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THE CONSTITUTIONAL INEVITABILITY OF SAME-SEX MARRIAGE

LAURENCE H. TRIBE* AND JOSHUA MATZ**

The cause of same-sex rights in the United States has enjoyed wondrous progress over the past decade. Battles in the courts and legislatures, along with cultural shifts and struggles for people's core beliefs, have produced such triumphs as *Lawrence v. Texas*,[1] a growing number of state laws prohibiting discrimination on the basis of sexual orientation,[2] the fall of "Don't Ask, Don't Tell" through joint military, presidential, and congressional opposition,[3] and full same-sex marriage rights in Massachusetts, New York, Connecticut, Iowa, New Hampshire,[4] Vermont, and the District of Columbia (with Washing-

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1. 539 U.S. 558 (2003).

2. *E.g.*, CAL. GOV'T CODE § 12920 (Deering 2011) (prohibiting discrimination on the basis of sexual orientation in employment); COLO. REV. STAT. § 24-34-402 (2011) (same); CONN. GEN. STAT. ANN. § 46a-81c-e (West 2011) (prohibiting discrimination on the basis of sexual orientation in employment, public accommodations, and housing); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2011) (prohibiting discrimination against gay, lesbian, bisexual, and transgender persons in the workplace); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2011) (prohibiting discrimination on the basis of sexual orientation in employment).

3. The Don't Ask, Don't Tell policy, 107 Stat. 1670, 10 U.S.C. § 654 (1993), was repealed by the Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010), which triggered a process that culminated on September 20, 2011, with the official end of Don't Ask, Don't Tell. *See also* DEPARTMENT OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (2010); Kerry Eleveld, *Gates and Mullen: Repeal DADT*, THE ADVOCATE (Dec. 2, 2010, 2:45 PM), http://www.advocate.com/News/Daily_News/2010/12/02/Gates_and_Mullen_Repeal_DADT/; Jason Links, *David Petraeus on DADT: 'The Time Has Come'*, HUFFINGTON POST (May 16, 2010, 06:12 AM), http://www.huffingtonpost.com/2010/03/16/david-petraeus-on-dadt-th_n_500928.html.

4. However, as this article goes to press, Republicans in New Hampshire are pressing a major legislative effort to revoke same-sex marriage (although this would require a successful override of Governor John Lynch's promised veto). *See* Abby Goodnough, *As Gay Marriage Gains Ground in Nation, New Hampshire May Revoke Its Law*, N.Y. TIMES, Feb. 27,

ton and Maryland likely soon to join the list).[5] It is perhaps especially significant that the latest string of victories has been won through high-profile, hard-fought legislative battles—a fact that reveals the power of constitutionally grounded principles of liberty, equality, and dignity to resonate far beyond the courthouse door in a dynamic and interactive process of judicial, political, and popular constitutional interpretation and social movement struggle.[6]

To be sure, in the early-to-mid 2000s the movement for marriage equality experienced dispiriting setbacks in a wave of state referenda.[7] Nonetheless, recent polling indicates that a majority of Americans now support same-sex marriage rights,[8] numerous states have em-

2012, http://www.nytimes.com/2012/02/28/us/gay-marriage-law-in-new-hampshire-may-be-revoked.html.

5. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); N.Y. DOM. REL. LAW § 10-a (McKinney 2011); CONN. GEN. STAT. ANN. § 46b-20(4) (West 2011); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); N.H. REV. STAT. ANN. § 457:1 (2011); VT. STAT. ANN. tit. 15, § 8 (West 2011); D.C. CODE § 1283(a) (2011). Legislatures in Maryland and Washington State passed bills legalizing same-sex marriage in 2012. *See* Civil Marriage Protection Act, H.D. 438 & S. 241, 2012 Leg., 430th Sess. (Md. March 1, 2012); Concerning civil marriage and domestic partnerships, H.R. 2516 & S. 6239, 62d Gen. Assemb., 2012 Reg. Sess. (Wash. Feb. 13, 2012). The governors of both states promptly signed the legislation, but enactment of the laws could be delayed if opponents gather the necessary signatures to place repeal referenda on the ballot. *See* Aaron C. Davis, *Gay Marriage Bill Approved by Md. Senate*, WASH. POST, Feb. 24, 2012, at A1; Reuters, *Washington: Gay Marriage Legalized*, N.Y. TIMES, Feb. 14, 2012, at A17.

6. *See, e.g.*, Ricardo Lopez, *Gay Marriage Backers Find Success Emphasizing Love and Family*, L.A. TIMES, Mar. 4, 2012, http://www.latimes.com/news/nationworld/nation/la-na-gay-marriage-20120304,0,1129155.story; Aaron C. Davis, *Md. Becomes Eighth State to Legalize Gay Marriage*, WASH. POST, Mar. 1, 2012, http://www.washingtonpost.com/blogs/maryland-politics/post/md-to-become-eighth-state-to-legalize-gay-marriage/2012/03/01/gIQAJKxmkR_blog.html; Michael Barbaro, *Behind N.Y. Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 25, 2011, http://www.nytimes.com/2011/06/26/nyregion/the-road-to-gay-marriage-in-new-york.html?pagewanted=all. A substantial body of work on popular constitutionalism charts the course of interactions among political, popular, and judicial actors. *See, e.g.*, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Robert Post & Reva Siegel, *Originalism As a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545 (2006); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

7. Thirty states have passed constitutional amendments defining marriage as between a man and a woman. *See Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NATIONAL CONFERENCE OF STATE LEGISLATURES (July 14, 2011), http://www.ncsl.org/default.aspx?tabid=16430.

8. In May 2011, the Gallup polling organization reported that for the first time in its history of tracking the issue, a majority of Americans (53 percent) supported same-sex marriage. Frank Newport, *For First Time, Majority of Americans Favor Legal Gay Marriage*, GALLUP (May 20, 2011), http://www.gallup.com/poll/147662/First-Time-Majority-Americans-Favor-Legal-Gay-Marriage.aspx.

braced civil unions and are moving toward marriage,[9] and the Department of Justice has filed briefs in federal courts championing the rights of same-sex couples in cases challenging the so-called "Defense of Marriage Act" ("DOMA").[10] Those briefs of the United States urging federal courts to invalidate DOMA are, of course, remarkable in their departure from the normal although not invariable Executive Branch practice of defending the constitutionality of federal statutes even when the President, advised by the Justice Department, has concluded that the disputed legislation is unconstitutional.[11] These heartening developments, born of both majoritarian politics and countermajoritarian judicial action, point the way to a brighter future for many gay, lesbian, and bisexual individuals and couples (as well as their children, families, friends, and allies, all of whom share in the suffering that the perpetuation of unequal status inflicts throughout American society).

It is ironic that this progress has become for some a justification for arguing that same-sex couples should wait a bit longer for their rights—that it would be better to wait another few years, or perhaps decades, so that majoritarian politics rather than judicial action might be the principal vehicle for bringing about the recognition of dignity that these men and women are currently being denied.[12]

9. *See, e.g.*, N.J. STAT. ANN. § 37:1-28 *et seq.* (a New Jersey law allowing civil unions that was adopted by the New Jersey Legislature in reaction to the opinion of the New Jersey Supreme Court in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)); *see also* Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, A Gay Marriage Groundswell*, N.Y. TIMES, Aug. 21, 2010. The New Jersey legislature approved same-sex marriage legislation in February 2012, *see* Marriage Equality and Religious Exemption Act, S. 1, 215th Leg., 2012 Sess. (N.J. Feb. 16, 2012), but the bill was vetoed by Gov. Chris Christie, who said he believed that voters should ultimately decide the issue in a ballot referendum. *See* Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES, Feb. 18, 2012, at A19.

10. *See, e.g.*, Def.'s Br. in Opp'n to Mot. to Dismiss, Golinski v. United States Office of Pers. Mgmt., No. 3:10-cv-00257-JSW (N.D. Cal. July 1, 2011) (stating that sexual orientation classifications should be subject to heightened scrutiny and that the Defense of Marriage Act is unconstitutional because it cannot withstand that heightened level of review); *see also* News Release, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), 2011 WL 641582, at *1.

11. *See generally* Saikrishna Prakash & Neal Devins, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. (forthcoming Apr. 2012); Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073 (2001); Marty Lederman, *John Roberts and the SG's Refusal to Defend Federal Statutes in* Metro Broadcasting v. FCC, BALKANIZATION (Sept. 8, 2005), http://balkin.blogspot.com/2005/09/john-roberts-and-sgs-refusal-to-defend.html.

12. *See, e.g.*, *Charles Fried, The Courts, the Political Process, and DOMA*, SCOTUSBLOG (Aug. 25, 2011, 12:23 PM), http://www.scotusblog.com/2011/08/the-courts-the-political-process-and-doma/ ("The ideal situation is to avoid a definitive constitutional ruling on the equal protection or due process right to same-sex marriage and to have the matter battled out in the legislative arena, as it was in New York this summer.").

Many of those who advance this essentially gradualist view ground it in a rhetoric of hard-nosed realism and assure us that, even though they recognize the justice of the case for same-sex marriage (and the *injustice* of the practices denying marriage equality in most of the States), legislative change is preferable either as a matter of principle in light of the need for democratic legitimacy[13] or as a matter of prudence and strategy in light of the risk of socio-political backlash—either against the gay rights movement or against the judiciary or both.[14]

Yet for all their realism, it is far from clear what consequence follows from this view. Perhaps they would prefer that nobody bring a federal lawsuit seeking recognition of same-sex marriage rights. But that ship has already sailed[15] and we see little point in revisiting a decision that, though understandably controversial at the time,[16] is no longer especially salient. Indeed, the constitutional status of same-sex marriage is before the federal judiciary on two separate fronts.

The first involves California's notorious Proposition 8, which was recently invalidated by a panel of the United States Court of Appeals for the Ninth Circuit. Judge Stephen Reinhardt, writing for the panel majority, drew on *Romer v. Evans*[17] to argue that withdrawing from gays and lesbians a marriage right that they had previously been

13. *See, e.g.*, Richard Posner, *Wedding Bell Blues*, NEW REPUBLIC, Dec. 22, 2003, at 33.

14. *See, e.g.*, William N. Eskridge, Jr., *The Ninth Circuit's* Perry *Decision and the Constitutional Politics of Marriage Equality*, 64 STAN. L. REV. ONLINE 93, 97 (2012), http://www.stanfordlawreview.org/online/perry-marriage-equality ("California is ready for marriage equality in ways most of the rest of the country is not: there are thousands of openly lesbian and gay couples, many rearing children, who have persuaded their neighbors and coworkers that marriage equality would be good for their communities . . . . It is likely that the federal courts of appeals in the South would be reluctant to reach exactly the same result as the Ninth Circuit in *Perry*. For now, the Supreme Court should deny review of those decisions as well. This would allow individual states to deliberate further, consistent with the common law tradition and with the Court's view of the states as 'laboratories of experimentation.' . . . Marriage equality is an idea whose time has come for California, as well as for New York, whose legislature recognized marriage equality last year. But has its time come everywhere in the country? I fear not.").

15. *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding that Proposition 8, the California ballot measure that banned same-sex marriage, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment), *aff'd sub nom.*, Perry v. Brown, No. 10-16696 & No. 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

16. *See* Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40 (noting that some leading gay rights organizations, including the ACLU, Human Rights Campaign, Lambda Legal, and the National Center for Lesbian Rights, initially issued a statement condemning David Boies and Ted Olson's decision to challenge California's Proposition 8 in federal court).

17. 517 U.S 620 (1996).

granted, and doing so without legitimate reason (but solely on the basis of "animus"), violated the Equal Protection Clause.[18] Judge Reinhardt thus declined to reach the broader question whether same-sex couples may ever be denied the right to marry in a state that makes civil marriage available to otherwise indistinguishable opposite-sex couples.[19] However, Proposition 8's defenders have sought *en banc* re-

18. *See* Perry v. Brown, 2012 WL 372713, at *1–2, *17.

19. *Id.* at *2. Despite the understandable reasons for the panel's decision to rest on the narrowest available ground, some have expressed concern that the court's rationale could serve to deter state legislatures from conferring same-sex marriage rights, and state courts from locating such rights in state constitutional protections of equality, for fear that a federal court might later invalidate measures like Proposition 8, by which the people of a state assert their preference for having the issue resolved by popular referendum. *See, e.g.*, Editorial, *Wobbly Justice*, WASH. POST, Feb. 9, 2012, at A16 ("The California Supreme Court's strained reading of the state constitution to mandate same-sex marriage gave rise to Proposition 8. The possible negative consequences of the 9th Circuit's decision may be more far-reaching, discouraging states from adopting civil unions or domestic partnerships for fear that they may one day be forced to recognize same-sex marriages. We believe that same-sex couples should be allowed to marry, but it would be unfortunate if they were deprived of the significant protections afforded by these other designations."); *cf.* David Cole, *Gambling with Gay Marriage*, NYRBLOG (Feb. 9, 2012, 11:48 AM), http://www.nybooks.com/blogs/nyrblog/2012/feb/09/gambling-gay-marriage/ ("[T]he court's reasoning—namely, that there is no conceivable motive, other than mere disapproval of a class of people, to deny same-sex couples the label 'marriage' when they are granted all other rights associated with marriage—would seem to apply to all states that allow same-sex couples to form civil unions, but not to marry. (New Jersey, Oregon, Nevada, Illinois, Rhode Island, Hawaii, Delaware, and Washington all fall into that category).").

The fact that no such deterrent effect appears to have prevented post-February 7, 2012, developments moving in the direction of marriage equality in Maryland and Washington may cast doubt on that concern to the degree it expresses an empirical prediction, although of course those states were already contemplating a move to full same-sex marriage rights and not a compromise "civil union" position whose constitutional footing may be less secure post-*Perry*. Unsurprisingly, reactions to Judge Reinhardt's opinion even among supporters of marriage equality have varied quite dramatically. *Compare* Jason Mazzone, *Marriage and the Ninth Circuit: Thumbs Down*, BALKINIZATION (Feb. 7, 2012, 7:18 PM), http://balkin.blogspot.com/2012/02/marriage-and-ninth-circuit-thumbs-down.html ("My initial reaction to the Ninth Circuit panel's decision today in *Perry v. Brown* is that it is dishonest and foolish. It is dishonest because it warps the relevant background and misrepresents *Romer v. Evans* to reach the conclusion that Romer requires invalidation of Proposition 8. It is foolish because it misses—indeed evades—a ripe opportunity for a straight-up ruling that *a ban* on same-sex marriage violates the federal Constitution, a ruling that has a better than even chance of being upheld by the Supreme Court."), *and* Robin West, *A Marriage is a Marriage is a Marriage: The Limits of* Perry v. Brown, 125 HARV. L. REV. F. 47, 52–53 (2012), http://www.harvardlawreview.org/media/pdf/vol125for_west.pdf ("*Perry v. Brown* ultimately does not advance our understanding of the political, social, moral, or even constitutional meanings of marriage or sex, and in fact it confuses both. But was the flame worth the candle? All that truncated social thought was, after all, put to an unequivocally good end . . . . It would have been all the better, though, if the Court and the lawyers who forced its hand had left the People alone to reach that decision themselves."), *with* Eskridge, *supra* note 14, at 96, 98 ("As a matter of constitutional *law*, Judge Reinhardt's opinion was more rigorously reasoned than either the trial court's opinion that he affirmed or the views of commentators who would have liked a more sweeping rul-

view before the Ninth Circuit, and it is entirely possible that the *en banc* court—or eventually the Supreme Court—will be forced to squarely address the question of same-sex marriage rights in the course of this litigation.[20]

The second front consists of challenges to DOMA, which has been invalidated by district courts in Boston[21] and San Francisco,[22] and which may soon face review before the First and Ninth Circuits. Given the current status of these cases, it is possible that the DOMA challenges may be the first same-sex marriage cases to reach the Supreme Court on a petition for certiorari.

These Proposition 8 and DOMA cases render moot much of the debate over the wisdom of bringing a constitutional challenge to laws that deny marriage equality. That game is already on.

So perhaps the gradualist would instead insist that, if faced with a supposedly direct challenge to laws banning same-sex marriage, the Supreme Court should aggressively exercise its famed "passive virtues" to avoid hearing any such claim or to narrow the scope of the question presented.[23] Although we can imagine particular respects in which such gradualism or minimalism may be feasible, we do not believe that the Supreme Court should bend over backwards to dodge the issue, nor do we believe the Supreme Court will be able to deploy its passive virtues legitimately as an all-purpose shield to avoid the fast-approaching question of same-sex marriage rights.

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ing. The fans of a broader ruling, of course, are more inspired by constitutional *politics* than by constitutional *law*—but they are wrong about the politics as well . . . Judge Reinhardt's decision in *Perry v. Brown* advances the ball just a little, and not too much."), *and* Marty Lederman, *Understanding* Perry v. Brown, BALKANIZATION (Feb. 8, 2012, 10:54 AM), http://balkin.blogspot.com/2012/02/understanding-perry-v-brown.html ("I find this reasoning to be quite sound, and it explains why the panel was right not to opine on whether a state can constitutionally confer the status of marriage only on straight couples as an initial matter—a much closer question, and thus one better reserved for a case that requires its resolution.").

20. *See* Lyle Denniston, *Prop 8: Further Review Opposed*, SCOTUSBLOG (Mar. 1, 2012, 05:20 PM), http://www.scotusblog.com/2012/03/prop-8-further-review-opposed/.

21. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Commonwealth of Massachusetts v. HHS, 698 F.Supp.2d 234 (D. Mass. 2010).

22. Golinski v. United States Office of Pers. Mgmt., No. C 10–00257 JSW, 2012 WL 569685 (N.D. Cal. Feb. 22, 2012).

23. *See, e.g.*, William Eskridge, *Marriage Equality State by State*, SCOTUSBLOG (Aug. 15, 2011, 1:50 PM), http://www.scotusblog.com/2011/08/marriage-equality-state-by-state/ ("[A]s Alexander Bickel argued, the 'passive virtues' are often the best. The Supreme Court ought to avoid a final judgment on the constitutionality of marriage [laws'] discrimination against lesbian and gay couples until the nation is substantially at rest on the issue. . . . [I]t is high time the federal courts debated the issue openly, and that federal court debate ought *not* be foreshortened by the Supreme Court.").

If the Proposition 8 case arrives at the Supreme Court on an appeal from Judge Reinhardt's opinion, or from an *en banc* opinion grounded on substantially similar reasoning, the passive virtues might admittedly come into play quite easily, since denial of certiorari might well be appropriate given the absence of a circuit split and the narrow cast of Judge Reinhardt's minimalist reasoning.[24]

By the same token, if same-sex marriage first reaches the Supreme Court via challenges to DOMA, the Justices may have an opportunity to evaluate that palpably infirm *federal* statute under the Fifth Amendment's Due Process Clause before reviewing state laws that discriminate with respect to marital status against same-sex couples. A decision invalidating DOMA's blatantly discriminatory singling-out of same-sex couples from the normal deference federal law gives to state definitions of marriage might constitute a useful stepping stone toward a later decision broadly invalidating state laws that deny same-sex couples the right to marry—and, importantly, this stepping stone might fall either some significant distance or mere micrometers away from the destination toward which the Court is stepping, all depending on how broadly the Court chooses to rule and under which theory it invalidates the disputed provisions of DOMA.[25]

Acknowledging that in at least some cases it might be possible for the Court to duck the issue of marriage equality, or to broach it nar-

24. *See, e.g.*, David G. Savage et al., *Gay Marriage: U.S. Supreme Court May Not Hear Prop. 8 Appeal*, L.A. TIMES, Feb. 7, 2012, http://latimesblogs.latimes.com/lanow/2012/02/prop-8-supreme-court-may-not-hear-california-gay-marriage-case.html ("[T]he 9th Circuit's opinion reads as though its intended audience was one — Justice Anthony Kennedy — and its message was that there was no need for the Supreme Court to decide the California case."); Erwin Chemerinsky, *Prop. 8 Ruling: The Path Ahead*, L.A. TIMES, Feb. 8, 2012, http://www.latimes.com/news/opinion/commentary/la-oe-chemerinsky-proposition-8-ruling-20120208,0,5128797.story ("Tuesday's federal court ruling declaring Proposition 8 unconstitutional can be easily explained: There is no legitimate government interest in prohibiting same-sex marriages. It is for this reason that the Supreme Court is likely to affirm the U.S. 9th Circuit Court of Appeals and hold that the denial of marriage equality to gays and lesbians violates the U.S. Constitution.").

25. For example, it is at least conceivable that a state government's decision to withhold recognition from same-sex marriage in the first instance might be deemed justifiable by considerations of gradualism and tradition, while a federal decision, against a backdrop of nearly universal federal deference to each state's own definition of marriage for internal purposes, selectively to reject a state's definition of marriage when, and only when, the state extends marriage equality to same-sex couples, would be deemed indefensible as reflecting nothing but constitutionally illegitimate animus against same-sex relationships as such and thus would be doomed to invalidation under the equality dimension of the Fifth Amendment's Due Process Clause. No more than that would be needed to strike down the pertinent provision of DOMA. Having gone that far, however, the Supreme Court might be hard-pressed to articulate a coherent rationale for a state decision to confer on same-sex couples all the rights, privileges, and responsibilities of marriage while withholding from such couples the label and the social standing that accompanies that status.

rowly before eventually tackling the ultimate question of state laws that deny same-sex marriage rights, two critical points remain.

First, the mere fact that the Court *could* non-embarrassedly dodge the issue does not mean that it *should* do so. An obvious historical analogy—the Court's disgraceful and widely condemned decision to duck the issue of interracial marriage when it first presented itself in *Naim v. Naim*,[26] an error later rectified in the justly celebrated and perfectly named case of *Loving v. Virginia*[27]—is hardly the kind of precedent whose spirit any Justice would wish to follow. And, to make matters worse, if the Justices were truly keen to dodge the issue even if it were squarely presented, the Court would have to perform legal acrobatics far more painful to behold than those employed in *Naim*, because *Lawrence* laid the groundwork for striking down bans on same-sex marriage in much starker terms than did *Brown* for invalidation of anti-miscegenation laws—terms so stark that Justice Scalia, in his ferocious *Lawrence* dissent, as much as conceded that a rejection of the federal constitutional right to same-sex marriage could not be reconciled with the *Lawrence* holding or with its underlying rationale.[28]

Nor do other bases for evasion readily come to mind. It is hard to imagine a persuasive basis grounded in standing or justiciability for the Court to pass the hot potato on any of the pending cases. And this question would truly reach the Court as no bolt from the blue, readily dodged or dismissed as improvident to consider due to lack of sufficient percolation. Indeed, the Supreme Court has already grappled with and embraced the very principles that ought to decide this matter. Finally, it bears mention that the court of history has not looked kindly on Justices, like those in *Naim*, who punted on the great civil rights issues of their era.

Second, some of the justifications that purport to explain why the Court should stay its hand or only strike narrowly at discrimination have grown quite frail. To put our point bluntly, the cultural ground has shifted so deeply as well as rapidly in recent years that the Court would simply lack credibility were it to claim that the equal protection of the laws—and the Constitution's protection of fundamental liberty

26. *See* 87 S.E.2d 749 (Va. 1955) (upholding Virginia's anti-miscegenation statute), *vacated* (due to the inadequacy of the record), 350 U.S. 891 (1955), *aff'd*, 90 S.E.2d 849 (Va. 1956), *appeal dismissed*, 350 U.S. 985 (1956) (mem.).

27. 388 U.S. 1, 2 (1967) (holding that Virginia's anti-miscegenation statute, and those of fifteen other states, "cannot stand consistently with the Fourteenth Amendment").

28. 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (arguing that the *Lawrence* majority opinion "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned").

interests—could be satisfied by relegating same-sex couples either to a second-class form of civilly sanctified relationship or to a social space in which their love, commitment, and dignity are denied any legal recognition at all. As a basis for judicial inaction, overblown fears of socio-political backlash grow harder to defend with every passing month. Calls for the Court to cut this baby in half—or to ignore it or throw it out the window entirely—are thus out of step with evolving social mores and deeply offensive to anyone who resents the injustice of condemning gays and lesbians to an open-ended legal limbo.[29]

This is especially true for those of us who believe that same-sex relationships are as valuable as opposite-sex relationships wherever they happen to be found, and who see little virtue in forcing gays and lesbians from across the United States to accept only a few geographic enclaves that recognize their rights while waiting for the rest of the nation to see the light.

However that may be, even if in some meta-legal sense it might be "better" for the process of recognizing same-sex marriage rights to proceed state by state, legislature by legislature, or referendum by referendum, that road now appears to be closed (or at least closing). This question, like so many others before it, has followed the path predicted by Tocqueville and spread from the realm of politics into the judicial domain.[30] Sooner or later—and it could well be sooner—the Supreme Court *will* hear a case squarely presenting the question of same-sex marriage rights. And when such a case appears before that Court, whether the case is styled *Perry v. Brown* or *Gill v. Office of Personnel Management* or something entirely different, the Justices

29. *See, e.g.*, Michael Klarman, *Why Gay Marriage Is Inevitable*, L.A. TIMES, Feb. 12, 2012, http://articles.latimes.com/2012/feb/12/opinion/la-oe-klarman-gay-marriage-and-the-courts-20120212 ("As recently as seven or eight years ago, there might not have been a single justice prepared to declare a federal constitutional right to same-sex marriage. Opinion polls then showed that Americans opposed gay marriage by a 2-1 margin, and a Massachusetts court decision declaring a right to gay marriage under the state constitution produced an enormous political backlash in 2004, with 13 states enacting constitutional bans . . . The situation has since changed dramatically. Opinion polls now consistently show that a slender majority of Americans support gay marriage. State supreme courts in California, Connecticut and Iowa have ruled in its favor, and legislatures in five states have enacted gay-marriage statutes. . . . Why is gay marriage inevitable? First, the basic insight of the gay rights movement over the last four decades has proved powerfully correct: As more gays and lesbians have come out of the closet, the social environment has become more gay friendly. . . . A second reason that gay marriage seems inevitable is that young people so strongly support it . . . . A 2011 poll found that 70% of those age 18 to 34 supported gay marriage. It is hard to imagine a scenario in which young people's support for gay marriage dissipates as they grow older.").

30. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed., HarperCollins 1988) (1840) ("There is hardly a political question in the United States which does not sooner or later turn into a judicial one.").

must do as constitutional principle requires and strike down laws that limit civil marriage to opposite-sex couples.[31]

The case for same-sex marriage follows directly from *Lawrence*'s potent recognition of the right to dignity and equal respect for *all* couples involved in intimate relationships, regardless of the sex of each individual's chosen partner.[32] Sounding in the constitutional registers of due process *and* equal protection, *Lawrence* sought to secure a fundamental and yet fragile dignity interest whose boundaries necessarily extend far beyond the bedroom door.[33] Notwithstanding a few half-hearted qualifications[34] that Justice Scalia quite rightly dismissed as inconsistent with its underlying reasoning and as trivial barriers to same-sex marriage rights,[35] *Lawrence* and the principles it represents are thus incompatible with state and federal laws that refuse two men or two women the full tangible and symbolic benefits of civil marriage.[36]

These benefits are undoubtedly substantial. As Chief Justice Margaret Marshall explained on behalf of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*:

31. There is, of course, a close connection between our argument that the Court should not hesitate to address this question when fairly presented with it and our argument that the Court should reach a particular result. If a Justice on the Court knew with certainty that he or she were the "swing Justice" on the matter and were simply unpersuaded by the case for same-sex marriage as it currently stands or unwilling to sign such an opinion until public opinion more firmly coalesced around marriage equality, he or she might reasonably decide to rule on the narrowest possible grounds in order to preserve room in the future for a pro-same-sex marriage rights opinion (or to at least keep the Court's options open). In that event, although use of the passive virtues can be troublingly rights-contracting where it forestalls a rights-expanding decision, the passive virtues may also be rights-expanding where they leave the issue open for further rights-favorable rulings.

32. *See Lawrence*, 539 U.S. at 567 (stating that relationships, whether gay or straight, involve not just "the right to have sexual intercourse" but the creation of "a personal bond that is more enduring," and that "[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice").

33. The *Lawrence* Court accordingly observed that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575. *See generally* Laurence H. Tribe, Lawrence v. Texas, *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

34. *See, e.g.*, *Lawrence*, 539 U.S. at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

35. *See supra* note 28; *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (asking, in light of *Lawrence*'s holding and reasoning, "what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising [t]he liberty protected by the Constitution?" (internal citation and quotation marks omitted)).

36. *See, e.g.*, The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

> Marriage [] bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.[37]

At least on this point, both sides of the debate typically agree. Notwithstanding occasional efforts to portray marriage as little more than a vehicle for procreation and family stability (a characterization that raises intriguing questions about why we allow marriage by prisoners, the elderly, the infertile, and those with no intention of procreation), most of us recognize that marriage has assumed profound expressive, personal, and financial significance in modern society.[38]

Laws that limit these benefits to opposite-sex couples will, we suspect, come in the not-too-distant future to be viewed as anachronisms that just barely survived the twentieth century and ultimately collapsed under the weight of their striking inconsistency with evolving public consensus, advances in civil rights, and core constitutional principles. Just as we now look back on *Loving* and celebrate its teach-

37. 798 N.E.2d 941, 954–55 (Mass. 2003) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)). In an appropriate memorial to Justice Marshall's stirring words, this passage has become one of the most popular readings at same-sex marriage ceremonies. *See* Bernadette Coveney Smith, *Top 5 Ceremony Readings for Gay Weddings*, 14 STORIES (July 9, 2011), http://www.14stories.com/_blog/Weddings_Redefined/post/Top_5_Ceremony_Readings_for_Gay_Weddings/.

38. We recognize, of course, that marriage is not necessarily the public and private form that all same-sex couples might prefer to adopt, and that marriage is not the *only* vehicle through which same-sex couples can achieve fulfillment or recognition. *See, e.g.*, Katherine Franke, *Marriage is a Mixed Blessing*, N.Y. TIMES, June 23, 2011, http://www.nytimes.com/2011/06/24/opinion/24franke.html ("While many in our community have worked hard to secure the right of same-sex couples to marry, others of us have been working equally hard to develop alternatives to marriage. For us, domestic partnerships and civil unions aren't a consolation prize made available to lesbian and gay couples because we are barred from legally marrying. Rather, they have offered us an opportunity to order our lives in ways that have given us greater freedom than can be found in the one-size-fits-all rules of marriage."). However, given the significance of marriage as an institution in American life and the fact that many same-sex couples quite obviously would prefer at least the *option* of participating in that institution, marriage equality remains a critical part of any movement to allow same-sex couples the freedom to order their lives as equals in American society and as agents entitled to full respect for their autonomy.

ing that the fundamental right to marry transcends boundaries of race that once seemed obvious and essential, so too should the restriction of marriage to opposite-sex couples be recognized as jarringly out of sync with the respect for dignity that *Lawrence* so memorably articulated: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[39] Whether conceptualized as a fundamental right to marriage steeped in traditions of liberty,[40] as an embrace of equality that refuses to discriminate against opposite-sex couples on grounds of sex and sexuality,[41] or as both,[42] same-sex marriage rights are firmly grounded in the Constitution. The time has come for the Court to recognize this truth.

As many others have powerfully demonstrated, arguments to the contrary are ultimately unpersuasive.[43] Some of those arguments boil down to an implausibly narrow and essentially question-begging reading of the "right to marry" that engages with precedent at an inde-

39. *Lawrence*, 539 U.S. at 578 (majority opinion).

40. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 794 (2011) ("The liberty claim [for same-sex marriage] is more persuasive because it performs the empathy it seeks. It frames the right at a high enough level of generality that opposite-sex couples are urged to imagine a world in which they were denied the right.").

41. *See* Deborah Hellman, *Marriage Equality: A Question of Equality Rather than Liberty*, SCOTUSBLOG (Aug. 26, 2011, 10:35 AM), http://www.scotusblog.com/2011/08/marriage-equality-a-question-of-equality-rather-than-liberty/ ("[T]he Court should rule that Proposition 8 is indeed unconstitutional, if it reaches the merits, but it should choose equal protection over due process for reasons of principle rather than reasons of policy."); *cf.* Heather Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 851 (2007) ("[W]hat is really at stake in these debates [over gay rights] is not whether all humans should enjoy a right, but whether gays and lesbians, in particular, should do so, and *that* idea is better captured by the equal protection paradigm. . . . Equal protection analysis *begins* with that issue.").

42. *See* Tribe, *supra* note 33; Martha Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 688 (2010) ("[M]arriage is a fundamental liberty right of individuals, and as such it also involves an equality dimension: groups of people cannot be fenced out of that fundamental right without some overwhelming reason."); *cf.* Pamela S. Karlan, *Foreword: Loving* Lawrence, 102 MICH. L. REV. 1447, 1449 (2004) ("*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality . . . [T]he *Lawrence* Court's discussion of liberty would be incoherent without some underlying commitment to equality among groups."); Robert Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 99 (2003) (noting "how closely *Lawrence* comes to explicitly melding the concerns of equal protection with those of due process").

43. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., GAY MARRIAGE: FOR BETTER OR WORSE? (2007); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED GOVERNMENT (1996); Martha Nussbaum, *A Right to Marry?: Same-Sex Marriage and Constitutional Law*, 56 DISSENT MAG. 43 (Summer 2009); Erwin Chemerinsky, *The Time for Marriage Equality Has Finally Arrived*, SCOTUSBLOG (Aug. 19, 2011, 11:35 AM), http://www.scotusblog.com/2011/08/the-time-for-marriage-equality-has-finally-arrived/.

fensibly low level of generality and reads out of cases like *Loving* and *Turner v. Safley*[44] their deep concern with respect for intimate relationships.[45] This miserly reading of precedent and the Constitution, which leaves the scope of protections against discrimination frozen in past prejudice, was decisively rejected by Justice Kennedy's proclamation for the Court in *Lawrence* that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."[46]

Other arguments, shorn of their rhetorical focus on some inarticulable "harm" to the "institution of marriage" and their pseudoscientific claims about the supposedly essential characteristics of each sex, consist of little more than expressions of moral disapproval of homosexuality and moral devaluation of same-sex couples. In addition to the obvious barriers that such arguments face—including the Court's rejection in *Romer v. Evans*[47] of anti-gay animus as a justification for discrimination on the basis of sexual orientation,[48] and Judge Vaughn R. Walker's devastatingly thorough rejection of the empirical evidence that purports to render these claims scientifically credible[49]—*Lawrence* also stands as an imposing hurdle. Justice Kennedy did indeed speak of demeaning those who are married, but his opinion said nothing to suggest any supposed "harm" to marriage as such that some insist would follow from its extension to same-sex couples. Rather, he emphasized that "it would demean a married couple were

44. 482 U.S. 78 (1987) (striking down a Missouri regulation that prohibited prison inmates from marrying without the approval of the prison superintendent).

45. *See id.* at 95 (noting that "inmate marriages, like others, are expressions of emotional support and public commitment"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

46. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

47. *See* 517 U.S. 620, 632 (1996).

48. The Ninth Circuit followed *Romer* in holding that California's Proposition 8 violated the Equal Protection Clause by depriving a minority group of an existing right without a legitimate reason. Perry v. Brown, No. 10-16696 & No. 11-16577, 2012 WL 372713, at *17 (9th Cir. Feb. 7, 2012) (stating that *Romer* "governs our analysis"). The court concluded, "Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status." *Id.* at *28. "The Constitution simply does not allow for 'laws of this sort.'" *Id.* at *1 (quoting *Romer*, 517 U.S. at 633). For evaluations of Judge Reinhardt's reasoning in *Perry*, see sources cited *supra* at note 19.

49. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 950 (N.D. Cal. 2010) (finding the scientific opinions of an expert proferred by the proponents of Proposition 8 to be "unreliable and entitled to essentially no weight"), *aff'd sub nom.*, Perry v. Brown, No. 10-16696 & No. 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

it to be said marriage is simply about the right to have sexual intercourse."[50]

By thus invoking the essential role that intimacy and love play in marriage as an institution that is simultaneously private in its personal significance and public in the face it presents to the world, Justice Kennedy pointed beyond purely sexual intimacy to the dignitary concerns that *Lawrence* safeguards and that are squarely implicated in the case for same-sex marriage. Just as morally rooted hostility to homosexuals and to same-sex intimacy flunked constitutional scrutiny in *Lawrence* even when dressed up in pseudo-scientific "studies" that purported to show the health risks or social harms wrought by same-sex sexual relations,[51] so too should such hostility be disapproved by the Court as a permissible basis for ongoing discrimination in the domain of marriage rights.

Indeed, a subset of these sorts of arguments is, if anything, all the more puzzling and all the less rational as a justification for denial of marriage equality when the issue is whether to withhold the dignity of equal citizenship from same-sex couples whose sexual conduct might be wholly unaffected by their marital status. This point, of course, is analogous to the common observation that denying marriage rights to same-sex couples who are already participating together in public life, raising children, mixing finances, and/or performing many other common features of "married life" makes very little sense if the true nature of the objection is to same-sex couples engaging in those activities (which will remain a fact of modern social life regardless of the decision whether to grant marriage equality).

Occasionally, commentators try to circumvent these concerns by invoking either the Religion Clauses or the doctrine of government speech.[52] Neither effort is persuasive.

Claims concerning religious freedom fail as a threshold matter because the government's decisions regarding civil marriage do not in any way implicate religious practice or belief and impose no obligation on religious individuals or institutions to adopt for their own purposes the definition of marriage adopted for civil purposes by the

50. *Lawrence*, 539 U.S. at 567.

51. *See, e.g.*, Brief of *Amici Curiae* Center for Arizona Policy and Pro-Family Network in Support of Respondent, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief in Support of Respondent on Behalf of *Amici Curiae* Texas Physicians Resource Council, Christian Medical and Dental Associations and Catholic Medical Association, *Lawrence*, 539 U.S. 558 (No. 02-102); Brief of *Amicus Curiae* Concerned Women for America, In Support of the State of Texas, Respondent, *Lawrence*, 539 U.S. 558 (No. 02-102).

52. *See, e.g.*, Roger Severino, *Or For Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007).

state. And the decision of any religious institution or individual to adopt its own definition of "marriage" for its own purposes reciprocally has no impact that comes within the cognizance of the Constitution, which operates as a limit only on government conduct and not on purely private action. As the Iowa Supreme Court explained in *Varnum v. Brien*:

> In the final analysis, we give respect to the views of all [persons] on the issue of same-sex marriage—religious or otherwise—by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution.[53]

These considerations, taken together, render the Religion Clauses irrelevant as obstacles to legal recognition of same-sex marriage.[54]

53. *See* Varnum v. Brien, 763 N.W.2d 862, 905–06 (Iowa 2009).

54. There is little reason to worry that the Supreme Court's recent recognition of the "ministerial exception" to anti-discrimination laws in *Hosanna-Tabor v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012), will disturb this argument. Admittedly, some have noted that the Court's effort to distinguish *Employment Division v. Smith*, 494 U.S. 872 (1990), in *Hosanna-Tabor* encounters some difficulty. *E.g.*, Michael Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html. The alleged inconsistency is that, whereas *Smith* held that the "right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)," 494 U.S. at 879, *Hosanna-Tabor* created an exception from the generally applicable anti-discrimination laws by relying upon a distinction between "government interference with an internal church decision that affects the faith and mission of the church itself" (at issue in *Hosanna-Tabor*) and "government regulation of only outward physical acts" (at issue in *Smith*). 132 S. Ct. at 707. Even if we were to believe that *Hosanna-Tabor* worked a major change in Religion Clause jurisprudence, there would be a compelling argument that decisions about which marriages to sanction as a theological and ceremonial matter within the church would fall on the "internal church decision that affects the faith and mission of the church itself" side of this novel line, thereby exempting objecting churches from any obligation to recognize or perform such marriages (and freeing them from the threat of lost tax benefits or liability under anti-discrimination statutes). But even before *Hosanna-Tabor*, and notwithstanding *Smith*, there was little reason to believe that religious bodies would be pressured, directly or indirectly, into performing same-sex marriages lest they be deemed to have violated various laws against discrimination based on sexual orientation and/or be placed in jeopardy of losing various tax or other financial governmental benefits.

Arguments grounded in government expression typically allege that a state's decisions about whether to *call* same-sex unions "marriages" constitute a form of government speech and thus do not implicate individual rights because the government is free to "say" whatever it wishes about what the institution of "marriage" means to it.[55] In the alternative, but in a similar vein, one might argue that such decisions constitute a matter of purely internal government procedures—akin to the government's decisions about how to classify persons within the census or for various bureaucratic purposes—that cannot be deemed to implicate anyone's "rights." Even assuming *arguendo* that expression is the proper frame of reference for constitutional analysis of same-sex marriage claims, neither of these positions withstands scrutiny.

The first sort of argument—familiar from cases like *Pleasant Grove City v. Summum*,[56] which noted that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech"[57]—effectively treats government's power to "speak" as unbounded by the rest of the Constitution. However, as the Court also recognized in *Summum*, "[t]he involvement of public officials in advocacy may be limited by law, regulation, or practice."[58] Specifically, government speech can be and surely is limited by other constitutional provisions—including the Establishment and Equal Protection Clauses.[59] This explains why the insult to dignity and equality inherent in government expression of the message that same-sex couples are somehow undeserving of inclusion in the institution of civil marriage would trigger limits of constitutional moment.

Imagine what we would say if, after *Loving v. Virginia*, a state were grudgingly to permit African Americans and whites to marry—but were to stamp the marriage licenses of such couples with an insignia designating official disapproval of their unions, or were to place signs voicing such disapproval in government offices dispensing marriage

55. This point is analogous to the argument of a religious body that it is free to "say" whatever *it* wishes about what it will recognize as a true marriage, with the key difference that government's "speech" in this context has important civic consequences within the control of the state whereas a religious body's proclamations about its internal beliefs do not.

56. 555 U.S. 460 (2009).

57. *Id.* at 467.

58. *Id.* at 468.

59. *Id.* at 482 (Stevens, J., concurring) ("[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.").

licenses. Who would defend the government's prerogative to engage in such demeaning labeling? Presumably we would condemn such instances of government "expression" through an analysis similar to that pioneered by Justice O'Connor in the context of Establishment Clause challenges to those official religious displays that a reasonable observer would construe as disparaging the equal citizenship of those outside the religion being favored or endorsed.[60]

So too here: Even if viewed as merely government speech, official policies excluding same-sex couples from the institution of civil marriage, like official policies excluding interracial couples or couples of mixed faith or, for that matter, non-Christian couples, from that institution, would violate constitutional principles of equal dignity for all citizens regardless of race, religion, or sexual orientation. Government speech is not unbounded—and its limits render it useless as a legal shield behind which states may discriminate against same-sex couples while evading the Fourteenth Amendment's broad compass.

A second argument borrows from cases like *Bowen v. Roy*[61] to insist that the terms used by the government to describe civil relationships are a matter of purely internal governmental concern that do not implicate individual rights. In *Bowen*, the government had conditioned the provision of welfare benefits to a Native American named Little Bird of the Snow on its assignment of a Social Security number to her file over her parents' objection—an objection grounded in their religious conviction that use of this number before Little Bird of the Snow came of age would be a sacrilege.[62] Although a narrow majority of the Justices indicated in dictum that they would have ruled otherwise had the parents been forced to participate actively in the assignment of a number to their daughter,[63] the Court rejected the parents' free exercise challenge to the mere use of such a number in the Social Security Administration's internal processes and concluded that, because the government had done nothing to inhibit the plaintiffs' freedom to "believe, express and exercise" their religion, its use

60. *See* Lynch v. Donnelly, 465 U.S. 668, 688–90 (1984) (O'Connor, J., concurring) (pioneering a non-endorsement test in Establishment Clause cases requiring a court to examine whether the challenged practice conveys a message of government endorsement or disapproval of religion, and explaining that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community").

61. 476 U.S. 693 (1986).

62. *Id.* at 695–96.

63. *Id.* at 714 (Blackmun, J., concurring in part); *id.* at 720 (Stevens, J., concurring in part and concurring in the result); *id.* at 727 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan, J., and Marshall, J.).

of a Social Security number for internal purposes did not violate their rights.[64] As Chief Justice Burger explained:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . . Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.[65]

The analogy to marriage, however, is so weak as to be less than even superficial. For one thing, couples cannot escape participating personally and actively in the labeling process; unlike parents who are mere passive bystanders in a government agency's decision concerning how to categorize their child for internal purposes, individuals seeking formal recognition as "married" are not bystanders but are obviously the key players in the unfolding drama. Moreover, the designation of marriage, unlike the numerical or other classifications used by government for its internal purposes, is a deeply public *and* private symbol that carries profound consequences touching on individual self-understanding and social mores. Decisions concerning its availability necessarily implicate important and intimate concerns—matters of love, dignity, and companionship—that extend so far beyond government filing cabinets that they might as well serve as a canonical account of what does *not* constitute an "internal procedure" under *Bowen*.[66] Where external, expressive impacts so predominate over comparatively trivial internal considerations, any claim of bureaucratic manageability can be dismissed as so tangential to the rights at issue that it serves as little more than an analytical red herring properly accorded no weight in constitutional reasoning.

Laws that discriminate against same-sex couples by relegating them to civil unions or some other lesser status are under political and legal assault throughout the nation. Numerous state courts, and thus far several federal courts, have rightly struck them down as viola-

64. *Id.* at 700 (majority opinion).
65. *Id.* at 699–700.
66. *Id.* at 700.

tions of due process and equal protection.[67] Legal challenges will undoubtedly proceed apace until the Supreme Court finally speaks.

When that fateful day arrives, adherence to constitutional principle and respect for the fundamental dignity of all persons dictate a clear result. As Chief Justice Earl Warren wrote in *Loving*, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[68] Those words ring at least as true today as they rang in 1967. Continued denial of marriage equality is simply *incompatible* with the application of the Constitution's core principles as we now understand them. The path of lesbian, gay and bisexual civil rights has been a difficult one, with tragic setbacks along the way and a course to constitutional understanding forged by extraordinary personal, political, and cultural struggle. Many difficult questions still lie ahead. But marriage equality is not one of them. Whether it comes about through popular referenda, legislative action, state constitutional law, or federal judicial opinions—all mechanisms through which the Constitution's deepest meaning can be written into American law—same-sex marriage *is* coming.

Whenever that momentous question finally arrives at the Supreme Court, the Justices should declare this right for the entire Nation. The reason is simple: if our Constitution's promises of liberty, equality, and dignity are to be realized for the millions of Americans whose most intimate lives are degraded by laws that set their love, their enduring commitments to one another, and their very sense of personhood apart as little more than second-class, then in the end the Justices must do their duty and recognize same-sex marriage rights. Such is their responsibility as faithful expositors of the Constitution.

There is no other way.

67. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.*, Perry v. Brown, No. 10-16696 & No. 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Baker v. State, 744 A.2d 864 (Vt. 1999).

68. Loving v. Virginia, 388 U.S. 1, 12 (1967).