available on a viewpoint-neutral basis,[222] and content-based regulations of the expressive resource of civil marriage should be tolerated only insofar as they are justified by a nonexpressive

218. Civil marriage may well be sui generis. *See In re* Johnson, 658 N.Y.S.2d 780, 785 (Sup. Ct. N.Y. 1997) (recounting "judicial pronouncements that the marriage contract was sui generis"); Brief of Amicus Curiae Hawaii Catholic Conference at 6, Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05), http://www.qrd.org/usa/legal/hawaii/baehr/1997/brief.catholic.conf-04.14.97 (defending mixed-sex requirement on ground "that marriage is a unique social institution") [hereinafter Brief of Catholic Conference]. *Cf.* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.").

219. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1604 (1998).

220. *See supra* Part I.A.

221. Post, *supra* note 195, at 1276 (citation omitted).

222. As Eugene Volokh has noted, the Court has applied strict scrutiny to laws that it has deemed viewpoint-based. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2425 n.44 (1996). However, as Professor Volokh has also correctly observed:

> [T]he Court has never specifically faced this question, and has at times hinted that the rule for viewpoint-based restrictions may be more stringent than for content-based restrictions. Moreover, the Court has at times said that speech restrictions imposed by the government as proprietor of a nonpublic forum must be viewpoint-neutral. If that's so, then it would seem that speech restrictions imposed by the government as sovereign would also have to be viewpoint-neutral.

Id. (citations omitted).

compelling governmental interest and afford adequate alternative expressive resources.[223]

One of the most basic neutrality commands of the First Amendment is that of viewpoint neutrality.[224] "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[225] The disfavoring of viewpoint-discriminatory regulations may be due to concerns about government interference with either the "expressive marketplace" or equal freedom of expression,[226] and "the symbolic (as much as any other) endorsement by the authority of one side of the controversy."[227] "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."[228] This requirement is a general First Amendment norm: "[O]ur

223. A more limited doctrine might demand such government interests and expressive alternatives if, but only if, a marriage regulation, such as the mixed-sex requirement, itself has an expressive basis. Such requirement of an "expressive" trigger by the state before balancing might be justified by reasons similar to those for demanding a nonexpressive governmental interest to outweigh private individuals' expressive rights. *See infra* notes 235–47 and accompanying text.

224. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 193 (1999) ("The Court generally treats restriction of the expression of a particular point of view as the paradigm violation of the First Amendment."). This demanding viewpoint-neutrality principle does not apply when the government itself speaks. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995). But, as I will argue *infra* Part I.C.2.e, denials of the expressive resource of civil marriage should not be analyzed as government speech.

225. Texas v. Johnson, 491 U.S. 397, 414 (1989). *See also, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'").

226. *See, e.g.*, Post, *supra* note 40, at 1825–26.

> Public forum doctrine's prohibition against viewpoint discrimination might derive from special concerns, not present in decisions dealing only with the internal management of speech, about the distortion of the ordinary workings of the marketplace of ideas, or about the principle of equal liberty of expression when applied to members of the general public.

Id. (internal quotation marks and citations omitted). *See also, e.g.*, Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 112 (1989) ("The principle of equality of communicative opportunity prohibits the government from structuring public discourse so as to produce a social consensus that persists only because some groups have fewer opportunities to speak or some viewpoints are forbidden.").

227. Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 324 (1997). Sadurski concludes that "[g]overnmental partisanship is . . . the main First Amendment sin targeted by the principle of viewpoint neutrality." *Id.* at 331.

228. Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000). "Access to a public forum, for instance, does not depend upon majoritarian consent." *Id.* Moreover, "there is in fact reason to doubt that we can confidently delineate a category of viewpoint-based restrictions that do not significantly distort public debate. As history teaches, judicial evaluations of viewpoint-based restrictions are especially likely to 'become involved with the ideological predispositions of those doing the evaluating.'" Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 225 (1983) (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 112 (1980)).

'cultural life,' just like our native politics, 'rests upon [the] ideal' of governmental viewpoint neutrality."[229] Accordingly, it should apply to governmental regulation of marriage, a uniquely powerful expressive resource that is of paramount importance in contemporary U.S. culture and politics.

Furthermore, even viewpoint-neutral regulations that are content based are constitutionally suspect under the First Amendment.[230] The canonical (albeit somewhat overstated[231]) quotation comes from *Police Department v. Mosley*: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[232] As Geoffrey Stone has suggested, concerns about equality of communicative opportunity, the impropriety of regulating expression based upon its communicative impact, distortion of public debate, and government hostility toward disfavored ideas, views, or items of information collectively provide "a sound basis for the Court's content-based/content-neutral distinction."[233] Because ruling majorities can easily impede equality of communicative opportunity and distort public discourse by amplifying speech favored by the majority, and because these skewing effects are potentially magnified where a unique expressive resource is at issue, content-based regulations of unique expressive resources should trigger closer First Amendment scrutiny. Hence, if the mixed-sex requirement is found to be content based it should be subjected to heightened purpose and means scrutiny.[234]

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229. NEA v. Finley, 524 U.S. 569, 603 (1998) (Souter, J., dissenting) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

230. "Content-based restrictions also have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." Burson v. Freeman, 504 U.S. 191, 197 n.3 (1992) (citing Police Dep't v. Mosley, 408 U.S. 92 (1972)).

231. *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 545 (1980) (Stevens, J., concurring in the judgment) (referring to "the hyperbole in the dictum" from *Mosley*, 408 U.S. at 95).

232. *Mosley*, 408 U.S. at 95.

233. Stone, *supra* note 228, at 233.

234. One does not necessarily have to embrace Steven Gey's argument that *all* instrumentalities of communication should be protected equally with tremendously stringent scrutiny of government regulations thereof to conclude that rigorous scrutiny is warranted for civil marriage's mixed-sex requirement. *See* Gey, *supra* note 219, at 1576 (proposing analysis "appl[icable] to any instrumentality 'specifically used for the communication of information and ideas'") (quoting United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 137 (1981) (Brennan, J., dissenting)). Rather, the analysis might be limited to unique expressive resources, regulation of which poses greater First Amendment dangers. If, on the other hand, one doubted courts' and other constitutional interpreters' abilities to make the requisite uniqueness determinations, extending the analysis proposed here to all expressive resources would be preferable to withdrawing from the field.

Moreover, if the mixed-sex requirement is subject to heightened scrutiny, one should also apply interference analysis from First Amendment forum doctrine in a manner limiting government to asserting *nonexpressive* interests if it wishes to restrict a unique expressive resource. Interference analysis protects speech on public property unless it would interfere with the ordinary, legitimate operations of government.[235] At first blush it might seem that if government itself wishes to express something via its regulation of the institution of civil marriage,[236] it could constitutionally restrict any conflicting use of that expressive resource by lesbigay couples. Thus, for example, if it were permissible for government to use civil marriage symbolically to express support for heterosupremacy,[237] same-sex couples could be denied use of civil marriage to express a belief in the equal capacities for love and commitment of heterosexually identified and lesbigay people.

This position, however, would undermine the constitutional purposes behind recognizing and analyzing civil marriage as an expressive resource. As Professor Gey has argued, interference analysis should protect access to instrumentalities of communication[238] unless "universal access to those assets . . . significantly interfere[s] with the *nonexpressive* operations of the government."[239] This is a salutary limitation, for it would run counter to First Amendment goals of a robust field of private (in the sense of nongovernmental) communication if government could override expressive rights, including rights to "equality of communicative opportunity,"[240] with its own desire to speak or to privilege the speech of a majority. This restraint is especially critical where a unique expressive resource—like civil marriage—is at stake because the potential for government to skew

235. *See, e.g.*, Gey, *supra* note 219, at 1558–76; Post, *supra* note 40, at 1765–82.

236. *See infra* Part I.C.2.e (discussing civil marriage as government speech); *infra* Part II.B (discussing impermissibility of government efforts to protect the current symbolic meaning of civil marriage).

237. This is, of course, a serious equal protection issue about the extent to which government could express the position that one group in U.S. society is superior to another. For arguments that equal protection principles preclude at least some such government expression, see, for example, Robert J. Bein, *Stained Flags: Public Symbols and Equal Protection*, 28 SETON HALL L. REV. 897 (1998); James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 YALE L.J. 505 (1991). *See also* Jack Achiezer Guggenheim, *The Indians' Chief Problem: Chief Wahoo as State Sponsored Discrimination and a Disparaging Work*, 46 CLEV. ST. L. REV. 211 (1998). *Cf.* Smith v. St. Tamany Parish Sch. Bd., 448 F.2d 414 (5th Cir. 1971) (affirming district court order enjoining official display of confederate flag by school district desegregating pursuant to constitutional litigation).

238. Gey, *supra* note 219, at 1604.

239. *Id.* at 1603 (emphasis added).

240. Solum, *supra* note 226, at 56.

discourse is heightened in that case.[241] Government certainly may speak in our constitutional order,[242] but First Amendment doctrine should guard scrupulously against the prospect of government expression—which is, after all, simply the preferred expression of some ruling majority—drowning out[243] and "unfairly dominat[ing]"[244] citizen speech.[245]

In brief, then, a governmental expressive purpose cannot count as compelling for purposes of overriding First Amendment constraints on regulation of a unique expressive resource such as civil marriage. My argument is not that government may never express messages of support for heterosexuality or even heterosexual superiority. The legitimacy *vel non* of government espousing such positions is—like the question of the constitutionality of governmental endorsement of white supremacy by monuments to Confederate leaders or the Confederacy[246]—primarily a question of equal protection and equal citizenship. But with respect to First Amendment limitations, governmental symbolism or other expression ought not count as compelling, for to do so would allow a majority to justify an abridgment of speech by its own desire to express something different.[247]

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241. *See* discussion *supra* note 234.

242. *See generally* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA (1983).

243. *See, e.g., id.* at 31–32, 204; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4, at 807 (2d ed. 1988) (arguing that government may "add its own voice to the many that it must tolerate, provided it does not drown out private communication"). *But see* Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 741 (1998) (arguing that "the increment of speech by the government authorized speakers does not . . . in truth drown out the non-government speaker, but only competes in the realm of thought for the attention of the audience").

244. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 607 (1980).

245. This approach is consistent with that advocated by Ashutosh Bhagwat, who has argued that "when core constitutional infringements are at issue, the universe of permissible governmental purposes is extremely limited, and its limits will be determined by the nature of the right allegedly burdened." Bhagwat, *supra* note 196, at 302. Professor Bhagwat has further observed that "many [of the Supreme Court's First Amendment] decisions seem to hold that only limited, speech-promoting purposes can justify certain types of speech regulation." *Id.* at 345.

246. *See generally, e.g.*, Bein, *supra* note 237; Forman, *supra* note 237; Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079 (1995).

247. And, although the Supreme Court has asserted that strict scrutiny was the appropriate test of constitutionality for laws targeting flag burning, its actual analysis in those cases did not rely on lack of narrow tailoring but rather simply concluded that the challenged laws were not justified by the government's expressive purpose. *See infra* notes 370–79 and accompanying text; *infra* note 382.

2. *The Necessity of a New Doctrine: Why Current Approaches Are Inadequate*

The need for the new grouping of First Amendment principles that I have proposed for judging the constitutionality of the mixed-sex requirement for civil marriage might be questioned: Given the prolixity of First Amendment doctrine, why cannot the constitutionality of the mixed-sex requirement be resolved under existing First Amendment rules? One might think that incidental infringement principles establish that the mixed-sex requirement does not even implicate the First Amendment on the ground that the requirement only incidentally infringes any expressive rights. Or someone might be tempted to argue that civil marriage ought to be treated as a governmental subsidy or benefit subject to little or no First Amendment scrutiny. Alternatively, even if one thinks that some heightened constitutional scrutiny is due the mixed-sex requirement, perhaps civil marriage should be analyzed as expressive conduct, a doctrinal approach available at least since 1968, thus obviating the need for any new doctrinal rules. Or the proposal of this Article might be seen as superfluous if civil marriage could be properly analyzed under the Supreme Court's forum doctrines by conceiving of civil marriage as a "space" from which people may speak. Finally, the institution of civil marriage might be analyzed as a form of governmental speech under extant doctrine, perhaps rendering my approach unnecessary. As this Subsection shows, however, these arguments either are clearly unpersuasive, in the case of the first two, or, in the case of the latter three, would not lead to a different conclusion about the unconstitutionality of the mixed-sex requirement for civil marriage and would not adequately capture the constitutional interests that are at stake when the mixed-sex requirement denies people the expressive resource of civil marriage.

a. *Incidental Infringement*

One challenge to the First Amendment argument of this Article might insist that the mixed-sex requirement for civil marriage should not be regarded as raising *any* First Amendment issue due to its being a general law with only incidental effects on expression. According to this view, even if civil marriage is an expressive resource, the limitation on the use of that resource effected by the mixed-sex requirement might be characterized as simply an incidental infringement by a general law not targeted at speech and hence supposedly of no First Amendment consequence. The strongest precedential basis for such an objection might be the Supreme

Court's 1986 decision in *Arcara v. Cloud Books, Inc.*[248] In *Arcara*, a majority of the Court held that, absent an impermissible motive, the First Amendment is not even implicated by closure of an adult bookstore, pursuant to nuisance laws, due to solicitation of prostitution occurring on the premises.[249] The Court held the First Amendment inapplicable because the nuisance closure statute penalized conduct "manifest[ing] absolutely no element of protected expression" and did not "inevitably single out bookstores or others engaged in First Amendment protected activities for the imposition of its burden."[250]

Civil marriage, in contrast, is exquisitely expressive and should be treated as high-value speech protected by the First Amendment.[251] The mixed-sex requirement directly denies the unique expressive resource of civil marriage to same-sex couples, and it denies this resource in every case, unlike a nuisance statute that does not burden First Amendment activity in most, let alone all, of its applications. Hence the mixed-sex requirement falls outside *Arcara*'s rule about incidental speech restrictions and should be subjected to First Amendment scrutiny.

Granted, Justice Scalia and Justice Thomas have advanced a broader argument that, *Arcara* aside, "[w]hen conduct other than speech itself is regulated, . . . the First Amendment is violated only where the government prohibits conduct *precisely* because of its communicative attributes."[252] This position, however, is not accepted doctrine.[253] Nor is such a strong scienter requirement a desirable implementation of the First Amendment's guarantees of free expression, for it would leave government too free to run

248. 478 U.S. 697 (1986).

249. *See id.* at 698–700, 706–07 & n.4.

250. *Id.* at 705.

251. *See supra* Part I.A.

252. City of Erie v. Pap's A.M., 529 U.S. 277, 310 (2000) (Scalia, J., joined by Thomas, J., concurring in the judgment) (emphasis added) (internal quotation marks omitted). *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment) (making same argument).

253. *See, e.g.*, *Arcara*, 478 U.S. at 705 n.2 (operative fact was that "the imposition of the closure order has nothing to do with any *expressive conduct* at all") (emphasis added); United States v. O'Brien, 391 U.S. 367 (1968) (articulating test requiring intermediate scrutiny of incidental burdens on expressive conduct such as burning one's draft card); David Bogen, *Generally Applicable Laws and the First Amendment*, 26 SW. U. L. REV. 201 (1997) (arguing against Justice Scalia's position and for application of *O'Brien*).

It is also not entirely clear whether Justice Scalia's incidental infringement rule would apply to civil marriage. Scalia's rule would apply to "expressive conduct" but not to "oral and written speech." *See Barnes*, 501 U.S. at 576. *But see Cohen*, 501 U.S. at 672 (majority opinion, joined by Scalia, J., finding impact on press of promissory estoppel action by informant "constitutionally insignificant"). It is unclear that marrying civilly and remaining so married should be treated as conduct rather than oral or written speech.

roughshod over expression so long as a litigant were unable to persuade the court that a statute was enacted "precisely" to target expression.[254]

Moreover, it would be a factual mistake to treat the mixed-sex requirement as only incidentally regulating expression. As shown above[255] and as the next Subsection discusses, the mixed-sex requirement for civil marriage clearly rests on an expressive basis. Hence, the incidental infringement approach does not eliminate the need for First Amendment analysis, which my proposed doctrine addresses.

b. *Government Subsidy*

Another possible challenge to the approach of this Article might seek to treat civil marriage as at root a governmental benefit or subsidy. After all, as was emphasized earlier, numerous economic perquisites attach to the status of civil marriage.[256] If civil marriage were thus best seen as a governmental subsidy for some preferred activity, it should be analyzed as such. To some, this perspective, like the incidental infringement perspective addressed above,[257] would subject the mixed-sex requirement to *no* First Amendment scrutiny.[258] But like the incidental infringement thesis, this argument lacks an adequate precedential or normative foundation.

This is not to say no one adopts this "largesse entails carte blanche" position. Justice Scalia (again joined by Justice Thomas) has argued that government subsidies, no matter how selectively applied or viewpoint-based, do not "abridge" anyone's freedom of speech and therefore do not violate the First Amendment.[259]

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254. *See, e.g.*, *Arcara*, 478 U.S. at 709 (Blackmun, J., joined by Marshall and Brennan, JJ., dissenting) (arguing that "the First Amendment, made applicable to the States by the Fourteenth Amendment, protects against all laws 'abridging the freedom of speech'—not just those specifically directed at expressive activity"). *Cf.* Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 645 (1992) ("If applied indiscriminately, [Scalia's] principle could be used to rewrite a great deal of First Amendment doctrine protective of speakers.").

255. *See supra* Part I.B.

256. *See supra* text accompanying notes 22–27.

257. *See supra* Part I.C.2.a.

258. *Cf.* Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983) (emphasizing that failure to subsidize does not violate First Amendment rights). *Regan*, itself a questionable decision, is distinguishable from the mixed-sex requirement for civil marriage both for the reasons addressed in this Section and because of the different sort of effects involved. *See supra* note 209.

259. *See* NEA v. Finley, 524 U.S. 569, 595–99 (1998) (Scalia, J., joined by Thomas, J., concurring in the judgment).

Again, however, that is not the state of the law. Indeed, the Supreme Court has squarely stated that "the First Amendment certainly has application in the subsidy context."[260] As well it should. "Otherwise, the government can avoid its First Amendment obligation to refrain from content and viewpoint regulation of speech simply by saying flatly that only speakers agreeing with the government need apply for public money."[261]

Moreover, while in some constitutional circumstances it may be most appropriate to analyze distribution of money as a governmental subsidy, civil marriage offers eligible couples far more than just money. It provides a web of legal entitlements (running against both government and private third parties) and responsibilities, an affiliation with a rich institutional tradition, and a uniquely potent expressive resource usable to communicate love and commitment to one another and to the world at large.[262] It is this latter aspect that is crucially important to marriage as a social practice and that renders civil marriage properly subject to First Amendment scrutiny; government does in fact regulate who may have access to this unique expressive resource. Accordingly, the guarantees of the First Amendment have an important role to play, and the doctrine proposed above[263] properly implements those guarantees in the civil marriage context.

c. *Expressive Conduct*

A third and less foundational challenge to the project of this Article might reject its proposed doctrine as unnecessary First Amendment bricolage.[264] On this view, civil marriage could adequately be regarded as

260. *Id.* at 587 (majority opinion).

261. Gey, *supra* note 219, at 1601.

The messages that may be expressed by those with access to civil marriage are various but not unlimited in complexion. Primarily, civil marriage enables people to make symbolic statements about commitment, love, family, the institution of marriage, and, under the mixed-sex requirement, heterosexuality. Yet governments do not choose among potential people who might seek the unique expressive resource of civil marriage by inherently subjective criteria such as "artistic merit"; rather, they allow unmarried persons of minimum age, who are sufficiently unrelated to each other, to marry, typically if they take or pass a blood test and pay a fee. Thus, the Supreme Court's holding in *Finley*, sustaining the constitutionality of a federal law requiring the NEA to base grants upon the criteria of artistic excellence and artistic merit, taking into consideration general standards of "decency and respect" for the diverse beliefs and values of the American public, is inapplicable. *Finley*, 524 U.S. at 569.

262. *See generally supra* Part I.A.

263. *See supra* Part I.C.1.

264. *See, e.g.*, Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1229 (1999) (characterizing bricolage as "the assembly of something new from whatever materials the constructor discovered") (citing CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 16–17 (Univ. of Chi. Press 1966) (1962)).

"symbolic speech" or "expressive conduct," with the doctrinal analysis accordingly governed directly by *United States v. O'Brien*[265] without need for new analytic constructs. But while civil marriage is in some respects akin to expressive conduct, *O'Brien* does not provide the best framework for assessing the mixed-sex requirement.

Expressive conduct is action in which people generally might engage with no expressive intent (destroying documents, for example), yet which may on occasion be engaged in for expressive purposes (burning a draft card as a war protest),[266] in which case "'speech' and 'nonspeech' elements are combined in the same course of conduct."[267] Thus, the government will usually have nonexpression-related reasons to regulate expressive conduct, which typically would only inadvertently come into conflict with expressive activity.[268] Civil marriage likewise may be regulated by government for nonexpression-related reasons, and this regulation (in particular, the mixed-sex requirement, but other restrictions as well) can interfere with people's ability to express love and commitment by marrying civilly.

Although the Supreme Court has recognized that the First Amendment does protect expressive conduct, it has also worried about the floodgate problem: *any* conduct could potentially be engaged in for expressive reasons, thus subjecting *all* governmental action to ideally (or at least ostensibly) demanding First Amendment scrutiny.[269] Realistically, a court

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265. 391 U.S. 367 (1968) (articulating test requiring intermediate or strict scrutiny of laws burdening draft card burning or other expressive conduct). *O'Brien* states that a law challenged on the ground that it interferes with expressive conduct is constitutional under the following conditions:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. *O'Brien*'s more lenient analysis is replaced by strict scrutiny, however, if the statute serves a government interest "related to the suppression of expression," or "[]related to the suppression of free expression." Texas v. Johnson, 491 U.S. 397, 407 (1989).

266. *Cf.* Chase v. Davelaar, 645 F.2d 735, 739 (9th Cir. 1981) (characterizing *O'Brien* as applicable where a challenged law "implicat[es] conduct, generally considered non-expressive, which the actor asserts to be communicative").

267. *O'Brien*, 391 U.S. at 376.

268. *See id.* ("[A] sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

269. *See, e.g., id.* ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Johnson*, 491 U.S. at 404 (quoting and reaffirming this aspect of *O'Brien*). *See also* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 576 (1991) (Scalia, J., concurring in the judgment) ("But virtually *every* law restricts conduct, and virtually *any* prohibited conduct can be performed for an expressive purpose—if only expressive of the fact that the actor disagrees with the prohibition."). *But see* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44

would hesitate to apply expressive conduct analysis to the mixed-sex requirement for marrying civilly unless the court were convinced that it could be distinguished from the vast majority of laws that do not "deserve" First Amendment scrutiny, such as statutes requiring drivers to stop at red lights.[270]

The high expressivity, historical pedigree, and uniqueness of civil marriage should suffice to place it on the protected side of the line between "expressive conduct" and conduct that is "de minimis expressive."[271] Courts have already recognized that a number of actions can be engaged in for expressive purposes sufficient to claim the shelter of the First Amendment. Marriage, including civil marriage, is at least as effective for communicating some messages[272] as is conduct such as making a donation

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HASTINGS L.J. 921, 929 (1993) (arguing that "all laws, the entire corpus juris, should be subject to" the same analysis used in expressive conduct cases).

This concern sounds more like a reason of institutional dimension rather than one of the substance of constitutional principle, although one might try to argue that a sensible First Amendment would not embody a principle *allowing* every law or government action to be challenged in court, even if the vast majority of such challenges would readily be held meritless.

270. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 554 (1965) ("One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest."). *See also* Arcara v. Cloud Books, Inc., 478 U.S. 697, 708 (1986) (O'Connor, J., joined by Stevens, J., concurring) (rejecting any analysis that would produce "the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment"); Troster v. Pa. State Dep't of Corr., 65 F.3d 1086, 1093–94 (3d Cir. 1995) (discussing *Cox* and similar examples).

271. By "de minimis," I mean to refer to a notion similar to that articulated by the Supreme Court in *City of Dallas v. Stanglin*: "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." 490 U.S. 19, 25 (1989).

272. Civil marriage might be seen as inherently expressive—or, in Justice Scalia's preferred terminology, "conventionally expressive." *See Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring in the judgment). Although *Barnes*, *id.* at 570 (plurality opinion); *id.* at 572 (Scalia, J., concurring in the judgment), and *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (plurality opinion); *id.* at 310 (Souter, J., concurring in part and dissenting in part) (noting "agree[ment] with the analytical approach that the plurality employs in deciding this case"), reject the idea that nudity is an inherently expressive *state* in which a person might be, that is because nudity is not conventionally (i.e., understood in society as) expressive and it is not clear what nudity would nontrivially express:

> [T]he voluntary assumption of that condition, without more, apparently expresses nothing beyond the view that the condition is somehow appropriate to the circumstances. But every voluntary act implies some such idea, and the implication is thus so common and minimal that calling all voluntary activity expressive would reduce the concept of expression to the point of the meaningless.

Barnes, 501 U.S. at 581 (Souter, J., concurring in the judgment). The situation with respect to civil marriage is quite different, for, as reflected *supra* Part I.A, civil marriage is conventionally understood as expressive, and it is expressive in a much deeper way than signifying vacuously that marriage is appropriate for a couple—marrying civilly and being civilly married expresses this, but for *reasons* going toward love or commitment, most predominantly. Marrying civilly *is* "normally engaged in for

to a political candidate;[273] beating a drum during an anti-war demonstration also involving chanting;[274] and allowing two court clerks to attend a training seminar in violation of their employer-judge's instructions that only people who contributed to his reelection campaign be allowed to attend.[275] And although its contours have changed over time,[276] civil marriage is a longstanding institution traditionally used by people to express themselves to each other and to society at large. Moreover, no other institution is very similar to marriage, and this uniqueness helps leave open the possibility of distinguishing marrying civilly from other actions people might try to bring within the scope of expressive conduct doctrine.[277]

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the purpose of communicating an idea or an emotion." *Barnes*, 501 U.S. at 577 n.4 (Scalia, J., concurring in the judgment).

273. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

274. *See* United States v. Doe, 968 F.2d 86 (D.C. Cir. 1992).

275. *See* Nunez v. David, 169 F.3d 1222 (9th Cir. 1999).

276. *See e.g.*, ESKRIDGE, *supra* note 19, at 95–96; GRAFF, *supra* note 52; Jennie Holman Blake, *The History and Evolution of Marriage*, 1999 BYU L. REV. 847 (reviewing JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION (1997)); Lisa O'Counell, *Marriage Acts: Stages in the Transformation of Modern Nuptial Culture*, DIFFERENCES: J. FEMINIST CULTURAL STUD., Spring 1999, at 68.

277. *But cf.* Texas v. Johnson, 491 U.S. 397, 417 (1989) (rhetorically asking "[h]ow would we decide which symbols were sufficiently special to warrant this unique status [of being subject to governmental restrictions designed to restrict their expressive uses]?"); *id.* ("There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone."). Of course, these passages reflect the Court's refusal to exempt use of the flag from First Amendment protection, not contempt for any suggestion that the flag, or any other uniquely distinctive means of expression, might receive *heightened* constitutional protection.

Another legal status presents itself as possibly akin to marriage for these purposes: citizenship. Like civil marriage, citizenship is a formal legal status, one that is frequently constitutive of a person's identity (particularly of naturalized citizens) and may be entered into at least in part to express one's sense of national belonging, that is, to express the relationship between oneself and a country, much like civil marriage may be entered into to express a personal relationship of mutual "belonging" of sorts.

The analogy is not perfect. In daily life people commonly, if not constantly, express their marital status (and such expressions are generally understood to include claims of civil marriage status), whereas except at naturalization ceremonies, when filling out government paperwork, and perhaps during election-related (or certain other political) discussions, people do not so commonly express their citizenship status. In addition, divorce is far more prevalent in the United States than is renunciation of citizenship. Staying married is concomitantly more conventionally expressive than remaining a citizen. And even were I mistaken about the relative extent to which citizenship is or is not understood to be expressive compared to civil marriage, citizenship implicates basic membership norms of a polity in a way that civil marriage is not as strongly thought to implicate. Thus, even if citizenship were considered another unique expressive resource, it is not clear that denials of citizenship should ultimately be held to violate the First Amendment, for the perceived need to limit national membership may support refusal to accept all comers as citizens. Whether it does is a question meriting separate investigation, for it implicates fundamental issues of national "self"-constitution.

Nevertheless, in another sense marrying civilly is unlike situations that the Court has treated as expressive conduct: burning a draft card, burning a flag, dancing in the nude, and sleeping in the park.[278] What one does when one marries legally is not really engaging in primary "conduct" with *both* physical consequences and communicative consequences in the world. Rather, people who marry civilly are engaging in an abstract act, entrance into a quasi-contractual legal status. This lack of separable underlying primary conduct may also suggest that the slippery slope concerns and the dual nature concerns that underwrote the development of current expressive conduct doctrine (which is less protective of expressive conduct than oral and written speech) are implicated less strongly here.

Even if the expressive-conduct framework were the best doctrinal way of treating civil marriage under the First Amendment, however, the bottom-line of the analysis would not change, for the relevant considerations under *O'Brien* informed the construction of the proposed doctrine. Pursuant to *O'Brien*, (1) government interests related to the suppression of expression trigger heightened scrutiny; (2) even laws unrelated to communicative impact are properly subject to First Amendment scrutiny and must be supported by a governmental interest that is not merely legitimate but "compelling; substantial; subordinating; paramount; cogent; [or] strong";[279] and (3) such expression-unrelated laws also must be drawn carefully so that the expressive conduct restricted is "no greater than is essential to the furtherance of that interest."[280] The analysis following in Part II establishes that the mixed-sex requirement fails these tests and is accordingly unconstitutional even under expressive-conduct doctrine.

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278. Technically, *United States v. O'Brien* assumed arguendo that O'Brien's draft-card burning was sufficiently imbued with communicative elements as to fall within the purview of the First Amendment. *O'Brien*, 391 U.S. at 376. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), did likewise with respect to sleeping overnight in the park. *Id.* at 293. *Johnson*, 491 U.S. at 397, and *United States v. Eichman*, 496 U.S. 310 (1990), do, however, squarely hold that the flag burnings at issue under the circumstances of those cases were expressive conduct protected by the First Amendment. In addition, *Barnes v. Glen Theatre, Inc.*, concluded that nude dancing is (albeit just barely) expressive conduct under the First Amendment. *Barnes*, 501 U.S. at 565–66 (plurality opinion of Rehnquist, C.J., joined by O'Connor and Kennedy, JJ.); *id.* at 581 (Souter, J., concurring in the judgment); *id.* at 587 (White, J., joined by Marshall, Blaekmun, and Stevens, JJ., dissenting). This holding was reaffirmed in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *Id.* at 288 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.); *id.* at 310 (Souter, J., concurring in part and dissenting in part); *id.* at 317, 324 (Stevens, J., joined by Ginsburg, J., dissenting).

279. *O'Brien*, 391 U.S. at 376–77.

280. *Id.* at 377.

d. *Public Fora*

Reliance on public forum doctrine for a ready-made method to analyze civil marriage could pose a fourth and similar challenge to this Article's doctrinal proposal. That move, however, should not affect the ultimate conclusion that the mixed-sex requirement violates the First Amendment. First, even under the rules for the most apt type of forum, the mixed-sex requirement should still be adjudged unconstitutional. Second, and more fundamentally, consideration of the principles underlying forum doctrine reveals that it is inapplicable in the marriage context.

Pursuant to the intricacies of current doctrine, the Supreme Court classifies governmental property into three types—"the traditional public forum, the public forum created by government designation, and the nonpublic forum"[281]—when restrictions ou public expressive activity are challenged on First Amendment grounds. Speech in traditional public fora, including such age-old venues for expression as parks and sidewalks,[282] is protected to a greater extent than is speech in designated or limited public fora, which include venues opened for expression by government,[283] which in turn is protected more than speech in "[o]ther government properties[, which] are either nonpublic fora or not fora at all."[284]

Civil marriage and fora do enjoy some similarity, in that neither one determines the precise content of associated expression. A speaker in a public park, for example, need not express any particular message, and the same is true of those who marry civilly. What people express through civil marriage may vary: for some, love; for some, financial support and commitment; for some, a desire to have "legitimate" children, or the valuation of sexual monogamy, and so on. This variability lends some support to conceptualizing civil marriage for purposes of First Amendment doctrine as a type of forum, a metaphorical "place" from which civilly married couples may (but need not publicly) speak.[285] People express various messages via civil marriage, and that is also what they do, if they

281. Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

282. *See id.*

283. *See id.*

284. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (citing Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee, 505 U.S. 672, 678–79 (1992)).

285. Couples need not express anything to the public via civil marriage; if they so choose, they may, for the most part, keep their marriage a public secret (even if they must disclose it to the government some of the time). They would almost invariably, however, express *something* to *each other* by choosing to marry civilly and remaining civilly married.

wish, in a forum. On this view, civil marriage might be conceptualized as a "metaphysical" forum.[286]

Under this approach, marriage would be analyzed as one of the three types of fora recognized by the Court, and an obvious possibility would be to treat civil marriage as a traditional public forum. Like parks and streets, marriage has "time out of mind" been used for expression.[287] Indeed, marriage conventionalists refer ceaselessly to "traditional marriage" in the context of defending the mixed-sex requirement.[288] This pedigree—civil marriage is substantially older than airports, which the Court has held are not a traditional public forum due primarily to their recent vintage[289]—might suggest that civil marriage should be treated as a traditional forum.

That conclusion would, however, be somewhat odd. Unlike tangible, physical property (streets, parks, sidewalks), civil marriage has no existence independent of the government; it is a governmentally created and sustained relationship. Applying traditional public forum doctrine would mean that a state "may not prohibit all communicative activity"[290] "in" civil marriage, and neither may it eliminate that traditional forum by

286. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).

287. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

288. *See, e.g.*, Coolidge, *supra* note 42, at 216 n.62 (noting that "Save Traditional Marriage-'98 (STM), [was] formed to campaign for the passage of" a state constitutional amendment to overturn the Hawaii Supreme Court's ruling favoring same-sex marriage); Duncan, *supra* note 176, at 240 (dismissively characterizing sex-discrimination argument against mixed-sex requirement as a "clever attack on traditional marriage laws [that] is superficially plausible, [but] contrived and ultimately unpersuasive"); Kohm, *supra* note 42, at 259 ("Because marriage is an institution based on the nation's deeply rooted history and tradition, an asserted contemporary concept of marriage could not expand the reach of a fundamental rights interest."); Leonard G. Brown III, Comment, *Constitutionally Defending Marriage: The Defense of Marriage Act,* Romer v. Evans *and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 171 (1996) ("DOMA provides a semblance of restraint on the Federal Judiciary by defining the meaning of marriage and displaying the intent of Congress to protect the traditional meaning of the word from those that wish to redefine it."); *id.* ("The legislative history of DOMA also clearly defines the defense of the traditional marriage as a substantial government interest."); Editorial, *Ballot Measure 2: A Yes Vote—But a Complex Choice*, ANCHORAGE DAILY NEWS, Oct. 25, 1998, at F2 ("[S]ociety has a right to define marriage and defend the tradition of marriage."). *Cf.* Michael Mandell, Legislative Review, *Same Sex Marriages: Arizona Reacts to a Perceived Threat to Traditional Marriages*, 29 ARIZ. ST. L.J. 623 (1997).

> One might recall, in this regard, one of the many famous passages from Justice Holmes:
> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), *quoted in* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

289. *ISKCON*, 505 U.S. at 680.

290. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

government fiat.[291] Hence, under this treatment, government *must* offer civil marriage to people. However, it is almost unanimously believed that government could, if it chose, cease offering marriage licenses and abolish civil marriage entirely,[292] which would have the effect of annihilating the expressive resource that civil marriage is, so that no one could express anything from that "site." Thus, traditional public forum is a suboptimal doctrinal match for civil marriage.

Perhaps, then, civil marriage should be likened to a limited or designated public forum, for "a state is not required to indefinitely retain the open character of" such a forum.[293] Other than the possibility of elimination, regulation in a designated public forum "is subject to the same limitations as that governing a traditional public forum."[294] As Robert Post explains, public fora are "resources governed by the most generally applicable first amendment standards."[295] Hence, analyzing the mixed-sex requirement as a restriction on speech in a designated forum entails that any licensing or regulation of civil marriage must be conducted in a viewpoint-neutral fashion,[296] which the mixed-sex requirement does not do,[297] and any content-based regulations would be subject to strict scrutiny, which the mixed-sex requirement fails to survive.[298]

It is, however, not wholly clear that civil marriage should be analyzed as a designated public forum. Such a forum is "property that the State has opened for expressive activity by part or all of the public."[299] Perhaps the state has created civil marriage for expressive activity by people identifying heterosexually. But current doctrine treats the existence *vel non* of a designated public forum as primarily a matter of governmental intent to

291. *See, e.g.*, United States v. Grace, 461 U.S. 171, 180 (1983).

292. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 5 (1995) (recommending that "we abolish marriage as a legal category"); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 30 (1996) (arguing that "marriage, except to the extent that it is a negative liberty right, need not be affirmatively recognized by the state" and "conclud[ing] that under current law, marriage can be abolished so long as intimacy, a negative liberty, is protected").

293. *Perry*, 460 U.S. at 46. *See also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (same).

294. *ISKCON*, 505 U.S. at 678 (citing *Perry*, 460 U.S. at 46).

295. Post, *supra* note 40, at 1717.

296. Even if current forum doctrine subjects viewpoint-discriminatory regulations not to automatic invalidity but only to strict scrutiny, *see infra* note 392, the mixed-sex requirement does not satisfy such scrutiny, *see infra* Part II.C.

297. *See infra* Part II.A.

298. *See infra* Part II.C.

299. *ISKCON*, 505 U.S. at 678 (citing *Perry*, 460 U.S. at 46).

create a forum,[300] and it is not clear whether government had the requisite intent with respect to civil marriage.

What should be clear is that civil marriage should not be analyzed as a nonpublic forum. The rationale for the extremely lenient First Amendment analysis applied to nonpublic forums turns upon the fact of government ownership of the forum property[301] coupled with the necessity of allowing government to exercise the authority of management over such internal resources or internal operations in a manner to avoid undue interference with the legitimate goals of governmental institutions.[302] The expressive resource of civil marriage should not be regarded as government property in the service of internal institutional operations of government.

First, civil marriages should not be analytically assimilated to nonpublic fora because a civil marriage is not part of those internal operations of government that justify restrictions on expressive activity in a nonpublic forum.[303] Couples who use civil marriage to express themselves do not do so as government officials, operatives, or agents and are not part of the internal affairs of government.[304] They are not acting within a governmental "organization." The expressive resource that is civil marriage is not "embedded in social practices that are constituted by [functionally defined] organizational roles" within government.[305] Rather, the "resource is used by individuals occupying widely different roles and statuses, with correspondingly divergent values and expectations, the resource lies in the public realm, and the state's authority over it is a matter

300. *See, e.g.*, Gey, *supra* note 219, at 1536.

301. *See, e.g., id.* at 1539 ("The public forum doctrine arose from the Supreme Court's rejection of the view that the government could regulate the use of its property in the same ways and to the same extent as a private property owner.").

302. *See, e.g.*, Post, *supra* note 40, at 1716–17.

303. In *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, the Court emphasized that it was sustaining a restriction on organizations eligible to participate in the Combined Federal Campaign charitable drive directed to federal employees because "[t]he federal workplace, like any place of employment, exists to accomplish the business of the employer[, and] 'the Government, as an employer, must have wide discretion and control over the management of its personnel and *internal affairs*.'" 473 U.S. 788, 805 (1985) (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part)) (emphasis added).

304. *Cf.* Post, *supra* note 40, at 1828. Post argues that a prison that let only pro-prison groups hold press conferences there would be unconstitutional:

> [T]he citizens' groups have not been incorporated into the organizational domain of the prison and endowed with specifically organizational roles, so that the regulation of their speech is not analogous to the internal management of speech. Unlike Alcoholics Anonymous in *Jones*, the citizens' groups are not performing internal management functions that prison officials themselves could perform had the institution sufficient resources.

Id. (construing Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977)).

305. Post, *supra* note 40, at 1793.

of governance."[306] Government is thus not exercising the authority of management, in Professor Post's helpful terminology,[307] when it regulates access to civil marriage. Couples who voluntarily undertake the obligations of marriage may be acting civic-mindedly, but they are far from governmental employees or agents.[308]

Moreover, the *raison d'être* of public forum doctrine's distinctions demonstrates the entire forum doctrine's inapplicability to regulation of civil marriage. As Post has explained, "[t]he object of public forum doctrine . . . is the constitutional clarification and regulation of government authority over particular resources."[309] One needs to distinguish between public and nonpublic fora only where government owns the property at issue. But, government shonld not be seen as "owning" civil marriage.

Although *civil* marriage, the institution, exists, by definition, as a matter of government creation, civil marriages exist as part of the broad cluster of social practices of marrying. Civil marriages, at least, thus do not really seem like governmental property. After all, they are something into which people enter: government licenses civil marriages. A civil marriage is somewhat like a contract, which is a thing of value, a res, "ownership" of which lies with the contracting parties. A civil marriage thus should not be viewed as governmental property.[310] Rather, government acts in a

306. *Id.*

307. *See id.* at 1784–97 (distinguishing management and governance).

308. In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), the Supreme Court upheld a public school district's grant of access only to one teachers' union because it, "pursuant to law, was designated the collective bargaining agent for all teachers in the Perry schools. [That union] thereby assumed *an official position in the operational structure* of the District's schools . . . ." *Id.* at 49 n.9 (emphasis added). And, as the Court explained in *ISKCON v. Lee*, limited public forum doctrine only applies "[w]here the government is acting as a *proprietor*, managing its internal operations, rather than acting as *lawmaker* with the power to regulate or license." *ISKCON*, 505 U.S. at 678 (emphases added). Clearly, government is not acting as a manager of internal affairs. The civilly married do not constitute a governmental organization over which management is necessary to effectuate publicly determined ends, so the accommodations of public-forum doctrine are not necessary in this context.

309. Post, *supra* note 40, at 1782.

310. Granted, the government might be likened to a party in a civil marriage contract, and it has been so characterized in some case law. *See, e.g.*, Appeal of Seeley, 14 A. 291, 292 (Conn. 1888).

> Inasmuch as the state rests upon the family, and is vitally interested in the permanency of a marriage relation once established, it, for the promotion of public welfare, and of private morals as well, makes itself a party to every marriage contract entered into within its jurisdiction, in this sense: that it will not permit the dissolution thereof by the other parties thereto.

Id. See also Roberts v. Roberts, 185 P.2d 381, 386 (Cal. App. 1947) ("This state is a party to every marriage contract of its own residents as well as the guardian of their morals."), *overruled by* Spellens v. Spellens, 317 P.2d 613, 618 (Cal. 1957); *In re* Lindgren, 43 N.Y.S.2d 154 (Sup. Ct. N.Y. 1943) ("There are three parties to every marriage contract—the two spouses and the state."), *aff'd*, 46

regulatory capacity with respect to civil marriage—as a sovereign exercising the authority of governance in Post's terminology, licensing civil marriage—and so the ordinary, demanding First Amendment standards should apply.[311] Thus, the public forum doctrine objection to this Article's analysis also fails.

e. *Government Speech*

Finally, a reader might object that civil marriage should be analyzed as itself a form of governmental speech. That is, the institution of civil marriage might be examined as a way in which governments symbolically express a message of approbation—and thus legitimacy—of certain valued activities and relationships. Certainly, *part* of the point of the *institution* of civil marriage is to be expressive, to legitimize, to convey a governmental message or messages of legitimacy.[312] Civil marriage has served to

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N.Y.S.2d 224 (App. Div. 1943), *aff'd*, 55 N.E.2d 849 (N.Y. 1944); Gant v. Gant, 329 S.E.2d 106, 114 (W. Va. 1985) ("[T]he state is a third party to any marriage contract."). But just because government dictates (many of) the terms of the civil marriage contract does not necessarily mean that society should view government as a party to civil marriages. Thus, for example, state statutes may refer to "*either* party to the marriage contract." *See, e.g.*, Kenneth Rigby, *The 1997 Spousal Support Act*, 58 LA. L. REV. 887, 888 n.4 (1998) (quoting 1916 La. Acts No. 269, § 1) (emphasis added). After all, government puts all sorts of restraints on contracts entered into by private parties; these restraints are ostensibly for the public welfare and so are not distinguishable on either of those grounds from civil marriage. *Cf.* Melinda J. Seeds, Bromhal v. Stott*: Revisiting the Court's Role in Separation Agreements in the Context of Attorneys' Fees*, 74 N.C. L. REV. 2151, 2151–52 (1996).

> However, over roughly the past twenty-five years developments in the law in most states have dramatically changed the dynamics of this marriage triangle between spouses and the state. Spouses are now free to contract with respect to virtually all issues incident to divorce, as long as the agreement adheres to basic contract principles of fairness.

Id. (internal quotation marks and citations omitted).

Furthermore, even if government were considered one of three parties to a civil marriage contract, and so one of three "owners" of the res of a civil marriage, this itself is dramatically different from the classical public forum situation of property—a park or sidewalk or street—*owned by government*, and government alone. The "investment" by private individuals in a civil marriage thus renders problematic the nonpublic forum model. Indeed, because civil marriage is not well conceived of as government property, the Court's characterizations of forum doctrine make clear its inapplicability to this unique expressive resource. Certainly where the issue is not "access to government property," nonpublic forum cases are "inapposite." *Perry*, 460 U.S. at 49 n.9.

311. *See* United States v. Kokinda, 497 U.S. 720, 725 (1990) ("[G]overnmental actions are subject to a lower level of First Amendment scrutiny when 'the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . .'") (all but first alteration in original) (quoting Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 896 (1961)).

312. *Cf.* WARNER, *supra* note 71, at 105 ("Marriage, after all, is a concrete personal benefit imbued with intense affect and nearly universal legitimacy."). Legitimation occurs not simply through relief from legal inhibitions in place for those who do not marry civilly but also through symbolic valorization. Indeed, the very desire of many lesbigay people for the right to marry civilly may implicitly valorize that institution. *See* KAPLAN, *supra* note 50, at 224. In the context of contemporary U.S. society, where civil marriage still matters a great deal to a great many people, *but cf.* Carol J.

legitimize certain children, although this is less true as a social matter today than in the past; it has served to legitimize certain sex acts, although this too is less true today in many circles; and it has served and continues to legitimize certain relationships, even if time has diminished but not eliminated this force as well.[313]

If civil marriage were assimilated to government speech, then the usual First Amendment neutrality rules would likely not apply.[314] For example, in *Rust v. Sullivan* the Supreme Court narrowly rejected the argument that Health and Human Services regulations limiting the abortion-related speech of health care providers who received federal funds[315] unconstitutionally discriminated on the basis of viewpoint by "prohibit[ing] all discussion about abortion as a lawful option . . . while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term."[316] The majority maintained instead that "the Government ha[d] not discriminated on the basis of viewpoint; it ha[d] merely chosen to fund one activity to the exclusion of the other,"[317] and the attendant restrictions on the use of funds "[did] not violate constitutional rights."[318]

Although "when the State is the speaker, it may make content-based choices," as the Court later explained in *Rosenberger v. Rector & Visitors of the University of Virginia*,[319] the First Amendment more tightly

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Williams, *When Love Is Never Having to Say "I Do"*, L.A. TIMES, Mar. 31, 2000, at A1 (reporting, somewhat hyperbolically, that "couples in Sweden, Norway, Denmark and Iceland" have "all but given up on marriage as a framework for family living, preferring cohabitation even after their children are born"), governmental maintenance of the mixed-sex requirement symbolically expresses that certain people or things are either superior to their alternatives or distinctively valuable. *Cf.* Brief of Amicus Curiae National Association for Research and Therapy of Homosexuality, Inc. at 2, Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05), http://www.qrd.org/usa/legal/hawaii/baehr/1997/brief.natl.assn.research.and.therapy.of.homosexuality-03.24.97 (asserting that Hawaii possesses "a compelling state interest in maintaining the *ideal* status of traditional marriage") (emphasis added).

313. This is not a logically necessary state of affairs—over time, "responsibility for legitimating marital relationships [has] shifted from de facto, to religious, to legal sources." Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245, 249 (1990) (reviewing MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989)). But in the world in which we all find ourselves today, to a significant degree, "legitimation . . . is synonymous with legal recognition." *Id.* at 251 n.19.

314. *See, e.g.*, Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1011–14 (9th Cir. 2000).

315. 500 U.S. 173 (1991). The case was decided 5-4. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, Scalia, Kennedy, and Souter joined; Justices Blackmun, Marshall, Stevens, and O'Connor dissented.

316. *Id.* at 192 (internal quotation marks omitted).

317. *Id.* at 193.

318. *Id.* at 198.

319. 515 U.S. 819, 833 (1995).

constrains government when it provides resources to aid private speech. The regulations upheld in *Rust* were permissible because "[t]here, the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program."[320] In *Rosenberger*, however, the University of Virginia made "student news, information, opinion, entertainment, or academic communications media groups" generally eligible for funds payable to third-party contractors to cover costs of publishing student newspapers or magazines.[321] Because this was not, then, government speech, the viewpoint-discriminatory exclusion of students who published a religious newspaper was held unconstitutional.[322]

Yet civil marriage is a means by which *people*—individual couples—variously express themselves and constitute their identities,[323] not just a mode of government speech. *Rosenberger* provides a better lens for examining the constitutionality of the mixed-sex requirement than does the government-speech framework of *Rust*.[324] Civil marriage is a resource for *private* speech. Because individual civil *marriages* are themselves expressive resources, analyzing civil marriage as merely or primarily state speech would overlook something vitally important to individuals' lives and to society. Private parties—not governmental employees or deputized recipients of government funds—are speaking through civil marriage.[325]

There is certainly an important argument to make that, with the mixed-sex requirement, the state is speaking in a way that perpetrates an expressive harm against lesbigay persons. But this would primarily be a violation of equal protection norms of equal concern and respect, not First

320. *Id.* at 833.

321. *Id.* at 824.

322. *See id.* at 837, 844–46. The dissent, although disagreeing that there was viewpoint discrimination involved in the eligibility conditions, agreed with the majority that "if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well." *Id.* at 895 (Souter, J., dissenting).

323. *See supra* Part I.A.

324. *But cf.* Alan E. Brownstein, *Alternative Maps for Navigating the First Amendment Maze*, 16 CONST. COMMENT. 101, 135 (1999) (reviewing DANIEL FARBER, THE FIRST AMENDMENT (1998)) (reading *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), as "suggest[ing] that when the government property, program, or subsidy system at issue serves some expressive purpose, government selectivity in employing private speech to further that purpose should not be understood to create a forum for First Amendment purposes"). I would not read *Arkansas Educational Television Commission* so broadly. The Court itself emphasized that the government did not open the candidates' debate at issue to a general class of eligible participants but made nonministerial selection decisions among those otherwise eligible. With respect to civil marriage, in contrast, no such individualized discretionary decisions are involved.

325. *See supra* notes 304–06 and accompanying text.

Amendment norms governing freedom of speech.[326] The heretofore under-analyzed issue that must be considered is the use by individual couples of civil marriage as an expressive resource, something that can vary (people may "say" different things via civil marriage) and is not mandated by the state (people need not publicize the fact of their civil marriage or invest it with personal significance).[327] It would therefore be a mistake to begin the analysis by treating civil marriage primarily as state speech, for the First Amendment is designed to protect individuals' expression against governmental restriction, not to shield government expression at the expense of individuals' speech. Instead, I consider the institutional expressive function of marriage in the course of analyzing whether restrictions on access to the unique expressive resource of civil marriage might be constitutionally justified.[328]

II. THE UNCONSTITUTIONALITY OF THE MIXED-SEX REQUIREMENT

Analyzing civil marriage as a unique expressive resource establishes that the mixed-sex requirement violates the First Amendment. Upon examination it is clear that an important purpose of the mixed-sex requirement is related to the content of expression,[329] so this restriction must at least be subjected to heightened constitutional scrutiny. In fact, the mixed-sex requirement for civil marriage is viewpoint based, which should automatically invalidate the restriction.[330] Even without automatic invalidation as viewpoint discrimination, however, the mixed-sex requirement does not pass constitutional muster. The First Amendment precludes government from utilizing the mixed-sex requirement to preserve the current symbolic meanings of civil marriage, which appears to be a primary purpose of the mixed-sex requirement. The remotely plausible public welfare purposes offered by marriage conventionalists in defense of the mixed-sex requirement either are not interests to which the mixed-sex requirement is carefully tailored or do not rise to the level of compelling governmental interests for First Amendment purposes,[331] as is true of any

326. *See generally, e.g.*, Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000).

327. These considerations show that civil marriage should not be understood as a *Rust*-like program for governmental speech carried out by married couples acting as, in effect, government agents.

328. I discuss this function of marriage *supra* notes 235–47 and accompanying text.

329. *See supra* Part I.B; *infra* Part II.A.

330. *See infra* Part II.A.

331. *See infra* Part II.C.2.

interest the government might have in expressing itself via the institution of civil marriage.[332] In addition, neither the definitional argument nor a "morality" purpose can provide a sufficiently compelling justification for the mixed-sex requirement.[333] Furthermore, the First Amendment bars government from restricting civil marriage to mixed-sex couples to protect heterosexual identity or to keep marriage unquestioned.[334] No other means of expression offers same-sex couples a constitutionally adequate alternative to the unique expressive resource of civil marriage.[335] Accordingly, the mixed-sex requirement in place in every U.S. jurisdiction[336] violates the First Amendment.

A. LACK OF VIEWPOINT NEUTRALITY AND CONTENT NEUTRALITY

Because the mixed-sex requirement for civil marriage rests at least in significant part upon a purpose related to the suppression of expression,[337] it must survive heightened scrutiny under the First Amendment doctrine I have proposed for such unique expressive resources.[338] The mixed-sex requirement, however, fails this analysis because it lacks the neutrality required by the Constitution. If one concludes, as this Section primarily argues, that the mixed-sex requirement is viewpoint discriminatory, then it should immediately be held an unconstitutional abridgement of same-sex couples' First Amendment rights. If, in the alternative, one concludes only that the mixed-sex requirement is a content-based limitation on access to the expressive resource of civil marriage, or if one concludes that automatic invalidation is not proper even for viewpoint-discriminatory laws,[339] then this should still trigger stringent First Amendment scrutiny that would invalidate the mixed-sex requirement, as I argue in the next Sections.

The mixed-sex requirement violates the viewpoint neutrality principle discussed earlier in this Article,[340] improperly amplifying the voices of those who view (civil) marriage as a heterosexual institution as opposed to

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332. *See infra* Part II.B.

333. *See infra* Parts II.C.1, II.C.3.

334. *See infra* Part II.D.

335. *See infra* Part II.E.

336. On April 1, 2001, the Netherlands became the first nation to abolish the mixed-sex requirement for civil marriage. *See* Keith B. Richburg, *Gay Partners Make It Official: Same-Sex Couples Are First to Marry Under Dutch Law*, WASH. POST, Apr. 1, 2001, at A21.

337. *See supra* Part I.B.

338. *See supra* Part I.C.1.

339. *See* Volokh, *supra* note 222, at 2425 n.44 (identifying the "orthodox view . . . that all [speech] restrictions, including viewpoint-based ones, are valid if they pass strict scrutiny").

340. *See supra* notes 224–29 and accompanying text.

the voices of those who see its virtues as fully realizable by same-sex couples. Granted, the mixed-sex requirement does not literally grant the expressive resource of civil marriage to those persons willing to swear opposition to civil same-sex marriage and deny it to those favoring recognition of same-sex marriage.[341] But this is the inevitable and necessary concomitant of defining both sexual orientation and civil marriage eligibility in terms of gender couplings.[342]

The mixed-sex requirement in and of itself clearly denies the right to use the expressive resource of civil marriage to *all* same-sex couples qua same-sex couples yet restricts *no* heterosexually identified couples qua mixed-sex couples.[343] Given the relational nature of marriage, it would be difficult if not impossible for a mixed-sex couple to use civil marriage to express lesbigay-positive messages. Expressive uses of civil marriage would thus be limited to ones affirming heterosexuality in some fashion. Even if one did not accept that this violates viewpoint neutrality—which I believe it does, by privileging one set of views about sexual orientation and intimate relationships—it should certainly be understood as content discrimination, which, as discussed earlier in this Article, is also constitutionally suspect under the First Amendment.[344]

Gay or lesbian couples simply may not use civil marriage to express their belief that same-sex couples can love each other, that committed same-sex relationships are valuable to society, that gay and lesbian people can form "families" deserving of respect and support. The statutory codification of heterosexuality represented by the mixed-sex requirement thus discriminates in favor of positive expressions about the subject of heterosexual intimacy and against lesbigay-positive expression. This violation of content (or, I would contend, viewpoint) neutrality should at the very least trigger exacting scrutiny of the mixed-sex requirement (if not automatically render that requirement unconstitutional as impermissible viewpoint discrimination).[345]

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341. This framing of the issue, however, "begs the question of whether a ban on [e.g., governmental recognition of same-sex marriage] is always in a sense content-based." DANIEL A. FARBER, THE FIRST AMENDMENT 29 (1998) (discussing ban on public nudity).

342. Specifically, heterosexual orientation is defined by some positive relationship between males and females, and civil marriage eligibility is defined by the presence of one male and one female (and subject to few other restrictions).

343. *Cf.* Texas v. Johnson, 491 U.S. 397, 439 n.* (1989) (Stevens, J., dissenting) ("The Court suggests that a prohibition against flag desecration is not content-neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents.").

344. *See supra* notes 230–34 and accompanying text.

345. *See* RICHARDS, *supra* note 58, at 170 ("Since same-sex marriage is, however, a constitutional right, the first provision [of DOMA, adopting a mixed-sex requirement for federal recognition of civil

As the Supreme Court has noted, "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases."[346] Moreover, in *R.A.V. v. City of St. Paul*, the Court relied upon a statute's "practical operation" to conclude that it was viewpoint discriminatory and hence unconstitutional.[347] A majority of the Court in *R.A.V.* invalidated a hate crimes law as viewpoint discriminatory on the ground that the *effect* of the ordinance would disproportionately burden the speech of people opposed to racial, religious, and gender tolerance and equality compared to those favoring equality and tolerance.[348] This clear precedent supports the

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marriages] is unconstitutional as well, illegitimately exercising viewpoint discrimination with respect to a fundamental right.").

It might be argued that effect alone is not enough to establish that a regulation is viewpoint or content discriminatory for First Amendment purposes under current precedent. In a number of cases, the Supreme Court has treated regulations that were discriminatory in effect as viewpoint neutral or content neutral. In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), the Court sustained portions of a judicial injunction restricting abortion protesters; the Court insisted that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based," and the Court "look[ed] to the . . . purpose [of the injunction] as the threshold consideration." *Id.* at 763. Similarly, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) the Court concluded that ordinances restricting nude dancing were not related to "the suppression of expression" or "the content of expression" because they were predicated upon the "secondary effects" of establishments offering such entertainment; treated as content-neutral measures, they were subject only to intermediate time, place, or manner scrutiny under the First Amendment. *Id.* 289–96. *See also* Sadurski, *supra* note 227, at 328 (quoting Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 893) (1995) ("He [Souter dissenting in *Rosenberger*] also implies that the disproportionate impact upon different viewpoints does not render a regulation viewpoint-discriminatory as long as the motive for regulation is not related to a viewpoint (because 'the issue . . . turns on whether the burden on speech is explained by reference to viewpoint')."). And in *Hill v. Colorado*, 120 S. Ct. 2480 (2000)—the Court's most recent pronouncement on content neutrality—a majority of the Justices held that a law restricting "oral protest, education, or counseling" within one hundred feet of medical facility entrances, *id.* at 2484, was content neutral, *see id.* at 2494, and constitutional, *see id.* at 2499 (affirming judgment of court below upholding statute), despite its clear burden on anti-abortion speech. *See, e.g.*, *id.* at 2517–18 (Kennedy, J., dissenting); *id.* at 2504 (Scalia, J., joined by Thomas, J., dissenting).

346. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). Although the passage quoted contemplated a statute that on its face appeared content based, I believe that it should be understood to have wider applicability under the First Amendment. *But see id.* at 643 ("By contrast, laws that confer benefits or impose burdens on speech *without reference to* the ideas or views expressed are in most instances content neutral.") (emphasis added).

347. 505 U.S. 377, 391–92 (1992) ("St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). In addition, in *Rosenberger*, a "University of Virginia [subsidy] program focused on [i.e., denied funding based on] the category of speech—religion—without regard for whether the speaker wanted to use state money to favor religion or to attack it," but the Court majority nonetheless held the program "an unconstitutional viewpoint regulation of speech." Gey, *supra* note 219, at 1599.

348. *See R.A.V.*, 505 U.S. at 391. *See also* Volokh, *supra* note 222, at 2444 (broaching the possibility that "*R.A.V.* was right, because the Free Speech Clause prohibits viewpoint-discriminatory rules even if they pass strict scrutiny").

conclusion that as a matter of constitutional law the mixed-sex requirement for civil marriage is viewpoint discriminatory as I have described.

The mixed-sex requirement reflects viewpoint discrimination because in practice it makes civil marriage available to some people to make statements about love and commitment—those who marry heterosexually—thus not excluding those entire subject matters but privileging certain speakers who correspond strongly with a certain viewpoint on love and commitment due to a virtually definitional connection between sexes and sexual orientations.[349] Analogizing to *Rosenberger*'s treatment of religion, one can regard sexual orientation as:

> a vast area of inquiry, but it also provides . . . a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective [on love and commitment and lesbigay equality], not the general subject matter, result[s] in the refusal to [let same-sex couples use the expressive resource of civil marriage], for the subjects [that would be] discussed [are] otherwise within the approved category of [expressions people are authorized to make with civil marriage].[350]

That the vast majority of the population is heterosexually identified and that the attendant expressive resource of civil marriage is widely available do nothing to ameliorate the discriminatory character of the mixed-sex requirement. As the Court has noted in the context of religious speech, "a majoritarian policy does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront."[351] If anything, the enduringly small proportion of lesbigay persons,[352] and thus of people likely to wish to make pro-lesbigay statements of commitment or equality via civil marriage, should heighten concern about the majority skewing debate in its favor via the mixed-sex requirement.

At a higher level of abstraction, the mixed-sex requirement for civil marriage discriminates with respect to viewpoint not only on matters of

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349. So-called opportunistic behavior aside, the overwhelming majority of same-sex couples who would freely and genuinely seek to make a long-term marital commitment to each other will include two lesbian, gay, or bisexual persons. The fact that a gay man and a lesbian woman may marry each other does not mean that they can use their civil marriage to make statements about the propriety of sexual love between persons of one sex—they cannot.

350. 515 U.S. 819, 831 (1995). *Cf.* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

351. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305 (2000) (quoting Lee v. Weisman, 505 U.S. 577, 594 (1992)) (internal quotation marks omitted).

352. With respect to enduringness, see, for example, Cruz, *supra* note 136 (reviewing scanty evidence of efficacy of attempts to give lesbigay people a heterosexual orientation).

sexual orientation but also with respect to gender. Lynn Wardle, a staunch marriage conventionalist, correctly observes that civilly married couples adopt a wide range of variously gendered life arrangements.[353] Some of them may use their civil marriages in conjunction with egalitarian arrangements to say something to the world about gender and its lack of neat correlation with the public-private distinction. Others may do precisely the opposite, publicly affirming gendered marital roles à la the Southern Baptists' 1998 amendment to their statement of faith directing "[a] wife . . . to submit herself graciously to the servant leadership of her husband" and "serve as his helper."[354] But considering gender more broadly and noting the relevance of *sex*, in the morphological sense, more readily reveals the lack of viewpoint neutrality of the mixed-sex requirement for civil marriage. Granted, mixed-sex couples may marry regardless of their belief in the inevitability and importance of gender difference. But only those who think marriage in its nature must be between one man and one woman due to supposedly fundamental gender differences between the sexes can use their civil marriage to help express that view, to make their lives send that message.[355]

Granted, people who take an opposing viewpoint could eschew civil marriage in protest of the mixed-sex requirement[356]—and if more did, perhaps challenges to the mixed-sex requirement would be taken more seriously—much like people of good will could refuse to join invidiously discriminatory country clubs.[357] This, however, would not be a "use" of

353. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 88 ("[B]oth traditional gender roles and *nouveau*, companionate gender roles, and a huge range of gender roles in between, are accommodated within the legal institution of heterosexual marriage . . . .").

354. Yonat Shimron, *Baptists Say Wives Must Submit*, NEWS & OBSERVER (Raleigh, N.C.), June 10, 1998, at A1 (quoting Amendment to the Baptist Faith and Message) (internal quotation marks omitted). Not coincidentally, the amendment "defines marriage strictly in heterosexual terms as a union of 'one man and one woman.'" *Id. See also* John M. Swomley, *Storm Troopers in the Culture War*, HUMANIST, Sept./Oct. 1997, at 8, 12 ("Tony Evans, one of [Promise Keepers'] most popular speakers, tells men to reclaim their role—without compromise—as head of the house and tells women they should submit for 'the survival of our culture.'").

355. A majority of the Supreme Court has already relied upon the expressivity of individuals' lives, and perhaps even of individuals' own persons, in a First Amendment context in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), where the majority effectively accepted the BSA's argument that the very presence of a gay scoutmaster would be expressive.

356. *See, e.g.*, Steven K. Homer, Note, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 520 n.96 (1994) (quoting mixed-sex couple who have "resisted marrying, partly in symbolic protect against the relentless drumbeat for 'family values'") (quoting Ellen Willis, *Say It Loud: Out of Wedlock and Proud*, NEWSDAY, Feb. 11, 1994, at 70).

357. Bill Rubenstein has been developing this analogy and exploring its limits, and I am grateful to him for our conversations on civil marriage.

civil marriage as an expressive resource but rather an expressive choice not to marry.[358] This would in part be like a requirement that people could receive a flag courtesy of the government but only if they use it for patriotic expression: Even though people could decline to accept such a government-provided flag in order to make an antipatriotic statement or one of protest, this would not eliminate the viewpoint discrimination in the eligibility criterion.[359]

It might be objected that the difference between the flag scenario and the mixed-sex requirement is the express condition of viewpoint agreement in the flag scenario. But in light of what I have argued is in practice the necessary, inherent, and inevitable viewpoint discrimination of the mixed-sex requirement, I do not think that a strong objection. Perhaps one might think the distinction salient insofar as the explicit nature of the condition in the flag scenario better supports an inference of *intended* governmental discrimination. But it would be wrong to say that the mixed-sex requirement only incidentally discriminates against pro-lesbigay viewpoints despite and not because of the connection between the two. This is not a case like *Personnel Administrator of Massachusetts v. Feeney*,[360] where the link between the statutory condition—veteran status—and the challenged resulting exclusion—of many women from the state civil service preference—is historical and contingent. Here, the classification is built in, definitional—an unavoidable aspect of making rights turn on their being claimed by a heterosexually configured couple.[361]

358. This choice would require further explanation before it could be regarded as expressive, even if some audience were aware of the bare fact of the refusal to marry as a conscious choice and not just nonaction.

359. This is not to say that the viewpoint discrimination in the flag distribution hypothetical necessarily renders unconstitutional that governmental effort to enlist private individuals to express a patriotic message. *See infra* note 383. My point here is simply that there *is* viewpoint discrimination involved.

360. 442 U.S. 256 (1979) (rejecting equal protection challenge to veterans' preference for civil service positions that almost exclusively benefited men).

361. *Hill v. Colorado*, 120 S. Ct. 2480 (2000), might lead to the conclusion that the mixed-sex requirement for civil marriage is not content based. *Hill* presented a First Amendment challenge to a Colorado law:

> [The law] makes it unlawful within [one hundred feet of the entrance to any health care facility] for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . .'

Id. at 2484. In a 6-3 decision, the Court sustained the statute's constitutionality. Early in its analysis, the majority concluded that the statute was content neutral "for three independent reasons":

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and

And, as I have stressed, the clear and necessary effect of the mixed-sex requirement is to discriminate with respect to the expressive resource of

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> the statutory language makes no reference to the content of the speech." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.

Id. at 2491 (citations omitted). Justice Scalia, joined by Justice Thomas as well as Justice Kennedy, dissented from this conclusion. *See id.* at 2507, 2516.

The dissents in *Hill* appear to have it right. The majority's first supposed reason for treating the Colorado statute as content neutral is so patently inadequate as to call into question the majority's entire treatment of the issue. Justices Scalia and Thomas correctly note that it makes little sense to say that a regulation of places where speech is allowed is not a regulation of speech and that the Court has in fact repeatedly treated such "place" regulations as regulations of speech. *Id.* at 2506 n.2. The majority's test really only determines whether the statute is a "place" regulation (and thus a "time, place, or manner" regulation); just because it is does not mean that it cannot be content based. The majority's test would be an adequate reason for inferring content neutrality only if a law's content neutrality and its being a time-place-manner regulation were equivalent. But, as the dissent properly notes, they are not. *See id.* The majority's phrase "some speech" ("a regulation of the places where some speech may occur") hides the content basis of the Colorado statute.

Second, even if Colorado's statute was not adopted because of disagreement with the message of abortion protesters, disagreement with the expression of that message to women about to undergo abortions clearly undergirds the statute. Even if the Colorado Supreme Court's holding that the statute applies to "all *demonstrators*" is taken not to raise any due process concerns despite the statute's being addressed only to "oral protest, education, or counseling," it still skews the expressive landscape (or lawscape) with respect to abortion: A person who wishes to escort a woman into a clinic in order to support her decision to have an abortion would not be a "demonstrator," and it is implausible that police would be equipped to prosecute any clinic escorts who might utter reassurances to a woman that technically might fall within the statute's definition of "counseling." A person who wishes to dissuade a woman from having an abortion, on the other hand, is forbidden to approach to "counsel" without permission.

Third, the majority essentially reduced the content-neutrality inquiry solely to the question whether the challenged regulation is related to the suppression or content of expression, over the dissenters' cogent protestation that this is only the "principal inquiry." *See id.* at 2506 (Scalia, J., joined by Thomas, J., dissenting) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Although the Court has occasionally concluded that certain laws were content neutral despite their facial terms due to a justification unrelated to the content of expression, this is a highly dubious doctrinal move. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 85–86 (1976) (Stewart, J., dissenting) (criticizing this move); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 55–56 (1986) (Brennan, J., dissenting) (same); Boos v. Barry, 485 U.S. 312, 334–38 (1988) (Brennan, J., joined by Marshall, J., concurring in part and concurring in the judgment) (same); TRIBE, *supra* note 243, § 12-19; David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 61 (1997) ("The secondary effects doctrine, a fertile ground for abuse, insidiously eviscerates free expression by allowing government officials to characterize content-based regulations as content-neutral. In practice, government officials use the doctrine to silence expression they dislike.") (citation omitted).

Such a justification inquiry could yield a conclusion of content neutrality in the civil marriage context if one took the justifications for civil marriage to be solely the proffered public welfare ones. If, however, one accepts my conclusion that preserving the symbolic meaning of civil marriage is an important contemporary purpose of the mixed-sex requirement, *see supra* Part I.B.1, then the requirement is clearly content based.

civil marriage on the basis of content or viewpoint, and that should suffice to trigger heightened First Amendment scrutiny or outright invalidation.

The content discrimination or viewpoint discrimination embodied in the mixed-sex requirement for civil marriage has the effect of skewing public debate about lesbigay people and our rights.[362] It distorts public discourse about the capacity of lesbigay people for fidelity and commitment[363] by providing the heterosexually identified with a uniquely powerful tool for expressing to the world their interpersonal bonds while denying that tool to lesbigay persons.[364] Thus, the mixed-sex requirement helps perpetuate the very stereotype of lesbigay persons as nothing more than sex maniacs which makes it seem proper to some to deny us the right to marry civilly.[365] This skews public discussion, and potentially the

362. *See, e.g.*, Alexander, *supra* note 269, at 939 ("[T]he First Amendment protects a process of citizens' evaluations of information and forbids governmental preemption of that process by privileging certain evaluations."); *id.* at 943 ("Legislative evaluations of information, though democratic (unlike judicial evaluations), are themselves antithetical to the core First Amendment value."). *Cf.* Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

> Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons. No conviction forced upon us can really be ours at all. Limits may be put on my actions insofar as my actions impinge on others, but my status as a rational sovereign requires that I be free to judge for myself what is good and how I shall arrange my life in the sphere of liberty that the similar spheres of others leave me.

Id.

363. *See, e.g.*, Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 293 n.180 (2000) ("[T]he exclusion [of same-sex couples from civil marriage] tells false stories about gay male and lesbian couples in committed relationships.").

364. As film is a medium in which expressive activity "may affect public attitudes and behavior in a variety of ways, . . . [including] the subtle shaping of thought," Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952), so too is civil marriage an expressive resource the widespread use of which can influence social perceptions, beliefs, and perhaps, legislation.

365. *See, e.g.*, Rick Devaney, Letter to the Editor, *Courage, Luck, and Message of Hope*, WALL ST. J., Dec. 3, 1996, at A23 ("There is clearly a difference in what 99% of heterosexuals would expect in the behavior of people in 'a marriage in every sense' and what the homosexual community expects out of its 'partners.'"); Bruce Murray, Editorial, *Same Sex Unions Hold Hidden Plan*, MONTGOMERY ADVERTISER, May 6, 1998, at 11A ("But given the relentless promiscuity of homosexuals in the midst of the AIDS epidemic, who could believe that permanent alliance is the real goal? Demanding same-sex 'marriage' is simply another tactic in the campaign to legitimize a poor choice."); George O'Brien, Commentary, *Gay Marriage and Moral Relativity . . .*, WASH. TIMES, July 7, 1996, at B5 ("'Same-sex marriage' implies that there is some kind of intimate, monogamous bond between two loving people, a notion which is no more a reality to the majority of homosexuals than the man in the moon."). *See also* Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 92 (1997) (discussing attributions of gay promiscuity).

Some scholars, on the other hand, take nonmonogamy among gay men as a reason for the state to allow same-sex couples to marry civilly, in order more effectively to promote sexual exclusivity. *See, e.g.*, ESKRIDGE, *supra* note 19, at 9–10, 58, 73–74; ANDREW SULLIVAN, VIRTUALLY NORMAL 105–09, 182–84, 202 (1995).

legislative recognition of rights, by obscuring commonalities of interests between lesbigay and heterosexually identified persons, such as the valuing of love, commitment, and support, thereby creating obstacles to the formation of coalitions between lesbigay people seeking civil marriage or other rights and otherwise potentially sympathetic heterosexually identified persons.[366]

B. PRESERVING SYMBOLIC PURITY

The fact that majorities might defend the discriminatory mixed-sex requirement for access to the expressive resource of civil marriage as an attempt to protect the current meaning of marriage[367] cannot save the requirement from invalidation under the First Amendment, for it is unconstitutional for government to limit symbolic expression in that fashion. The "meaning of marriage" is an important public or common symbolic resource:[368] As a unique expressive resource, civil marriage functions as a sign or symbol, a way by which people can convey to each other and to the world their commitment and identity as a couple; preserving the symbol's current meaning cannot justify denying it to same-sex couples—either by offering no legal status comparable to civil marriage or by fencing such relationships into a separate legal status such as domestic partnership. "Could the state set aside a park and allow only married people to hold meetings there?"[369] The answer is no, and it is

366. *Cf.* ESKRIDGE, *supra* note 19, at 8–9 ("Marriage would contribute to [the integration of gay lives and the larger culture] because same-sex couples would be able to participate openly in this long-standing cultural institution. Such participation would establish another common tie between gay people and straight people.").

This analytic approach would not necessarily conclusively resolve the public welfare questions about marital rights and couples' gender configurations, for government might come back later and show that some particular right should be decoupled from marriage or perhaps that same-sex couples should be excluded on functional grounds from a specific marital benefit or obligation. But initial blanket inclusion of same-sex couples in all the privileges and duties of civil marriage is prima facie more fair than Richard Posner's recommended 'let's only include same-sex couples one proven benefit at a time' approach, which seems to me to give undue consideration to (wrongfully) accreted heterosexual privilege. *See* RICHARD A. POSNER, SEX AND REASON 313 (1992). On this point, Posner is heartily endorsed by marriage conventionalists. *See, e.g.*, Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 158 (1997).

367. *See supra* Part I.B (explicating the concerns about what civil marriage would mean were same-sex couples included).

368. *See supra* Part I.A.

369. Karst, *supra* note 32, at 685. Professor Karst offered this rhetorical query as an analogy to "the state's offering the marital status to heterosexuals and denying *any* comparable status" to same-sex couples, thus denying them "the opportunity to make a formalized commitment, recognized by law," for which there "demands some important justification." *Id.* at 684.

likewise unconstitutional under the First Amendment for government to attempt to reserve civil marriage for symbolic use only by mixed-sex couples.

The inconsistency of the mixed-sex requirement's attempt to preserve the symbolic meaning of the institution of civil marriage with constitutional principles of free expression may be illuminated by the Supreme Court's "flag burning" decisions, *Texas v. Johnson*[370] and *United States v. Eichman*.[371] Although this comparison may be surprising, these cases are among the very few Supreme Court decisions that address government interests in symbolic preservation and hence might speak to the disputes over access to the symbolic meaning of civil marriage. *Johnson* and *Eichman* support the position of marriage expansionists, for those cases reject the proposition that government may seek to preserve the current meaning of a symbol by precluding its use by persons who may take a different view of its meaning and wish to use it to convey a message different from that of the majority.

Both *Johnson* and *Eichman* presented challenges to laws prohibiting certain actions with respect to the United States flag. State and federal governments argued that the laws were justified as symbolic meaning preservation efforts. *Johnson* considered a Texas law forbidding "desecration of a venerated object" by "defac[ing], damag[ing], or otherwise physically mistreat[ing] [it] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."[372] *Eichman* concerned the Flag Protection Act of 1989, a federal statute proscribing "knowingly mutilat[ing], defac[ing], physically defil[ing], burn[ing], maintain[ing] on the floor or ground, or trampl[ing] upon any" U.S. flag, unless one is disposing of a worn or soiled flag.[373] In *Johnson*, the state of Texas argued "that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings."[374] In *Eichman*, the United States argued that it had "an interest in 'protect[ing] the physical integrity of the flag under all circumstances' in order to safeguard the flag's identity 'as the unique and unalloyed symbol of the Nation.'"[375]

370. 491 U.S. 397 (1989).
371. 496 U.S. 310 (1990).
372. *Johnson*, 491 U.S. at 400 & n.1.
373. *Eichman*, 496 U.S. at 314.
374. *Johnson*, 491 U.S. at 413.
375. *Eichman*, 496 U.S. at 315 (citation omitted).

The Supreme Court accepted that government may have a legitimate interest in the meaning of at least some symbols. According to *Eichman*, "[g]overnment may create national symbols, promote them, and encourage their respectful treatment."[376] And in *Johnson*, the Court maintained that "[i]t cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to 'preserv[e] the national flag as an unalloyed symbol of our country.'"[377] Recognizing that the U.S. flag was an exceptional symbol, the Court majority in *Eichman* noted the "firm historical roots" of a governmental interest in "safeguarding" "the flag [as] emblematic of the Nation as a sovereign entity," and "concede[d] that the Government has a legitimate interest in preserving the flag's function as an 'incident of sovereignty,' . . . [that is, an] interest in maintaining the association between the flag and the Nation."[378]

Thus, these anti-flag-burning laws violated constitutional guarantees of free expression not simply because the government was interested in preserving the flag's symbolic purity, in protecting the dominant meanings of the U.S. flag, but because of the way the state and federal governments had gone about serving that symbolic interest: restricting contradictory expression with that symbol. On that point the Court was clear: "It is not the State's ends, but its means, to which we object."[379] The problem was that the laws at issue precluded others from using the flag as a symbolic resource to express dissenting views. As the Court observed in *Johnson*, "[w]e never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents."[380] And in both cases, the Court held that the First Amendment barred government from doing so.

Similarly, free-expression principles should invalidate the mixed-sex requirement for civil marriage since it denies that expressive or symbolic resource to same-sex couples. I have already considered the ways in which marrying civilly is a unique act of symbolic expression by which couples make distinctively serious expressions of their commitment.[381] Even if admitting same-sex couples to the institution of civil marriage modulates the messages that marrying might convey, that is the consequence of our

376. *Id.* at 318.
377. *Johnson*, 491 U.S. at 413 (quoting Spence v. Washington, 418 U.S. 405, 412 (1974)).
378. *Eichman*, 496 U.S. at 316 n.6.
379. *Johnson*, 491 U.S. at 418.
380. *Id.* at 417.
381. *See supra* Part I.A.

expansive commitment to expressive freedom.[382] It is not constitutional for government to reserve civil marriage for mixed-sex couples to try to keep

382. The constitutional protection of the contestability of public symbols such as the U.S. flag—or civil marriage—is not limited to criminal laws. The Court properly concentrated in *Johnson* and *Eichman* on the importance of the flag as a means of expression, and it would be a mistake to think that its discussion of the particular coercions of the criminal justice system, such as imprisonment, signals that such coercions were the only reason the flag-burning laws were held unconstitutional. It is inconceivable that the Court would have upheld a civil scheme of fines designed to reserve the flag for approved symbolic expression by making unapproved uses costly, nor should free-expression principles be understood in such a crabbed fashion. Rather, the anti-flag-burning laws violated free expression rights because of their attempted denial of opportunity to use the flag for dissent, even if that dissent was expressed in ways deeply offensive to a majority of persons. *See Johnson*, 491 U.S. at 417 ("To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.").

If one rejected my interpretation of the flag-burning cases and maintained that they establish only that the Constitution prohibits governmental coercion in the service of symbolic preservation, *see id.* at 418 ("The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.") (quoting W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943)), what would this say about the mixed-sex requirement for civil marriage? In the current social setting, are people (and, if so, how many people) coerced into mixed-sex marriage? These are difficult questions beyond the scope of this Article. For a partial exploration of them, see David B. Cruz, *The New "Marital Property"*, 30 CAP. U. L. REV. (forthcoming 2001).

A footnote in *Eichman* remarked that "[b]urning a flag does not threaten to interfere with [the] association [between the flag and the Nation] in any way; indeed, the flag burner's message depends in part on the viewer's ability to make this very association." *Eichman*, 496 U.S. at 316 n.6. Nowhere, however, did the Court state that it would hold differently were flag burning to interfere with the "core function" of the flag as symbolizing the sovereign United States. *Id.* Nor did the Court contest the dissent's contention that "[t]he symbolic value of the American flag is not the same today as it was yesterday" or the dissent's prediction that "[i]n today's marketplace of ideas, the public burning of a Vietnam draft card is probably less provocative than lighting a cigarette. Tomorrow flag burning may produce a similar reaction." *Id.* at 323 (Stevens, J., joined by Rehnquist, C.J., and White and O'Connor, JJ., dissenting). Of course, any change in the symbolic impact of burning a Vietnam draft card probably has more to do with the passage of time than any constitutional restraint, for *United States v. O'Brien*, 391 U.S. 367, 372 (1968), held that the First Amendment did not preclude criminal prosecutions for burning one's draft card.

Insofar as control over public resources is concerned, this expressive contestability principle may be limited to *unique* expressive resources and so does not always conflict with the government's presumed ability to utter patriotic messages, to "disburse[] public funds to private entities to convey a governmental message, [and to] take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995). If the government had wished to hold a rally in the Ellipse in Washington, D.C., and to provide pennant-sized U.S. flags only to members of the public willing to use them to convey a message of support for U.S. troops in the Gulf War, it might constitutionally do so without violating the expressive contestability principle. Even though dissenters who might wish to use the U.S. flag to convey a contrary message would be denied a government subsidy, they would still be free to purchase or to make their own identical pennant-sized U.S. flags and to burn or to deface or otherwise to use those to make their point. Thus, the pro-patriotic condition on the recipients of the government's flags would not insulate "the flag" from use for contrary expression by dissenters. Civil marriage, however, is a product of government monopoly; same-sex couples cannot "make" their own civil marriages if government refuses to recognize them. The mixed-sex requirement thus does bar them from contesting the majority's preferred sense of the meaning of civil marriage.

the term "marriage," the symbol that "marriage" is, or the social notion of "marriage" from coming to be understood as in principle embracing same-sex couples. Many same-sex couples do consider themselves already married, although not yet legitimately in the eyes of the law. That some political majority takes a contrary position does not authorize them to enshrine in law a requirement that denies the expressive resource of civil marriage to those with whom they differ.

Further, indirect support for the conclusion that free-expression principles support same-sex couples' claims to access to civil marriage may, as Toni Massaro has suggested, be found in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*.[383] In *Hurley*, a unanimous Supreme Court held that applying Massachusetts public accommodations law to the private organizers[384] of a St. Patrick's Day parade to require them to include a unit of lesbigay persons under a banner not chosen by the organizers[385] violated the First Amendment.[386] *Hurley* thus confirms a constitutional right to noninterference in the composition of one's expressions, even when conducted in public and in the face of contrary legislative judgments about proper or desirable expression.

Individuals who wish to marry civilly may be seen as akin to organizers of a parade. Like marchers in a parade "who are making some sort of collective point, not just to each other but to bystanders along the way,"[387] two people may well marry at least in part as a way of making a collective point to the world, expressing their commitment and, indeed, their identity.[388] In *Gay Rights, Thick and Thin*, Dean Massaro argues as follows:

> If private persons can define their parades as they wish—even with an official *permit*, and via a *public* thoroughfare, policed and maintained by public money—and despite an official policy *against* discrimination, then private persons can define their *marriages* (surely more central to personhood than parades) as they wish—even with an official license and despite an official policy against same-sex unions. . . .
>
> . . . .
>
> . . . [P]rivate citizens who reject racial equality as a value still may stage parades that reflect their view, with official permits. It arguably

383. 515 U.S. 557 (1995). *See also* Massaro, *supra* note 217, at 66–68 (discussing *Hurley* case).
384. *Hurley*, 515 U.S. at 566 (noting absence of state action issue before U.S. Supreme Court).
385. *Id.* at 570, 572–73 (discussing banner issue).
386. *Id.* at 559.
387. *Id.* at 568.
388. *See supra* Part I.A.

> follows that private citizens who reject heterosexism and take same-sex partners should be allowed to have their own same-sex marriages with official marriage licenses. A symmetrical reading of *Hurley* suggests that government cannot regulate the content of the private actors' speech/association decisions, no matter how distasteful that content may be.[389]

So, on this reading, *Hurley* confirms the primacy under the First Amendment of expressive and associationally expressive uses of common, public resources over government preferences to restrict such resources to promote even constitutionally worthy policies.[390] Government thus may not privilege heterosexual expression by reserving the unique expressive resource of civil marriage to mixed-sex couples.[391]

C. FAILURE OF HEIGHTENED SCRUTINY

If the mixed-sex requirement is not adjudged outright unconstitutional as a viewpoint-discriminatory condition on access to the expressive resource of civil marriage, at the least it is content based and so must survive strict scrutiny,[392] and it must do so on the basis of some purpose other than preserving the current symbolic meaning of marriage.[393]

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389. Massaro, *supra* note 217, at 67–68.

390. *Hurley*, 515 U.S. at 572 (affirming that laws prohibiting discrimination on the basis of sexual orientation and other specified characteristics "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

391. I address above the potential objection that *Hurley* is inapposite to the mixed-sex requirement debate because streets are a traditional public forum, whereas civil marriage might perhaps be thought a nonpublic forum, in which case government would have tremendous regulatory latitude. *See supra* Part I.C.2.d.

392. *See supra* Part II.B. I note at the outset of this Part that Justice Kennedy believes it improper to uphold most content-based laws simply because they may survive strict scrutiny. In his view, with certain narrow, categorical exceptions, content-based laws automatically violate the First Amendment. However, strict scrutiny may sometimes be useful to identify whether a particular law is in fact content based. Burson v. Freeman, 504 U.S. 191, 212 (1992) (Kennedy, J., concurring in the judgment) ("The [compelling-interest] test may have a legitimate role, however, in sorting out what is and what is not a content-based restriction."). *See also* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 147 n.20.

> Some readers have suggested that these cases do not truly represent the law, and that the Court's approach to content-based restrictions comes closer to an absolute ban, with a few narrow exceptions. I agree that the Court *should* follow that sort of more categorical approach, and that the Court in practice does sometimes seem to do so, paying only lip service to strict scrutiny.

Id. On that approach, the analysis in this Section establishes or corroborates the conclusions of Parts I.B and II.A—that the mixed-sex requirement for civil marriage *is* related to the suppression of expression, is a content-based, indeed, viewpoint-discriminatory, restriction on access to an important expressive resource.

393. *See supra* Part II.B.

However, as this Section argues, the other statutory purposes advanced by litigants, courts, and commentators of sundry stripes as putative justifications for the mixed-sex requirement are not sufficiently well tailored to justify that requirement under the requisite heightened First Amendment scrutiny. Indeed, the most common arguments offered in support of the mixed-sex requirement are distinctly unpersuasive.[394]

1. *The "Definitional" Argument*

The stock "definitional" argument holds that the mixed-sex requirement does not discriminate or deny any rights to anyone because marriage simply means one man and one woman.[395] Yet this claim is patently unresponsive to the challenge that constitutional principles render such a legal definition of marriage impermissible. Indeed it is circular, effectively saying that the reason government may adopt a definition of marriage excluding same-sex couples is that the definition of marriage excludes same-sex couples. The Hawaii Supreme Court so concluded in its same-sex marriage decision *Baehr v. Lewin*.[396] An argument epitomizing such a basic logical fallacy cannot provide a rational basis for the mixed-sex requirement for civil marriage and thus is inadmissible under even the lowest level of constitutional scrutiny. The circular definitional argument is little more than legal ipse dixit.[397]

Little more, but not nothing more. Among the proponents of the definitional characterization are a current generation of natural law scholars who maintain "that marriage is *not* wholly a creature of the state; that marriage is a human good achievable by [mixed-sex] couples that simply

394. These arguments have been ably presented in the increasingly voluminous legal literature on same-sex marriage. *See generally* ESKRIDGE, *supra* note 19; MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION (1997); Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253; John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215 (1995). Wardle, *supra* note 354, at 97–101 app. B, contains an extensive bibliography of law journal articles through 1995, and Culhane, *supra*, at 1120 n.4, cites numerous even more recent sources.

395. *See supra* notes 100–05 and accompanying text.

396. 852 P.2d 44, 63 (Haw. 1993) (criticizing "the tautological and circular nature of [the] argument that . . . same sex marriage is an innate impossibility").

397. *See also* Massaro, *supra* note 217, at 65.

> Declaring *ipse dixit*—as too many courts have in the same-sex marriage cases—that the privacy case law on sexual conduct is 'about procreation,' or that the right to marriage, 'by definition,' means a man and a woman, not two men or two women, is as conclusory and superficial a response as was the judiciary's one-time insistence that because 'Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents,' interracial marriages could be proscribed.

Id. (citation omitted).

cannot be achieved by [same-sex] couples, whatever the law may say";[398] and that government has a "compelling interest in promoting the realization of one of the highest goods that human beings can achieve, the good of marriage."[399] The new natural lawyers' version of the definitional characterization does try to distinguish between same-sex couples and infertile mixed-sex couples[400] and so might be thought to provide a viable interpretation of civil marriage, which admits the latter but not the former. To make this distinction, however, they must offer "a reason, connected with the distinctive good achievable by the sexual faculty, [for infertile mixed-sex couples] to engage in intercourse."[401] And as Andrew Koppelman notes:

> Their argument can be salvaged, if at all, only by silently presupposing a kind of Aristotelian hylomorphism, in which the infertile [mixed-sex] couple participates imperfectly in the idea of one-flesh unity, but the [same-sex] couple does not participate at all. The infertile [mixed-sex] couple does become one organism, albeit an organism of a handicapped sort, that cannot do what a perfectly functioning organism of that kind can do. The [mixed-sex] couple is only accidentally infertile, while the [same-sex] couple is essentially so. But... unless one posits a divine artificer whose intentions are knowable, it is not clear how the essence/accident distinction can do any moral work.[402]

While one could invoke disputed theological positions in favor of the *religious value* of peno-vaginal intercourse even when performed by infertile couples,[403] "[w]hat neither [the new natural lawyers] nor anyone else has a good reason to do is to get laws enacted on the basis of such exceedingly contestible religious surmises."[404] In the United States, such sectarian religious positions are an inadequate basis for deploying

398. Koppelman, *supra* note 105, at 56 (discussing the views of some natural law scholars) (citation omitted).

399. *Id.* at 57.

400. If it did not, it would be difficult to argue persuasively that the definitional argument provides a basis for current marriage laws, which do not disbar infertile people from civil marriage.

401. Koppelman, *supra* note 105, at 70.

402. *Id.* at 75 (citation omitted).

403. *See id.* at 94.

404. *Id.* at 94–95.

governmental authority,[405] thus the definitional argument in favor of keeping civil marriage heterosexual should be adjudged a failure.[406]

2. *Public Welfare Rationales*

Marriage conventionalists also commonly advance a slew of public welfare arguments in support of the mixed-sex requirement: protecting the public fisc, procreation, childrearing, and so forth. These aims, however, do not satisfy heightened scrutiny and thus also do not justify denying the expressive resource of civil marriage to same-sex couples.[407]

For example, arguments about the supposed costliness to the public fisc of civilly recognizing a new class of marriages (same-sex marriages) utterly fail to justify imposing the burdens of nonrecognition on same-sex couples. Even if avoiding some level of monetary cost were to be deemed a compelling governmental interest (a proposition that is by no means certain), *no* necessary extraordinary costs of recognizing *same-sex* marriages have been shown or persuasively might be thought to exist.[408] Thus, since both same-sex marriages and mixed-sex marriages are costly, the mixed-sex requirement is not narrowly tailored to serve a policy of fiscal restraint.

Neither may the mixed-sex requirement be justified as a dike against the floodtide of ostensibly self-evident evils such as legalized prostitution, polygamy, and incest. Searching scrutiny is due the mixed-sex requirement for civil marriage because it is a viewpoint- or content-based denial of an expressive resource for communicating love and commitment, and so this form of First Amendment challenge is not applicable to prostitution. It is true, however, that those wishing to enter plural marriages are denied the

405. *See generally* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); JOHN RAWLS, POLITICAL LIBERALISM 212–54 (1993); John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). *But see, e.g.*, MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES (1997).

406. *See generally* Mark Strasser, *Natural Law and Same-Sex Marriage*, 48 DEPAUL L. REV. 51 (1998) (rebutting moral and legal arguments of new natural lawyers).

407. The possible public welfare functions served by the mixed-sex requirement that are not important or compelling do not adequately justify the abridgment of important rights. Functions for which the mixed-sex requirement is ill-suited ought not be deemed the point of the institution of civil marriage, because they needlessly abridge important rights, suggesting instead that something else—in my view, the symbolic function of marriage—is more fundamentally at work. *Cf.* Massaro, *supra* note 217, at 95 (noting that "many of the arguments commonly advanced in support of the regnant accounts of homosexuality are just too flimsy to support government regulation that interferes with such basic, essentially private, decisions as whom to love and marry").

408. *See also* Cicchino, *supra* note 8, at 155–56 (briefly rebutting conservation of public resources as justification for laws that discriminate on the basis of sexual orientation).

expressive resource of civil marriage, thus the dyad requirement is subject to challenge on First Amendment grounds under the theory advanced in this Article. It is widely thought, based on historical practice and contemporary social realities, that polygamy poses distinctive risks of gender subordination.[409] Even if that argument were not adjudged sufficient under the appropriate constitutional scrutiny to justify civil marriage's dyad requirement, society might have to accept polygamous civil marriages (unless government chooses to get out of the marriage business entirely): It simply is not the case that the constitutionality of denying legal recognition to polygamous unions is so clear that any contrary constitutional theory must be rejected, particularly since states have already recognized foreign polygamous marriages.[410] As for incest, my expressive resource argument would again apply and demand the state to satisfy a high level of justification for its failure to recognize civilly incestuous marriages between people of sufficient age, which the state might or might not be able to do. Again, however, this does not establish the propriety of denying recognition to both same-sex marriages and incestuous marriages, as opposed to the possible constitutional necessity of recognizing both.[411] Moreover, most functional arguments that fail to distinguish same-sex marriages from incestuous marriages would also fail to distinguish mixed-sex marriages from incestuous ones, so some marriage conventionalists may perhaps be justly accused of self-serving selectivity in their insistence on principle.

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409. For a detailed argument that a reconstructed Hegelian analysis justifies prohibiting Mormon polygamy, explains the fundamental right to marry, and does not justify barring same-sex marriages, see Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

410. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 948 & n.87 (1998) (detailing state recognition of foreign-contracted polygamous marriages). *Cf.* David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 81 (1997) ("Unless some strong reasons exist for continuing to exclude them, I would favor legal mechanisms to give recognition to more than the first marriage."); Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 851 (1998) (apparently suggesting that "polygamy prohibitions .... serve no valid purpose"); Todd M. Gillett, *The Absolution of* Reynolds*: The Constitutionality of Religious Polygamy*, 8 WM. & MARY BILL RTS. J. 497 (2000) (concluding that polygamy is constitutionally protected).

411. To the extent that these considerations do not adequately distinguish polygamous from same-sex marriages, my inclination would be toward presuming that both rather than neither should be protected, in the absence of compelling reasons for the contrary conclusion. On certain incestuous marriage prohibitions, see MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE 14, 151–52 (1996) (identifying assimilation of immigrants as a reason behind U.S. bans on first-cousin marriage).

Jean Bethke Elshtain's dogmatic contention that "marriage . . . is and always has been about the possibility of generativity"[412] notwithstanding, one should read in-house procreation—procreation requiring only genetic material contributed by the two spouses—out of the viable defenses of the mixed-sex marriage requirement.[413] A man and a woman need not have children to continue to be civilly married, need not intend to have children, and need not even be capable of having children.[414] The procreation rationale thus fits the mixed-sex requirement like a square peg fits a round hole. Some marriage conventionalists attempt to defend this grossly poor fit between the mixed-sex requirement and procreation on the grounds that *no* same-sex couple can procreate in-house and that it would be intrusive to ask the questions of mixed-sex couples that would be necessary to limit civil marriage solely to those who will procreate in-house.[415] That rationale, however, does not survive heightened scrutiny, for it would indefensibly privilege modest intrusions on heterosexual privacy over the major First Amendment infringement represented by the mixed-sex requirement's denial of the expressive resource of civil marriage to same-sex couples.[416] Why should the law be able to deny same-sex couples the right to marry civilly—given the myriad consequences of civil marriage, and the expressive resource that civil marriage is—while simultaneously preferring not to ask heterosexually identified couples if at least one of them is sterile or whether they definitely plan to have children within some reasonably short period of time?[417] This question's point is sharpened by the observation that if government's concern is for informational privacy of the heterosexually identified, it may take steps to assure the confidentiality

412. Jean Bethke Elshtain, *Against Gay Marriage*, COMMONWEAL, Oct. 22, 1991, *reprinted in* SAME SEX MARRIAGE: PRO AND CON, *supra* note 107, at 57, 59.

413. *Cf.* ESKRIDGE, *supra* note 19, at 118 ("To the extent the law of marriage focuses on children (by and large it does not), it is agnostic as to where the children come from.").

414. *See, e.g.*, Baker v. State, 744 A.2d 864, 881 (Vt. 1999) ("It is . . . undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children."); *id.* ("The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal [of 'furthering the link between procreation and child rearing'].").

415. *See, e.g.*, Duncan, *supra* note 366, at 160–61 (defending procreative rationale for mixed-sex requirement, *under rational basis review*, on grounds of heterosexual privacy); Brief of Catholic Conference, *supra* note 218, at 8 n.9 (defending mixed-sex requirement as balancing "privacy of persons applying for a marriage license" against "*legitimate* state interests") (emphasis added).

416. It would also tie constitutional rights somewhat curiously to the present state of technology, as one of the Justices of the Vermont Supreme Court recognized at oral argument in *Baker*, 744 A.2d at 864.

417. *Cf.* Samuel A. Marcosson, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their "Second Line of Defense"*, 35 U. LOUISVILLE J. FAM. L. 721, 743–44 (1997) (criticizing procreation justification).

of answers to such questions.[418] Thus, linking civil marriage and in-house procreation is not a compelling interest to which the mixed-sex requirement is narrowly tailored.

To the extent that society properly cares about future generations, the pressing issue is child *rearing*, not child production, which is what I take Elshtain roughly to mean by "generativity." It is difficult, although perhaps not impossible, to argue that there is a shortage of children now, but how one ultimately resolves that question is beside the point. I have seen no credible argument as to how such a shortage might come about in the future as a result of allowing same-sex couples to marry civilly.[419] If anything, one might expect that if same-sex couples could secure the protections of legal marriage, more would seek to become parents not only through two-parent adoption but also through assisted reproduction technologies or surrogacy arrangements, resulting in an *increase* in births.

Claims about a supposed adverse impact on the development of children have been rejected by, for example, the trial court in the Hawaii litigation, based on the social science literature.[420] Speculative in its predictions of harm, the objection that same-sex couples do not provide role models of each sex to children should be understood as maintaining that they cannot *constitute* role models of each sex, for same-sex couples frequently do socialize with members of the other sex. There is, however, no convincing evidence that a child raised by gay or lesbian parents cannot look to others for gender role models in any psychologically necessary sense.[421] Thus this argument too fails heightened scrutiny.

As to the objection that there would be an adverse impact on recognition of a state's marriages were it to eliminate the same-sex requirement,[422] I have seen no plausible argument that a state's authorizing

418. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977) (sustaining constitutionality of state statutes requiring that the state be provided with copy of all prescriptions for certain drugs and providing for security measures for that information).

419. *See also* Cicchino, *supra* note 8, at 151 (briefly rebutting procreation as justification for laws that discriminate on the basis of sexual orientation).

420. *See* Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

421. *See also* Ball & Pea, *supra* note 394, at 272–308 (concluding that a prominent opponent of same-sex parenting "failed to establish a credible normative or empirical link between the sexual orientation of parents and the well-being of children"); Cicchino, *supra* note 8, at 155–56 (briefly rebutting conservation of public resources as justification for laws that discriminate on the basis of sexual orientation).

422. *See, e.g.*, Brief of Amici Curiae States of Nebraska, Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina and South Dakota in Support of Defendant-Appellant at 7–9, Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05), http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg00803.html.

same-sex marriages would lead other states to disregard the first state's mixed-sex marriages. The prospect that the extra-state effects of a same-sex marriage might be limited does not make sense as a reason not to recognize such marriages within the state.[423]

3. *Morality Claims*

An additional common defense of the mixed-sex requirement adverts to morality, claiming that a majority's view that same-sex conduct or relationships are immoral justifies the restriction of civil marriage to mixed-sex couples. For example, Hawaii's Attorney General defended that state's mixed-sex requirement in part by arguing that it "constitute[s] a statement of the moral values of the community."[424] Vermont argued as follows in its motion to dismiss the suit challenging its mixed-sex requirement for civil marriage:

> The State has an interest in using the law to make normative statements. No matter how modern we may believe our society to be, the law still has a role in reflecting and shaping value judgments. . . . "[I]t is not the role or authority" of the . . . court to make decisions on morality regarding homosexuals; for a "proper understanding of our constitutional authority" the court must defer to the legislative finding under rational basis review. . . . "The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."[425]

Similarly, in the debates on DOMA, recurrence to "morality" was routine. Senator Coats attacked the left, declaiming that Congress' "urgent responsibility is to nurture and strengthen that institution, not undermine it with trendy moral relativism."[426] Representative Barr charged that challenges to the mixed-sex requirement were leveled "by extremists intent, bent on forcing a tortured view of morality on the rest of the country[.]"[427] Representative Canady argued that the majority of the country thought it improper for government to "treat homosexual

423. *See, e.g.*, Baker v. State, No. S1009-97CnC (Vt. Super. Ct. Dec. 19, 1997), http://www.vtfreetomarry.org/opinion121997.html ("[T]he State's purported interest in ensuring that its marriages are recognized in other states to avoid conflict-of laws issues doesn't appear to even approach a valid public purpose.").

424. Baehr v. Lewin, 852 P.2d 44, 52 (Haw. 1993) (internal quotation marks omitted).

425. Vermont's Motion to Dismiss, *supra* note 161 (quoting first *Baker v. Wade*, 774 F.2d 1285, 1286–87 (5th Cir. 1985) (en banc), then *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring)).

426. 142 CONG. REC. S4947 (1996) (statement of Sen. Coats).

427. *Id.* at H7482 (statement of Rep. Barr)

relationships as morally equivalent to heterosexual relationships."[428] Representative Smith of Texas asserted that to abandon the mixed-sex requirement for civil marriage would "legitimize unnatural and immoral behavior."[429] Representative Hyde stated that "same-sex unions sanctioned by the government trivialize marriage and condone public immorality."[430]

Marriage conventionalists in the legal academy have also pressed morality arguments in defeuse of the mixed-sex requirement.[431] And morality arguments are a staple in marriage conventionalist writings in newspapers throughout the country.[432]

Such morality arguments do not provide a sufficiently compelling basis for overriding lesbigay people's First Amendment right to share access to the expressive resource of civil marriage. First, morality arguments often are themselves expressive justifications for laws. Thus, Justice Powell maintained that "[t]he State, representing the collective *expression* of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations *reflect* the widely held values of its people."[433] As expressive interests, morality arguments cannot provide a compelling governmental interest of the kind necessary to trump what would otherwise be a First Amendment violation.

Second, and more fundamentally, claims that homosexuality or same-sex sexual conduct are immoral cannot plausibly be justified in secular

428. *Id.* at H7491 (statement of Rep. Canady).

429. *Id.* at H7494 (statement of Rep. Smith).

430. *Same-Sex Marriage "Immoral," GOP Says*, CINCINNATI POST, May 31, 1996, at 2A. *See also, e.g.*, Glen Hall, Editorial, *Letters from the People*, ST. LOUIS DISPATCH, Apr. 21, 1996, at 2B ("We all know that homosexual acts are wrong; they are immoral.") (letter from Missouri state senator sponsoring mixed-sex requirement bill).

431. *See, e.g.*, Richard F. Duncan, *Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a "Homophobe"?*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 587, 600–01 (1996); Finnis, *supra* note 174, at 1069–76; Robert R. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 313–18 (1995). Professor Ball cites and discusses these specific examples and others in Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997).

432. Robert Conlon confidently asserts that "[t]here can be no moral reasons for same sex marriages, only immoral reasons." Robert J. Conlon, Letters to the Editor, *Social Order*, CINCINNATI POST, June 12, 1996, at 18A. Florence Metcalf opines that "[l]egalizing same-sex relationships and calling it marriage will protect immoral behavior." Florence Metcalf, Editorial, *Don't Protect Immoral Unions*, PEORIA J. STAR, Apr. 23, 1996, at A4. Matthew Moles of Oakland writes that same-sex marriage "is utterly immoral in every sense of the word, as homosexuality itself is immoral." Matthew H. Moles, *Letters to the Editor: Readers Assess Pro and Con Articles on Same-Sex Marriage*, S.F. EXAMINER, Mar. 27, 1996, at A18.

433. Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (Powell, J., concurring) (emphases added).

terms by any interests subject to empirical disproof.[434] Arguments resting on the supposed immorality of lesbigay relationships or sexual acts thus rest on "bare" assertions of morality, which should be understood not to provide an "important," "substantial," or "compelling" reason to override First Amendment rights.

Admittedly, the Court has previously rejected claimed constitutional rights on the basis of bare assertions of morality. In *Paris Adult Theater I v. Slaton*, the Court upheld a zoning restriction applicable to adult movie theaters on the grounds of a "social interest in order and morality."[435] Further, in *Bowers v. Hardwick*, the Court rejected a due process challenge to Georgia's law criminalizing oral and anal sex on the basis of "the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."[436] However, as Justice Scalia later observed, "neither opinion held that those concerns were particularly 'important' or 'substantial,' or amounted to anything more than a *rational basis* for regulation."[437] What a majority of the Court has relied upon are public welfare purposes that are empirically verifiable at least in theory.[438]

Moreover, as Peter Cicchino explains:

> Such [bare morality] arguments, because they are not rooted in human experience commonly accessible to any rational person, are "private" in that they are intelligible to and command the assent of only those who share certain assumptions about reality, assumptions that are impervious either to examination or to refutation by reference to human experience. "Private," in this context, is therefore more closely akin to "sectarian," meaning truths accessible only to those who have already made an assent of faith.[439]

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434. *See, e.g.*, Cicchino, *supra* note 8, at 151–56 ("A Brief Rebuttal of Public Welfare Arguments on Behalf of Laws that Discriminate on the Basis of Sexual Orientation").

435. 413 U.S. 49, 61 (1973).

436. 478 U.S. 186, 196 (1986) (concluding that "majority sentiments about the morality of homosexuality" are "[]adequate" in due process suit).

437. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 580 (1991) (Scalia, J., concurring in the judgment). *See, e.g.*, *Bowers*, 478 U.S. at 196.

438. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 296–302 (2000) (plurality opinion) (four Justices relying on secondary effects to uphold challenged law); *id.* at 310–11 (Souter, J., concurring in part and dissenting in part) (agreeing with plurality that "Erie's stated interest in combating the secondary effects associated with nude dancing establishments is an interest unrelated to the suppression of expression" and that "the city's regulation is thus properly considered under the *O'Brien* standards"); *Barnes*, 501 U.S. at 582–87 (Souter, J., concurring in the judgment) (providing fifth vote that challenged law survives First Amendment scrutiny, relying on "secondary effects" rather than morality).

439. Cicchino, *supra* note 8, at 141. "'Bare public morality' arguments defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any

One need not go so far as to agree with Professor Cicchino that "[a] bare assertion of public morality, divorced from any empirical effect on the public welfare, cannot constitute a legitimate government interest for equal protection review."[440] Rather, it suffices that such assertions, whether or not they are deemed constitutionally "legitimate" (that is, sufficiently rational to uphold a law challenged under some constitutional guarantee demanding only rational basis review), do not constitute reasons of a kind sufficient to satisfy heightened scrutiny under the First Amendment.

> [Such bare morality assertions do] not qualify as a reason for discourse in a democracy like ours, namely, a pluralistic democracy, one in which, for any foreseeable future, the citizens will have significant and irreconcilable differences on matters of conscience, including but not limited to such issues as the existence and nature of God, and an exhaustive list of the constitutive elements of a good human life.[441]

This is not to say that such claims are actually religious in nature, but only that they partake of enough of the characteristics that render religious reasons constitutionally suspect as not to justify abrogation of rights protected by more than rational-basis review. As Professor Cicchino cogently explains, "moral interests unrelated to an empirical effect on public welfare are not, in principle, distinguishable from irrational prejudice and private bias" and "are, for the purposes of discourse in a pluralistic democracy, analytically and practically indistinguishable from theological or sectarian assertions."[442] Because an important purpose of the First Amendment is to protect minority justice claims including claims about morality *vel non*, it would be perverse to allow a majority's or even a supermajority's preferred moral system not embedded in the Constitution to abridge free-expression rights. And, despite conclusory assertions to the contrary, no one has adequately explained why heterosexuality or heterosexual superiority ought to be understood to be constitutionally privileged in such a fashion. Thus, the morality defense of the mixed-sex requirement for civil marriage rests upon bare assertions of immorality that cannot satisfy heightened scrutiny.[443]

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empirical connection to goods other than the alleged good of eliminating or increasing, as the case may be, the behavior at issue." *Id.* at 140.

440. *Id.* at 142.

441. *Id.* at 173.

442. *Id.*

443. To the extent that *Bowers v. Hardwick*, 478 U.S. 186 (1986), does in fact sanction governmental deployment of the criminal law in the interest of bare assertions of morality, it might pose an obstacle to the recognition of a constitutional principle disbarring assertion (by legal favoring) of the moral superiority of heterosexual sex acts. Of course, given actual sexual practices in the contemporary United States, *see generally, e.g.*, EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL &

In summary, neither the definitional argument, any of the commonly proffered public welfare purposes, nor a morality claim provides a

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STUART MICHAELS, THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES (1994), one may need to squint to see marriage as symbolizing such an exaltation in a nondiscriminatory way. *But see* Sally F. Goldfarb, *Family Law, Marriage, and Heterosexuality: Questioning the Assumptions*, 7 TEMP. POL. & CIV. RTS. L. REV. 285, 287 (1998) (concluding as descriptive matter that "family law . . . reflects . . . an assumption that what marriage is for is, quite simply, heterosexual genital intercourse"); *id.* at 288 (suggesting that family law treats "heterosexual intercourse [as] the defining element of marriage itself"). As one commentator has acerbically responded to the morality justification for the mixed-sex requirement for civil marriage, "to presume that morality follows on marriage is to ignore centuries of evidence that each is very much possible without the other." Fenton Johnson, *Wedded to an Illusion: Do Gays and Lesbians Really Want the Right to Marry?*, HARPER'S, Nov. 1996, at 43, 47.

It is possible, as Thomas Grey has argued, that *Romer* has "diminished" *Bowers*. Thomas C. Grey, Bowers v. Hardwick *Diminished*, 68 U. COLO. L. REV. 373, 373–74 (1997). Certainly *Romer* shows that there are some constitutional limits on the degree to which government may rely on the proscribability of sodomy as a shield for practices disadvantaging lesbigay people. In Grey's view:

> [*Bowers* said] it was rational (hence constitutional) to treat private homosexual acts between consenting adults as crimes—this on the basis of "majority sentiments" unsupported by any argument. *Romer* said that it was irrational, hence unconstitutional, for a state to tie its hands against giving explicit antidiscriminatiou protection to gay men, lesbians, and bisexuals.

Id. at 373 (citations omitted). And, because "the two decisions are inconsistent on this point, . . . not much is left of" *Bowers*. *Id.* at 374. In particular, because Grey with some foundation considers it "rational," as that term is ordinarily understood in the discourse of judicial constitutional scrutiny, for government to draw conclusions about "sodomitical conduct" from indications of lesbigay identity, *see id.* at 376, 378–79, he concludes that *Bowers*' rational basis holding has been necessarily albeit implicitly overruled by *Romer*, *see id.* at 386. Grey also argues that the Court's "failure to address . . . the alternative rational bases the State put forward in its brief . . . . suggests (as does the citation of *Plessy*) that the Court is tending in the direction of heightened scrutiny for discrimination based on sexual orientation." *Id.* at 385 n.49.

To like effect, Sam Marcosson has argued that "[a]nti-gay moral views" will not save the mixed-sex requirement for civil marriage "in light of the Supreme Court's historic decision in *Romer v. Evans*." Marcosson, *supra* note 80, at 219. *Romer*, according to Marcosson, holds that at least as to certain government actions disfavoring lesbigay persons, "anti-gay morality will not count as even a legitimate state interest." *Id.* at 220. He argues that the holding of *Bowers* "cannot stand together with the reasoning of *Romer*," for the fruits of *Bowers*, the uses to which the Court's holding have been put, establish that "like Amendment 2, [*Bowers*] has had the effect of denying lesbians and gay men equal protection of the laws across a wide range of transactions." *Id.* at 233. And, because civil marriage confers "literally hundreds of rights and privileges," *id.* at 250, its mixed-sex requirement also falls afoul of *Romer* as Professor Marcosson reads that decision. *Id.* at 250–51, 256–57.

But as a matter of practice in the world where law controls people's daily lives to a tremendous degree, rather than merely in the academic world of theory, all of the understandings of *Romer*'s import await further judicial unfolding. Judicial reception to date has been mixed. The Seventh Circuit predicted in *Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996), that *Romer* will come to eclipse *Bowers*, yet the Sixth Circuit held in *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati* that *Romer* does not even prohibit an Amendment Two copycat law when adopted at the municipal level. 54 F.3d 261 (6th Cir. 1995), *cert. granted and judgment vacated*, 518 U.S. 1001 (1996), *aff'd on remand*, 128 F.3d 289 (6th Cir. 1997), and *cert. denied*, 525 U.S. 943 (1998). Academic commentary about the robustness of *Romer*'s holding is far from unanimous. *See, e.g.*, Richard F. Duncan, *"They Call Me 'Eight Eyes'": Hardwick's Respectability,* Romer*'s Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241 (1998). Aside perhaps from the Rodney Dangerfield allusion, the title speaks for itself.

compelling, well-tailored justification for the mixed-sex requirement for civil marriage. Marriage expansionists thus would seem to have prevailed, unless the mixed-sex requirement can be justified as a means to shield heterosexually identified persons from the unsettling of their identities that could occur were same-sex couples brought within the fold of civil marriage or to keep the institution of civil marriage from being questioned by denying same-sex couples the expressive resource of civil marriage. Such purposes are a more fundamental point of the mixed-sex requirement than are the ill-fitting rationales just canvassed. These defenses of the requirement, however, are constitutionally unsound, as the next Section explains.

D. IMPERMISSIBLE APPROACHES

The purpose that the mixed-sex requirement best serves is preserving the current symbolic meaning of civil marriage by denying this expressive resource to same-sex couples. The object of such efforts might be the protection of heterosexually identified persons from the unsettling effects of sharing the institution of civil marriage with same-sex couples. Or it might be the desire to keep marriage from being questioned in a time when many old values are under re-examination and freefloating anxieties fill the national psyche like smog in Los Angeles. In any instance, it should be regarded as impermissible under the First Amendment for government to seek to insulate the meaning of this important symbol from contestation.[444]

1. *Protecting Heterosexual Identity*

Denying the expressive resource of civil marriage to same-sex couples due to the potentially discomfiting effect on some heterosexually identified persons is antithetical to basic First Amendment principles. In particular, a strong current of First Amendment jurisprudence identifies the "heckler's veto"—whereby government limits expression out of concern with how it will be received—as inconsistent with our national commitment to robust discourse even at significant cost to peace of mind.[445] As the Supreme Court held in *Cohen v. California*, "verbal tumult, discord, and even

444. Hence, for example, I believe that Leonard Brown is fundamentally mistaken when he asserts, with little analysis, that there is "compelling government interest [in] maintaining the traditional definition of marriage." Brown, *supra* note 288, at 184.

445. *See generally* Paul Siegel, *Second Hand Prejudice, Racial Analogies and Shared Showers: Why "Don't Ask, Don't Tell" Won't Sell*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 185, 190–93 (1995).

offensive utterance" are protected by the Constitution.[446] "[A] principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[447] Protection of minority expression is a fundamental object of the First Amendment as it is understood today.[448] Psychic disturbance is the unavoidable—and perhaps in many circumstances desirable—consequence of our constitutional protection of free expression.[449] In trying to protect how some heterosexually identified persons think and feel by denying the expressive resource of civil marriage to same-sex couples,[450] government again runs afoul of a type of neutrality norm embodied in the First Amendment: "Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails . . . ."[451] That general rule should govern here.

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446. 403 U.S. 15, 24–25 (1971).

447. Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

448. *See, e.g.*, *Cohen*, 403 U.S. at 21 (protecting wearing of jacket displaying the phrase "Fuck the Draft" because contrary holding "would effectively empower a majority to silence dissidents simply as a matter of personal predilections").

449. *Cf.* Boos v. Barry, 485 U.S. 312, 321 (1988) (plurality opinion) (protection from "psychological damage" associated with perceiving the regulated speech is "content-based" and thus subject to strict scrutiny); *Cohen*, 403 U.S. at 26 ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 24. *See also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

450. Interestingly, some marriage conventionalists take psychic comfort to be the chief aim of marriage expansionists. *See, e.g.*, Daniel Torres, Editorial, *Yes on 22*, PRESS DEMOCRAT (Santa Rosa, Cal.), Mar. 1, 2000, at B7 (high school senior arguing in letter to editor that "[a]ll that Proposition 22 says is that marriage will not be redefined to ease the minds of homosexual couples"). Of course, while this view overlooks the many economic aspects of civil marriage, it is relatively consistent with my emphasis on civil marriage as a unique expressive resource by which people express and constitute themselves. In that respect, my primary difference with Torres may be my belief that the First Amendment does not allow government to sacrifice a minority's "ease [of] mind[]" in order to project the majority's.

451. United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000). *But see* Post, *supra* note 195, at 1266 ("Although this focus on 'listeners' reaction' could be a powerful and far-reaching principle, it is not at all clear what it means.").

2. *"Keeping Marriage Unquestioned"*

While considering types of justifications for speech regulations that are impermissible under the First Amendment, I should note one additional argument sometimes made in support of the mixed-sex requirement. Marriage conventionalists occasionally argue that same-sex couples should continue to be forbidden to marry civilly in order to keep marriage "unquestioned."[452] Regardless of the fact that it may well be too late for that, in light of the current incidence of unmarried cohabitation and of unmarried women becoming pregnant,[453] as well as the striking national debate about same-sex marriage,[454] the aim is nonetheless profoundly antidemocratic and at odds with basic First Amendment principles.

Senator Byrd, speaking in support of DOMA, expressed great incredulity "that federal legislation would be needed to provide a definition of two terms [i.e., 'marriage' and 'spouse'] that for thousands of years have been perfectly clear and *unquestioned*."[455] The amicus brief cowritten by Jay Sekulow and filed by Pat Robertson's American Center for Law and Justice in the Vermont marriage litigation argued that the mixed-sex requirement was justified because it was necessary to preserve current meanings of "marriage": "[B]lurring the distinction between marriage and same-sex relationships will blur and eventually over time *cut off our society's understanding of* and commitment to marriage as a uniquely valuable union of a man and a woman."[456] Another amicus brief filed on behalf of the newly formed marriage conventionalist organization, Take It to the People, urged the Vermont Supreme Court not to allow same-sex couples to marry. The organization argued that "the entire discursive context in which the Appellants argue, and in which the state has been forced to offer its response, is inappropriate and deeply subversive" and decried use of the very phrase "same-sex marriage," warning that "[o]nce the definitional ground has been shifted, one finds it difficult to argue

452. *Cf.* Larry A. Hickman, *Making the Family Functional: The Case for Same-Sex Marriage*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 40, at 192, 193 (offering as one possible conventionalist argument a claim "that human societies have worked out over several centuries a satisfactory set of rules for establishing the essence of what it means to be a family, and that the time has now come to stop inquiry into the matter").

453. *See supra* note 53 and accompanying text.

454. *See, e.g.*, Deb Price, *Consensus Emerges for Gay Marriage*, THE DETROIT NEWS, Oct. 4, 1999, at A9 ("Clearly, gay marriage is no longer unthinkable.").

455. 142 CONG. REC. S10,108 (1996) (statement of Sen. Byrd) (emphasis added).

456. Brief of Amicus Curiae American Center for Law and Justice, Baker v. State, 744 A.2d 864 (Vt. 1999) (No. 98-32) (emphasis added), http://www.aclj.org/issues/issues_samesex_brief.asp.

against the newly-privileged position."[457] The state of Vermont argued that its mixed-sex requirement should be upheld because it allows the majority "to make a normative statement."[458] Similarly, the state of Hawaii (in a brief cowritten by Jay Sekulow) defended its mixed-sex requirement by quoting Justice Powell, who believed that "[t]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people."[459] And James Q. Wilson has argued "against homosexual marriage" in part on the ground that admitting same-sex couples to civil marriage "would *call even more seriously into question* the role of marriage at a time when the threats to it . . . have hit record highs."[460]

If, however, marriage really is the foundation for society and a crucial training ground for new citizens,[461] then along with the importance of the institution to society comes a greater importance in allowing questioning of that institution. This is one lesson from the eventual (somewhat) protective treatment of pro-Communist speech under the First Amendment.[462] Our constitutional rights, including rights of free expression, extend to "things that touch the heart of the existing order."[463] As the Court has stated, "[t]he First Amendment does not guarantee that . . . concepts virtually sacred to our Nation as a whole . . . will go unquestioned in the marketplace of ideas."[464]

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457. Brief of Amicus Curiae Take It to the People, Baker v. State, 744 A.2d 864 (Vt. 1999) (No. 98-32), http://www.vtfreetomarry.org/tipamicus.htm.

458. *See supra* note 426 and accompanying text.

459. Brief of Abinsay, supra note 138, at 7 n.4 (quoting Zablocki v. Redhail, 434 U.S. 374, 398 (1978) (Powell, J., concurring)).

460. James Q. Wilson, *Against Homosexual Marriage, reprinted in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, *supra* note 40, at 137, 141 (emphasis added). *See also, e.g.*, Bauer, *supra* note 38, at 22 (suggesting that DOMA "would have seemed unnecessary and even unthinkable just a few years ago").

461. *See, e.g.*, FINEMAN, *supra* note 292, at 226 ("In our individualistic society, the state relies on the family—allocating to it . . . the production and education of its future citizens."); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 773 (1973) ("In democratic theory as well as in practice, it is in the family that children are expected to learn the values and beliefs that democratic institutions later draw on . . . .").

462. For a chronological examination of the development of First Amendment law and the treatment of the Communist Party of the United States, see Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1 (1991).

463. W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.").

464. Texas v. Johnson, 491 U.S. 397, 418 (1989).

Moreover, with only narrow and rare exceptions,[465] the First Amendment should be interpreted to prohibit government from passing laws with the aim of fostering ignorance, even as a means to some generally permissible goal. As Ashutosh Bhagwat has observed:

> In a number of recent commercial speech cases—most notably, [the] decision in *44 Liquormart* . . .—the Court has suggested that creating or maintaining public ignorance, even in pursuit of otherwise legitimate ends, are [sic] inherently suspect, and perhaps automatically unconstitutional purposes, because such aims violate fundamental First Amendment principles.[466]

The theory of the First Amendment,[467] as understood by many courts and scholars, identifies "more speech" rather than less as the proper response to expression that may have troubling effects,[468] even at the expense of compelling governmental interests.[469] As Geoffrey Stone has summarized First Amendment doctrine, "the government ordinarily may not restrict the expression of particular ideas, viewpoints, or items of information because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression."[470] Thus, however vital the good that civil marriage produces may be, government may not deny that expressive resource to same-sex couples in order to keep people from questioning the institution or its importance.

E. INADEQUATE ALTERNATIVE EXPRESSIVE RESOURCES

Even if the mixed-sex requirement was judged to satisfy heightened scrutiny, that regulation would still have to leave adequate alternative expressive resources for same-sex couples because the mixed-sex requirement is a content-discriminatory regulation of a unique expressive

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465. One example might be demonstrable, at least to an appropriate court *in camera*: threats to national security. However, I doubt that a claim of military need to "foster *instinctive* obedience, unity, commitment, and esprit de corps," Etheredge v. Hail, 56 F.3d 1324, 1328 (11th Cir. 1995) (emphasis added) (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)), should justify a restriction on a military base that reaches even *civilian* speech embarrassing or disparaging the President.

466. Bhagwat, *supra* note 196, at 317 (citation omitted).

467. *See* Volokh, *supra* note 222, at 2444–54 (discussing approach, rooted in Supreme Court precedent, that treats certain speech-restrictive means as categorically impermissible rather than tolerated if able to survive strict scrutiny).

468. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

469. *See, e.g.*, Volokh, *supra* note 222, at 2417 ("There are [speech] restrictions the Court would strike down . . . even though they are narrowly tailored to serve a compelling state interest. . . . In striking these restrictions down, the Court would, in my view, be correct.").

470. Stone, *supra* note 228, at 213.

resource.[471] However, it is quite doubtful that there are constitutionally adequate expressive alternatives to civil marriage. Given the unique potency of (civil) marriage as a medium or mode of expression, as discussed above,[472] civil marriage is akin to the U.S. flag, a distinctive institution with a distinctive history.[473] The discriminatory distribution of this expressive resource powerfully handicaps the expression of lesbigay persons in favor of the heterosexually identified majority.

Admittedly, the Court and constitutional commentators have shed little light on the doctrinal requirement of ample expressive alternatives. Yet in light of the unique expressive power of civil marriage, no presently available alternative should be adjudged adequate. Without the state sanction afforded mixed-sex couples, all the efforts of lesbigay couples and supportive religious institutions to declare that these couples are married—wedding ceremonies, "marriage speech," wedding rings—are likely to be met with resounding disbelief. Courts will place *married* in scare quotes when discussing same-sex marriages.[474] Citizens and commentators will dismiss these relationships as "pretend" marriages.[475] And many people will go on believing that the definitional argument in defense of the mixed-sex requirement is a sound and persuasive argument, despite its patent circularity when proffered as a legal justification for denying lesbigay people the expressive resource of civil marriage.[476] Meanwhile, heterosexual privilege will trumpet its triumph, and government will continue to skew the expressive and self-constitutive landscape.

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471. *See supra* Part II.C. This is likely true even if one did not accept my proposed doctrinal analysis of civil marriage as a unique expressive resource. If confined to existing First Amendment doctrine, civil marriage should probably be analyzed as expressive conduct or as a designated public forum. Under *United States v. O'Brien*, 391 U.S. 367 (1968), even as to content-neutral laws, "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [the justifying 'important or substantial governmental'] interest." *Id.* at 377. Under public forum analysis, even innocuous time, place, or manner restrictions must "leave open ample alternative channels of communication," Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983), and may not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

472. *See supra* notes 87–94 and accompanying text.

473. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., joined by White and O'Connor, JJ., dissenting) ("For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here."); *id.* at 422–29 (reverently traversing the history of the U.S. flag).

474. *See supra* note 38 and accompanying text.

475. *See* DAVID BELL & JON BINNIE, THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND 111 (2000) (discussing section 28 of Local Government Act (U.K.) which deems same-sex marriages or partnerships mere "pretended family relationships").

476. *See supra* notes 100–05 and accompanying text.

Such maldistributive consequences—much more drastic than, for example, the expressive handicapping that resulted from the inability lawfully to burn one's draft card in the wake of *United States v. O'Brien*[477]—strikingly show the inadequacy of the expressive alternatives to civil marriage for same-sex couples. For this reason, too, the mixed-sex requirement should be adjudged unconstitutional under the First Amendment.

III. WHITHER MARRIAGE?

Assuming the argument of this Article is correct, marriage practices in America will have to change. It is unconstitutional for the vast majority of states and the federal government to provide people in committed mixed-sex relationships with the expressive resource of civil marriage while leaving committed same-sex couples to do what they can to obtain some of marriage's legally operative aspects through often costly contract law. And it is even unconstitutional for California, Hawaii, and Vermont to provide heterosexually identified couples with the option of civil marriage while relegating lesbigay couples to the distinctly less puissant domestic partnerships,[478] reciprocal beneficiary arrangements,[479] or civil unions[480] offered respectively by those states. None of these marriage substitutes is an adequate alternative to the uniquely powerful expressive resource that civil marriage is.[481]

This leaves government with a choice. When the Vermont Supreme Court held that the state constitution's Common Benefits Clause precluded the state from reserving the benefits and protections of civil marriage to mixed-sex couples,[482] it did not immediately hold that the state had to commence issuing civil marriage licenses to same-sex couples, despite the partial concurrence's strong argument that this was the only proper remedy.[483] Rather, the majority left the choice to the Vermont legislature

477. 391 U.S. 367 (1968).

478. *See* CAL. FAM. CODE §§ 297, 299.5–.6 (West Supp. 2001); CAL. HEALTH & SAFETY CODE § 1261 (West 2000).

479. *See* HAW. REV. STAT. ANN. §§ 572C-1 to 572C-7 (Michie 1999).

480. *See* VT. STAT. ANN. tit. 15 §§ 1201–1207 (Supp. 2000).

481. Thus, I believe that Professor Eskridge may have overlooked this value in concluding that "[t]he main thing that a Danish-style compromise [that gives same-sex couples marriage with all the trappings except the name and adoption rights] would sacrifice is formal equality." ESKRIDGE, *supra* note 19, at 121–22.

482. *See* Baker v. State, 744 A.2d 864, 867 (Vt. 1999) ("We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.").

483. *See id.* at 898 (Johnson, J., concurring in part and dissenting in part).

in the first instance to determine precisely how to equalize its treatment of mixed-sex and same-sex couples.[484] The court expressly reserved judgment on whether (what I and other observers have characterized as) a separate-but-equal regime could satisfy that state's constitutional equality mandate.[485]

Under this Article's analysis, Vermont's civil unions violate the First Amendment of the U.S. Constitution by restricting the unique expressive resource of civil marriage to mixed-sex couples with inadequate justification.[486] It may well be that the Vermont Supreme Court could also ultimately conclude that the expressive capacity of civil marriage is one of the "benefits" that the Vermont Constitution requires be provided equally.[487] Neither of these conclusions, however, would necessarily mean that same-sex couples must be allowed to marry civilly.

Vermont, and probably any other U.S. jurisdiction confronting the issue, may choose whether to abolish the mixed-sex requirement, and thus to extend civil marriage to same-sex couples, or instead *to abolish civil marriage itself.*[488] Either course should comport with Vermont's Common Benefits Clause, for if civil marriage were abolished, its expressive capacity would not be available to anyone, thus there would be no question of whether it was being improperly reserved to "a part only" of the populace.[489] Similarly, both extension of civil marriage and its abolition

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> I concur with the majority's holding, but I respectfully dissent from its novel and truncated remedy, which in my view abdicates this Court's constitutional duty to redress violations of constitutional rights. I would grant the requested relief and enjoin defendants from denying plaintiffs a marriage license based solely on the sex of the applicants.

Id.

484. *Id.* at 867 ("Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature.").

485. *See supra* notes 143–44 and accompanying text.

486. *Cf.* ESKRIDGE, *supra* note 19, at 50 ("Western culture generally and the United States in particular ought to and must recognize same-sex *marriages*.").

487. Because the Vermont Supreme Court has already given same-sex couples so much and would face even greater political uproar were it to adopt the arguments of this Article to require same-sex *marriages*, I believe that, at this time, litigation to test my arguments judicially would be premature. Nonetheless, I believe it vitally important for the arguments to enter the public dialogue on marriage in the twenty-first century United States.

488. *See, e.g.*, Cain, *supra* note 292, at 28 ("There are two ways to create equal access to marriage: (1) let everyone in, or (2) keep everyone out."); Jonathan C. Wilson, *"Civil Unions" Aren't Equal for Gays: Vermont Action May Force the State out of the Marriage Business*, DES MOINES REG., Apr. 27, 2000, at 15. I write "probably" because I have not examined the constitutions of all U.S. jurisdictions to assess whether any of them might require the provision of civil marriage.

489. The Common Benefits Clause of the Constitution of the State of Vermont provides, in pertinent part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any

would be consistent with the First Amendment, for neither would regulate a unique expressive resource on any ground related to the content (let alone viewpoint) of expression; rather, the resource would simply no longer exist were civil marriage abolished. Recall in this regard that the U.S. Supreme Court has never intimated that government is constitutionally mandated to establish and to maintain civil marriage.

Of course, if Vermont or some other jurisdiction were to "disestablish" marriage, there might arise a question about whether that abolition of civil marriage were an unconstitutional "sour grapes" reaction resting impermissibly on hostility toward lesbigay people and our intimate relationships. However, the Supreme Court has been notoriously squeamish about subjecting governmental decisions not to provide services to meaningful constitutional scrutiny. Thus, for example, in *Palmer v. Thompson*,[490] the Court was faced with an equal protection challenge to a decision by the city of Jackson, Mississippi, to close its theretofore racially segregated municipal pools rather than to integrate them after a federal court held that the city could not constitutionally segregate its pools, golf links, or other public facilities—which it was still operating in 1963, "nearly nine years after *Brown* [*v. Board of Education*[491]] and more than seven years after" other Supreme Court decisions making clear that *Brown* covered such facilities.[492] The city council conclusorily justified this decision with bare assertions that "they could not be operated safely and economically on an integrated basis."[493] Nonetheless, the Supreme Court majority upheld the pool closure because, however invidious the city's motivation, there was "no state action affecting blacks differently from whites."[494] Similarly, the abolition of civil marriage would leave lesbigay and heterosexually identified people with equal (lack of) access to civil marriage, and neither the First Amendment argument of this Article nor, I suspect, extant equal protection doctrines would foreclose that course of action.

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single [person], family, or set of [persons], who are a part only of that community . . . ." VT. CONST., ch. I, art. 7.

490. 403 U.S. 217 (1971).

491. 347 U.S. 483 (1954).

492. *Palmer*, 403 U.S. at 247.

493. *Id.* at 225. Although the Supreme Court majority averred that "[t]here [was] substantial evidence in the record to support this conclusion," *id.*, Justice White noted in dissent that "the only evidence in this record is the conclusions of the officials themselves, unsupported by even a scintilla of added proof." *Id.* at 260 (White, J, joined by Brennan and Marshall, JJ., dissenting).

494. *Id.* at 225.

It is, however, far from clear that government would disestablish marriage.[495] The city council of Jackson likely abolished its municipal pools for of fear of violence[496] from those ideologically opposed to racial integration.[497] Although the city had apparently at least somewhat successfully "desegregate[d] its public parks, auditoriums, golf courses, and the city zoo,"[498] I suspect that the bodily exposure and potential contact involved with swimming led to greater fears, for fear of bodily mingling or "race mixing" underlay such pillars of U.S. racism as antimiscegenation laws and lynchings of Black men. With civil marriage, by contrast, no heterosexually identified persons would be threatened with touching bodies of lesbigay spouses that they find loathsome. Whether the symbolic proximity of nondiscriminatory civil marriage would be more or less threatening to marriage conventionalists than the physical proximity of nondiscriminatory pools was for the people of Jackson, Mississippi, in the 1960s is difficult to answer.

What seems clear, however, is that much more than symbolic proximity is at stake for heterosexually identified people with respect to civil marriage. Losing a municipal pool cost the white majority what Justice Blackmun deemed "a general municipal service of the nice-to-have but not essential variety, . . . a service, perhaps a luxury, not enjoyed by many communities."[499] This nice service or luxury was presumably of most value only during part of each year. Giving up civil marriage, by contrast, would cost the heterosexually identified much more. It would deprive *them* of the expressive resource that civil marriage is. It would cost single-earner married couples the "marriage bonus" in their federal income tax. It would leave them to worry about inheritances, hospital visitation and medical decisionmaking, no longer being able to hold property by the entirety, loss of the testimonial privilege, and a host of other fairly "concrete" benefits. And it might say to them that they are no longer the "special favorite of the laws."[500] I do not know, I cannot know, but it is at least plausible that enough marriage conventionalists would, if faced with this choice, prefer to "suffer" the symbolic association with lesbigay people rather than give up all of that. At least they would still retain a bundle of

495. *See* Cain, *supra* note 292, at 28 ("For obvious reasons, the legal battle has been over the first option; let everyone in. In the real world, no state is about to abolish marriage completely.").

496. *See Palmer*, 403 U.S. at 260 (White, J, joined by Brennan and Marshall, JJ., dissenting).

497. *See, e.g., id.* at 224–25 (conceding evidence of such opposition).

498. *Id.* at 219.

499. *Id.* at 229 (Blackmun, J., concurring).

500. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

privileges and valuable obligations, even if these were now shared with slightly more people.

The civilly married would still be able to lay claim to a form of legitimation that would exclude *some*. The abolition of the mixed-sex requirement would not by itself invalidate the other restrictions on civil marriage, which would still exclude people who cannot or do not wish to conform to the institution of civil marriage (at least until such day, if ever, that challenges to those restrictions were pressed and confronted on their merits). As Michael Warner has argued:

> Marriage sanctifies some couples at the expense of others. . . . Stand outside it for a second and you see the implication: if you don't have it, you and your relations are less worthy. Without this corollary effect, marriage would not be able to endow anybody's life with significance. The ennobling and the demeaning go together. Marriage does one only by virtue of the other. Marriage, in short, discriminates.[501]

And, it would seem, civil marriage *must* discriminate. If all of its benefits and obligations were universally available, then there would really be no need for the legal institution at all. (Even the symbolic value of civil marriage would be reduced or eliminated if everyone were deemed "married" from birth.)

Indeed, there are many who argue that this is precisely what the state should do—disestablish marriage, which would become solely a religious or social institution but not a legal one. Paula Ettelbrick,[502] Martha Fineman,[503] Nancy Polikoff,[504] and Michael Warner[505] have all written articles or books arguing that the state should not regulate civil marriages as such.[506] Support for this position is not limited to academics. One self-

501. WARNER, *supra* note 71, at 82.

502. *See, e.g.*, Paula L. Ettlebrick, *Legal Marriage Is Not the Answer*, HARV. GAY & LESBIAN REV., Fall 1997, at 34; Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK NAT'L GAY & LESBIAN Q., Fall 1989, at 9, *reprinted in* SEXUAL ORIENTATION AND THE LAW 721 (William B. Rubenstein ed., 2d ed. 1997); Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996); FRANK BROWNING, THE CULTURE OF DESIRE: PARADOX AND PERVERSITY IN GAY LIVES TODAY 154 (1993) (quoting Ettelbrick presentation against same-sex marriage).

503. FINEMAN, *supra* note 292, at 228–30.

504. *Cf.* Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993) (arguing that the lesbian and gay rights movement's advocacy of civil marriage for same-sex couples excludes the possibility of a more radical transformation of the institution of marriage).

505. WARNER, *supra* note 71, at 81–157.

506. *See also* Homer, *supra* note 21. *Cf.* Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 365 (1998) (concluding "that as between marriage and domestic partnership, the latter is preferable"). Although

professed "longtime gay activist" wrote to the *Star Tribune* (Minneapolis-St. Paul):

> [I urge opposition to] all special state support for persons based on their marital or conjugal status (whether they are straight or gay). All individuals should be equal before the law and society, and should have equal access to medical, tax and other benefits regardless of whether the state has blessed whatever sexual relationship they happen to have.[507]

Even someone who admits to being "offended at the notion of using the same word to describe the relationship I have with my wife and my god, and the relationship two gay men might have" nonetheless takes the stance that "it is immoral for the state to grant permission for any marriage.... What business is it of the state or anyone else who [sic] I marry?"[508]

Even the First Amendment theory of this Article supports the disestablishment of marriage under one interpretive approach to the Constitution. The chief constitutional vice of the mixed-sex requirement upon which I have focused is its lack of neutrality.[509] Without powerful justification, which I have argued is also lacking here, such a breach of neutrality with respect to the expressive resource of civil marriage is impermissible under the First Amendment. Yet a more fundamental neutrality principle that some scholars take to underlie the U.S. constitutional order is that of neutrality about the good life. On this view, government may not act to promote one vision of the good at the (relative) expense of those who take a different view.[510] Yet this is precisely what civil marriage, with or without the mixed-sex requirement, does. So long as government licenses marriage, it provides a resource to those who model

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some critical race theorists have also criticized the same-sex marriage movement, most who have done so in print have focused upon the prioritization of civil marriage by lesbigay organizations and activists, rather than arguing that the actual abolition of the mixed-sex requirement would itself be undesirable. *See, e.g.*, Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"? Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1370 (2000).

> The scattered racial critiques of same-sex marriage have not questioned the advisability of pursuing marriage altogether. Rather, race critics challenge the extraordinary prominence given to marriage (and other formal equality goals) within gay and lesbian politics; race critics have also argued that many (or most) of the benefits from same-sex marriage will accrue to white and upper-class individuals.

Id.

507. David Thorstad, Letters from Readers, *Why Ape Marriage?*, STAR TRIB. (Minneapolis-St. Paul), Mar. 5, 1995, at 28A.

508. Jay Carper, Letters, Faxes & E-mail, *Libertarian Solution*, DENVER POST, Jan. 14, 2000, at B6.

509. *See supra* Part II.A.

510. *But see, e.g.*, Ball, *supra* note 431, at 1883 (arguing in favor of "[t]he perfectionist liberalism of Joseph Raz [which] permits the state to rely on notions of the good, and in particular on the ideal of personal autonomy, in defining the right").

their expression and their lives in governmentally approved ways.[511] A more thoroughgoing commitment to neutrality than that embodied in current First Amendment doctrine would condemn this result as well. Rather than package an *enormous* bundle of economic and legal strictures into the civil marriage package, government would be required to distribute them on a less ideological, more functional basis.

CONCLUSION

The national debate over governmental regulation of marriage has not attended adequately to the expressive issues involved. Whatever else civil marriage does and provides, it is a unique expressive resource, and the mixed-sex requirement rests upon an expressive basis. Moreover, this expressively based restriction is both content discriminatory and viewpoint discriminatory. Accordingly, the restriction would be constitutional under the First Amendment only if it satisfied heightened scrutiny, which it does not. The public welfare purposes offered in defense of the mixed-sex requirement are indefensibly overbroad, underbroad, or simply not compelling. And the First Amendment precludes reliance on the expressive purposes that might undergird the mixed-sex requirement, aimed as it is at insulating the current symbolic meaning of marriage from contestation, protecting the psyches of heterosexually identified marriage conventionalists, or shielding heterosexually identified civil marriage from democratic and social questioning.

It may well be, however, that the country's current constitutional doctrines and legal institutional cultures will render acceptance of this analysis difficult for courts, legislatures, and legal scholars. This Article, however, may at least contribute to an increased appreciation of what is truly at stake in the controversy. An understanding of the unique expressive dimensions of civil marriage may afford another reason to conceive the fundamental right to civil marriage as prima facie embracing claims by same-sex couples, who desire and would be able to exercise this expressive resource were the mixed-sex requirement eliminated. Such an understanding also underscores the full value of civil marriage, which is being denied to lesbigay persons, and this in turn may improve the long-run chances for success of the equal protection challenges that are being leveled against the mixed-sex requirement.

511. *Cf.* 142 CONG. REC. S10,114 (1996) (statement of Sen. Coats) ("Government cannot be neutral in this debate over marriage.").

As more states follow in Vermont's footsteps, the bankruptcy of the common justifications for limiting civil marriage to mixed-sex couples will become clearer. So too, I hope, will the constitutional offensiveness of even a regime (different from Vermont's) that gave same-sex couples *all* the protections and obligations of civil marriage—whether controlled by states, the federal government, or international law—yet withheld admittance to this historic institution as such and instead insisted on a semiotically separate status for lesbigay people. This is, after all, one nation, with one people equal before the law.[512] It is time for this truth to triumph over the mixed-sex requirement for civil marriage.

512. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens."); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) ("The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity."); ESKRIDGE, *supra* note 19, at 124 ("We are citizens, and we insist on equal treatment.").