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Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages

*Kenneth K. Hsu**

I. INTRODUCTION

This article examines the progress of gay rights activists in the pursuit of legalizing same-sex marriage. After some initial success in late 2003 and early 2004, the same-sex marriage movement encountered a wall of opposition to its cause. Rather than carrying the wave of success forward, the movement's progress stalled in the lead-up to the 2004 presidential election and, in fact, new barriers to same-sex marriage were raised. While gay rights activists knew that their battle for same-sex marriage would need to be hard-fought, the ferocity and effectiveness of their opposition found them unprepared. The timing of certain events may have had a part to play. For example, same-sex marriage was a hot-button election issue in 2004. Both presidential candidates from the nation's two major political parties in 2004 were explicit in their opposition to same-sex marriage; their opposition was politically calculated in an attempt to win votes from the medium voters.¹ But this article will argue that a contributing factor to the same-sex marriage movement's falter has been its ineffectiveness at playing the politics of marriage.

In order to consider this premise, this article will provide an overview of the historical events that have taken place during the campaign for same-sex marriage to date. I will then draw upon these events and analyze the rhetoric employed by the same-sex marriage proponents, on the one hand, and their opposition, on the other. The

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1. See, e.g., Paul Furi, *Kerry Again Opposes Same-Sex Marriage*, WASHINGTON POST, AO6, May 15, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A28118-2004May14.html>.

findings show a wide disparity in the theories espoused by gay rights activists. This article will describe several of these theories in detail, most notably, the “assimilation” theory. In light of these theories, I will assess what went wrong for same-sex marriage proponents in the game of politics leading up to the 2004 presidential election. Flaws can be detected in the strategic approach of the same-sex marriage proponents in contrast to the approach of their opposition. I will conclude by asserting that the same-sex marriage proponents need to argue for their case on a common ground with their opponents, using arguments that will appeal to the mainstream electorate. The “assimilation” theory would be the preferred theory for building these arguments and should be embraced as a way forward for same-sex marriage proponents.

II. THE VICTORIES AND FAILURES OF THE SAME-SEX MARRIAGE MOVEMENT

A. *The Last Five Years: One Step Forward, Two Steps Back*

In his 2001 essay “All Together Now,” Evan Wolfson, then Marriage Project Director for Lambda Legal Defense and Education Fund and co-counsel for the plaintiff in the landmark case of *Baehr v. Andersen*,² declared, “We can win the freedom to marry . . . possibly . . . [this] is doable within five years.”³ Wolfson’s optimism was based on his confidence in the ability of gay rights activists to form political alliances with religious, labor, child welfare, youth, senior, and business interest groups and constituencies. In addition, Wolfson mapped out what he saw as an effective, multi-faceted strategy to obtain gay marriage rights: take the same-sex marriage issue to courts; take the issue public through news media and television talk shows like *Oprah*; use social science research to convince the public of the positive impacts of same-sex marriage on society; use statistics to demonstrate general public support for same-sex marriage; and link the issue of the same-sex marriage to social issues such as childcare, family law, senior care, social security, and

2. 852 P.2d 44 (Haw. 1993). In this case, the Hawaii Supreme Court stopped short of recognizing the freedom of same-sex couples to marry, but the case is credited with sparking the national discussion about same-sex marriage. Although in 1996, the Court ruled that the state’s marriage policy violated the state Constitution’s prohibition against sex-based discrimination by denying the freedom to marry to lesbian and gay couples, the judge stayed his decision to allow the state to appeal to the Hawaii Supreme Court. In 1998, anti-gay groups succeeded in passing a state constitutional amendment to grant the legislature a new power to “reserve marriage” to heterosexual couples only. On December 9, 1999, the Hawaii Supreme Court determined that the case was now “moot” due to the change in the state constitution.

3. Evan Wolfson, “All Together Now,” in MARRIAGE AND THE SAME-SEX UNIONS at 3 (Lynn D. Wardle et al. eds., 2003).

healthcare.⁴

Explicit in the strategy of Wolfson and other gay rights activists has been the understanding of same-sex marriage as a political struggle, a surely difficult—but winnable—fight in the democratic political process.⁵ They all recognized that scholarly research and debates, court fights, and publicity would need to be deployed creatively in order to convince the public, policymakers, and lawmakers of the merits of same-sex marriage.

Initially, these strategies seemed to be resulting in “victories” for same-sex marriage advocates. The most notable of these “victories” was the historic decision handed down by the Massachusetts Supreme Judicial Court on November 18, 2003 in the case of *Goodridge v. Department of Public Health*⁶ (“Goodridge”). In that case, the court ruled that Massachusetts’ ban on same-sex marriage was unconstitutional.⁷ Shortly following that decision, on February 4, 2004, the Massachusetts Supreme Judicial Court stated in an opinion submitted to the state Senate that only full, equal marriage rights for same-sex couples, not civil unions, are constitutional.⁸

Following the lead from Massachusetts, on February 12, 2004, San Francisco Mayor Gavin Newsome authorized city clerks to grant marriage licenses to same-sex couples. One week later, after sanctioning more than 2,800 same-sex marriages, the City of San Francisco sued the State of California to challenge the ban on same-sex marriages on constitutional grounds.⁹

The response to Massachusetts’ judicial decisions and San Francisco’s initiative in enabling same-sex couples to legally wed was bittersweet for gay rights activists. These local victories boosted the optimism of gay rights activists across the country that they could eventually win the fight for same-sex marriage.¹⁰ Full media coverage of these local victories gave same-sex marriage activists’ cause

4. *Id.* at 6-9.

5. See, e.g., Mubarak Dahir, *Marriage on his mind: longtime crusader Evan Wolfson sets out to win same-sex marriage rights within five years - Pride 2003* at THE ADVOCATE, June 24, 2003, available at http://www.looksmarttrends.com/p/articles/mi_m1589/is_2003_June_24/ai_105367738.

6. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

7. See *id.* For a more substantive discussion of *Goodridge*, see Section III (B), *infra*.

8. Massachusetts Supreme Judicial Court, *Opinions of the Justices to the Senate*, SJC-09163 (2004), <http://news.findlaw.com/hdocs/docs/conlaw/mag1marriage20304.html>.

9. See *S.F. Sues State over Gay Marriage Ban*, ASSOCIATED PRESS, February 20, 2004, <http://www.foxnews.com/story/0,2933,111935,00.html>.

10. See, e.g., Kathleen Burge, *Decision on Out-of-Staters in Courts’ Hands*, BOSTON GLOBE, at B9 May 18, 2004, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/decisions_on_out_of_staters_in_courts_hands/.

unprecedented attention. The fallout of the media attention, however, was a ferocious counterattack from the political right. It was only after the successes in Massachusetts and San Francisco that the anti-same-sex marriage campaign became highly politicized and, ultimately, successful.¹¹ The potency of the opposition unveiled by gay rights activists' small victories were stronger than gay rights activists expected or for which they were prepared.

Debate over same-sex marriage was one of the major issues that dominated the airwaves for most of 2004. In response to the Massachusetts Supreme Judicial Court's decision in *Goodridge*, Republican President George W. Bush declared in his 2004 State of the Union Address that the "nation must defend the sanctity of marriage between a man and a woman."¹² Both the Democratic and Republican presidential candidates spoke openly against the legalization of same-sex marriage in their 2004 campaigns. Leading up to the election, there was ongoing pressure for the Republican-dominated Congress to pass the Federal Marriage Amendment—a proposed amendment to the United States Constitution that would define marriage as between a man and a woman only.

Less than one year after initial successes in Massachusetts and San Francisco for gay rights activists, the confidence of same-sex marriage proponents was weakened by the concerted efforts of political and religious conservatives to prohibit same-sex marriage. In the November 2004 national and state elections, voters in eleven states approved constitutional amendments codifying marriage as an exclusively heterosexual institution,¹³ with eight of the eleven states containing additional language that could also ban civil unions and other legal protections for gay and lesbian people.¹⁴ All of the state amendments were passed by large margins.¹⁵ President Bush, widely regarded as the "more" anti-same-sex marriage candidate in the 2004 election and a strong supporter of the Federal Marriage Amendment, was considered to have been reelected partly due to an increased turnout by religiously

11. Stanley Staley Kurtz, *The "Gay" Election*, NATIONAL REVIEW ONLINE, Feb. 10, 2004, <http://www.nationalreview.com/kurtz/kurtz200402100850.asp>.

12. President George W. Bush, State of the Union Address 2004, WHITE HOUSE.gov, Jan. 20, 2004, <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>.

13. The eleven states are Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah and Oregon.

14. The eight states are Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma and Utah. In early 2004, voters in Missouri and Louisiana also approved amendments banning same-sex marriage. See *Same-sex Marriage Bans Winning On State Ballots*, CNN.com, <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/index.html>.

15. *Id.*

conservative voters who opposed same-sex marriage.¹⁶

With electoral victory in 2004 for the Republican Party in both the executive and legislative branches, the Federal Marriage Amendment was again a major priority on the religious right's political agenda.¹⁷

For gay rights activists, the last five years moved them one step toward their objective with initial wins in Massachusetts and San Francisco. However, it appears that they ended the period two-steps back. The thrust of their opponent's defense suppressed the flow of optimism from their initial wins. More potent, however, are the legal barriers that have been created in eleven states where marriage has been codified as an exclusively heterosexual union. The question that needs to be addressed is why gay rights activists' multi-faceted strategies could not withstand the defense of the opposition.

B. How Same-Sex Marriage Proponents Missed Their Mark

There are four observations to be gleaned from the failure, to date, of the struggle to legalize same-sex marriage. First, although the same-sex marriage movement attained some early success, that success sparked a huge backlash from the opponents of same-sex marriage. Second, anti-same-sex marriage proponents were able to mobilize and energize their base, especially religious conservatives, quickly. This efficiency was quickly translated into votes. The backlash was not only cultural or religious, but also political; political actors were able to capitalize on media exposure and voters' reactionary attitudes to reach their political goals.¹⁸ Third, the defeat of presidential candidate John Kerry and other Democrats at the polls prompted commentators, including some from the liberal establishment, to question the Democratic Party's commitment to a leftist social agenda.¹⁹ In short, some journalists interpreted the Democrats' electoral losses as a result of the party's over-commitment

16. See Richard Benedetto, *The Morality Vote was Out There for All to See*, USATODAY.COM, Nov. 6, 2004, http://www.usatoday.com/news/opinion/columnist/benedetto/2004-11-06-benedetto_x.htm.

17. See Jim Drinkard, *Rove Speaks Out on Bush's Win*, USA TODAY, at 11A, Nov. 8, 2004. The contrary view is that the conservatives only use the same-sex marriage issue during election years as a hot-button election issue to turn out conservative voters, and will not bring out the FMA as a serious issue in the Congress.

18. See, e.g., Kevin Potvin, *Whose "Moral Values?"* THE REPUBLIC, Nov. 11 to 24, 2004, http://www.republic-news.org/archive/101-repub/101_potvin_values.htm.

19. For example, the prominent and influential California Senator Dianne Feinstein had explicitly said that certain Democratic Party members' support of the gay marriage issue had been "too much, too fast, and too soon" and had helped "energize a very conservative vote" in the November 2004 election. See Carolyn Lochhead, *Gay Marriage: Did Issue Help Re-elect Bush?*, SAN FRANCISCO CHRONICLE, at A1, Nov. 4, 2004, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/11/04/MNG3A9LLVII.DTL>.

and alignment with an overly ambitious social agenda that endorsed gay-marriage.²⁰ Fourth, five years after Wolfson's declaration that legalization of same-sex marriage was "doable within five years,"²¹ proponents of same-sex marriage face an increasingly hostile and powerful opposition, while at the same time, it appears they have fewer and fewer politically powerful allies.

All four observations lead to a more general conclusion that Wolfson and those who agreed with him were overly optimistic. Their strategy became the victim of its own success. All of the legal and political tools employed by same-sex marriage proponents were met with highly formidable and organized tools from the "conservative right."²² The result has been the "conservative right's" victory in the polls—one of the main battlegrounds. Currently, the same-sex marriage debate rages on, as more voters are willing to amend their state constitutions to ban same-sex marriage. Proponents of same-sex marriage attempted to use the politics of marriage in this cultural war, but the "conservative right" has proven more adept at politicizing this issue.

Same-sex marriage proponents predominantly entered the arena by bringing judicial actions (such as *Goodridge*) and by petitioning the executive branches of local governments (such as the Mayor's Office of San Francisco). A medley of theories was used by advocates, including an individual rights theory based on the right to privacy and the theory of equal protection under the law. Both of these theories will be defined and analyzed below. It will become clear in this analysis that these two theories alone, putting aside other theories also used by same-sex marriage proponents (some of which are discussed in this article), have very different philosophical bases. These internal conflicts present same-sex marriage proponents with difficulty in presenting a united front both in making their arguments and refuting arguments made by their opponents. The conservative political machine was easily able to exploit these theories and design and shape a campaign based on broad community values that defeated the same-sex marriage agenda within the political arena. The events of 2004 clearly demonstrate that gay rights activists need to change their approach in the political arena to appeal to voters at large.

20. See, e.g., Walter Shapiro, *Presidential Election May Have Hinged on One Issue: Issue 1*, USA TODAY, at 6A, Nov. 5, 2004, available at http://www.usatoday.com/news/opinion/columnist/shapiro/2004-11-04-hype_x.htm.

21. Wolfson, *supra* note 4, at 3.

22. See, e.g., Kathleen K. Ruthledge, *Full Court Pressure*, CHRISTIANITY TODAY, Vol. 49, No. 1, at 58-59 (January 2005); Sheryl Henderson Blunt, *The Man Behind the Marriage Amendment*, CHRISTIANITY TODAY, Vol.48, No. 9, at 46 (September 2004).

III. THEORIES FOR SAME-SEX MARRIAGE

In this section, the “assimilation theory” is introduced as a moral and social foundation for same-sex marriages. Following this introduction, the article will examine the two legal theories used to support the majority’s ruling in the Massachusetts Supreme Judicial Court case of *Goodridge*, namely, the right to privacy and the right to equal protection under the law. In turn, these two theories will be compared to the assimilation theory to see whether the underlying bases of these two theories can be accommodated by the assimilation theory. In order to understand gay rights activists’ framing of same-sex marriage arguments in the political arena, one needs to pay close attention to how such rights are articulated and debated both in the public square and among activists. The rhetoric of privacy and equality can take on different forms with very different meanings.

A. Assimilation Theory

*“The centerpiece of [the] new [homosexual] politics ... is equal access to civil marriage”*²³

-Andrew Sullivan

Gay rights commentators, scholars, and activists place a high premium on homosexuals’ access to marriage. Andrew Sullivan called this access the “centerpiece” of homosexual politics and the most public symbol of equality for gays and lesbians.²⁴ Sullivan framed the right to same-sex marriage as a necessity for gays and lesbians to be accepted in society,²⁵ because marriage is a fundamental civic institution. Under this conceptual framework, legalization of same-sex marriage allows gays and lesbians to participate fully in civic life. This is the essence of the “civil rights” or, what is referred to in this article, the “assimilation” argument.²⁶ “Marriage . . . is a social and public recognition of a private commitment . . . the highest public recognition of personal integrity. Denying it to homosexuals is the most public affront possible to their public equality.”²⁷ Legalization of same-sex marriage for the assimilation

23. Andrew Sullivan, *Virtually Normal*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE, 126 (Robert M. Baird & Stuart E. Rosenbaum eds., Prometheus Books 1997).

24. *Id.*

25. *Id.*

26. See Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709 (2002).

27. Sullivan, *supra* note 24, at 126.

is about civil rights, equality, and public recognition. The “assimilation” theory calls for the state to extend marriage rights to homosexual couples. The idea of “assimilation” itself implies that the outsider is brought into the mainstream. The purpose of this theory is to recognize gay individuals and couples as “normal,” and allow them to enjoy the substantive and symbolic benefits that accompany marriage.

Consequently, the underpinnings of the “assimilation” argument of the same-sex marriage agenda can be considered moral and social. The theory is moral in the vision of a society in which this right to marry is accepted, recognized, and granted. The theory is social in the sense that the entrant needs to assimilate into the society, and the social, religious, and civil institutions need to accommodate the entrant. Therefore, the “assimilation” argument is not unlike the arguments employed by the desegregation movement and women’s rights movements of the 1950s, 1960s, and 1970s. The assimilation argument paints a picture of a disadvantaged group that is being denied the fundamental right to marry, which is a right that is enjoyed and taken for granted by heterosexual couples. The social dimension of the argument pertains to the rights, privileges, and benefits that accompany the right to marry. Assimilationists maintain that the institution of marriage is not only a symbol of equality for gays and lesbians, but also a substantive necessity for gays and lesbians to participate, and be benefited equally, in society. Being able to marry brings the right to the same-sex partner’s healthcare benefits, pensions, and other benefits that are available to heterosexual married couples. Christine Pierce notes in her article, *Gay Marriage*:

What drives this issue is the practice of most United States employers and many institutions (such as the IRS) to give significant benefits including health, life, disability and dental insurance, tax relief, bereavement and dependent care leave, tuition, use of recreational facilities, and purchase discounts on everything from memberships at the local Y to airline tickets only to those in conventional heterosexual families.²⁸

Pierce refers to these rights and entitlements as the “monetary and benefits” argument for same-sex marriage.²⁹

What makes the monetary and benefits argument a pertinent element in the “assimilation” articulation of same-sex marriage right is the argument’s appeal to principles of equality. These benefits, just like the

28. Christine Pierce, *Gay Marriage*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE* 169 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

29. *Id.*

right to marry, are taken for granted by married heterosexual couples. In this regard, the gay rights movement shares common similarities to the desegregation and feminist movements, but whereas those movements were successful in relating to the general public, the gay rights movement has found it difficult to relate to “the conservative right.” In I’s view, the gay rights activists have not been able to relate to the “conservative right” because assimilations have been unable to articulate the “assimilation” theory in convincing political terms.

Given its moral and social underpinnings, the assimilationist proponents’ main target of focus should be the political arena. Assimilation theory’s arguments seemingly have the potential to appeal to voters on a large scale by appealing to the public’s sense of what it means to be American. By explaining that same-sex couples should be included in the society of married couples, assimilationists remind Americans that the United States is a country that puts stock in the concepts of fairness and equality. Similarly, the monetary and benefits argument is also an easy concept for a majority of people to understand.

B. Legal Arguments Used in the Goodridge Ruling

In *Goodridge*, the Massachusetts Supreme Judicial Court ruled that barring an individual from civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. The decision was based on both the right to privacy and the doctrine of equal protection under the law. Marshall, C.J., for the majority, stated:

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.³⁰

Further, in explaining how to reconcile the two theories, she states:

The individual liberty and equality safeguards of the Massachusetts Constitution protect both “freedom from” unwarranted government intrusion into protected spheres of life and “freedom to” partake in benefits created by the State for the common good . . . Both freedoms

30. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual’s liberty and due process rights . . . And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations . . . The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.³¹

The two theories – the right to privacy and equal protection – as applied to same-sex marriage are considered in-depth in the next two sections. I will then assess the political effectiveness of each theory in the context of the broader cultural war regarding same-sex marriage.

C. Exploring the Right to Privacy

1. An issue of Constitutional Rights, not moral opinions

In contrast with assimilation theory, some same-sex marriage proponents who focus on the right of privacy argument frame the legal arguments for same-sex marriage as “an issue of constitutional rights, not moral opinions.”³² Embedded in the legal rhetoric (following *Goodridge*) has been an explicit rejection of morality and values as the underlying substance to same-sex marriage’s policy rationale.

For example, Brenda Feigen, attorney and co-founder of the National Women’s Political Caucus and *Ms. Magazine*, emphasizes the individual’s right of privacy as the valid constitutional ground for the U.S. Supreme Court to afford same-sex couples the right to marry.³³ By couching the legal case for same-sex marriage in terms of the right of privacy, Feigen compared same-sex marriage to abortion rights. “The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* viewed marriage and procreation . . . as so fundamentally personal that the state should not intrude . . .”³⁴ In addition to making this analogy, Feigen viewed the Supreme Court’s decision in *Lawrence v. Texas*³⁵ as the precursor of extending marriage rights to gay couples. “Drawing on

31. *Id.* at 954.

32. Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights not Moral Opinions*, 27 HARV. WOMEN’S L.J. 345 (2004).

33. *Id.* at 347.

34. *Id.*

35. 539 U.S. 558 (2003).

Casey's focus on individuals' most intimate and personal choices, including the right to create one's own concept of existence and personhood, the *Lawrence* majority reached the crucial conclusion that 'persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.'"³⁶ To Feigen, since the right to choose to have "intimate conduct" is protected under the Constitution, the next logical step would be to extend the rights of privacy to the right to marry. As highlighted in the previous section, the Massachusetts Supreme Judicial Court did apply the right of privacy to the right to marry. Marshall, C.J. stated that the court owes "great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues."³⁷

2. *Can the right to privacy be applied to the assimilation theory?*

The arguments used by right to privacy advocates are problematic for same-sex marriage proponents who rely on the assimilation theory. This is not because the rights to privacy arguments are unsound, but rather because they lack the same kind of moral underpinning that is associated with the assimilation argument. In other words, under the assimilation argument, the right to marry is a right denied arbitrarily by the state, along with many other rights and benefits that heterosexual married couples take for granted. Denying the right to marry denies one's rightful participation in an important aspect of civic life. However, by framing the right to marry as a fundamental right of privacy (as the Supreme Court had defined the marriage right under this category),³⁸ and the right of privacy being a constitutional issue within the purview of the judiciary, the position takes away the moral force of the assimilation argument.

In fact, Feigen and others are explicit in rejecting references to morality with respect to the principle of the right to privacy. For example, Professor Chai Feldblum, cited by Feigen in her article, was even concerned that in the case of *Lawrence v. Texas*,³⁹ the majority's reasoning in supporting homosexual rights was "dangerously predicated on moral views."⁴⁰ Professor Feldblum argues that by referring to

36. Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345, 348 (2004).

37. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 966 (Mass. 2003).

38. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). "The present case, then, concerns a [marital] relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485.

39. 539 U.S. 558.

40. Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights not Moral*

grounds of morality “the [C]ourt wants to leave itself the leeway to announce, at some later date, that the institutions of marriage or military could not withstand the influx of openly gay couples or individuals.”⁴¹ In essence, Feigen and Feldblum are worried that the Court’s open reference to “current public moral views” could be an impediment to marriage rights for homosexuals in the current political environment and, generally, leaves the right to marry for same-sex couples at the whim of the then current political environment. The right of privacy argument is, in their view, best articulated without reference to morality or public opinion.

This explicit rejection of moral reasoning and public opinion from the “right of privacy” line of legal reasoning cuts against the grain of the assimilation argument. The legally sound argument may find some success in courts, but piecemeal decisions across state courts will not win widespread support for gay rights. The right to privacy issue is difficult for the general public to understand, and arguments based on individual rights may not have the same political pull as rights based on community values. The battle will never be won with finality in a courtroom unless the voting public accepts gay rights. This right to privacy reasoning deviates from the basic premise of the assimilation argument, which emphasizes the institution of marriage as a public institution with tremendous civic and the political importance. The assimilation argument makes marriage an entitlement and a benefit that ought to be recognized and accepted by all citizens. It goes further, stating that the government, as well as the public, should recognize marriage as an important right and a public institution that should be encouraged. By recognizing the marriage institution as such, the logical inference from the assimilation point of view is that the government and the public in general are *in* the business of regulating marriage as an institution.

If the assimilation argument is to have any success in the broader political arena, then the discussion surrounding the right to same-sex marriages cannot exclude public opinion and morality. To do so would alienate the majority of the voting public from the debate. The concern that a right based on morality is subject to the whims of current opinion forsakes arguments predicated on morality grounds that can be made in favor of same-sex marriage. For example, the perspective on the role of marriage in civic life can be viewed as favoring the extension of marriage rights to gay couples.

The politics of the right of privacy reasoning can be seen as making

Opinions, 27 HARV. WOMEN’S L.J. 345, 349-50 (2004).

41. *Id.*

same-sex marriage rights an exclusively “gay” issue. Such politics can easily polarize the public. The right of privacy argument makes it sound as if marriage is exclusively about “our business, our right, our choice, and our privacy, therefore, everyone (in particular, the government) should leave us alone.” This not only alienates the public, but it has the unfortunate effect of not educating the public about the issue and not communicating the merits of same-sex marriage to the larger audience.

3. *Does the right to privacy stand up against the “conservative right”?*

Conservatives, and particularly the “religious right” were able to oppose same-sex marriage in a way that resonated with voters precisely because they were able to frame the institution of marriage as a public issue. The conservatives’ strategy is exactly the opposite of the right of privacy argument. Conservatives have been more successful in articulating the important role that *traditional* marriage plays in the American public life, than same-sex marriage proponents have been in convincing the public of the benefits of including same-sex couples into married society. This was the case in the lead up to the 2004 election, regardless of the legal merits of the argument. The conservatives’ success is explored in more detail in Section IV.

In short, the right of privacy argument is counterproductive and is unlikely to resonate with the electorate. Although the American people value the right to privacy, they do not see it as universal and absolute. Most Americans and the government have demonstrated their support for the right of privacy in areas of abortion rights (*Roe v. Wade*⁴²), in the right to intimate relationships between adults (*Lawrence v. Texas*⁴³), and in end-of-life matters, such as the Terry Schiavo episode that took place in 2005. The Terry Schiavo episode during the spring of 2005 has demonstrated how a large percentage of Americans do believe that the right of privacy in intensely *personal* matters is a right that ought to be respected by the government.⁴⁴

However, all of the examples listed above relate to decisions over one’s body; marriage involves choosing with whom to share an exclusive commitment, but it is much more. Its meaning, benefits, role in public life, symbolism, tax consequences, and other attributes are defined by the public and regulated by state and federal governments. In this regard, assimilations can find a common ground for argument with the

42. 410 U.S. 113 (1973).

43. 539 U.S. 558 (2003).

44. See Gary Langer, *Poll: No Role for Government in Schiavo Case*, ABCNEWS.COM, Mar. 21, 2005, <http://abcnews.go.com/Politics/PollVault/story?id=599622&page=1>.

“conservative right,” which generally favors more government intervention in social issues.

D. Exploring the Equal Protection Theory

1. Equal application of the law regardless of sexual orientation

The equal protection argument was the other legal argument that was successfully employed by the plaintiffs in *Goodridge*. The equal protection argument for same-sex marriage was first used by the Supreme Court in *Romer v. Evans* to abolish unlawful treatments and classifications based on sexual orientation.⁴⁵ In *Romers*, the Supreme Court held that a state constitutional provision that identifies persons by their homosexual orientation and then denies them the right to seek any specific protections from the law is a violation of the equal protection principle. Such a state provision implied animosity toward such persons and is thus not related to any legitimate state interest.⁴⁶ The premise of the equal protection argument is that the law shall be applied equally to persons in similar situations regardless of one’s race, sexual orientation, or gender.

2. Can the equal protection theory be applied to the assimilation theory?

The equal protection argument is consistent with the assimilation argument. It emphasizes the state’s obligation not to discriminate based on suspect classifications. The equal protection doctrine emerged from the case of *Brown v. Board of Education*,⁴⁷ in which it was decided that segregation of public school students simply based on their race violated the equal protection clause of the Fourteenth Amendment. The equal protection methodology of *Brown* is closer to the ideology articulated by the assimilation camp than that presented by the right of privacy argument. Barring a same-sex couple from the right to marriage solely because that person wishes to marry a person of the same sex violates the right to equal protection under the law. Barring a person from civil marriage also bars that person from the benefits, protections and obligations of marriage. It is not fair to deny a person the attributes that flow from the status of being married because that person wants to marry a person of the same sex.

The social element of the assimilation theory correlates with the

45. See *Romer v. Evans*, 517 U.S. 620 (1996).

46. *Id.* at 626-27.

47. 347 U.S. 483 (1954).

basic and universal concept of fairness and equal treatment underlying the equal protection theory. Similarly, the equal protection doctrine also carries a certain moral and ideological vision, like that underlying the assimilation theory. Equal treatment not only confers the benefits of the right, which is being applied to all, but there is a certain status associated with having that right. These social and moral elements could be more difficult for conservatives to challenge, at least in the electoral arena, because these concepts - fairness, equal treatment, and moral values - resonate with the voting public at large.

Another reason that the equal protection argument may resonate better with the conservatives is that the theory does not have some of the qualities that conservatives disdain about the right of privacy argument. “Right of privacy” is nowhere to be found in the language of the Constitution, while the equal protection clause is found in the Fourteenth Amendment of the Constitution. The phrase “All men are created equal” is arguably the best-known phrase in any of America’s documents. These observations are relevant, because many conservatives and especially those who are strict constructionists do not favor policy unsupported by a plain reading of the law. Furthermore, as mentioned above, for a same-sex marriage argument to have any resonance with conservative voters, one needs to speak in a language that the listeners can understand and from which they will not be intrinsically alienated.

3. Is the equal protection theory supported by all same-sex marriage proponents?

Some proponents of same-sex marriage may be uncomfortable with the equal protection doctrine. First, there is a risk that legislators may provide same-sex couples with the benefits of marriage without actually conveying the status of marriage. Second, equal protection exists in the public realm and is therefore subject to the vagaries of the public system.

The first concern with the equal protection doctrine is the risk that application of the doctrine may result in a two-tier system. In order to provide same-sex couples with the benefits of marriage, without changing the definition (explicit or normative) of “marriage” to include same-sex couples, the legislature may create a separate right for unions between same-sex couples. This has been the case in Vermont where civil unions between homosexual couples are recognized by the state, but marriages are not.⁴⁸ Some proponents of same-sex marriage and gay

48. 15 VT. STAT. ANN. tit. 15 § 1201 (WESTLAW, through 2005).

rights activists are not happy with the two-tier system.⁴⁹

A second problem with the equal protection theory is that the public, the politicians, and the courts determine which people are entitled to equal protection and its material benefits. This aspect of the equal protection doctrine does not necessarily work against proponents of same-sex marriage who advocate the assimilation theory because that theory is premised on access to marriage as a public symbol of equality for gays and lesbians. The proponents of the right to privacy, however, could argue that under this theory, the right of privacy is an inherent, fundamental right outside the reach of the government.

It is interesting to note this inherent tension between the theories of equal protection and the right of privacy, because the ways in which these theories play out in the politics of marriage have determined, and will continue to determine, the effectiveness of the same-sex marriage movement as a whole.

E. Conclusion

This Section has described the fundamental theories with respect to same-sex marriage rights that have been debated to date in the public arena, namely, the right to privacy and the equal protection doctrine. Although these two theories were both used to support the decision in *Goodridge*, there are inherent tensions between these two theories. In addition, with respect to the assimilation theory (supported by many same-sex marriage proponents as a potential strategy in the fight for same-sex marriage), the right to privacy is inconsistent with the moral underpinning of the assimilation theory. The right to privacy argument has been used successfully in the judicial realm with respect to same-sex marriage rights, but it has less potential to win in the broader political debate because it does not focus on broad community values.

When a theory fails to be politically persuasive, it needs to be re-examined. In other words, for proponents of same-sex marriage to be successful in using the political process, they need to find the theory and the stance that is most accessible to the public and makes the most sense. Of the two theories used in *Goodridge*, the equal protection theory appears to be more accessible than the right of privacy and it has the potential to be used in the broader assimilation theory. I will describe in later sections how the rhetoric of the right of privacy, among other things, has not contributed to a successful political strategy to date. Prior

49. See Sherry Corbin, *Why Civil Unions Aren't Enough*, March 2004, VERMONT FREEDOM TO MARRY TASK FORCE ONLINE, www.vtfreetomarry.org/notenough.php.

to that discussion, the next section describes and examines two alternative theories in support of same-sex marriage rights.

IV. ALTERNATIVE THEORIES TO SAME-SEX MARRIAGE

A contributing factor to the same-sex marriage movement's falter has been its ineffectiveness at playing the politics of marriage. As explained below, a big contributing factor in the movement's ineffectiveness has to do with the inability of the movement to argue for their case on a common ground with their opponents, using arguments that will appeal to the mainstream electorate. Especially detrimental to the movement's effectiveness and unity is some gay rights commentators and scholars' theories, which undermine and are directly in conflict with some of the more mainstream arguments for same-sex marriage. I would call them the alternative theories to same-sex marriage.

There are two alternative theories to the concept of same-sex marriage. The first alternative theory, in this article referred to as the "changing marriage concept" theory, does not base its premise on the assimilation of homosexuals into the heterosexual "mainstream," but has the goal of transforming the heterosexual concept of family.⁵⁰ One example of this type of transformation would be the passage of legislation that would not impose monogamy on married couples.

The second alternative theory is entirely against the idea of same-sex marriage. This idea is borrowed from feminist scholars who reject the institution of marriage as a patriarchal institution. This theory rejects same-sex marriage on the basis that it reinforces the oppressive and coercive nature of heterosexual marriage and family life.⁵¹

On the surface, these two alternative theories seem to be unrelated to the current debate and politics of same-sex marriage as described in Section III above. In fact, these alternative theories present formidable obstacles for gay rights activists striving to legalize same-sex marriage. The assimilation tendency of the same-sex marriage movement has been to attempt to "normalize" homosexual unions, to present them as complementary to and part of American civic life. The alternative theories, which are inherently opposed to the mainstream "family values," are completely at odds with the "normalized" picture the assimilations have attempted to portray.

These alternative theories are presented here to highlight the disparity in the views of gay rights activists toward the same-sex

50. See Richard D. Mohr, *The Case for Gay Marriage*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 84, 96-98 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

51. See Robson, *supra* note 27.

marriage debate. Although it evidences the depth of discussion and critical thought being invested in examining the status of same-sex couples, the disparity of views creates opponents for same-sex marriage proponents within the gay rights community itself. In addition, it makes it difficult for same-sex marriage proponents advocating any of the same-sex marriage theories to present a unified view of same-sex marriage outside the gay rights community. Furthermore, these theories need to be understood in order to see how they may impact the political rhetoric surrounding the same-sex marriage debate. Understanding the alternative theories will also help to identify any common or complimentary arguments within these theories in the application of the three theories already discussed, specifically, the assimilation theory, the right to privacy and the equal protection doctrine.

A. Transforming the Traditional Notion of Marriage

I advocate the legalization of same-sex marriage. My analysis does not in the main proceed by appeal to the concept of equality; in particular, nothing will turn on distinctive features of [the?] equal protection doctrine. Rather, the analysis is substantive and turns on understanding the nature and meaning of marriage itself.⁵²

-Richard D. Mohr

Same-sex marriage proponents who wish to transform the traditional meaning of marriage reject its normative definition and content. In order to deconstruct the traditional notion of heterosexual marriage, “changing marriage concept” proponents must first deconstruct traditional marriage before adding the homosexuals’ normative meaning and content. Necessary to their argument is the rejection of the more traditional and yet powerful argument for same-sex marriage—the appeal for equality, as highlighted by Mohr in the quotation above.⁵³ To accept the equal protection argument, for example, is to concede that the homosexual arrangement, lifestyle, and family are inferior to their heterosexual counterparts, because when one strives to be on equal footing with another party (e.g. a family-oriented lifestyle), he or she is conceding that he or she is not on equal footing or is lacking a quality that makes his or her position inherently unequal.

“Changing marriage concept” proponents do not deny the

52. Mohr, *supra* note 51, at 86.

53. *Id.*

importance of the right to marry, but the goal of attaining that right is not about assimilation, benefits, or civic participation. The purpose is to inject homosexuals' normative meaning and content into "marriage" and "family," because normative content for traditional marriage lacks legitimacy.

Mohr asks his readers: "If one asks the average Jo(e) on the street what marriage is, the person generally just gets tongue-tie(d). Try it."⁵⁴ What "changing marriage concept" proponents are asserting here is that because the normative meaning and the content of heterosexual marriage are so unstable and precarious, it is pointless for lawmakers and the courts to define marriage as something as definitive as a union between a man and a woman. Assimiliations would be more inclined to agree that the term "marriage" has normative content, whether the term includes homosexual couples or not. For example, the normative content may include a monogamous relationship between spouses and shared responsibility in raising and educating children.

Drawing on the distinctive experience and ideals of gay male couples, Mohr argues that gay couples can be models of marriage and family life.⁵⁵ Mohr's model posits that monogamy is not an essential component of love and marriage, because sexual exclusivity is not essential to marital commitment.⁵⁶ Instead, emotional interdependence transcends these concerns.⁵⁷ Mohr's model also argues that common-law marriage should be favored over marriage licensing or solemnization:

For people are mistaken to think that the sacred valuing of love is something that can be imported from the outside, in public ceremonies invoking praise from God or community. Even wedding vows can smack of cheap moral credit, since they are words, not actions. The sacred valuing of love must come from within and realize itself over time through little sacrifices in day-to-day existence.⁵⁸

In other words, Mohr argues that the state should get out of the marriage business, because for gay couples, marriage is about commitment, love, and mutual support, not state registration. In his view, even the ceremony is unnecessary because words can be "cheap";⁵⁹ the commitment, love and mutual support is realized through the build-up of day-to-day

54. *Id.* at 87.

55. *Id.* at 57.

56. *Id.*

57. *See id.* at 96-97.

58. *Id.* at 93-95.

59. *Id.*

actions.

For Mohr, the normative definition and content of traditional marriage is unworkable for gay and lesbian couples. Unlike the assimilations, Mohr sees fundamental differences between the model for gay couples and the traditional notion of marriage. Mohr believes that the model for gay couples is a superior form that the normative definition of marriage should imitate. Mohr's argument and proposal certainly have theoretical merit, especially considering that the normative definition of marriage is reasonably static. But how does Mohr's theory work in the politics of marriage? First, the non-monogamous or non-regulated model of marriage is certainly outside today's mainstream concept of marriage. In fact, this concept is diametrically opposed to what many would consider to be the underpinning values of marriage. For example, the ideal marital relationship is monogamous. In addition, marriage is both a private and a public event. The wedding is ceremonial and public; it is acknowledged and sanctioned by the state. The married couple receives special status, privileges, and benefits. The status, privileges, and benefits are acknowledged, accepted and expected.

Removing the public and the state-sanctioning dimensions from the normative content of marriage reduces the rationale for the rights, benefits, and privilege entitlements bestowed upon married couples. This is one reason why the "changing marriage concept" proponents do not strictly subscribe to the equal protection argument. If marriage ceases to be a normative, public institution, or if married couples do not desire acknowledgment and recognition, proponents of same-sex marriage cannot make an equal protection argument on the grounds that they deserve these rights and benefits. When rights, benefits, public affirmation, and civic participation are not part of the normative content of marriage, marriage is less about its institutional function and social value, and more about the privacy and the norms defined by the marriage partners.

In reality, marriage (as we know it) is both private and public. By not seeking equal protection and by couching the normative content and language of marriage in the vocabulary of the right to privacy, use of the "changing marriage concept" theory by proponents of same-sex marriage would be a definite set back in the political arena. As was discussed in the previous section of this article, the language of "privacy," unlike a normative description of the public role and recognition of marriage, is a less effective argument in the political arena. The right of privacy can be a potent weapon in the courtroom, but the politics of marriage require a content much more accessible and politically appealing than a rhetoric that is only theoretically plausible.

In addition, the non-monogamous model within the “changing marriage concept” theory is certainly not going to translate into a real political advantage. More fundamentally problematic is the theory’s inherent opposition to the value-driven concept of both traditional marriage and the assimilation view of marriage. The incompatibility between the “changing marriage concept” theory and the “assimilation” theory is something that proponents of same-sex marriage need to work out. Otherwise, proponents of same-sex marriage cannot have a unifying and effective voice in advancing the same-sex marriage cause.

B. Gay Rights Activists Who Oppose Same-Sex Marriage

Some of the fiercest critics of same-sex marriage are gay rights activists, scholars and those from the “radical” feminist tradition. These critics borrow from feminist scholars who reject marriage as a patriarchal institution. Although this rejection of marriage is the flipside of the feminist critique of marriage, the homosexual critique of marriage has its own rationales and perspectives.

These rationales and perspectives are critical to how the politics of same-sex marriage plays out in the greater context of the legal and cultural debates. As described below, I will discuss these perspectives and explain their implications for the politics of marriage.

In “Assimilation, Marriage, and Lesbian Liberation,”⁶⁰ Ruthann Robson suggests that even if same-sex marriage has a necessary “civilizing” effect, same-sex marriage may end up serving the interests of an oppressive and unjust state.⁶¹ Since “the state itself creates the conditions that allow the married to be wealthier and healthier, through a legal regime that benefits and promotes marriage,” such a state-imposed marital regime “makes it difficult to disentangle [homosexuals’] personal interests and the state’s interests.”⁶² Further, “the regime of compulsory matrimony . . . makes it difficult to discern whether [homosexuals’] ‘choices’ are truly voluntary.”⁶³ Therefore, Robson claims that homosexuals should not adopt the state’s “preoccupation with equality”⁶⁴ - whether homosexuals are equal to heterosexuals - because in doing so, the so-called “equality” ultimately only satisfies the state’s interests in coercing and oppressing minorities through the apparatus of marriage. Homosexuals, therefore, ought to avoid the dangerous trap of choosing

60. See Robson, *supra* note 27, at 800-03.

61. *Id.*

62. *Id.* at 802.

63. *Id.*

64. *Id.*

equality over their fundamental rights and autonomy.⁶⁵

One of Robson's biggest concerns is that, even if homosexuals were allowed to marry, the state explicitly excludes inquiries concerning "other minorities, such as cohabiting but unmarried heterosexuals, persons in intimate relationships with relatives, and persons who are simultaneously married to more than one person"⁶⁶ She alleges that such "exclusions" would not achieve the ends of equality, and would only serve the interests of the state.

Robson's views are certainly not shared by all of the gay rights activists and scholars who are opposed to same-sex marriage. Robson's methodology here is explicitly neo-Marxist and dialectical, which is at odds with the assimilation values and ideals of many proponents of same-sex marriage. However, I am not offering her theories here just to discuss how politically impractical they are; Robson's theories are not meant to be politically "effective" or "feasible." What I do want to emphasize here, however, is Robson's unequivocal rejection of the notion of "equality" as a viable vehicle for gay liberation. Robson's position here is directly counter to that of the assimilations in their view of homosexuality and of homosexuals' position in society.

The assimilations, and especially believers in the equal protection argument, believe marriage to be a symbolic and substantive means for homosexuals to anchor their legitimate place in society. Robson rejects the "civic" effects of marriage out of hand. For Robson, marriage not only perpetuates inequality and oppression, but the right to same-sex marriage would link homosexuals to this oppressive regime and make them complicit in their own oppression.

Robson challenges the universality of the prohibition on incest, and points out that "the advocacy of same-sex marriage has failed to adequately explain or address the exclusion of others from the institutions of marriage or quasi-marital institutions."⁶⁷

Equal protection doctrine and our notions of equality have not proved capable of the task of divorcing considerations of gender from marital and quasi-marital institutions . . . [a]lthough same-sex marriage advocates have attempted to articulate distinctions between same-sex unions and incestuous or polygamous unions, notions of equal protection and equality are applicable to all of these relationships.⁶⁸

65. *Id.*

66. *Id.*

67. *Id.* at 747.

68. *Id.*

In other words, the fact that the assimilations' notion of "equal protection" and "equality" all fail to include incestuous and polygamous relationships demonstrates the fallibility of the notion of equality. This is such an extreme view that as long as gay rights activists continue to back such radical notions, the voting mainstream will never accept such an argument.

As Robson has correctly pointed out, the assimilations necessarily had rejected the idea that their hard-fought marriage right ought to be extended or related to those who practice polygamy or incest. The logic is simple. Polygamy and incest are legally outlawed and considered morally troubling and criminal in most communities in America. Same-sex marriage proponents want to assimilate, to be recognized, and not to be stigmatized as are practitioners of polygamy and incest. Comparisons of homosexuality with polygamy and incest are troubling to gay men and lesbians. This is, of course, *not* Robson's implication: her theory is that if an ideal equal protection theory can apply to homosexuals, then the theory should extend the right to any consenting adult, including polygamists and those who practice incest.

Same-sex marriage proponents should vehemently reject both these unfair comparisons and Robson's theory. They should make the case that homosexual relationships have nothing to do with the supposedly decadent practices of polygamy and incest. Further, assimilations should insist that because long-term homosexual relationships are just like long-term heterosexual relationships, homosexuals have earned the right to marry.⁶⁹

This line of argument is opposed by Robson, as well as the "changing marriage concept" proponents discussed in the previous section. These proponents believe that homosexuals do not need to adapt to the mainstream, heterosexual majority. Many of the gay rights activists reject outright the heterosexual conception of marriage. The assimilations, in contrast, have had to adopt the opposite strategy in order to convince the majority that homosexuals and homosexual relationships are in fact deserving of recognition.

C. Influence of the Alternative Theories in the Political Arena

Not every supporter of gay rights falls neatly into one of the same-sex marriage theories outlined in this article. For instance, it would be incorrect to assume that most assimilations unreservedly buy into the

69. There will be readers of this article who would think that those who practice incest or polygamy in a committed, long-term relationship may also have "earned" the right of marriage. But this is an extreme minority view, including the political and electoral arenas.

heterosexual/majority conception of marriage. The truth is that most people have their own ideas of what marriage is and what society expects of married people. The politics of marriage, however, do not permit each individual to define what is “normal” and “legal.” In politics, an interest group’s agenda needs to be unambiguous. Indeed, as the cultural war over same-sex marriage rages in ballots and courthouses around the country, can same-sex marriage proponents, especially the assimilations, afford not to define their conception of marriage in the most majoritarian terms?

The truth is that by defining marriage in anything less than majoritarian terms, proponents of same-sex marriage face an insurmountable obstacle. In fact, by defining marriage as anything remotely close to non-monogamous relationships, polygamy, or incest, same-sex marriage proponents have little chance in winning the right to marry.

This area is where the conservatives are able to soundly defeat same-sex marriage proponents. The rhetoric of Robson and the “changing marriage concept” proponents are decried by these conservatives. Even the most tolerant-minded Christian conservatives see same-sex marriage as a predominantly moral issue; their refusal to lower the moral bar showcases their belief that homosexuality is a sin and should not be condoned through the institution of marriage.⁷⁰ The less tolerant-minded conservatives would lump homosexuals, polygamists, and those who practice incest together.⁷¹ It is no surprise that much of their argument stems from the fact that because polygamists and blood relatives do not have the right to marry, neither should homosexuals. In other words, their “slippery slope” argument claims that allowing homosexuals to marry would allow anyone and everyone to marry whomever they wanted.

Strangely enough, the slippery slope argument is where the “religious” right and the assimilations have some common ground. Both groups acknowledge that marriage and its normative content are to be differentiated from polygamists and others associated with the “slope.” In the same way, both the conservatives and the assimilations are attempting to define the “norm” of marriage, and this picture ought to include characteristics of a heterosexual marriage, not those of polygamy

70. See Robert Benne & Gerald McDermott, *Thirteen Bad Arguments for Same-Sex Marriage: Why the Rhetoric Doesn’t Stand Up Under Scrutiny*, CHRISTIANITY TODAY, Vol. 48, No. 9, at 51-52 (September 2004); see also Edith M. Humphrey, *What God Hath Not Joined: Why Marriage was Designed for Male and Female*, CHRISTIANITY TODAY, Vol. 48, No. 9, at 36-41 (September 2004).

71. See Stanley Kurtz, *The Libertarian Question: Incest, homosexuality, and adultery*, NATIONAL REVIEW ONLINE, Apr. 30, 2003, <http://www.nationalreview.com/kurtz/kurtz043003.asp>.

and incest. It is logical to infer that it is imperative for proponents of same-sex marriage to articulate this “common ground” and distinguish themselves from polygamists and persons engaging in incestuous relationships. It is where proponents of same-sex marriage, and especially the assimilations, urgently need to clarify their position.

Unfortunately, proponents of same-sex marriage have not been successful in using such “common ground” in a visible and politically advantageous way. Instead, political conservatives have managed to associate homosexuals with stigmatized groups.⁷²

D. Conclusion

Gay rights activists’ own lack of unity on the issue of same-sex marriage has proven costly. The disagreement on the principle of equal protection and the civic effects of marriage demonstrates that proponents of same-sex marriage are politically powerless in an area where they could have been stronger. There is no question that if proponents of same-sex marriage desire to rebound from the resounding defeat in the 2004 election, they need to pay serious attention to the reasons for the defeat and their own mishandling of the marriage issue.

Once again, the tension between the theories of equal protection and the right of privacy has been highlighted, in this case, in the discussion of the two alternative theories. Even though the equal protection rationale is politically more palatable for the assimilations, many gay activists prefer the right of privacy theory. In fact, many gay rights activists, including those who oppose same-sex marriage, are hostile toward the equal protection rationale. It is ironic that, given equal protection’s potential effectiveness and its historical resonance with majoritarian politics, it is the one theory that has been repeatedly rejected by progressive activists and scholars for ideological reasons. Their rejection of equal protection’s appeal in majoritarian politics is a troubling setback for those who debate the politics of marriage.

In the following section, I will show how gay rights activists, and in particular, proponents of same-sex marriage, have repeatedly mishandled the politics of marriage because of their refusal to employ politically more pragmatic and effective means of achieving their goals.

72. The conservatives’ well-established and documented “slippery slope” argument will be described in more detail in Section V of this article. *See, e.g.,* Stanley Kurtz, *Rick Santorum Is Right: Meet the Future of Marriage in America*, NATIONAL REVIEW ONLINE, http://www.nationalreview.com/kurtz/kurtz2005_0323_0746.asp.

V. THE BACKLASH: MISHANDLING OF THE POLITICS OF MARRIAGE, AND
RISE OF THE RELIGIOUS RIGHT

Although some may argue that the resounding defeat of the same-sex marriage issue at the 2004 polls was exacerbated by the use of the same-sex marriage issue as a “hot-button” issue, it is clear that the strategy employed by same-sex marriage proponents was not effective in winning votes. Same-sex marriage proponents have many resources and strategies at their disposal. As Wolfson and other proponents of same-sex marriage have stated, the politics of marriage should include education, informative debate, and political arguments that link same-sex marriage and social issues.⁷³ Before identifying what strategies the same-sex movement should take moving forward, this section will pinpoint the weak points in the same-sex marriage debate during 2004. Once these weak points are identified, the same-sex marriage movement will need to choose a single theory for the debate of same-sex marriages in the political arena. The chosen theory must have the potential to fix the weak points identified during 2004. As I have already mentioned, in his view, that theory should be the assimilation theory. Once the theory has been chosen, then the necessary and most appropriate strategies for that theory can be implemented.

Two weak spots will be discussed in detail below. First, the same-sex marriage movement underestimated voters, and misunderstood the perception of its strategies on voters. Second, the same-sex marriage movement failed to respond effectively to the mainstream arguments presented by conservatives.

A. *The “Average Joes” Go to the Polls*

If same-sex marriage is to be accepted, it must first be accepted by the voting public. In order to decide how to get the voting public to accept gay marriage, we must understand the voters’ concept of marriage. Gay right activists and scholars underestimated voters. The abovementioned statement by Richard Mohr about an average Joe being tongue-tied when asked about the definition of marriage is a case in point.⁷⁴ Mohr’s attitude is reflected in his confident taunt: “Try it.”⁷⁵

Mohr’s overconfidence is characteristic of gay activists’ mishandling of the politics of marriage. If you were to ask anyone who voted in 2004 to define marriage, it is highly likely that he or she would know the

73. Wolfson, *supra* note 4, at 6-9.

74. Mohr, *supra* note 51, at 87.

75. *Id.*

meaning of marriage. In fact, many so-called “average Joe” voters in the battleground states would most likely answer that “marriage is between a man and a woman.”

The sad truth is that even if Mohr’s proposition was true in 1995 when the article was written, it was definitely no longer true by 2004. By that stage, the political debates about same-sex marriage had become highly controversial. If voters did not already possess some normative view on marriage, most likely they would have heard the definition brandished around in the media prior to going to the polls. This heightened awareness translated into votes against same-sex marriage.

Proponents of same-sex marriage failed to clearly define their arguments, while political conservatives, especially those on the “religious right,” took the opportunity to do so. When proponents of same-sex marriage failed to reach the mainstream voters and the conservatives capitalized on these failures, the same-sex marriage agenda suffered at the polls.⁷⁶

Not only did the same-sex marriage movement fail to articulate its views, the movement failed to consider how its strategies could be portrayed in the media or, otherwise, viewed by voters. The strategy of going straight to the executive branch of local government, bypassing the legislative and judicial branches, left a very negative impression with voters. When proponents of same-sex marriage celebrated on the steps of San Francisco City Hall by gaining marriage licenses from Gavin Newsome and his city clerks, the political right said that an arrogant public servant was practicing undemocratic and lawless politics, and that voters should put such behavior to an end.⁷⁷

This misunderstanding of the so-called “average voters” has plagued, and will continue to plague, advocates of same-sex marriage. Proponents of same-sex marriage could have practiced assimilation politics by promoting the merits of same-sex marriage and appealing to the public’s sense of fairness, but they chose to stand behind someone like Newsome. The conservatives easily exploited these unwise decisions by denouncing them as lawless, undemocratic, and anti-majoritarian.⁷⁸

Ultimately, the so-called “average Joes” did listen and did form an opinion regarding the issue of same-sex marriage. They went to the polls

76. See, e.g., Lou Chibbarro Jr., *Gay Ponder Bush Victory*, WASHINGTONBLADE.COM, Nov. 5, 2004, <http://www.washingtonblade.com/2004/11-5/news/national/ponder.cfm>.

77. See e.g., Tony Perkins, *Take a Stand for Marriage*, FAMILY RESEARCH COUNCIL ONLINE, <http://www.frc.org/get.cfm?i=PD04E01>, (last visited April 6, 2006); see also Carolyn Lochhead, *supra* note 20.

78. Charles Colson, *Free for All: How Same Sex “Marriage” is Breaking Down the Rule of Law*, PRISON FELLOWSHIP (May 24, 2004), <http://www.pfm.org/AM/Template.cfm?Section=BreakPoint1&template=/CM/HTMLDisplay.cfm&ContentID=12508>.

and voted in accordance with their opinions regarding the issue. This is especially true in states where ballots were cast to ban constitutionally same-sex marriages on a state level (and in some instances, civil unions as well). Instead of characterizing the success of these conservative efforts solely as forces of bias, prejudice, and intolerance against gay rights, it will serve proponents of same-sex marriage well to examine and critique their own failed strategies.

B. Conservative Theories Against Same-Sex Marriage

The results of the 2004 election show that conservatives know how to reach voters. Although President Bush won only by a narrow margin, exit polls show a large majority of Bush voters turned out precisely because of the “morality” factor. Many observers also believe that John Kerry was defeated because he had a more ambiguous stance on “moral” issues such as same-sex marriage. Conservative commentators boasted of how the right had fired up “the base” and turned them out in unprecedented numbers to elect President Bush and more Republican members of Congress.

It is important to note that voter mobilization is tremendously difficult in America under most circumstances.⁷⁹ Although same-sex marriage was only one of several major issues in the 2004 campaign, the conservative right’s unambiguous position on the issue should not be overlooked. It would be too simpleminded to assume that the religious right had its way in 2004 simply because millions of Americans are homophobic and/or “unenlightened.”⁸⁰ The key is to understand how the right was able to mobilize the voters. In other words, the right was successful because it played by the rules of majoritarian politics and was able to connect with the voters.

Although many voters perceived same-sex marriage as a “moral” issue, conservatives were, generally speaking, not explicit in their rejection of homosexuality. Instead, the conservative discourse was unsophisticatedly centered on buzzwords, such as “family” and “children.” Conservative arguments, although based on buzzwords that elicit emotion instead of upon solid legal principles, have nevertheless proven effective and resonate with voters.

79. American political scientists have for decades written and commented on the difficulties of mobilizing voters in America. See, e.g., THOMAS E. PATTERSON, *THE VANISHING VOTER* (Knopf, 2002).

80. This line of argument—equating President Bush’s victory as a sign of the voters’ lack of enlightenment—has been articulated by the nation’s several media outlets. The head of the “blame-the-voters” camp is Pulitzer Prize-winning historian and cultural critic, Gary Wills, with his *New York Times*, *The Day Enlightenment Went Out* on November 4, 2004.

One of the more popular conservative theories is the procreation argument. The argument states that the legal institution of marriage is primarily for the purpose of producing children.⁸¹ Therefore, same-sex couples are not denied the right to marry because of some invidious discrimination against them, but rather because they cannot procreate. This line of argument insists that because procreation is concerned with society's future, same-sex marriage is a threat.

There is really no legal or even biological support for this argument. No state law now requires heterosexual couples to be capable of producing children before granting a marriage license. Some conservative social and biological scientists have attempted to show how human beings are designed "naturally" to mate with members of the opposite sex for the purpose of procreation.⁸² However, their "research" results are largely inconclusive.

A corollary of the procreation argument is the childrearing argument. This line of argument points to conservative studies that show that children raised by homosexuals were more dissatisfied with their own gender, had homosexual experiences more frequently, and suffered a greater rate of molestation by family members.⁸³ This argument has clashed with other studies that have drawn the opposite conclusions.⁸⁴ It also ignores the fact that gay and lesbian "co-parent adoption" is legal in at least twenty-two states.⁸⁵ Like the procreation argument, there is really no legal support for this argument. It also fails to recognize that many same-sex partners bring children to the same-sex union from prior heterosexual relationships.

Another cornerstone of the conservative argument invokes the sanctity of marriage. This theory states that expanding the scope and definition of marriage to include any two people would damage and devalue marriage. If marriage ceased to be based on procreation, child rearing, and family, but rather were to be based on physical attraction,

81. Stephen C. Whiting, *Same-Sex Marriage Pros and Cons: "Gay Marriage" is an Oxymoron*, 19 ME. BAR J. 79, 82 (Spring 2004).

82. For this line of reasoning from the conservatives, see Hoover Institute's Jennifer Roback Morse, and her work on the subject of marriage and gay marriage: *Marriage and the Limits of Contract*, HOOVER INSTITUTION, at <http://www.policyreview.org/apr05/morse.html>, (last visited April 6, 2006).

83. See Benne & McDermott, *supra* note 7, at 52.

84. See Dale Carpenter, *Gay Marriage Helps Children*, April 1, 2004, INDEPENDENT GAY FORUM ONLINE, <http://www.indegayforum.org/authors/carpenter/carpenter44.html>. For an example of a comprehensive study on this topic and arguments for same-sex couple parenting, see Judith Stacey and Timothy Biblarz's article, *(How) Does the Sexual Orientation of Parents Matter?* AM. SOC. REV. Vol. 66, No. 2 (April 2001).

85. See Joanna Grossman, "A New York Court Authorizes A Lesbian Couple's Joint Adoption of A Child: Part of a Growing Same-Sex Adoption Trend," FINDLAW, Apr. 19, 2004, <http://writ.news.findlaw.com/grossman/20040419.html>.

“the entire foundation for marriage would be eroded.”⁸⁶ This theory claims that the erosion of marriage would lead to additional alleged social “evils,” such as teen pregnancy, sexually transmitted diseases, and poverty. Here the slippery slope argument enters to warn against allowing marriage between those who cannot or should not procreate. Finally, if gay couples are permitted to marry, marriage “would decrease the incentive for opposite-sex couples to become married,” because marriage then would be based on physical attraction.⁸⁷ None of these arguments has a clear legal or constitutional basis. Gretchen Van Ness, an advocate of same-sex marriage, has stated:

Make no mistake about it, civil marriage is available to anyone over the age of eighteen who passes a syphilis test and is marrying someone of the opposite sex—that’s it! The marriage that the opposition [the conservatives] is protecting and all of this discussion about children, love, devotion, procreation, an exalted relationship in every way; it is not required by any state statute.⁸⁸

Van Ness assumes that same-sex marriage is inevitable because the law simply does not support the conservatives’ “unsophisticated” argument.

Van Ness is correct that factors like children, love, and procreation are completely absent from the statutes. She is wrong, however, in assuming that because these discussions are absent in the written law, that the conservative argument against same-sex marriage lacks merit or potency. On the contrary, it is highly likely that, because the arguments were about “family values” and “children,” they resonated more readily with voters, particularly the socially conservative ones. The arguments could be considered extremely convincing. However, convincing arguments do not always translate into votes. The fact that some voters already hold a particular opinion does not mean that they would go out and vote in a certain way simply because they were told to do so.

These beliefs apparently were effective enough to get voters to the polls. “Family values” and the “welfare of children” are not just slogans created by the Republicans to draw out voters. Most candidates have spoken out about American “values.” These are issues that speak to voters. It is difficult to dispute that the 2004 election results, both locally and nationally, are about the triumph of “moral” or “conservative” values

86. Whiting, *supra* note 82, at 86; Benne & McDermott, *supra* 71 at 51.

87. *Id.* at 86-87.

88. Gretchen Van Ness, *The Inevitability of Gay Marriage*, 38 NEW ENG. L. REV. 563, 566 (2004).

over liberal values.⁸⁹ But the critical question is what exactly pushed these voters to oppose same-sex marriage on the basis of “conservative values.” Proponents of same-sex marriage should really ask how these voters could have been “swayed” to vote down the amendments against same-sex marriage.

Proponents of same-sex marriage should have asked how they should have responded to conservatives’ ability to make same-sex marriage an issue of value and morality. They should have taken the time to educate the public about the merits of same-sex marriage in “family-friendly” terms. For example, same-sex marriage proponents could have explained how the ban on same-sex marriage deprives children of same-sex couples from enjoying the status of a family structure based on marriage and the benefits that flow from marriage.

This section has examined how the issue of same-sex marriage has been “legitimized” in the politics of marriage. Conservatives have been much more conventional, modest, majoritarian, and effective. As a result, voters responded by going to the polls and voting against same-sex marriage. The fact that “moral” or “family-friendly” arguments are absent from “state statutes,” as Van Ness pointed out, becomes moot when voters in eleven states changed their state constitutions to specifically limit marriage to a heterosexual union.

VI. TOWARD AN ASSIMILIATION THEORY OF SAME-SEX MARRIAGE

Unless proponents of same-sex marriage become better prepared in promoting the benefits of same-sex marriage and become more assimilation in their rhetoric, they will continue to be marginalized. The passage of anti-same-sex marriage amendments in eleven states should serve as a warning.

My argument is premised on the fact that proponents of same-sex marriage desire to win this right through the political process, and that this right is a winnable one. It is worthwhile to mention these two intuitive premises here because many proponents of same-sex marriage and gay right activists and scholars do not help their cause by their (1) anti-assimilation stance on same-sex marriage; (2) anti-assimilation stance on values that are at the core of society and civic participation; and (3) ignorance, misunderstanding, or underestimation of the conservative values that were used to argue against same-sex marriage.

Gay scholars may scoff at my proposal for a more “assimilationist”

89. James Sterngold, *Bush Reaches Out Moral Issues: Dems Caught By Surprise*, at A1, Nov. 4, 2004, SAN FRANCISCO CHRONICLES.

stance. They will wonder why a group that has been historically mistreated and discriminated against would want to take a “compromised” or “assimilationist” stance on an issue that they care deeply about. My answer is threefold. First, if the politics of same-sex marriage is an arena in which proponents of same-sex marriage want to engage in, they have to “play by the rules” to win. It is evident that more perceived lawlessness at city halls around the country would do more harm than good for the cause.

Second, regardless of what the more radical gay right activists and scholars say, “traditional” marriage values and ideals still hold a prominent place in American life, even when heterosexual couples have such trouble living up to these values, as evidenced, for example, by the nation’s high divorce rate.⁹⁰ Championing “traditional” values has proven exceptionally advantageous. Radical gay rights activists and scholars’ criticisms of traditional marriage and family values only reinforce the perception that homosexuals are only interested in deconstructing more traditional notions of marriage and family. This idea, combined with the perception that proponents of same-sex marriage are subverting the law of marriage, is devastating to the advocacy of same-sex marriage rights.

Third, proponents of same-sex marriage should reframe and communicate the same-sex marriage agenda in terms used by the conservatives, because “value discussions” need not be monopolized by the political right. The equal protection theory is one such discussion that proponents of same-sex marriage could use to appeal to the public (even though many gay activists and scholars oppose it). There is no reason for proponents of same-sex marriage not to talk about family values, monogamy, commitment, and other values-driven “buzz” words. It is puzzling that proponents of same-sex marriage are reluctant to speak about same-sex marriage in those terms.

Again, radical gay rights activists and scholars would scoff at this notion as “assimilationist” and accommodating to the corrupting and oppressive interest of the state. The most conservative (or “essentialist”) faction probably never entertained such ideas. However, I do not believe that many Americans can be influenced by messages emanating from both sides. While they may be discomforted by “lawlessness” in city halls or the rulings of “activist” judges, at the same time, they are not hostile to homosexuals.

As mentioned above, the values discussion should not be monopolized by conservatives, because there is no reason why gay

90. For reference to divorce statistics, see <http://www.divorcereform.org/rates.html>.

couples cannot talk about the values by which they live. Proponents of same-sex marriage, especially assimilationists, should resist the temptation to allow their more radical peers to deconstruct marriage. Assimilationists ought to reject the deconstructionist views outright, because these views cannot help the cause.

Proponents of same-sex marriage should practice a more unified and assimilationist politics of marriage and quiet the dissident voices. This will never happen completely, but assimilationists should focus on talking more about these values.

Dwight J. Penas' article, "Bless the Tie that Binds: A Puritan-Covenant Case for Same-Sex Marriage," recognizes the importance of giving the support for same-sex marriage this kind of theological content and value.⁹¹ The theological content complements the legal arguments for same-sex marriage. As conservatives have so aptly demonstrated, talk about morals and values is more effective than academic and legal arguments. More importantly, this theological content and value directly rebut both conservatives' and radical stereotypes of homosexuals.

As the politics of marriage continues to play itself out, I believe proponents of same-sex marriage need to employ this kind of theoretical content for same-sex marriage not only to complement their legal and social policy arguments, but also to place it at the core of their advocacy. This theoretical content is something that most voters can accept.

A. *Marriage as Covenant*

Penas' Puritan-Covenant case for same-sex marriage is rooted in the understanding of Puritan ideology as a major influence on early American law, democracy, and society.⁹² Because Puritan theology has shaped church and evangelical organizations, it provides a moral and theological underpinning to same-sex marriage that modern conservatives may potentially accept.

At the heart of Puritan thought was the principle of covenant. "A covenant is a mutually beneficial relationship formed when two parties pledge absolute faithfulness to each other."⁹³ The Puritans "structured their entire theological system around the notions of a covenant between God and humanity and of human covenants that reflected the divine-

91. Dwight J. Penas, *Bless the Tie that Binds: A Puritan-Covenant Case for Same-Sex Marriage*, in *SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE*, 126 (Robert M. Baird & Stuart E. Rosenbaum eds., Prometheus Books 1997).

92. *Id.* at 146-48.

93. *Id.* at 149.

human covenant.”⁹⁴ For the Puritans, history was a series of covenants. First, God established a covenant with humanity by promising to lead and care for it, and in exchange, humanity pledged faithfulness to God. Even when humanity fell short, God never broke his covenant. In effect, God has continued to “work” by loving and leading humanity, while humanity (or in this case, the Puritans) has devoted its service and dedication to the Lord in gratitude and faithfulness.⁹⁵

In applying this covenant relationship to society, Puritans maintained that human life “is essentially communal” and “defined in terms of relationships with others” and that covenant relationships between humans should reflect and parallel the covenant between God and the human race.⁹⁶ For example, neighbors “worked” and “served” each other out of their devotion to God and to one another.

Puritans understood marriage as a partnership in which spouses “undertook serious obligations” to each other.⁹⁷ Puritans downplayed the view of marriage as an expression of the requirements of procreation, and emphasized mutual help, affection, and respect in marriage.⁹⁸ The marriage covenant was only one of many social covenants that would serve the “iconic function” which exemplified “in microcosm the love and cooperation, and care that the city, state, and nation were to practice . . . ”⁹⁹ For example, those who held political power had a covenantal obligation to be responsible for the people that they ruled. The ruled had a covenantal obligation to obey their rulers. Those who were privileged or affluent had a covenantal obligation to provide for those who were not. Because the Puritans were highly conscious of their covenantal duties to each other, to society, and to the state, they had a profound respect for rules and social convention. All aspects of life were and had to be integrated under the rule of God and the “triparty agreement[s among] God, the civil ruler, and the people.”¹⁰⁰

Covenant theory affirms the ideal that covenanting with one another is of the essence of being human, and that this ideal should be upheld by the state.¹⁰¹ Because of theological affirmation to covenantal relationships between individual to individual and individual to the state, Penas argues that a covenant “marriage” relationship for a gay couple would be supported by the Puritan doctrine of covenant theology. First,

94. *Id.*

95. *See id.* at 149-50.

96. *Id.*

97. *Id.* at 150.

98. *See id.*

99. *Id.*

100. *Id.*

101. *Id.* at 154.

because the covenant relationship is the basic expression of being human and being responsible, by definition it contributes to the common good; to outlaw it would be detrimental to society.¹⁰² He also argues that covenant theory “transcends” the privacy theory behind the same-sex marriage debate by recognizing the importance of each unit of committed relationship in society.¹⁰³ And finally, he argues that the covenant theory carries an assimilationist component by stating that, because human beings are all equal before God, covenant equity requires equality of participation in society. Such participation in society is “an end in itself,” wherein equal participation of all in the end benefits the society. Such participation brings about additional benefits in the Puritan sense, because participation in the covenantal relationships preserves order and confers equality upon all members of a society.¹⁰⁴ Covenant equality also means that people share equally in the benefits of the whole society, for “[i]t is incumbent on a legal system to remove any and all barriers to full and equal participation by all people.”¹⁰⁵ The goal is to have mutual commitment. Same-sex marriages—if covenantal—ought to be recognized by society as essential to the covenant principle.

Many people could be skeptical of applying this theological agenda to the politics of the present day, and especially to the advocacy of same-sex marriage. The more radical theorists could be critical and argue that this kind of equal participation theory is illusory and unrealistic because of the oppressive nature of the system and the predominant interest of the state in discriminating against the minority.

The counterargument would be that this kind of theological and philosophical argument is really not so farfetched. The theory closely resembles the theory of equal protection. Furthermore, Penas suggests that this theory complements the political and legal strategies for same-sex marriage by providing not only a theological or religious basis for same-sex marriage, but also a historical argument, since Puritan philosophy has intellectually and politically shaped modern American institutions.¹⁰⁶

B. Puritanism and Fundamentalism

To see how Penas’ theory can be politically effective and successful in today’s cultural and political debates regarding same-sex marriage, it

102. *See id.* at 155-56.

103. *See id.* at 155.

104. *See id.* at 156-58.

105. *Id.* at 156.

106. *See id.* at 146.

is helpful to briefly discuss the nature of the religious fundamentalism in America today; the political manifestations of this kind of religious conservatism has already had great impacts on the same-sex marriage debate, as discussed in previous sections of this paper.

Religious fundamentalism, i.e., the current evangelical movement, in America shares many characteristics with the Puritanism that Penas discusses. Both share the Judeo-Christian religious tradition and the same types of family-centered conservative values, although the fundamentalists do not share the Puritans' vision of the state. Additionally, both value the concept of law and order, though not for the same reason. It is unnecessary to discuss the theological content of American religious fundamentalism here, because it is more important to see the political manifestations of this kind of conservatism. As previously stated, the religious right identifies itself strongly with the nuclear family.¹⁰⁷ Many religious conservatives share Bush's vision of "compassionate conservatism."¹⁰⁸ In this vision, the state acts as the guardian of these families and their most cherished values, and reaches out to those who are less fortunate. This vision does not necessarily translate into policy, although it has great political appeal.

Therefore, proponents of same-sex marriage should regard Penas' theory, at the very least, as a bridge to more socially conservative voters. Penas' theory should have great appeal to gay rights activists if they believe that it is imperative to communicate to the public that same-sex marriage poses no threat whatsoever to the social fabric. Penas' theory could prove that the goal of same-sex marriage is for the good of society and for building communities in which traditional values can thrive. Unless same-sex marriage advocates communicate its substantive merits and value, it will be impossible to shatter the negative and unfair stereotypes of gay couples, because many voters do not hear about or understand gay couples.

The average voters see only two sides of the debate. For example, while the gay rights activists paraded in San Francisco during Mayor Newsome's "legalization" of same-sex marriage in the city, an average television viewer may have also seen protesters carrying signs condemning homosexuality, vigorously protesting against the city issuing marriage license to same-sex couples.¹⁰⁹ These messages leave

107. For example, the Family Research Council and Focus on the Family are powerful Christian fundamentalist political organizations that have regularly championed traditional family values and have been vocal against same-sex marriage. See www.frc.org and www.family.org.

108. See Robert Westbrook, *Compassionate Conservatism: What It Is, What It Does, and How It Can Transform America*, CHRISTIAN CENTURY, Sept. 13, 2000, http://www.findarticles.com/p/articles/mi_m1058/is_25_117/ai_65702750.

109. See Broadcast Transcripts, *Protest over gay marriage in San Francisco*, CNN.COM,

little room for meaningful discussion. As a result, they are likely to oppose same-sex marriage. Penas' message interjects substance, merits, and values into the conceptual framework of arguments for same-sex marriage.

My point is that support for same-sex marriage needs to have a more substantive, value-based identity. As Penas has implied, there is nothing actually wrong with the core values of conservative fundamentalism and Puritanism. Substantively, these values do not necessarily contradict progressive causes (although the likes of the radical feminists would disagree). There is no reason that a gay couple cannot say with confidence that they have the same family and community values that other Americans do. If they have spoken, their voices have not been heard by voters or were muted by other distracting elements.

VII. CONCLUSION

I have pointed out the flaws in the reasoning and strategies of proponents of same-sex marriage. First, proponents of same-sex marriage have largely succeeded in bringing same-sex marriage into the headlines and initiating intense discussions. However, proponents of same-sex marriage have failed to convey the merit of same-sex marriage to the public. Underlining this failure is gay rights activists' inability to educate the public and present the issue as a win-win situation. They have also underestimated the power and intelligence of the voters.

Second, when gay rights activists' presentation of the issue is less about equal protection and equal participation but more about "their" fundamental rights and "their" notions of relationships and family, the public is unlikely to understand the merits of same-sex marriage and its benefits to society. In the politics of marriage and the majoritarian political process, average voters then would most likely follow the conservatives' platform, which demands a return to fundamental values.

Furthermore, in presenting the legal and theoretical merits of same-sex marriage, gay rights activists cannot agree on the substance and the meaning of marriage and its goal. Beneath all of the political failures of same-sex marriage advocacy is a more important question of what same-sex marriage should look like. But without some kind of consensus, the politics of same-sex marriage is muddled and ineffective.

Finally, Penas' covenant relationship model—which closely resembles the "ideal" model of heterosexual couples—is a viable model for same-sex marriage advocates because it is not only politically more

viable, but because it presents a complete picture of how gay couples function and coexist for the good of the state, the community, and themselves. This is not a reactionary point of view; it is one of many potential models of same-sex marriage. Such a model is important, because same-sex marriage is a right that is to be won. But to achieve this end, one needs to understand what one is fighting for. Having only an incomplete picture means one does not present a credible or convincing picture to the public.

Critics can reject this model and point to the self-interest of the state and the discriminatory nature of society as warnings against adopting this point of view. However, if gay rights activists are already fighting for the right to marry, then the public has the right to know what same-sex marriage entails. Penas' theory is only a start. It is up to those who engage in the politics of marriage to decide what they want. It is critical that the proponents of same-sex marriage make up their minds about same-sex marriage before the rest of the country does it for them.