

THE NEW “MARITAL PROPERTY”: CIVIL MARRIAGE AND THE RIGHT TO EXCLUDE?

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Good afternoon. I, too, would like to join everyone else in extending my gratitude to the Capital University Law School, Dean Bahls, BIGLaw, especially LeeAnn Massucci and Shawn Beem, and everyone else involved in this symposium for creating this forum and inviting me to participate. I am going to use my time today to make a few remarks about marriage as metaphorical property.

To start, I think it important to examine the remarkable fin de siècle development of civil unions in Vermont. Many people have, quite rightly in my view, lauded the courageousness of the Vermont legislature and Governor Howard Dean in adopting this legislation in the wake of the Vermont Supreme Court’s December 1999 decision in *Baker v. State*¹ which held that the State’s exclusion of same-sex couples from the benefits and protections incident to marriage violated the Common Benefits Clause of the Vermont constitution.² Many Vermont citizens—although, it is also important to note, far from all—opposed even this move.³ But many people have also

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¹ Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions, Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 113-15 (2000); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 16 (2000).

² *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). The Common Benefits Clause states “[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 single person, family, or set of persons, who are a part only of that community.” VT. CONST. ch. 1, art. 7.

³ Claudia Glenn Dowling, *Culture Clash; with Same-Sex Relationships Legalized in Vermont, Neighbors Find Themselves in an Uncivil War over Family Values*, PEOPLE, Oct. 23, 2000, at 64 (presenting both supportive and non-supportive views of Vermonters in regard to the same-sex civil union laws); Catherine Edwards, *Social Measures Do Well On Ballot*, INSIGHT ON NEWS (Washington, D.C.), Dec. 11, 2000, at 20 (summarizing reactions by various

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questioned whether the creation of a regime of parallel marriage and civil unions, or the creation of domestic partnership legislation elsewhere, is an improper variation of “separate but equal,”⁴ only now in the symbolic service of heterosexuality supremacy, not white supremacy.

This common charge⁵ would certainly not be plausible in jurisdictions that do not even have domestic partnership laws, for they offer same-sex

states to Vermont’s same-sex civil unions law); Richard Grossman, *Vermont Tense over Gays*, POST-STANDARD (Syracuse, N.Y.), Oct. 30, 2000, at A8 (clarifying attitudes of pro-civil union Vermonters); Stanley N. Kurtz, *Civil Revolt: Vermont Stands Up*, NAT’L REV., Oct. 9, 2000, at 24 (providing background on Vermont and the “Take Back Vermont” anti-same-sex marriage/civil union movement); Ritika Nandkeolyar, *Coalition Protests Vermont’s Same-Sex Unions*, DARTMOUTH, Sept. 28, 2000; Hanna Rosin, *Civil Dis-Union in America’s “Gay State”*, TORONTO STAR, Oct. 22, 2000, at BS02 (presenting both supportive and non-supportive views of Vermonters in regard to the same-sex civil union laws); Hanna Rosin, *Same-Sex Union Divides Small Vermont Community; State’s Debate Turns Intimate as Ceremonies Begin*, WASHINGTON POST, Oct. 11, 2000, at A1 (providing examples of Vermont-specific backlash to the same-sex civil-union laws).

⁴ Cox, *supra* note 1, at 123-37; Barbara Amiel, *Same-Sex Marriage is OK*, MACLEAN’S, July 10, 2000, at 13 (presenting a view on why same-sex marriages should be allowed); David Organ Coolidge, *The Civil Truth About “Civil Unions”*; *Vermont Has Legalized Quasi-Marriage for Same-Sex Couples. Will Other States Be Forced to Follow?*, WKLY. STANDARD, June 26, 2000, at 26 (focusing on legal similarities between same-sex civil unions and marriage, as defined in Vermont); Andrew Sullivan, *State of the Union*, NEW REPUBLIC, May 8, 2000, at 18.

⁵ See, e.g., Cox, *supra* note 1, at 119; Jeffrey G. Gibson, *To Love, Honor, and Build a Life: A Case for Same Gender Marriage*, 23 HUM. RTS. Q. 22, 22 (1996); Ratna Kapur & Tayyab Mahmud, *Hegemony, Coercion, and Their Teeth-Gritting Harmony: A Commentary on Power, Culture, and Sexuality in Franco’s Spain*, 5 MICH. J. RACE & L. 995, 1022 n.116 (2000); Amy Persin Linnert, *In the Best Interests of the Child: An Analysis of Wisconsin Supreme Court Rulings Involving Same-Sex Couples with Children*, 12 HASTINGS WOMEN’S L.J. 319, 343 (2001) (“The legislation, unfortunately, falls under the rubric of ‘separate but equal,’ which the United States Supreme Court has determined is ‘inherently unequal.’”) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 215, 239 (1995); Katrina C. Rose, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA’s Box by Closing the Door on Transsexuals’ Right to Marry*, 9 LAW & SEXUALITY 1, 4 (1999-2000); Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 961 (2000); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 606-07 (1994-95); David Link, Comment, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1149 (1990); Cathleen Palumbo, *Separate-But-Equal*, MANCHESTER J. (Manchester, Vt.), Nov. 13, 1997, at 8; Deb Price, *“Separate But Equal” Policy is Never Fair*, DETROIT NEWS, (continued)

couples no legal institution or status to be "equal" to civil marriage from which same-sex couples are presently excluded throughout the country. There, the discriminatory character of the mixed-sex requirement for civil marriage would have to be defended as justified discrimination without any potentially mitigating claim that the government afforded same-sex couples an equal (if separate) status.

Similarly, the "separate but equal" charge is only slightly more plausible with respect to domestic partnership or reciprocal beneficiaries legislation, but only because those laws are so weak, afford so few of the benefits and protections incident to marriage, that it is clear that such "separate" institutions do not have even a colorable claim of being "equal." Consider, for example, Hawaii's reciprocal beneficiaries law.⁶ Hawaii law restricts reciprocal beneficiaries to people prohibited from marrying, confers only a small set of primarily financial rights, and may be terminated by paying an eight dollar fee and filing a signed notarized declaration of termination.⁷ Hawaii marriage, in contrast, confers a huge set of rights and obligations (including mutual support)⁸ and may only be terminated by annulment or divorce proceedings which require the involvement of courts.⁹ Or consider California's domestic partnership legislation: the California law limits eligibility to couples sharing the same residence¹⁰ which married couples need not do;¹¹ is open to mixed-sex couples over age sixty-two both of whose partners are eligible for Social Security,¹² whereas marriage in California is not open to similar same-sex couples;¹³ is terminable by the mere expedient of sending written notice of termination to the other partner¹⁴ as opposed to requiring judicial involvement in divorce proceedings as does

Feb. 28, 2000, at A9; *Separate but Equal?*, NEW REPUBLIC, Jan. 10, 2000, at 9. *But see, e.g.*, William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 863 (2001) ("I do not think the civil unions law creates an apartheid [n]or do I believe the analogy to *Plessy* holds up The analogical relationship of apartheid and civil unions is complicated, however, and does not establish that the civil unions law creates a liberal regime."); *id.* at 870 ("*Baker* is much more like *Brown* than like *Plessy*."); Paula L. Ettelbrick, *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. SCH. J. HUM. RTS. 753, 761 (2000).

⁶ HAW. REV. STAT. § 574C-4 (2000).

⁷ *Id.*

⁸ HAW. REV. STAT. § 580-47 (1993).

⁹ HAW. REV. STAT. § 580 (1993).

¹⁰ CAL. FAM. CODE § 297(b)(1) (West Supp. 2001).

¹¹ CAL. FAM. CODE §§ 350-352 (West 1994).

¹² CAL. FAM. CODE § 297(b)(6)(B).

¹³ CAL. FAM. CODE § 308.5 (West Supp. 2001).

¹⁴ CAL. FAM. CODE § 299(a)(1) (West Supp. 2001).

marriage;¹⁵ and basically provides only for the benefits of automatic proportional joint ownership of property acquired during the partnership and hospital visitation rights,¹⁶ whereas marriage entitles spouses to a panoply of rights and benefits, including mutual obligations of support,¹⁷ tenancy by the entirety,¹⁸ testimonial privileges,¹⁹ and so on.²⁰ Under these circumstances, defenders of the mixed-sex requirement should be pressed first to justify the dramatically unequal nature of the benefits provided via marriage or via these new relationship statuses before one needs worry as much about the fact that the government is providing separate statuses for mixed-sex couples and same-sex couples.

In Vermont, however, the charge that civil unions and civil marriage are “separate but equal”—and thus supposedly constitutionally objectionable like *de jure* race segregation in the historical United States²¹—enjoys the most plausibility. In Vermont, the state-controlled obligations and benefits of these two relationship statuses are virtually identical.²² Now, one could

¹⁵ CAL. FAM. CODE § 2330.3(a) (West Supp. 2001) and § 2340 (West 1994)

¹⁶ CAL. FAM. CODE § 299.5(e) (West Supp. 2001).

¹⁷ CAL. FAM. CODE §§ 92, 100, 3590, 3591, 3650, 4351, 4350, 4330-4337, 4338, 4339, 4320-24, 6257, 10001, 10004, 10005, 17202 (West 1994 & West Supp. 2001).

¹⁸ CAL. FAM. CODE § 2581 (West 1994).

¹⁹ CAL. EVID. CODE §§ 970, 971 (West 1995); *But see* §§ 972, 973 (West 1995).

²⁰ For a general listing of the myriad benefits appurtenant to marriage, see CAL. FAM. CODE §§ 700-1500 (West 1995).

²¹ *See generally* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²² VT. STAT. ANN. tit. 15, §§ 1204-06 (Supp. 2001). The qualification “virtually” is necessary, and those who depict Vermont’s civil union law as “specifically assur[ing] same-sex couples the same statutory benefits and obligations as different-sex couples and meticulously integrates civil unions into Vermont’s family law,” Eskridge, *supra* note 5, at 859, paint with slightly overbroad brush strokes. *See* VT. STAT. ANN. tit. 18, § 5142(1), VT. STAT. ANN. tit. 15, § 1303 (Supp. 2001), and VT. STAT. ANN. tit. 18, § 5163(a)(1) (2000) (regarding minors who may marry with parental permission); VT. STAT. ANN. tit. 18, § 5160 (2000) (regarding different routes of entry into marriage and civil union). The differences between when people may enter into civil marriage or civil union is elided by phrasings such as, “same-sex couples entering into civil unions will enjoy the same benefits and obligations that Vermont law provides for different-sex couples who enter into civil marriages.” Eskridge, *supra* note 5, at 853.

The fact that Vermont chooses to allow minors to marry a person of a different sex with parental consent or judicial approval but refuses to allow minors to marry a person of the same sex is sufficiently significant that it should be noted and not glossed over. *See* VT. STAT. ANN. tit. 18, § 5163 (Supp. 2001). Like statutory rape laws that do not criminalize minor females’ sexual conduct, having a higher age of consent to marriage for same-sex couples than for mixed-sex couples reflects and reinforces stereotypes of sexual predation—here not by men preying on vulnerable women (as in the statutory rape case) but of homosexuals preying on

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respectably argue, as some such as Professor Barb Cox have, that they should not be regarded as constitutionally "equal" because, inter alia, civil unions are less "portable," that is, less likely to be recognized by other jurisdictions, than are civil marriages.²³ But suppose I bracket that point. If one otherwise thought that Vermont's civil unions and civil marriage were equal in their legal consequences, would the enforced segregation of mixed-sex couples into civil marriage and same-sex couples into civil unions still appear an impermissible form of "separate but equal" requiring Vermont to abolish the distinction and treat same-sex couples and mixed-sex couples the same, or might the "separateness" be justified in light of the (hypothetical) "equality"?

Vermont-style domestic partnerships may indeed bear an unpleasant resemblance to the "separate but equal" regime of racial apartheid in much of the pre-civil rights United States.²⁴ Although I am aware that it is controversial, I believe the analogy to U.S. segregation practices highly relevant here. Given social relations in millennial America, the inference that such a status-differentiating scheme would constitute governmental expression of heterosexual superiority and homosexual inferiority seems difficult to avoid.²⁵ As far as status relations are concerned, separate-but-equal civil marriage/civil union present a situation significantly (although not entirely) akin to what the Supreme Court faced in *Brown v. Board of Education*,²⁶ where the Court unanimously concluded that "separate but equal" black and white schools were inherently unequal.²⁷ Although radical in its implications for the segregationist South, this view was entirely

confused youth. See DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 78-79 (1997); cf. RICHARD A. POSNER, *SEX AND REASON* 150 (1992) ("[e]xpect[ing] the opportunistic homosexual to like boys"). It also reinforces stereotypes of homosexuality as an immature developmental stage. See Warren J. Blumenfeld, *History/Hysteria: Parallel Representations of Jews and Gays, Lesbians, and Bisexuals*, in *QUEER STUDIES: A LESBIAN, GAY, BISEXUAL & TRANSGENDER ANTHOLOGY* 146, 151-52 (Brett Beemyn & Mickey Eliason eds., 1996); David B. Cruz, "Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource, 74 S. CAL. L. REV. 925, 928, n.12 (2001).

²³ See Cox, *supra* note 1, at 119, 136, 137, 140, 147.

²⁴ Accord Eskridge, *supra* note 5, at 860 ("There is a disturbing parallel between the civil unions law and the segregation of railroad cars upheld by the United States Supreme Court in *Plessy v. Ferguson*.").

²⁵ Cf. Eskridge, *supra* note 5, at 854 ("In important respects, the civil union law is inconsistent with the premises of the liberal state as applied to same-sex couples: it treats them differently from different-sex couples, and for reasons that are hard to justify without resort to arguments grounded in status denigration or even prejudices.").

²⁶ 347 U.S. 483 (1954).

²⁷ *Id.* at 495.

warranted: as Charles Black persuasively argued, anyone familiar with mid-twentieth century America and its racial history would be entitled to laugh at the denial of the conclusion.²⁸ White-only schools clearly and intentionally expressed white superiority and black (and other minority) inferiority.²⁹ Similarly, mixed-sex only civil marriage would seem purposefully to express heterosexual superiority and homosexual and bisexual inferiority.

Some might think, however, that racial segregation is not the most apt analogy for a legal regime of same-sex-only civil union and mixed-sex-only civil marriage.³⁰ It was widely known, for example, that the ostensibly “equal” black schools were perhaps nowhere in the country actually equal to their counterpart white schools.³¹ Thus, “separate but equal” might be condemned as a mere subterfuge for an unconstitutional allocation of concrete educational opportunities on the basis of race.³² In contrast, a domestic partnership given all the rights and privileges of mixed-sex civil marriage³³ would not be inferior in its legal operation to civil marriage.³⁴

But *Brown* was decided on the assumption that the specific challenged black schools were tangibly equal to their white counterparts.³⁵ The Court nonetheless held that separate was inherently “unequal” and hence unconstitutional in that context.³⁶ The constitutional infirmity of public racial segregation in schools accordingly rested not merely on the school’s tangible deficiencies, but on the schools’ intangible differences or what they

²⁸ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

²⁹ George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 574 (1994) (“It is less widely acknowledged that Mexican-Americans have faced a similar obstacle [to that which confronted African-American persons] in their effort to become educated citizens.”); *Id.* at 574-606 (focusing on school desegregation litigation); *see, e.g.*, Joyce Kuo, Note, *Excluded, Segregated, and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181 (1998) (examining efforts of Chinese-Americans to overcome de jure school segregation in San Francisco).

³⁰ *Cf., e.g.*, Eskridge, *supra* note 5, at 863-68 (making the case that civil unions form an “Inapt Analogy to Apartheid”).

³¹ *Id.* at 865.

³² Any symbolic message of inferiority such schools expressed might have stemmed from the demonstrable inferiority of the facilities afforded black children.

³³ This would in part require recognition of domestic partnerships by the federal government, other states, and foreign countries to the same degree that they recognize mixed-sex civil marriages.

³⁴ *But see* Cruz, *supra* note 22, at 928 (arguing marriages and civil unions have disparate expressive potential).

³⁵ *Brown v. Bd. Of Educ.*, 347 U.S. 483, 492 (1954).

³⁶ *Id.* at 493.

represented.³⁷ Equal protection was offended by the underlying purpose of the segregation and/or by its social meaning: reflection and/or reinforcement of white supremacy, the ideology underwriting a dividing practice inimical to the Constitution.³⁸

So, the purpose or the social meaning of separate institutions for committed same-sex couples and mixed-sex couples may be key to the question of their constitutionality. Defenders of civil unions might be tempted to rely upon Vermont's "generosity," the range of rights and obligations civil unions extend for the first time to same-sex couples (essentially all the legal rights and obligations of civil marriage within Vermont's power to confer), in concluding that a regime of parallel civil marriage for same-sex couples and civil union for mixed-sex couples does not have a constitutionally objectionable purpose or meaning despite denying same-sex couple relationships the designation of "marriage."³⁹ Civil unions then would dramatically contrast with the situation in a state that provides nothing like civil marriage to same-sex couples as is the case virtually everywhere in the United States.⁴⁰ The latter situation is certainly operationally worse for lesbian people (and might be thought generally to require greater justification than the former for that reason). But the lack of benefits in many other states does not necessarily entail that both the purpose and the social meaning of Vermont's separate statuses are constitutionally innocuous.

Both Vermont and a state with no formal relationship status for same-sex couples, by reserving civil marriage as a mixed-sex-only institution, may convey a message of heterosexual superiority and it is not immediately clear

³⁷ *Id.* at 493-94.

³⁸ *Accord* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 3, 8-11 (2000). While Professor Hellman would reconstruct equal protection doctrine to treat the expressive content of government action as necessary for unconstitutionality, *id.* at 2, I prefer a more modest modification of doctrine, treating improper expressive content as sufficient to establish unconstitutionality but retaining current law's focus on improper purpose, although treating that as sufficient but not necessary to establish unconstitutionality. *Id.* at 1 (characterizing reigning Supreme Court doctrine). This preference stems in part from the belief, the defense of which is beyond the scope of this essay, that Hellman makes a far better case for the non-necessity of improper purpose to equal protection violations than she does for the non-sufficiency of improper purpose.

³⁹ *Cf.* Eskridge, *supra* note 5, at 870 ("Given the substantial equality assured by the civil unions law and its positive contribution to a minority group's politics of recognition, analogies to *Plessy* and racial apartheid are inapt if not ridiculous."). Perhaps needless to say, I respectfully demur to this conclusion.

⁴⁰ *But see, e.g., supra* notes 6-20 and accompanying text (discussing California's domestic partnerships and Hawaii's reciprocal beneficiaries laws).

which message is more denigrating. Utter denial of marriage or any “marriage-like” status could easily be seen as worse than a regime of distinct but operationally equal domestic partnership in that flat denial says that lesbian people are not worthy of a whole host of functional rights to which domestic partnerships or civil unions would (for whatever reason) allow access.⁴¹ On the other hand, a parallel domestic partnership or civil union regime might express a degrading message in that it may symbolically say that, although the state is willing (however reluctantly) to recognize lesbian persons’ claims to substantive rights, it deems their lives so fundamentally inferior to or different from the heterosexually identified majority’s that it would be deceptive or degrading to the heterosexually identified to have to participate in the same relationship institution as lesbian persons.

What, after all, would be the point of a separate-but-equal regime of marriage rights?⁴² Aside from the sad political reality that a legislative (and gubernatorial) vote to open marriage to same-sex couples would likely have led to a backlash amending the state constitution to bar same-sex marriages and civil unions,⁴³ perhaps the readiest way of understanding this kind of scheme is as symbolism, an expression of belief in a fundamental, unbridgeable (or at least not to be bridged) gulf between mixed-sex and same-sex couples. Separate civil unions for same-sex couples then would signify, in purpose and effect, an irreducible alienness of lesbian people, relationships or lives from the heterosexual norm despite the virtual identity of state-controlled rights under civil marriages and civil unions—much as separate drinking fountains and restrooms for “white” and “colored” people were part of an indubitably powerful public representational scheme regardless of any physical comparability.⁴⁴ And that government message of

41 The reason could be that a state court has ordered that lesbian people be allowed the operational legal benefits of marriage and that the people of the state are, in the face of insufficient popular will to override that command by state constitutional amendment, unwilling to risk defying the court.

42 Reserving the question of the degree of opprobrium that should attach, I think that it is a fair characterization of what Vermont has wrought to describe the situation as one of separate-but-equal “marriage rights,” for the rights appurtenant to a civil union are statutorily defined by reference to the rights appurtenant to marriage in Vermont. VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2001) (“Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”).

43 See, e.g., Eskridge, *supra* note 5, at 871-74.

44 One difference between the two situations is in the nature of the disabilities imposed. Vermont itself only officially discriminates against same-sex couples with respect to the status it affords us, whereas states, including but not limited to Louisiana, physically segregated black and white people in an intentionally insultingly wide range of settings. HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED* (continued)

inferiority was illegitimate in and of itself.⁴⁵ Whether a "separate but equal" civil union regime is constitutionally justifiable even though "separate but equal" drinking fountains or buses or schools were not justifiable is a question at least somewhat separate from the similarity of the governmental, semiotic technologies deployed in each case.⁴⁶

That similarity of method reinforces the conclusion that the reservation of civil marriage for mixed-sex couples, whether accompanied by no legal relationship status for same-sex couples or by Vermont-style civil unions, expresses heterosexual superiority.⁴⁷ To the extent that the intended or expressed message is one of the superiority of "heterosexuality" over an

STATES, 332-33 (7th ed. 1998). But consider: Vermont is the only state to offer lesbian persons civil unions. VT. STAT. ANN. tit. 15, § 1204. The federal government has provided by statute (whether or not ultimately constitutional) that no state need recognize another state's same-sex marriages. See Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996), (codified at 1 U.S.C. § 7 (1996)). Openly gay and lesbian persons are excluded from the U.S. armed forces (unless an individual miraculously manages to prove a lack of propensity to engage in a viciously broad swath of "homosexual acts"). See generally, JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999). People perceived to be gay or lesbian are subject to vicious, murderous attacks. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1342-44 (1999). Lesbian people in the turn-of-the-millennium United States truly live under what Professor Eskridge has aptly dubbed an "apartheid of the closet." William N. Eskridge, Jr., *Race and Sexual Orientation in the Military: Ending the Apartheid of the Closet*, 2 RECONSTRUCTION 52 (1993).

⁴⁵ This may provide one way of understanding the Supreme Court's emphasis on intangible factors in separate but equal cases such as *Sweatt v. Painter*, 339 U.S. 629 (1950), as well as its cursory per curiam opinions extending *Brown's* desegregation mandate to settings such as public beaches, *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955), golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), and buses, *Gayle v. Browder*, 352 U.S. 903 (1956), which of course were appreciably different from the educational setting the Court so emphasized in *Brown*.

⁴⁶ I am not here suggesting that the social and legal position of lesbian persons in the United States near the turn of the millennium ought to be understood as identical or isomorphic to that of Black persons under Jim Crow. I would resist any attempt to rank order the oppressions under which these two somewhat overlapping groups lived or live. I do, however, believe that the nature or character of the one is sufficiently like that of the other that cautiously drawn analogies can be fruitful.

⁴⁷ For this reason, mixed-sex-only civil marriage laws, even when coupled with Vermont-style domestic partnership, should be understood to inflict an injury upon lesbian persons sufficient to confer standing to challenge the message government expresses with such laws.

inferior “homosexuality,”⁴⁸ this would be a negative symbolism inconsistent with the constitutional commitment to equal regard.⁴⁹

In fact, debates about “marriage” often expressly invoke negative views of homosexuality to support the positive heterosexual identity marriage is said to properly symbolize. A riot of remarks in recent same-sex marriage debates reflects outrageous indignation at the prospect that the government might say or express—with a sex-neutral marriage law—that gay and lesbian relationships are “as valuable as,” or “the moral equivalent of,” heterosexual relationships.⁵⁰ As Judge Posner has observed, “[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 a desirable, even a noble, condition in which to live.”⁵¹ “[O]ne 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.’”⁵² And the amicus

⁴⁸ Cf. Richard D. Mohr, *The Stakes in the Gay-Marriage Wars*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 105, 106 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) (“[The function of the argument that marriage is by definition mixed-sex] is not to clarify or explain; its function is to assure heterosexual supremacy as a central cultural form.”). I consider a distinctiveness interpretation. See Section III.C. *infra*.

⁴⁹ See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282-84 (1994) (arguing that the First Amendment should be seen as embodying principle of equal regard); Hellman, *supra* note 38, at 8 (accepting as axiom “that Equal Protection requires the equal concern of government for all.”) (citing RONALD DWORKIN, *LAW’S EMPIRE* 381- 99 (1986)); *id.* at 30-31 (“Baker argues for an ‘equality of respect’ conception of Equal Protection which...” requires that “the state must not pursue purposes, and the political process must not further individuals’ preferences, to subordinate or to denigrate the inherent worth of any category of citizens.”) (quoting C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 959 (1983)).

⁵⁰ See notes 48-50 and accompanying text *infra*. Cf. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 658 (1980). According to Karst:

For example, whatever may have been the original purposes of laws forbidding homosexual sex, it seems clear that today one of the chief concerns underlying the maintenance of those laws is a concern to regulate the content of messages about sexual preference. It is said that the state, by repealing its prohibition on homosexual conduct, will itself be seen as making a statement approving that conduct.

Id. (footnotes omitted).

⁵¹ POSNER, *supra* note 22, at 312.

⁵² Cruz, *supra* note 22, at 951.

brief, filed by several states in the Hawaii Supreme Court after the state trial court had held the state's mixed-sex requirement for civil marriage unconstitutional, argued that Hawaii possessed "a compelling interest in refusing to endorse homosexuality by allowing members of the same sex to obtain a marriage license."⁵³ Such critics are clearly operating from a belief that the state should symbolically affirm the superiority of "heterosexuality"⁵⁴ and inferiority of "homosexuality."

Those who reject a comparable characterization of the continued exclusion of same-sex couples from civil marriage in Vermont as denigrating typically focus on the intent of the legislators.⁵⁵ Thus, for example, Professor Greg Johnson of the Vermont Law School has argued that, unlike the legislatures that installed and maintained Jim Crow in the U.S. South, the Vermont legislature was not trying to stigmatize lesbian and gay persons⁵⁶ and has not had the effect of doing so.⁵⁷ After all, Johnson observes, many same-sex couples do not find civil unions stigmatizing, but are clamoring to "join in civil union"⁵⁸ (as Beth Robinson has explained is the proper terminology⁵⁹).

⁵³ Brief of Amici Curiae in Support of Appellant/Defendant at 8, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (No. 91-1394-05), available at <http://legalminds.lp.findlaw.com/list/queerlaw-edit/msg00801.htm>.

⁵⁴ I place heterosexuality in scare quotes in part because it is rarely clear to what heterosexuality might refer, or even that there is one unique referent. See generally, JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* (1995); *THEORISING HETEROSEXUALITY* (Diane Richardson ed., 1996).

⁵⁵ E.g. Johnson, *supra* note 1, at 18, 56-57.

⁵⁶ *Id.*

⁵⁷ *Id.* at 16-18. Cf. Eskridge, *supra* note 5, at 865 ("Like *Brown*, and unlike *Plessy*, *Baker* reflected an advancement of gay people's politics of recognition, from the outlaw status reflected in *Hardwick*, to the status of substantially equal citizens before the law."). I believe that, in evaluating the social meaning of the civil marriage-civil union regime in Vermont, it is a mistake to focus so much more attention on the Vermont Supreme Court's laudable decision holding the state to have discriminated unconstitutionally—as reflected by Eskridge's titular reference to "the Jurisprudence of Civil Unions"—than on the large, but still inadequate, statutory step the legislature took in response. While Vermont now offers more to same-sex couples than any other state in the union, and thus a civil union might more readily bear a positive connotation outside Vermont, the fact remains Vermont is semiotically segregating mixed-sex and same-sex couples, and the legislature refuses to treat gay and lesbian couples like heterosexually identified couples. Within Vermont, then, the exclusion may be a more salient reference point than other states' deficiencies.

⁵⁸ Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Afterword, Straightness as Property: Back to the Future: Law and Status in the 21st Century*, 12 U. FLA. J.L. & PUB. POL'Y 71, 85 n.89 (2000).

⁵⁹ Beth Robinson, Esq., Remarks at Lavender Law 2000, the annual conference of the
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The latter point, however, fails fully to distinguish American apartheid. One might easily have suggested that segregated public transportation was not stigmatizing because black Americans widely chose to ride in the buses, albeit constrained to do so in the back. But as this hypothetical parallel defense of segregation illustrates, Professor Johnson's reliance on ostensibly voluntary participation in a segregated institution⁶⁰ is not, in all cases, enough to preclude that segregation from being stigmatizing. Just because black people saw value in public transportation that commonly led them to choose it in its segregated form rather than try to find other, costlier or less effective alternatives on their own does not mean that the governmental maintenance of physical race segregation was not stigmatizing. Additionally, neither do same-sex couples' decisions that there is more to be gained from joining in civil union than from boycotting this new institution mean that the legal segregation of same-sex couples is not stigmatizing even if, to be fair to Johnson, same-sex couples who are joining in civil union seem to have more enthusiasm than I am given to understand black Americans who had to ride mustered at the backs of buses. Yet I would nonetheless feel confident hazarding the guess that, of lesbian and gay persons interested in entering into civil union or civil marriage, the vast majority would prefer at least the option of marrying civilly instead of being relegated to a separate if comparable status.

But let us not ignore Johnson's point about the legislators' purpose.⁶¹ What is the purpose of creating civil unions rather than admitting same-sex couples to civil marriage alongside mixed-sex couples? It seems difficult to deny that the political situation in Vermont in the wake of *Baker* was such that even if the full legislature managed to pass and the Governor to sign a bill opening marriage as such to same-sex couples (two dubious prospects), the backlash from voters might have resulted in the repeal of that expansion after the next state-wide election and the amendment of the Vermont Constitution at the next earliest opportunity.⁶² Was not the legislature then acting upon the best interests of lesbian and gay persons, ensuring that we would at least gain something somewhat enduring and rather meaningful, even if it had to be called "civil union" rather than "civil marriage"?⁶³

National Lesbian and Gay Law Association (NLGLA), (Oct. 20, 2000) (presentation attended by author). Ms. Robinson was one of the attorneys for the plaintiffs in *Baker v. State*, 744 A.2d 864 (Vt. 1982). *But see* Kurtz, *supra* note 3, at 24 ("All summer long, gays [sic] from around the country have been heading to Vermont to get 'C.U.ed' (joined in 'civil union') . . .").

⁶⁰ Johnson, *supra* note 1, at 56-59.

⁶¹ *Id.* at 18.

⁶² Eskridge, *supra* note 5, at 873-74.

⁶³ *See* Johnson, *supra* note 1, at 19.

Quite possibly.⁶⁴ Nonetheless, neither the possibility that—whatever the prejudiced views that might have been prevailing in the state electorate at large—a majority of legislators might have harbored full equality views in their hearts and acted as they saw best for the long run, nor the reality of what remedy was pragmatically available, ought to save the resulting segregated institutions from condemnation as violating constitutional equality principles.

There ought be no need to gild Vermont's actions out of gratitude for what it did manage to achieve.⁶⁵ And what it did was to deny lesbian persons full equality in order to "accommodat[e] traditionalist anxieties."⁶⁶ In evaluating either the purpose of maintaining the mixed-sex requirement for civil marriage or the social meaning of the continued exclusion of same-sex couples from marriage, one ought not refuse to confront the vehement insistence by so many that same-sex couples not be allowed to "marry."⁶⁷

But perhaps Professor Eskridge and I are wrong to characterize Vermont's marital segregation as "accommodation of traditionalist anxieties."⁶⁸ When the institutions are, I am still assuming, equal insofar as Vermont controls their legal incidents,⁶⁹ defenders of the separate institutions approach might argue that one should not attribute the segregation to anti-lesbian hatred, loathing, or animus—which would after all violate the Equal Protection Clause of the U.S. Constitution under the U.S. Supreme Court's 1996 decision in *Romer v. Evans*.⁷⁰ Nor, they might continue, should the

⁶⁴ I agree in this respect with Professor Eskridge: A true supporter of lesbian equality should have voted in favor of the civil union law. Eskridge, *supra* note 5, at 871.

⁶⁵ And I write that as one who traveled to Vermont in October of 2001 to get "C.U.ed." Professor Eskridge might well agree that principled criticism of separate civil marriage and civil union is an important part of the dialogic process by which rights are advanced, even if we disagree about the necessity of symmetrical treatment for inclusionary and exclusionary ideologies. *Cf.* Eskridge, *supra* note 5, at 877. Eskridge states:

Even for most of us who would prefer completely equal treatment as an aspiration ought to settle for conditional equality out of humane respect for other people's feelings. Especially when loved ones are willing to accommodate our identities as gay people, we ought to accommodate their identities as gay-ambivalent people.

Id.

⁶⁶ *Id.* at 881.

⁶⁷ See, for example, *supra* note 50 and accompanying text.

⁶⁸ Eskridge, *supra* note 5, at 881.

⁶⁹ See VT. STAT. ANN. tit. 15 § 1204 (Supp. 2001).

⁷⁰ 517 U.S. 620 (1996). The Court stated:

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segregation be attributed to heterosexual dis-ease, the self-professed subjective sense of many heterosexually identified Vermonters, including Governor Dean, of being “uncomfortable” thinking about same-sex marriage.⁷¹ That arguably would run afoul of the strong trend in First Amendment law to invalidate “heckler’s vetoes”⁷² or laws justified on the grounds that people’s sensibilities are being protected⁷³ as California tried in

[Colorado’s] Amendment 2 fails, indeed defies, even [the] conventional [equal protection-rational basis] inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Id. at 632.

⁷¹ Cruz, *supra* note 22, at 929, n.13 (citing *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,” by stating, “there are a lot of people who are uncomfortable with the notion of same-sex marriage.)).

⁷² See generally *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)); *Cohen v. California*, 403 U.S. 15, 21 (1971) (protecting wearing of jacket displaying phrase “Fuck the Draft” because contrary holding “would effectively empower a majority to silence dissidents simply as a matter of personal predilections”); *id.* 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.”); 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, 190-193 (1995). 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.”). Cf. *United States v. Playboy Entm’t Group*, 529 U.S. 813, 813 (2000); *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).

⁷³ See, e.g., Daniel Torres, Editorial, *Let the Public Speak*, 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. See generally Cruz, *supra* note 22. 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 protect the majority’s.

punishing Paul Cohen's "Fuck the Draft" message.⁷⁴ Rather, marriage exclusionists (by which I mean those who would defend separate civil unions for same-sex couples because it is proper to keep same-sex couples out of civil marriage),⁷⁵ if pressed to refine their often semi-articulate insistence that it be essential to keep marriage heterosexual, might retreat to two related positions on which I will touch in turn.

Both of these positions take the salient impulse behind the mixed-sex requirement for civil marriage and relegation of same-sex couples to a separate institution of civil unions to be one of excluding same-sex couples. The argument I am envisioning, however, would see the exclusion as not necessarily predicated upon and reflecting hatred of or the supposed inferiority of lesbian/gay persons or our relationships, but instead flowing from belief in and expressing some other, less disreputable proposition. Now exclusion, or, more carefully, the right to exclude, is the hallmark of property⁷⁶ and both of my hypotheses about what is going on in the marriage and civil union/domestic partnership debates might be analogized to legal treatments of property insofar as people in the United States generally⁷⁷ do not take it to be legally problematic when people choose to exclude others from private property. After all, the right to do so is merely an incident of ownership.

My first hypothesis concerning marriage as property is that marriage exclusionists might repair to some notion of historic preservation in an effort to establish that the social meaning of excluding same-sex couples from civil marriage does not denigrate us. Typically, people think of landmarking laws as applying to real property, to buildings, or perhaps to so-called "natural" settings⁷⁸ if one includes environmental protection. These historic

⁷⁴ *Cohen*, 403 U.S. at 21-23.

⁷⁵ I have previously referred to such persons as "marriage conventionalists." See *Cruz*, *supra* note 22, at 929. I use the terminology of "marriage exclusionists" here precisely because of the focus of my analysis on the at least impliedly asserted right to exclude same-sex couples from civil marriage.

⁷⁶ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others.").

⁷⁷ If a statute imposed an access requirement, such as anti-discrimination laws do upon places of public accommodation, the functionally public and thus non-"private" character of the property would change the intuitions, I believe.

⁷⁸ See SIMON SCHAMA, *LANDSCAPE AND MEMORY* (1995)

[A]lthough we are accustomed to separate nature and human perception into two realms, they are, in fact, indivisible. Before it can ever be a repose for the senses, landscape is the work of the mind. Its scenery is built up as much from strata of memory as from layers of rock.

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preservation laws are adopted in order to preserve culturally and historically significant properties in their extant forms even if there might be other useful or beneficial changes that might be made to the properties.⁷⁹

These arguments are either charitable interpretations, or perhaps lamentations, of marriage exclusionists. Rather than see their exclusory impulse as negative, as something born out of fear or hostility, they often seem to view their civil marriage exclusion urges as an attempt to protect something old and positive. Thus, in debates in various fora throughout the nation, one sees repeated invocations of “the institution of marriage”⁸⁰ and the supposed ancient pedigree of that institution.⁸¹ (I set to one side the

Id. at 6-7. “[I]t seems right to acknowledge that it is our shaping perception that makes the difference between raw matter and landscape.” *Id.* at 10. “Landscapes are culture before they are nature; constructs of the imagination projected onto wood and water and rock.” *Id.* at 61.

⁷⁹ See generally Charlotte R. Bell, *Protecting the Built Environment: An Overview of Federal Historic Preservation Law*, 15 ENVTL. L. REP. 10354 (1985); Christopher D. Bowers, *Historic Preservation Law Concerning Private Property*, 30 URB. LAW. 405 (1998); Albert H. Manwaring, IV, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291 (1990); Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63 (1993); David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64 (1985).

⁸⁰ Wade F. Horn, *Wedding Bell Blues: Marriage and Welfare Reform*, 19 BROOKINGS REV. 39, 42 (2001) (“Marriage is our most vital social institution, the seedbed from which healthy children and, ultimately, a healthy society spring. It is no accident that communities with lower marriage rates have higher rates of social pathology. Marriage matters—to children, adults, and communities.”); Richard John Neuhaus, *To Choose and be Chosen*, FIRST THINGS, Oct. 2000, at 85 (“[T]he world is disenchanted and desacralized. In response to such a world, human beings flee to institutions of marriage and the family”); George Roche, *The Lists Every American Should Make*, IMPRIMIS, March 1996. (“Our children need capable, responsible parents who have made a lifelong commitment to each other within the specific institution of marriage.”). But see, Mary Winter, *Time to Redefine “Family,”* ROCKY MOUNTAIN NEWS, June 2, 2001, at 2f (“One of these days, we’ll let it go. We’ll look hard in the mirror and finally give up the fantasy that traditional marriage and nuclear families are the bedrock of the nation. Because they’re not.”).

⁸¹ Jack A. Smith, *Wedding Etiquette Reflects New Era: Marriage Boot Retail Sales, GIFTS & DECORATIVE ACCESSORIES*, Apr. 1, 1989, at 48 (“Social mores have most certainly changed in the last 30 years—or even 20 or ten—but, in terms of weddings, the changes mentioned here only reaffirm the old cliché, ‘The more things change, the more they seem to stay the same.’”); John Witte, Jr., *Consulting a Living Tradition: Christian Heritage of Marriage and Family*, THE CHRISTIAN CENTURY, Nov. 13, 1996, at 1108 (“[W]hen properly contracted and consummated among Christians, marriage rises to the dignity of a sacrament.

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actual historical variation that marriage has undergone throughout the ages and continuing to the present.⁸²) "We simply want to preserve something we value, that's very old, from change," seems to be the sentiment. Indeed, Vermont's civil union statute avows that it "does not bestow the status of civil marriage" on state-recognized same-sex relationships because the state sought to "provide due respect for tradition and long-standing social institutions."⁸³ Now, this argument is more plausible coming from marriage exclusionists willing to enact something like Vermont's civil unions than it is from those who insist, like California state legislator Pete Knight, author of my state's anti-same-sex marriage Proposition 22,⁸⁴ that even domestic partnership provisions "cheapen" or demean the institution of marriage.⁸⁵

But, granting the sincerity of this line of argument, the question remains: Does attention to the historical preservation rationale suffice to save, constitutionally, a marital regime of separate but equal from bearing a purpose or social meaning of denigration? I believe the answer has to be "no" for essentially the same reasons that Professor Cox has articulated.⁸⁶ She notes the parallels between the mixed-sex requirement for civil marriage and the ostensibly parallel men's and women's public colleges that Virginia unsuccessfully tried to defend in *U.S. v. Virginia*.⁸⁷

Before examining this analogy, one should note that a structurally similar defense was in fact tendered for racial segregation. Many Southern defenders of separate but equal argued passionately that, if truly equal, racial segregation could be preserved not as a negative statement about black Americans, but as a positive recognition and preservation of a Southern "way of life."⁸⁸ I think it would be ahistorical, epistemological arrogance for us

The temporal union of body, soul and mind within the marital estate symbolizes the eternal union between Christ and his church. Participation in this sacrament confers sanctifying grace upon the couple and the community."); David Orgon Coolidge, *What the Vermont Court Has Wrought*, WKLY. STANDARD, Jan. 17, 2000, at 21 ("Our country will either reaffirm marriage as a unique social institution based on the union of a man and a woman—grounded in history, tradition, and human nature—or it will follow the attempt of the Vermont supreme court to redefine marriage.").

⁸² See Cruz, *supra* note 22, at 938 (citing E.J. GRAFF, WHAT IS MARRIAGE FOR? THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION (1999)).

⁸³ An Act Relating to Civil Unions, § 1(10), 1999 Vt. Acts & Resolves 847 (2000).

⁸⁴ Christopher Heredia, *Bill Seeks to Ratify Same-Sex Unions; California Measure Similar to Vermont's*, SAN FRANCISCO CHRON., Mar. 1, 2001, at A3.

⁸⁵ Joanne Jacobs, *Gay Couples Are Allies in Fight to Save Marriage*, TULSA WORLD, Nov. 28, 1998, at 17.

⁸⁶ Cox, *supra* note 1, at 128-30.

⁸⁷ *Id.*

⁸⁸ EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS (PBS Video, 1986) (six-part
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today to say that all of these apologists for apartheid were in fact insincere. But what we can say is that the negative and the positive cannot be so neatly divorced, nor the historical context of racial segregation so ignored. To do otherwise would be to adopt the perspective of the exclusionists, much as the majority in *Plessy v. Ferguson*⁸⁹ blamed perceptions of inferiority on the subjective quirkiness of black folk.⁹⁰ *Brown v. Board of Education*,⁹¹ thankfully, rejected that perspective, focusing instead on those excluded.⁹² Although the *Brown* Court's psychological analysis has been criticized,⁹³ its semiotics have largely not been: almost everyone agrees today that the purpose and/or social meaning of governmentally imposed racial segregation was white supremacy and black inferiority.⁹⁴ If one retains this focus on the excluded, it should be highly relevant that most lesbian persons who have spoken publicly (although not all, as Professor Johnson's writings may show),⁹⁵ if my reading and personal listening are at all representative,⁹⁶ view

documentary on years 1954-1965); (part two is discussed at <http://www.breakthrough.org/blackside/EducationOutreach/eyes1-guidetext2.html>); Gwenda Anthony & Jimmy Hart, *White Citizens' Councils Aimed to Maintain "Southern Way of Life,"* JACKSON SUN, available at http://www.jacksonsun.com/civilrights/sec2_citizencouncil.shtml. Not all such defenders are consigned to the past, however much they may dwell in it today. See Rev. Joseph A. Darby, *Southern Heritage, After All, Means Different Things to Different People*, CHARLESTON POST & COURIER (Charleston, S.C.), Aug. 15, 2000, available at <http://www.commondreams.org/views/081500-107.htm> (describing encounter with member of Sons of Confederate Veteran who "came to breakfast to defend what he called 'the Southern way of life'").

⁸⁹ 163 U.S. 537 (1896).

⁹⁰ *Id.* at 551.

⁹¹ 347 U.S. 483 (1954).

⁹² *Id.* at 494 ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

⁹³ Donald N. Bersoff & David J. Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. CHI. L. SCH. ROUNDTABLE 279, 293 (1995); Edmund Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 164-166 (1955); Dean M. Hashimoto, *Science as Mythology in Constitutional Law*, 76 OR. L. REV. 111, 139-43 (1997); Ernest van den Haag, *Social Science Testimony in the Desegregation Cases: A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 77-78 (1960);. But see, Stuart W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420, 431 (1979) (answer: no).

⁹⁴ Cox, *supra* note 1, at 126-27.

⁹⁵ Johnson, *supra* note 1, at 17.

⁹⁶ Although my contacts are not so limited, they would at most be representative of the views of mostly professional, largely "out," non-rural lesbian persons, and certainly not, I concede, of lesbian Vermonters, who might collectively have different views.

the governmental exclusion of same-sex couples from civil marriage as stigmatizing as well.⁹⁷

But if the purpose or social meaning of Vermont's exclusion of same-sex couples from civil marriage and relegation of us to a separate civil union status is to be regarded as non-denigrating on the ground that it is justified by the "protection" of (the institution of) marriage,⁹⁸ one must be able to identify what the affirmative value is that is being preserved. Plausible candidates are not readily forthcoming. Perhaps not the Southern, but "the heterosexual way of life"?

One does hear many imprecise heterosexists invoking a supposed "homosexual lifestyle"⁹⁹ which I suppose must be distinguished from a

⁹⁷ Cox, *supra* note 1, at 134-35. Cf. Eskridge, *supra* note 5, at 860. Eskridge states:

The historically excluded group can easily view this [i.e., Vermont's civil union law] as second-class citizenship, the only justification for which is 'tradition'—the belief that marriage has long been limited to unions between men and women. Tradition is generally not a liberal justification for a polity's treating some citizens differently from others.

...

Id.

⁹⁸ A position that must be considered an extremely charitable interpretation of the purpose and/or social meaning of the maintenance of separate civil marriages and civil unions, in light of the stereotypical character of the different ages at which mixed-sex and same-sex couples may enter their respective institutions. See sources cited *supra* note 1.

⁹⁹ See, e.g., Brian E. Crowley, *Fla. Senate Passes Bill to Ban Gay Marriages*, PALM BEACH POST, Apr. 30, 1997, at A1A (quoting John Grant, R-Tampa: "As long as I am a member of the Florida Senate I will never vote to legalize gay marriages. . . . For 6,000 years of recorded history marriage has been a relationship between one man and one woman. There is no reason to change that now."); Joshua W. Schultz, Letter to the Editor, *416 Isn't Bigoted*, OMAHA WORLD-HERALD, Nov. 2, 2000, at 28 (opining that any sexual act outside a heterosexual, sacramental marriage, including mixed-sex premarital acts, is immoral); The Westboro Baptist Church Website available at <http://www.godhatesfags.com> (last visited June 29, 2001); The Traditional Values Coalition website available at <http://www.traditionalvalues.org> (last visited on June 29, 2001). See also 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, 537 (1992) ("[There is a] belief that gay people are defined by and obsessed with sexual activity—what I call the sex-as-lifestyle assumption.").

Only slightly less offensive is the still singular variation, "the gay lifestyle." See, e.g., *Larry King Live: Should Same-Sex Couples Get the Same Rights and Recognition as Straight Ones?* (CNN television broadcast, May 2, 2000) During the broadcast, Jerry Farwell remarked, "and there are thousands of former gays . . ., [including] couples now married, raising children, but

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“heterosexual lifestyle”. (Defenders of the marriage exclusion do not seem to avow living ‘the heterosexual lifestyle.’¹⁰⁰) “There is no way I could support recognition by the state of same-sex marriage I do not wish to share my tax burden or employee benefits supporting this type of lifestyle,” writes a reader of *The Columbian*.¹⁰¹ (Another reader is more descriptive: “Homosexuality is a perverted, filthy, disease-ridden lifestyle.”)¹⁰² In the congressional debates over the combatively named federal Defense of Marriage Act,¹⁰³ one Senator defended the bill’s privileging of heterosexual marriages against charges of intolerance, arguing that “[t]olerance does not require us to say that all lifestyles are morally equal.”¹⁰⁴ According to one Representative, “[s]ame-sex ‘marriages’ trivialize marriage as a mere ‘lifestyle choice.’”¹⁰⁵ Even politicians opposed to DOMA’s discrimination were frequently prone to lapse into the rhetoric of gay “lifestyles.”¹⁰⁶ Back

who both were involved in the gay lifestyle. God can deliver from it. It’s a chosen lifestyle. . . . The lifestyle is moral perversion.” See also Lynne Marie Kohm, A Reply to “*Principles and Prejudice*”: *Marriage and Realization That Principles Win over Political Will*, 2 J. CONTEMP. L. 293, 308 (1996) (“[I]nstead of fairly analyzing the issues surrounding homosexuality, both legal and cultural, the public and academic press, under the guise of the Fourth Estate, continually appears to pursue the goal of legitimizing the gay lifestyle.”).

¹⁰⁰ Of course, it is possible (although I am doubtful) that while the ways that heterosexually identified persons have of living in the world are too diverse to allow for designation of a (let alone “the”) “heterosexual lifestyle,” there is nonetheless a distinctively gay way of living in the world. Cf. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 116 (1999) (“If there is such a thing as a gay way of life [although he is talking more about people he denominates “queers”], it consists in these relations, a welter of intimacies outside the framework of professions and institutions and ordinary social obligations.”).

¹⁰¹ *Info-Line Forum*, *THE COLUMBIAN*, Feb. 26, 1997, available at Westlaw, 1997 WL 6516647.

¹⁰² *Id.*

¹⁰³ Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (enacted).

¹⁰⁴ 142 CONG. REC. S10114 (1996) (Statement of Sen. Coates).

¹⁰⁵ 142 CONG. REC. H7494 (1996) (Statement of Rep. Smith). This comment reflects a common prejudice that itself trivializes the lives of lesbian and gay persons. As one comic once pointedly quipped, “why is it that straight people have lives but gay people only get ‘lifestyles’?” And according to Milton Regan, “[a] lifestyle is not constitutive of identity.” MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 62 (1993).

¹⁰⁶ See, e.g., 142 CONG. REC. S10119 (1996) (Statement of Sen. Dodd) (“In fact, Connecticut’s antidiscrimination law is considered a success in providing recourse for those Americans affected by antigay bias, in giving them the guarantee they will be judged by the abilities of their labor and not their lifestyles.”); 142 CONG. REC. S10124 (1996) (Statement of Sen. Wyden)

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on the exclusionist side, Vermont State Representative Nancy Sheltra (R-Derby) called on her colleagues to ignore the mandate of *Baker* and impeach the Justices for their "usurpation"; in her words, "I personally do not equate this to civil rights This is a lifestyle, this is a choice of lifestyle."¹⁰⁷ Conservative columnist Don Feder wrote of Vermont's civil union bill said: "While the measure was pending, gays told legislators of their loving relationships. So what? They're not procreating; the future is not in their hands. . . . And, frankly—for reasons of public health as well as morality—this lifestyle should not be encouraged."¹⁰⁸

What, however, might be the defining characteristics of a "heterosexual lifestyle" that might provide the value of preserving civil marriage as exclusively mixed-sex? The most obvious choices fail to stake out any distinctively heterosexual lifestyle turf. Indeed, in defending the mixed-sex requirement against charges that it improperly lends the force of government to gender subordination, one marriage conventionalist undermines the claim to heterosexual lifestyle distinctiveness, effectively conceding "that both 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."¹⁰⁹ If that is so, if spouses sexes matter so little, then what's so unique about mixed-sex marriage that it would be valuable to preserve as mixed-sex?

Perhaps one might think childrearing the mark of a heterosexual lifestyle. But this would not be very plausible given what should be undeniable facts of life in the contemporary United States: first, childrearing only occupies one segment of a person's lifespan (even though it usually forms life-long attachments). Second, large numbers of heterosexually identified people do not raise children. Third, significant numbers of lesbian and gay people do raise children. Lesbian soccer moms, for example, disrupt the representation of child-rearing mixed-sex marriages as exemplars of a distinctive childrearing lifestyle. One might try to save childrearing as the definitive trait of heterosexual lifestyles by treating it as an aspiration, but given the paucity of

When I talk with gay and lesbian Oregonians, they invariably ask me about the concerns held by the majority of Americans. They ask about jobs and wages and health care and crime. Not once has a gay or lesbian Oregonian come to me and asked that the Federal Government endorse their lifestyle.

Id.

¹⁰⁷ Ross Sneyd, *Legislators Seek to Impeach Justices*, ASSOCIATED PRESS, Feb. 10, 2000.

¹⁰⁸ Don Feder, *In Vt., Unnatural Becomes Law*, BOSTON HERALD, May 1, 2000.

¹⁰⁹ Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 88 (1996).

evidence that heterosexually identified people/couples are appreciably better at raising children than lesbian persons,¹¹⁰ it would seem odd to view the aspiration as a distinctly heterosexual one.

So perhaps commitment, with or without sexual exclusivity, is the hallmark of a heterosexual lifestyle.¹¹¹ This too, however, seems implausible. Something in the neighborhood of half of all mixed-sex marriages end in divorce and many include extramarital sexual activity.¹¹² Even if one accepted the suggestion that same-sex couples as a group engage in more extra-primary relationship sex than mixed-sex couples, that would at best produce two overlapping bell curves with no normative reason to characterize commitment as a distinctly heterosexual good. Moreover, tremendous same-sex commitment may be found, if one cared enough to look, for example in the caring for ill partners that lesbian persons have admirably conducted.¹¹³

One is left with no positive, affirmative definition of a “heterosexual lifestyle” whose value might be taken to justify preserving civil marriage as

¹¹⁰ See generally, e.g., Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998); Judith Stacey & Timothy Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 65 AMER. SOCIOLOGICAL REV. 159, 177 (2001) (concluding, from extensive literature review, that most differences between same-sex and mixed-sex parenting “cannot be considered deficits from any legitimate public policy perspective”).

¹¹¹ Cf. Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81, 95-96 & n. 56 (1996) (discussing marriage conventionalists’ invocation of supposed “gay lifestyle” characterized by depravity and sex-obsession).

¹¹² See, e.g., EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 496 (1994).

¹¹³ Perhaps one might make an argument that sexual exclusivity is a normatively heterosexual ideal due to concerns about certainty of paternity, whereas with same-sex couples there is no doubt given current technology that the same-sex parents are not both the biological parents of a child. Cf. Tom Utley, *Gay Marriage Would Be Only a Parody of the Real Thing: The Wednesday Column*, DAILY TELEGRAPH (London), Sept. 27, 2000 (arguing that it is normatively relevant that “the origins of marriage . . . are rooted, of course, in human biology and in the awkward fact that, until very recently, the human male could never be absolutely sure that the child carried by his mate was his own”). Nor is it clear that biological parenthood is particularly normatively freighted. See, e.g., Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995). If anything, however, this would suggest that same-sex marriages are less problematic than mixed-sex marriages because of the relative transparency of paternity issues where assisted reproduction is concerned. So the exclusion of same-sex couples from civil marriage cannot sensibly be justified on this basis. (Also relevant is the great accuracy of contemporary DNA parentage testing). A deficit in ideal heterosexual fidelity hardly counts as a positive good worth preserving.

mixed-sex institution. It would be at least theoretically possible to define a heterosexual lifestyle as a complement to some "homosexual lifestyle" from which it should be distinguished. However, I have yet to see anyone define "the homosexual lifestyle" in any way that avoids negative stereotyping. Calumnious overbroad generalizations cannot form the basis for a social meaning that would be non-denigrating. Nor are they an adequate basis for governmental action under heightened scrutiny—which should apply to the exclusion of same-sex couples from marriage¹¹⁴—as the Supreme Court's 1996 decision in *U.S. v. Virginia* teaches,¹¹⁵ to return to the case I mentioned in connection with Professor Cox.

In *Virginia*, the Supreme Court invalidated the state's exclusion of women from the public Virginia Military Institute, an all-male college with a rich history and tradition. The Court rejected the dissenting suggestion of Justice Scalia that the state had an adequate interest in preserving this institution and its "character" in their historical—read, exclusionary—form.¹¹⁶ The Court's response was, in effect, "well, if it has to change in some respects (and you have not shown any really significant necessary

¹¹⁴ See, e.g., David B. Cruz, *Same-Sex Marriage, I*, in 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2307-08 (Leonard W. Levy, et. al. eds., 2d ed. 2000).

¹¹⁵ 518 U.S. 515, 533, 540-41 (1996) ("Equal protection principles, as applied to gender classifications, mean state actors may not rely on overbroad generalizations to make judgments about people that [sic] are likely to perpetuate historical patters of discrimination. . . ."); see also *id.* at 572-75 (Scalia, J., dissenting) ("Intermediate scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the state interests that it serves. . . .").

¹¹⁶ See *Id.* at 529

In Judge Phillips' view, the [panel majority] had accepted "rationalizations compelled by the exigencies of this litigation," and had not confronted the Commonwealth's "actual overriding purpose." That purpose, Judge Phillips said, was clear from the historical record; it was "not to create a new type of educational opportunity for women, . . . nor to further diversify the Commonwealth's higher education system[,] . . . but [was] simply . . . to allow VMI to continue to exclude women in order to preserve its historic character and mission."

See also *id.* at 566 (Scalia, J., dissenting) (invoking "the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government"); *id.* at 587 (Scalia, J., dissenting) (concluding that "imparting those [general educational] values in that fashion—i.e., in a military, adversative, all-male environment—is the distinctive mission of VMI. And as I have discussed (and both courts below found), that mission is not 'great enough to accommodate women'").

changes), tough.”¹¹⁷ The majority also refused to endorse Chief Justice Rehnquist’s suggestion that, while Virginia’s complete failure to provide and indeed resistance to providing women with anything truly comparable to VMI necessitated abolition of the male admission criterion, a state need not always integrate an institution just to avoid providing men with ready-made longstanding traditions and prestige denied to women.¹¹⁸

That is precisely what reserving marriage to mixed-sex couples and creating civil unions newly for same-sex couples does. It reserves one of the most historical and potent symbols and statuses for heterosexually identified persons, depriving lesbigay people of that resource. Indeed, even inspection of the working title of this Symposium at the time I was invited—“Same-Sex Marriage, Civil Unions, and Domestic Partnerships”¹¹⁹—reveals the symbolic inequality of the two. Marriage is a longstanding institution and thus one sees the organizers of this conference on legal recognition of same-sex relationships refer to “marriage,” in the institutional and abstract singular; by contrast, there is no history or tradition for the other statuses, neither of which then amounts to an institution, and thus they are designated in the common and concrete plural, “civil unions” and “domestic partnerships.” One might agree with Professor Johnson that it might be valuable to have a new institution for which lesbigay persons could help fashion a new history.¹²⁰ But a truly equal regime would need not to add “civil unions” to “marriage” but rather to offer instead something like “mixed-sex marriage”

¹¹⁷ See, e.g., *id.* at 545 n.15 (“Inclusion of women in settings where, traditionally, they were not wanted inevitably entails a period of adjustment.”); *id.* at 550 n.19 (“Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. Experience shows such adjustments are manageable...”).

¹¹⁸ See *id.* at 565 (Rehnquist, C.J., concurring in the judgment)

[T]he remedy should not necessarily require either the admission of women to VMI or the creation of a VMI clone for women. An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution.

¹¹⁹ E-mail from Richard J. Wood, Professor of Law, Capital University Law School, to David. B. Cruz, Associate Professor of Law, University of S. Cal. Law School (Nov. 16, 2000, 10:04:11 EST) (on file with author).

¹²⁰ Johnson, *supra* note 1, at 19 (“The lesbian and gay community is free to write the story of civil unions on its own without having to borrow every term and tradition from heterosexuals.”). In this respect Johnson seems to echo marriage exclusionists. See, e.g., Info-Line, *supra* note 101 (“There could be another name for the lesbian and gay unions and contracts that would be legitimate and not deny them of their rights. But a marriage between two people of the same sex is not a marriage.”) (response of Sally Reudink, Vancouver).

and "same-sex marriage," and perhaps "civil union" or "same-sex civil union" and "mixed-sex civil union" if (equal opportunity for) fresher symbolism were the aim. In addition, to avoid the compelled disassociation aspect inherent in governmentally mandated segregation, the state would need to offer opportunities for same-sex couples and mixed-sex couples to associate symbolically, so even without a set of "fresh slate" civil union statuses, we would be up to "mixed-sex marriage," "same-sex marriage," and "sex-neutral marriage"—or perhaps just "marriage."¹²¹

But maybe the historic preservation rationale is not the best analogy for marriage exclusionists and the mixed-sex requirement for civil marriage. After all, unlike a historic building, marriage (whether a marriage or the "institution" of marriage) is not something one can touch. It is a (contractually-based) status,¹²² an abstraction. Not being able to touch it does not mean that one cannot try to exclude people from it as events from 1970 on clearly show.¹²³ Conveniently, there is a name for such intangible forms of property, which brings me to another type of property—intellectual property—and to my second hypothesis: perhaps marriage should be examined as a unique specie of intellectual property from which marriage exclusionists wish to exclude same-sex couples. But this approach too comes with a set of problems and questions.

First, as I have argued elsewhere, attempts to preserve the present symbolic meaning of a symbol by excluding uses that would change the meaning of that symbol are inherently suspect if not outright invalid under the First Amendment.¹²⁴ This is the upshot of the Supreme Court's flag burning decisions which said that dissenters from the presumed patriotic

¹²¹ Cf. *Virginia*, 518 U.S. at 578 (Scalia, J., dissenting). Justice Scalia stated:

As a theoretical matter, Virginia's educational interest would have been best served (insofar as the two factors we have mentioned are concerned) by six different types of public colleges—an all-men's, an all-women's, and a coeducational college run in the "adversative method," and an all-men's, an all-women's, and a coeducational college run in the "traditional method."

Id.

¹²² Cruz, *supra* note 114, at 2307.

¹²³ The year 1970 marked the first reported (and unsuccessful) legal challenge to the mixed-sex requirement in the U.S. See *Baker v. Nelson*, 409 U.S. 810 (1970).

¹²⁴ David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV 925, 996-1001 (2001). To the extent that the First Amendment was thought inapplicable because government was not deemed the owner of marriage, insuperable difficulties arise with respect to ownership, as I discuss *infra*.

majority may not be denied access to the expressive resource of the flag to do as they wish with it.¹²⁵ So too, I have argued, marriage is an expressive resource, allowing people to speak to each other and to the broader world and thereby constitute their identities¹²⁶ and a concern that the institution of marriage might mean, express, or symbolize something different were lesbian folk allowed to marry their spouses of choice cannot justify the mixed-sex requirement.¹²⁷

But there are other problems as well under an intellectual property approach. For example, under the exclusive rights clause of the Constitution,¹²⁸ Congress is empowered to extend protection only “for limited times.”¹²⁹ The Defense of Marriage Act (hereinafter “DOMA”)¹³⁰ has no sunset provision; it purports to exclude same-sex couples from the benefits of marriage for federal purposes for perpetuity.¹³¹ DOMA thus might run afoul of additional constitutional limitations (besides potential full faith and credit and equal protection restrictions)¹³² were its exclusion of same-sex couples from marriage defended on intellectual property grounds.¹³³

¹²⁵ The Supreme Court invalidated state and federal anti-flag burning laws in *Texas v. Johnson*, 491 U.S. 397 (1989) and *U.S. v. Eichman*, 496 U.S. 310 (1990). I analyze these cases, reaching the conclusion stated in the text above, in *Cruz*, *supra* note 124, at 993-1001.

¹²⁶ See *Cruz*, *supra* note 124, at 935-945.

¹²⁷ *Id.* at 945-52.

¹²⁸ Cf. Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1068 (2001) (“The ‘exclusive rights’ clause has become the ‘intellectual property’ clause”).

¹²⁹ U.S. CONST. art. I, § 8, cl. 8 (“[The Congress shall have power to] promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”).

¹³⁰ Defense of Marriage Act, 1 U.S.C. § 7 (1996) (enacted).

¹³¹ *Id.* In pertinent part, the Act provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

¹³² See generally, e.g., MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* (1999); MARK STRASSER, *LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION* (1997); Andrew Koppelman, *Dumb And DOMA: Why The Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

¹³³ See generally Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. (continued)

For another example, under copyright law one can obtain exclusive rights to a particular expression but not to an idea;¹³⁴ this limitation itself is likely of constitutional magnitude.¹³⁵ Should "marriage" be considered just one expression or should it be judged an idea, a concept,¹³⁶ to which same-sex couples ought to have access? And even if marriage were an expression, not all expressions are protected by intellectual property law. Generic terms cannot be protected under trademark law;¹³⁷ again, there may be constitutional dimensions to this restriction as generic terms are ones that do not leave adequate alternatives for designating a product like "sugar."¹³⁸ Given its long and unique history, "marriage" arguably is a generic term, or, in copyright parlance, a "scene à faire," a theme or plot element so common it is judged necessary for creative expression and thus not the subject of copyright (nor the attendant power to restrict usage).¹³⁹

But if "marriage" were not deemed generic, perhaps civil marriage might be assimilated to trademark. Perhaps the purpose of or the social meaning of excluding same-sex couples from civil marriage might be understood not as a denigration of lesbian persons or relationships, but as an attempt to preserve the meaningfulness of "marriage" as an identifying word (a "mark") for a particular type of relationship licensed by government.¹⁴⁰ Thus, the (for

1057 (2001) (15th Melville B. Nimmer Memorial Lecture, broadly exploring meaning of "limited times" provision of Copyright Clause and applicability to extension of copyrights as challenged in *Eldred v. Reno*, 239 F.3d 372 (D.C. Cir. 2001)).

¹³⁴ DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 4C[1][d][i] (Matthew Bender & Company, Inc. 1992). *See also* 17 U.S.C. § 102(b) (2001) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work"); *Baker v. Seldon*, 101 U.S. 99, 102-03 (1879) (distinguishing an author's original writing from the art or practical knowledge explained by the writing, with only the former being a valid subject of copyright).

¹³⁵ *See, e.g., Harper & Row, Publ'g, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985) (discussing First Amendment foundation of expression/idea dichotomy).

¹³⁶ *See infra* note 140, and accompanying text.

¹³⁷ CHISUM & JACOBS, *supra* note 134, at § 5C[2][a][vi] at 5-67. *See also* 15 U.S.C. § 1065 (2001) ("[N]o incontestable right shall be acquired in a mark which is the generic name for the goods or services or a portion thereof, for which it is registered.").

¹³⁸ *See, e.g., Duraco Prod. Inc. v. Joy Plastic Enter., Ltd.*, 40 F.3d 1431, 1442 (3d Cir. 1994) ("What is 'generic' in trademark law is a word with so few alternatives (perhaps none) for describing the good that to allow someone to monopolize the word would debilitate competitors.").

¹³⁹ *See* CHISUM & JACOBS, *supra* note 134, at § 4C[1][d][iv].

¹⁴⁰ There would remain, however, a serious question whether the latter could ever be
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some) self-evident propriety of excluding same-sex couples might be likened to a supposedly unobjectionable attempt to save the “mark” that is civil “marriage” from “dilution.”

Indeed, Mae Kuykendall in a wonderfully sociological law review article has argued that in the debates over same-sex marriage, “[t]he fight is mostly about a word.”¹⁴¹ Marriage exclusionists do not want the admission of same-sex couples to dilute the meaning of “marriage.” Cambridge marriage exclusionist Dwight G. Duncan believes that “legally sanctioned gay marriages would dilute and debase marriage as an institution.”¹⁴² Law professor Richard Duncan believes that “[i]t is both legitimate and reasonable to resist any attempt to dilute the importance and meaning of traditional marriage as the most fundamental building block of human community.”¹⁴³

accomplished without the former.

¹⁴¹ 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, 387 (1999). See also, e.g., Info-Line, *supra* note 101 (“If gays want to get insurance and tax breaks, they could get . . . a certificate of domestic partnership from the state. Just don’t use the word ‘marriage’ in the issue of the homosexuals’ rights.”) (response of Lynn Grant).

¹⁴² John-Henry Doucette, *ODU Series Brings Debate on Legalizing Gay Marriage*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk Va.), Nov. 10, 2000, at B4 (internal quotation marks omitted); Kurtz, *supra* note 3 (asserting that broadening civil union eligibility “would only dilute the institution of marriage in a new way”). See also, e.g., F.H. Buckley & Larry Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 587 n. 144 (2001) (characterizing ERIC A. POSNER, *LAW AND SOCIAL NORMS* 85 (2000) as “arguing that allowing same-sex marriage would dilute the meaning of marriage”); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 621 (1999) (“Validating gay marriage would dilute this support [i.e., ‘public recognition and support for marriage’] and lead to demands that unmarried couples receive the same legal benefits as spouses.”); Info-Line, *supra* note 101 (“Same-sex marriage is an attempt to dilute the sanctity of real marriage.”) (response of Ben Delozier, Vancouver); Joan Beck, *Accommodate, But Don’t Legalize, Same-Sex Couples*, SUN-SENTINEL (Ft. Lauderdale Fla.), Jan. 6, 1997, at 9A (“[Marriage between a man and a woman] should not be diluted legally to accommodate same-sex marriages or any other variations.”); Joan Beck, “*Domestic Partnership*” for Committed Gay Pairs, BALTIMORE SUN, Mar. 20, 1996, at 21A (“But most of the people who oppose gay marriages—63 percent in one poll—simply believe that by its very definition, backed by thousands of years of human history, marriage means a man and a woman, and it’s essential not to dilute that concept.”); Lynn Marie Kohm, *infra* note 144, at 331 (“The obvious result of legalizing same-sex marriage will be a demise of fundamental relationships between men and women, as the dilution of the most intimate of relations between the sexes continues.”); Susan Swartz, *Union of Controversy: Polls Show for Most, It’s an Idea That Goes Too Far*, PRESS DEMOCRAT (Santa Rosa, Cal.), Aug. 4, 1996, at A1 (“the idea of diluting the sanctity of opposite-sex marriage isn’t acceptable”) (quoting pollster Mervin Field).

¹⁴³ Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent*
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Lest the reader wrongly conclude that men have a lock on this position, one might note law professor Lynn Kohm's somewhat conclusory assertion that "[a] valid argument can be made that legal recognition of same-sex marriages would weaken the nation's social structure by diluting the meaning of marriage and family."¹⁴⁴ Thus, dilution of the meaning of marriage appears to be a strong concern motivating those who would restrict civil marriage to mixed-sex couples.

Trademark law thus might seem an apt fit for it often "protect[s] against dilution of a famous mark's distinctive character even in the absence of competition or confusion."¹⁴⁵

The law of trademark dilution aims to protect the distinctive quality of a trademark from deterioration caused by its use on dissimilar products. The dilution injury is the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name by its use on non-competing goods. The overriding purpose of anti-dilution statutes is to prohibit a merchant of noncompetitive goods from selling its products by trading on the goodwill and reputation of another's mark.¹⁴⁶

I think it fair to assume that, generally speaking, civil marriage open to mixed-sex couples and civil marriage open to same-sex couples may be considered non-competing goods.¹⁴⁷ For exclusively heterosexually identified and exclusively gay or lesbian people, only one of these options will generally appeal.¹⁴⁸ And for bisexual persons, too often overlooked in discussion of marriage or other legal issues,¹⁴⁹ the question of competing goods ought to be addressed at the moment they decide whether to "buy (into)" marriage. At that point, I suspect it would be the exceedingly rare

Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman, 6 WM. & MARY BILL RTS. J. 147, 164 (1997).

¹⁴⁴ Lynn Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51, 61 (1996).

¹⁴⁵ CHISUM & JACOBS, *supra* note 134, at § 5E[3].

¹⁴⁶ L.L. Bean, Inc. v. Drake Pubs., Inc., 811 F.2d 26, 30 (1st Cir. 1987).

¹⁴⁷ Cf. Don Feder, *Defending Marriage and Civilization*, BOSTON HERALD, July 17, 1996, at 23 (implying that same-sex marriage "offers a competing model" to mixed-sex marriage).

¹⁴⁸ Such exceptional situations such as "marriage fraud" for immigration law purposes, *see Cruz, supra* note 124, at 940 & n.64, should in my view be discounted in the analysis of competing vs. non-competing.

¹⁴⁹ *See, e.g., Kenji Yoshino, The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

individual who might simultaneously be considering making a lifelong, legal, exclusive commitment to a particular man and to a specific woman and thus be in a position to choose among configurations of marriage. Rather, there will be that “one special person” and the question of which configuration to go with will be determined by the parties’ sexes.

These observations are, however, relevant for more than just the threshold determination that mixed-sex marriages and same-sex marriages ought to be considered non-competing goods. They also illuminate a curious feature about conceiving of “marriage” along trademark lines. Trademark law is a form of unfair competition law.¹⁵⁰ But where is the unfairness in letting same-sex couples designate their marriages as “marriages”? In what sense are same-sex couples improperly “trading on the goodwill and reputation of another’s mark”?¹⁵¹ Although “tarnishment” is a way that one can infringe a trademark,¹⁵² the rationale here cannot be that same-sex couples are tarnishing the mark “marriage.”¹⁵³ Were it, then that would mean that the purpose and/or social meaning of marriage is one of denigration of lesbian persons and relationships¹⁵⁴ in which case trademark law offers no way around condemnation of Vermont’s unwillingness to go the final step and its insistence instead on lesbian-subordinating separate-but-equal marital statuses.¹⁵⁵

¹⁵⁰ CHISUM & JACOBS, *supra* note 134 at 5-9.

¹⁵¹ See *supra* note 101 (addressing coattails argument).

¹⁵² See, e.g., CHISUM & JACOBS, *supra* note 134 at 5-236 (citing, *Eastman Kodak Co. v. Rakow*, 739 F. Supp. 116, 118 (W.D.N.Y. 1989) and *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189 (E.D.N.Y. 1972)).

¹⁵³ This legal conclusion is true even though it is quite clear that many marriage exclusionists think just that. U.S. Representative Henry Hyde, for example, has publicly resisted allowing same-sex couples to marry civilly on the ground that “It demeans the institution. . . . The institution of marriage is trivialized by same-sex marriage.” House Debate on the Defense of Marriage Act, in *SAME-SEX MARRIAGE: PRO AND CON* 213, 226 (Andrew Sullivan ed., 1997).

¹⁵⁴ That attribution of lesbian inferiority would be consistent with the views of those marriage exclusionists who maintain that same-sex marriage is a “parody” of “real” marriage. See, e.g., Paul Barker, *Hagues Hidden Army*, *EVENING STANDARD*, May 19, 2000 at 13 (suggesting that “gay marriage ceremonies . . . could be seen as mere parodies of accepted social forms”); Feder, *supra* note 147, at 23 (“In reality, the public is correct in viewing same-sex marriage as a bizarre parody of a time-honored institution.”); Tom Utley, *I Have a Confession to Make: It Is about Homosexuality*, *DAILY TELEGRAPH* (London) Oct. 30, 1998 (“I think that even long-term and faithful relationships between homosexuals can never be more than a parody of heterosexual marriage . . .”);

¹⁵⁵ I emphatically disagree that parody captures the intent of the vast majority of same-sex couples who join in civil union or seek the right to marry. But if this were the case, it would be important to note that trademark parody is possibly constitutionally mandated
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Finally and fundamentally, as much as marriage exclusionists may feel that marriage (the idea or concept,¹⁵⁶ the institution¹⁵⁷) is simply theirs and something from the use of which they may therefore exclude same-sex couples without embracing notions of lesbigay inferiority,¹⁵⁸ the apparent underlying notion that marriage is like intangible property runs into a grave problem with respect to ownership. Who would be the "owner" of marriage? Although civil marriage, the institution, exists, by definition, as a matter of government creation, civil marriages exist due to the consent of pairs of persons, as part of the broad cluster of social practices of marrying. Civil marriages, at least, thus do not really seem like governmental property.¹⁵⁹ 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.¹⁶⁰

exception or defense to charges of trademark infringement. *See* CHISUM & JACOBS, *supra* note 134, at 5-321—5-324.

¹⁵⁶ *See, e.g.*, Info-Line, *supra* note 101 ("The idea of same-sex marriage is merely an attempt to legitimize homosexual perversion.") (response of Garron Guest, Vancouver); Wendy Herdlein, *The Damage of Same-Sex Marriage*, WASH. TIMES, Aug. 1, 2001, at A14 ("The concern is not that all married people would be lured out of their marriages, but that the very concept of marriage would be weakened tragically."); John Leo, *Gay Rights, Gay Marriages*, U.S. NEWS & WORLD REP., May 24, 1993, at 19 ("[L]arge majorities of Americans approve of some spousal rights for gays but reject the idea of gay marriage.").

¹⁵⁷ *See, e.g., supra* note 80 (invoking "institution of marriage").

¹⁵⁸ *See, e.g., Leo, supra* note 156, at 19

The insistence on calling these [same-sex] arrangements marriages is quite another matter [from many benefits of marriage such as health plan coverage, tenancy rights, and control of partners' funerals]. It's an attempt to overhaul tradition, language and common sense for perhaps one tenth of one percent of the population interested in appropriating heterosexual practice and ceremony.

¹⁵⁹ And if civil marriages were owned by government, the norms or private property owners' *carte blanche* would be inapplicable and thus unable to provide a potentially non-invidious basis for the exclusion of same-sex couples from civil marriage.

¹⁶⁰ Granted, the government might be likened to a party to a civil marriage contract, and it has so been 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 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

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Nor, however, should marriage be deemed private property: “ownership” of marriage should not be judged to rest with some nebulous class of past, present, and future heterosexually identified marriage exclusionists.¹⁶¹ One

will not permit the dissolution thereof by the other parties thereto.

Roberts v. Roberts, 185 P.2d 381, 386 (Cal. Ct. App. 1947) (“This state is a party to every marriage contract of its own residents as well as the guardian of their morals.”), *disapproved insofar as it is contrary to* *Spellens v. Spellens*, 317 P.2d 613, 618 (Cal. 1957); *In re Lindgren*, 43 N.Y.S.2d 154, 157 (Sup. Ct. NY 1943) (“There are three parties to every marriage contract—the two spouses and the state.”), *aff’d* 46 N.Y.S.2d 224 (1943), *aff’d* 55 N.E.2d 849 (N.Y. 1944); *Grant v. Grant*, 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 civil marriage contract doesn’t necessarily mean that we 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., 1916 LA. ACTS 269, §1 (quoted in Kenneth Rigby, *The 1997 Spousal Support Act*, 58 LA. L. REV. 887, 888 n. 4 (1998)). After all, government puts all sorts of restraints on contracts entered by private parties, and 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. Stot: Revisiting the Court’s Role in Separation Agreements in The Context of Attorneys’ Fees*, 74 N.C.L. REV. 2151, 2151-52. Sneed provides:

However, over roughly the past twenty-five years developments in the law in most states have dramatically changed the dynamics of the “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.

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 the 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.” *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49-51 n.9 (1983).

¹⁶¹ *Cf.* 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, 433 (1998) (“The First Amendment, however, does not recognize ownership of words or ideas, at least not outside the realm of copyright, trademark, or allied doctrines, which obviously could not properly apply in this context.”).

cannot point to any closed set of human "inventors" or "authors" of marriage. Even discounting the tragic levels of spousal abuse, marital rape, divorce, and adultery in U.S. society, the current generation of marriageable heterosexually identified people (save perhaps for those seeking to remarry) has done little distinctive to invest marriage with significance.¹⁶² Marriageable people may well have celebrated their parents' and friends' anniversaries, but so have many, indeed probably most, lesbian people.¹⁶³

¹⁶² While people who civilly divorce may do so in part out of reverence for marriage and a belief in the importance of not tarnishing the symbolic value of that institution by perpetuating a bad exemplar, *cf., e.g.,* Catherine Kohler Riessman, *Life Events, Meaning, and Narrative: The Case of Infidelity and Divorce*, 29 Soc. Sci. Med. 743 (1989), it is not clear that divorced persons have affirmatively contributed to marriage's expressive capacity, rather than done an admirable job of not impairing that capacity.

¹⁶³ Thus, it would be wrong to think that lesbian persons wishing to marry a partner of the same sex are improperly seeking to ride on the coattails of heterosexually identified predecessor in any significant degree more than heterosexually identified persons desiring to marry a different-sex partner are improperly seeking to ride such coattails.

The charge—essentially one of theft—that lesbian people wrongly seek to reap the benefits of others' efforts is not limited to the marriage context. Even as to antidiscrimination law, some voices have declared lesbian persons to be coattail riders. *See, e.g.,* Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African-American Communities as Viewed Through the Privacy Prism*, 38 Howard L.J. 231, 232 (1994) (noting "the perception that the lesbian and gay community, which is almost always perceived as being white and male, is attempting to ride on the coattails of the black civil rights movement to achieve civil rights for lesbians and gay men."); Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209, 222-23 ("I think we should place on the record exactly what the political and social agenda is of the homosexuals What they're trying to do is attach themselves to the coattails of other minorities who . . . legitimately need the special protection and their purpose does not stop here.") (quoting Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A)); Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., Basic Books 1998 (1982)).

And, it seems, lesbian people have made similar charges of transgender persons. *See* Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and The Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 140 n.28 (2000) As Frye states:

At the beginning of the struggle for transgender inclusion in ENDA (1994), many gay and lesbian detractors argued with us that we were simply trying to catch onto the coat tails of a twenty year old gay and lesbian political movement. It was akin to saying that we had not paid our

(continued)

Such efforts thus cannot justify excluding the vast majority of lesbian and gay persons from those eligible to use the intellectual property that we might see marriage as.¹⁶⁴

Rather, marriage should be understood as a unique common or public expressive resource, maintained (although not owned) by government for the benefit of the public, and not simply for private “owners.” Marriage might thus be conceived of as a symbol in the public domain.¹⁶⁵

“In the intellectual property context,” Jessica Litman has explained, “the term [‘public domain’] describes a true commons comprising elements of intellectual property that are ineligible for private ownership.”¹⁶⁶ Professor Litman has argued that “[t]he public domain should be understood . . . as a

dues: that we were trying to add on.

¹⁶⁴ These considerations suffice to distinguish *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 548 (1987), where the Supreme Court by a 5-4 vote upheld the constitutionality of a federal law allowing the United States Olympic Committee to refuse to allow the Gay Olympics—today known as the Gay Games—to call itself that. The majority held that the creation of such property-type rights in the word “Olympics” did not violate the First Amendment in large measure because the word itself had been made valuable by the contributions of the Committee over decades. *See, e.g., id.* at 536-37, 539. Thus the right to exclude was structurally akin to trademark rights, which the Court axiomatically took to be constitutionally proper. *See id.* at 534-35. Moreover, at least arguably the U.S. Olympic Committee had worked to create something potentially of comparable value to all in the nation, a genuine public resource, whereas married or marriageable persons clinging to the mixed-sex requirement for civil marriage would freeze marriage as something vastly more valuable to the heterosexually identified than to gay and lesbian people. In addition, many—indeed, most—lesbian and gay persons are also the descendants of heterosexually identified persons and not all heterosexually identified persons are descendants of other heterosexually identified persons, so the continuity of identity of the group of the heterosexually identified is significantly less than that of the corporate entity, the U.S. Olympic Committee. Furthermore, the decision might be “easily distinguishable [from lesbian and gay marriage speech] since it arose in the context of commercial trademark law.” *See Wildenthal, supra* note 161, at 433. Finally, even if *San Francisco Arts and Athletics* is not fully distinguishable, the majority’s controversial decision reflects an impoverished notion of the value of the speech at issue in the case and should be deemed an incorrect application of constitutional free expression principles. *See, e.g., Christopher W. Coffey, International Olympic Committee v. San Francisco Arts and Athletics: No Olympic Torch for the Gay Games*, 17 *GOLDEN GATE U. L. REV.* 129 (1987).

¹⁶⁵ Currently, however, a part of the public—lesbians and gay men and some bisexual people—are being denied use of it by the mixed-sex requirement of current civil marriage laws.

¹⁶⁶ Jessica Litman, *The Public Domain*, 39 *EMORY L.J.* 965, 975 (1990).

device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."¹⁶⁷

And that is precisely what civil marriage is, in important part: "the raw material of authorship." The expressive capabilities of civil marriage form a critical creative resource for people to author their lives, to express themselves, and to constitute themselves through committed relationships.¹⁶⁸

Just as "authors necessarily reshape the prior works of others,"¹⁶⁹ so too people who marry civilly build upon and transform the work of preceding generations of married couples.¹⁷⁰ Civil marriage is a common, not a scarce or private, expressive resource.¹⁷¹ Hence, the intellectual property view of marriage cannot save Vermont's otherwise extraordinarily progressive relationship laws from the opprobrium of being a denigrating "separate but equal" regime. Civil unions are a giant step on the road to full sexual orientation equality for lesbian and gay persons.¹⁷² The fact that we are still excluded from civil marriage even in the only state in the Union that has offered us virtually all the rights and obligations of marriage that it controls just underscores how far we still must travel.

¹⁶⁷ *Id.* at 968.

¹⁶⁸ *Cf.* MORRIS B. KAPLAN, *SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE* 224 (Routledge 1997) ("The freedom of intimate association requires not only a negative right to be left alone, but also a positive capacity to create intimate spaces and social support for personal choices that establish and maintain personal relationships and identities."). *See also* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 *YALE L.J.* 1119, 1145 (1995) ("Human freedom is the freedom to write: to give one's life a text.").

¹⁶⁹ Litman, *supra* note 166, at 969.

¹⁷⁰ *Cf.* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 670 (1980). Karst provides:

We have seen how the act and state of marriage are statements of identity and of identification with one's partner. This phenomenon feeds on itself; if large numbers of people equate marriage and commitment, then each successive marriage is apt to seem to the marrying couple both the symbol of commitment and the undertaking itself.

Id.

¹⁷¹ *Cf.* Ed Fallon, *I Have Anguished*, address to Iowa H. Rep. (Feb. 20, 1996), reprinted in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 182, 184 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) ("Marriage licenses aren't distributed on a first-come, first-served basis here in Iowa. Heterosexual couples don't have to rush out and claim marriage licenses now, before they are all snatched up by gay and lesbian couples.").

¹⁷² *Accord* Eskridge, *supra* note 5, at 863 (characterizing "Civil Unions as a Big Step Forward in the Politics of Recognition").

