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SOMETHING OLD, SOMETHING NEW: CIVIC VIRTUE AND THE CASE FOR SAME-SEX MARRIAGE

Tiffany C. Graham*

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I: INTRODUCTION

In 1993, the Supreme Court of Hawaii issued a decision¹ that forced the question of same-sex marriage from the hinterland of academic speculation to the front pages of newspapers all over the country. The nation was stunned when the court in *Baehr v. Lewin* held that same-sex marriage might be compelled by the state constitution of Hawaii.² Many argued that Hawaii would become a destination state for gay and lesbian weddings, after which the couples would return to their home states and demand recognition under the Full Faith and Credit Clause.³ One state—

1. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by statute*, Act of June 22, 1994, No. 217, 1994 Haw. Sess. Laws 526 (amending marriage licensing statute to clarify the legislature's intention to limit marriage to members of the opposite sex) (codified as amended at HAW. REV. STAT. § 572-1 (2007)), *as validated by constitutional amendment*, HAW. CONST. art. I, § 23.

2. *Baehr*, 852 P.2d at 67.

3. See, e.g., Jeffrey Schmalz, *In Hawaii, Step Toward Legalized Gay Marriage*, N.Y. TIMES, May 7, 1993, at A14 (arguing that states would have to recognize same-sex marriages performed in Hawaii unless they acted quickly to block recognition); see also Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 236 (1995) (“[I]f one is married in Hawaii, one is married everywhere—thanks both to common law tradition and to the U.S. Constitution’s [F]ull [F]aith and [C]redit [C]lause.”). Statements such as these, of course, simply misstated the law. See, e.g., Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1532 (2007) (“Under traditional choice of law

Utah—responded to this alleged threat by passing a statute that clearly expressed opposition to same-sex marriage.⁴ The federal government responded to the decision by passing the Defense of Marriage Act (DOMA), which accomplishes two goals: (1) the Act defines marriage as a union between a man and a woman for purposes of federal law, and (2) it affirms the states' right to refuse to recognize same-sex unions contracted in foreign jurisdictions.⁵

Since the *Baehr* decision, same-sex marriage has received a significant amount of attention. Many states have passed “baby DOMAs,” all of which limit marriage to the union of a man and a woman.⁶ In addition, several states have passed constitutional amendments that accomplish the same end.⁷ Activist groups and individual complainants filed test cases in several states; subsequently, the highest courts of Vermont and Massachusetts became the first supreme courts in the nation to hold that gay and lesbian couples were entitled to equal “marital” treatment under the law.⁸ Massachusetts became the first state to hold that same-

principles, . . . a state can refuse recognition to marriages performed elsewhere that violate its fundamental public policies. . . . [I]t is unlikely that a state's refusal to recognize a same-sex marriage would have violated Article IV's full faith and credit demand . . .”).

4. When Congress passed the Defense of Marriage Act (DOMA), four states had laws explicitly limiting marriage to the union between a man and a woman: Maryland, New Hampshire, Utah, and Wyoming. *See* MD. ANN. CODE art. 62, § 1 (1979) (current version at MD. CODE ANN., FAM. LAW § 2-201 (West 2007)); N.H. REV. STAT. ANN. §§ 457:1–2 (West 1992) (current version at N.H. REV. STAT. ANN. §§ 457:1–2 (West 2007)); UTAH CODE ANN. § 30-1-2 (1995) (current version at UTAH CODE ANN. § 30-1-2 (2007)); WYO. STAT. ANN. § 20-1-101 (1996) (current version at WYO. STAT. ANN. § 20-1-101 (2007)). Apart from Utah, none of these states passed their laws in response to the decision in *Baehr*. Within ten years of the passage of DOMA, thirty-nine other states had passed statutes, constitutional amendments, or both, limiting marriage to the union between a man and a woman. *See* HERITAGE FOUND., MARRIAGE IN THE FIFTY STATES, <http://www.heritage.org/research/family/marriage50/index.cfm> (last visited July 15, 2007).

5. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

6. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 25-101C, -112C (2007); COLO. REV. STAT. § 14-2-104(b) (2006); FLA. STAT. § 741.212 (2007); IND. CODE § 31-11-1-1 (2007). In addition, some of these statutes also refuse to recognize civil unions. *See, e.g.,* FLA. STAT. § 741.212 (2007).

7. *See, e.g.,* ALASKA CONST. art. I, § 25; ARK. CONST. amend. LXXXIII, § 1; HAW. CONST. art. I, § 23; MISS. CONST. art. XIV, § 263A; NEV. CONST. art. I, § 21.

8. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 973–74 (Mass. 2003); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). Even though the Vermont Supreme Court declined to find that a right to same-sex marriage existed, *see Baker*, 744 A.2d at 869 (finding that Vermont's marriage statute presupposed that marriage was the union between a man and a woman), I say “equal marital treatment” here because

sex couples were entitled to marry.⁹ The New Jersey Supreme Court followed the path set forth in Vermont, insisting that gays and lesbians receive equal treatment under the law, but leaving the method for doing so in the hands of the legislature.¹⁰ Independent of any prompting by a court, California, Connecticut, and New Hampshire have created new regimes governing the formalization of gay and lesbian relationships, and the three regimes offer state law benefits nearly identical to those given opposite-sex married couples.¹¹ In a few isolated acts of civil disobedience, elected officials began dispensing marriage licenses to same-sex couples.¹² These actions resulted in a failed push for passage of the Federal Marriage Amendment, which proposed to constitutionalize the requirement of different-sex marriage.¹³ Finally, the California General Assembly became the first elected body in the nation to authorize same-sex marriage by statute, before Governor Schwarzenegger vetoed the legislation.¹⁴

the court *did* hold that the state was obliged to offer gay and lesbian couples the same legal benefits to which married couples were entitled under state law. *Id.* at 886.

9. *Goodridge*, 798 N.E.2d at 973–74.

10. *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006). The New Jersey legislature subsequently passed a comprehensive civil unions law to comply with the command from the state high court. *See* N.J. STAT. ANN. § 26:8A-2 (West 2007).

11. *See* CAL. FAM. CODE § 297 (Deering 2007); CONN. GEN. STAT. § 46b-38bb (2007); N.H. REV. STAT. ANN. §§ 457-A:1 to :8 (West 2007) (effective Jan. 1, 2008). Hawaii and Maine have also created statutory regimes establishing marriage-like benefits for gay and lesbian couples, but they are far less generous than the regimes created in California and Connecticut. *See* HAW. REV. STAT. §§ 572C-1 to -7 (2007) (establishing a “reciprocal beneficiaries” system); ME. REV. STAT. ANN. tit. 22, § 2710 (2007) (establishing a registry for domestic partnerships); Lena Ayoub & Shin-Ming Wong, *Foreign and International Law in Gay Rights Litigation: Separated & Unequal*, 32 WM. MITCHELL L. REV. 559, 561 n.1 (2006) (describing the nature of the benefits offered in Maine, Hawaii, and other states). In recent developments, the Washington, Oregon, and New Hampshire legislatures passed domestic partnership legislation offering benefits to same-sex couples, and in New York, Governor Spitzer introduced legislation that proposes to legalize same-sex marriage. Mike Rosen-Molina, *Oregon Senate Approves Domestic Partnership Law*, JURIST, May 2, 2007, <http://jurist.law.pitt.edu/paperchase/2007/05/oregon-senate-approves-domestic.php>.

12. *See, e.g.*, Steve Barnes, *National Briefing Rockies: New Mexico: Gay-Marriage Injunction Stands*, N.Y. TIMES, Aug. 27, 2004, at A15; Thomas Crampton, *Unitarian Ministers Defy Authorities by Conducting Same-Sex Weddings in New Paltz*, N.Y. TIMES, Mar. 7, 2004, at 130; Dean E. Murphy, *San Francisco Forced to Halt Gay Marriages*, N.Y. TIMES, Mar. 12, 2004, at A1.

13. *See* H.R.J. Res. 56, 108th Cong. (2003).

14. Gen. Assemb. 849, 2005–2006 Leg., Reg. Sess. (Cal. 2005) (vetoed Sept. 29, 2005); *see also* Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at B3.

These events have shaken the cultural landscape of American society; as a result, many people have begun to evaluate their beliefs about the values underlying marriage. Proponents of same-sex marriage, for instance, argue that marriage stands for a number of principles and ideals, which include the following: the lifelong commitment among family members to love and care for one another;¹⁵ the provision of a stable atmosphere for raising children;¹⁶ the “settling” effect of marriage;¹⁷ and the need for companionship.¹⁸ Traditionalists who oppose same-sex marriage¹⁹ have identified other fundamental principles: biological procreation;²⁰ the role complementarity of the sexes;²¹ and the maintenance of tradition.²² One of the most important, and recurrent, claims set forth by opponents of same-sex marriage is the notion that traditional marriage is absolutely necessary for the continued maintenance of civilization itself.²³ Many of these

15. See Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1642–43 (2001) (discussing family care-giving function as providing civic virtue).

16. See *id.* at 1639–40 (explaining the importance of family routines in raising children).

17. See, e.g., WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8–10 (1996) (arguing that same-sex marriage will “civilize” gays because it will move their status from cultural outsiders to mainstream insiders who participate fully in all dimensions of civic life).

18. See, e.g., JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 21–22 (2004) (describing marriage as a commitment between two people to make each the other’s top priority).

19. I make specific reference to “traditionalists” who oppose same-sex marriage because I wish to distinguish them from non-traditionalist scholars such as Martha Fineman, who advocates for the abolition of civil marriage altogether. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995). This Article will focus its attention on the objections raised by traditionalists.

20. See Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat From Marriage by Redefining Marriage*, 39 *S. TEX. L. REV.* 735, 748 (1998) (explaining that the union between two persons of different genders is what makes marriage a unique institution).

21. See, e.g., Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World by Congregation for the Doctrine of the Faith (July 31, 2004), available at <http://www.catholicculture.org/library/view.cfm?recnum=6094>.

22. See Wardle, *supra* note 20, at 748–49 (explaining the concept of marriage in history); Val D. Ricks, *Marriage and the Constitutional Right to Free Sex: The State Marriage Amendments as Response*, 7 *FLA. COASTAL L. REV.* 271, 324–25 (2005) (explaining that traditional family is the root of humanity).

23. See, e.g., Blake Hurst, *Only Traditional Marriage Can Fulfill Promise to Next Generation*, *KANSAS CITY STAR*, July 17, 2004, at B7 (arguing that children do best when raised in a traditional family); Drew McKissick, *On Gay Marriage, America Showed What It Thinks*, *THE STATE* (Columbia, S.C.), Dec. 10, 2004, at A9

critics have relied on the obvious claim that only different-sex couples are biologically capable of producing a child, and therefore, they are responsible for the literal propagation of society.²⁴

The argument connecting marriage and civilization has been transformed by some opponents of same-sex marriage into a theory about the link between marriage and politics. Specifically, they have argued that there is an essential nexus between different-sex marriage and the proper development of civic spirit in the American constitutional democracy.²⁵ The claim, however, is generally offered in a conclusory fashion, leaving elaboration to the imagination of the reader. What civic virtues are relevant to life in a modern, liberal democracy? What role can (or should) government play in encouraging the development of any particular conception of virtue? Why is marriage a place where these values can be inculcated? If marriage *is* such a place, why is it that only a different-sex couple is capable of completing this task? The commentators who raise this issue typically fail to an-

(stating traditional marriage is best to promote stable societies); Timothy Rookey, *Marriage Amendment Must Be Passed To Preserve Bedrock of Our Civilization*, CAPITAL TIMES (Madison, Wis.), July 8, 2004, at 13A (arguing that traditional marriage is needed to preserve civilization).

24. See, e.g., Hurst, *supra* note 23; Rookey, *supra* note 23.

25. See, e.g., Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 372-73 (2003) (arguing that marriage is the place where people, especially children, learn their most important lessons about self-sacrifice, care-giving, cooperation, and social connection, all of which are lessons that have both a private and a public application); see also Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 167-68 (2005); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 438-39 (2004); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472-91 (1983); John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1070 (2001). The idea has also manifested itself in statements made by various citizens and politicians who oppose same-sex marriage. See, e.g., Statement by Kevin Lundberg, Rep., Colo. House Dist. 49, Comments on the Floor during the Debate over H.J. Res. 04-1013, 2004 Leg., (Colo. 2004) (Apr. 29, 2004) (transcript available at <http://www.kevinlundberg.com/TheIssues/Archives/Family/FederalMarriageAmendment/Index.html>) ("[T]he legislature will never be able to mandate a responsible citizenry. In stark contrast, a solid family is the first, best step toward building and maintaining that responsibility at all levels. In the public arena the very best that can be done is to always encourage and promote the health of the traditional family.") (resolution voted down Apr. 23, 2007); see also Allan C. Carlson, *Marriage on Trial: Why We Must Privilege and Burden the Traditional Marriage Bond*, <http://www.frc.org/get.cfm?i=PL03D1&v=PRINT> (last visited June 7, 2007) (quoting with approval a statement that argues that marriage is a political institution necessary for maintaining liberty, and using the statement to bolster the point that marriage should be limited to different-sex couples).

swer these and other critical questions that might bolster the claim of gay and lesbian civic incompetence. The criticism rests on the assumption that these non-traditional family units are devoid of the characteristics that transmit democratic values to future generations.²⁶

Even among supporters of same-sex marriage, the relationship between marriage and the inculcation of democratic values has received little attention. An overwhelming number of scholars who have considered the question have examined it through the prism of individual rights and doctrinal application.²⁷ Other scholars have examined the question through the lens of philosophy, from proposing arguments that examine same-sex marriage through the lens of new natural law theory²⁸ to claims that posit the affirmative good of same-sex marriage.²⁹ Still other scholars have considered the question of same-sex marriage from numerous other angles, including the comparison to bans on interracial marriage;³⁰ the comparison to polygamy;³¹ international approaches to same-sex marriage;³² and the political strategies underlying the debate.³³ Precious few, however, have seriously considered the question of same-sex marriage from the stand-

26. It is not my intent in this Article to imply that the strongest argument in favor of same-sex marriage is the impact that gay and lesbian couples may have on the civic development of any children they decide to raise, or that children are the primary reason that justifies allowing any couple to marry. Instead, it is simply my intent to examine the particular claim at stake and engage it on its own terms.

27. The scholarly literature in this area is incredibly vast. See, e.g., Gary J. Simon, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313 (2006) (arguing that bans on same-sex marriage violate the Establishment Clause); Mark Strasser, *Lawrence, Same-Sex Marriage and the Constitution: What is Protected and Why?*, 38 NEW ENG. L. REV. 667 (2004) (arguing that same-sex marriage should be protected under the Court's fundamental rights and equal protection jurisprudence).

28. See, e.g., John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97 (1997).

29. See, e.g., Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 15 GEO. L.J. 1871, 1930-43 (1997).

30. See, e.g., Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873, 898-99 (2006) (explaining similarities between opposition to gay marriage and anti-miscegenation laws).

31. See, e.g., Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

32. See, e.g., Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. REV. 1073 (2006).

33. See, e.g., Kenneth K. Hsu, *Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages*, 20 BYU J. PUB. L. 275, 280 (2006) (discussing same-sex marriage advocates' political strategies).

point of civic virtue:³⁴ If institutions like marriage and family are critical to the maintenance of civil society and if civil society is deeply important to the development of civic virtue, which aspects of marriage and family life will assist in the inculcation of virtue? Does same-sex marriage undermine or reinforce the process of developing virtue? Precisely *what* virtues are necessary for the construction of a modern, diverse civil society? Is it a mistake to focus on the transformative potential of civil society institutions when (1) victories won by the gay rights movement largely represent the triumph of liberal democratic progress, and (2) efforts to instill virtue by transforming the human character run the risk of oppression by insisting on one vision of the good life?

Within the legal academy, Professors Linda McClain and Lynn Wardle have engaged these questions most thoroughly, and I propose to enter the debate by focusing primarily on the manner in which families—particularly married families—inculcate the virtues necessary for self-government.³⁵ After exploring the relationship between married family life and civic virtue, I will (1) identify autonomy as a critical virtue that is necessary for raising citizens in a modern, liberal, tolerant democracy, (2) locate the connection between marriage and the transmission of this virtue, and (3) argue in favor of the objective ability of gays and lesbians to convey this virtue.³⁶

34. Throughout this Article, I will use “virtue” and “civic virtue” interchangeably. Anne Dailey has described civic virtues as “the qualities that define citizenship in the liberal state,” and it is this definition on which I will primarily rely. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1838 (1995).

35. It is clearly an open question whether a liberal, democratic, and ostensibly neutral government should ever concern itself with the inculcation of virtue. Answering this question, however, is beyond the scope of this Article. Accordingly, I will simply proceed from the assumption that supporting the inculcation of a particular virtue—namely, the constitutional norm of autonomy that exists in the United States today—is an affirmatively good and normatively appropriate position to take.

36. This Article operates under the assumption that a committed, stable marriage may not be necessary for children, but is certainly ideal. It is not the purpose of this Article to justify this assumption; doing so would move beyond the scope of its contours. In making this assumption, it is important to note that numerous commentators have challenged this decision to privilege marriage above other intimate relationships. See generally Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573 (2005) (criticizing the “child welfare” arguments of both opponents and supporters of same-sex marriage); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006) (arguing that marital-status discrimination in adoption and assisted reproduction does not survive inter-

Part II of this Article considers the role of virtue in family life, with a particular emphasis on married family life.³⁷ This section also examines the historical origins of the link between married family life and republican virtue, and re-casts the valuable aspects of the claim with an eye toward modern concerns about tolerance and gender equality. In addition, I argue that married families are comparatively better-equipped to foster and convey the virtue of autonomy than are unmarried families.

Part III of this Article defends autonomy as the virtue of choice by relying on Joseph Raz's theory of perfectionist liberalism. I then turn my attention to the manner in which autonomous citizens are produced in a liberal state by emphasizing the feminist theory of relational autonomy. By focusing on relational autonomy and moving away from traditional, liberal notions of autonomy, I establish the claim that the virtue of autonomy is best produced and conveyed in the context of community—specifically, the family. Finally, using the Court's opinion in *Lawrence v. Texas*³⁸ as a purely normative text, as well as the gay and lesbian experience of life in the closet, I support the claim that the precepts of relational autonomy equally apply to gays and lesbians.³⁹ I ultimately conclude that, from the standpoint of civil society, committed gay and lesbian relationships are affirmatively good and should be legitimized in the law.

II: FAMILY LIFE, MARRIAGE, AND THE INCULCATION OF VIRTUE

As an initial matter, one must acknowledge that considerations of virtue and the good life seem to contradict the essence of

pretist scrutiny because it relates neither to the purposes of marriage nor to child welfare).

37. Throughout this Article, I emphasize the preferred status of married family life. In doing so, I am not referring to *all* forms of married family life; instead, I am referring to stable, low-conflict, ideally-constructed married family lives where all members of the unit receive the emotional and material support necessary to maintain a healthy family structure. I recognize that many married families are complete disasters, insofar as the participants in the relationships may be emotionally or physically abusive, may abuse alcohol or drugs, or may simply be distant family members, among other ills. These family structures are not the focus of my concern in this Article.

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

39. In this Article, I will use the phrase “gays and lesbians” to refer to any person who experiences an enduring physical and emotional attraction to individuals of the same sex.

the liberal state.⁴⁰ The liberal state has traditionally been described as one that grounds itself in the principle of neutrality and emphasizes the importance of individual rights.⁴¹ Liberalism rejects an over-arching vision of the good life for two reasons: (1) skepticism about our ability to identify such a vision in a vast community that is marked by the diversity of its citizens, and (2) a deep-seated fear about the coercive possibilities lurking behind the imposition of doctrines that require compliance.⁴² Thus, even if one argues that virtue can be generated in the family setting, it is not clear that a liberal state should encourage that process. Conceptual divergences notwithstanding, the idea of virtue retains force in our liberal politics because it is the point around which the defense of civil society practically and rhetorically orients itself. In light of this, one is forced to wonder about the degree to which the liberal orientation of our society can comfortably co-exist with the call to virtue. When we seek to defend an old institution (like the family), or to justify a new one (like

40. The "liberalism" to which I refer is the philosophical tradition that emphasizes individual rights, and counts as its expositors theorists from John Locke to Immanuel Kant to John Rawls.

41. Michael Sandel has described liberalism as follows:

[S]ociety, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles . . . is . . . that they conform to the concept of *right*, a moral category given prior to the good and independent of it.

MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 1 (2d ed. 1998); see also LINDA C. McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 32 (2006) ("Political liberalism posits that a stable polity is possible without an orthodoxy about the good life, or a unified comprehensive moral doctrine."). Political philosopher John Rawls offers a similar accounting of liberalism: "Political liberalism presents . . . a political conception of justice for the main institutions of political and social life, not for the *whole* of life." JOHN RAWLS, *POLITICAL LIBERALISM* 175 (1993) (emphasis added). "The basic idea is that in virtue of their two moral powers (a capacity for a sense of justice and for a conception of the good) and the powers of reason (of judgment, thought, and inference connected with these powers), persons are free." *Id.* at 19. Regarding the human capacity for conceiving the good, Rawls is not advocating here for the imposition of a substantive, broad-based norm of living to which the community must subscribe; rather, he is referring to the capacity of the individual to identify her own ends and rationally pursue them. *Id.* Regarding the rights-centered focus of liberalism, Rawls reminds us that "it must affirm certain basic rights and liberties, [and] assign them a certain priority." *Id.* at 175.

42. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 318-19 (1996) (discussing the critiques of republicanism that emphasize its greater suitability for a smaller, homogeneous society and its tendency to pressure individuals to conform).

same-sex marriage), does it make sense to appeal to arguments about virtue? In order to evaluate the problem, it is necessary to consider the roots of virtue as a political concept, any role that it might play in a liberal society, and the manner in which claims about virtue have continued political relevance in the same-sex marriage debate today.

The classical model of virtue received its earliest defense from Aristotle, who claimed that the ideal political state was one whose organizing principle was the attainment of virtue.⁴³ Virtue at its core was the source of excellence in the human character, and in the context of politics, it was achieved through public consideration of the common good.⁴⁴ Consequently, institutions were structured with the aim of facilitating deliberative processes that would move society closer to achieving its true end: "The end of the state is the good life, and [social institutions] are the means towards it."⁴⁵ Classical conceptions of virtue, then, turned on the idea that it was not only possible to identify the common good, but that the task of the citizen was to develop habits of character that would permit him to achieve the good.⁴⁶

The Aristotelian vision of the state has clearly been modified over time, but his basic insight about the purpose of political life was critical to the development of republican theory. According to republican theory, the citizens of a republic commit themselves to the practice of self-government, but the enterprise relies for its success on the virtue of its citizens. A specific reliance on virtue, however, presupposes the ability and obligation to identify those civic characteristics that government prefers: "[R]epublican politics cannot be neutral toward the values and ends its citizens espouse. The republican conception of freedom,

43. ARISTOTLE, *Politics*, in *THE BASIC WORKS OF ARISTOTLE* 1127, 1127 (Richard McKeon ed., Random House 1941) (1831–1870) ("Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that which they think good. But, if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.").

44. See, e.g., Jeremy Waldron, *On the Objectivity of Morals: Thoughts on Gilbert's Democratic Individuality*, 80 CAL. L. REV. 1361, 1384 (1992) ("Aristotle believed that distinctively human capacities for reflection and individual virtue could flourish only in a community organized around the idea of public deliberation about the common good.").

45. ARISTOTLE, *supra* note 43, at 1189.

46. See ARISTOTLE, *Nicomachean Ethics*, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 43, at 935, 952 ("[L]egislators make the citizens good by forming habits in them . . .").

unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character self-government requires."⁴⁷ Liberty in the republican state does not lie in a robust conception of individual rights, or in the ability of a person to choose her own moral ends; rather, liberty lies in the exercise of a deliberative form of self-rule that is tied to a muscular notion of virtue.⁴⁸ This question about the relevance of virtue in the modern liberal state has become increasingly important over the course of the past two decades. During that time, contemporary political thinkers and social commentators have been engaged in a lively debate over the declining structures of civil society and the corresponding impact on our ability as a nation to develop the virtues that sustain our democracy.⁴⁹

These civic revivalists⁵⁰ have considered a variety of issues in their commentaries on the loss of commitment to the structures and institutions of public life.⁵¹ They have also proposed numer-

47. SANDEL, *supra* note 42, at 6.

48. In *DEMOCRACY'S DISCONTENT*, Michael Sandel argues that "[r]epublican freedom requires a certain form of public life, which depends in turn on the cultivation of civic virtue." *Id.* at 26.

49. See generally *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* (Mary Ann Glendon & David Blankenhorn eds., 1995) [hereinafter *SEEDBEDS*] (collecting essays from prominent thinkers who have focused their attention on the problems of civil society).

50. See, e.g., Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 *HOFSTRA L.REV.* 379, 386 (2003) (discussing the role of marriage in generating civic virtue). I believe that it is appropriate to call these thinkers "revivalists" because their claims are largely rooted in the eighteenth century strain of American civic republicanism. Much like the republicans of ancient Greece and the Middle Ages, eighteenth century civic republicanism was rooted in a belief that political freedom could be defended only by individuals who possessed so-called "virtues" like independence, moderation, loyalty, self-sacrifice, and a commitment to the common good. These virtues were learned and practiced in a variety of settings, but eighteenth century republicans believed that they were best developed in the context of marriage and family life. See *infra* notes 128–53 and accompanying text. Eighteenth century republican thought is incompatible with life in a modern, liberal democracy because it excluded numerous constituencies along many lines, including race, class, and gender, and furthermore, relied on an oppressive form of consensus that rather plainly does not exist. Modern day civic revivalists obviously do not call for the return of a time when vast swathes of the American population had no voice in political affairs. Instead, the civic revivalists rely on republican insights about the relationship between local community life and broader political norms in an effort to mitigate the effects of social decline and deepen citizens' commitment to public life.

51. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 277–84 (2000) (explaining the reasons for a decline in civic participation); David Popenoe, *The Roots of Declining Social Virtue: Family, Community, and the Need for a "Natural Communities Policy"*, in *SEEDBEDS*, *supra* note 49, at 71, 71 (explaining the reasons for a decline in civic involvement).

ous efforts to halt, and ultimately reverse, the trend.⁵² Even though the civic revivalists have directed their attention to a number of problems, their particular emphasis has been the twin concerns of marriage and the family. In particular, they have staked a claim about the importance of marriage and the family on the relationship that exists between married family life and the inculcation of virtue.⁵³

A. *Families, Civil Society, and the Inculcation of Virtue*

“Civil society” has been described as “the many forms of community and association that dot the landscape of a democratic culture, from families to churches to neighborhood groups to trade unions to self-help movements to volunteer assistance [for] the needy.”⁵⁴ The institutions of civil society are meant to weave bonds of service, obligation, unity, and concern that will ideally connect community members and foster their willingness to cooperate with each other. Civil society, however, is not confined just to those tangible organizations that individuals can join; it also encompasses “our national public philosophy and our culture—in other words, all of those intangible values and beliefs upon which democracy rests.”⁵⁵ In short, civil society is a mesh of institutions and ideas that fill the gap between the individual and the state and has the ability to mediate interactions between the two.⁵⁶ More directly, however, the institutions of civil society

52. See, e.g., Popenoe, *supra* note 51; William M. Sullivan, *Reinstitutionalizing Virtue in Civil Society*, in SEEDBEDS, *supra* note 49, at 185, 197 (discussing methods by which virtue can be revitalized).

53. See, e.g., Popenoe, *supra* note 51, at 71 (explaining the importance of the proper socialization of children to civic involvement); Dailey, *supra* note 34, at 1850–56 (discussing family responsibility in developing civic virtue). *But see* PUTNAM, *supra* note 51, at 279 (arguing that, with few exceptions, “none of the major declines in social capital and civic engagement . . . can be accounted for by the decline in the traditional family structure.”).

54. JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 5 (1995).

55. Don Eberly, *Civic Renewal vs. Moral Renewal*, POL’Y REV., Sept. & Oct. 1998, at 44, 44, available at <http://www.policyreview.org/sept98/renewal.html>.

56. See ELSHTAIN, *supra* note 54, at 5–6. Other communitarian scholars have also devoted their attention to the connection between civil society and self-government.

A communitarian perspective recognizes that the preservation of individual liberty depends on the active maintenance of the institutions of civil society where citizens learn respect for others as well as self-respect; where we acquire a lively sense of our personal and civic responsibilities, along with an appreciation of our own rights and the rights of others; where we develop the skills of self-government as well as the habit of governing ourselves, and learn to serve others—not just self.

create opportunities for citizens to develop the virtues and skills they need for effective self-governance.⁵⁷ It is within these "seedbeds of civic virtue"⁵⁸ that new generations of citizens acquire the habits and character traits that typify members of a democratic regime.⁵⁹

Civil society revivalists, however, have been ringing alarm bells for quite some time because evidence shows that the institutions of civil society are in a slow decline. Commentators have marshaled a wealth of information attesting to this fact.⁶⁰ A primary example is found in the examination of schools across the country, especially inner-city schools. Even though schools are among the most critical institutions responsible for developing citizens, they are failing throughout much of inner-city

INST. FOR COMMUNITARIAN POL'Y STUDIES AT GEO. WASH. UNIV., THE RESPONSIVE COMMUNITARIAN PLATFORM, <http://www.gwu.edu/~icps/civil.html> (last visited July 18, 2007).

57. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. 2000) (1835).

58. See Mary Ann Glendon, *Introduction to SEEDBEDS*, *supra* note 49, at 6–9.

59. Mary Ann Glendon has argued that "a regime of self-government must have an adequate supply of citizens who are skilled in the arts of self-government—deliberation, compromise, consensus-building, civility, reason giving." *Id.* at 3–4. Along similar lines, William Galston has claimed that the citizens in a liberal republican state should possess such virtues as courage, a belief in the value of the rule of law, and loyalty, among other virtues. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE*, 221–22 (1991).

60. In the mid-1990s, two prominent task forces were formed to examine "our civic condition," as demonstrated by the condition of civil society. NAT'L COMM'N ON CIVIC RENEWAL, *A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT* (1997); COUNCIL ON CIVIL SOC'Y, *A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS* (1998). The National Commission on Civic Renewal and the Council on Civil Society produced two reports that offered their diagnoses of the problems facing American democracy and their prescriptions for addressing those concerns. See generally NAT'L COMM'N ON CIVIC RENEWAL, *supra*; COUNCIL ON CIVIL SOC'Y, *supra*. The problems cited included the familiar litany of family disintegration, poor educational systems, high levels of crime, and the vulgarity of popular culture, among others. See NAT'L COMM'N ON CIVIC RENEWAL, *supra*, at 5; COUNCIL ON CIVIL SOC'Y, *supra*, at 6. Even though the respective emphases in both reports differed—A NATION OF SPECTATORS focused more explicitly on shoring up the pillars of civic life in the nation while A CALL TO CIVIL SOCIETY focused on reinvigorating public moral philosophy—both reports offered similar remedies for addressing the problems they identified. See NAT'L COMM'N ON CIVIC RENEWAL, *supra*, at 5–20 (proposing that children receive the benefit of a two-parent household and that all levels of society strengthen networks of support for families; that individuals actively participate in neighborhood life; that individuals establish connections with voluntary associations; and that schools take more seriously their obligation to reinforce codes of personal and civic responsibility); see also COUNCIL ON CIVIL SOC'Y, *supra*, at 7–13.

America—the communities that need them the most.⁶¹ Similarly, commentators have noted that there is a decline in membership in voluntary associations, ranging from civic groups like the Rotary Club to professional groups like unions.⁶² Indeed, another sign of declining civic life is the steady decline in church

61. See, e.g., Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1428 (1999) (discussing the decline in civic education in schools). This problem is particularly chilling when one considers the linkage between education and democracy:

Civic education in a democracy is preparation for sustaining and enhancing self-government. Democratic self-government means citizen participation based on informed, critical reflection. In a constitutional democracy, effective civic education is a necessity because “the competence to participate in democratic communities, the ability to think critically and act deliberately in a pluralistic world, the empathy that permit [sic] us to hear and thus accommodate others, all involve skills that must be acquired.

CTR. FOR CIVIC EDUC., *THE ROLE OF CIVIC EDUCATION: A REPORT OF THE TASK FORCE ON CIVIC EDUCATION* 4 (1995) (quoting BENJAMIN R. BARBER, *AN ARISTOCRACY OF EVERYONE: THE POLITICS OF EDUCATION AND THE FUTURE OF AMERICA* 4 (1992)). In fact, a recent study confirmed this insight when it found that “[h]igh school dropouts are significantly less likely than better-educated Americans to vote, trust government, do volunteer work, or go to church,” all actions that indicate civic engagement. Amy Goldstein, *Civic Involvement Tied to Education*, WASH. POST, Sept. 19, 2006, at A19.

62. See, e.g., Theda Skocpol, *The Narrowing of Civic Life*, AM. PROSPECT, May 27, 2004, at A5, available at http://www.prospect.org/cs/articles?article=the_narrowing_of_civic_life (arguing that a significant number of Americans joined professional fellowship organizations, unions, and voluntary associations between the late nineteenth and mid-twentieth centuries, but starting in the 1960s, these groups declined and new associations arose that were more specialized, professional, and decentralized). Skocpol’s account is not a nostalgic one; she criticizes the prior racist and sexist tendencies that existed in the older associations. *Id.* Nevertheless, she laments the decline of these associations because their loss has contributed to the impairment of individual civic capacities today:

Voluntary federations taught people how to run meetings, handle money, keep records, and participate in group discussions. Often, they exposed members to the inner workings of representative democracy—from parliamentary procedures and elections to legislative, judicial, and executive functions. And, importantly, these traditional voluntary associations reinforced ideals of good citizenship. They stressed that members in good standing should understand and obey laws, volunteer for military service, engage in public discussions—and, above all, vote.

Id. The transformation of civil society from a place that supported active, voluntary networks to one that supports narrowly focused, professionally-managed groups marks an overall loss in civic competence. See also Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of Civic Virtue*, in *SEEDBEDS*, *supra* note 49, at 143 (noting that grass roots political clubs, service organizations, and fraternal organizations have suffered sharp declines in membership over the past several decades).

membership.⁶³ More depressing yet, a recent study has found that Americans report having fewer close friends than they did twenty years ago.⁶⁴ Overall, the picture that these commentators paint is one that shows Americans moving toward increased isolation, a state that does not bode well for democracy.

Most troubling for these commentators, though, is the steady disintegration of traditional family structures. Stable families are viewed as the ultimate seedbed of virtue, the very first environment where children learn to be both good people and good citizens.⁶⁵ For civic revivalists, the value of this formative experience cannot be overestimated:

The family is the social microcosm that creates and reflects the strengths and weaknesses of the larger social structures. The family, as the basic building block of society, is also the primary agent of socialization and acculturation. The family experience may be so powerful in shaping a person's behavior that it creates an internal construct of reality that is then used to create the external world. From the experiences while growing up in their families, people use what they learn in social institutions, such as schools, businesses and Governments. Individuals who experienced democratic practices in their families are more likely to support, and expect, democratic social institutions, while those who experienced totalitarian prac-

63. See Kohler, *supra* note 62, at 143. The trend is most apparent among the seven largest mainline Protestant denominations (United Methodists, Evangelical Lutherans, Episcopalians, Presbyterian Church (USA), Disciples of Christ, United Churches of Christ, and American Baptist Churches). Membership in these denominations dropped 7.4% between 1995 and 2004. See Cathy Lynn Grossman, *Some Protestant Churches Feeling Mainline Again*, USA TODAY, Oct. 31, 2006, available at http://www.usatoday.com/news/religion/2006-10-31-protestant-cover_x.htm. The evidence shows, however, that many Americans are still going to church, and continue to affiliate themselves with specific denominations. Membership within the Roman Catholic Church, the Southern Baptist Convention, the Pentecostal Assemblies of God, and the Church of Jesus Christ of Latter-day Saints (Mormons) actually grew during the same period by 11.4%. See *id.*

64. See Bharathi Radhakrishnan, *Americans Have Fewer Friends*, *Researchers Say*, ABC NEWS, June 23, 2006, <http://abcnews.go.com/Health/print?id=2107907> (reporting on a research study that found that Americans had one-third fewer close friends than they did twenty years ago).

65. The Council on Civil Society describes the family as "the cradle of citizenship," the place where children learn "the essential qualities" of "honesty, trust, loyalty, cooperation, self-restraint, civility, compassion, personal responsibility, and respect for others." COUNCIL ON CIVIL SOCIETY, *supra* note 60, at 7. Mastery of these traits imbues children with the ability to exercise self-control, and as a consequence, prepares them for the task of self-governance. *Id.*

tices in their families are likely to tolerate and create totalitarian social structures.⁶⁶

In a democracy, then, individuals, governments, and the mediating structures in between are molded by a dynamic process of interaction. The success of this process, however, is not immediately assured. Success depends on institutions, like the family, nurturing a spirit of civic engagement in their members, and the members, in turn, ensuring that the institutions facilitate the instrumental goals of democracy. Citizens and institutions therefore reinforce each others' educative tendencies, a necessity in a system whose politics require commitment to self-rule through rational deliberation. Any other outcome is simply unacceptable. If citizens fail to develop a capacity for deliberation, self-rule becomes untenable, and if institutional accommodation of deliberative activities weakens because of civic disengagement, self-rule will effectively become incoherent.

It is precisely this concern that frightens civic revivalists. Even though they would likely conclude that our democracy ultimately remains strong, they have observed an inherent fragility in the system that threatens its continued viability. Democracy depends for its strength on the attention and nourishment of its members, and the gradual loss of this resource is the source of the civic revivalists' concern. They argue that many of the institutional breeding grounds for civic activity are under threat, largely because the most important breeding ground—the *family*—is under an increasing amount of pressure. This pressure stems from a variety of sources, and the litany is familiar: drug abuse,⁶⁷ divorce,⁶⁸ high numbers of out-of-wedlock births,⁶⁹ single-parenthood,⁷⁰ absentee fathers,⁷¹ unmarried cohabitation,⁷²

66. Wardle, *supra* note 25, at 364 (quoting JANA B. WEINHOLD & BARRY K. WEINHOLD, *PARTNERSHIP FAMILIES: BUILDING THE SMALLEST DEMOCRACY AT THE HEART OF SOCIETY* 3 (1993)).

67. See James Q. Wilson, *Liberalism, Modernism, and the Good Life*, in SEEDS, *supra* note 49, at 17, 17–18 (identifying drug abuse as a contributor to a declining public morality that flows from radical individualism and suppresses the growth of virtue).

68. See *id.* (identifying out-of-wedlock births as a contributor to a declining public morality that flows from radical individualism and suppresses the growth of virtue).

69. See *id.* (identifying high divorce rates as a contributor to a declining public morality that flows from radical individualism and suppresses the growth of virtue).

70. See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 124–40 (2000) (describing the disadvantages for children who are raised by a single parent).

and the presence of mothers of young children in the workforce.⁷³ Traditional households headed by two married parents raising children are in increasingly short supply, and civic revivalists identify this loss as the root cause of civic erosion today. For civic revivalists, then, one critical first step on the road to halting the process of erosion is to encourage couples to “stay married, stay accessible to [their] children, stay active in [their] local communities, and stay put.”⁷⁴

The instinct that connects political life and the life of the marital family is clearly an important one. One might reasonably conclude that stable, married families are more likely to have the emotional and material resources necessary to support the adults' desire (if any) for civic engagement, as well as the transmission to their children of those virtues that will ideally make them good people and citizens. The persuasiveness of this point, however, begs a logical question: If families are capable of inculcating virtue, are they not equally capable of inculcating vice?⁷⁵ Linda McClain describes this as the problem of “congruence,” and in *The Place of Families*, she poses the natural follow-up question: Assuming that families *are* capable of generating virtue, should government mandate those family forms that most efficiently achieve the preferred ends of the state?⁷⁶ Doing so would, after all, potentially eliminate the problem created by families who encourage vice.

Without question, families are just as capable of inculcating vice as they are capable of inculcating virtue. There are, for instance, people who were raised on a steady diet of pervasive bigotry, and, as adults, make the deliberate choice to eschew efforts at personal reform. In the context of a nation that is exception-

71. See, e.g., DAVID POPENOE, LIFE WITHOUT FATHER 2 (1996) (“[I]nvolved fathers are indispensable for the good of children and society[,] and our growing national fatherlessness is a disaster in the making.”).

72. See WAITE & GALLAGHER, *supra* note 70, at 36–46 (arguing that cohabitating couples rarely display the markers of stability seen in married couples).

73. See Glendon, *supra* note 58, at 3 (linking family decline to, among other factors, the increased participation by mothers of young children in the workforce); see also INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 5 (2000) (arguing that “the greater economic independence of women” has contributed to marital decline).

74. Popenoe, *supra* note 51, at 98.

75. See LINDA C. McCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 73–74 (2006) (noting that families may just as easily “plant ‘bad seeds’” or serve as “seedbeds of vices such as inequality, parochialism, prejudice, and intolerance”).

76. See *id.* at 74.

ally diverse along multiple axes, including race, ethnicity, and faith, tolerance is—ideally, at least—a minimum expectation for those who navigate public life. Families in a diverse, liberal state who reject the virtue of tolerance risk producing citizens who are partially ill-equipped to enter the world of politics.⁷⁷ This risk, however, is simply one of the costs that must be borne by those who live in a liberal state. The heart of American politics is the opportunity for dissent, and even if the “bad” seeds find themselves in the seat of power, opposing voices may persuade the public that those positions are undeserved.⁷⁸ Therefore, even though McClain is right to raise a cautionary note about the problem of congruence, the possibility that families will inculcate vice does not undermine those families who undertake virtue. The problem of congruence notwithstanding, it is still correct to view families as a seminal location for the production of virtue.⁷⁹

77. I say that these individuals are “partially” ill-equipped to enter public life because even a bigot can keep the trains running on time. There are many aspects of governance that do not turn on whether a politician is appreciative of diversity and tolerance.

78. This idea, which has been described as the “marketplace of ideas” thesis, was most famously articulated by John Stuart Mill: “If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM AND ON LIBERTY* 100 (Mary Warnock ed., Blackwell Publ’g 2003) (1859). This idea has gained a solid footing in American political life. In *Whitney v. California*, for instance, Justice Brandeis’ concurring opinion stated as follows:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to [be] the secret of happiness and courage to be the secret of freedom. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . [T]hey knew that order cannot be secured merely through fear of punishment for its infraction; . . . and that the fitting remedy for evil counsels is good ones.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Here, Justice Brandeis famously expressed one of the core values of American politics—the notion that evil propositions should not be suppressed through totalitarian measures. Rather, such ideas should be defeated through the operation of disagreement and dissent.

79. Insofar as the role of government here is concerned, Professor McClain does not advocate for affirmative governmental regulation of the inner workings of

B. *Linking Marriage, Family Life, and the Inculcation of Virtue*

Theorists and commentators agree that families have a special role to play in preparing individuals for civic life. Most of the commentators, however, inevitably link marriage to this task as well. Some commentators—for instance, the members of the marriage movement—are explicit about their bases for identifying marriage itself as an institution whose inherent goods and instrumental purposes serve society in a way that plainly distinguishes it from simple cohabitation.⁸⁰ Other commentators, however, who are not directly affiliated with the marriage movement, are not so explicit in their claims. Some have expressed support for the proposition that marriage has a unique role to play in fashioning citizens, but the arguments that they advance tend to collapse the line between marriage and family and assume that the arguments relevant for family life are, by definition, relevant for a married couple.⁸¹ This assumption, however, is unsupported, and it rests on the unproven claim that unmarried, cohabiting couples are incapable, almost by definition, of generating the same kind of civic virtues as married couples. In the following section, I propose to examine the connection between marriage and virtue, and will conclude that unmarried, cohabiting couples may be equally capable of completing the same tasks, but that married couples are uniquely situated to do it more consistently and with greater expertise.

1. Married Family Life as a Source of Virtue

Mary Ann Glendon writes that “[o]ne of the main reasons why families are excellent schools of virtue is that, even under the best of circumstances, they are places of testing and trial.”⁸² Conflict and compromise, discipline and reward, the experiences

private life. The very concept of such interference is anathema in a liberal state. Instead, she resolves the dilemma by encouraging government to foster the civic capacity of families. See McClain, *supra* note 75, at 83–84 (“Government should promote equality but should not insist on complete congruence between democratic and family life.”) (emphasis added).

80. See *infra* notes 84–87, 94, 96, 98, 100–02, 104, 106, 110–12, 115, 118 and accompanying text.

81. See, e.g., Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 2 (2000) (arguing that there is a link between a well-ordered family life and democratic government). The analysis employed by Wardle largely presupposes that the form of family life that establishes this link is *married* family life.

82. Glendon, *supra* note 58, at 13.

of authority and autonomy—all of these realities and more form the substance of family life. Proponents of civic virtue argue that these experiences are not simply ones to endure; rather, they are the constitutive elements of the character-building process that informs family members' civic capabilities.⁸³ The lessons that we learn in the home, plus the lessons that we learn in the world, should engender a democratic disposition that readies us for public life.⁸⁴

Under the best circumstances, the citizens who successfully cultivate this disposition are honest, loyal, hardworking, and practical; they are also independent, with a well-developed sense of self, and moderate in their demands. These small “d” democrats prefer the richness of neighborhood life because it offers better opportunities for them to develop leadership skills and directly impact the circumstances of their lives. They are the “joiners” we encounter in life, committed to the prospect of a vibrant community that works on the basis of cooperation and compromise. Moreover, as members of the American political community, citizens commit themselves to liberty, tolerance, equality, and the deliberative autonomy that is required by self-rule. Proponents of civic revival argue that “[t]he American version of the democratic experiment”⁸⁵ requires these traits: “Politically, what is at stake is nothing less than the great question of whether a self-governing republic can exist in an extended territory with a heterogeneous population.”⁸⁶ As society continues to suffer from the diminution of these qualities, civic revivalists fear that the American experiment is risking failure.

The idea that families play a deeply significant role in shaping civil society is almost too obvious to be contested. In fact,

83. See Wardle, *supra* note 81. Wardle argues that “[t]he home is the most important learning institution in a democracy,” claiming that children learn valuable lessons about “cooperation, commitment, sharing, sacrifice, and obedience to the unenforceable, which form the foundation for self-government.” *Id.* at 4–5. Children, however, are not the only members of the family unit who benefit from the educative function of family life: “Most adults learn the importance of, and refine the techniques of, sacrificing for others, caring for the next generation, looking beyond the present, and nurturing the basics of life and community when they marry and raise children.” *Id.* Given the significance that he attaches to the home, Wardle naturally concludes that the breakdown of the two-parent, nuclear family model poses a serious threat to the maintenance of democracy. See *id.* at 10–18.

84. See, e.g., POPENOE, *supra* note 71, at 46–47 (“Marriage and the family are the pivotal institutions in every society. They are the seedbeds of social virtue. They teach, cajole, promote, and reinforce moral and civil behavior.”).

85. Glendon, *supra* note 58, at 2.

86. *Id.* at 4.

scholars, theorists, and commentators who examine the decline of civil society often tackle the problems from vastly different perspectives, but they all seem to agree on at least one thing—the breakdown of the traditional, two-parent, child-centered family has resulted in immeasurable harm to our community.⁸⁷ Yet, accepting the position that families provide the raw materials from which democratic life derives its vitality fails to address a more precise question: what does *marriage*, specifically, add to family life that makes its presence both necessary and unique?

A number of arguments have been offered in support of the claim that marriage is, in fact, special. Many of these arguments have been advanced by members of the so-called “marriage movement,” described as “a loose amalgam of initiatives reacting to the decline of the heterosexual, marital, nuclear family, defined as a heterosexual married couple raising the children born to the two of them in one household.”⁸⁸ The marriage movement emerged from the fatherhood movement of the early 1990s and devoted itself to “improv[ing] child well-being by strengthening fatherhood, improving the quality and stability of marriage as a social institution, and reducing unwed childbearing and unnecessary divorce.”⁸⁹ Even though the movement does not completely disregard the natural interest that adults have in using marriage to deepen the relationship with their spouses,⁹⁰ the movement emphasizes children as the primary good that results from marriage:

Marriage serves many social purposes, including meeting adult needs for love and intimacy. The classic goods and goals of marriage include love, fidelity, sexual satisfaction, and mutual support, as well as the creation and care of children. . . . Equality, intimacy, and benefits for adults are all important. But these adult needs cannot displace marriage's central role in

87. INST. FOR AM. VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 12 (2006), available at <http://law.nd.edu/news/marriagestatement.pdf> (“[A] broad consensus of scholars across ideological lines [has] acknowledg[ed] the important role marriage plays in protecting the well-being of children . . .”).

88. Storrow, *supra* note 36, at 348.

89. David Blankenhorn, *The Marriage Problem*, AM. EXPERIMENT QUARTERLY, Spring 2003, at 61, 62, available at <http://www.americanexperiment.org/uploaded/files/aeqv6n1blankenhorn.pdf>.

90. See WAITE & GALLAGHER, *supra* note 70, at 202 (“[A]lthough marriage as an institution has been weakened by societal change, broad and compelling evidence suggests that it is vitally important: Adults no less than children require rooted relationships to flourish.”).

creating children who are connected to and loved by the mother and father who made them.⁹¹

Adult intimacy is treated as a secondary purpose of marriage for a variety of reasons, but the chief philosophical justification rejects the belief that marriage is “only a private relationship between two individuals.”⁹² The movement contends that the institution of marriage is greater than the sum of its intimate parts, and, since it has a public dimension, it should be protected by law.⁹³ Accordingly, government institutions, policy-makers, and interested citizens are urged to implement programs that make marriage an attractive and viable option. Lawmakers in particular can do this by discarding public policies that equate marriage with cohabitation, eliminating disincentives to marry, and burdening a couple’s ability to divorce.⁹⁴

Members of the movement, as well as their allies, have concluded that marriage is a unique and preferred institution for a

91. See INST. FOR AM. VALUES, *supra* note 87, at 6. In fact, the members of the marriage movement have specifically pledged to devote themselves to an overwhelmingly child-centered vision of marriage: “We come together to pledge that in this decade we will turn the tide on marriage and reduce divorce and unmarried childbearing, so that each year more children will grow up protected by their own two happily married parents . . .” INST. FOR AM. VALUES, *supra* note 73, at 4; see also *id.* at 3–4 (articulating concerns about divorce rates, single-parent poverty, and civil society issues in terms that relate to children).

92. INST. FOR AM. VALUES, *WHAT NEXT FOR THE MARRIAGE MOVEMENT?* 7 (2004), available at <http://www.americanvalues.org/pdfs/whatsnext.pdf>; see also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 108 (1987) (offering an implied criticism of American laws regarding marriage and family life because they emphasize the importance of individual self-fulfillment rather than other considerations, like children); Alvaré, *supra* note 25, at 186–91 (criticizing marriage arguments that emphasize the interests of adults over children).

93. See, e.g., Alvaré, *supra* note 25, at 186–91. This statement is peculiar, given the fact that marriage is already protected—and preferred—in numerous ways. See, e.g., OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, *DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT* (2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (identifying a total of 1,138 federal laws in which marital status has an impact on the receipt of benefits, rights, or privileges).

94. See, e.g., INST. FOR AM. VALUES, *THE FUTURE OF FAMILY LAW: EXECUTIVE SUMMARY* 5–6 (June 2005) (criticizing recent pronouncements by the American Law Institute and the Law Commission of Canada, which effectively equated cohabitation and marriage), available at <http://www.americanvalues.org/familylaw.htm>; Wade F. Horn, *Government Policy Pushes Cohabitation*, WASH. TIMES, Oct. 20, 1998, at E2 (arguing that the impact of the marriage penalty on recipients of the Earned Income Tax Credit discourages couples from getting married); see also INST. FOR AM. VALUES, *supra* note 92, at 10 (listing as one of the goals of the marriage movement the beginning of an effort to lengthen divorce waiting periods); COUNCIL ON CIVIL SOC’Y, *supra* note 60, at 20 (describing covenant marriage legislation as a “potentially promising reform” which might aid in renewing the moral spirit of America).

variety of reasons. Those reasons reflect an assortment of beliefs about the properties that are intrinsic to marriage, as well as the instrumental functions that are most effectively achieved by marriage. The arguments presented by the movement and its allies range from the public consequences that flow from marriage, to the religious meaning it conveys, to the regulatory function it supports, to the civic growth it facilitates. These arguments are presented as practically irrefutable distinctions that identify marriage as a unique social institution and justify both preferential treatment and limitations on access. Some of the more persuasive arguments posited by the movement's members and sympathetic commentators are surveyed below.

a. Intrinsic Characteristics Deemed Exclusive to Marriage

The marriage movement, as well as other defenders of traditional marriage,⁹⁵ has identified features that purportedly represent many of the intrinsic distinctions between married couples and unmarried, cohabiting couples (whether gay or straight). These distinctions follow.

i. Public Consequences of Marriage

The most profoundly obvious distinctions between married and unmarried couples lie in the public consequences that result from marriage. As an initial matter, the decision to marry implicates serious legal ramifications for the couple. Marriage alters the manner in which the couple relates to the public institutions of society, and, in particular, alters the couple's relationship with the government. One example of these changes is the manner in which marriage affects the application of state and federal laws. Under federal law, for instance, statutes in at least thirteen subject areas contain provisions that turn on the recognition of a person's marital status. Those areas include the following: social security and related programs pertaining to housing and food stamps; veterans' benefits; tax matters; crimes and family vio-

95. I must qualify my use of the phrase "other defenders of traditional marriage" as it refers to the members of the marriage movement. The movement has not taken a position on same-sex marriage because its membership cannot agree on which position it should take—some members support same-sex marriage, while other members do not. See *INST. FOR AM. VALUES*, *supra* note 87, at 18. Therefore, when I refer to "other defenders" in this specific context, I am focused on aspects of traditional marriage other than the respective genders of the couple.

lence; employment benefits; and other related laws.⁹⁶ In some instances, the recognition of status may be detrimental: unmarried couples do not shoulder the tax burden created by the marriage penalty.⁹⁷ On the other hand, recognition of marital status is critical for the receipt of marital benefits after the death of a spouse.⁹⁸ The law showers a wealth of material benefits on a married couple and their children, a fact that plainly proves the uniqueness of marriage with respect to non-marital unions.⁹⁹

The public consequences of marriage, however, are not simply legal in nature. There are also social ramifications that alter the couple's status in the community as soon as they announce their decision to marry, a decision that is often viewed as a marker of adulthood.¹⁰⁰ Social expectations about the behavior of married couples are implicitly conveyed, and when transgressions occur, are frequently enforced. Married couples who allow each other to pursue a sexually non-exclusive lifestyle, for instance, may find that their friends and acquaintances disapprove of the choice in both subtle and apparent ways.¹⁰¹ In addition, extended family members may be more willing to invest in a married couple than a cohabiting couple. At least one study has shown that intact families (defined as couples who have remained in their first marriage) are more likely to receive intergenerational wealth transfers than cohabiting couples.¹⁰²

96. See OFFICE OF THE GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT 3 (1997), available at <http://www.gao.gov/archive/1997/og97016.pdf>.

97. The marriage penalty was eased when the Economic Growth and Tax Relief Reconciliation Act of 2001 went into effect. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301-303, 115 Stat. 38, 53-57 (2001).

98. Social Security Act, 42 U.S.C. §§ 301-1397 (2000).

99. See WAITE & GALLAGHER, *supra* note 70, at 21.

100. See *Transition to Adulthood Delayed, Marriage and Family Postponed, Study Finds*, PENN NEWS (Univ. of Pennsylvania/Office of University Communications, Phila., Pa.), Jan. 12, 2004, available at <http://www.upenn.edu/pennnews/article.php?id=573> (describing the traditional markers of adulthood as "starting a career, forming a new household, [and] starting a family"). Of course, the continued relevance of these events as markers of adulthood is clearly waning in light of the fact that many people do not achieve all of these markers until after the age of thirty. *Id.*

101. In *THE CASE FOR MARRIAGE*, the authors recount the story of a young couple who agreed to forego sexual exclusivity. Female acquaintances refused to accept any of the husband's advances for the specific reason that he was married, which effectively made him romantically invisible. WAITE & GALLAGHER, *supra* note 70, at 19.

102. Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269, 281 (1996).

Finally, one who claims the status of "husband" or "wife" gains an informal right to receive from outsiders information about the spouse.¹⁰³ Even though cohabiting couples will also observe sexually circumspect behavior amongst their friends, and further, may receive financial assistance from their families, embedded social instincts about the singularity of marriage will garner measurably different responses based on the couple's relationship status.

ii. Comparative Levels of Expectation

The marriage movement and its allies have identified a second intrinsic difference between married and cohabiting couples: the nature of the expectations that partners are likely to have about each other. Features of the institutional design, plus cultivated assumptions about marriage, encourage couples to make demands on each other that they might not otherwise make.

The most important expectation that married couples have (and that cohabiting couples are far less likely to have) is the promise of permanence. Couples who enter into marriage tend to believe that their marriage is going to last forever. The marriage rite functions for these people as a public affirmation of their intention to last "till death do [they] part." This formal expression of intent imbues the relationship with a sense of endurance, and relying on that sentiment, the partners make even deeper material and emotional investments in each other:

The formal commitment of marriage is also the basis of stable expectations in personal relationships. . . . Marriage . . . carries with it a commitment toward permanence that places it in a different category of relational interests than if it were temporary. A "justifiable expectation . . . that [the] relationship will continue indefinitely" permits parties to invest themselves in the relationship with a reasonable belief that the likelihood of future benefits warrants the attendant risks and inconvenience.¹⁰⁴

Cohabiting couples, on the other hand, tend not to have the same expectations of permanence and stability.¹⁰⁵ Failure to expect or prepare for a long-term relationship tends to manifest itself in

103. See WAITE & GALLAGHER, *supra* note 70, at 20 (arguing that the terms "husband" and "wife" convey information about the relationship that outsiders often automatically respect).

104. Hafen, *supra* note 25, at 485-86 (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 860 (1977) (Stewart, J., concurring)).

105. WAITE & GALLAGHER, *supra* note 70, at 37-38 ("The prime difference between marriage and cohabitation in contemporary American culture has to do with

specific ways. Financial pressures spurred by income disparities are far more likely to doom a cohabitating relationship because the unmarried partners tend to prefer economic independence, a stance that does not encourage faith in a long-term commitment.¹⁰⁶ In addition, the absent expectation of permanence encourages many cohabiters to hold tightly to their sense of personal independence. This stance can inspire a deliberate ambiguity about the future, and “[b]ecause they aren’t sure what the future holds, couples living together cannot plan for it together.”¹⁰⁷

It is certainly true that many of the marriages that start off in a promising fashion end in divorce.¹⁰⁸ It is equally true that a non-trivial number of cohabiting relationships closely resemble marriage in most, if not all, appreciable ways. These facts do not, however, undermine the value of the distinction based on expectations of permanence. In fact, this belief produces yet another relevant distinction between marriage and cohabitation: the difficulty of exit. Since law reflects the social convention that assumes the permanence of marriage, couples’ financial lives become deeply enmeshed with each other in multiple ways. Resentment over failed expectations can make disentanglement extremely difficult, especially if there are children involved. The majority of cohabiting relationships, on the other hand, are more easily disentangled. Couples who have assumed greater responsibilities—for a jointly-purchased home, the care of a partner’s child, or a jointly-held bank account, for instance—may have a similarly difficult time if the relationship ends. Most couples that cohabit, however, do so for the precise reason that they *do not* want to share the responsibilities of marriage.¹⁰⁹ Accordingly,

time horizons and commitment. . . . Cohabitation . . . is seen by partners and society as a temporary arrangement.”).

106. See *id.* at 39–40.

107. *Id.* at 45.

108. According to the conventional wisdom, the divorce rate in the United States is hovering around the 50% mark. According to social scientists, however, this figure was derived from a flawed calculation: the annual marriage rate per capita as compared to the divorce rate for the year. Researchers prefer to use the following method to estimate the divorce rate: calculate the number of people who have ever been married and subsequently divorced. Using this methodology, scientists have concluded that the American divorce rate is not only decreasing, but has never exceeded 41%. Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at F7.

109. See WAITE & GALLAGHER, *supra* note 70, at 45 (discussing relationship partners who remain ambiguous about future plans based on a need to avoid greater commitment).

even though exit from most cohabiting relationships will almost certainly be difficult, it will not pose the same challenges as marital exit.¹¹⁰

Yet another difference identified by the marriage movement is the expectation of responsible care that a spouse may assume is forthcoming, but that a cohabiting partner may not assume. One aspect of the difference is material: one may expect a spouse to offer care and assistance when the other falls ill. In effect, “[a] spouse acts as a sort of small insurance pool against life’s uncertainties, reducing the need to protect oneself from unexpected events by oneself alone.”¹¹¹ Another aspect of the difference is spiritual: spouses have a special role to play in facilitating the partner’s ability to develop a rich interior life. This task can be achieved in many ways, but one of the best descriptions of the sentiment was expressed in the oddest place: a speech offered by Susan Sarandon in the otherwise forgettable film, *Shall We Dance?*:

Why is it, do you think, that people get married? . . . Because we need a witness to our lives. There’s [sic] a billion people on the planet, I mean, what does any one life really mean? But in a marriage you’re promising to care about everything—the good things, the bad things, the terrible things, the mundane things. All of it. All the time. Every day. You are saying, “Your life will not go unnoticed because I will notice it. Your life will not go unwitnessed because I will be your witness.”¹¹²

In this speech, Sarandon’s character has perfectly situated the daily reality of marriage within the context of an ethic of care.¹¹³ Spouses *choose* to forge a deeply intimate link that is publicly recognized and given meaning through the operation of law. Therefore, they are responsible for maintaining that link through the complex act of caring for each other. The obligation to care manifests itself here as the decision to give witness, an act that is

110. See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 88 (2004) (“As in other commons settings, exit tends to undermine sharing and trust by exacerbating the difficulty of collective action, inviting opportunism, and thus threatening cooperation, even in long-term relationships. This difficulty is particularly acute in marriage, where couples often make long-term, relationship-specific investments based on the assumption that their marriage will endure for a lifetime, thus creating asymmetric vulnerability as to the contingency of early termination by divorce.”).

111. WAITE & GALLAGHER, *supra* note 70, at 31.

112. SHALL WE DANCE? (Miramax Films 2004).

113. See ROBIN WEST, CARING FOR JUSTICE 7 (1987) (discussing Carol Gilligan’s concept of an “ethic of care,” which claims that “the work . . . of caring for the relationships that sustain us, is *moral* work, rather than emotional affect”).

not only intrinsically good, but also contributes to the instrumental end of maintaining the good, or moral, relationship.

Drawing a distinction between married couples and cohabiting couples on this ground has some limited intuitive appeal, but ultimately appears to be speculative at best and wrong at worst. The live-in girlfriend/boyfriend might refuse to nurse the partner through a diagnosis of cancer, but so, too, might a husband or a wife. It seems fairly unremarkable to believe that couples who have decided to cohabit are sufficiently concerned for each others' well-being that they *would* offer care when the other is in need. Moreover, the simple act of intimate living necessarily provides the opportunity for witness, a task that most healthy couples will perform, whether or not they are married.

Two additional, and interconnected, distinctions between marriage and cohabitation have been offered by the marriage movement and its allies: married couples are more likely to practice sexual fidelity through exclusivity, and the commitments of faith often support this decision.¹¹⁴ The authors of *The Case for Marriage* note that close, personal relationships can be achieved with a number of people in our lives, but they go on to argue that "the emotional relationship that underlies marriage is fundamentally different from these because of the couple's exclusive sexual bond."¹¹⁵ The expectation of exclusivity that attaches to marriage, however, is contrasted with the expectations in a cohabiting relationship: "Cohabitators are less likely than spouses to view their sexual union as permanently exclusive[,] . . . [they] are less faithful to their partners than are married couples, and even when sexually faithful, they are less committed to the idea of sexual fidelity."¹¹⁶ Assuming the truth of these statements, they offer yet another ground for distinguishing marriage.

114. I do not mean to suggest here that individuals who cohabit are not people of faith, or do not act according to the dictates of their faith. I am simply referring to the fact that mainstream religions tend to disfavor extra-marital sex. Whether or not it is an act of spiritual intention, married couples who profess a belief in one of the mainstream faiths and who do not indulge in extra-marital sex are living in accordance with the tenets of their faith.

115. WAITE & GALLAGHER, *supra* note 70, at 32.

116. *Id.* at 39; *see also id.* at 91 (citing a National Sex Survey in support of the finding that 4% of married men compared to 16% of cohabiting men had admitted being unfaithful in the past year). *But see* Nat'l Healthy Marriage Resource Ctr., Frequently Asked Questions About: Infidelity (Affairs), http://www.healthymarriageinfo.org/docs/downloads/faq_infidelity.pdf (last visited Nov. 1, 2007) (citing the leading sex researcher in the country in support of the conclusion that over the

Fidelity, however, can also be linked to a couple's faith life. Commentators have noted that for religious people, marriage is different from cohabitation because it sanctifies the union between them. In fact, members of mainstream religions may view marriage as "the form of sexual relationship most pleasing to God."¹¹⁷ This instinct has been grounded in a theoretical framework by the noted philosopher, John Finnis. Pursuing an argument informed by classical natural law theory and the doctrinal tenets of the Catholic Church, Finnis claims that the communion of men and women in marriage is a fundamental good, one that cannot be achieved through non-marital sexual acts:¹¹⁸

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their personal reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can actualize and allow them to experience their real common good—their marriage with the two goods, parenthood and friendship, which (leaving aside the order of grace) are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will, their capacity for biological parenthood will not be fulfilled by that act of genital union. . . . For want of a common good that could be actualized and experienced by and in this bodily union, [extra-marital sexual] conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus dis-integrates each of them precisely as acting persons.¹¹⁹

Even though marriage is an end unto itself, sex is an intrinsic part of the marriage because it is the act through which full marital union occurs. Sexual union standing alone, however, cannot join two people in the sense that Finnis describes here; it is the sanctifying cover of marriage that transforms sex into something more than an animal act. Neither pleasure nor unmarried, long-term, monogamous commitment can substitute as equivalent ends for

course of a marriage, approximately 25% of men and 10–15% of women cheat on their spouses).

117. WAITE & GALLAGHER, *supra* note 70, at 21.

118. See John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1064–66 (1994).

119. *Id.* at 1066–67.

marriage, and sexual activity in either context is akin to mutual masturbation.¹²⁰

Finnis' argument is ultimately unpersuasive. The biological unity to which he refers does not depend on marriage for its existence, and the goods of parenthood and friendship (which are associated with marriage) are achievable outside of the context of marriage. Plenty of couples in long-term, marriage-like relationships have experienced the goods of friendship and parenthood within the context of their relationship, and marriage for these people will not make either good any more substantial. In order for his argument to work, Finnis must persuade the reader that the sole good to which sex is attached is marriage, and, as a consequence, marriage should hold a privileged status. Even if one is inclined to believe that this is true, Finnis' argument does not successfully distinguish between married and cohabiting couples.

The difficulty with Finnis' arguments notwithstanding, it is indisputable that for many people of faith, marriage is, indeed, distinctive, and fuels their willingness to remain faithful. Thus, even if the claims here do not present the strongest objective distinctions between marriage and cohabitation, they nevertheless present distinctions that are relevant for many people.

b. Instrumental Purposes of Marriage

In addition to the intrinsic goods of marriage, members of the marriage movement have identified instrumental purposes of marriage that distinguish it from simple cohabitation. As an initial matter, members of the marriage movement highlight the fact that marriage has a regulatory component attached to it. Not only does marriage serve as the proper context within which sex and procreation occur in an orderly and productive way, but marriage ensures that the resulting families are both intact and legitimate.¹²¹ The argument goes on to claim that the stability

120. See, e.g., Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 146 (1997) (arguing that individuals who engage in sexual acts merely for the sake of pleasure are engaged in an act "of mutual masturbation, [which] is as self-alienating as any other instance of masturbation").

121. Maggie Gallagher, *Rites, Rights, & Social Institutions: Why and How Should the Law Support Marriage?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 232-33 (2004) (discussing the role marriage plays in allowing societies to function).

that flows from this structure makes marriage the ideal setting for raising children.¹²²

Movement activists also claim that marriage has a civilizing function for men. The argument rests on the assumption that men are biologically inclined to be promiscuous, but will channel the urge if they have a wife and family. According to this theory, once men settle down, they will be able to embark upon the life of a productive citizen.¹²³ In addition, many commentators claim that marriage serves the instrumental purpose of producing citizens: adults reinforce the lessons that they learned as children, and then pass on the same lessons to their children with the intention of preparing them for life as active, productive citizens.¹²⁴

Finally, activists claim that marriage is distinguishable from cohabitation because it has a signaling function that informal relationships cannot hope to mimic. First, the prospect of marriage conveys a signal to the parties that there is a shared intention to stay together.¹²⁵ This message is a valuable one because the partners will believe that they can safely invest in each other and the future. Second, marriage is also a signal to the community.¹²⁶ Once the community knows how to define the couple, it will structure its interactions with them with an eye toward the customary norms that govern married couples. Finally, commentators argue that marriage sends a message to children. This

122. Dent, *supra* note 25, at 428–32 (discussing benefits of traditional marriage to raising children).

123. See Gallagher, *supra* note 121, at 233 (explaining the role of marriage in “integrating men into family life” and sustaining the “family system”); POPENOE, *supra* note 71, at 4 (noting that a major purpose of marriage is to “hold men to the reproductive pair bond”); Dent, *supra* note 25, at 434–35 (discussing the ability of marriage to socialize adults away from destructive behavior); INST. FOR AMERICAN VALUES, *supra* note 73, at 9.

124. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (explaining that marriage is necessary for civilizations’ progress); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (discussing marriage as producing social obligations and building society); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (explaining that the union between a man and a woman is “the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement”); Hafen, *supra* note 25, at 472–83, 487 (explaining marriage’s role in sustaining democratic society through inter-generational transmission of traditions and culture); Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 *YALE J.L. & FEMINISM* 221, 233, 250–53 (2005) (describing the manner in which marriage transmits values).

125. See Hafen, *supra* note 25, at 486; INST. FOR AM. VALUES, *supra* note 73, at 9.

126. See INST. FOR AM. VALUES, *supra* note 73, at 9.

message communicates their parents' intent to remain together as a stable family unit.¹²⁷

Despite their dogged defense of the institution, members of the marriage movement and their allies have not been wholly successful in articulating a persuasive distinction between the goods that can be achieved by marriage and the goods that can be achieved in equally committed, non-conjugal relationships. It is unclear whether an unmarried, cohabiting couple who displays the same features of marriage—a mutual expectation of permanence, a commitment to making future plans, a willingness to rely on the partner in numerous arenas, a willingness to share with the partner, especially in financial matters—will be unable to achieve the same civic goods that a married family can achieve. Virtues do not inhere only in those members of society who follow a prescribed path; the non-traditional members of society are equally capable of possessing the virtues that facilitate the democratic process. Moreover, it is reasonable to believe that committed cohabiting partners are equally capable of passing those virtues on to children and reinforcing them with their adult partners.

These facts notwithstanding, there is certainly an ease and efficiency that flows from identifying marriage—and, more to the point, married family life—as the preferred setting for conveying these values. Community support, civil institutions, government benefits, and other institutional advantages materially ease the burden of sharing a life and rearing new lives. Instrumental efficiency, however, is not the sole persuasive distinction that exists between married family life and cohabitation. Marriage also consists of an intrinsic, intangible, hard-to-quantify characteristic that distinguishes it from cohabitation—the social capital that inheres in the institution. Marriage is one of the primary forms of entry into the community of adulthood, which accepts responsibility for handling the reins of self-government. In some sense, marriage proclaims individuals as citizens who can be trusted to handle the responsibilities of governing. As such, marriage appears to have a transformative effect on the individual participants themselves, an effect that stems in part from the cultural expectations that accompany the institution.¹²⁸ Married couples

127. See Hafen, *supra* note 25, at 486.

128. *But see generally* Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399 (2004) (critiquing the Supreme Court's opinion in *Lawrence v. Texas* because its emphasis on the dignity of gay and lesbian

are the presumed backbone of communities; they provide the social raw materials through which communities generally perpetuate themselves. Moreover, married couples are more likely to be invested in the community, if for no other reason than they are more likely to have children. All of these factors can transform the married couple in a way that ties it to the life of the community.

Even though the notion of marriage having such relevance in the political setting is potentially powerful, it is not new; it has periodically been a prominent feature of American political thought since the early colonial period. It will be instructive to consider the origins of the belief that marriage is a proper setting for conveying these values before determining whether those lessons cross-apply to the modern setting.

2. Origins of the Connection Between Civic Republican Ideology and Marriage

Even if one agrees that families serve the functional purpose of inculcating civic virtues in their members, the idea that *married* families possess particular capabilities in this regard is not obviously true. This fact notwithstanding, the idea has a long provenance in the intellectual history of the United States. The historian Nancy Cott has offered a richly detailed account of the understanding of marriage and government held by the American colonialists and Founders. The Founders of the American republic certainly possessed, articulated, and defended an explicitly political vision of marriage.¹²⁹ Their vision, however, underwent a radical change from the vision of marriage and the state that predominated in the early colonial period.

Prior to the Revolutionary period, American culture was patriarchal, notions of authority were prominent, and women and children were obliged to obey both God and the husband/father.¹³⁰ Equality was not the norm, and the social enforcement of hierarchical relations was deemed necessary for the proper construction of public life: "Everyone sensed the ascending order of social power enhancing the ascending order of civil author-

relationships, as opposed to gay and lesbian *sexuality*, risks undermining the movement's political aim of equalizing non-normative forms of intimacy).

129. See NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 10 (2000).

130. See *id.* at 12–13.

ity.”¹³¹ Marriage and family life contributed to this sense of power by serving a particular political purpose: individuals learned to submit to authority in the family setting, and the family served as the base upon which social order was maintained.¹³² Marriage was structured in a similar fashion. When describing the marital relationship, the dominant metaphor of choice was the model of the parent/child relationship. Just as the child was meant to obey his or her father, the wife was meant to obey her husband.¹³³

Over the course of the eighteenth century, however, cross-pollination occurred between a set of newly-evolving political thoughts and the revolutionaries’ prior vision of marriage.¹³⁴ As notions of monarchy and authority were rejected, the Founders settled on a new vision of government. Hierarchy was overthrown, and republican government—which rested on a model of popular sovereignty, adherence to law, moderation in nature, and consent—was chosen as the model for the new nation.¹³⁵

The marriage metaphor had been used to describe the colonists’ relationship with the British king, but as dissatisfaction with the colonial relationship deepened, resistance to the use of the metaphor increased. Eventually, the revolutionaries settled on marriage as the metaphor of choice for understanding republican government.¹³⁶ As Cott notes, “The method of the new nation was union and the essence of the national union was to be the voluntary adherence of its citizens.”¹³⁷

131. STEPHANIE COONTZ, *THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES 1600–1900* 79 (1988) (citation omitted). Coontz also notes that many aspects of colonial life, ranging from such trivial decisions as where one sat in church to the dispensation of political offices, depended on adherence to a class-based system which emphasized social status. *Id.*

132. See COTT, *supra* note 129, at 12–13; MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 4 (1985) (“Through much of the colonial period, most colonists conceived of the family as part of a hierarchically organized, interdependent society rather than as a separate and distinct sphere of experience.”); MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 57 (1996) (“[M]arriage necessarily preceded the relationship between a father and his sons, which many theorists interpreted as the foundation of all political authority.”).

133. See COTT, *supra* note 129, at 13 (noting that the Fifth Commandment order to “Honor Thy Father and Thy Mother” was viewed as an order to wives to obey their husbands).

134. See *id.* at 14; see also COONTZ, *supra* note 131, at 116.

135. See COTT, *supra* note 129, at 10; see also COONTZ, *supra* note 131, at 131–33.

136. See COTT, *supra* note 129, at 15.

137. See *id.* at 15–16.

Marriage did not simply serve as an intellectually powerful metaphor that explained the decision to rebel. It also had a tangible, functional purpose—marriage served as the school within which individuals learned republican virtues:¹³⁸

More than an analogy was involved in the public reiteration of the “loving partnership” between husband and wife. Actual marriages of the proper sort were presumed to create the kind of citizen needed to make the new republic succeed. It was not only that marriages and the families following from them brought a predictable order to society There were specifically political reasons imbedded in revolutionaries’ thinking about human nature, human relations, and the possibilities for just government that put demands upon marriage. American revolutionaries’ concern with virtue as the spring of their new government motivated this attention to marriage. The United States was a political experiment The character of the citizens mattered far more there than in a monarchy, Revolutionary leaders believed. . . . In a republic, the people were sovereign, and the motivating principle was political virtue. The government would depend on the people’s virtue for its success. . . . American republicans [began] to see marriage as a training ground of citizenly virtue.¹³⁹

Love was not irrelevant in marriage; instead, the experience of love between husband and wife was supposed to convey the lessons of social virtue. Marital love may have had the potential for romance, but its true purpose was to model the virtue of service and illustrate the pleasure derived from serving others. Exposure to the value of service would ideally persuade citizens of the value of self-sacrifice, a virtue that was important to the common good and went to the heart of republican thought.¹⁴⁰ This focus on the common good of the family unit taught its members lessons that were valuable for society as a whole—it taught the lessons of moral integrity and public-spiritedness, both of which were pillars of civic virtue. The republic could not succeed if the citizens did not possess a virtuous character; hence, marriage was necessary for the development of the new American nation.¹⁴¹

None of these sentiments, standing alone, explains the manner in which these lessons in civic republican ideology would be

138. See *id.* at 17–19; see also Jan Lewis, *Motherhood and the Construction of the Male Citizen in the United States, 1750–1850*, in *CONSTRUCTIONS OF THE SELF* 143, 144 (George Levine ed., 1992).

139. COTT, *supra* note 129, at 17–18.

140. See *id.*; see also Lewis, *supra* note 138, at 146 (“[R]epublicanism rested upon the principle of self-sacrifice for the common good, which was known as virtue.”).

141. See COTT, *supra* note 129, at 17–18.

taught. On their face, these ideas had the potential to create a gender-neutral vision of civic development, where both partners to the relationship contributed equally to the overall good of both the family and society. The emphasis on joint rights and responsibilities, the social contractarian vision of marriage, and the importance of voluntarism had the potential to re-imagine gender roles within society and the home.¹⁴² Eighteenth century conventions regarding gender, however, did not permit such a construction. Moreover, as Cott notes, post-Revolutionary visions of marriage focused less on the relationship itself and more on the consequences that flowed from having freely agreed to enter the relationship. Specifically, “[b]y consenting, the citizens delegated authority to their elected representatives, and the wife gave authority to her husband. . . . [G]overnance based on consent was no less governance.”¹⁴³ Rhetoric notwithstanding, the regime of *feme covert* would not give way.

Even though women still suffered under the disability of coverture and lived within the confines of their “domestic sphere,” they were not invisible to the early republicans—indeed, the precise opposite was true.¹⁴⁴ Women were not perceived as having individual civic capacity, but they were nonetheless the instruments by which *male* citizenship was constructed.¹⁴⁵ In her essay on the construction of male citizenship, historian Jan Lewis notes, “Marriage opened the heart and mind both, and both realms, which later Americans would segregate into separate spheres, must be developed in the mature political personality.”¹⁴⁶ The characteristics of the life of the mind—in particular, the possession of reason and judgment—were viewed as intrinsically male characteristics.¹⁴⁷ These two qualities, however, were an insufficient basis upon which the new republic could situate itself. Instead, it was necessary for male citizens to embrace their fellow men, identify a common set of ideals, and work as a unit for the achievement of those goals.¹⁴⁸ These ideals

142. See *id.* at 16–17; see also ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 110–12 (1997); COONTZ, *supra* note 131, at 155.

143. COTT, *supra* note 129, at 17.

144. See SMITH, *supra* note 142, at 146–48.

145. See *id.* at 111–13; see also COONTZ, *supra* note 131, at 152–53; Lewis, *supra* note 138, at 147.

146. Lewis, *supra* note 138, at 147.

147. See *id.*; see also COTT, *supra* note 129, at 19.

148. See COTT, *supra* note 129, at 19; see also LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT & IDEOLOGY IN REVOLUTIONARY AMERICA* 189–90 (1980).

were viewed as feminine in nature, and women were clearly best equipped to teach these forms of behavior. At their core, women were viewed as possessing the quality of passion, but more importantly, they were viewed as possessing "manners."¹⁴⁹ These manners could be harnessed to temper the rational orientation of men, thereby preparing them for a life in society,¹⁵⁰ as "[i]ntimate interaction between the sexes in courtship and marriage would serve especially well to cultivate and exercise [the quality of affection] in men."¹⁵¹

Eighteenth century manners did not solely refer to proper deportment; they also referred to habits, values, morality, and character.¹⁵² These behaviors were not necessarily intrinsic; in fact, they were behaviors that could be learned.¹⁵³ Revolutionary-era Americans believed that women were more susceptible to learning manners because they were "pliable and impressionable" and, therefore, were better able to grasp the requirements.¹⁵⁴ As such, women were in the ideal position to soften men and teach them the proper kinds of behaviors and concerns that were necessary in a virtuous citizenry. Thus, women in the roles of wife and mother taught their husbands and sons how to be good citizens, and one might infer that they also taught their daughters to be future democratic teachers, rather than democratic participants.¹⁵⁵ It was in this way that the affairs of the household were inextricably tied to the affairs of government.

Two points emerge from this historical recitation: (1) the eighteenth century republicans, and their present-day ideological heirs, have a point when they argue that marriage—and in particular, married family life—is a context that facilitates the transmission of democratic values; and (2) this argument cannot be advanced without acknowledging the existence of powerful critiques that speak to present-day norms, including concerns about

149. See COTT, *supra* note 129, at 19–20; see also COONTZ, *supra* note 129, at 178–80.

150. See COTT, *supra* note 129, at 19–20; see also COONTZ, *supra* note 129, at 152–54.

151. COTT, *supra* note 129, at 19; see also KERBER, *supra* note 148, at 199–200, 229 (discussing the political role mothers played as the guarantors of civic virtue in their sons in Revolutionary America).

152. COTT, *supra* note 129, at 19; see also KERBER, *supra* note 148, at 203–06.

153. COTT, *supra* note 129, at 19–20; see also GROSSBERG, *supra* note 132, at 8; COONTZ, *supra* note 131, at 154–56; KERBER, *supra* note 148, at 199–200.

154. COTT, *supra* note 129, at 20.

155. See *id.* at 19–21; see also COONTZ, *supra* note 131, at 152–56; KERBER, *supra* note 148, at 199–200, 229–30.

autonomy and, especially, concerns about gender. Once the critiques are acknowledged, however, the crux of the argument remains—married families are places where adults and children learn civic virtues. Married family life is not the only context within which these values are conveyed, and in the instances of abusive or otherwise unhealthy homes, is certainly not the preferred place for the transmission of these values. Assuming the existence of a healthy, non-abusive home, a modernized vision of the link between married family life and politics—one that eliminates gender-based subordination and emphasizes, among other values, autonomy—persuasively informs this vision of the family as a place where children first learn the habits they will need as they develop into citizens. Understanding this modern conception is a necessary step in making the connection between democratic politics and the ability of gay and lesbian families to participate.

3. Modern Conception of the Relationship Between Marriage and Politics

In the current debate over same-sex marriage, many commentators have taken the position that traditional marriage is best for children based on two simultaneously operating justifications: (1) traditional marriage is intrinsically ideal for children because it contributes to their psycho-social development into adults, and (2) traditional marriage serves an instrumental goal because children raised in its environs develop the necessary skills to become contributing adult members of the civic community.¹⁵⁶ The former argument tends to break down further into two related claims: (1) children who were raised in a traditional, two-parent household appropriately engage in gender role modeling, and (2) children who grow up in traditional households learn how to interact with members of the opposite sex. Testing the validity of this argument is beyond the scope of this Article. The latter argument, however, focuses on transforming children into public-spirited adults, and in doing so, moves beyond the realm of psychology and explicitly grounds itself in a political vi-

156. See, e.g., Peter Sprigg, *Questions and Answers: What's Wrong With Letting Same-Sex Couples "Marry?"*, IN FOCUS (Fam. Res. Council, Wash., D.C.), July 28, 2005, <http://www.frc.org/get.cfm?i=IF03H01> (arguing that children raised by lesbian couples will be "less likely to conform to traditional gender norms"); see also Hafen, *supra* note 25, at 478–84 (discussing family life as a structure within which civic virtues are passed from parents to children).

sion of marriage, its meaning, and its purpose.¹⁵⁷ Many of these statements are offered as self-evident, without any need for sustained logical argument or proof.¹⁵⁸

Several prominent legal scholars on both sides of the same-sex marriage debate have also staked out claims about the relevance that marriage and/or the family play in maintaining a constitutional democratic framework. Professor Lynn Wardle is the leading opponent of same-sex marriage in the legal academy.¹⁵⁹ He has not only critiqued the constitutional and policy-based arguments that militate in favor of same-sex marriage, but he has also offered an affirmative account of why traditional marriage is important to the maintenance of a democratic society:

Marriage is the best, most promising foundation for lasting, growing, individual, and family happiness and security. It also is "the very seedbed of democracy. . . ." It is in the home that spouses as well as children learn lessons about cooperation and commitment, sharing and sacrifice, and obedience to the unenforceable that form the foundation for self-government. It is from their marriages that husbands and wives learn how to make the best of shortages, how to care for others, how to be happy, to love liberty, to fulfill one's duty, and the critical citizenship skills of mutual respect and cooperation. It is in marriage and in raising children that most adults relearn the importance of and refine the techniques of sacrificing for others, how to really care for the next generation, to look beyond the present, to nurture the basics of life and community. . . . The home is the first and the most important schoolhouse in a democracy.¹⁶⁰

157. See, e.g., Rick Santorum, U.S. Sen., *The Necessity of Marriage* (Sept. 25, 2003), in *HERITAGE LECTURES*, Oct. 20, 2003, at 2, http://www.heritage.org/Research/Family/upload/50920_1.pdf ("The reason marriage is important is that it affirms what our Founding Fathers understood—that the purpose for this country is to use our freedoms for the promotion of the common good.").

158. While it is true that the overwhelming majority of commentators who offer this particular objection to same-sex marriage fail to do so analytically, a non-trivial minority of speakers have offered a sustained argument. See, e.g., *COMM. ON MARRIAGE AND FAM. LIFE, U.S. CONF. OF CATHOLIC BISHOPS, BETWEEN MAN AND WOMAN: QUESTIONS AND ANSWERS ABOUT MARRIAGE AND SAME-SEX UNIONS 2* (2003), available at http://www.usccbpublishing.org/client/client_pdfs/5-626pdf.pdf ("Ultimately, the stability and flourishing of society is dependent on the stability and flourishing of healthy family life.").

159. See generally Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 *BYU L. REV.* 1 (1996); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 *U. ILL. L. REV.* 833 (1997); Wardle, *supra* note 20; Wardle, *supra* note 25; Wardle, *The Curious Case of the Missing Legal Analysis*, 18 *BYU J. PUB. L.* 309 (2004); Wardle, *supra* note 124. All of these articles present various critiques of arguments that favor same-sex marriage.

160. Wardle, *supra* note 25, at 372 (citation omitted).

Wardle has a vision of the goods and goals of marriage that is strongly rooted in a communitarian point of view. The individual preferences of parents are not the primary locus of the family community; instead, the good of the unit as a whole is the focus, and the good of the unit is often expressed through the health, happiness, and well-being of the children it produces. Moreover, achieving a series of stable, well-ordered family units is a necessary component of maintaining the democratic framework; the community at large has as much of a stake in the proliferation of traditional, child-raising families as do the individuals who perform the actual work. Wardle argues that “[h]eterosexual marriage seems to provide the strongest and most stable companionate unit of society, and the most secure setting for intergenerational transmission of social knowledge and skills, and reflects the understanding of marriage that has been constant across cultures and throughout history.”¹⁶¹

Professor Linda McClain has offered a similar vision of the role that intimate relationships play with respect to the larger community. She argues that “[g]overnment . . . has an important responsibility to carry out a formative project of fostering persons’ capacities for democratic and personal self-government.”¹⁶² Government carries out this responsibility in two ways: (1) by fostering policies that offer the opportunity for developing both democratic and individual self government,¹⁶³ and (2) by adhering to a principle that she describes as “toleration as respect,” a concept that rests on the notion that “government[] [will] refrain from coercive action with respect to a range of decisions and behaviors.”¹⁶⁴

McClain’s vision turns on the difference between governmental action and inaction, and seeks a proper delineation of the spheres within which government should offer either response.¹⁶⁵ Drawing on both liberal and communitarian thinkers, Professor McClain notes that the call for personal self-government and autonomy must be situated within a broader framework of interconnected social structures and relationships, as “[i]t is by virtue of a person’s participation in relationships of nurture and care, initially within families and eventually in other forms of associa-

161. *Id.* at 375.

162. McClain, *supra* note 41, at 15.

163. *Id.* at 15–16.

164. *See id.*

165. *Id.* at 16.

tion, that he or she is able to develop the capacity for autonomy."¹⁶⁶ Such autonomy is necessary for both personal and democratic self-government, and government is obliged to offer its assistance: "Government has a responsibility to take steps to help develop persons' moral powers, or moral capacities, for self-governing citizenship." As an application of her theory, Professor McClain argues in favor of legalizing same-sex marriage: if government took the affirmative step of recognizing same-sex marriage, it would result in a showing of "equal concern and respect for the moral capacity of lesbians and gay men to form intimate relationships and to pursue goods associated with family life and marriage."¹⁶⁷

The debate between Professors McClain and Wardle highlights a central question that must be addressed: is there anything in the nature of the gay or lesbian relationship that makes these citizens fundamentally incapable of fostering virtue in each other or in any children they decide to raise? I contend that there is nothing in the nature of gay or lesbian relationships that precludes them from fostering virtue, a claim I explore in more depth in Part III.

III: SAME-SEX MARRIAGE AND VIRTUE IN THE LIBERAL STATE

A. *Producing Autonomous Citizens in the Context of Family Life*

1. The Virtue of Autonomy

The notion of families as places where democratic values are conveyed necessarily begs a critical question—what are those values, and how does family structure bear on the inculcation of those values? One potential answer is offered by the theory of liberal perfectionism. Perfectionism, standing alone, is the idea that "the legislator must labour to ensure that his citizens become good men. He must therefore know what institutions will produce this result, and what is the *end* or *aim* to which a good life is directed."¹⁶⁸ Aristotle's theory suggests the existence of a single good around which life can and should be directed. A *lib-*

166. *Id.* at 18.

167. *Id.* at 156.

168. Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1102 (1989) (quoting ARISTOTLE, *THE POLITICS* 317 (E. Barker trans., 1958)) (emphasis added).

eral perfectionist, on the other hand, would not completely reject the effort to identify a comprehensive world view; nevertheless, she would temper her effort with a qualified liberalism that respected individual freedom to make critical choices. Thus, even though liberal perfectionists support a conception of government that requires the state to choose among different ends (a position that directly contradicts Rawlsian liberals who support government neutrality among competing ends),¹⁶⁹ they also recognize the importance of “principles of liberty as necessary social conditions for people to lead the best kind of lives.”¹⁷⁰ These principles of liberty include support for pluralism, which contemplates the potential legitimacy of varied and even competing worldviews: “Value-pluralism means that there will be a multiplicity of valuable options to choose from, and favourable conditions of choice.”¹⁷¹ The liberal perfectionist’s support for value-pluralism, then, critically distinguishes her from traditional perfectionists.¹⁷²

If the liberal perfectionist believes that “legislators and officials may consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and setting the framework for social and personal relationships,”¹⁷³ what principle justifies her in reaching this conclusion? Joseph Raz, the leading liberal perfectionist today, has focused on what he calls “the autonomy principle”: “The autonomy principle permits and

169. See, e.g., Joseph Raz, *Liberty and Trust*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 113, 113 (Robert P. George ed., 1996) (“The main purpose of government . . . is to assist people, primarily its subjects, to lead successful and fulfilling lives, or, to put the same point in other terms, to protect and promote the well-being of people.”). Carlos Ball has argued that Raz’s brand of perfectionist liberalism offers a strong theoretical basis for gay rights because it avoids the trap of moral bracketing and allows government to stake out a position which explicitly relies on the moral case for gay rights. Ball, *supra* note 29, at 1883 (“The perfectionist liberalism of Joseph Raz permits the state to rely on notions of the good, and in particular on the ideal of personal autonomy, in defining [rights].”). *But cf.* RAWLS, *supra* note 41, at 193–94 (“[J]ustice as fairness as a whole tries to provide common ground as the focus of an overlapping consensus. It also hopes to satisfy neutrality of aim in the sense that basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine.”).

170. See generally Peter de Marneffe, *Liberalism and Perfectionism*, 43 *AM. J. JURIS.* 99, 110–14 (1998) (discussing various strands of philosophical thought in the liberal and perfectionist camps).

171. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 412 (1986).

172. See Ball, *supra* note 29, at 1883 (“Raz’s perfectionist liberalism recognizes the duty of the state to provide an acceptable range of options to individuals so that they can attain personal autonomy.”).

173. Waldron, *supra* note 168, at 1102.

even requires governments to create morally valuable opportunities, and to eliminate repugnant ones."¹⁷⁴ Raz has defined autonomy as follows:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.¹⁷⁵

Even though autonomy lies at the heart of his theory, Raz does not claim that its preferred form is unconstrained. Instead, he accounts for the common sense reality that society imposes restrictions on one's ability to act purely independently.¹⁷⁶ In fact, he argues that those restraints are appropriate: "Autonomy is possible only within a framework of constraints."¹⁷⁷ If constraints do not exist, the autonomous person will never determine the precise nature, scope, and limits of her actual needs because they will never be tested against a background condition of restraint.¹⁷⁸

It is, paradoxically, the existence of these conditions that permit the acts of authorship that are critical to the development of Raz's autonomous human being. Limitations create the opportunity for meaningful choice by creating a structure within which certain options are accepted and other options are rejected.¹⁷⁹ According to this vision, "[n]o one can comprehensively determine her life, if only because life is always lived among others, and the choices others make, the options they establish, and the meanings they sustain affect what is available to any individual."¹⁸⁰ Social structures, material resources, and relationships impact the kind of narrative that the truly autonomous author will construct. Even though these constraints may seem coercive, Raz argues that these background conditions are often only minimally invasive, and coercion of this sort does not

174. RAZ, *supra* note 171, at 417.

175. *Id.* at 369.

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

177. *Id.* at 155.

178. *See id.* at 155-56 ("An autonomous personality can only develop and flourish against a background of biological and social constraints which fix some of its human needs. Some choices are inevitably determined by those needs. . . . Autonomy is a matter of degree.").

179. As a consequence, Raz is careful to note that autonomous people are only *partially* the authors of their own lives. *See id.* at 155.

180. Waldron, *supra* note 168, at 1108.

significantly undermine the individual's ability to live an autonomous life.¹⁸¹ These qualifications notwithstanding, the principle of autonomy remains the key to Raz's vision of government. For Raz, the primary duty of government is to ensure that citizens have the chance to live autonomously.¹⁸² Government has this duty because it is obliged "to take positive action to enhance the freedom of [its] subjects,"¹⁸³ and government may meet its obligation by "creating the conditions of autonomy."¹⁸⁴

Raz's position here resonates with the claim that families have the ability to generate democratic virtue. If government has the obligation to create the conditions of autonomy, and if ideally-constructed family life has the ability to produce autonomy in its members, then government should support those family forms that do, in fact, have the potential to create virtue in citizens. Arguably, a number of family forms contain this potential, but I will not examine that claim for two reasons: (1) doing so exceeds the scope of this Article, and (2) I am committed to the position that marriage is the preferred family form, for the reasons stated above, even if alternative forms are capable of producing virtue.

Focusing on married family life, then, a final question remains: Even if one accepts that the operation of family life can generate virtue, what support exists for the proposition that it can generate the particular virtue of autonomy? If married family life can produce autonomy, then the natural implication of Raz's theory is that government *must* support it because it creates the conditions through which autonomy is generated. Beyond that, however, is the specific question of *same-sex* married family life—if the characteristics of married family life that generate autonomy are equally applicable to gay and lesbian relationships, then one might conclude that Raz's theory would mandate legislative support for same-sex marriage. Even though I believe that Raz's perfectionist liberal theory is extremely persuasive and offers an excellent foundation on which to base an argument in favor of same-sex marriage, I hesitate to adopt this final implication of his theory. If same-sex couples are equally capable of generating autonomy, I believe that this conclusion

181. See RAZ, *supra* note 171, at 156.

182. See Raz, *supra* note 169, at 115 ("[G]overnment[] [has a] duty to protect and promote the autonomy of people.").

183. RAZ, *supra* note 171, at 427.

184. *Id.* at 425.

offers a sound basis for *persuading* state governments to support same-sex marriage; I do not believe that any such conclusion would *require* state governments to support same-sex marriage.¹⁸⁵ These qualifications notwithstanding, it still remains for me to establish that family life can, indeed, generate the virtue of autonomy.

2. Relational Autonomy and Virtue Production in Family Life

The notion of the family as a setting within which autonomy develops is so counter-intuitive that it simply sounds false. The hierarchical relationship that exists between parents and children is molded, to a large degree, on parents exercising decision-making authority over their children. Moreover, family life was traditionally organized around the model of disparate power relations based on gender. Given these realities, it is odd to argue that autonomy is a value that can be developed and practiced in the home. Nevertheless, many feminist scholars, in particular, have argued that autonomy—*properly understood*—can be practiced in the context of relationships, and family relationships are no exception to this rule.¹⁸⁶

The vision of family life that fosters autonomy in all of its members, however, turns on a particular rendering of the dynamics of family life: (1) for the adults, family life must be viewed as both an opportunity to acquire the support that is necessary for making independent choices about the direction of their lives, as well as the embodiment of a chosen obligation to which the adults have independently committed themselves, and (2) for any children of the union, the parental model, as well as the imposition of discipline and restraint, ideally offers a long-term opportunity to learn what autonomy means, how it functions, and how to exercise gradually increasing amounts of freedom in a manner that is conducive both to their own personal development and to

185. Even Raz recognizes that societies that are not prepared for the full implications of a correctly-applied perfectionist liberalism may reject it through some form of civil strife. *See id.* at 429. I do not believe that civil strife would occur here if states were obliged to legalize same-sex marriage; nonetheless, I am sensitive to the lack of social consensus that exists around this issue, and temper my claims accordingly. Therefore, I would support a *requirement* that states offer same-sex marriage only on the basis of a constitutional decision; I would not support a requirement on the basis of the arguments that I am presenting in this Article. Since my argument does not implicate constitutional principles, I will claim that the argument presented offers only a *persuasive* justification for legalizing same-sex marriage.

186. *See, e.g.,* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 170–86 (1989) (discussing achieving justice and equality within the family).

their maturation as responsible, participating citizens of a democratic society. Properly constructed family lives, then, play a critical role in developing members' capacities for reasoned self-government as they exercise the prerogatives of self-rule.¹⁸⁷

a. *Understanding Autonomy in the Context of Human Relationships*

The concept of autonomy as a constitutive element of liberal politics is certainly not a new idea. Individual autonomy has long been viewed as a necessary component in a governmental system that organizes itself around the principle of self-rule.¹⁸⁸ The ideal citizen of a liberal, democratic state is marked by qualities of reason and independence that prepare her for meaningful participation in public life. These qualities, however, cannot be developed in citizens who are incapable of living a self-directed life and making the choices necessary for self-governance. A well-developed sense of autonomy creates the conditions under which the capacity for self-government can be developed, but that begs an important question: What creates the conditions under which *autonomy* can develop?

In order to understand the conditions under which autonomy can develop, one must first understand what "autonomy" means. The meaning of autonomy is not static, and has been subject to a great deal of analysis over the years. As a traditional matter, autonomy was viewed as a concept that idealized a solitary, atomistic existence, and devalued the importance of human relationships.¹⁸⁹ Even though human beings, as a matter of indis-

187. See, e.g., Dailey, *supra* note 34, at 1791 ("Laws regulating family life have less to do with respecting the moral autonomy of mature individuals than with fostering the growth of responsible, independent citizens."). Assuming for the sake of argument the accuracy of Professor Dailey's position, it does not undermine the core of my argument—namely, that the state, as a normative matter, should promote the autonomy of gay and lesbian adults by facilitating their ability to construct the public lives of their choosing.

188. See, e.g., MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* 75 (2003) ("One foundational liberal principle, if not *the* foundational liberal principle, is the requirement that the exercise of the coercive power of government is justified only if it is considered legitimate from the standpoints of those over whom it is exercised.").

189. See, e.g., Dailey, *supra* note 34, at 1841–42 (noting that autonomy was traditionally understood as resting on a fiercely individualistic view of the self); see also CARLOS A. BALL, *THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY* 92–93 (2003) (describing the traditional liberal account that emphasizes the separation of individuals from each other, and divines from this separation an account of politics that prioritizes the right to pursue interests and needs without undue interference).

putable fact, began their lives in physical connection with another person, the separation that occurred after birth and maturation was both inevitable and desirable because it was only through this process that human beings could achieve freedom.¹⁹⁰

It was this idea of freedom through separation that constituted the essential moral thrust of the classic liberal argument: Human beings' physical detachment from each other allowed them to develop as free individuals. As a result, they were able to form independent perceptions of the good life. Individuals, then, could expect that their human dignity would be respected both by their peers and by the government. Human beings' physical and moral singularity justified the creation and obligation of legal rights and political responsibilities.¹⁹¹ Thus, the freedom described by classic liberal theorists had implications that extended beyond questions of morality; it also served as the linchpin for politics, properly construed. Feminist scholar Robin West describes the essence of classical liberalism in this way: "Because we are all free and we are each equally free, we should be treated by our government as free, and as equally free."¹⁹²

This vision of autonomy was profoundly masculine in its origin and application, and failed to account for the contradictions embodied by the reality of women's lives. First of all, as discussed above, coverture rendered women legally invisible as a matter of legal doctrine. Though separate human beings *in fact*, the fiction that melded wives into their husbands made the concept of female autonomy deeply incoherent: one could not embrace the capacity for reason and self-government in a person who did not even exist. Next, as a matter of practice, traditional female roles were defined in relation to the rhythms of family life, which focused on the obligation to maintain those patterns of domesticity and maintain the lives of individual family members.¹⁹³ Women simply were not viewed as occupying a sphere of life that encouraged autonomy as it was traditionally conceived; in fact, the process of male individuation relied on the presence

190. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 5 (1988) (arguing that the separation theory which underlies the traditional account of liberalism justifies the liberal emphasis on freedom).

191. See *id.* at 5-6.

192. *Id.*

193. See *supra* notes 142-43 and accompanying text.

of women in the home, leaving them free to focus on both public life and their own intellectual/personal concerns.¹⁹⁴

This critique of autonomy is a familiar one, and it has prompted feminist scholars to reexamine the idea.¹⁹⁵ In the process of doing so, they have offered a series of analyses that seek either to undermine or reconfigure the traditional understanding of autonomy. One of the more significant challenges to the traditional autonomy thesis is the idea of relational feminism. Relational feminists claim that autonomy is not achieved in a vacuum; rather, they argue that social interactions and human connections are the backdrop against which autonomy forms. Jennifer Nedelsky, for instance, has argued that people become autonomous through relationships because these connections “provide the support and guidance necessary for the development and experience of autonomy.”¹⁹⁶ Social networks—families, friends, neighbors, co-workers—can and often do provide emotional support and material commitment, which ensure that individuals have the opportunity to meet their fullest potential. This support is “crucial to our ability to lead lives that are fully human”¹⁹⁷ because it fosters our capacity for engaging the world in the ways that we choose.

b. Liberty, Autonomy, and the Relationships We Choose

The relational thesis does not focus solely on the manner in which autonomy can develop in a dynamic manner within the relationship itself. It also considers the “big bang” moment in a relationship—the point in time when the adult couple *chose* each other, and decided to enter into a long-term commitment with

194. See *supra* notes 142–51 and accompanying text.

195. See FRIEDMAN, *supra* note 188, at 82–83 for a discussion of four feminist objections to the traditional autonomy thesis. First, Friedman discusses the argument by some feminists that the traditional account of autonomy presupposes the existence of a “coherent, unified subject with a stable identity” who can, in fact, take ownership of her own decisions. *Id.* at 82. Second, she identifies the critique lodged by feminists who argue that the traditional liberal account assumes that individuals are more self-aware than current psychology believes is true. *Id.* Third, she notes that still other feminist critics claim that the traditional account of autonomy places reason in a normatively preferred position over other characteristics like instinct or emotion, a preference that cannot be justified. *Id.* at 82–83. Finally, Friedman identifies those critics who note that the traditional narrative fails to account for the significance of relationships in developing autonomy. *Id.* at 83. These latter critics form the relational feminist school of autonomy.

196. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989).

197. BALL, *supra* note 189, at 91–92.

each other. This is also the point in time when the link between autonomy and relationships is clearest—the couple has independently chosen to oblige themselves to each other, and in the course of doing so, has fashioned a public face for the relationship. When couples embrace this commitment, they also accept other obligations that extend beyond the private sphere and impact the public sphere. Most notably, those obligations include promises to care for each other and to care for their children. Once these promises are made, and as long as the couple stays together, they are obligated¹⁹⁸ to keep their promises—not only for the sake of the health of the relationship, but also for the sake of sharing the public burden of caring for community members.

The significance of the link between human relationships and fostering autonomy is not simply a staple of the philosophical literature; it was also expressed by the U.S. Supreme Court in *Lawrence v. Texas*.¹⁹⁹ *Lawrence*, of course, overruled *Bowers v. Hardwick*,²⁰⁰ the decision that upheld statutes criminalizing sodomy.²⁰¹ Doctrinal matters aside, *Lawrence* offered a strikingly robust defense of personal autonomy as a *theoretical* matter, specifically grounding it in the idea that its exercise was crucially linked to the intimate bonds we make with one another. It is not my contention that this was a deliberate move by the Court. Instead, I read *Lawrence* as a normative text that imbues autonomy with a substance that reflects the position of relational feminism. By doing so, *Lawrence* ultimately supports the claim that the family—through the functioning of those relationships that are at the core of family life—is a situs for sustaining and conveying autonomy.

198. Depending on the nature of the relationship, the obligation would be legal, contractual, or a matter of personal honor.

199. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). A number of scholars and philosophers have offered various descriptions of autonomy and the meaning of the autonomous life. While they certainly add to the depth, richness, and diversity of the conversation, I have chosen to focus my attention on the conception of autonomy that was expressed by the Supreme Court in *Lawrence* for one specific reason: even though this outcome was almost certainly unintended, the *Lawrence* Court threw its institutional prestige behind the concept of relational autonomy by offering a vision of liberty that was not only highly theoretical, but tied to the manner in which relationships give the concept meaning. I do not contend that my reading of *Lawrence* is now mandated as a matter of constitutional law; instead, I am simply reading *Lawrence* as a normative text that informs the analysis of this Article.

200. *Id.* at 578.

201. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Lawrence, on its initial read, describes a story that is easy to tell. The two male petitioners were arrested one night for engaging in sodomy²⁰²—a private act between consenting adults that most states by this time had chosen to decriminalize.²⁰³ After the petitioners lost their bid to challenge the constitutionality of the statute in the state courts, the Supreme Court invalidated anti-sodomy statutes across the nation.²⁰⁴ Of course, *Lawrence* offered more than the brief recitation just described. It also spun an account of the threads that link intimate relationships with autonomy, and in the process, implied a constitutional basis for theorizing about the connection between relational autonomy and democratic self-government.

In *Lawrence*, the Court articulated a full-bodied vision of the liberty that was protected by the Due Process Clause: “Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. . . . [T]he Due Process Clause gives [the petitioners] the full right to engage in [private, consensual, sexual] conduct without intervention of the government.”²⁰⁵ The Court’s reasoning here, which was infused with a specific regard for the dignitary interests of lesbian and gay persons, emphasized the geographic and decisional aspects of liberty that underlie the acceptable practice of adult, consensual, gay and lesbian sexual behavior.²⁰⁶ This rationale placed *Lawrence* comfortably within the line of substantive due process cases that turned on the importance of certain critical spaces and choices in the personal lives of the individuals whose freedom was invaded.²⁰⁷

The Court’s thick conception of liberty, however, was not only grounded in the traditional claim of the individual against

202. *Lawrence*, 539 U.S. at 563.

203. At the time *Lawrence* was decided, only thirteen states still had anti-sodomy statutes on their books. See *id.* at 573.

204. See *id.* at 578–79.

205. *Id.* at 562, 578.

206. See generally Franke, *supra* note 128.

207. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850–51 (1992) (reaffirming a woman’s constitutional right to an abortion); *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977) (upholding the right of related individuals to make independent choices regarding the construction of their family structure); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (establishing a woman’s fundamental right to an abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to use birth control to single people under an equal protection analysis); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (arguing that married couples have a due process right to use birth control without undue interference from the state).

the state. It was also grounded in a vision of autonomy that encompassed the relevance of human relationships. The prohibition embodied in anti-sodomy statutes did not simply condemn a sexual act, enjoyed by the partners in carnal isolation; rather, they undermined human dignity by criminalizing the decision to embrace another human being in an adult, consensual, private setting.²⁰⁸ The *Bowers* Court missed this point entirely by reducing the claim to its coarsest basics; it “demean[ed] the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”²⁰⁹

The marriage comparison evoked by the Court highlights the core of its actual concern. Individuals clearly had a protected liberty interest in adult, consensual, casual sex—including “one-night stands”—and the government had no defensible interest in regulating these forms of sex. Nevertheless, the Court directed most of its attention to more significant forms of intimate interaction. When the Court made the marriage comparison, it implicitly recognized that the commitment expressed by millions of gay and lesbian couples was identical to that expressed by millions of heterosexual married couples, “whether or not [their relationships were] entitled to formal recognition in the law.”²¹⁰ The *Lawrence* Court saw moral equivalence between heterosexual sex and gay and lesbian sex, and, as a consequence, imbued gay and lesbian relationships with constitutionally-protected honor and worth.

Therefore, even though the Court argued that liberty is found in the choice to enter the relationship, it was the fact of the *relationship itself* that transformed the liberty claim into a dignitary claim. Moreover, it was the dignitary concern expressed by the Court that gave greater substantive depth to its analysis of autonomy. The autonomy protected by liberty was partially constituted by the right to make the choice, but the substantive meaning of the sexual act was the critical constitutive element of autonomy—“[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the

208. See *Lawrence*, 539 U.S. at 567 (“The statutes do seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals.”).

209. *Id.*

210. *Id.*

mystery of human life.”²¹¹ As understood in this context, autonomy finds its fullest expression in self-definition. Autonomy matters not because of what it allows us to *do*, but rather because of who it allows us to *be*. Raz describes this as “significant autonomy”:

(Significantly) autonomous persons are those who can shape their life and determine its course. They are not merely rational agents who can choose between options after evaluating relevant information, but agents who can in addition adopt personal projects, develop relationships, and accept commitments to causes, through which their personal integrity and sense of dignity and self-respect are made concrete. In a word, significantly autonomous agents are part creators of their own moral world.²¹²

To the degree that sexual acts (beyond the question of preference) more fully defined a gay or lesbian identity, the identity was one that had to be embraced in concert with another human being. The autonomy described in *Lawrence* was a lived experience depending on relationships for its sustenance, and the Court’s analysis impliedly rested on this conclusion.

Drawing the connection between liberty and this substantive view of autonomy opens space for an argument about virtue in a constitutional setting. In *Lawrence* itself, the Court did not consider the link between the instrumental function of autonomy and the practice of democratic politics. Instead, the Court focused on one of the inherent features of autonomy that was necessary for practicing democratic politics: a resistance to the tyranny that would result if “[b]eliefs [that] . . . define[d] the attributes of personhood were . . . formed under compulsion of the State.”²¹³ As Jed Rubenfeld has argued, sexual conformity enforced by the state is an especially pernicious form of oppression,²¹⁴ and in *Lawrence*, the Court rejected the regularizing control that anti-sodomy statutes imposed. Broadly speaking, the *Lawrence* majority adhered to the belief that constitutional freedom rested on the presumption that “there is a realm of personal liberty which the government may not enter.”²¹⁵ Precise identification of that realm was left to the prerogative of “later generations [who could] see that laws once thought necessary

211. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

212. RAZ, *supra* note 171, at 154.

213. *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851).

214. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

215. *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847).

and proper in fact serve only to oppress.”²¹⁶ Both the liberty identified in *Lawrence* and the process through which it was identified were intrinsic to and reflective of generally-accepted democratic principles like individual freedom and a belief in the popular right of self-revision. Even though the Court does not explicitly reason about the links between autonomy and democracy in *Lawrence*, its recognition and rejection of the tyranny imposed by anti-sodomy statutes permits one to draw the inference.

Focusing on these aspects of the opinion does not, however, capture completely the manner in which the Court's analysis implicates additional claims about democracy. Indeed, the Court's rich conception of autonomy lends itself to an argument about the instrumental role that autonomy plays in fostering virtue in citizens, with a particular emphasis on gay and lesbian citizens. The argument ultimately relies on the fact that relationships are at the core of this opinion. One can read *Lawrence* as standing for the proposition that the intimate choices we make—including our adult, consensual choices about sex—can and often do reflect our deepest commitments about life, love, and personal identity. These commitments are relevant for obvious personal reasons, but also for political ones: the choices we make about our lives and the conclusions we draw about who we are can influence significantly our engagement with public life.

As such, the freedom to construct our identities—a more substantive vision of autonomy—is closely related to the goal of maintaining a democratic society. At one level, one may view autonomy as a procedural concept that focuses on the freedom to make particular choices. Autonomy acquires substance, though, when those choices fuel the formation of identity. As we construct our identities, we learn who we are by evaluating multiple strands of diverse, conflicting, incomplete information and drawing conclusions about ourselves that reflect our best judgment. We learn to identify which claims are more persuasive than others; which positions resonate with our ethical instincts; which outcomes will yield the greatest personal and practical benefits; and which risks we should take, and which we should avoid.

The identity that we form, however, is not just a private identity. It is also a civic identity that is imbued with the capacity for virtue. The practice of autonomy in our private lives prepares us for a self-governing public life, and we develop habits of rea-

216. *Id.* at 579.

son in private that transfer to the public arena. Self-definition—the product of autonomous choices supported by the relational networks of which we are a part—stimulates a vision of ourselves, the world, and our respective places within it, such that we develop a capacity for rational judgment that is essential to the project of democratic self-governance. At its core, then, *Lawrence* implicitly recognizes the connection between autonomy and the political goal of self-rule. Beyond that, *Lawrence* also implicitly supports the claim that gay and lesbian couples not only have the capacity for embracing this muscular vision of autonomy, but that they also have the competence to sustain it in each other and convey it to any children they may decide to have.

B. *The Experience of the Closet and the Production of Virtue*

Sustaining autonomy is, without question, necessary in a democratic republic. The question that must be answered, of course, is how autonomy is developed, practiced, and conveyed. Since it is as important for adults to practice autonomy as it is for them to convey its value to their children, one potential answer to the question focuses on the operation of the family. As discussed above, married family life provides a unique setting within which parents continue to develop and sustain their autonomy skills and children learn their relevance and value. “[T]he cultivation of autonomy . . . requires the efforts not only of the individual in question but also of others. . . . [because] autonomy entails *interdependence*. . . . [and] requires community.”²¹⁷ The family is easily the first, and for many people, the primary, community. As such, the natural operation of a well-ordered, low-conflict, stable family life will ensure that individuals receive the raw materials necessary for practicing autonomy. For instance, partners may offer to manage household and child-rearing responsibilities while their spouses take time to enjoy leisure activities that reinforce a sense of self. Not only does the freely-acting partner here have the opportunity to exercise his or her autonomy, but doing so satisfies individual desires that contribute to a robust sense of personal identity. In addition, parents can, in some sense counter-intuitively, teach their children the meaning and importance of autonomy by constraining their options: “[Children] can rightfully be subjected to parental . . . efforts to

217. RICHARD DAGGER, *CIVIC VIRTUES* 38–39 (1997).

inculcate their visions of good character so long as these efforts are not repressive, and so long as the child is also presented with information about alternative ways of life."²¹⁸ Parents provide rules and structures that limit the options that their children may pursue because this will ideally teach them the values of wisdom, discipline, and self-restraint in preparation for their lives as autonomous, self-governing adults.

So what does this mean for the adults in a same-sex relationship? If stable, well-ordered, low-conflict heterosexual families are ideal sites for the production of virtue—particularly the virtue of autonomy—what would preclude similarly-fashioned, married same-sex couples from carrying out the same function? I contend that *nothing* would do so. In fact, insofar as the production of autonomy is concerned, same-sex couples are not only equally competent to sustain and convey autonomy, they possess a certain advantage in doing so. The primary aspect of gay and lesbian life that offers this unique advantage is the experience of the closet. Even gays and lesbians who are completely “out” are constantly forced into invisibility by the normative assumption of heterosexual preference.²¹⁹ As a result, gays and lesbians who are committed to living their lives openly must reaffirm their commitment to doing so on a fairly regular basis. These acts of will are ultimately political decisions to place a public face on their sexuality, decisions that implicate the autonomous freedom to insist on the “moral authenticity” of their “personal . . . identity[ies].”²²⁰ Insisting on the salience of a hidden identity is an experience that few others must endure.²²¹ In this way, gays and

218. STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 237 (2000).

219. See, e.g., EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 71–76 (1990) (discussing the phenomenon that forces homosexuals to self-identify as gay or lesbian on a consistent basis because of the presumption of heterosexuality); see also Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 962 (1989) (noting that gays and lesbians are often presumed to be heterosexual and are forced to consider the cost of addressing the false impression).

220. See DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 9–10 (1999).

221. The people who are most like gays and lesbians in this respect are religious people. Jews who wear a yarmulke on a daily basis, for instance, or Christians who consistently wear a chain with a cross on it, visibly announce their faith to the world. But these people are, by and large, exceptional. Instead, religious people who choose to be open about their faith must announce it on a regular basis so that people who are unaware of their commitment have the opportunity to learn. Wil-

lesbians live a life of practiced autonomy, equipping them with the necessary tools for inculcating autonomy.

The closet, as well as the notion of “coming out” of the closet, are the primary metaphors that define the experience of gays and lesbians today.²²² In fact, the closet is “the defining structure for gay oppression in [the twentieth century].”²²³ The effectiveness of the metaphor lies in its subtle complexity. In one sense, it represents the oppression that flows from anti-gay harassment and discrimination, but in another sense, it also offers certain opportunities for self-definition: “[W]hereas . . . ‘closetedness’ has its liabilities, it also bestows a certain freedom from regulation, along with opportunities for self-naming and self-preservation, that would be impossible under conditions of visibility.”²²⁴ It is this richly complex interaction between closely-held secrets and public truths, as well as the link between choice and imposition, that equips gays and lesbians with a unique set of tools to develop and encourage autonomy. In order to understand this process, it will be helpful to consider the nature and operation of the closet.

The nature of the closet is suggested by the metaphor itself, which conveys the descriptive invisibility of its contents. Sexual-

liam Eskridge has noted the following similarities between sexual orientation and religion:

[O]ne’s religion and sexual orientation are not apparent, unless one is making an effort to self-identify. We reveal our religious or sexual identities only by what we say and what religious- or sexual-specific conduct we engage in. Thus, a religious or sexual orientation minority can almost always “pass” for mainstream, simply by expressing the religious or sexual views associated with the majority and keeping secret the conduct characteristic of one’s minority group. More important, religious and sexual identity is dependent upon the ability and willingness both to express the identity and to engage in activities characteristic of the identity.

WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 297 (1999).

222. See, e.g., RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 22 (1988) (“[M]ost gay people live in hiding—in the closet—making the ‘coming out’ experience the central fixture of gay consciousness and invisibility the chief social characteristic of gays.”); see also *LESBIAN AND GAY PSYCHOLOGY: THEORY, RESEARCH, AND CLINICAL APPLICATIONS* 6 (Beverly Greene & Gregory M. Herek eds., 1994) (defining the coming out process as both a descriptive and a normative process through which individuals self-identify as gay and lesbian and subsequently disclose this identity to the world, as well as the life-long process of constructing an identity that is deeply informed by sexual preference).

223. SEDGWICK, *supra* note 219, at 71.

224. DIANE HELENE MILLER, *FREEDOM TO DIFFER: THE SHAPING OF THE GAY AND LESBIAN STRUGGLE FOR CIVIL RIGHTS* 30 (1998).

ity, by and large, cannot be determined by the naked eye, and it is this aspect of gay life—the shrouded nature of *all* sexuality, including homosexuality—that provides the raw materials for constructing the closet.²²⁵ The closet, however, is not a unified concept that functions in one coherent way. Instead, the closet operates on multiple levels, all of which contribute to or diminish the individuals' experiences of autonomy. One of the more pernicious ways the closet operates is the manner in which it simultaneously feeds and is fed by a person's refusal to accept his or her own sexual orientation. This is due to the fact that "gay men and lesbians learn a range of negative stereotypes and attitudes about gay and lesbian persons . . . long before they know that they are gay or lesbian themselves. The subsequent internalization of such attitudes complicates the process of self-acceptance."²²⁶ Eventually, though, many gays and lesbians are able to embrace the fact of their sexual orientation: "Only with time, luck, and great personal effort does the person gradually come, if she does, to accept her orientation, to view it as a given material condition of life, coming as materials do with certain capacities and limitations."²²⁷ By acknowledging the existence of the closet and the orientation it conceals, the gay or lesbian person embarks on a process of discovery that may ultimately lead to a public declaration of identity.²²⁸

Thus, the coming out process—both to oneself and to the world at large—grants the gay man or lesbian the freedom to insist on a more fully-constructed identity that has a greater claim to morality because of its honesty about sexuality. "[T]he basic human right of intimate life"²²⁹ allows the gay person to

225. See *id.* at 14 ("[Gay] identity is most often invisible unless specifically acknowledged by the [gay person him] or herself."). William Eskridge, however, has argued that one draws an incomplete picture of the closet if one focuses solely or primarily on the manner in which it promotes invisibility: "The idea of the closet . . . is not just the idea that deviant gender or sexuality must be secret . . . but is more centrally a complex product of society and the law . . ." ESKRIDGE, *supra* note 221, at 7. Even though the broader implications of the closet should not be disregarded, a focus on secrecy, invisibility, and their explicit rejection are sufficient for the purpose of examining the relationship between the experience of the closet and the development of autonomy.

226. LESBIAN AND GAY PSYCHOLOGY, *supra* note 222, at 7.

227. MOHR, *supra* note 222, at 40.

228. Richard Mohr argues, "[T]he experience of coming out to oneself has for gays the basic structure of a discovery . . . [T]he coming out process affords one of the few remaining opportunities in ever more bureaucratic, mechanistic, and socialistic societies to manifest courage." *Id.*

229. See RICHARDS, *supra* note 220, at 175.

engage in “intimate relations . . . [that] structure [his or her] sense of self as a person with creative moral powers formed, sustained, and transformed in relation[] to other persons dealing with . . . [the] issues of living (the meaning of birth, love, and death).”²³⁰ By coming out of the closet and entering into same-sex relationships, gays and lesbians exercise their right to choose the pattern of their intimacy, which supports their capacity for experiencing “an integrated personality and . . . personal well-being.”²³¹ The autonomy implied by the initial decision to come out, then, is not only critical at the point in time when this event occurs; it also structures the continuous process of identity formation in the context of the intimate relationships that structure gay and lesbian lives.

The experience of the closet described above, however, is not its only relevant manifestation. A second deeply important problem is the precise manner in which the closet impacts the ability of gays and lesbians to navigate public life. Without question, the very existence of the closet precludes the negotiation of sexuality on open terms. Nevertheless, the closet impacts the public lives of gays and lesbians in multiple ways: some gays and lesbians are completely closeted because they want to avoid the stigma associated with homosexuality; others remain closeted under specific circumstances—for instance, gay and lesbian members of the military abide by the “don’t ask, don’t tell” policy; and finally, the normative assumption of heterosexual preference forces all gays and lesbians—including those who are otherwise out—into a closet created by external expectations. These aspects of the closet lend it ambiguity, unpredictability, and instability,²³² but for the gay man or lesbian, they also have the counterintuitive effect of presenting new and varied opportunities to exercise personal choice and authority.

For gays and lesbians who live their public lives within the shelter of the closet, the implications of the choice are manifold. One of the primary justifications for making this choice is the need for the protection that is offered by the closet. Many individuals who are in the process of discovering that they are gay

230. *Id.* at 175–76.

231. MOHR, *supra* note 222, at 40.

232. See ESKRIDGE, *supra* note 221, at 7–8.

suffer from the anxiety that may accompany this realization.²³³ The stress of the discovery, fueled by internalized homophobia and the fear of social disapproval, lead some individuals to choose the closet under all circumstances.²³⁴ They may have accepted the truth of their orientation in their own minds, but the difficulties associated with living an openly gay or lesbian life simply prove too difficult to bear: "Coming out is not chiefly a means to happiness. It is a conscious giving up of power, a subjection to discrimination, an opening up to a heightened awareness of the ways that society despises gays—these are not the materials and conditions of happiness."²³⁵

In a very real sense, then, the decision to remain in the closet is not only rational, but reflects a particular exercise of autonomy. Nevertheless, it represents a cramped form of autonomy that constrains the person's ability to make many other life-affirming choices: the ability to enter into an open, intimate relationship with a partner, the ability to have and raise children (if so desired) within that relationship, the ability to command practical forms of social support for these relationships in the form of domestic partner benefits, and the ability to command emotional forms of social support, especially from family and friends who accept both the person's orientation and the inherent value of his or her relationship. Undoubtedly, the self-aware gay or lesbian person who knowingly chooses the closet under nearly all circumstances will be deprived of the opportunity to exercise many other forms of personal authority as well, losses that will ultimately limit his or her ability to craft a healthy, fully-formed, integrated identity.²³⁶

233. See LESBIAN AND GAY PSYCHOLOGY, *supra* note 222, at 8 ("The discovery or confirmation of a lesbian or gay sexual orientation may be experienced as frightening, ego alien and/or a source of great subjective distress.") (citation omitted).

234. See *id.* at 6–11, 180 (discussing the difficulties associated with coming out of the closet).

235. MOHR, *supra* note 222, at 327. Mohr makes this statement in support of his claim that "[c]oming out is the fundament of gays' existence as political creatures." *Id.* Without question, the decision to come out is one that opens gays and lesbians to significant forms of discrimination, but it is also a decision that allows gays and lesbians to control fundamentally the direction of their lives.

236. See, e.g., BALL, *supra* note 189, at 145 (recognizing the life-affirming value of community that a closeted person misses and arguing that this choice results in "a life without much satisfaction or fulfillment—in which lies, deception, and a perceived need to go it alone undermine an individual's sense of self-worth and self-respect").

The decision to remain closeted, however, does not necessarily reflect shame or internalized homophobia. In some instances, gays and lesbians remain *selectively* closeted in order to accommodate practical concerns.²³⁷ In fact, “[e]ven at an individual level, there are remarkably few of even the most openly gay people who are not deliberately in the closet with someone personally or economically or institutionally important to them.”²³⁸ Discrimination on the basis of sexual orientation can take a variety of forms, and, in order to protect themselves against its more pernicious manifestations, some gays and lesbians choose to conceal their identity. One of the most important places where gays and lesbians conceal their sexuality is in the professional setting. Even though many employers have made important efforts to create gay-friendly workplaces,²³⁹ a significant number of people have reported harassment and discrimination in the employment context.²⁴⁰ Moreover, individuals continue to report discrimination in housing,²⁴¹ public accommodations,²⁴² and in the occurrence of hate crimes²⁴³. It is certainly true that coming out offers a great deal of freedom, but the cost

237. See, e.g., Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 820 (2002) (“The multiplicity of gay closets means that gays can choose to be open to pro-gay audiences while remaining closeted to anti-gay ones. That gays have exercised this choice is unsurprising, as many entitlements can turn on selective closeting.”); see also Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1300–01 (2000) (discussing the phenomenon of “strategic passing,” by which social “outsiders” fool social “insiders” into believing that the outsider is, in fact, an insider).

238. SEDGWICK, *supra* note 219, at 67–68.

239. In fact, record numbers of individuals are currently out in the workplace. According to Lambda Legal, 74% of gays and lesbians are completely out at work. LAMBDA LEGAL & DELOITTE FIN. ADVISORY SERVS. LLP, 2005 WORKPLACE FAIRNESS SURVEY 3 (2006), <http://data.lambdalegal.org/pdf/641.pdf>; see also HUM. RTS. CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS 2005–2006 7–8 (2006), http://www.hrc.org/documents/SOTW_2005-2006.pdf (noting that 51% of Fortune 500 companies extend domestic partner benefits, and 86% prohibit discrimination on the basis of sexual orientation).

240. See LAMBDA LEGAL & DELOITTE FIN. ADVISORY SERVS. LLP, *supra* note 239, at 4–5 (finding that 39% of gays and lesbians around the country have reported some form of workplace discrimination or harassment—approximately 19% have experienced the effects of the glass ceiling, while 11% have reported very frequent or frequent discrimination or harassment).

241. See, e.g., Mike Wilkinson, *Michigan Gays Face Housing Discrimination*, DETROIT NEWS, Jan. 31, 2007, at 3B (discussing the fact that housing discrimination on the basis of sexual orientation happens in 27% of instances across the state).

242. See, e.g., Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1271 (2006) (discussing the refusal by businesses like the online dating service, eHarmony, to match same-sex couples).

of that freedom is sometimes too high: "Voluntarily coming out . . . signals a relinquishing of the closet's protection Coming out marks both one's subjection to public stereotypes of homosexuality and one's readiness to challenge these dominant misunderstandings."²⁴⁴

Practical considerations aside, however, there are additional reasons why some gays and lesbians may choose to remain closeted or partially-closeted: "[H]iddenness . . . bestows a certain freedom from regulation, along with opportunities for self-naming and self-preservation, that would be impossible under conditions of visibility."²⁴⁵ Coming out can subject gays and lesbians to definitional constraints imposed by straights who essentialize homosexuality, because "[i]n [American] culture, being out means being defined in terms of what one does in bed and as "essentially" sexual: a hyper-sexual being whose core identity is sex, sex, sex."²⁴⁶ It is certainly true that there are many heterosexuals who will avoid this particular trap. Nevertheless, it can be strategically useful for others to insist that the crux of gay identity is sex. Serious harm is often caused by those for whom the position bolsters a strategic opposition to gay rights: the rhetorical force of the reductive argument minimizes gay rights' claims by stripping them of their moral salience through an over-emphasis on conduct. If the conduct is then characterized as immoral, the claims are far easier to reject.²⁴⁷ Heterosexism claims the power to identify and name gays and lesbians for socio-cultural purposes, and the power, in turn, transforms itself into a basis for public policy decisions. This regulatory power, however, has limited authority over those who refuse to acknowledge publicly the nature of their sexuality. As noted above, for individuals who are completely closeted, intentionally choosing the closet is a double-edged sword: one is protected from many forms of regulation, but one also loses the opportunities that

243. See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2005 1-2 (2006), <http://www.fbi.gov/ucr/hc2005/docdownload/victims.pdf> (noting that 13.8% of victims of single-bias hate crimes were targeted on the basis of sexual orientation, 61.3% of which were targeted on the basis of anti-male homosexual bias).

244. MILLER, *supra* note 224, at 31.

245. *Id.* at 30.

246. Mary Becker, *Becoming Visible*, 1 NAT'L J. SEX. ORIENT. L. 147, 148 (1995), available at <http://www.ibiblio.org/gaylaw/issue2/mbecker.html>.

247. See *id.* at 149 (arguing that heterosexism not only reduces gay and lesbian identity to the incomplete sum of its sexual parts, but subsequently demonizes the very thing it refuses to understand).

arise from linking a private conception of self with the dignity of a public face, as “[p]ublic (exterior) representation [of homosexuality] is not merely the presentation of a predeveloped (interior) identity, but a continuous dialogue with society that shapes that identity.”²⁴⁸ It is this ongoing, public conversation that continually reinforces the contours of both public and private identity. Individuals who *selectively* embrace the invisibility of the closet, on the other hand, grapple meaningfully with the richness of their sexuality, and by publicly self-identifying as gay (even under limited circumstances), reaffirm their commitment to living a more fully integrated life. It is this commitment that gives them the stronger claim to an autonomous life than their completely closeted counterparts.

The process of dialogue described above is not, however, simply a core part of the manner in which gay and lesbian identity is formed. It also reflects the conflict that exists between the efforts of a gay person to live openly and honestly, and the constraints imposed by the normative presumption of heterosexuality. Under this norm, gay identity is rendered invisible by the assumption that everyone is straight until proven otherwise. Moreover, this norm undermines the autonomous efforts that gays and lesbians have made to identify publicly as gay by forcing them to correct false impressions. Thus, the presumption of heterosexuality *itself* constructs a closet from which out gays and lesbians must constantly emerge:

[T]he deadly elasticity of heterosexist presumption means that . . . people find new walls springing up around them even as they drowse: every encounter with a new classful of students, to say nothing of a new boss, social worker, loan officer, landlord, doctor, erects new closets whose fraught and characteristic laws of optics and physics exact from at least gay people new surveys, new calculations, new draughts and requisitions of secrecy or disclosure.²⁴⁹

Increased levels of “outness” do not eliminate this problem:

Even an out gay person deals daily with interlocutors about whom she doesn’t know whether they know or not; it is equally difficult to guess for any given interlocutor whether, if they did know, the knowledge would seem very important. . . . [F]or many gay people [the closet] is still the fundamental feature of social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the

248. Fadi Hanna, *Gay Self-Identification and the Right to Political Legibility*, 2006 WIS. L. REV. 75, 103–04 (2006).

249. SEDGWICK, *supra* note 219, at 68.

support of their immediate communities, in whose lives the closet is not still a shaping presence.²⁵⁰

The presumption of heterosexuality does not simply impose on gays and lesbians a normative framework that does not fit; it also imposes social liabilities on the people who decline to live within that framework. This is due to the fact that "gay men and lesbians, no matter how 'out,' must constantly resist assimilation into the class of heterosexuals and so constantly must make decisions about the price they are willing to pay to do so."²⁵¹ The costs may be high—employment discrimination, victimization through hate crimes, and rejection by family and old friends are simply a few of the costs that a person might have to pay in order to assert his or her gay identity. The benefits, however, may be immeasurable: "The transparency of the narratives of those who have gone through the coming out experience bear a stronger witness than even that of the recently religiously reborn to the centrality to self of what they have undergone."²⁵² The advantages of coming out notwithstanding, the presumption of heterosexuality is so pervasive and overwhelming that fighting it *at every turn* would be unreasonable. As Janet Halley notes, "[gays and lesbians] may decide . . . [to] allow a false ascription of heterosexuality to go uncorrected when they are buying stamps at the post office. It would be virtually impossible to resist so consistently that one *never was heterosexual* in the sense of bearing that social identity."²⁵³ Nevertheless, it is the decision to assert personal authority and fight the presumption of heterosexuality that makes coming out such a powerfully insistent statement of individual autonomy: not only is the gay man or lesbian risking social rejection and public discrimination, but he or she re-scripts the sexual narrative that conventional society has written in favor of the narrative that he or she prefers.

The decision to come out, then, is one that requires, for many people, significant reserves of pride and a sense of self. The unique experience of life in the closet, and in particular, the process of "coming out," deeply affect the sense of individuality and autonomy that gays and lesbians possess. Identifying as gay or lesbian, proclaiming it to the world, and then knowingly embracing a relationship that has been relegated to the margins of

250. *Id.*

251. Halley, *supra* note 219, at 962.

252. MOHR, *supra* note 222, at 158.

253. Halley, *supra* note 219, at 962.

culture proves a deeply-held self-regard that would have been cultivated by a specific set of life experiences. For the gay or lesbian person, the decision to live an open and honest life, as well as the daily exercise of actually living it, is autonomy practice in living color.

The relational autonomy thesis emphasizes this point. When autonomy is viewed through the lens of this relationship, it is clear that the participants offer countless forms of direction and support that allow them to pursue their own interests, ends, goals, and desires. Gay and lesbian couples who simply support each other in the context of their relationships are necessarily engaged in the task of fostering autonomy. Moreover, any children who are raised by gay or lesbian couples will be exposed on a constant basis to role models who embody autonomous behavior. In this way, gay and lesbian persons are uniquely situated to inculcate the value of autonomy. Moreover, the experience of the closet offers gays and lesbians a potential advantage with respect to the inculcation of this particular virtue. To the degree that public policy decisions are based on the claim that same-sex marriage is actually bad for society, it must contend with the fact that same-sex marriage presents an opportunity for our constitutional democracy to strengthen itself.

IV. CONCLUSION

Marriage, without question, is good for reasons other than its value in a democracy. In its stable, low-conflict, ideal form, marriage is good because it cements a private expression of love, concern, and mutual obligation between two people who have entered a long-term relationship. It is good for children who are born into an ideally-fashioned marriage because it offers them structural stability and emotional benefits that they might not otherwise receive. Marriage is also good for religious people because it channels their sexual desires into an appropriate setting and sanctifies their need for emotional intimacy and communion. There are a variety of reasons why marriage is affirmatively good, reasons that have nothing to do with democracy, constitutionalism, or any other form of politics.

Nevertheless, marriage has deeply important public components as well, including "the public expression of commitment by the partners to each other, the recognition and support on the part of the community for the partners' relationship, and the le-

gal rights and benefits that accompany marriage.”²⁵⁴ These ideas broadly describe the state’s interest in supporting the caregiving function of marriage, as well as in organizing the manner in which marriage affects the redistribution of rights, entitlements, and economic goods that individuals possess. These aspects of marriage and its public face have been thoroughly aired in the academic literature, but the relationship between same-sex marriage and democracy is largely unexplored. In particular, the question of virtue—its meaning, relevance to same-sex marriage and democracy, and finally, its practical achievability—has been similarly neglected. Given the natural tension that exists between liberal politics and the concept of virtue, this outcome is not surprising. Nevertheless, these ideas are certainly worth exploring because they offer a persuasive accounting of why same-sex marriage, in particular, is affirmatively good for the democratic state.

In order to achieve this goal, however, a preliminary matter must be addressed: how does one persuade the general population that committed gay and lesbian relationships are no different from the heterosexual relationships that we are used to experiencing and observing? How does one persuade the general population that the emotional depth and promises of commitment that exist in same-sex relationships are either identical or substantially the same? More importantly, how does one persuade the general population that the morality of gay rights generally, and same-sex marriage in particular, is not a laughably incoherent concept? The answers to these questions are incredibly complex and force us to confront our most dearly held beliefs about faith, reason, justice, equality, and the manner in which these concerns interact in the public square. I did not propose to answer these questions in one fell swoop in this article, but by focusing on the question of the affirmative good that can flow from same-sex marriage, it was my hope to start addressing these and similar questions.

At this point in time, it would be extremely difficult to find widespread agreement on the claim that supporting same-sex marriage is actually a profoundly moral public policy position to

254. Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1202–03 (2004).

take.²⁵⁵ Without question, it is a moral instinct—namely, about the immorality of homosexuality, and specifically, gay sex—that motivates a great deal of the opposition to same-sex marriage.²⁵⁶ The morality of the issue can, however, be temporarily side-stepped if we shift the focus to the affirmative good that same-sex relationships produce. To this end, the claim that same-sex relationships have the ability to produce virtuous citizens has the potential to gain some purchase in the political debate. The argument, of course, is grounded on the notion that marriage serves a purpose that extends beyond the claim that it is meant to cement the private love that two people have for one another, or provide a stable setting within which children are produced. To that end, the argument may encounter a great deal of resistance. Nonetheless, the argument has strong historical roots and a non-trivial contemporary relevance. Many would likely agree that successful marriages *do* require love, friendship, loyalty, self-sacrifice, and any number of virtues that one can identify. Still others would probably agree that married couples teach each other, and their children, many values that ideally make them all better people, and in the long run, better citizens. If, in fact, these instincts are correct, it is difficult to see why the exact same statements could not be made about gay and lesbian couples.

This is particularly true with respect to the question of inculcating autonomy. As discussed above, gay and lesbian couples are uniquely situated to support each other in the practice of autonomy and to teach their children the meaning of autonomy. The decision to live, every single day, as one half of a whole unit that is subject to discrimination and disregard, is one that requires significant reserves of self-respect and self-regard, qualities that necessarily relate to the construction of character. Allowing same-sex couples to marry would only strengthen this aspect of their relationships because it would formally publicize the decision that they made, and it would be a statement of iden-

255. In fact, Marine General Peter Pace, the Chairman of the Joint Chiefs of Staff, recently stated his belief that homosexual activity is immoral, and followed it up by saying that gays and lesbians should not be allowed to serve openly in the military. See Pauline Jelinek, *Pace Expresses Regret Over Gay Remark*, WASH. POST, Mar. 13, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300185.html>. When important public figures feel that they may comfortably articulate such a position for the world to see, it is clear that there is still a great deal of support for the claim.

256. See, e.g., Ball, *supra* note 29, at 1927 (“The struggle for societal acceptance of same-sex relationships entails a frontal attack on the deeply held views of many Americans regarding the (im)morality of homosexuality.”).

tity to a world that would normalize them by reinserting them into the world of the closet. Virtue, at the end of the day, is about character, and the formative experiences of the closet, as well as the experience of marriage, would undoubtedly shape gay men and lesbians in ways that have not even been explored. The autonomy that these individuals experience in their personal lives would almost certainly be put to instrumental uses in their public lives (especially since the decision to come out in the first place, and then marry a person of the same gender, are both quasi-public acts themselves), uses that would shape their ability to engage the project of self-rule.

This affirmative good notwithstanding, forty-four states have passed laws that limit marriage to the union between a man and a woman.²⁵⁷ To date, only one state has rejected an effort to amend its state constitution in this way—Arizona—and it did so primarily because of the impact that the amendment would have had on the rights of non-gay, unmarried couples.²⁵⁸ One who espoused a purely majoritarian vision of democracy would conclude from this outcome that supporting same-sex marriage rights clearly contradicts the expression of the democratic will, and in a narrow, nose-counting sense of the word “democracy,” this is, indeed, correct. The democratic prerogative of self-rule as Americans understand it, however, relies for its success on the *character* of those whose preferences would be counted. This concern for character, as well as the manner in which marriage can shape character, should persuade state legislatures that same-sex marriage is not only a question of right, it is a matter of the good. Same-sex marriage is an idea that works, not just for the gays and lesbians who would immediately benefit, but for the American democratic framework that would benefit in the end.

257. Twenty-four states have achieved this end through the operation of a statute and a constitutional amendment. Seventeen have done so through the use of statutory language only. Finally, three states have achieved this through the operation of a constitutional amendment only. See HERITAGE FOUND., *supra* note 4.

258. See Peter J. Smith, *Poll: Arizona Marriage Amendment Failed Because it Also Affected Unwed Heterosexual Couples*, LIFE SITE, Nov. 24, 2006, <http://www.lifesite.net/ldn/2006/nov/06112411.html>.