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# The Search for Moral Neutrality in Same-Sex Marriage Decisions

Adam J. MacLeod\*

## I. INTRODUCTION

On May 15, 2008, the California Supreme Court in *In re Marriage Cases*<sup>1</sup> struck down California's conjugal marriage and domestic partnership statutory scheme. On October 10, 2008 the high court of Connecticut struck down that state's conjugal marriage and civil union scheme.<sup>2</sup> California and Connecticut thus joined Massachusetts and became the second and third states, respectively, to create the institution of same-sex marriage and to remove marriage between one man and one woman (conjugal marriage) from its privileged place in state law. It is instructive to examine a central premise underlying this project to redefine "marriage," namely that the issue can be resolved on morally neutral grounds of equality or autonomy. Rejections by high courts in Massachusetts, California, and Connecticut of civil unions and domestic partnerships, which provide to same-sex couples all or substantially all of the rights and responsibilities of marriage, call this premise into question. And the search for a morally neutral foundation for same-sex marriage has turned out to be much more difficult than many scholars and jurists anticipated.

Indeed, all three state high courts, which have created same-sex marriage, have done so by dismissing the states' considered conception of the meaning and purposes of marriage and by reading into the institution their own purposes and fundamental requirements. Despite their assertions that they were maintaining neutrality as between competing moral conceptions of marriage, all three courts committed themselves to morally partisan conceptions of marriage and on those foundations held exclusively conjugal marriage unconstitutional. The Massachusetts Supreme Judicial Court ("SJC") declared without

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\* Associate Professor, Faulkner University, Jones School of Law. I am indebted to my gifted and gracious colleague, Andy Olree, for his insightful criticisms of and comments on an earlier draft. Many thanks to the editors of the Brigham Young University Journal of Public Law for their able and timely editorial work. All the errors are mine.

1. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

2. *Kerrigan v. Comm'r Pub. Health*, —A.2d—, 289 Conn. 135 (Conn. 2008).

explanation that the essence of marriage is not conjugality but rather stable relationships. The California Supreme Court discerned a different essence of marriage: individual self-fulfillment. The Connecticut high court assumed without explanation that the essence of marriage is the individual interest in having a family. On the grounds of their various morally partisan conceptions of marriage, all three courts concluded that same-sex intimacy is the equivalent of conjugal marriage, an historically privileged institution, and is superior in its meaning and purposes to other, common relational arrangements, such as friendship, political affiliation, polyandry, and polygamy.

For four years prior to the California Supreme Court's decision, the *Goodridge* decision<sup>3</sup> of the Massachusetts SJC was the only judicial rejection in the United States of exclusively conjugal marriage, the union of one man and one woman in monogamous commitment. Nearly every scholar who has commented on the *Goodridge* decision has taken as true the proposition that the SJC's reasoning follows from some morally neutral principle, such as equality or tolerance.<sup>4</sup> However, the scholarship has ignored a second marriage decision of the SJC, *Opinions of the Justices to the Senate*,<sup>5</sup> which the SJC decided only weeks after it announced its holding in *Goodridge*. The legislative civil union proposal that the SJC rejected in *Opinions of the Justices* would have treated same-sex couples and conjugal, monogamous couples the same in every regard except in terms of moral approbation.

In *Goodridge* and *Opinions of the Justices*, the SJC introduced a new conception of marriage as a civil institution constructed around stable, intimate relationships. It required the Commonwealth to lend its approbation to relationships defined by sexual arrangements other than conjugal monogamy. In this sense the SJC's same-sex marriage decisions are perfectionist: they are legal pronouncements founded upon morally partisan presuppositions intended to advance those presuppositions.<sup>6</sup>

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

4. E.g., Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005); Lawrence Friedman, *The (Relative) Passivity of Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 1 (2004); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431 (2005).

5. *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

6. This article shall use the terms "perfectionist," "perfectionism," and "non-perfectionist" in the sense that they are employed in moral and legal philosophy. Joseph Raz's definition is appropriate: "'Perfectionism' is merely a term used to indicate that there is no fundamental principled inhibition on governments acting for any valid moral reason, though there are many strategic inhibitions on doing so in certain classes of cases." Joseph Raz, *Facing Up: A Reply*, 62 S. CAL. L. REV. 1153, 1230 (1989). For "strategic inhibitions on" one might substitute, prudential considerations against. Raz contrasts perfectionist liberalism with "liberal doctrines of moral neutrality." Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 782 (1989).

Contrary to the SJC's assertions, the decisions do not follow from neutral principles to which the aggregate of reasonable persons, with a plurality of moral convictions, can assent.<sup>7</sup>

California's adventure in marriage review has fallen prey to the same moral partisanship. Prior to *In re Marriage Cases*, California had both a conjugal marriage statute and a domestic partnership law, which granted to same-sex couples substantially all of the rights and obligations attendant to marriage, much as the legislative proposal in Massachusetts would have done.<sup>8</sup> The California Supreme Court struck these laws down, committing itself to the morally partisan proposition that gender is irrelevant to the marriage question.<sup>9</sup> The court denigrated those "core elements" of marriage, which the state had always considered central to the meaning and purposes of the institution.<sup>10</sup> It committed itself to the moral claim that marriage is essentially a vehicle for advancing individual fulfillment.<sup>11</sup> In this manner the court injected into marriage its own moral conception of which aspects of marriage constitute "core elements" and which ones can be disregarded.<sup>12</sup> And on the basis of this moral conception, the court concluded that conjugal marriage does not deserve a place of special approbation in law.

Most recently, the Connecticut Supreme Court held that permitting same-sex couples to participate in civil unions, which are afforded all the rights and privileges of marriage, but not permitting them to marry, offends the equal protection of the law.<sup>13</sup> Like the Massachusetts and

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A more particular definition of "perfectionism" is that employed by Robert George. "Perfectionism holds that one cannot hope to ascertain what is right (and wrong) for governments to do—and thus what rights, as a matter of political morality, human beings have—without considering what is for (and against) human well-being (including moral well-being) and fulfillment." ROBERT GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 161 (Oxford 1993).

I do not use the terms to refer to a mode or modes of constitutional interpretation. Thus, I do not intend to enter the debate between Cass Sunstein and his critics over the relative merits of "minimalism" and "constitutional perfectionism."

7. Though defense of these decisions fails on morally neutral grounds, for the reasons set forth below, one can attack (and many have attacked) the decisions on morally neutral grounds. One morally neutral argument against the decisions is that they constitute judicial overreach. The argument is that the Massachusetts Constitution is simply silent on the question how marriage ought to be defined. On this view, even if the SJC's moral conception of human personhood and human sexuality is correct, the SJC ought not to have incorporated its conception into law by judicial fiat.

Another morally neutral argument is that the decisions undercut respect for the rule of law. For a version of this argument see William C. Duncan, *Goodridge and the Rule of Law Same-Sex Marriage in Massachusetts: The Meaning and Implications of Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 42 (2004).

8. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 684–85 (Cal. Ct. App. 2006).

9. See *infra* Part IV.C.2.

10. See *infra* Part IV.C.1.

11. *Id.*

12. *Id.*

13. *Kerrigan v. Comm'r Pub. Health*, —A.2d—, 289 Conn. 135 (Conn. 2008).

California high courts, the Connecticut court reached this conclusion by tossing out the purposes for which the State of Connecticut had always maintained a special place in its laws for conjugal marriage. It identified its own purposes for the institution and then determined that same-sex couples are similarly situated to conjugal couples for those purposes.<sup>14</sup>

Several years before state courts entered the fray, scholars on both sides argued that moral neutrality is impossible on the question what characteristics define “civil marriage.” Dispute over the predicates of marriage—including conjugality (spouses are of opposite sexes), monogamy (spouses are two, no more and no less), non-consanguinity (spouses are not related to each other), and age—is, according to Robert George, who defends conjugal marriage,<sup>15</sup> and Carlos Ball, who favors same-sex marriage,<sup>16</sup> an inherently moral dispute. Far from disproving this claim of George and Ball, state courts have thus far failed to justify removal of the conjugality requirement on morally neutral grounds. This failure suggests a reason why the debate over the state same-sex marriage decisions has stalled. Treating the marriage decisions as exercises in moral neutrality renders productive discussion of the merits of the decisions impossible for the simple reason that the decisions are not, in fact, morally neutral.

Though judicial decisions creating same-sex marriage have failed to produce morally neutral justifications, there exists a morally neutral rational basis for leaving conjugal marriage laws in place. Courts remain morally neutral when they acknowledge the rationality of legislatures’ distinctions between self-evidently distinct relational arrangements—conjugal monogamy, polygamy, same-sex intimacy, non-sexual friendship—where legislatures have created distinct legal categories for various types of relationships.

Part II of this article contrasts the non-perfectionist rhetoric of the SJC’s *Goodridge* decision with the SJC’s perfectionist ambitions, made manifest in the subsequent *Opinions of the Justices*, and explains why the two decisions together cannot be understood as morally neutral rulings. Part III explains why morally neutral principles of equality and autonomy do not support the SJC’s same-sex marriage decisions. Part IV considers the judicial re-definition of marriage in California. It begins with the decision of the California Court of Appeal in *In re Marriage*

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14. *Id.* at 14–15.

15. See Robert P. George, *Marriage and the Illusion of Moral Neutrality*, in TOWARD THE RENEWAL OF CIVILIZATION 114, 124–27 (T. William Boxx & Gary M. Quinlivan eds., Eerdmans Pub. Co. 1998).

16. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871 (1997).

*Cases* and that court's attempt to resolve the marriage issue in a morally neutral manner. It then considers the perfectionist arguments made by same-sex marriage advocates to the California Supreme Court, and concludes with an examination of the California Supreme Court's moral perfectionism. Part V examines the similar perfectionist project that the Supreme Court of Connecticut undertook. Part VI examines a perfectionist account of same-sex marriage that, while it fails to persuade this author, renders the Massachusetts, California, and Connecticut same-sex marriage decisions comprehensible. Part VII offers both morally partisan and morally neutral rational bases for upholding states' conjugal marriage laws. Part VIII briefly summarizes the findings of this piece.

## II. THE MASSACHUSETTS DECISIONS

Before *Goodridge*, Massachusetts marriage law required as a prerequisite to acquisition of a marriage license that the applicants be members of opposite sexes. Furthermore, the law provided that any marriage in which one or both partners were incapable of conjugal union was voidable.<sup>17</sup> In these and other ways, Massachusetts law approved of committed, conjugal monogamy and distinguished it from other sexual relationships. It accorded a special status to, and provided legal and structural support for, the two-in-one-flesh communion instantiated in a monogamous, opposite-sex marriage. In *Goodridge* the SJC eradicated that special status by a one-vote margin.

Most commentators have read the *Goodridge* decision as an application of the non-perfectionist principle that moral considerations should not resolve the question how "marriage" should be defined.<sup>18</sup> The SJC itself fostered this impression in *Goodridge*, taking pains to assert that moral considerations and convictions did not resolve the question before it.

Commentators have paid insufficient attention to the holding of the SJC's *Opinions of the Justices*,<sup>19</sup> which followed the *Goodridge* decision. In that decision, a majority of the SJC rejected a proposal by the Massachusetts General Court, the state legislature, to create civil unions in response to the concerns the SJC had expressed in *Goodridge*. Although the proposal would have resolved all of the Court's express,

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17. *Martin v. Otis*, 124 N.E. 294, 296 (Mass. 1919); *Smith v. Smith*, 50 N.E. 933, 935 (Mass. 1898). Neither the SJC nor the Massachusetts legislature has addressed the effect of *Goodridge* upon this provision.

18. See authors cited *supra* note 4.

19. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

ostensibly morally neutral concerns,<sup>20</sup> it was nevertheless an insufficient remedy for the ostensible injustice the Court identified in *Goodridge*.<sup>21</sup> When read together, the majority opinion in *Goodridge* and the subsequent *Opinions of the Justices* make clear that the SJC's marriage doctrine is not morally neutral. Indeed, the decisions together are unreasonable unless understood as judicial exercises in what some have derided in other contexts as legislation of morality.

#### *A. Non-perfectionist Rhetoric and Perfectionist Principle*

In *Goodridge*, the SJC majority began its analysis by declaiming its ostensible moral neutrality. It assured the reader of its mindfulness “that our decision marks a change in the history of our marriage law.”<sup>22</sup> It recognized the “deep-seated religious, moral, and ethical convictions” that underlie arguments on both sides of the question how “marriage” ought to be defined and the question whether homosexual conduct is moral or rather unworthy of persons who engage in it.<sup>23</sup> It nevertheless insisted, “Neither view answers the question before us. . . . ‘Our [sic] obligation is to define the liberty of all, not to mandate our [sic] own moral code.’”<sup>24</sup>

Though nothing prohibited the SJC from examining in *Goodridge* the moral reasons *in favor of* conjugal marriage, the majority did not consider any. The SJC, employing the rational-basis test, cited the extant standard that legislative enactments must “bear[ ] a real and substantial relation to the public health, safety, *morals*, or some other phase of the general welfare.”<sup>25</sup> The absence of moral considerations in favor of

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20. This is not to suggest that had the SJC accepted the General Court's civil union proposal, its *Goodridge* decision would be capable of a morally neutral reading, only that the holding of *Opinions of the Justices* precluded any reasonable morally neutral interpretation of *Goodridge*.

21. This lesson has direct application in California because the California “[l]egislature has passed landmark legislation providing substantially all the rights, responsibilities, benefits and protections of marriage to same-sex couples who register as domestic partners.” *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 684–85 (Cal. Ct. App. 2006) (citing CAL. FAM. CODE §§ 297–299.6 (West 2004)). Section 297.5(a) of the California Family Code provides:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

22. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

23. *Id.*

24. *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 559 (2003)).

25. *Id.* at 960 (quoting *Coffee-Rich, Inc. v. Comm'r Pub. Health*, 204 N.E.2d 281, 287 (Mass. 1965)) (emphasis added).

conjugal marriage in the majority's reasoning resulted both from the Commonwealth's advocates failing to bring them up, and from the majority's natural inclination toward one-column bookkeeping in terms of moral considerations. Notably, the rational bases that the Commonwealth proffered in support of conjugal marriage did not include any purely moral considerations. Instead, the Commonwealth identified three prudential considerations that support the traditional definition: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."<sup>26</sup> The Commonwealth made no attempt to tie any of these prudential concerns to the moral value of conjugal marriage.<sup>27</sup>

The majority, in passing, mentioned the arguments of some *amici curia* that conjugal marriage "reflects community consensus that homosexual conduct is immoral."<sup>28</sup> However, it did not address this argument, instead reciting provisions of Massachusetts law that prohibit discrimination against homosexuals.<sup>29</sup> In short, the court did not consider, much less respond to, any perfectionist arguments in favor of conjugal marriage.

While the *Goodridge* majority ignored moral arguments for conjugal marriage, it employed moral arguments in favor of same-sex marriage. Despite the majority's disclaimers, much language in the decision conveys the impression that, by striking conjugal marriage, the majority understood itself to be engaged upon a project of moral approbation for homosexual conduct and identity. The *Goodridge* majority objected to exclusively conjugal marriage as "an official stamp of approval on the" view that same-sex relationships "are not worthy of respect" because they are "unstable."<sup>30</sup> It saw itself as vindicating the "dignity . . . of all individuals."<sup>31</sup> It saw the decision to marry one's choice of a sexual

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26. *Id.* at 961.

27. Apparently, Connecticut's advocacy before its high court was even worse. There, the state expressly *disavowed* that regulating or encouraging procreation constituted a rational basis for conjugal marriage. *Kerrigan v. Comm'r Pub. Health*, —A.2d—, 289 Conn. 135, 163 n.19, 254 (Conn. 2008). The state argued (weakly) that its interest in preserving exclusively conjugal marriage was its interest in preserving the traditional definition. *Id.* at 252.

28. *Goodridge*, 798 N.E.2d at 967.

29. *Id.* If the SJC took the amici to argue that Massachusetts ought to discriminate against homosexuals, then perhaps it *understood itself* to be responding to their moral argument. However, the moral arguments of the amici in *Goodridge* did not entail, much less state expressly, that discrimination against homosexuals is just, right, or morally permissible.

30. *Id.* at 962.

31. *Id.* at 948.

partner as a decision that shape one's identity.<sup>32</sup> Each of the plaintiffs in *Goodridge* desired not merely "to secure the legal protections and benefits afforded to married couples and their children," but also "to marry his or her partner in order to affirm publicly their commitment to each other."<sup>33</sup>

This language stands in contrast to the majority's insistence that it was not choosing sides on the question whether privileging exclusively conjugal marriage serves moral ends. The majority here portrayed the issue as one of public affirmation of and respect for an individual's choice to marry a member of the same sex. Insistence upon this state-mandated affirmation and respect makes sense only if the majority was committed to the prior moral claims that marriage is primarily a vehicle of affirmation of autonomous choice, no matter what that choice may be, and that the conjugality element of marriage is not necessary to advance the purposes of the institution.

It is instructive to note that the seven couples who sued the Commonwealth in *Goodridge* sought approbation not for their friendship or love, but more particularly for their sexual intimacy with each other. The law and the culture in Massachusetts already affirmed non-sexual, same-sex commitments in many other contexts, such as business partnerships, fraternity pledges, and heroic acts on behalf of fellow soldiers in the field of battle. That affirmation was insufficient for the *Goodridge* plaintiffs. They sought approbation of a different kind. They requested that the law of Massachusetts be re-written to express equal affirmation of same-sex intimacy and opposite-sex, conjugal monogamy. The SJC granted this request a few months after *Goodridge* in *Opinions of the Justices to the Senate*.

It is also instructive to note the manner in which the SJC loaded the dice, by tossing out the Commonwealth's understanding of the meaning and purposes of marriage and substituting its own fundamental element into the equation. The SJC dismissed, in three short paragraphs, the Commonwealth's interest in facilitating procreation. This prudential consideration could not possibly justify conjugal marriage, the court concluded, because some conjugal couples marry without procreating, while some procreate through non-coital means.<sup>34</sup> The majority acknowledged that procreation is an "unbridgeable difference between same-sex and opposite-sex couples."<sup>35</sup> However, the majority apparently never considered that the Commonwealth's prudential interest in

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32. *Id.*

33. *Id.* at 949.

34. *Id.* at 961–62.

35. *Id.* at 962.

encouraging procreation and child-rearing might reflect a more foundational moral interest in encouraging a particular type of relationship, one of the benefits of which is the propagation of the human race through procreation. The moral claim that conjugal marriage is a basic human good, and therefore a rational object of choice with significant societal benefits (including procreation),<sup>36</sup> never appeared in the court's reasoning, not even long enough to be rejected.

Instead, the SJC read into the institution of marriage its own moral value: stability of relationship.<sup>37</sup> Marriage, the majority insisted, has as its central aim the promotion of "stable, exclusive relationships."<sup>38</sup> The Commonwealth was wrong, the majority thought, to imply that same-sex relationships are "inherently unstable."<sup>39</sup> This "destructive stereotype" attends the equally impermissible conclusion that same-sex relationships are "inferior" to conjugal marriages.<sup>40</sup> Why, in the SJC's view, are same-sex couples equally able to satisfy the foundational elements of marriage? They are capable of having stable relationships. Of course this is true as a factual matter. However, it resolves the question whether same-sex marriage is consistent with the meaning and purposes of marriage only if that meaning and those purposes boil down exclusively to relational stability. The court did not explain why this might be so. Thus stability became the *sine qua non* of marriage in Massachusetts, to the exclusion of all other moral considerations, without a hearing on other, competing moral claims.

Furthermore, the SJC's concern for relational stability extended only to intimate same-sex couples. The court did not explain its prior moral judgment that intimate, same-sex relationships are more deserving of the Commonwealth's protection against stability than polygamous, polyandrous, or other intimate groupings.

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36. This claim is examined in Section VII.A, *infra*.

37. The majority invoked relational stability as the central justification and purpose for marriage throughout its opinion. It asserted, "Civil marriage anchors an ordered society by encouraging stable relationships over transient ones." *Goodridge*, 798 N.E.2d at 954. Civil marriage reflected "the Legislature's deep commitment to fostering stable families." *Id.* at 969. Same-sex marriage would ensure a "stable family structure" for children of persons involved in same-sex relationships. *Id.* at 964. Ultimately, the majority insisted that the Commonwealth failed to identify a justification for conjugal marriage that was consistent with "promoting stable families." *Id.* at 968. Indeed, the majority found a way to make every other purpose for marriage subsidiary to relational stability.

38. *Id.* at 969.

39. *Id.* at 962.

40. *Id.*

*B. A Perfectionist Holding*

After the SJC's *Goodridge* decision, the Massachusetts legislature proposed creating a civil union institution endowed with all of the rights and privileges appurtenant to marriage. This proposal, if adopted, would have eradicated the ostensible harm that the SJC identified in *Goodridge*: that the conjugal marriage statute denied same-sex couples "access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations."<sup>41</sup> The proposal would have honored "the individual liberty and equality safeguards of the Massachusetts Constitution," as the SJC read those safeguards in *Goodridge*, which "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."<sup>42</sup>

In *Opinions of the Justices*, the SJC rejected the civil union proposal by a one-vote margin, explaining that conferring on same-sex couples the tangible rights and privileges of marriage was insufficient to satisfy its mandate in *Goodridge*.<sup>43</sup> *Opinions of the Justices* belies the SJC's ostensible concern, expressed in *Goodridge*, that conjugal marriage denies to same-sex couples the "[t]angible as well as intangible benefits [that] flow from marriage."<sup>44</sup> After the *Opinions of the Justices* the SJC can no longer consistently assert that the hardship that conjugal marriage works upon same-sex couples "for no rational reason"<sup>45</sup> is the ground for its creation of same-sex marriage. The proposal of the Massachusetts legislature to create civil unions would have eradicated the "omnipresent hardships"<sup>46</sup> by granting to "spouses in a civil union" "all the benefits, protections, rights and responsibilities afforded by the marriage laws."<sup>47</sup>

Indeed, the legislature's proposal would have alleviated each of the legally cognizable harms that the *Goodridge* plaintiffs had allegedly suffered as a result of the conjugal marriage statute.<sup>48</sup> Only the lack of affirmation by the Commonwealth would have persisted. The proposal would have addressed the shortcomings that the SJC saw in conjugal marriage, among them that non-married couples did not face the same

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41. *Id.* at 950.

42. *Id.* at 959.

43. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

44. *Goodridge*, 798 N.E.2d at 955.

45. *Id.* at 968.

46. *Opinions of the Justices*, 802 N.E.2d at 567.

47. *Id.* at 568 (quoting Senate No. 2175 section 2).

48. The harms identified in the complaint included difficulty gaining in-hospital access to a child born to one partner and inability to gain coverage under a partner's insurance policy. *Goodridge*, 798 N.E.2d at 950 n.6.

restrictions on disposition of assets<sup>49</sup> and did not enjoy the same property rights<sup>50</sup> as married couples. The SJC noted that same-sex couples could not file tax returns jointly, hold property as tenants by the entirety, inherit from each other, obtain spousal benefits and coverage by various insurance policies, be entitled to bereavement leave, be subject to universal divorce rules and obligations, or refrain from testifying against each other.<sup>51</sup>

Notwithstanding that the legislature's proposal would have attached all of those rights, privileges, and obligations to civil unions, the majority in *Opinions of the Justices* rejected the civil union proposal as impermissibly discriminatory and irrational; the proposal failed to survive the least rigorous scrutiny, thought the SJC.<sup>52</sup> The civil union proposal could not "possibly be held rationally to advance" any legitimate state interests.<sup>53</sup> Indeed, the majority opinion in the *Opinions of the Justices* stands for the proposition that no civil union statute that the Massachusetts legislature might concoct could conceivably be supported by a rational basis.<sup>54</sup>

Thus, interpreting its own *Goodridge* decision less than three months after it handed down *Goodridge*, the four-justice majority in *Opinions of the Justices* abandoned the posture of moral neutrality it had adopted in *Goodridge*. It turned instead to affirmation of the equal moral worth of conjugal and non-conjugal intimate relationships. Despite the veneer of morally neutral equality, this is a morally partisan project. It entails removal of the conjugality element from marriage, which necessarily rests upon a more foundational (morally partisan) rejection of those ends that are furthered by the participation of both a man and a woman. Without expressly acknowledging what it was doing, the SJC majority disregarded what the Commonwealth of Massachusetts had always taken as true, namely that the meaning and purposes of marriage (including reproduction, tradition, the bringing together of two persons who are inherently different) are advanced by insistence upon conjugality, the SJC majority substituted its own conception of the meaning and purpose of marriage and its own notion of what requirements would best serve that meaning and purpose.

After *Opinions of the Justices*, intimate same-sex relationships are accorded, if the members of the relationship so choose, a designation that

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49. *Id.* at 955 n.13.

50. *Id.* at 955.

51. *Id.* at 955–57.

52. *Opinions of the Justices*, 802 N.E.2d at 569.

53. *Id.* at 569.

54. *See id.* at 581 (Cordy, J., dissenting).

historically has distinguished conjugal monogamy from all other relationships, whether same-sex, opposite-sex, or asexual. Intimate same-sex relationships are thus distinguished both from non-intimate same-sex relationships—friendships and business, fraternal, and professional relationships between members of the same sex—and from non-intimate opposite-sex relationships. Conjugal marriage no longer occupies a unique class, but rather shares its place of honor with same-sex intimacy.

When taken together, the *Goodridge* decision and the *Opinions of the Justices* can reasonably be read only as a declaration that the law must not merely remove all legal impediments from same-sex couples desiring to live together as married couples, but must also lend its approbation to homosexual intimacy, teaching citizens that homosexual intimacy is a reason for action equally as reasonable or worthy as conjugal marital union. Grasping the implications of *Opinions of the Justices*, one scholar has construed the right of same-sex couples to marry in Massachusetts “not as a right to be free from state interference nor even a right to be interfered with by the State, but as a right to receive community endorsement.”<sup>55</sup> It is difficult to avoid the conclusion that the SJC intended as a consequence of its rulings that endorsement in public law

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55. Randy Lee, *Finding Marriage Amidst a Sea of Confusion: A Precursor to Considering the Public Purposes of Marriage*, 43 CATH. LAW. 339, 342 (2004). Lee believes that the community’s endorsement is not forthcoming, however. All the SJC has to offer same-sex couples is the words of community approval without the attendant reality that the community of Massachusetts citizens actually approves. *Id.* at 342–43. Lee finds the SJC’s mandate confusing because it constitutes an (in Lee’s estimation, ultimately unsuccessful) attempt to order “people in a free-thinking society . . . that they must think in a certain way.” *Id.* at 342. Lee thinks that the putative right to force citizens to accept the view that homosexuality is a morally worthy end is illusory. *Id.* at 343.

Contrary to Lee’s supposition, the SJC’s endorsement of a particular moral position does not entail ordering thoughts about morality. This endorsement interferes with freedom of thought no more than other endorsements of moral positions contained in the law. Laws prohibiting possession of narcotics, for example, do not interfere with the freedom of citizens to think and believe that possession and use of recreational drugs are not, in fact, immoral acts or that such acts ought not to be criminalized. By the same token, repeal of a criminal prohibition on adultery does not interfere with the thoughts and beliefs of those who consider adultery immoral, even those who believe adultery ought to be criminalized *qua* immoral act.

However, as Lee seems to discern, the SJC’s mandate in the *Opinions of the Justices* is not without consequence for public discourse on the question which sexual relationships are, and are not, moral. That positive law influences public conceptions of the right and the good is an uncontroversial observation. See Francis Cardinal George, *Law and Culture in the United States*, 48 AM. J. JURIS. 131, 135 (2003); Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003) [hereinafter *Law and Culture*]; Adam J. MacLeod, *The Law as Bard: Extolling a Culture’s Virtues, Exposing Its Vices, and Telling Its Story*, 1 J. JURIS. 13 (2008). As Francis George has observed, the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) recognized “that law, whether just or unjust, functions as a teacher.” *Law and Culture*, at 6. The law is capable of initiating a great cultural change and of reinforcing the status quo. *Id.* “The Justices [who decided *Brown*] knew that segregation, as a cultural practice, would not end so long as law testified, and thus taught, in season and out, that black and white are unequal.” *Id.* It is no accident that the SJC majority invoked *Brown* in *Opinions of the Justices*. *Opinions of the Justices*, 802 N.E.2d at 569 n.3.

of homosexual intimacy would lead people to reconsider (and reject) a view that the SJC deemed morally incorrect, namely that conjugal marital relationships are more worthy reasons for action than non-conjugal relationships.

Whether or not the SJC's decisions have caused citizens to reject special approbation for conjugal marriage, the SJC's purpose appears to have been, at least in part, to influence moral conceptions of the human person and marriage. The SJC majority reached farther than was necessary merely to remove social stigma from homosexual intimacy.<sup>56</sup> It went beyond de-stigmatization to an affirmative declamation of a special moral worth inherent in homosexual intimacy. Indeed, it placed homosexual intimacy on equal footing with conjugal monogamy, to which the Commonwealth had always accorded *special* status, apart from and superior to the status accorded to friendship, business relationships, political associations, polygamous groupings, and other relational arrangements. By its ruling in *Opinions of the Justices*, a majority of the SJC held that, like conjugal marriage, same-sex intimacy is deserving of a special status, higher honor than that accorded to other intimate arrangements (such as polyandry and polygamy), and non-sexual arrangements, such as friendships and political parties.

The majority either promoted same-sex intimacy to a special status superior to other, common relational arrangements or demoted marriage from its special status in order to bring it down to the level of other relationships. Either way, the court made a morally partisan judgment about the relative moral worth of same-sex intimacy vis-à-vis conjugal marriage, on one hand, and less privileged relationships, on the other. This judgment is predicated upon the presupposition that same-sex intimacy is more deserving of the special esteem accorded to marriage than are other common relational arrangements. This presupposition is

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56. This point did not escape the attention of Justice Sosman, who dissented. He stated,

Today's answer to the Senate also assumes that such "invidious discrimination" may be found in the mere name of the proposed licensing scheme. If the name chosen were itself insulting or derogatory in some fashion, I would agree, but the term "civil union" is a perfectly dignified title for this program—it connotes no disrespect. Rather, four Justices today assume that anything other than the precise word "marriage" is somehow demeaning. Not only do we have an insistence that the name be identical to the name used to describe the legal union of opposite-sex couples, but an apparent insistence that the name include the word "marriage." From the dogmatic tenor of today's answer to the Senate, it would appear that the court would find constitutional infirmity in legislation calling the legal union of same-sex couples by any name other than "marriage," even if that legislation simultaneously provided that the union of opposite-sex couples was to be called by the precise same name.

*Opinions of the Justices*, 802 N.E.2d at 579 n.5.

anything but obvious. Why is same-sex intimacy more deserving of the appellation “marriage” than friendship, business partnership, polygamy, polyandry, and political associations? The court did not address this question.

In the *Opinions of the Justices*, the majority continued to insist that its advice to the General Court was “not a matter of social policy but of constitutional interpretation.”<sup>57</sup> And it declaimed, as it had in *Goodridge*, that Massachusetts may not interfere with deep-seated religious, moral, and ethical convictions concerning the definition of “marriage” and the morality of homosexual conduct.<sup>58</sup> However, notably absent from the majority’s opinion in *Opinions of the Justices* is the disclaimer, so prominent in the majority opinion in *Goodridge*, that moral considerations were irrelevant to the question then before it. Instead, the majority denigrated the special status of conjugal marriage, which it thought a form of “invidious discrimination” “under the guise of protecting ‘traditional’ values.”<sup>59</sup> In other words, only those moral considerations that commend conjugal marriage were inappropriate grounds for the SJC’s decision; moral arguments in favor of same-sex marriage were not merely appropriate but dispositive.<sup>60</sup>

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57. *Opinions of the Justices*, 802 N.E.2d at 569.

58. *Id.* at 570.

59. *Id.*

60. One might argue that the SJC was being consistent to non-perfectionist principles because it was not requiring the Commonwealth to recognize marriage at all, in the first instance. The decision to recognize marriage at all was made by the legislature, the argument goes, and the SJC was merely correcting an inequality within this set framework.

Though it is difficult to avoid the conclusion that the SJC was advancing perfectionist goals, for the reasons stated above, the extent of the SJC’s perfectionist ambition is necessarily a matter of speculation. For example, we do not know whether the SJC would accept a proposal by the legislature to abolish marriage, civil unions, and all other similar institutions. The answer would seem to turn on how far the SJC is willing to go to ensure that respect for same-sex intimacy receives the law’s “stamp of approval.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). It is conceivable that the SJC might consider itself constrained by the limits of its judicial function from overruling a legislative decision to remove from the law approbation for *all* committed, sexual relationships vis-à-vis non-committed or non-sexual relationships. That constraint would operate as a limitation not upon the SJC’s perfectionist principles but rather upon its power to found legislation on those principles.

Furthermore, the legislative abolition of marriage-like institutions itself would be a perfectionist act. And the SJC might approve such a proposal consistent with its perfectionist ambition. Abolition of all marriage-like institutions would, in light of the extensive tradition in civil and common law of favoring conjugal marriage constitute a perfectionist coup in favor of non-conjugal unions. To remove the special approbation accorded to conjugal marriage throughout the history of our legal tradition is to make a statement about the value of non-conjugal unions, including same-sex unions, as against conjugal marriage. More generally, abolition would serve to teach through positive law the partisan assertion that all sexual unions are equally moral.

On the other hand, it is equally rational to infer that the SJC would reject this hypothetical legislation as inconsistent with its commitment to placing the law’s stamp of approval on same-sex monogamy vis-à-vis non-committed relationships, polygamy, etc. Such a holding

### III. MORALLY NEUTRAL PRINCIPLES CANNOT EXPLAIN THE SJC'S DECISIONS

The SJC appears to have predicated its decisions on two ostensibly neutral principles: equality and autonomy. However, if these principles are to remain morally neutral then neither principle justifies the holding in *Opinions of the Justices*. A neutral conception of equality or autonomy does not lead one to conclude that same-sex intimacy should be accorded a status superior to other common, relational arrangements, such as friendships or polygamous groupings. Only when infused with the prior, moral assumption that homosexual intimacy adds something to same-sex friendship equal in value to conjugal monogamy, do these principles render the SJC's decisions comprehensible.

Equality between homosexuals and heterosexuals does not entail the conclusion that the majority reached in the *Opinions of the Justices* because the civil union proposal would not have treated heterosexuals and homosexuals differently. Unless the majority employed a perfectionist approach to the issue how "marriage" should be defined, its reasoning on grounds of equality makes no sense.

The majority's invocation, in both *Goodridge* and *Opinions of the Justices*, of the Supreme Court's *Lawrence v. Texas*<sup>61</sup> decision, and its favorable quotation of the mystery-of-life passage from *Planned Parenthood v. Casey*,<sup>62</sup> might suggest that the SJC impliedly rested its perfectionist reasoning on some principle of personal autonomy. However, the SJC's rejection of the legislature's civil union proposal renders that reading implausible; the Massachusetts legislature's civil union proposal would have supplied the autonomy that *Lawrence* and *Casey* demanded.

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would be perfectly consistent with *Goodridge* and *Opinions of the Justices*. And that holding would be manifestly perfectionist.

It is clear that the California Supreme Court would not permit the State to abolish civil marriage. That court stated that the fundamental, individual right to marry a person of one's own choice includes a right to get married in the first instance, which the State may not abolish or abrogate. *In re Marriage Cases*, 183 P.3d at 61–62, 425–26. The right to marry "cannot properly be understood as simply the right to enter into such a relationship *if (but only if)* the Legislature chooses to establish and retain it. *Id.* at 62 (emphasis original). See also *Kerrigan v. Comm'r Pub. Health*, — A.2d—, 289 Conn. 135, 323–24 (Conn. 2008) (Zarella, J. dissenting).

Thanks to Andy Olree for calling my attention to this hypothetical.

61. 539 U.S. 558 (2003).

62. *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

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*A. The Court's Equality Analysis*

Dicta in the majority opinion in *Opinions of the Justices* suggest that the majority thought it was applying some principle of equality. That homosexuals and heterosexuals ought to be equal before the law is a morally neutral proposition, which meets with the agreement of advocates on both sides of the “marriage” question. For this reason, the SJC’s attempt in its *Goodridge* decision to contrast the moral views of those who believe “that homosexual conduct is immoral” and those who believe “that homosexual persons should be treated no differently than their heterosexual neighbors,”<sup>63</sup> not only rested upon a false distinction but also constituted unhelpful and unnecessary *ad hominem* against advocates of exclusively conjugal marriage. Indeed, there is no inconsistency in both advocating for exclusively conjugal marriage and affirming the equal worth and dignity of homosexual and heterosexual persons. Thus, if the holding of *Opinions of the Justices* follows from some principle of equal protection of the law, then the decision might be morally neutral in at least one sense.

The holding does not so follow. Though one may affirm equality without engaging in moral partisanship, the SJC majority’s reasoning cannot reasonably be read as application of an equality principle. The majority found inequality between the institution of marriage and the proposed civil union institution. It then conflated individual Massachusetts citizens with the respective institutions in which the majority assumed each individual would be most likely to participate. Stripped of this conflation, the majority’s reasoning falls apart. Equal protection of heterosexual and homosexual persons does not entail that conjugal and non-conjugal relationships must receive equal approbation in law.

*1. The majority's fatal conflation*

Though the SJC majority lamented the legislature’s proposal “to relegate same-sex couples to a different status” than that which conjugal couples enjoy,<sup>64</sup> it did not undertake to explain whether it thought the proposal subjected homosexuals, considered as individuals, to a different status than heterosexuals. Rather, it objected to the dissimilitude between the labels for marriage and civil unions.<sup>65</sup> This dissimilitude, it thought,

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63. *Goodridge*, 798 N.E.2d at 948.

64. *Opinions of the Justices*, 802 N.E.2d at 569.

65. *Id.* at 570.

relegated “same-sex, largely homosexual, couples to second-class status.”<sup>66</sup>

This last statement, which glossed over the real and important distinctions between same-sex couples, the institutions of civil unions and marriage, and individual homosexuals, is the only indication that the majority ever recognized, however briefly, its conflation of the institution of civil unions with the persons of individual homosexuals. To the extent that the majority intended to rest its reasoning on a principle of equality, this conflation is fatal to its reasoning. That civil unions would have been distinct from marriages would not have worked invidious discrimination, or *any* type of discrimination, based on sexual orientation; the Massachusetts legislature distinguished not between persons but between institutions. Under the legislature’s proposal, a heterosexual person could have entered into either a civil union (as the majority implicitly acknowledged in *Opinions of the Justices*) or a marriage; a homosexual person could enter into either a marriage with a person of the opposite sex (as he or she could before *Goodridge*) or a civil union with a person of the same or opposite sex.

An analogy here might prove useful. The state does not discriminate against non-religious persons (conceding, for the moment, that such a creature exists) by recognizing in law a distinction between churches, synagogues, and mosques, on the one hand, and Kiwanis and Rotary clubs on the other. This is true even though religious institutions have historically occupied a position of special honor in American law and culture.<sup>67</sup> For the same reasons, states do not violate a neutral principle of equality by distinguishing between conjugal marriage and other relational arrangements.

The SJC majority had expressly acknowledged this distinction between individuals and institutions in its *Goodridge* decision. In redefining “marriage” it chose to employ the terms “same sex” and “opposite sex,” rather than “homosexual” and “heterosexual,” because “[n]othing in our marriage law [prior to the *Goodridge* decision] precludes people who identify themselves (or who are identified by

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66. *Id.*

67. An additional analogy may be employed by substituting “Democrat” for “heterosexual,” “Republican” for “homosexual,” “non-profit” for “marriage,” and “corporation” for “civil union.” It is commonly believed that Democrats are more inclined toward non-profit work and Republicans are more inclined toward for-profit work. However, by distinguishing between non-profit, eleemosynary institutions and for-profit, wealth-creating institutions, states do not discriminate against Republicans. This is true even if the state grants special privileges and rights, such as tax exemptions, to non-profit institutions. And it is true even though, in many circles, non-profit work is considered more virtuous and self-sacrificial and a higher calling than commercial labor. It would remain true if the state gave for-profit corporations the same rights and privileges as non-profit institutions.

others) as gay, lesbian, or bisexual from marrying persons of the opposite sex.”<sup>68</sup> For this reason, the question that the SJC answered in *Goodridge* was not, as many have mistakenly supposed, whether homosexuals are entitled to marry. As the SJC recognized in *Goodridge*, marriage was available to both heterosexuals and homosexuals on equal terms.<sup>69</sup>

For these reasons, sexual orientation is simply irrelevant to the question whether one satisfies the qualifications for conjugal marriage. Of course, special approbation for conjugal marriage will adversely affect homosexuals by impeding their preferences; a homosexual who chooses to enter into a relationship with a member of the same sex cannot in a conjugal marriage state use the word “spouse” to describe his or her chosen partner. However, the frustration of certain preferences does not amount to a legally cognizable inequality, even where the contrasted preferences are equally felt and the frustration of preferences is unequally distributed. The disparate impact of conjugal marriage laws on homosexuals does not create a classification based on sexual orientation because equal protection is implicated only when a state “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>70</sup>

Like homosexuals, polygamists also would prefer not to be confined to a choice between conjugal marriage and not marrying, but the law does not discriminate against them by presenting to them only those options. In a more trivial case, someone living in Oklahoma might prefer not to be confined to a choice on Saturday between watching Oklahoma football and Oklahoma State football on television. They might prefer to watch Stanford. The frustration of that preference, though it causes a disproportionately adverse effect upon the Stanford fan, does not mean that the television company is discriminating against that person based on where they attended school.

Once one has identified the conflation in which the SJC indulged, it becomes easier to see why the SJC’s reasoning is morally partisan. One can defend conjugal marriage without denying that heterosexuals and homosexuals ought to be treated equally before the law.<sup>71</sup> Thus a neutral principle of equality does not entail the SJC’s holding. Instead, the proposition that the SJC is left defending is that there exist no relevant,

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68. *Goodridge*, 798 N.E.2d at 953 n.11. Later, in *Opinions of the Justices* the majority objected to conjugal marriage’s ban against same-sex couples, not as pairs of homosexuals but rather “as same-sex couples.” *Opinions of the Justices*, 802 N.E.2d at 569.

69. *Id.*

70. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

71. See *infra* Part VII for a defense along these lines.

moral or prudential distinctions between the sexes. A man ought to equally be permitted to marry a woman or a man; a woman should be free to marry a man or a woman. In the SJC's view, gender does not matter. The court has removed from "marriage" an element (conjugal, with its attendant uniting and procreative functions) that the Commonwealth considered essential to the meaning and purposes of marriage. It has substituted its own meaning (self-fulfillment) and purposes (state-sanctioned affirmation of the special moral worth of homosexual intimacy), and its own conception of how to advance that meaning and those purposes. One can reach the conclusion that same-sex unions and conjugal marriages ought to be treated identically in positive law only if one begins with the presupposition that gender and conjuality are irrelevant to the meaning and purposes of marriage.<sup>72</sup>

In *Goodridge*, the majority did not address the respective rights of individual homosexuals and individual heterosexuals, much less did it address the rights of homosexuals *qua* homosexuals. By the same token, the question before the SJC in *Opinions of the Justices* was not whether homosexuals must choose civil unions *or* no state-sanctioned commitment and be excluded from civilly recognized institutions altogether. Like the conjugal marriage statute, the legislature's civil union proposal did not distinguish or discriminate between heterosexuals and homosexuals.<sup>73</sup> For the reasons stated above, the legislature's proposal accorded to any person, regardless of sexual orientation, equal choices with respect to civil, conjugal marriage and civil unions.

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72. See George, *supra* note 15, at 126.

73. Another argument, one that the SJC majority did not employ, would have been that exclusively conjugal marriage results in gender discrimination. Justice Greaney, writing in concurrence, used a version of this argument. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring). A majority of the California Supreme Court expressly rejected this argument. *In re Marriage Cases*, S147999, slip op. at 85 (Supreme Court of California, George CJ, Kennard, Werdegar, Moreno, JJ, May 15, 2008). Because under conjugal marriage laws a man may marry a woman but a woman may not do so, the law might be understood to discriminate on the basis of sex.

However, this argument fails for two reasons. First, equal protection forbids only discrimination on the basis of a trait that is irrelevant to the purpose of the law. To assume that gender is irrelevant to marriage is to assume a controversial, morally partisan position. Thus, even if the SJC had found constitutionally infirm discrimination on the basis of sex, rather than discrimination on the basis of sexual orientation, its holding and reasoning would have nevertheless been morally partisan.

Second, conjugal marriage does not discriminate on the basis of gender because the law has equal application to both genders. Neither a man nor a woman may marry a member of the same sex. The California Court of Appeal made this point in *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006).

## 2. *The majority's faulty syllogism*

Despite the SJC's invocation of *Brown v. Board of Education*,<sup>74</sup> the rule and reasoning of *Brown* was not at all relevant to the issue in *Opinions of the Justices*.<sup>75</sup> The offensive inequality that *Brown* eradicated resulted from black children having no choice where to attend school; blacks were shuttled into separate, and inherently unequal, schools because they were black. Similarly, contrary to the SJC's invocation of it, *Loving v. Virginia*<sup>76</sup> is inapplicable to the conjugality issue. *Loving* overruled a regime that prohibited blacks, *qua* blacks, and whites, *qua* whites, from marrying each other. The law that a white woman (for example) could not marry a black man constituted an inequality because it discriminated between black and white men on no grounds other than their respective races.

The SJC in *Opinions of the Justices* confronted an entirely different scenario. Under the Massachusetts legislature's civil union proposal, a person would be assigned to different institutions—civil union or conjugal marriage—according to the choice he or she made, not according to his or her status as homosexual, heterosexual, bisexual, or based upon any other characteristics or predispositions. The mistaken assumption that a heterosexual person will always choose conjugal marriage and a homosexual person will always choose civil union, upon which the SJC's equality analysis rests (and which the same SJC majority had expressly rejected in *Goodridge*), disregards the importance of individual choice. And the principle of equality does not entail that persons who choose union with a member of the same sex must be permitted to call that union the same name as that assigned to conjugal, monogamous unions.

The common rejoinder to this distinction between persons and the institutions they might choose is that homosexuals prefer union with someone of the same sex, and thus are unlikely to choose conjugal marriage. On this view, all persons must have available equally meaningful choices. The choice of conjugal marriage is not a meaningful choice for at least some homosexuals because it is a choice to which they are not predisposed.

This rejoinder suffers from fatal flaws. For one, the meaningfulness of the choices available does not necessarily correlate with the sexual

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74. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), cited in *Opinions of the Justices*, 802 N.E.2d at 569 n.3.

75. For a more complete discussion of this point, see Dwight G. Duncan, *How Brown is Goodridge? The Appropriation of a Legal Icon*, 14 B.U. PUB. INT. L.J. 27 (2004).

76. *Loving v. Virginia*, 388 U.S. 1 (1967).

orientation of the chooser. Heterosexuals might be predisposed to a same-sex arrangement. Non-homosexuals might choose civil unions for any number of reasons, including a desire to support an ailing relative or to benefit from tax breaks. Any discrimination between marriage and civil unions will not fall exclusively on homosexuals, or even on homosexuals *qua* homosexuals, but rather on all persons who would, if the law allowed, choose to be legally united with a member of the same sex. Furthermore, those homosexuals who, for whatever reason, choose conjugal marriage would suffer no prejudice at all from any disparity between marriage and civil unions.

Under the Massachusetts legislature's civil union proposal, which the SJC rejected, homosexuals would have had exactly the same number of meaningful choices (as same-sex union advocates conceive of meaningfulness) as heterosexuals had. A homosexual and a heterosexual would each have available the options to enter into a civil union with one member of the same sex or to enter into a civil marriage with one member of the opposite sex. That the heterosexual might (but not necessarily would) prefer marriage and the homosexual might (but not necessarily would) prefer civil union would not be a reason to call the choices available to them unequal.

However, assuming *arguendo* that the meaningful choices available to a homosexual are not equal to those available to a heterosexual, a neutral principle of equality does not entail changing this circumstance. Any mandate that any particular individual, whether heterosexual, homosexual, or asexual, have a meaningful choice does not follow from the neutral principle of equality employed in *Brown*. It might arguably follow from some commitment to a particular moral conception. However, commitment to morally neutral equality does not entail that all persons have available to them all desired options, all meaningful options, or even a plurality of options.

For example, under the Massachusetts legislature's civil union proposal, neither the heterosexual nor the homosexual would have had the option to enter into a civil union or marriage with more than one person. The option to receive state-sanction for a plural relationship might be preferable to a homosexual or heterosexual who prefers polygamy or polyandry, and some morally partisan principle, such as a personal autonomy right to plural marriage,<sup>77</sup> might be invoked in favor of legal recognition of polygamy.

Nevertheless, under current Massachusetts law, both the heterosexual and the homosexual are equally unable to choose to enter into a

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77. See *infra* Part III.B.

polygamous institution sanctioned by the law of the Commonwealth. That the Commonwealth (thus far) sees no principled reason to make available the choice of plural marriage does not violate equal protection.

Equality of persons before the law does not entail equality of the institutions from which those persons may choose. Nor does equality of persons require that persons have available to them all desired choices. The Stanford fan is not denied equal protection of the law by being forced to choose between Oklahoma and Oklahoma State games. The would-be polyandrist is not denied equality before the law when she is forced to choose between having one husband or no husbands. For the same reasons, no morally neutral principle of equality explains the majority's reasoning in *Opinions of the Justices*.

*B. The Majority's Invocation of Lawrence-type Autonomy*

Those attempting to demonstrate the moral neutrality of the Massachusetts same-sex marriage decisions might argue that the decisions are premised upon a morally neutral principle of autonomy. The argument might proceed as follows: regardless of whether one views homosexual conduct as a good, one can nevertheless endorse the proposition that the autonomy to choose homosexual conduct is, itself, a desirable end. To prevent persons from choosing homosexual conduct, or to stigmatize that choice by failing to approve of it in law, is to disparage the autonomous choices of homosexual persons, and thus to infringe upon their autonomy.

The SJC gave a hint of its inclination toward this view by its citation of *Lawrence v. Texas*. In *Goodridge*, the SJC interpreted *Lawrence* to mean "that the core concept of human dignity," found in the Fourteenth Amendment Due Process Clause, "precludes government intrusion into . . . one's choice of an intimate partner."<sup>78</sup> Recalling *Lawrence*, the *Goodridge* majority stated:

Recently, the United States Supreme Court has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support. The Court struck down a statute criminalizing sodomy. *See Lawrence, supra* at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice").<sup>79</sup>

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78. *Goodridge*, 798 N.E.2d at 948.

79. *Goodridge*, 798 N.E.2d at 958 n.17.

The *Goodridge* majority did not explain how the anti-sodomy statutes in *Lawrence* “demean[ed] human dignity.”<sup>80</sup> However, at the least, it saw anti-sodomy laws and conjugal marriage laws as two forms of the same, impermissible regulation of sexual conduct.

It seems reasonable to infer that the *Goodridge* majority thought it permissible for the Commonwealth to regulate sexual conduct in the first instance. If the autonomy principle forbids all legislative judgments concerning intimacy, then there ought to be no distinction between marriage and non-marriage. The Court maintained that distinction. So the *Goodridge* majority must have understood the autonomy principle articulated in *Lawrence* to require the State, when regulating sexual conduct, to refrain from preferring one type of conduct to another. And the SJC’s interpretation of *Lawrence* appears in a footnote to the majority’s assertion that historical understandings of “marriage” “must yield to a more fully developed understanding of the invidious[ness]” of conjugal marriage.<sup>81</sup> One might reasonably infer that the *Goodridge* majority saw *Lawrence* as exemplifying that more fully developed understanding.

This conception of autonomy made other appearances in *Goodridge*. The majority chided the dissent for its “narrow focus” on procreation as a basis for a fundamental right to marry.<sup>82</sup> It thought a more expansive, and thus appropriate, view of marriage encompassed considerations of “personal autonomy” in addition to family life and child rearing.<sup>83</sup> And it ultimately perceived conjugal marriage as “incompatible with the constitutional principle of respect for individual autonomy.”<sup>84</sup> Echoing the self-actualization rhetoric of *Casey* and *Lawrence*, the *Goodridge* majority opined, “the decision whether and whom to marry is among life’s momentous acts of self-definition.”<sup>85</sup>

It thus appears that the *Goodridge* majority thought that the autonomy principle at work in *Lawrence* explained, at least in part, what injustice it saw in Massachusetts’ conjugal marriage statute. An unlawful government intrusion into autonomous choice, as the SJC conceived of it, includes the failure of state government, where it has recognized marriage, to endorse the choice as one’s marital partner of whomever one wants to choose. If the autonomy principle of *Lawrence* supports this

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80. *Id.*

81. *Id.* at 958.

82. *Id.* at 962.

83. *Id.*

84. *Id.* at 949.

85. *Id.* at 955.

conception of constitutional liberty, and if *Lawrence* is morally neutral, then *Goodridge* might be saved from moral partisanship.

However, *Lawrence* fails to salvage the moral neutrality of the Massachusetts same-sex marriage decisions. *Lawrence* is susceptible to two interpretations. Perhaps the *Lawrence* Court meant to assert that protection of autonomy requires the State to treat all forms of sexual conduct the same. The SJC preferred this interpretation. Viewed this way, neither *Lawrence* nor the autonomy principle employed in *Lawrence* is morally neutral; the *Lawrence* Court in this view has substituted its own conception of the meaning and purposes of marriage for those adopted by all of the states. Alternatively, *Lawrence* might stand merely for the proposition that the State may not criminalize certain types of sexual conduct. Viewed in this manner, whether it is morally neutral or not, *Lawrence* offers no logical framework for understanding or explaining the Massachusetts decisions.

*1. Lawrence as guarantor of the right to choose any type of sexual conduct*

If, as the SJC seems to suppose, *Lawrence* stands for the proposition that constitutional protection of autonomy requires the State to validate all choices with respect to sexual relationships then employment of the autonomy principle articulated in *Lawrence* does not save the Massachusetts same-sex marriage decisions from moral partisanship for two reasons. First, predicated legal approbation of homosexual conduct on a principle of autonomy does not avoid the necessity of demonstrating that homosexual conduct is valuable. As Robert George has demonstrated, autonomy as an end has no intrinsic value.<sup>86</sup> Autonomy adds no value to a valueless choice because autonomy itself does not provide an ultimate reason for action. Rather, the value of an autonomous choice lies in the end chosen.

For example, the autonomous choice to enter into a polygamous relationship is not rendered valuable by virtue of its being freely and autonomously made. A polygamous group in which all persons participate voluntarily, free of coercion, does no violence to personal autonomy. However, that fact does not make participation in the polygamous arrangement a morally upright and valuable choice. Only if polygamy is a morally valuable end for human choice can the autonomous choice of polygamy be said to be morally valuable. The

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86. George, *supra* note 6, at 173–82.

value of the choice is determined by the end chosen, not by the fact of it being chosen freely.

Second, Justice Kennedy's autonomy argument in *Lawrence*,<sup>87</sup> if interpreted the way we are considering it in this section, is itself morally partisan. The *Lawrence* majority, like the *Goodridge* majority, made express assertions of its moral neutrality, insisting that "[ethical and moral] considerations do not answer the question before us . . . ."<sup>88</sup> The *Lawrence* majority decided that the "majority" may not "use the power of the State to enforce . . . on the whole society" its view of homosexual sodomy as immoral.<sup>89</sup> However, like the anti-perfectionism of *Goodridge*, the anti-perfectionism of *Lawrence* ran only in one direction. The Court demonstrated no qualms about using its power to enforce against the states its moral view that autonomy entails a "right to demand respect" for homosexual conduct.<sup>90</sup> Thus, the majority disdained perfectionism in aid of traditional convictions about sexual conduct but embraced moral partisanship in demanding respect in law for homosexual conduct.

Indeed, the autonomy that *Lawrence* arguably defends and that the Massachusetts SJC invoked is inconsistent with moral neutrality. The *Lawrence* majority perceived an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>91</sup> The majority thought that autonomy to choose homosexual relations follows from the right to define one's own concept of meaning and the universe, which right, according to *Casey* and *Lawrence*, the Due Process Clause protects.<sup>92</sup> This is, to say the least, a controversial position that depends upon a prior commitment to a particular, morally partisan view.

Assuming, arguendo, the validity of the *Lawrence* Court's premise—the Due Process Clause protects a right to define the meaning of life—the conclusion that the choice of homosexual conduct promotes self-actualization does not follow. Unless one starts with the presupposition that homosexual conduct is instrumental to the self-actualization process described in *Casey*, one does not arrive at the *Lawrence* Court's conclusion that *Casey* requires the legalization of homosexual sodomy. Thus, even if this were the only conclusion that followed from the

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87. Kennedy, writing for the majority, considered the prospect of declaring anti-sodomy laws unconstitutional on grounds of equal protection but declined to do so. *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

88. *Id.* at 571.

89. *Id.*

90. *Id.* at 575.

91. *Id.* at 572.

92. *Id.* at 573–74 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851).

*Lawrence* majority's autonomy principle, the reasoning would be morally partisan.

But the *Lawrence* majority actually went further. In the *Lawrence* majority's view, the State is not merely forbidden to interfere with the autonomous choice of homosexual conduct but must, in addition, remove from the law all stigma attending such conduct. The supposed "right to demand respect for [non-conjugal] conduct" requires the State to remove from its criminal laws all expressions of disapprobation of homosexual conduct, even where those expressions take the form of minor prohibitions—misdemeanors, infractions—rarely or never enforced.<sup>93</sup> The majority worried that, if the Court tolerated a criminal prohibition of non-conjugal conduct, "its stigma might remain even if it were not enforceable . . . ." The majority imagined that an unenforced law prohibiting non-conjugal conduct "demeans the lives of homosexual persons"<sup>94</sup> and denies to them the respect due to their choices.

This conception of liberty is controversial. Not only must persons be free to act autonomously, but additionally, according to the *Lawrence* majority, they must receive from the State respect for the choices they make. It is not enough for the State to remain agnostic concerning the morality of particular choices. Rather, the State must demonstrate in its laws respect for choices that it hitherto treated as unworthy of respect.

One problem with this reasoning is that it rests upon the assumption that anti-sodomy laws were predicated upon anti-homosexual animus, or were directed at or intended to stigmatize homosexual conduct. However, as an historical claim, this is simply untrue. As the *Lawrence* majority noted, "early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally."<sup>95</sup> Indeed, like conjugal marriage laws, anti-sodomy laws simply were not about homosexuals. Homosexual "conduct was not thought of as a separate category from like conduct between heterosexual persons."<sup>96</sup>

Despite this history, the *Lawrence* majority thought the stigma of anti-sodomy laws "not trivial."<sup>97</sup> Though sodomy was "a minor offense in the Texas legal system," it was nevertheless "a criminal offense with

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93. *Id.* at 559, 575.

94. *Id.* at 575. This failure to distinguish between persons and their conduct, like the SJC's failure to distinguish between persons and the institutions in which they choose to participate, renders the *Lawrence* majority's reasoning translucent, at best.

95. *Id.* at 568.

96. *Id.* at 569.

97. *Id.* at 575.

all that imports for the dignity of the persons charged.”<sup>98</sup> That persons convicted under the Texas statute would be required to register as sex offenders in at least four states “underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition.”<sup>99</sup>

Note what the *Lawrence* majority did not say. It did not assert that registration as a sex offender was a disproportionate expression of societal disapprobation for homosexual conduct. Many persons who consider homosexual conduct unworthy of persons who engage in it, including this author, can readily agree that a State-sanctioned association between persons who have engaged in homosexual sodomy and (for example) persons who have molested children is an excessive expression of disapprobation for homosexual conduct. One might further oppose the requirement that persons convicted of homosexual sodomy register as sex offenders on the additional, prudential ground that the requirement does not serve the purpose of the registry, which is to protect the public from sexual predators. For these and other reasons, one may (and this author does) agree with the proposition that same-sex relationships ought not be stigmatized by criminalizing them and at the same time maintain that states act rationally by according special status to conjugal marriage. Between affirmatively stigmatizing same-sex intimacy through criminal convictions and affirmatively according to same-sex relationships the special status of marriage lies a third alternative that is perfectly rational. Unless the SJC’s morally partisan interpretation of *Lawrence* prevails, one might rationally oppose criminalization of sodomy on prudential grounds and defend conjugal marriage on both moral and prudential grounds.

But the *Lawrence* majority argued neither that autonomy requires any sort of proportionality between immoral sexual conduct and the stigma attached to it nor that the registry requirement and criminal statutes were unsound as a prudential matter. Instead, it argued that autonomy requires the removal of all stigma from a particular type of sexual conduct, namely homosexual sodomy. So, even a state like Texas that makes homosexual sodomy a minor offense, or a state like Georgia that never enforces its anti-sodomy statute has violated Due Process because it has neglected its duty to remove from homosexual conduct all societal disapprobation.

Therefore, states cannot satisfy the mandate of *Lawrence* by removing all legal obstacles that lie between persons (whether

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98. *Id.* Here again, the *Lawrence* majority was guilty of indulging a convenient conflation, this one between persons and their choices. This conflation is fatal for reasons discussed below.

99. *Id.* at 576.

heterosexual or homosexual) and the sexual conduct of their choice: homosexual sodomy, polygamy, etc. Instead, *Lawrence* demands that states stop treating certain types of sexual conduct as immoral. And in the SJC's hands, this prohibition means that states must refrain from treating same-sex intimacy as *less* morally valuable (or even valuable for different reasons) than conjugal marriage. To the extent that the *Lawrence* Court intended this conception of autonomy, it adopted a position of moral partisanship.

## 2. *Lawrence as guarantor of freedom from criminal liability*

If one can construct a morally neutral interpretation of *Lawrence*, based on freedom from criminal liability, one still cannot thereby render the Massachusetts same-sex marriage decisions morally neutral. If *Lawrence* merely means that the State may not, for some morally neutral reason, punish persons for engaging in homosexual conduct then the reasoning of *Lawrence* fails to explain the Massachusetts same-sex marriage decisions. This failure can be demonstrated with a few observations.

### *a. Condemning a person's conduct does not demean the person.*

First, that the law disparages a particular choice or course of conduct does not mean that the law demeans persons who engage in that conduct. Thus, the conflation in which both the *Lawrence* Court and the *Goodridge* court indulged, between persons and the choices they make, is untenable. No one ought to suppose, for example, that conviction for theft demeans the dignity of the thief. To the contrary, conviction of a crime affirms, among other things, that the criminal conduct giving rise to the conviction is unworthy of the person who engaged in it and is inconsistent with that person's status as a law-abiding member of civil society. That proposition rests upon the more foundational premise that theft is an immoral act. Only by rejecting the immorality of theft can one argue that the thief's dignity is demeaned by a conviction.

By the same token, the criminalization of homosexual sodomy demeans homosexual persons only if homosexual sodomy is a good end to be chosen. However, that predicate is a controversial, morally-partisan proposition. Criminal prohibitions of homosexual acts may be undesirable for prudential reasons, that is, as a matter of policy. However, they do not disrespect homosexuals and are in that sense not unjust unless homosexual acts are morally valuable. Indeed, if homosexual conduct is unworthy of persons who engage in it, then the

law does homosexuals a disservice by treating that conduct as a reason for human choice and action. If, on the other hand, homosexual conduct is a rational and good object of human choice, then criminalizing that choice impedes the homosexual's integral human fulfillment. The fundamental, moral question is thus unavoidable. To pretend that the courts are not taking a side is simply to ignore the morally partisan proposition underlying the SJC's autonomy principle.

*b. Conjugal marriage does not stigmatize same-sex couples.*

Second, the autonomy principle employed in *Lawrence* does not entail the conclusion that the SJC reached in *Opinions of the Justices*. The *Lawrence* majority insisted that states eradicate all criminal prohibitions of homosexual conduct because it found constitutionally impermissible the stigma attendant to status as a criminal.<sup>100</sup> One simply cannot equate the stigma of being a criminal and the stigma, if any, of not being married, nor would participation in the civil unions that the Massachusetts legislature proposed generate any stigma, much less a stigma comparable to that attending criminal conviction.

By recognizing conjugal marriage, the State does not stigmatize couples or other groupings, whether heterosexual or homosexual, same sex or opposite sex, who are living in committed, supportive arrangements. No one supposes, for example, that recognition of conjugal marriage entails any disparagement of an adult daughter living with and caring for an elderly mother or father. The statute recognizing conjugal marriage does not demean the devoted daughter or deny her any amount of respect for the choice she has made. Nor does it express disapproval of her decision to care for her parents.

Of course, enshrinement of conjugal marriage as a legal and civic institution *does* entail the approbation of committed, monogamous, conjugal relationships relative to non-committed, non-monogamous, or non-conjugal, sexually oriented arrangements. The State sanction of marriage necessarily involves the State's affirmation that certain traits of marriage are more desirable than whatever virtues other arrangements might offer. However, no principle of autonomy, whether morally neutral or otherwise, forbids such approbation. The State lends legal approbation to all sorts of choices without infringing the autonomy of persons who do not make the approved choices. Tax deductions for charitable donations, for example, do not infringe upon the autonomy of persons who do not

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100. *Lawrence v. Texas*, 539 U.S. 558, 560, 575 (2003).

give to charity, much less (to paraphrase *Lawrence*) demean their lives or disrespect them.

Furthermore, the state's obligation not to stigmatize certain forms of intimacy does not entail affirmative endorsement of those relational arrangements. For these reasons, *Lawrence*'s prohibition against stigmatizing same-sex intimacy does not mandate approval of same-sex conduct.

*c. Recognition of conjugal marriage does not limit autonomous choice.*

Perhaps a defender of *Opinions of the Justices* might argue, extending *Lawrence*, that whether or not conjugal marriage laws attach stigma to homosexual conduct, autonomy requires the state to eradicate all legal preferences for conjugal marital conduct. On this view, a person's choice of homosexual conduct is not entirely free and autonomous because that choice involves forgoing the legal benefits of marriage. Only by choosing conjugal marriage can a person who identifies herself as homosexual enjoy the legal appurtenances of marriage. Thus, a decision not to choose conjugal marriage is not truly free and voluntary.

This view of *Goodridge* as an extension of the *Lawrence* autonomy principle beyond the use the *Lawrence* Court made of it finds some support in *Goodridge* itself. The *Goodridge* majority acknowledged that the *Lawrence* Court had not resolved the constitutionality of conjugal marriage, an issue that was not before it.<sup>101</sup>

However, this line of reasoning is not persuasive. That different choices have disparate consequences is not a problem for autonomy. It is uncontroversial that states may permissibly establish or recognize any number of institutions even though, by choosing not to participate in a particular state-sanctioned institution, individuals forego any rights or benefits appurtenant to participation.

More to the point, this interpretation of *Lawrence* fails to account for the decision of the majority in *Opinions of the Justices*. In that decision, a majority of the SJC rejected as insufficient the General Court's proposal to eradicate all legal barriers to actualization of same-sex sexual preferences. A system of conjugal marriage and civil unions was unjust, in the SJC's reasoning, notwithstanding its respect for the autonomy of persons to choose to enter into homosexual relationships and in spite of the legislature's removal of all legal obstacles to same-sex unions.

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101. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

## IV. CALIFORNIA'S TURN WITH THE ISSUE

The lessons learned from Massachusetts' experience have direct application in California, where that state's Supreme Court recently considered a challenge to California's conjugal marriage laws. Both the state legislature and the people of California, acting by popular initiative, had in separate enactments endorsed the definition of "marriage" as the union of a man and woman. Also, as the Massachusetts legislature proposed to do, the California "Legislature has passed landmark legislation providing substantially all the rights, responsibilities, benefits and protections of marriage to same-sex couples who register as domestic partners."<sup>102</sup>

In striking down California's statutory scheme by a one-vote margin, the California high court adopted a perfectionist holding. Its holding is perfectionist for many of the same reasons that the SJC's decisions in *Goodridge* and *Opinions of the Justices* were perfectionist. However, its perfectionism is much less subtle and can easily be perceived in the court's determinations that California's marriage-domestic partnership scheme infringed a fundamental right to marry and denied to homosexuals equal protection of the laws. The court reached these conclusions after committing itself to the moral claims that procreation and gender are irrelevant to the question how "marriage" ought to be defined.

## A. California Court of Appeal

After a state trial court concluded that conjugal marriage violates the California constitution,<sup>103</sup> the decision was appealed to the California Court of Appeal. Like the SJC, the court of appeal began its analysis by declaiming its moral neutrality. The court thought its task was "not to decide who has the most compelling vision of what marriage is, or what it should be."<sup>104</sup> The court recognized that the judicial branch ought not

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102. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 684–85 (Cal. App. 2006) (citing California Family Code §297–299.6). Domestic partners are defined as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Calif. Family Code § 297(a) (2004).

103. The provisions at issue are California Family Code section 300, which was enacted by the California legislature and defines marriage as "a personal relation arising out of a civil contract between a man and a woman," and Family Code section 308.5, which was enacted by voter initiative and provides, "Only marriage between a man and a woman is valid or recognized in California."

104. *In re Marriage Cases*, 49 Cal.Rptr.3d at 685.

pass judgment on the validity of any “value” or prefer one moral judgment over another.<sup>105</sup>

Unlike the SJC, the California Court of Appeal remained true to this mandate. The California Court of Appeal avoided the conflation so fatal to the ostensible moral neutrality of the Massachusetts SJC by maintaining the distinction between individual persons of varying sexual orientations and the institutions of marriage and domestic partnership. The court expressly declined to refer to conjugal marriage as “heterosexual unions,” noting that the conjugal marriage laws make no reference to sexual orientation.<sup>106</sup> The court noted that in California, as in Massachusetts before *Goodridge*, homosexual individuals were free to participate in conjugal marriages.<sup>107</sup>

The court acknowledged that California has historically understood marriage to consist of the union of one man and one woman and inferred that those challenging the conjugal marriage law were asking the court to create a new right.<sup>108</sup> It stated, “Courts simply do not have the authority to create new rights, especially when doing so involves changing the definition of so fundamental an institution as marriage.”<sup>109</sup> Moral judgments about balance, order, beauty, and goodness, and prudential judgments concerning the best social policy are all in the exclusive purview of the legislative branch, the court asserted.<sup>110</sup> The question before the court distilled to who gets to define “marriage” in a democratic state.<sup>111</sup> The court stated, “We believe this power rests in the people and their elected representatives, and courts may not appropriate to themselves the power to change the definition of such a basic social institution.”<sup>112</sup> For these reasons, the court upheld California’s conjugal marriage law.<sup>113</sup>

The California Court of Appeal found that California’s conjugal marriage law neither deprived individuals of a vested fundamental right nor discriminated against a suspect class.<sup>114</sup> So like the Massachusetts SJC before it, the court applied rational basis review.<sup>115</sup> In its search for a rational basis, the court was expressly mindful of California’s domestic

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105. *Id.*

106. *Id.* at 691 n.9.

107. *Id.*

108. *Id.* at 685.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 686.

114. *Id.*

115. *Id.* at 686, 717.

partnership law, which grants to domestic partners, “substantially ‘the same rights, protections and benefits’ as married spouses, and imposes upon them ‘the same responsibilities, obligations and duties under law’ as are imposed on married couples.”<sup>116</sup> The existence of this law narrowed the court’s inquiry to whether there existed a rational basis for distinguishing between marriage and domestic partnership.

The rational basis for conjugal marriage, in the view of the Court of Appeal, is the state’s “strong interest in promoting marriage.”<sup>117</sup> The rational basis for domestic partnerships is the state’s “interest in supporting stable family relationships.”<sup>118</sup> These interests are related by the state’s singular purpose of “provid[ing] an institutional basis [to] defin[e] the fundamental rights and responsibilities” of committed couples, whether of the same sex or opposite sexes.<sup>119</sup> The court concluded, “The state may legitimately support these parallel institutions while also acknowledging their differences.”<sup>120</sup>

Thus, the court of appeal steered clear of moral partisanship, leaving to the people of California and their elected representatives the task of discerning morally significant and morally neutral distinctions between different relational arrangements. This article examines some of those distinctions in section VI, below.

### *B. Perfectionist Arguments to the California Supreme Court*

On appeal to the California Supreme Court, the petitioners who sought judicial creation of same-sex marriage made expressly perfectionist arguments. They did not shy away from moral partisanship, instead asserting that “lesbians and gay men are excluded from marriage *precisely because* this institution is considered so sacred.”<sup>121</sup> As the petitioners viewed the matter, California’s domestic partnership laws were insufficient to cure the putative constitutional infirmity inherent in

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116. *Id.* at 719 (quoting Cal. Fam. Code § 297.5(a)).

117. *Id.* at 720.

118. *Id.*

119. *Id.*

120. *Id.* at 721.

121. Petitioner City and County of San Francisco’s Opening Brief on the Merits at 2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (Case No. S147999) (emphasis in original). Of course, this argument is factually wrong. As set out above, lesbians and gay men are not excluded from marriage. The petitioners (predictably) assert that “lesbian [sic] and gay men are totally denied access to marriage, because marriage to a member of the opposite sex is nothing but a demeaning sham for them.” *Id.* at 4. This curious and relativist conception of marriage—conjugal marriage has no subjective value to homosexuals, or some of them—undercuts the petitioners’ argument. Either marriage has an objective, special meaning or it does not. If it does not, as the petitioners suggest, then the only ground for the creation of same-sex marriage is the subjective, emotional attachment some homosexuals have to the concept of same-sex marriage.

conjugal marriage laws. The law must teach that homosexual intimacy is equally as morally valuable as conjugal marriage, and thus of greater (or at least different) worth than non-marital relationships, and California's failure to endorse that moral claim was constitutionally impermissible. In the words of the petitioners, the state's separate categories for marriage and domestic partnerships "unavoidably and unmistakably teaches" a moral lesson that the petitioners deemed unconstitutional.<sup>122</sup>

The petitioners spoke of a societal "homage" paid to marriage.<sup>123</sup> They asserted that marriage affects both the perception that others have of the married person and that person's self-image.<sup>124</sup> They argued that participation in the institution improves psychological well-being.<sup>125</sup> And they revealed the core of their complaint when they asserted that conjugal marriage laws send a "powerful message . . . : the State will recognize, *but it will not honor*," intimate same-sex relationships.<sup>126</sup>

The honor that the petitioners sought for same-sex relationships was forthcoming only if the California Supreme Court accepted the claim that same-sex intimacy and conjugal marriage are morally equivalent. That claim is morally partisan in the extreme. Nevertheless, the California high court adopted it as its own.

### *C. The California Supreme Court's Decision*

The California Supreme Court's ruling is predicated upon the proposition that gender is irrelevant to the marriage question. A woman (for example) can choose to marry either a woman or a man. Either choice is equally as morally and socially valuable. Attendant to this proposition is the rejection of the State's conception of the meaning and purposes of marriage. The court tossed out the traditional elements of marriage and substituted its own elements in their place. And it denigrated the purposes of marriage—such as procreation—as the state had identified them. It created a new purpose for marriage: individual self-fulfillment.

These are controversial and morally partisan predicates, and they infuse the court's additional controversial claims that conjugal marriage does not deserve a special place in the law, that same-sex intimacy has moral value equal to conjugal monogamy, and that same-sex intimacy is of greater worth than non-marital relationships. By committing itself to

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122. *Id.* at 48.

123. *Id.* at 50.

124. *Id.* at 50–51.

125. *Id.*

126. *Id.* at 51 (emphasis in original).

these principles, the California high court abandoned moral neutrality on the marriage question.

Like the Massachusetts SJC and the California Court of Appeal, a majority of the California Supreme Court began its opinion by disclaiming its ostensible moral neutrality. It declared at the outset that

our task in this proceeding is not to decide whether we believe, as a matter of policy, that the officially recognized relationship of a same-sex couple should be designated a marriage rather than a domestic partnership (or some other term), but instead only to determine whether the difference in the official names of the relationships violates the California Constitution.<sup>127</sup>

The majority asserted its awareness of the “very strongly held differences of opinion . . . on the matter of policy.”<sup>128</sup> And the majority justices dismissed as irrelevant their own “views as individuals with regard to this question . . . .”<sup>129</sup>

Yet within several paragraphs, the court committed itself to the morally partisan proposition that same-sex intimacy is entitled to the same legal approbation accorded to conjugal monogamy.

One of the core elements of the right to establish an officially recognized family that is embodied in the California constitutional right to marry is a couple’s right to have their family relationship accorded dignity and respect equal to that accorded to other officially recognized families, and assigning a different designation for the family relationship of same-sex couples while reserving the historic designation of “marriage” exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples such equal dignity and respect.<sup>130</sup>

The court asserted that California’s statutory scheme harmed same-sex couples and their children “because denying such couples access to the familiar and highly favored designation of marriage is likely to cast doubt on whether the official family relationship of same-sex couples enjoys dignity equal to that of opposite-sex couples.”<sup>131</sup> The court expressed its concern that California’s conjugal marriage law reflected

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127. *In re Marriage Cases*, 183 P.3d at 398–99 (emphasis original).

128. *Id.* at 399.

129. *Id.*

130. *Id.* at 400.

131. *Id.* at 401.

the “official view” that same-sex relationships “are of lesser stature than the comparable relationships of opposite-sex couples.”<sup>132</sup>

The court asserted that a same-sex couple enjoys a fundamental right “in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.”<sup>133</sup> Because the term “marriage” is “unreservedly approved and favored by the community,” the word has “considerable and undeniable symbolic importance.”<sup>134</sup> The court appropriated this approbation, favor, and symbolism for same-sex intimacy. It thus promoted same-sex intimacy above non-marital relationships, such as friendship and polygamy. And it did so in order to advance its own ambitions for marriage, which were unrelated to traditional purposes, such as unifying persons who are inherently different and facilitating procreation.

California’s marriage-domestic partnership scheme never withheld respect or dignity from any individual heterosexual or homosexual. The scheme *did* affirm the proposition that conjugal monogamy is distinguishable from non-conjugal relationships on relevant, discernable grounds. The court thought this distinction impermissible because the law did not endorse the morally partisan proposition that same-sex intimacy has moral worth equal to conjugal monogamy and thus must be accorded dignity and respect.

After defining the fundamental right implicated, the court went on to “conclude that although the provisions of the current domestic partnership legislation afford same-sex couples most of the substantive elements embodied in the constitutional right to marry,” California’s statutory scheme infringed a right enjoyed by intimate male-male couples and female-female couples “to marry under the California Constitution.”<sup>135</sup> Curiously, the court made no attempt to explain why, on this reasoning, polygamous groupings and non-sexually intimate couples are as a matter of principle not also entitled to have their relationships called “marriage.”<sup>136</sup> Nor did it explain what is to be done with domestic partners who are not involved in intimate same-sex relationships.

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132. *Id.* at 402.

133. *Id.* at 401; *see also id.* at 445.

134. *Id.* at 445.

135. *Id.* at 401.

136. The court attempted to distinguish polygamous and incestuous relationships on the prudential ground that such relationships have a “potentially detrimental effect on a sound family environment.” *Id.* at 434 n.52. Of course, any demonstration that a particular polygamous or incestuous relationship (or several of them) constituted a healthy family environment would allay this concern of the court. Indeed, the court rejected this very same type of argument in favor of conjugal marriage when it disassociated conjugal marriage from procreation on the ground that some conjugal couples are infertile or choose not to have children, yet are permitted to marry. *Id.* at 431–32. The court tried to have it both ways; either generalized assertions about the social utility of

Like the Massachusetts SJC, the California Supreme Court smuggled into its autonomy and equality principles a perfectionist commitment to granting the approbation of the law to same-sex intimacy. The court asserted that the fundamental right to marry and the equal protection of the law both require the State of California to approve of (accord “respect” to) the choice of some persons to engage in homosexual conduct. Respect for same-sex relationships generally, including male-male friendships or female-female business partnerships, is insufficient. Instead, the state must affirm the value of intimate, same-sex conduct.

*1. The court’s perfectionist autonomy analysis*

Unlike the Massachusetts SJC, the California Supreme Court front-loaded its perfectionism. By inserting its moral claims into the definition of the fundamental right to marry, the California Supreme Court denigrated the traditional association between marriage and procreation, and it gave marriage a new purpose, namely advancing individual, personal fulfillment.

The court developed the elements of the fundamental right in several stages, expanding its definition of the right by degrees, until at last the court discerned in the California Constitution a right to require the state to approve of one’s intimate relationship with a member of the same sex. In the first stage, the court began with “the right of an individual to establish a legally recognized family with the person of one’s choice.”<sup>137</sup> This definition begs the central question whether marriage is inherently conjugal. If, as the people of California supposed, marriage is a one-flesh communion of a man and a woman, then the state is free to recognize marriage in its traditional sense, while permitting each individual to marry a member of the opposite sex of his or her own choosing. So, had the court stopped here, it might have upheld the will of the people of California.

However, the court continued to amend the right to marry. In the second stage, after examining the ways in which marriage is beneficial to individuals and society, the court added to the fundamental right the “‘positive’ right to have the state take at least some affirmative action to acknowledge and support the family unit.”<sup>138</sup> Whatever form acknowledgement and support take in the court’s view, the right to marry

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relational arrangements are permissible grounds for distinguishing between types relational arrangements or they are not. In any event, the court cited no data for its generalized ascription of detriment to polygamous arrangements.

137. *Id.* at 423.

138. *Id.* at 426.

on this conception encompasses at least some official recognition by the state. However, even this formulation does not lead to the court's holding.<sup>139</sup> If the court were morally neutral between competing conceptions of "the family unit," the fundamental right would remain a right to have state support of marriage as the state of California had defined it, namely the union of a man and a woman.

So, the court took yet another step, altering the shape of the fundamental right just one paragraph later. In the third stage, the fundamental right appeared as an obligation of the state

to grant official, public recognition to the couple's relationship as a family as well as to protect the core elements of the family relationship from at least some types of improper interference by others . . . [and to provide] assurance to each member of the relationship that the government will enforce the mutual obligations between the partners (and to their children) that are an important aspect of the commitments upon which the relationship rests.<sup>140</sup>

This formulation satisfied two predicates necessary to the creation of same-sex marriage. First, for the first time, the right to marry includes the right to receive from the State approbation for one's relationship, but only if two people are involved in the relationship and those two people are "commit[ted]" to each other. With this language the court distinguished two-person relationships from polygamy, polyandry, and serial unions, effectively segregating same-sex intimacy from those arrangements. However, it did not explain its reasoning for doing so. Second, this definition of the right set the stage for the court's later insertion of a morally partisan commitment to moral equivalence between conjugal marriage and same-sex intimacy. By its reference to the "core elements of the family relationship," the court prepared the reader for its own declaration of which aspects of intimate relationships constitute core elements and which are irrelevant to the right to receive approbation from the state. By disposing of old "core elements" and adding new ones, the court was able to maintain the shell of marriage while inserting its own perfectionist substance into that shell.

The court first tossed aside the core element of tradition. It ignored the value that Anglo-American law has historically discerned in conjugal

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139. Writing in dissent, Justice Baxter made this point, observing that none of the cases cited by the majority "holds, or remotely suggests, that any right to marry recognized by the Constitution extends beyond the traditional definition of marriage to include same-sex partnerships." *Id.* at 462 (Baxter, J., dissenting).

140. *Id.* at 427 (George, C.J.) (citations omitted).

marriage, asserting “that history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one’s ability to enter into an officially recognized family relationship with a person of the opposite sex.”<sup>141</sup> Then it dispensed with procreation and conjugality as core elements of marriage on the ground that not all conjugal couples produce children (though no same-sex couples can produce children without the participation of a third person of the opposite gender).<sup>142</sup>

Finally, the court placed within the shell of marriage new core elements. “Marriage,” the court assured the reader, is fundamentally a relationship resting upon personal affections and advancing individual fulfillment.<sup>143</sup> Marriage promotes individual fulfillment by enriching the personal lives of those who enter into it,<sup>144</sup> providing a venue for expressions of emotional support,<sup>145</sup> and increasing happiness and well-being.<sup>146</sup> Now the transformation of the fundamental right to marry was complete. Freed of its attachment to tradition, conjugality, and procreation, marriage became an institution capable of promoting the loftiest end of constitutionally protected autonomy: individual, personal fulfillment.

Thus, loaded with the court’s polemical moral commitments and freed from any association with childbearing and child rearing, the fundamental right to marry again mutated. The right to marry in this fourth stage “guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one’s life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.”<sup>147</sup> From here it was a short step to “the right of same-sex couples to have their official family relationship accorded the same dignity, respect, and stature as that accorded to all other officially recognized family relationships.”<sup>148</sup>

Thus, by incremental modulation, the court carefully shifted from a morally neutral refrain to one containing an antipathy toward conjugal marriage’s privilege in law. The new definition of “marriage” is perfectionist in that it is loaded with and predicated upon the court’s moral conception of which aspects of marriage constitute “core

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141. *Id.* at 430.

142. *Id.* at 431–32.

143. *Id.* at 432.

144. *Id.*

145. *Id.*

146. *Id.* at 424, 432.

147. *Id.* at 433.

148. *Id.* at 434.

elements” and which ones can be disregarded. That conception values affection and individual, personal fulfillment and disassociates “marriage” from conjugality and procreation. On this basis the court drew moral equivalence between conjugal marriage and same-sex intimacy.

*2. The court’s perfectionist equality analysis*

The perfectionism in the court’s equality analysis is even less subtle. The court conceived an equality so gender-blind that it renders the self-evident differences between men and women irrelevant to the question of how “marriage” ought to be defined. It then used this conception of equality to overturn California’s definition of “marriage.”

The court agreed with the state attorney general “that the provisions of the Domestic Partner Act afford same-sex couples most of the substantive attributes to which they are constitutionally entitled under the state constitutional right to marry.”<sup>149</sup> Indeed, the court concluded that the only distinction in California between domestic partnerships and marriages is the designation, “marriage.”<sup>150</sup> Nevertheless, according to the court the “historic and highly respected designation of marriage” must also be made available to same-sex couples so that their relational arrangements may receive the moral approbation (“dignity and respect”) of the law.<sup>151</sup> Otherwise, California law denies to same-sex couples equal protection of the laws.<sup>152</sup> This account of equality makes no sense if it is not perfectionist.

As a threshold matter, the court rejected the argument in defense of California’s laws that same-sex couples and opposite-sex couples are not similarly situated, and that equal protection analysis is thus unnecessary. The court stated:

Both groups at issue consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection

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149. *Id.* at 435.

150. *Id.* at 398.

151. *Id.* at 434.

152. *Id.* at 445.

principles that require a court to determine whether distinctions between the two groups justify the unequal treatment.<sup>153</sup>

This definition of the two groups' relevant interests is inapposite. If the relevant interest in marriage is receipt of equal rights and imposition of equal responsibilities, then the statutory scheme that the court struck down was sufficient for equal protection purposes.

Furthermore, this analogy between the two groups is morally partisan. The court prejudiced the comparison by emphasizing similarities between the two groups that are relevant only if one first commits to moral equivalence between conjugal marriage and same-sex intimacy (and thus assumes the conclusion to be reached before beginning one's analysis) and by ignoring relevant differences. The court emphasized the putative value of pairing in "long-term family relationships," the obvious common characteristic, and made no mention of conjugality or procreation, two obvious points of distinction. Thus, the court began with a commitment to a marriage institution divorced from conjugality and procreation and founded solely upon the ability to have a relationship.

The court again smuggled its moral commitments into its definition of the suspect class. The court determined that "sexual orientation" is a suspect class and that California's law discriminated on the basis of sexual orientation.<sup>154</sup> The common response to this definition of the class (in fact, the ground on which the court of appeal had rejected this definition of the class) is that homosexuals, like heterosexuals, were free to marry a member of the opposite sex under California's statutory scheme. The court dismissed this response as "sophistic . . . because making such a choice would require the negation of the person's sexual orientation."<sup>155</sup> It posed a hypothetical statute that restricted marriage to couples of the same sex and supposed that such a statute would discriminate against heterosexuals on the basis of their sexual orientation.<sup>156</sup>

The moral partisanship underlying this argument is the court's commitment to the presupposition that gender doesn't matter. If relevant differences between the sexes exist, as California's citizens appear to believe, then the choice of conjugal marriage by both heterosexuals and homosexuals has value. A man (for example) chooses something of

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153. *Id.* at 435 n.54.

154. *Id.* at 442, 445.

155. *Id.* at 441.

156. *Id.*

value when he chooses to marry a woman, and the substitution of a second man for the woman does not reproduce that value.

Furthermore, the choice of conjugal marriage does not render a homosexual's personal integrity nugatory, but defeats only the homosexual's personal preference. One's preference for a member of the same sex is relevant to the equality analysis of conjugal marriage only if it does not matter whether one is joined in marriage to a member of the opposite sex. Only by sequestering common sense observations about gender from the equality analysis of marriage can one conclude that equality entails same-sex marriage.

Put differently, equal access to conjugal marriage amounts to sophistry only if one first adopts the morally partisan and controversial claim that men and women are interchangeable in morally valuable, intimate relationships. An individual who chooses to marry a member of the opposite sex makes a choice that the common law has affirmed throughout its history. In order for an individual man (for example) to choose to marry a man rather than join with a woman, the state must first endorse the proposition that a man can be substituted for a woman without affecting the value of the marital union. That proposition, which the California Supreme Court endorsed, is (to say the very least) not neutral as between competing moral conceptions of the human person and human sexuality. Had the court remained neutral on the moral question whether the sexes are interchangeable, it would have left California's marriage regime intact.

According to a slim majority of the California Supreme Court, it is not enough to grant to same-sex couples all of the rights, benefits, and obligations of marriage. Instead, the court required the State to extend legal approbation to same-sex intimacy. It pre-loaded into its equality analyses the moral claims that conjugal marriage is neither unique, nor special, and that the sexes are interchangeable. The court assured the residents of California that same-sex intimacy is, in fact, meaningful and valuable in the same way and to the same degree as conjugal marriage. In short, early on in its decision, a majority of the high court of California abandoned any pretense of moral neutrality on the marriage question.

## V. CONNECTICUT

The Connecticut Supreme Court, like the high courts of Massachusetts and California, considered and rejected by a one-vote margin a scheme that provided an institution (civil unions, in this case) in which same-sex partners would enjoy and bear all of the rights,

privileges, and responsibilities of marriage.<sup>157</sup> Like the California and Massachusetts courts, the Connecticut majority insisted that it was maintaining a position of strict moral neutrality.<sup>158</sup> It acknowledged, “same sex marriage is a subject about which persons of good will reasonably and sincerely disagree.”<sup>159</sup> Like the California high court, the Connecticut court departed from this neutral position early in its reasoning. It began its equal protection analysis by tossing out the traditional purposes of marriage and substituting its own. It asserted that the purposes of marriage are the sharing of a “committed and loving relationship” and “having a family and raising their children.”<sup>160</sup> In this way, the majority “assume[d] that loving commitment between two adults is the essence of marriage, even though the essence of marriage is the very question at the heart of this case.”<sup>161</sup>

Of course, as the court observed, same-sex couples have the same interests in marriage *for these purposes*. So the court’s morally-partisan definition of the relevant purposes enabled the court to find that Connecticut had denied to homosexual persons, as homosexual persons, equal protection of the law. The Connecticut equal protection clause compares persons who are similarly-situated “for the purposes of the law challenged.”<sup>162</sup> Because same-sex couples have the interest and capacity to pursue the court’s designated purposes for marriage, it did not matter that the conduct they sought to engage in—“marrying someone of the same sex—is fundamentally different from” the conduct that had always constituted the act of marriage.<sup>163</sup> So the court’s morally partisan conception of marriage was essential to its preliminary finding that the marriage statute implicated equal protection in the first instance.

Unlike the California court, the Connecticut court hid the mechanics of its perfectionism. In a crucial footnote it dismissed the notion that “same sex and opposite sex couples . . . are not similarly situated because the former cannot engage in procreative sexual conduct.”<sup>164</sup> The fact that same-sex couples cannot procreate did not, in the court’s view, resolve the question whether homosexuals and heterosexuals are similarly situated “for present purposes,” in other words, the purposes of

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157. *Kerrigan v. Comm’r Pub. Health*, —A.2d—, 289 Conn. 135, 143 (Conn. 2008) (citing Conn. Gen. Stat. §46b-38nn).

158. The Connecticut majority quoted directly the Massachusetts SJC’s declamation that moral considerations did not resolve the question before the court. *Id.* at 260–61.

159. *Id.* at 253 n.79.

160. *Id.* at 162.

161. *Id.* at 335 (Zarella, J., dissenting).

162. *Id.* at 158.

163. *Id.* at 162.

164. *Id.* at 163 n.19.

marriage.<sup>165</sup> The real purposes of marriage, the majority insisted, were only the homosexual individual's "interest in having a family and the same right to do so" that heterosexuals enjoy.<sup>166</sup> This interest, shared by homosexuals and heterosexuals alike, constituted "the fundamental and overriding similarit[y]," which rendered irrelevant "the mere fact" that same-sex couples cannot procreate without outside assistance.<sup>167</sup> Here the members of the majority expressly resorted to their personal beliefs. The majority did not "believe that [procreation] so defines the institution of marriage that the inability to engage in that conduct is determinative" of the question of similar situation.<sup>168</sup>

Having determined that same-sex and conjugal couples are similarly situated for the purposes of marriage that the court itself concocted, the court went on to determine that homosexuals are a quasi-suspect class under the Connecticut Constitution.<sup>169</sup> Having identified a quasi-suspect class, the court applied to the marriage-civil union scheme intermediate scrutiny, requiring Connecticut to demonstrate that its law was substantially related to an important governmental objective.<sup>170</sup> Additionally, the court explained (again, in a footnote) that because of the quasi-suspect classification, the state was not permitted to invoke all relevant governmental interests but rather only those that "actually motivated the legislature" to distinguish between conjugal marriage and civil unions.<sup>171</sup> On this basis, the court declined to consider the reasons for conjugal marriage articulated by various amici curiae and one of the dissenting justices, Justice Zarella.

Justice Zarella in dissent noted that, far from discriminating against homosexuals, the law of conjugal marriage simply takes no notice of sexual orientation; Connecticut's marriage laws did not classify persons on the basis of sexual orientation.<sup>172</sup> He observed, "The ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry."<sup>173</sup> Indeed, the "long-standing, fundamental purpose" of conjugal marriage, which the State of Connecticut had always recognized (and had been known from "ancient" times), "is to privilege and regulate procreative conduct."<sup>174</sup> This was clear, Justice

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 165–251.

170. *Id.* at 251.

171. *Id.* at 253 n.79.

172. *Id.* at 325–26.

173. *Id.* at 323.

174. *Id.*

Zarella thought, from a review of our nation's long legal tradition.<sup>175</sup> Zarella insisted upon judicial neutrality as between the people's conception of the purpose of marriage the four-justice majority's conception, and asserted, "If the state no longer has an interest in the regulation of procreation, then that is a decision for the legislature or the people of the state and not this court."<sup>176</sup>

Justice Zarella identified other reasons for conjugal marriage, which are subsidiary to and facilitative of the state's fundamental interest in encouraging and regulating procreation. These include the "regulation of heterosexual behavior," ordering the relationships in which procreation takes place, and ensuring "a stable family structure" for children.<sup>177</sup> Zarella explained the relationship among these functions of conjugal marriage.

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed.<sup>178</sup>

And, Zarella noted, Connecticut had long recognized that conjugal marriage "is necessary for the propagation of the species" and for the "preservation and education" of the offspring of conjugal unions.<sup>179</sup>

The "legal and normative [moral] link"<sup>180</sup> that Justice Zarella identified between procreation and the state's regulation of procreative relationships through civil marriage was served by two important functions of conjugal marriage.

First, in order to advance society's interest in the survival of the human race, the institution of marriage honors and privileges the only sexual relationship – that between one man and one woman – that can result in the birth of a child. Second, in order to protect the offspring of that relationship and to ensure that society is not unduly burdened by irresponsible procreation, marriage imposes obligations on the couple to care for each other and for any resulting children.<sup>181</sup>

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175. *Id.* at 326–29. This tradition, of course, was only recently interrupted by one-vote majority votes of three state high courts, all of which are discussed in this article.

176. *Id.* at 323.

177. *Id.* at 327.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 328–29.

For all of these reasons, it was “obvious” that the classification created by conjugal marriage was based not on sexual orientation but rather “on a couple’s ability to engage in sexual conduct of a type that may result in the birth of a child.”<sup>182</sup>

By refusing to consider any of these reasons for and purposes of conjugal marriage, the Connecticut Supreme Court ensured that its decision, and the four-justice majority opinion justifying that decision, would be morally partisan. And by its unexplained insistence that the only purposes of civil marriage are the individual’s interest in sharing a committed relationship and having a family, the majority became an apologist for a controversial and novel, moral conception of marriage, which directly contradicted the considered view of the people of Connecticut and every other state. As Justice Zarella noted, the majority assumed an answer to the very question it purported to answer.<sup>183</sup>

## VI. A PERFECTIONIST CONCEPTION

That the decisions of the Massachusetts, California, and Connecticut high courts are illogical if viewed as exercises in moral neutrality does not mean that those decisions are incapable of a comprehensible reading. Rather, the decisions can be read intelligibly if they contain an unexpressed (and likely unexamined), prior commitment to a particular moral principle, namely that same-sex intimacy has moral value equal to the moral value of monogamous, conjugal intimacy.

Indeed, the most reasonable reading of the decisions is that majorities of the courts assume that homosexual activity is a worthy end or good, a moral reason for action. In this view, homosexual conduct adds something of value to less-valuable, non-sexual same-sex friendships, and thus ought to receive the encouragement and approbation of the law. This assumption, if incorporated implicitly in the Massachusetts, California, and Connecticut decisions, renders the courts’ autonomy reasoning comprehensible.

This argument is not new. Carlos Ball, a same-sex marriage advocate who understands himself to make a moral argument for same-sex marriage, has long predicated his argument on the putative moral value of homosexual intimacy. Ball attempts to ground an argument for same-sex marriage on “a recognition that same-sex relationships are

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182. *Id.* at 329.

183. *Id.* at 335.

normatively valuable.”<sup>184</sup> It is insufficient, in Ball’s view, to premise arguments for same-sex marriage upon non-perfectionist liberalism. Though Ball finds persuasive the non-perfectionist arguments that homosexual-conduct advocates successfully employed against anti-sodomy laws, the push for legal recognition of same-sex marriage “reflects a fundamental change in what many homosexuals are asking of society.”<sup>185</sup> Non-perfectionist principles of equality and tolerance are, Ball recognizes, ineffectual to bring about same-sex marriage. Political liberalism “must necessarily remain silent” on the justness of same-sex marriage because legal approbation of homosexual relationships requires “endors[ing] a particular conception of the good, and this political liberalism cannot do.”<sup>186</sup>

To illustrate the shortcomings of non-perfectionist liberalism, Ball states that a “political liberal, relying on notions of equality, tolerance, and privacy, cannot satisfactorily respond to” the argument, commonly asserted in defense of conjugal marriage, that a society that recognizes same-sex marriages must also recognize polygamous marriages.<sup>187</sup> Ball observes that one can differentiate between or equate polygamous relationships and homosexual relationships only “by engaging in normative assessments” of the respective values of each.<sup>188</sup>

Adumbrating the problem that the Massachusetts, California, and Connecticut high courts would later face, Ball wrote, “Gays and lesbians are now asking that society fully recognize their relationships. They seek not only eligibility for the receipt of the legal and financial benefits associated with marriage, but also the normative acceptance of their relationships.”<sup>189</sup> Ball supposed that, if homosexual-conduct advocates were seeking for same-sex couples the benefits of marriage without the label “marriage” (if they sought civil unions or domestic partnerships, for example), sentiments of equality might move the majority to accept that proposal. But equality in access to benefits is insufficient for same-sex couples “because gays and lesbians currently seek not only equality in

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184. Ball, *supra* note 16, at 1875. Ball’s formulation is (no doubt unintentionally) misleading. Recognizing the value of same-sex relationships, such as male-male friendships, entails neither affirmation of the putative value of homosexual conduct nor equality in law between intimate, same-sex relationships and conjugal marriage. Indeed this author is among those who both affirm the value of same-sex friendship and oppose same-sex marriage. Ball is actually calling for approbation not of same-sex relationships but rather of same-sex sexual intimacy.

185. *Id.* at 1874.

186. *Id.* at 1875.

187. *Id.* at 1878–79.

188. *Id.* at 1879.

189. *Id.* at 1876.

the tangible benefits associated with marriage, but also full acceptance in a normative sense.”<sup>190</sup>

Ball considered and rejected both Rawlsian and Dworkinian, non-perfectionist liberalism as foundations for an argument of favor of same-sex marriage.<sup>191</sup> Both fail to account for the moral content requisite to any argument in favor of same-sex marriage. Ball acknowledges that a concession that homosexual acts are immoral or debasing would render ineffectual the argument that “society should condone that immorality by recognizing gay marriages even if [as Rawls supposes] there is an overlapping political consensus that toleration and equality should be encouraged and promoted.”<sup>192</sup> The proposition that society has an obligation to approve or reward immoral conduct does not follow from the premise that a society must tolerate that conduct.

Similarly, Dworkin’s prohibition against punishing someone for leading the life he wants to lead does not mandate same-sex marriage; recognition of conjugal marriage does not involve coercion or deprive unmarried persons of their liberty. Ball recognizes the distinction that the Massachusetts SJC majority glossed over: “Society’s refusal to recognize same-sex marriage does not ‘forbid’ gays and lesbians from leading the lives they think are best for them; it instead entails withholding societal approval of their relationships.”<sup>193</sup>

For these reasons, Ball concludes, “If our society is going to recognize same-sex marriage, the supporters of such marriages must incorporate perfectionist ideals into their arguments—they must be prepared to speak not only in terms of individual rights, but also in terms of collective goods and the moral value of same-sex relationships.”<sup>194</sup>

The purpose of this article is neither to critique the merits of Ball’s argument nor to comment on its persuasiveness. Rather, it is helpful to consider Ball’s argument in light of the California and Massachusetts courts’ insistence that they were engaged upon a morally neutral project. As Ball recognizes, changing the definition of marriage to include same-sex relationships is an exercise about which non-perfectionist liberalism has nothing to say.

Ball’s argument provides an account of marriage that, when read into the state same-sex marriage decisions, renders them comprehensible. That the SJC understood and intended to play the role of moral teacher is illustrated by its reasoning, as demonstrated in Part II, above. As

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190. *Id.* at 1877 (emphasis omitted).

191. *Id.* at 1883–1909.

192. *Id.* at 1893–94.

193. *Id.* at 1899.

194. *Id.* at 1881.

demonstrated in Part III, the decisions make no sense as applications of equality or autonomy principles. Similarly, as demonstrated in Part IV above, the California court's reasoning does not hold together if stripped of the court's prior antipathy toward a special status for conjugal marriage. But when read as implicit endorsements of the proposition that homosexual conduct is a worthy reason for action, the same-sex marriage decisions make sense. If one begins, as Ball does, with the premise that homosexual conduct has affirmative moral value, one can endorse the additional proposition that homosexual conduct adds something of value to a relationship between two persons of the same sex.<sup>195</sup>

Once one has accepted this presupposition, one can logically insist that the law equally endorse and approve conjugal, monogamous relationships and relationships defined by homosexual conduct. However, a court that follows this reasoning has abandoned any moral neutrality and has engaged in a perfectionist project, injecting into law the controversial moral claims that (1) same-sex intimacy has positive moral value and (2) conjugal marriage does not deserve the special place in the law it once occupied.

## VII. TWO RATIONAL BASES FOR STATES' CONJUGAL MARRIAGE LAWS

Two rational bases ground conjugal marriage laws.<sup>196</sup> Both rational basis arguments begin with the observation that different types of relational arrangements—same-sex intimacy, non-sexual friendship, conjugal monogamy, polygamy—are self-evidently distinguishable in relevant ways. As Robert George has observed, “Unless one embraces a strict (and implausible) belief in androgyny, it is clear that [marriage

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195. This author is among those who reject that premise. This is not to say that relationships between persons of the same sex, including homosexual persons of the same sex, have no moral value. It is only to say that homosexual conduct adds nothing of value to those relationships but instead detracts from the integration of persons in a same-sex relationship by instrumentalizing the human body. For more on this point, see Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, in *IN DEFENSE OF NATURAL LAW* 139–60 (Robert P. George ed., Oxford Univ. Press 1999); Patrick Lee & Robert P. George, *What Sex Can Be: Alienation, Illusion, or One-Flesh Union*, 42 *AM. J. JURIS.* 135 (1997).

196. The California Supreme Court held, *contra* the Massachusetts SJC and the California Court of Appeal, that conjugal marriage statutes discriminate on the basis of sexual orientation, a suspect class under the California constitution, and that same-sex couples have a fundamental right to receive the law's “respect,” and for those reasons applied strict scrutiny review. *In re Marriage Cases*, 183 P.3d 384, 400, 421 (Cal. 2008). As demonstrated in section IV.C.2 above, the premise of the court's equal protection assertion is wrong. Conjugal marriage laws have exactly the same application to homosexuals that they have to heterosexuals, permitting persons of all sexual orientations to marry one person of the opposite sex who is not a close relative or a minor and not married to a third person.

As for the fundamental right, the court gave no reason why this right should be limited to same-sex couples, rather than polygamous and other groupings, and none appears in logic, as set

between one man and one woman] is scarcely an arbitrarily drawn class.”<sup>197</sup>

The class of conjugal marriage is defined by readily discernable features that bear rational relationships to both (1) particular moral goods and (2) morally neutral societal benefits. For whatever reasons state legislatures distinguish between same-sex and opposite-sex unions, the capacity to make this distinction in law is itself a rational basis for the traditional definition of marriage.

Justice Martha Sosman, writing in dissent, in *Opinions of the Justices*,<sup>198</sup> seemed to grasp this point. She chastised the majority for requiring the legislature to give the statutory schemes for same-sex and opposite-sex relational arrangements the same name “even if the statutory schemes are substantively different and those differences stem from good and valid reasons.”<sup>199</sup> The majority of the California Court of Appeal, in *In re Marriage Cases*, made an observation similar to this when it reasoned that legislatures act rationally by defining the respective rights and obligations appurtenant to different relational arrangements.<sup>200</sup> This section of the article attempts to flesh out the differences that legislatures rationally recognize between same-sex and conjugal relationships.

#### A. A Morally Partisan Rational Basis for Conjugal Marriage Laws

A morally partisan rational basis for conjugal marriage begins with the claim that conjugal marriage is a self-evidently basic good, joining as it does a man and a woman in a one-flesh communion that is an *intrinsic* reason for choice and action. This means that conjugal marriage is good in and of itself, regardless of any extrinsic benefits that may or may not result from being married. So, whether any particular marriage is useful for procreation, support, affection, economy, love, pleasure, or even for individual fulfillment (to borrow from the California Supreme Court), human persons rationally choose to participate in conjugal marriage

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forth in section IV.C above. However, the court extends the right only to same-sex couples. So the definition of the right, in addition to being morally partisan, is internally inconsistent.

Because the bases for applying strict scrutiny are morally partisan and internally inconsistent, this article will review conjugal marriage laws under the more sensible rational basis standard.

197. Robert P. George, *Marriage, Morality, and Rationality in THE MEANING OF MARRIAGE* 142, 169 (Robert P. George & Jean Bethke Elshtain eds., Spence Publ. Comp. 2006) [hereinafter *Rationality*].

198. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 574–78 (Mass. 2004).

199. *Id.* at 578 n.4.

200. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 720 (Cal. App. 2006), *rev'd* 183 P.3d 384 (Cal. 2008).

when they choose it for its own sake. Gerard Bradley and Robert George have made this defense of conjugal marriage. While morally partisan, in the sense that it invokes a particular conception of goods and human persons, this argument depends only on principles accessible through the exercise of practical reason and is therefore rational.

Bradley and George argue that marriage, consisting of a two-in-one-flesh communion actualized by sexual acts of the reproductive type, is a basic human good, like life, knowledge, and aesthetic experience.<sup>201</sup> This means that marriage is intrinsically good, in addition to being instrumentally expedient.<sup>202</sup> It is reasonably chosen not merely because it enables participants to experience other goods, such as love, affection, and child rearing, but also because it is good in and of itself; it is, in George's words, "a reason for acting whose intelligibility as a reason depends on no ulterior end."<sup>203</sup>

The basic good of marriage is, according to Bradley and George, actualized through conjugal sex acts of the reproductive type. Though not all conjugal marital sex acts are reproductive in fact, because the non-behavioral conditions of reproduction do not always pertain (as where one or both of the spouses is infertile), the behavioral conditions of reproduction, the bodily union of one man and one woman, are self-evidently part of marital union.<sup>204</sup> For this reason, spouses have a basic reason to perform conjugal acts.

By contrast, when people engage in sexual acts that do not actualize the self-evident, basic good of marriage they treat the body as a mere instrument for the pursuit of pleasure, affection, or some other end, and thus damage personal integrity.<sup>205</sup> Sex acts that are not reproductive in type or do not take place within marriage are thus inconsistent with the basic human good of integrity, regardless of the sexes or sexual orientations of the persons participating in them.<sup>206</sup>

In other words, conjugal marital sex acts have special value and meaning, which non-marital sex acts do not share. Note that the force of this argument does not depend upon commitment to any particular religious dogma. Rather, the argument follows from the self-evident principle that conjugal marriage is a basic human good. This principle is

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201. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 301–02 (1995) [hereinafter *Liberal Imagination*].

202. *Id.* at 302.

203. *Rationality*, *supra* note 197, at 153.

204. *Id.* at 157–65, 168.

205. *Liberal Imagination*, *supra* note 201, at 302.

206. *Id.*

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grasped through non-inferential acts of understanding and may be tested through dialectical argument.<sup>207</sup>

Because this defense of marriage begins with an invocation of self-evidence, it has met the criticism that it is circular and conclusory, and thus irrational. For example, Dale Carpenter, a critic of conjugal marriage, asserts that Bradley's and George's defense of conjugal marriage "suffers a fatal circularity."<sup>208</sup> He faults them for their candid reliance upon a self-evident principle, which must be grasped, if at all, in non-inferential acts of reasoning. He concludes that Bradley and George are guilty of "because-I-say-so reasoning," which constitutes a "bad argument."<sup>209</sup>

If Bradley and George offered only their own *ipse dixit*, as Carpenter supposes, then their argument would indeed be bad. However, Carpenter pummels a straw man. That Bradley and George make a self-evident observation neither defeats the rationality of their argument nor renders it circular. Reliance upon self-evident principles is neither new nor irrational. The law depends upon numerous self-evident premises without thereby defeating its logic; every argument has to start somewhere. By starting with a principle grasped through non-inferential acts of reasoning, Bradley and George offer a clear starting point, from which a straight line departs.

Proponents of same-sex marriage may disagree with the claim that the intrinsic value of conjugal marriage is self-evident. Indeed, many of them seem to assume that marital sex is self-evidently *not* unique.<sup>210</sup> Carpenter himself takes as an unexamined first principle that conjugal acts are not morally significant. Carpenter's conclusion requires commitment either to the presupposition that consensual sex is morally indistinguishable from consensual arm wrestling or to the presupposition that same-sex intimacy is equally as morally valuable as conjugal

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207. *Id.* at 307.

208. Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 190 (2005).

209. *Id.* at 189.

210. In fact, it is proponents of same-sex marriage who make circular arguments predicated upon *ipse dixit*. The equality argument for same-sex marriage (for example) depends upon establishment of the proposition that choice of a partner of the same sex is the only valuable choice for a homosexual person. However, same-sex marriage advocates have made no attempt to demonstrate this point. In fact, this presupposition follows only from their ultimate conclusion, namely that same-sex intimacy is equally as morally valuable as conjugal monogamy.

The California Supreme Court made this same circular argument while trying to establish that conjugal marriage laws treat homosexuals differently than heterosexuals. Rather than identify a way in which the law discriminated in intent or effect, the court asserted baldly, "By definition, gay individuals are persons who are sexually attracted to persons of the same sex and thus, if inclined to enter into a marriage relationship, would choose to marry a person of their own sex or gender." *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008).

monogamy. Carpenter does not provide an account of his reasoning on this point.

Regardless, this disagreement on first principles does not defeat the moral rational basis for conjugal marriage. As the California Court of Appeal recognized, it is not up to courts to choose between competing conceptions of human goods where the people have done so either through their elected representatives or through direct lawmaking.

Carpenter also characterizes Bradley's and George's argument as irrational on the much-abused ground that sterile and elderly couples are allowed to marry, and homosexual couples are indistinguishable from these couples in terms of their ability to procreate.<sup>211</sup> However, the argument for conjugal marriage is predicated neither upon a requirement that all marriages produce children nor upon an assumption that all marriages will do so.

In Bradley's and George's view, marital sex is not an instrumental good but rather a constituent aspect of the basic good of marriage. Marital sex has special value, irrespective of the fertility of the married persons. Indeed, Bradley and George expressly reject the view that sex can properly be considered a mere means to any extrinsic end, whether that end is procreation, pleasure, or friendship.<sup>212</sup> So, this argument for conjugal marriage runs in the opposite direction of Carpenter's characterization of it.<sup>213</sup>

As Bradley and George demonstrate, one can grasp through the exercise of reason the unique moral value of conjugal monogamy. If a state legislature accepts the claim that conjugal marriage is a basic good, then that legislature may rationally lend to conjugal marriage special approbation in law, granting to conjugal marriage its own unique civil institution. The legal recognition of that institution might encourage and incentivize participation in it. Legislatures thus act rationally by lending the approbation of law to conjugal marriage on the ground that conjugal marriage is a morally valuable relational arrangement, which promotes human flourishing. Whether or not courts agree with this moral argument, it is rational and thus sufficient to support the defense of conjugal marriage from equal protection and due process challenges.

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211. Carpenter, *supra* note 208 at 194–95.

212. *Liberal Imagination*, *supra* note 201, at 305.

213. *Id.* at 305–06.

*B. A Morally Neutral Rational Basis for Conjugal Marriage Laws*

A morally neutral rational basis for upholding conjugal marriage laws is the capacity to distinguish in law between relational arrangements that are self-evidently distinguishable in relevant ways in fact. Legislatures rationally distinguish between man-woman monogamy, man-man intimacy, man-woman-woman polygamy, woman-man-man polyandry, man-boy pedophilia, and other intimate arrangements on the ground that different relational arrangements have differing levels and types of instrumental values to an ordered society.<sup>214</sup>

States might rationally classify relational arrangements for both morally partisan and morally neutral reasons. Even if Bradley and George are incorrect in their claim that the two-in-one-flesh union of a man and a woman has *intrinsic* value, different relational arrangements serve different *extrinsic* values for individuals and the societies in which they participate. Legal distinctions between and among institutions such as marriage, civil unions, and domestic partnerships enable legislators and citizens to identify and protect the relative instrumental values in different relational arrangements. On this ground states may rationally call male-female monogamy by one name, same-sex intimacy by another, polygamy by a third name, and non-sexual supportive relationships (i.e. a daughter caring for an elderly mother) by a fourth name. Each legal institution corresponds to a different relational arrangement, and each relational arrangement is useful to society for different purposes.

Same-sex marriage advocates make a similar point when they argue (unpersuasively, in the view of some)<sup>215</sup> that same-sex marriage is distinguishable from polygamous marriage. Whether or not same-sex intimacy has greater moral value than polygamy, same-sex marriage advocates and the California Supreme Court claim to discern relevant distinctions between the two relationships in terms of their social utility. In their view, one supposes, these distinctions would serve as a rational basis for prohibiting polygamy while recognizing same-sex “marriages.”

Not all prudential distinctions between relational arrangements must imply superiority of one arrangement over another. Legislatures might

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214. Of course it is true, as the Connecticut court noted, that a classification “cannot be maintained merely for its own sake.” *Kerrigan v. Comm’r Pub. Health*, —A.2d—, 289 Conn. 135, 255 (Conn. 2008). However, legislatures do not distinguish between relationships in positive law merely for the purpose of distinguishing between relationships in positive law. Instead, they do so to reflect actual distinctions that appear between relationships in reality, and in order to classify those distinctions according to their (1) moral value and (2) social utility.

215. See Hadley Arkes, *The Family and the Laws*, in *THE MEANING OF MARRIAGE* 125–27, 138–39 (Robert P. George & Jean Bethke Elshtain eds., Spence Publ. Comp. 2006).

rationally distinguish between relationships according to the types, as well as the degrees, of social uses they produce. A legislature may determine that some relationships are valuable for some purposes, while other relationships are valuable for other purposes, and arrange its institutions so as to incentivize the most useful aspects of each type of relationship.

To be sure, a state legislature is entitled to determine which intimate relationships are instrumentally valuable, and thus deserving of institutional recognition, and which ones are less useful and thus not deserving of their own institutions or deserving of more limited institutional recognition. However, state legislatures might additionally and rationally separate institutions not merely hierarchically along one axis but also in a matrix based upon a number of prudential factors. They might, for example, determine that non-sexual, same-sex relationships are beneficial for the promotion of friendship, while same-family pairings, such as mother-father or nephew-uncle, are useful for financial and emotional support. They could, based upon these findings, rationally establish different institutions for those types of relational arrangements. The distinction between those institutions would imply no moral or prudential superiority of one over the other. The potential axes are numerous. Legislatures might rationally distinguish between different types of erotic relationships, between different types of non-sexual relationships, and might distinguish erotic relationships from non-sexual relationships.

A state legislature might determine that conjugal marriage is valuable to the State because, among other reasons, it is the best institution for the breeding and rearing of children.<sup>216</sup> For this reason,

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216. Justice Zarella noted Connecticut's legitimate interest "in promoting and regulating procreative conduct." Zarella dissent, at 9. Conjugal marriage, he observed, is rationally related to that interest for at least three reasons. *Id.* First, the state might rationally conclude that "biological ties" make conjugal families more stable environments for child-rearing. *Id.* "Second, and relatedly, the state rationally could conclude that children do best when they are raised by a mother and a father, a belief that finds great support in life experience and common sense." *Id.* "Third, the benefits and social status associated with traditional marriage encourage men and women to enter into a state, namely, long-term, mutually supported cohabitation, that is conducive both to procreation and responsible child rearing on the part of the biological parents." *Id.*

Maggie Gallagher, an expert in these matters, after reviewing relevant social science studies concluded:

Marriage has powerful benefits for children and communities. When parents get and stay married, children do better in every way that social scientists know how to measure, provided those marriages are not high-conflict or violent. Communities benefit from more productive, law-abiding citizens, more orderly schools and neighborhoods, and fewer troubling and expensive social problems.

California might afford to conjugal marriages tax breaks and other privileges related to stability of intimate, opposite-sex relationships and the raising of children. At the same time, California might create a separate institution for adult offspring and their ailing parents, who reside together for convenience of care and support, endowing that relational arrangement with certain rights and privileges helpful to one trying to care for an elderly or ailing parent. This institution might serve the prudential purpose of reducing the State's health care costs. And the state might create a third institution for same-sex friendship, which the California Supreme Court thought beneficial to an individual's happiness and well-being.<sup>217</sup> The distinction between these institutions would bear a rational relationship to legitimate state interests.

That conjugal marriage distinguishes between genders does not render it irrational. Indeed, many laws necessarily distinguish between genders in order to reflect self-evident gender differences. For example, the state has a legitimate interest in determining the paternity of children. As Justice Sosman pointed out in *Opinions of the Justices* the presumption of paternity

reflects reality with respect to an overwhelming majority of those children born of a woman who is married to a man. As to same-sex couples, however, who cannot conceive and bear children without the aid of a third party, the presumption is, in every case, a physical and biological impossibility.<sup>218</sup>

Justice Sosman thought this difficulty not insuperable; "substantial modification[s]" to the laws concerning parenthood could make sense of the application of those laws to same-sex unions.<sup>219</sup> However, a moment's reflection reveals that this is not the case. The paternity presumption (to stay with that example) is designed around a biological fact, that women give birth. Because of this fact, mothers are easily identifiable while fathers, in cases of fornication and infidelity, are not. As Justice Sosman rightly pointed out, same-sex couples cannot bear children without the aid of a third party. Where that third party is a woman assisting two men in a male-male relationship, the presumption of paternity will not pertain, and the law will need some other

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Maggie Gallagher, *(How) Does Marriage Protect Child Well-Being?*, in *THE MEANING OF MARRIAGE* 197–212, 212 (Robert P. George & Jean Bethke Elshtain eds., Spence Publ. Comp. 2006) [hereinafter *Child Well-Being*].

217. *Id.* at 59.

218. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 577 n.3 (Mass. 2004).

219. *Id.*

mechanism for determining parenthood. Where the third party is a male assisting two women in a female-female relationship, the third party male will not qualify for the paternity presumption and paternity will remain unresolved.

It is useful to note how closely these hypotheticals resemble polygamy and polyandry. Indeed, for same-sex couples to procreate, they necessarily must cooperate with at least one additional partner, and in this sense their relationships resemble plural marriages. This further underscores the morally neutral rational basis for conjugal marriage laws. Any legal regime that bestows intimate same-sex relationships with some institutional recognition will necessarily have to distinguish those relationships both from conjugal monogamy and from polygamy and polyandry. Indeed, it will be necessary to do so not just with respect to paternity, but for other purposes as well. As long as polygamy remains prohibited, the state will need some mechanism for distinguishing third-party participation in same-sex non-marital procreation (as in the cases discussed above) from third-party participation in marriage.

Health insurance providers that provide coverage for families may find it necessary to distinguish between families in which both parents present male-specific health risks, those in which both parents present female-specific health risks, and those that contain some combination. The state might rationally identify those families in which children are raised by adults who did not conceive them, such as polygamous families, same-sex arrangements, second-marriage homes, and foster families.<sup>220</sup> Other variations on this theme will occur to the imaginative reader. For these reasons, state legislatures may rationally distinguish different relational arrangements from each other.

Legislatures may rationally acknowledge different characteristics and instrumental values inherent in certain relationships that other relationships do not share. When legislatures acknowledge these differences in law, they do so for non-moral reasons. States might rationally distinguish between conjugal marriage and same-sex domestic partnerships on the ground that conjugal marriages have, on the whole, demonstrated throughout history their social utility, while same-sex partnerships have not yet done so.<sup>221</sup> On this rational basis, unrelated to

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220. Don Browning and Elizabeth Marquardt, two liberals who understand themselves to propose a “progressive” understanding of marriage, have discussed the societal benefits of “kin altruism,” the phenomenon that natural parents are inclined to feel special affection for, and thus provide care to, the children whom they conceived. Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, in *THE MEANING OF MARRIAGE* 29–52 (Robert P. George & Jean Bethke Elshtain eds., Spence Publ. Comp. 2006).

221. Justice Zarella noted in his dissent from the Connecticut decision that the societal implication of same-sex marriage, particularly for child-rearing, will not be known for some time

the relative moral worth of these two types of relationships, California (for example) might have given same-sex partnerships provisional recognition, to enable them to demonstrate their instrumental worth, as conjugal marriages have done. Alternatively, states might determine after experience and study that conjugal marriage instrumentally produces extrinsic benefits that other relational arrangements do not generate.<sup>222</sup> This also would constitute a morally neutral rational basis for according to conjugal marriage a special status in the law.

### VIII. CONCLUSION

In the view of the majorities of the Massachusetts, California, and Connecticut high courts, the law must affirm that gender does not matter, that conjugal marital relationships are not special, and that intimate, same-sex relationships are deserving of special approbation in a way that non-marital relationships are not. These claims are not nearly as uncontroversial as many seem to suppose, and they certainly are not morally neutral. The courts' arguments are morally partisan because they promote a particular conception of human sexuality and the good. The claim that homosexual conduct is equally as good or worthy as conjugal marital sexual conduct is a moral claim because it entails a necessarily moral conception of the good and the worthy.

That most people have treated the Massachusetts same-sex marriage decisions as morally neutral is perhaps a central reason why much of the debate over the justness of the decisions has generated more heat than light. Notwithstanding the non-perfectionist rhetoric so prominent in *Goodridge*, no morally neutral defense of the SJC's marriage decisions, taken together, is possible because the decisions are not themselves morally neutral. The majority's ruling in *Opinions of the Justices* and the reasoning that the majority employed both foreclose any reasonable reading of the same-sex marriage decisions that is consistent with a

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into the future. *Kerrigan v. Comm'r Pub. Health*, —A.2d—, 289 Conn. 135, 344 (Conn. 2008). "Thus, it is entirely reasonable for the state to be cautious about implementing genderless marriage, the long-term effects of which cannot be known beforehand with any degree of certainty." *Id.*

222. In fact, studies support this conclusion. Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. ST. THOMAS L.J. 33, 46–51 (2004).

While scholars continue to disagree about the size of the marital advantage and the mechanisms by which it is conferred, the weight of social science evidence strongly supports the idea that family structure matters and that the family structure that is most protective of child well-being is the intact, biological, married family.

*Child Well-Being*, *supra* note 216, at 200. See also Browning & Marquardt, *supra* note 220, at 46.

commitment to moral neutrality. For similar reasons, the California Supreme Court's reasoning in *In re Marriage Cases* and the Connecticut Supreme Court's decision in *Kerrigan* are incapable of a morally neutral reading.

Because the same-sex marriage rulings are not morally neutral, one trying to defend the decisions as just must engage his or her opponents on moral grounds. Predicating the rulings are implicit resolutions of the fundamentally moral questions: (1) whether conjugal marriage has special value, and (2) whether homosexual intimacy is a worthy human end (moral) or rather an act inconsistent with integral human fulfillment and unworthy of persons who engage in it (immoral). On these grounds, and on these grounds alone, will further debate prove fruitful.

Nevertheless, though ultimate resolution of the merits of same-sex marriage (in legislatures and other democratic fora) must turn on the underlying moral dispute, there remain two rational bases for upholding conjugal marriage laws against judicial challenges. The first rational basis is morally partisan, but derives from the self-evident principle, accessed through the exercise of practical reason, that conjugal marriage has intrinsic value, and is thus in itself a basic reason for human choice and action.

The second rational basis is morally neutral in the sense that it does not depend upon any prior commitment to a particular conception of the human person or human sexuality. Instead, it derives from the self-evident observation that different relational arrangements display different characteristics and produce different social benefits. On this ground, states rationally distinguish between conjugal marriage and other relationships and retain for conjugal marriage a special status in the law.