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The Decline and Fall of the Case
against Same-Sex Marriage

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ARTICLE

THE DECLINE AND FALL OF THE CASE AGAINST SAME-SEX MARRIAGE

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My primary task here is to review and critique the arguments that are now being made against same-sex marriage. Before I do that, however, I want to say something about the context in which this conversation is taking place.

Same-sex marriage is one of the central issues that has made religious Christians a reliable part of the Republican coalition that dominates modern American politics.¹ Religious Christians are indispensable to this coalition's success, but they do not lead it. The most powerful members are large economic actors, notably the energy, farm, steel, and pharmaceutical industries. The principal elements of the Republican program—I speak here of actual behavior, not of puffery or promises—are expansion of the national debt through the distribution of favors to these interests, tax cuts for the rich, and resistance to any spending measures that would benefit the poor. One consequence of the present Republican dominance is that 45 million Americans are without health insurance, which means that they do not receive routine medical checkups, which means that many of them will die of easily preventable diseases.²

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1. This by no means describes all American Christians, of course, but strong Christian religiosity and frequent church attendance has become an increasingly reliable predictor of support for Republican candidates.

2. One measure of the partisan divide over whether health insurance is even a problem is the difference between the health care proposals of the two candidates in the recent presidential election. George Bush's proposal (quickly forgotten once the election was over) would bring health insurance to approximately 2 million people. John Kerry would have insured approximately 26 million. Paul Starr, *Health Care's Big Choice*, 15 Am. Prospect (Oct. 2, 2004).

Christianity did not originally understand itself to be a champion of the strong against the weak, the rich against the poor. So it is strange that Christians, who have so often been at the vanguard of progressive American movements,³ find themselves in this company. In politics, of course, it is often necessary to form coalitions of convenience with those with whom one deeply disagrees. But precisely what have Christians gotten in exchange for this particular alliance? The Marriage Amendment is typical in this regard: no tangible results even with respect to this issue, but only a symbolic gesture, a signal of support for a proposal that everyone understood was destined for humiliating defeat. (That defeat is not unwelcome to some of their partners, who want their support but don't want to alienate the moderate wing of the party.)⁴ My complaint is not just that the Christians have sold out. It is that they have sold out cheap.

But anyway, here we are, and this is the conversation we're having. Serious and intelligent people disagree about whether same-sex marriages should be recognized. Our disagreements about priorities merge with our disagreements about substance. Those who oppose such marriages think that preventing them is important enough, not only to warrant a constitutional amendment, but also to hold President Bush's feet to the fire on this, and no other, issue.

I'm going to begin by considering the specifics of the proposal that has been put forward. Then I'm going to turn to the larger cultural context in which this conversation takes place, and end by considering the collapsing case against same-sex marriage.

I. THE DUBIOUS MARRIAGE AMENDMENT

Constitutional analysis cannot, of course, say whether any particular constitutional amendment should or should not be adopted. That is a political and not a legal question. Legal analysis can, however, evaluate claims that particular language will or will not have a certain effect.

The specific amendment that has been proposed turned out to be more extreme than it was advertised as being, and that partly explains why a provision that needed a two-thirds supermajority could not even command a simple majority in the Senate.⁵

3. See A. James Reichley, *Religion in American Public Life* (The Brookings Instn., 1985); Garry Wills, *Under God: Religion and American Politics* (Simon & Schuster 1990).

4. Thomas Frank, *Failure Is Not an Option, It's Mandatory*, N.Y. Times A2 (July 16, 2004) ("Failure allows for endless grandstanding without any real-world consequences that might upset more moderate Republicans or the party's all-important corporate wing.").

5. The motion to proceed on the amendment failed by a 48-50 vote. Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. Times A1 (July 16, 2004). In the House, the amendment failed by "227 to 186 in favor of the amendment, far short of the 290 votes, or two-thirds of the House, required to adopt it." Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. Times A14 (Oct. 1, 2004). Another bill, to deny federal courts the right to

Most Americans agree with the first sentence of the proposed amendment: "Marriage in the United States shall consist only of the union of a man and a woman."⁶ The main question this raises is whether this rule is important enough to enshrine in the Constitution.

It should be noted, however, that even this sentence may be broader than many Americans could agree with. It is possible that it would invalidate domestic partnership laws that give gay couples the rights of marriage without the name. Robert George and Gerard Bradley have argued that "marriage" refers to an institution, not just a word, and that the amendment precludes allowing gays access to that institution. If a state were precluded from having a "navy," it could not maintain a fleet of ships and call it an "armada."⁷

If the amendment contained only its first sentence, as quoted above, and only tried to impose a federal definition of marriage on the states, it would still be an unprecedented intrusion on federalism and states' rights.⁸ States have always had the power to define their own family law. That was enough for many prominent Republicans, such as former Congressman Bob Barr, author and primary sponsor of the Defense of Marriage Act, to oppose it. President Bush responded to this objection by arguing that the federal courts were about to impose same-sex marriage on all the states, but he was, to put it most charitably, confused. Even if this were correct, the amendment goes much further.

The second sentence of the amendment, as originally introduced by Rep. Marilyn Musgrave, provides: "Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."⁹ No law or contract can be enforced unless it is "construed" by someone. This provision would thus invalidate the domestic partnership laws of Vermont, California, Connecticut, New Jersey, and Hawaii, as well as any other similar domestic partnership laws that might be

hear same-sex marriage cases, passed the House but got no further. See Carl Hulse, *House Backs Bill to Limit Power of Judges*, N.Y. Times A19 (July 23, 2004).

6. H.R. Jt. Res. 56, 108th Cong. § 1 (May 21, 2003).

7. Their views are reported in Ramesh Ponnuru, *Times v. Sullivan: In Defense of the New York Times*, <http://www.nationalreview.com/ponnuru/ponnuru200402091407.asp> (Feb. 9, 2004). The analogy rests on a misreading of the Constitution, which in fact permits states to "keep . . . Ships of War in time of Peace" with Congress's consent. U.S. Const. art. I, § 10, cl. 3. The Alliance for Marriage never addressed George and Bradley's interpretation of its amendment, but it did indicate its disapproval by summarily removing them from its Board of Advisors listed on its web page.

8. It is also uncertain whether it would permit churches and synagogues to celebrate same-sex weddings, as some now do. The amendment is not limited to state action. There is no enforcement clause, but the self-executing force of the amendment might be the basis of an injunction. See H.R. Res. 56, 108th Cong. (2004).

9. *Id.* at § 1. Remarkably in an amendment carefully drafted by lawyers, this sentence twice uses "or" when it means "nor."

enacted in the future, either at the state or the municipal level. The Vermont Civil Union statute grants parties to a civil union “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to a spouse in a marriage.”¹⁰ The amendment would forbid any court or public official from construing the Vermont law to mean what it plainly says. It might even be interpreted to prohibit courts from enforcing private contracts that give marriage-like rights to same-sex couples, since to do so would be to “construe” state law—here, state contract law—to confer such rights upon them.

The amendment’s proponents obfuscated the effects of the second sentence. The Alliance for Marriage, the organization of the amendment’s sponsors, claims on its website that “[t]he second sentence ensures that the democratic process at the state level will continue to determine the allocation of the benefits and privileges traditionally associated with marriage.”¹¹ Robert Bork, the nation’s most prominent conservative legal scholar, writes that the second sentence “recognizes that liberal activist courts are the real problem,” and leaves the question of domestic partnerships “where it should be, to the determination of the people through the democratic process.”¹²

These interpretations depend on a strange understanding of what it means to say that a law may not be “construed” in a certain way. They read the amendment as if it applies only to courts, and prevents them from construing constitutions and laws *that do not on their face specifically say anything about same-sex marriages* to require such marriages, as the Massachusetts court did. But, of course, that is not what the amendment says.

These difficulties evidently led Sen. Wayne Allard to introduce an amendment shortly before the Senate vote with a second section containing somewhat different language: “Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man

10. Vt. Stat. Ann. tit. 15, § 1204(a) (2004); *see also* 2003 Ca. A.B. 205, § 297.5(a); Connecticut Public Act No. 05-10, § 14. There are also a number of other state “domestic partnership” laws, but these are far weaker, carrying with them only a small subset of the rights of married couples. For a survey, see American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 Fam. L. Q. 339, 379-97, 414-16 (2004). On the specific deficiencies of one such statute, see David M. Stauss, *The End or Just the Beginning for Gay Rights under the New Jersey Constitution? The New Jersey Domestic Partnership Act, Lewis v. Harris, and the Future of Gay Rights in New Jersey*, 36 Rutgers L. J. 289, 306-18 (2004).

11. Alliance for Marriage, *Multicultural Coalition Reintroduces AFM Marriage Amendment in Congress*, http://www.allianceformarriage.org/site/PageServer?pagename=Mac_FederalMarriageAmendment (accessed Sept. 26, 2004). Curiously, the website’s interpretation of the second sentence has remained constant even as the text itself has changed; the Alliance previously endorsed the Musgrave version and has now without explanation posted the Allard language.

12. Robert Bork, *Stop Courts from Imposing Gay Marriage*, Wall St. J. A14 (Aug. 7, 2001).

and a woman.”¹³ This no longer constrains what states can do with their statutory law, though it continues to restrict the interpretation of state constitutions.

The White House has suggested that gay couples can secure many of the benefits of marriage, such as the right to hospital visitation, through civil contracts.¹⁴ As already noted, it is not clear that even this would be permitted by the amendment. But even if such contracts are deemed valid, when your partner is injured and you’re rushing to the hospital, you’re not likely to stop at the bank to get your power of attorney out of the safe deposit box.

The political logic of Bush’s endorsement of the amendment is clear. His political strategists said that his re-election strategy would rely on turning out the vote among conservative voters, much more than winning over the diminishing swing vote.¹⁵ So he decided to give the religious right precisely what it had asked for on this issue. But the strategy also depended on keeping the rest of the voters in the dark about how extreme a position he was taking.

Once the language started being parsed, and the proposal was considered with care, it died quickly. More moderate language might have done better,¹⁶ but it would not have inflamed the troops nearly so well, and that was the real point. Once more, it is silly for opponents of the amendment to fight this stillborn idea as if it were a serious proposal.

But if Bush was extreme on the marriage issue, wasn’t John Kerry even more so? Kerry was, after all, one of only 14 senators who voted against the Defense of Marriage Act of 1996 (“DOMA”), which provides that same-sex marriages need not be recognized in other states. But this part of DOMA just restated existing law; states always had the right to withhold recognition of same-sex marriages. What DOMA really accomplishes is to deny federal benefits to same-sex couples.¹⁷ Is that what Americans really want? One recent poll shows that 55 percent think that there should be Social Security benefits for gay partners. Only 36 percent are opposed.¹⁸ So Kerry actually staked out the moderate and centrist posi-

13. Sen. Jt. Res. 40, 108th Cong. § 2 (July 7, 2004). The Senate voted on cloture on July 15.

14. Jennifer Lee, *Congressman Says Bush Is Open to States’ Bolstering Gay Rights*, N.Y. Times A3 (Feb. 9, 2004).

15. Richard W. Stevenson, *Bush Expected to Endorse Amendment on Marriage*, N.Y. Times A1 (Feb. 5, 2004).

16. Ponnor, *supra* n. 7 (suggesting that the amendment might be revised to read, “In the laws of the United States and of the states, the word ‘marriage’ will refer only to the union of a man and a woman.”).

17. See generally Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1 (1997).

18. Roper Ctr. for Pub. Opinion Research, *Question ID No. USPSRNEW.020704*, R14E (Feb. 2004) (available at WL, POLL database).

tion on gay rights, when nearly every other politician was joining a stampede they should now regret.

Amending the Constitution is a serious business, and there is an interesting debate to be had about this proposal. But before it can begin, President Bush and the amendment's other proponents need to tell the truth about just what it is that they are proposing. This is an inauspicious beginning for what is advertised as a moral crusade.

II. THE TWO DEBATES OVER SAME-SEX MARRIAGE

Now let's turn to the merits of the question whether same-sex marriage should be permitted. In recent years, for better or worse, discussions about gay rights have shifted away from AIDS prevention, HIV and health care, anti-gay violence, immigration, employment discrimination, sodomy laws, and the military's exclusion of gays. The Hawaii Supreme Court's 1993 decision that same-sex marriage is a constitutional right¹⁹ was eventually overruled by a state constitutional amendment,²⁰ but it placed the issue onto the national agenda, where it remains prominent today.

The controversy over same-sex marriage involves a confusing congeries of issues. Questions about health insurance and hospital visitation intersect with deeper ones, about which family forms are valued and who is a full citizen. And at the center of it all is the word "marriage," which is emotionally fraught for reasons that have never been fully explained. I will begin by attempting an explanation.

One reason why the debate is so muddled is that we are really having two debates at once. The first is a normative debate about what relationships to value or even to sanctify. The second is a debate about administration—about which relationships ought to have legal consequences.

The normative debate concerns what relationships are intrinsically valuable. It is taking place within most religious denominations within the United States, creating divisions that sometimes approach schism.²¹ The key question is one about objective moral reality: are same-sex relation-

19. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

20. Haw. Const. art. 1, § 23 (enacted 1998).

21. Divisions over the moral status of homosexual conduct have produced major controversies among Presbyterians, Lutherans, Episcopalians, and Methodists. See David Van Biema, *Out of the Fold? The Debate Over Gay Ordination and Same-Sex Unions Poses a Critical Choice for Mainline Protestants: Embrace or Schism?*, 156 Time 1 (July 3, 2000); Dave Condren, *Presbyterian Church Faces Split over Same-Sex Unions*, Buffalo News B1 (Mar. 12, 2001); Tom Heinen, *Lutherans Address Same-Sex Unions*, Milwaukee J. Sentinel 1B (Jan. 16, 2001); Caryle Murphy, *Confrontation Reveals Episcopal Split: Conservatives Attempt to Develop a Parallel, Supportive Church Hierarchy*, Wash. Post B9 (June 2, 2001); John Rivera, *Deep and Difficult Differences Trouble Episcopalians in U.S.*, Balt. Sun 1F (Nov. 4, 2001); Bruce Nolan, *Methodist Split Not Seen as Answer, Bishop Says: But Church Still Deeply Divided on Gay Issue*, New Orleans Times-Picayune E6 (May 15, 2004). There is also a danger of schism over the issue within the worldwide Anglican church. Stephen Bates, *A Church at War: Anglicans and Homosexuality* (I.B. Tauris & Co. Ltd. 2004).

ships, as such, morally equal to heterosexual relationships, or do heterosexual relationships partake of a good that homosexual relationships cannot possibly share? The conservatives have some powerful resources: authoritative texts, longstanding traditions, the considered views of clergy, and a primitive revulsion that many feel toward homosexual sex. If their views have not carried the day, it is only because of the fundamental difficulty of having to maintain (as they must) that there is too much love in the world, and that we therefore must weed out love of the wrong kind.

The most powerful argument on the other side notices the strong resemblance between the most successful heterosexual couples and their gay counterparts, in terms of both care for spouses and the creation of a family environment in which children can thrive. Like things should be treated alike. Unless there is some salient moral difference between the two kinds of couple, they should be treated the same. This argument has been powerful enough that the burden has been shifting to the opponents of same-sex marriage to explain just what the moral difference is.

The conservative view may or may not be linked to the view that homosexual relations are intrinsically wrong. Many Americans detach the two. The number of Americans who oppose same-sex marriage considerably exceeds the number who think that homosexual conduct is always wrong.²²

The administrative debate concerns what relationships between persons ought to be given legal recognition. Here the issue is nothing as exalted as intrinsic value. It is the more mundane questions of how resources should be allocated and unfair disruption of people's lives prevented. Like it or not, households, of whatever kind, and relationships of dependency exist. From those relationships, one can reasonably infer what the members of those households would want and need if some unprovided-for contingency arises, such as the illness or death of one of them. From this perspective, law ought to maximize welfare by reflecting people's preferences and providing the default options that they would probably have chosen had they been able to think about it. The task of constructing the law of marriage is analogous to the task of constructing the law of business corporations:²³ How can the state maximize efficiency and satisfy people's preferences about their relationships by constructing sensible "one size fits all" default rules, while protecting the interests of third parties, notably chil-

22. A Time/CNN poll in February 2004 found that 62% of respondents opposed same-sex marriage, with 30% in favor. John Cloud, *The Battle Over Gay Marriage*, Time 57 (Feb. 16, 2004). In the same poll, only 51% of respondents thought that a homosexual relationship between consenting adults is morally wrong; 45% thought that it was not a moral issue. *Id.*

23. Here I borrow an analogy by Mary Anne Case. See Mary Anne Case, *Marriage Licenses*, 89 Minn. L. Rev. 1758 (2005); Mary Anne Case and Paul Mahoney, *The Role of the State in Marriage and Corporations* (unpublished ms., 1996).

dren? Here it all turns on what we know about the effects of various practices and policies. And issues of sanctification are very far from our minds.

The American puzzle is that here the two debates have become conflated. In part this is because, during the Reformation, marriage stopped being a sacrament and was therefore handed over to the state, but never lost its quasi-mystical associations.²⁴ Joseph Story in 1834 called civil marriage “a religious, as well as a natural and civil contract,”²⁵ and the Supreme Court in 1890 described “the holy state of matrimony” as “a sacred obligation.”²⁶ The state thus found itself in the peculiar business of administering a sacrament. Moreover, America has always thought of itself in religious terms, as “a city on a hill,” and this idea survives in modern American civil religion. The First Amendment notwithstanding, religion of a peculiar kind has been an integral part of American identity.²⁷

This is why so many contemporary Americans are willing to split the difference by acquiescing in “civil unions,” which have all the benefits of marriage without the name. Americans oppose same-sex marriage by overwhelming margins, typically two to one. But polls also show that the label of “marriage” is all that many really care about. So long as that line isn’t crossed, they are quite willing to let the law recognize same-sex relationships. A poll in March 2000 found that health insurance for gay partners was supported by 58 percent of Americans, and 54 percent thought—contrary to the federal Defense of Marriage Act—that partners should get Social Security benefits. (Only 34 percent of those polled thought there should be legally sanctioned same-sex marriages.)²⁸ When people are asked about giving gay couples *all* the same legal rights as married couples, the split is one-third in favor, one-third against, and one-third who don’t care.²⁹

24. A good short overview of the history is John Witte, Jr., *The Tradition of Traditional Marriage*, in *Marriage and Same-Sex Unions: A Debate* 47 (Lynn D. Wardle et al. eds., Praeger Publishers 2003).

25. Joseph Story, *Commentaries on the Conflict of Laws* 100 (Boston 1834).

26. *Davis v. Beason*, 133 U.S. 333, 343-45 (1890).

27. See Robert Bellah, *Civil Religion in America*, 96 *Daedalus* 1 (Winter 1967). The relevance of Bellah’s argument, and much else in the present article, was suggested in conversation by Charles Taylor.

28. John Leland, *Shades of Gay*, *Newsweek* 46, 46 (Mar. 20, 2000). An Associated Press poll two months later produced nearly identical results. The poll found that 51% were opposed to allowing gay couples to marry, while 34% approved. On the other hand, at least half of Americans support the rights of gays to receive health insurance (53%), Social Security benefits (50%) and inheritance (56%) from their partners. Will Lester, *Poll: Americans Back Some Gay Rights*, Associated Press (May 31, 2000).

29. More precisely, when asked “Do you think gay or lesbian couples should – or should not – be allowed all the same legal rights as married couples in every state, or does it not matter to you?” the numbers are: 32% yes, 35% no, and 32% “doesn’t matter.” The margin of sampling error is 3 percentage points, so the differences are statistically insignificant. The poll was conducted jointly by CNN, USA Today, and Gallup in September 2003. See Heather Mason, *How Would Same-Sex Marriages Affect Society?*, Gallup Org., <http://www.gallup.com/poll/content/login.aspx?ci=9670> (accessed Nov. 11, 2003).

On the other hand, if the word "marriage" is used, not only do the numbers shift, but passions suddenly run very high. Richard Viguerie, the most experienced conservative direct-mail fundraiser in the country, told the New York Times after the Massachusetts decision legalizing same-sex marriage in that state that same-sex marriage will be a better fundraising issue than abortion. "I have never seen anything that has energized and provoked our grass roots like this issue, including *Roe v. Wade*," said Richard Land, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, which has 16 million members.³⁰ This presents a puzzle. According to what view of the world could same-sex marriage possibly be a more severe problem than abortion, when it is stipulated that abortion involves the killing of millions of babies?

If the legal issue of same-sex marriage is actually a religious one, then the puzzle can be solved. Abortion may be thought a great moral evil, but it is not one that the state participates in. The state merely tolerates it. If marriage is a state-administered sacrament, on the other hand, then state recognition of the wrong kind of marriage is a kind of sacrilege, a profaning of the temple. It's easy to see why that would raise the blood pressure of conservatives. Thus President George W. Bush, announcing his support for a constitutional amendment prohibiting same-sex marriage: "Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society."³¹ Or Rep. Henry Hyde, during the debate over the federal Defense of Marriage Act:

People don't think that the traditional marriage ought to be demeaned or trivialized by same-sex unions. If two men want to love each other, go right ahead. If you want to solemnize your love affair by some ceremony, create one. But don't take marriage, which for centuries has been a union between man and woman, and certainly is in this country, and try to say that what you're doing is American.³²

So why not just compromise and enact an equivalent without the label? In Vermont, Connecticut, and California, "civil unions" and "domestic partnerships" give same-sex couples nearly all the legal benefits of marriage.³³ When California enacted its law, with no prodding from any court, the leg-

30. David Kirkpatrick, *Conservatives Using Issue of Gay Unions as a Rallying Cry*, N.Y. Times A1 (Feb. 8, 2004).

31. George W. Bush, Speech, *President Calls for Constitutional Amendment Protecting Marriage*, <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (Feb. 24, 2004).

32. Barney Frank & Henry Hyde, *House Debate on the Defense of Marriage Act*, in *Same-Sex Marriage: Pro and Con* 225 (Andrew Sullivan ed., Vintage Books 1997).

33. See Vt. Stat. Ann. tit. 15, § 1204(a); 2003 Ca. A.B. 205, § 297.5(a); Connecticut Public Act No. 05-10, § 14.

isolation was so uncontroversial that the national press hardly even picked up the story.³⁴

There are two reasons why gay rights advocates resist the “civil unions” compromise. First, they also buy into the sanctification narrative, and they want their relationships sanctified, too. Jonathan Rauch thus writes that “marriage is society’s most fundamental institution. To bar any class of people from marrying as they choose is an extraordinary deprivation.”³⁵ Andrew Sullivan describes marriage as “the social institution that defines for many people the most meaningful part of their lives.”³⁶ More is at issue here than legal benefits.

When the normative debate shifts to this ground, asking what relationships the *state* ought to honor, the gay advocates are on stronger ground than they are in the religious sphere, because the dogmas and revelations that traditionalists rely on are not articulable in this context. It is a deeply entrenched American norm that government may not declare religious truth.³⁷ The prohibitions of Leviticus may be a good reason for an orthodox rabbi to refuse to celebrate a same-sex marriage, but they don’t offer a sensible conversational move for a legislator.

The second objection to civil unions is that gays don’t want second-class status, and that’s what civil unions amount to. They are unwilling to concede that their relationships are in any way different from heterosexual marriages: couples of both types are equally able to form households, care for each other, and create environments in which children can thrive.³⁸ The Massachusetts Supreme Judicial Court rejected such unions, because they “would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.”³⁹ Here gays can draw on a second American redemption narrative, the long struggle for equality. This struggle, of course, also has a religious dimension, with themes of sacrifice and rebirth symbolized in the lives and deaths of Lincoln and King.⁴⁰ The gay struggle for equality in many ways resembles the struggle against racism. Both narratives prominently feature vicious, irrational prejudice, gang violence met

34. There has been some litigation over the legislation, but that has also gotten little press. *E.g. Knight v. Super. Ct.*, 26 Cal. Rptr. 3d 687 (Cal. App. 3d Dist. 2005); see Jim Wasserman, *Conservatives Tell Court Partner Rights are Illegal*, *Contra Costa Times* F4 (Mar. 26, 2005).

35. Jonathan Rauch, *For Better or Worse?*, in *Same-Sex Marriage*, *supra* n. 32, at 169, 172.

36. Andrew Sullivan, *Introduction*, in *Same-Sex Marriage: Pro and Con* xix (Andrew Sullivan ed., Vintage Books 1997).

37. See Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87 (Mar. 2002).

38. See Andrew Koppelman, *The Gay Rights Question in Contemporary American Law* 77-79 (The U. of Chicago Press 2002).

39. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004).

40. See Bellah, *supra* n. 27, at 9-11.

with official indifference, pervasive discrimination, and an unresponsive political system.⁴¹ Separate but equal has an unattractive history.

III. THE COLLAPSING CASE AGAINST SAME-SEX MARRIAGE

All this explains why the burden of proof has suddenly shifted to those who want to deny same-sex couples the right to marry. It has shifted with respect to both the normative and the administrative debates.⁴²

There are a number of empirical claims that, if true, would greatly bolster the case against same-sex marriage. If all gay people are dangerously mentally ill, then it would be absurd to honor choices that are the product of psychosis. The same doubt about gays' relationships might also be sustainable if gays all have milder mental maladies, such as low self-esteem, depression, or suicidal tendencies. If gays are likely to molest children, this would have obvious implications for the law's stance toward gay families. It would also be relevant if gay people were negative role models for children, or if exposure to gay people were likely to have negative effects on a child. It would also be relevant if gay people are not capable of sustained relationships or if same-sex relationships are demonstrably inferior to heterosexual relationships. All these arguments were made, not long ago, to justify a broad range of discriminations against gay people.⁴³

The basic problem for opponents of same-sex marriage is that none of these claims are true.⁴⁴ The arguments that are now being made evidently draw a lesson from the chastening experience of having one's claims refuted: they deftly avoid making any testable empirical claims whatsoever. In this way, they avoid falsification. They also, however, fail to provide any reason to think that they are correct.

Contemporary arguments against same-sex marriage take two main forms. One, the New Natural Law argument, is immune to empirical objections because it is nonconsequentialist. It is, however, obscure and hard to follow, and when its arguments are unpacked they are not sustainable. The other argument is consequentialist. It holds that the structure of family life throughout the United States will be adversely affected if same-sex marriages are recognized. It offers claims that, if true, would be powerful objections against same-sex marriage. However, there is no good reason to think that those claims are true.

41. See Andrew Koppelman, *Antidiscrimination Law and Social Equality* 146-76 (Yale U. Press 1996); Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 Md. L. Rev. 777 (2001).

42. Resistance to administrative recognition of same-sex couples is itself parasitic on normative claims. Many opponents of domestic partnership argue that, although such partnerships confer indisputable benefits on some people, the sacrifice of those benefits is justified by the overriding importance of avoiding perceived endorsement of homosexual conduct.

43. See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & Sexuality 133, 134 (1991).

44. *Id.*

A. *The New Natural Law Argument*

Begin with the New Natural Law argument (hereinafter “NNL”). The arguments developed by the theologian Germain Grisez and the legal scholar and philosopher John Finnis, and further elaborated by Robert George, Gerard Bradley, and Patrick Lee, constitute the most sophisticated philosophical case against same-sex marriage that anyone has developed. Consistent with the religious—usually Catholic—tradition from which it emerges, NNL condemns ubiquitous sexual behaviors that are widely regarded in the West as morally innocuous, such as contracepted heterosexual coitus and masturbation. But NNL theorists also defend many popular moral intuitions, including the condemnation of homosexual activity.

One of NNL’s central claims is that marriage is necessarily a relation between one male person and one female person. NNL argues that whatever (nonsexual) goods a same-sex couple is capable of achieving, marriage is impossible for them because of the kind of thing that marriage is. Many Americans agree. Even people who are friendly to gays and their claims for social recognition and legal protection often draw the line at same-sex marriage. So NNL’s views are not idiosyncratic. On the contrary, NNL is the most fully developed statement of a position that is both widely held and politically powerful.

A foundational theme of NNL is that particular identifiable goods are intrinsically, and not merely instrumentally, worthy of being pursued. These “basic goods” are intelligible ends, valuable in themselves, and capable of motivating us to act. Such goods are worth pursuing even at the price of discomfort or pain. In the early work of Grisez and Finnis, the reasons “for acting which need no further reason” include life, health, knowledge, aesthetic experience, excellence in work and play, friendship, inner peace, peace of conscience, and peace with God.⁴⁵ Each good, as an end, can provide a sufficient explanation of human action: being told that an action is done for the sake of these goods is answer enough.⁴⁶ Note that bodily pleasure for its own sake is not a basic good.⁴⁷ Declining to acknowledge the intrinsic value of pleasure makes it easier for NNL to reject nonprocreative sexuality like masturbation and homosexual relations.

The basic goods are incommensurable: none is reducible to any other or to a common factor, such as utility, that they essentially share. Further,

45. Germain Grisez et al., *Practical Principles, Moral Truth, and Ultimate Ends*, 32 Am. J. Juris. 99, 103, 107-108 (1987); John M. Finnis, *Natural Law and Natural Rights* 85-90 (Clarendon Press 1980). For variations of the list in Finnis see Sabina Alkire, *The Basic Dimensions of Human Flourishing: A Comparison of Accounts*, in *The Revival of Natural Law: Philosophical, Theological, and Ethical Responses to the Finnis-Grisez School* 76 (Nigel Biggar & Rufus Black eds., Ashgate Publ. Co. 2000).

46. Robert P. George, *In Defense of Natural Law* 45-48 (Oxford U. Press 1999).

47. Finnis, *supra* n. 45, at 95-96; see Rufus Black, *Introduction: The New Natural Law Theory*, in *The Revival of Natural Law*, *supra* n. 45, at 11-12.

as incommensurable “[n]o basic good considered precisely as such can be meaningfully said to be better than another.”⁴⁸ Hence they cannot be arranged hierarchically.⁴⁹ It follows from this that it can never be morally justified to act in a way directly contrary to one of the basic goods. For Finnis:

A proposed destroying, damaging, or blocking of some basic aspect of some person’s reality provides, of itself, a reason not to choose that option. . . . [T]hat reason could be set aside . . . only if one could . . . identify some rationally preferable reason for choosing that option: that is, some greater good . . . promised by that option than is . . . promised by the options which do not include that choice to destroy, damage, or block a basic human good. But . . . such a commensurating of goods is rationally impossible.⁵⁰

Basic goods may never be sacrificed for less valuable advantages or states of affairs, and this is how>NNL grounds the wrongness of, for example, contraception, “acts whose exclusive intention is to impede the coming-to-be of a human life.”⁵¹ Life is a basic good, and sexual acts employing contraception impede this good: “the choice to exclude the possibility of procreation while engaging in intercourse is always, and in an obvious and unambiguous way (which it requires no Christian weighting of the value of procreation to see), a choice directly and immediately against a basic value.”⁵² Similarly, for>NNL, casual sex, masturbation, and homosexual acts are wrong because they, too, damage or block basic goods.

The integrity of the self, “harmony among all the parts of a person which can be engaged in freely chosen action,”⁵³ is a basic good; it is better to be a single, coherent self rather than a heap of conflicting desires and impulses. Integrity is violated when one acts for the sake of bodily pleasure in, for example, masturbating or using psychoactive drugs. In these cases, “one separates in one’s choice oneself as bodily from oneself as an intentional agent. The content of such a choice includes the disintegration attendant upon a reduction of one’s bodily self to the level of an extrinsic instrument.”⁵⁴ Similarly, Finnis claims that “in masturbating, as in being . . . sodomized,” the body is a mere tool of satisfaction. As a result, a person undergoes disintegration. In these activities “one’s choosing self

48. Grisez et al., *supra* n. 45, at 110.

49. Finnis, *supra* n. 45, at 92.

50. John M. Finnis, *Moral Absolutes: Tradition, Revision, and Truth* 54-55 (The Catholic U. of Am. Press 1991).

51. *Id.* at 87.

52. John M. Finnis, *Natural Law and Unnatural Acts*, 11 *The Heythrop J.* 365, 384 (1970).

53. Germain Grisez, *The Way of the Lord Jesus: Christian Moral Principles* vol. 1, 124 (Franciscan Herald Press 1983).

54. Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 *Am. J. Juris.* 135, 139 (1997).

[becomes] the quasi-slave of the experiencing self which is demanding gratification."⁵⁵ The danger of disintegration is especially prominent in sexuality, since sexual conduct aims at bodily pleasure.

For NNL, the only morally permissible sexual acts are those of married couples (even here there are many restrictions). In their more recent work, Grisez and Finnis add another basic good to those enumerated above, claiming that marriage is among them.⁵⁶ Marriage is a basic good because it constitutes "a full communion of persons: a communion of will by mutual covenantal commitment, and of organism by the generative act they share in."⁵⁷ Communion of will consists of a mutual commitment to an exclusive and indissoluble partnership, while organic communion consists in the fact that, when husband and wife engage in procreative marital intercourse, they become a single organism. For NNL,

each animal is incomplete, for a male or a female . . . is only a potential part of the mated pair, which is the complete organism . . . capable of reproducing sexually. This is true also of men and women: as mates who engage in sexual intercourse suited to initiate new life, they complete each other and become an organic unit. In doing so, it is literally true that 'they become one flesh' (Gn 2.24).⁵⁸

For the married couple, sexual union is not extrinsic to their mutual friendship. It is not merely a means to their experience of bodily pleasure, and so does not violate their integrity the way other sexual acts would. On the contrary, according to Lee and George, sexual union preserves their integrity:

In sexual intercourse they unite (become one) precisely in that respect in which their community is distinct and naturally fulfilled. So this bodily unity is not extrinsic to their emotional and spiritual unity. The bodily, emotional, and spiritual are the different levels of a unitary, multi-leveled personal communion. Therefore, in such a community sexual intercourse actualizes the multi-leveled personal communion.⁵⁹

Nonmarital sexual acts, whether homosexual or heterosexual, cannot achieve this bodily unity. At best, they achieve the *illusory experience* of unity.⁶⁰ "For a truly common good, there must be more than experience;

55. John M. Finnis & Martha C. Nussbaum, *Is Homosexual Conduct Wrong? A Philosophical Exchange*, 209 *New Republic* 12 (Nov. 15, 1993).

56. John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 *Notre Dame L. Rev.* 1049, 1064-65 (1994); Germain Grisez, *The Way of the Lord Jesus: Living a Christian Life* vol. 2, 556 (Franciscan Press 1993).

57. Grisez, *supra* n. 56, at 580.

58. *Id.* at 570.

59. Lee & George, *supra* n. 54, at 144.

60. See Michael J. Perry, *The Morality of Homosexual Conduct: A Response to John Finnis*, 9 *Notre Dame J.L. Ethics & Pub. Policy* 41 (1995); Paul J. Weithman, *A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics*, 9 *Notre Dame J.L. Ethics & Pub. Policy* 75 (1995).

the experiences must be subordinated to a truly common act that is genuinely fulfilling.”⁶¹ When gay couples—or heterosexual couples, for that matter—achieve sexual satisfaction by means other than marital intercourse, the act “is really an instance of mutual masturbation, and is as self-alienating as any other instance of masturbation.” Thus Finnis writes about sex between unmarried people that:

their reproductive organs cannot make them a biological (and therefore personal) unit. Because their activation of . . . their reproductive organs cannot be an actualizing and experiencing of the *marital* good . . . it can do no more than provide each partner with an individual gratification. For want of a *common good* that could be actualized . . . *by and in this bodily union*, that 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 disintegrates each of them precisely as acting persons.⁶²

Homosexual acts are wrong not only because they violate integrity, but also because they “violate the good of marriage.”⁶³ Choosing nonmarital sex “damages the body’s capacity for the marital act as an act of self-giving which constitutes a communion of bodily persons.”⁶⁴ This damage is “a damage to the person as an integrated, acting being; it consists principally in that disposition of the will which is initiated by the choice to engage in” such sexual activity.⁶⁵ Consider a married man who has never committed adultery, but who might be willing to do so if, say, his wife were unavailable when he felt strong sexual desire. The exclusivity of the man’s sex with his wife is not an expression of commitment, because conditional willingness to commit adultery precludes commitment. He is thus motivated even in marital intercourse by something other than the good of marriage. This is why Finnis claims that the “complete exclusion of nonmarital sex acts from the range of acceptable and valuable human options is existentially, if not logically, a precondition for the truly marital character of one’s intercourse as and with a spouse.”⁶⁶ When one damages that precondition, one damages marriage, since “to damage an intrinsic and necessary condition for attaining a good is to damage that good itself.”⁶⁷

Thus, the NNL case against sexual acts that are not of the procreative kind (including masturbation, homosexual sex, and any marital sex involving male ejaculation outside the vagina) can be summarized as follows:

61. Lee & George, *supra* n. 54, at 146.

62. Finnis, *supra* n. 56, at 1066-67 (emphasis added).

63. Grisez, *supra* n. 56, at 633.

64. *Id.* at 650.

65. John M. Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 Am. J. Juris. 97, 119 (1997).

66. *Id.* at 123.

67. Grisez, *supra* n. 56, at 650-51.

1. It is always wrong to act directly contrary to a basic good.
2. Performing sex acts not of the procreative kind is always directly contrary to the basic good of integrity.
3. Performing sex acts not of the procreative kind is always directly contrary to the basic good of marriage.
4. Therefore, it is always wrong to perform sex acts not of the procreative kind.

For the conclusion (4) to be correct, the premises (1 and 2, or 1 and 3) must be true. There is, however, reason to think that none of them are.

First, from NNL's claim that the basic goods are incommensurable, it does not follow that acting directly contrary to a basic good is always wrong. Even if there is no airtight argument that can justify any particular trade-off of incommensurable goods, it might still be possible to compare these goods intuitively and to feel reasonably confident of one's conclusions. NNL concedes that, even after honoring the rule against "doing evil that good might come of it," there are still choices to be made between goods, for example, between pursuing graduate programs in psychology or in medicine.⁶⁸ The choice against a basic good might rest on just this kind of intuitive weighing. NNL, which constrains choice regardless of the consequences, might in some circumstances require one to endure very bad consequences. For example, one might be required to surrender to a totalitarian state if the only defense against that state is the use of nuclear weapons, which is prohibited because doing so directly targets the innocent, contrary to the basic good of life. Charles Larmore has argued that deontology's indifference to consequences is acceptable only if we have theological guarantees, so that we are assured that the damage we tolerate or suffer will be corrected, ultimately, by divine providence.⁶⁹ NNL theorists are divided over whether their moral theory makes sense without this theology. Finnis places great weight on faith in providence,⁷⁰ while Grisez suggests that the theory holds together without such faith, that "a generous and reasonable love of human goods will lead one to act in a way compatible with this ideal."⁷¹

The second premise is also weak. Even if nonmarital sex acts cannot realize the good of marriage, it does not follow that such acts "can do no more than provide each partner with an individual gratification."⁷² Weithman, for one, thinks that homosexual activity "provides the occasion

68. George, *supra* n. 46, at 117-18.

69. See Charles Larmore, *Patterns of Moral Complexity* 134-39 (Cambridge U. Press 1987).

70. Finnis, *supra* n. 50, at 9-20; John M. Finnis, *Aquinas: Moral, Political, and Legal Theory* 315-19 (Oxford U. Press 1998).

71. Grisez, *supra* n. 53, at 186.

72. Finnis, *supra* n. 56, at 1066.

of, and thus serves the function of, promoting emotional intimacy.”⁷³ In this way, loving homosexual activity could avoid damaging and even support integrity. If so, loving homosexual activity is a counterexample to the second premise. There are other reasons the premise fails.

NNL claims that it is always wrong to manipulate one’s body, or another’s, for the sole purpose of pleasure, because doing so involves disintegration. Hence NNL concludes, in effect, that most sexual activity engaged in by human beings is wrong. Were bodily pleasure a basic good, this conclusion could be avoided. Of course, we often do act solely for the sake of pleasure, and it is extraordinarily difficult to comprehend how this is morally problematic. Many would agree that “bodily pleasure is itself an important human good” and that “absolutely nothing [is] wrong with using one’s body for the purpose of getting pleasure.”⁷⁴ Finnis admits that pleasure is a good but he qualifies that concession: “when it is the experienced aspect of one’s participation in some intelligible good.”⁷⁵ This piggybacking of pleasure onto other goods underestimates the value of pleasure.

Further, and perhaps more to the point, it is not obvious that pursuing pleasure for its own sake always disrupts integrity. The pursuit of pleasure is often a response to a bodily need. In scratching an itch, I am not abusing my body or regarding it as “a lower form of life with its own dynamism.”⁷⁶ I am tending to its needs, which are *my* needs, the needs of an integrated person, not the needs of a body detached from or distinct from me. And when A gives B sexual pleasure, A is tending to the needs of at least B’s body (if not also B’s mind), which are B’s needs, the needs of a similarly integrated person. Such considerations seem not to move NNL. Even a married couple, according to NNL, might fail to achieve unity if their sexual pleasure is divorced from marital acts: “If Susan, for example, masturbates John to orgasm or applies oral stimulation to him to bring him to orgasm, no real unity has been effected.”⁷⁷ But a case can be made that their joint sexual activity, even if neither coital nor procreative, can still deepen their union and preserve their integrity. One might even suggest that solitary masturbation, too, involves no disintegration: “An experience of masturbation . . . is not an experience of a conscious self but of a whole person. . . . There is no existential alienation from the body.”⁷⁸

73. Weithman, *supra* n. 60, at 87; Paul J. Weithman, *Natural Law, Morality, and Sexual Complementarity*, in *Sex, Preference, and Family: Essays on Law and Nature* 239-40 (David Estlund & Martha Nussbaum eds., Oxford U. Press 1997).

74. Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 Va. L. Rev. 1515, app. 4 (1994); Biggar, *Conclusion*, in *The Revival of Natural Law*, *supra* n. 45, at 286-87.

75. Finnis & Nussbaum, *supra* n. 55, at 12.

76. Grisez, *supra* n. 53, at 139.

77. Lee & George, *supra* n. 54, at 146.

78. Gareth Moore, *Natural Sex: Germain Grisez, Sex, and Natural Law*, in *The Revival of Natural Law*, *supra* n. 45, at 232; accord Koppelman, *supra* n. 38, at 85-86.

Under premise 3, seeking pleasure for its own sake in sexuality also runs counter, for NNL, to the basic good of marriage. What about a young married couple that has intercourse when and only when it gives them pleasure to do so—is their intercourse morally licit? On Finnis's sympathetic account of Aquinas's sexual ethics, "there is nothing wrong at all with our welcoming assent to such pleasure in the marital act, nor in our being motivated towards such an act by the prospect of giving and sharing in that delight as token of our marital commitment."⁷⁹ Moreover, it is appropriate for spouses to refrain from intercourse when, for example, "either of them is disinclined or unwell."⁸⁰ But it is morally illicit for spouses to desire coitus solely for its pleasure, even if they are wholly unwilling to have sex with anyone else.⁸¹ What is wrong is one's having an attitude in which "one is not interested in or concerned with anything about one's spouse other than what one would be concerned with in a prostitute."⁸² Some pretty fine line-drawing seems at work here. How could one tell whether the young married couple is engaging in sex for the sake of the good of marriage, or as a token of their commitment (in which case the pleasure of the act is innocent), or just for the sake of their mutual pleasure? Probably not even the couple will know. Another implication is that an elderly married couple that no longer experiences pleasure in intercourse still has reason, for NNL, to engage in it—in order to actualize their unity.⁸³ It is a curious view that blesses "unitive" intercourse without pleasure but condemns pleasure for its own sake even within marriage.

Many object to NNL's prohibition of contraception not only because the purported harm done to the basic goods seems strained, but also because the emphasis placed on the value of procreative coitus would seem to rule out, in addition to contraception, not just masturbation and homosexual activity but any coitus engaged in by infertile heterosexual couples—whether due to advanced age or a medical condition. NNL's answer focuses on the capacity of the heterosexual couple to engage in acts of the reproductive *kind*. Even when a heterosexual couple cannot reproduce, 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)."⁸⁴ The gay couple is different: "their reproductive organs cannot make them a biological (and therefore personal) unit." Finnis also writes that the infertile married couple

79. Finnis, *supra* n. 70, at 147; see also Finnis, *supra* n. 65, at 102.

80. Finnis, *supra* n. 70, at 151 n. 86; Finnis, *supra* n. 65, at 109 n. 47.

81. Finnis, *supra* n. 70, at 148-49.

82. Finnis, *supra* n. 65, at 103.

83. Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 Geo. L. J. 301, 310 (Dec. 1995).

84. Finnis, *Law, Morality, and "Sexual Orientation"*, *supra* n. 56, at 1066 (emphasis added).

who unite their reproductive organs in an act of sexual intercourse which, so far as they can make it, is of a kind suitable for generation, do function as a biological (and thus personal) unit and thus can be actualizing . . . the two-in-one-flesh common good and reality of marriage, even when some biological condition happens to prevent that unity resulting in generation of a child. Their conduct thus differs radically from the acts of a husband and wife whose intercourse is . . . sodomitic or by fellatio or coitus interruptus.⁸⁵

The *radical* difference here is difficult to discern. That sterile heterosexual coitus could have been procreative in some other possible world does not distinguish it from homosexual sex.

The NNL distinction turns on the *form* of the act, about which Lee and George write:

People who are not temporarily or permanently infertile could procreate by performing exactly the same type of act which the infertile married couple perform and by which they consummate or actualize their marital communion. The difference between sterile and fertile married couples is not a difference in what they do. Rather it is a difference in a distinct condition which affects what may result from what they do.⁸⁶

What sense, however, does it make to say that heterosexual intercourse is an act of a reproductive type or kind even if reproduction cannot be intended and is known to be impossible? It would seem to be equally plausible to say that all acts of seminal ejaculation are reproductive in kind (even masturbatory acts) or even that no ejaculatory acts are reproductive in kind (since no mere ejaculation, by itself, results in procreation). Reproduction would then be merely an accidental effect that occurs only under certain conditions. Nothing in nature dictates that the lines should be drawn one way or another.

The distinctive good of marriage that NNL advocates appears to be incoherent. Gareth Moore has argued that the idea of a “two-in-one-flesh” cannot do the necessary work in NNL’s argument unless it is understood literally (since even gay and lesbian couples might unite metaphorically). But it cannot be so understood, because a heterosexual couple does not in fact unite biologically:

We might at a pinch speak of male and female reproductive organs as incomplete, if by that is meant that one cannot achieve reproduction without the other, but the male and female animals are in no sense incomplete. So neither is a mating pair a single

85. *Id.* at 1068.

86. Lee & George, *supra* n. 54, at 150.

complete organism: it is simply two organisms cooperating in a joint activity of mating.⁸⁷

NNL's argument might be salvaged by presupposing an Aristotelian metaphysics in which infertile heterosexual married couples participate imperfectly in the *idea* of one-flesh unity but same-sex couples do not participate at all. The infertile heterosexual couple does become one organism, albeit a handicapped organism that cannot do what a normally functioning organism can do. The heterosexual couple is only accidentally infertile, while the same-sex couple is essentially so. In what sense, however, is an infertile couple one flesh, since in them procreative unity is not realized? Their unity, if it exists outside the symbolic community in which they participate, and in which the same-sex couple could also participate, consists in their membership in a class, a natural kind composed of those who ideally *could* procreate. But why think that this natural kind is a real thing, rather than a construct? An unloaded but otherwise functional gun remains a gun, a device designed for and capable of shooting. In contrast, the genital organs of a sterile man cannot be called reproductive organs at all. They are not fit for reproduction. They are more like a gun with a busted firing pin that is, as a result, unfit for shooting.

Finnis recognizes that not every ejaculation of normal male genitalia will successfully lead to conception, and perhaps this is meant to minimize the difference between the organs of normal and infertile males. "Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation."⁸⁸ But whether such behavior "is suitable for generation" depends on whether the organs are in fact suitable for generation. A sterile person's genitals are no more suitable for generation than a gun with a broken firing pin is suitable for shooting. The gun's pin might be repairable, perhaps not; perhaps medicine can in some cases cure infertility. It is, however, a conceptual stretch to insist that the sexual acts of the incurably infertile are of the same kind as the sexual acts of fertile organs that occasionally fail to deliver the goods.

NNL might, finally, appeal to the essentialism implied by the ordinary meaning of words. A dead man's heart, which will never beat again, is still a heart, and his stomach is still a digestive organ. (So to speak! Don't put lasagna in it.) So the penis of a sterile man is still a reproductive organ. But the only aspect of reproductiveness relevant to NNL's argument—the reproductive power of the organ—does not inhere in this particular organ. It is not reproductive in the sense of power or potential, even if it is a

87. Moore, *supra* n. 78, at 225-26.

88. Finnis, *supra* n. 45, at 1066.

reproductive organ in the taxonomic sense. It is mysterious why its being taxonomically a reproductive organ should have any moral significance.⁸⁹

The claims of NNL theorists may sometimes be obscure, but they are significant. Only NNL theorists, among defenders of traditional views about the morality of homosexuality, justify those views without invoking false factual claims about gay people. Intellectually candid, they recognize that the task is to identify something of value in the sexuality of married, infertile heterosexual couples that is absent from homosexual relations. A fair assessment of NNL is important, because it may be the last respectable stronghold of the beliefs that homosexual conduct is intrinsically wrong and that marriage is necessarily heterosexual.

B. *The Spectre of Family Decline*

The NNL view is complex and hard to understand, and some objections, such as the sterile-couples objection, elicit responses that are even more difficult to follow. Perhaps for this reason, the NNL view has largely disappeared from public discourse.

Opponents of same-sex marriage have lately abandoned the claim that homosexual conduct is intrinsically evil, and have shifted to a different kind of claim: that indisputably bad consequences will follow if same-sex marriage is recognized. Thus Maggie Gallagher argues that same-sex marriage “affirms that children do not need mothers and fathers, and that marriage has nothing to do with babies,” and claims that if the state endorses this message, there will be an increase in “poverty and trauma caused by widespread fatherlessness.”⁹⁰ Stanley Kurtz claims that the recognition of same-sex relationships in the Scandinavian countries has led to a decline in heterosexual marriage. “Instead of encouraging a society-wide return to marriage, Scandinavian gay marriage has driven home the message that marriage itself is outdated, and that virtually any family form, including out-of-wedlock parenthood, is acceptable.”⁹¹

89. See Koppelman, *The Gay Rights Question*, *supra* n. 38, at 86-93.

90. Maggie Gallagher, *A Reality Waiting to Happen: A Response to Evan Wolfson*, in *Marriage and Same-Sex Unions: A Debate*, *supra* n. 24, at 10, 12.

91. Stanley Kurtz, *The End of Marriage in Scandinavia*, *Weekly Stand*. 26 (Feb. 2, 2004). It is possible that a similar claim is being made by Richard Wilkins, *The Constitutionality of Legal Preferences for Heterosexual Marriage*, in Lynn D. Wardle et al., eds., *Marriage and Same-Sex Unions: A Debate* 227 (2003). Kurtz's claim has been quite influential, and was repeatedly cited in recent Congressional debates over the constitutional amendment against same-sex marriage. See 150 Cong. Rec. S7886 (July 9, 2004) (remarks of Senate Majority Leader Bill Frist); 150 Cong. Rec. S7905 (July 12, 2004) (remarks of Sen. Wayne Allard); 150 Cong. Rec. S7908 (July 12, 2004), S7980 (remarks of Sen. Rick Santorum); 150 Cong. Rec. S7921-22 (remarks of Sen. John Cornyn); 150 Cong. Rec. S7927, S7997, S8011 (remarks of Sen. Sam Brownback); 150 Cong. Rec. S7967 (remarks of Sen. James Inhofe); 150 Cong. Rec. S8088 (remarks of Sen. Mitch McConnell); 150 Cong. Rec. S8003-07 (entire Kurtz article inserted into Congressional Record by Sen. Wayne Allard).

Their understanding of marriage is functionalist rather than essentialist. Marriage is not a timeless telos, as it is for NNL, but rather is a human construct created to bring about certain desirable results. Same-sex marriage is bad, these writers claim, because it will make those desirable results occur less frequently.

The basic argument here is that same-sex marriage is a signifier for a kind of individualism that is corrosive of the kinds of commitments on which children depend. Same-sex marriage depends on the idea that "[m]arriage is an essentially private, intimate, emotional relationship created by two people for their own personal reasons to enhance their own personal well-being."⁹² This idea, because it recognizes no moral constraints outside the preferences of the adult self, is dangerous to children, because it corrodes the idea that parents have obligations to children even if they did not choose to bring them into the world. "Far more than mothers, reliable fathers are cultural creations, products of specific ideals, norms, rituals, and mating and parenting practices."⁹³

Now, it is true that there is an individualistic philosophy abroad in our culture that is in tension with the idea of any moral constraint outside the choices of the self. That philosophy is indeed potentially corrosive of ties between parents and children. It is also internally incoherent, because authentic choice only makes sense against a background of values that are not themselves chosen.⁹⁴ But what has this got to do with same-sex marriage?

Recall that a chronic difficulty for arguments against same-sex marriage is their vulnerability to empirical refutation. NNL responds to this difficulty by eschewing any empirical claims. The Gallagher-Kurtz position⁹⁵ is likewise nicely immunized against this danger. There is no way to disprove its claim, in which the alleged causal chain runs through the unobservable consciousnesses of millions of people. The problem is that there's not much reason to believe it, either. It's hard to imagine how legal recognition of same-sex marriage would affect even one man's deliberations about whether to marry a woman or to stay with his children.⁹⁶

It is good for children to grow up in stable, loving households. But this tells us nothing about relationships between gay people, many of whom have stable loving households of their own and are raising children very

92. Maggie Gallagher, *Normal Marriage: Two Views*, in *Marriage and Same-Sex Unions*, *supra* n. 90, at 13.

93. *Id.* at 17.

94. Charles Taylor, *The Ethics of Authenticity* ch. 4 (Harvard U. Press 1991).

95. In using this shorthand term, I do not suggest that either of them endorses every claim made by the other, but only that both are making essentially the same argument about the destructive effects of same-sex marriage.

96. One editorial cartoon by Daryl Cagle shows a man saying to a woman, "Of course I want to marry you, Charlene. Really. But you know I can't because the moral foundation of marriage has crumbled with gay marriages in Massachusetts." <http://cagle.slate.msn.com/news/dean-gaymarriage/main.asp> (visited Sept. 23, 2004).

competently.⁹⁷ Gallagher argues that if same-sex marriage is recognized, "[m]arriage will no longer be about producing and protecting the next generation, or about getting mothers and fathers for children. In the new regime, marriage will be about legally affirming the sexual and emotional lifestyles of adults in the governing class."⁹⁸ But, as she acknowledges elsewhere, these two models of marriage "are not mutually exclusive."⁹⁹ Marriage performs both functions: it is good for adults *and* good for children.¹⁰⁰ Some marriages, notably childless ones, follow the second model. But same-sex couples with children are closer to the first.

It is just bad anthropology to claim that same-sex marriage is understood by Americans to stand for corrosive individualism. Kurtz makes a similar leap in his discussion of Scandinavia. He blames the declining rate of heterosexual marriage there on the recognition of same-sex marriage, but not a single country treated same-sex relationships as equal to marriage during the period he discusses.¹⁰¹ It is always dangerous to attribute a unitary cultural meaning to anything, particularly in a culture as pluralistic and fragmented as ours. But it's particularly dangerous with respect to same-sex marriage.

Some gay rights advocates, such as Michael Warner and Michel Foucault, are proponents of radical individualism.¹⁰² But it is noteworthy that none of them are advocates of same-sex marriage. They understand that marriage, as an institution, privileges some choices over others. That's why they have a problem with it.

When one reads the supporters of same-sex marriage, one gets a different set of predictions about the cultural consequences, because those writers attribute a different kind of significance to same-sex marriage. William Eskridge claims that same-sex marriage will move gay people "From Sexual Liberty to Civilized Commitment."¹⁰³ Andrew Sullivan,¹⁰⁴ Jonathan

97. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 Am. Sociological Rev. 159 (Apr. 2001).

98. Maggie Gallagher, *Marriage Defeatists*, Weekly Stand. ¶ 23 (Dec. 15, 2003).

99. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773, 775 (2002).

100. In other work, Gallagher emphasizes the advantages of marriage for adults, with or without children. See Maggie Gallagher & Linda J. Waite, *The Case for Marriage: Why Married People are Happier, Healthier, and Better-Off Financially* (Doubleday 2000).

101. William N. Eskridge, Jr., Darren Spedale, & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, "Issues in Legal Scholarship" 3, <http://www.bepress.com/ils/issb/art4/> (2004).

102. See Michael Warner, *The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life* (Harvard U. Press 1999); Michel Foucault, *The History of Sexuality, Volume I: An Introduction* (Robert Hurley trans., Random House 1980).

103. See William N. Eskridge, Jr., *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* (The Free Press 1996).

104. Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* ch. 5 (Vintage Books 1995).

Rauch,¹⁰⁵ and Gabriel Rotello¹⁰⁶ all claim that same-sex marriage would change the behavior and self-understanding of gay people, toward monogamy and stable two-partner households. Michael Warner¹⁰⁷ and Janet Halley¹⁰⁸ agree, though they are deeply suspicious of this attempted normalization.

I don't think that there's enough evidence to support any of these claims. (Probably the strongest of them is Warner, who offers a detailed analysis of the political and cultural economy of the normalization process and a history of how it has in fact played out in recent New York City politics.¹⁰⁹) Each offers a plausible, but no more than plausible, scenario of the aftermath of marriage recognition. Which scenario prevails will depend on cultural variables that cannot now confidently be predicted. All one can say with confidence is that different people will attribute different meanings to the legal recognition of same-sex marriage. This is a pretty vague consideration to weigh against the concrete benefits of legal recognition.¹¹⁰

Institutions simply don't have stable cultural meanings. For example, the YMCA began as a Christian organization that successfully crusaded in favor of censorship and managed to make it a crime to distribute truthful information about contraception.¹¹¹ It is today associated with the best known popular song based on gay culture, which is sung by many Americans who grasp its homoerotic subtext dimly or not at all.¹¹² Also, in argu-

105. Jonathan Rauch, *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America* (Time Books 2004).

106. See Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men* (Dutton 1997).

107. Warner, *supra* n. 102.

108. See Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* ch. 5 (Robert Wintemute & Mads Andenaes eds., Hart Publ. 2001).

109. Sometimes Warner claims that marriage necessarily implies that the state will police nonmarital sexuality. See Warner, *supra* n. 102, at 96. But of course it is possible to have one without the other. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating prohibitions of homosexual sex while disavowing any intention to change the law of marriage). Even Warner is equivocal in his opposition to same-sex marriage, at one point conceding that ending the discriminatory ban on same-sex marriage might be a worthwhile goal if it were tied to other kinds of reform, such as the extension to nonmarried persons of "health care, tax reform, rights of intimate association extending to immigration, recognition for joint parenting, and other entitlements currently yoked to marital status." Warner, *supra* n. 102, at 146; see also Law Commn. of Canada, *Beyond Conjugality: Recognizing and Supporting Close Adult Personal Relationships* (2001). It is indeed ridiculous for one's access to health care to depend on whether one is married or to whom, but that is a pathology of the American health care delivery system, not of the law of marriage.

110. Gallagher argues that these benefits are small, because very few gay people are likely to marry. Gallagher, *supra* n. 90, at 19-20. But even if this is true – this is also a matter of speculation – it only matters if there are demonstrable harms on the other side.

111. See Helen Lefkowitz Horowitz, *Rereading Sex: Battles over Sexual Knowledge and Suppression in Nineteenth Century America* 299-318 (Alfred A. Knopf 2002).

112. The Village People, who first performed the song, have been studiously ambiguous about their subtext. See Roberto Santiago, *Village People Want You to Keep Guessing*, Cleveland Plain

ments about marriage law, the spectre of polygamy gets tossed about,¹¹³ but the meaning of polygamy is similarly multifaceted. For the original Mormons, it stood for a certain type of institutionalization of patriarchy, with assumptions about gender that are not all that different from those held by contemporary opponents of same-sex marriage.¹¹⁴ For some modern Mormon polygamists, it stands for a certain kind of feminism, in which women have more freedom and power than they have in monogamous relationships.¹¹⁵ For other modern “polyamorists,” it stands for a certain kind of liberation from traditional constraints, of just the kind that contemporary conservatives fear.¹¹⁶

Some writers try to stabilize the Gallagher/Kurtz view by combining it with the NNL position. The advantage of NNL is that, if its premises are accepted, heterosexuality and homosexuality have a definite moral valence that is not hostage to the vagaries of popular culture. The result, though, is an unstable combination of consequentialism and nonconsequentialism. One might think, for example, that bad consequences follow if the culture becomes too far removed from the NNL view. The trouble with this move is that the NNL view is so obscure and unfamiliar that it is hard to maintain that its argument is a significant part of our culture’s shared understandings.¹¹⁷

As a causal claim, the Gallagher/Kurtz position is dubious. When one presses it to find out just what the mechanism is whereby recognition of same-sex marriage will induce heterosexual fathers to abandon their children, the answer appears to be that what keeps fathers around is the fathers’ belief, correct or not, that marriage is mystically connected with biological inevitability.¹¹⁸ This delusion is understood by Kurtz, though perhaps not by Gallagher, to be embedded in other mystifications about gender, prominently males’ delusions that they are the rulers of the women who in fact

Dealer 41 (Nov. 18, 1994); Barbara Ellen, *Is It Still Fun to Stray at the YMCA?*, *The Times* (London) (Dec. 10, 1999).

113. It is sometimes suggested that the legalization of same-sex marriage would entail legalization of polygamy. Whether it would or not depends on the basis of the recognition. Same-sex couples have gotten as far as they have by showing their families’ resemblances to families whose worth is widely recognized. Polygamous families would have to shoulder the same burden.

114. See Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (U. N.C. Press 2002).

115. Elizabeth Joseph, *My Husband’s Nine Wives*, *N.Y. Times* A31 (May 23, 1991); Elizabeth Joseph, *Polygamy: The Ultimate Feminist Lifestyle*, <http://www.polygamy.com/Practical/Ultimate.htm> (accessed Mar. 9, 2005).

116. See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 *N.Y.U. Rev. L. & Soc. Change* 277 (2004).

117. See Mark Strasser, *An Analysis of the Federal Constitutional Right to Same-Sex Marriage*, 19 *Const. Comment.* 761, 771 (2002).

118. We have already noted Gallagher’s claim that reliable fathers, more than mothers, are “cultural creations.” Gallagher, *supra* n. 92. Kurtz similarly writes that “[t]he association between marriage and parenthood is partly a mystique.” Kurtz, *supra* n. 91, at 34.

rule them.¹¹⁹ Call this the Grand Inquisitor view: people cannot behave well unless they are induced to do so by miracle, mystery, and authority. There's no way to conclusively refute the Grand Inquisitor view. People can sometimes be pretty stupid and self-destructive, and mystifications can sometimes induce them to behave better than they otherwise would. But in this context, the hypothesis is unduly pessimistic. I have three kids, and I don't think I stick around because I'm mystified or confused.

The claim that same-sex marriage symbolizes corrosive individualism can't be refuted, because anything can symbolize anything. There are dangers in this kind of symbolic politics. Symbolic dangers can't be contained, and can seem enormously threatening. There is no limit to what can be justified by invoking them.¹²⁰

The Gallagher/Kurtz claim is best understood, not as a causal one, but as a report of a mental association. Gay people appear to be in some way associated in many people's minds with social trends that they dislike. But an association is not an argument, and it is a terrible basis for social policy. Salem, Massachusetts in 1692, historians Paul Boyer and Stephen Nissenbaum observe, was in the throes of social and economic upheaval, as an older agrarian order was being replaced by a new commercial one. Those who were accused of witchcraft were, for the most part, much more involved in the commercial activities of the nearby port than their accusers were. Unable to understand the forces that were transforming their world, the Salem villagers "lashed out with accusations not only against those who seemed in one way or another to represent the new order, but also against those who reminded them how far they, themselves, had already been se-

119. The linkage is particularly clear in Stanley Kurtz, *What is Wrong With Gay Marriage*, 110 Comment. 35, 39 (2000):

If a man's proprietary interest in wife and family—his sense of possession and responsibility—is what both induces and permits him to give up the restless search for sexual conquest, the maintenance of this interest depends on, at a minimum, the tokens of entitlement suggested . . . by the image of a home as a castle and the father and husband as its king. . . . [W]hat the Promise Keepers have the audacity to say out loud about a man's authority within the marriage bond remains, in subtler form, the formula for heterosexual marital success.

This defense of gender hierarchy as a socially necessary mystification originates with Rousseau, and has in recent decades been elaborated by George Gilder, Phyllis Schlafly, Marabel Morgan, and Allan Bloom. See Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 Yale J. of L. & Humanities 399, 413 (1992).

120. Here is one illustration, from the French Revolution: "The execution of the Hebertists implied that of the Dantonists also. If they were left alive after their opponents had been killed their position would be relatively stronger, and it would appear that the Committee had acted at their command." M.J. Sydenham, *The French Revolution* 212 (G.P. Putnam's Sons 1965). Similar logic was used for many years to maintain the criminalization of homosexual sex: if the law stopped hunting down gays' private sex acts, it was successfully argued, this would implicitly send a message of approval. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327, 1339-46 (2000).

duced from their traditional moorings.”¹²¹ They hanged 19 people and had more than 100 other suspects in jail when the trials ended. It did no good. The commercial and secular world continued its inexorable advance. Opponents of same-sex marriage like to talk about morality, but their eagerness to scapegoat innocent people for social problems that those people have nothing to do with has moral implications of its own.

The Gallagher/Kurtz view rests on admirable motives. Both authors are clearly concerned about the well-being of children and eager to promote stable families in which children can thrive. But there is no reason to think that any heterosexual family will benefit from withholding marriage from same-sex couples. What is certain is that some children will be harmed when their families are denied recognition. Gallagher and Kurtz are fighting for a good cause, but they are firing on their own troops.

IV. CONCLUSION

*Goodridge v. Department of Public Health*¹²² typifies the impasse we are now in. When the reasons for denying gays the right to marry are articulated, they seemed weird to the Supreme Judicial Court of Massachusetts. That’s why the court concluded that there was no rational basis for the rule forbidding gays to marry. But when the court invalidated the restriction, that seemed weird to the traditionalists, to whom the exclusion of gays seemed profoundly rational. Because the debate is a secular one, they’re tongue-tied. They can’t win absent some mechanism by which they can register pure majoritarian preference with no need to explain itself, such as legislation or a referendum on a state constitutional amendment. In the long run, that won’t be enough.

The religious conservatives are fighting a losing battle. It is a sociological commonplace that religious belief is an artifact of its social context, though a sophisticated sociology understands that this has no implications whatsoever about the truth of any particular religious view.¹²³ Life in a democratic and pluralist society tends to promote more egalitarian attitudes toward differences of gender and sexual orientation.¹²⁴ That’s reflected in the generational divide over same-sex marriage: while most Americans oppose it, most 18-to-29-year-olds are in favor.¹²⁵ Perhaps this is why two-

121. Paul Boyer & Stephen Nissenbaum, *Salem Possessed: The Social Origins of Witchcraft* 212-13 (Harvard U. Press 1974).

122. 798 N.E.2d 941 (Mass. 2003).

123. On both points, see Peter L. Berger, *The Sacred Canopy: Elements of a Sociological Theory of Religion* (Doubleday 1967).

124. See Ronald Inglehart & Pippa Norris, *The True Clash of Civilizations*, Foreign Policy 63 (Mar./Apr. 2003).

125. A 2003 Gallup poll found that only 39% of all respondents thought that same-sex marriage should be legally valid, but it also found that same-sex marriage was supported by 61% of the 18 to 29 year old group. Linda Lyons, *U.S. Next Down the Aisle Toward Gay Marriage?*, Gallup Org., <http://www.gallup.com/poll/content/login.aspx?ci=8881> (July 22, 2003).

thirds of Americans think that same-sex marriage will eventually be legal in the United States.¹²⁶

This growing attitude of approval will inevitably have an effect on religious doctrine. If the refusal to allow gays to marry turns out to be, when understood in secular terms, merely the manifestation of lazy prejudice, then increasing numbers of people will be persuaded that the religious basis for that refusal is no better. The religious and the secular can be kept apart, but, as I said earlier, in America they have a powerful tendency to run together. This fact is presently the religious conservatives' chief weapon, but in the long run it is likely to be turned against them.¹²⁷

The story of opposition to same-sex marriage is one of steady decay. The general trajectory of the position is to move away from empirical claims, because the evidence of harm is so weak.¹²⁸ There are advantages to blasting away at invisible phantoms; no one can prove that you're missing your target. But there are costs to this increasing insulation from reality.

126. A 1999 NBC News/Wall Street Journal poll found that two-thirds of Americans think that same-sex marriage will probably be legalized in the twenty-first century. Christy Harvey, *Optimism Outduels Pessimism*, Wall St. J. A10 (Sept. 16, 1999).

127. Bellah observes that American civil religion has had a "pervasive and dominating influence within the sphere of church religion," so that American religion "has been predominantly activist, moralistic, and social rather than contemplative, theological, or innerly spiritual." Bellah, *supra* n. 27, at 12.

128. A notable exception is the work of Lynn Wardle, who has energetically claimed that children are harmed by being raised by same-sex couples. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 833 (1997). His claims have been systematically refuted in Carlos Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. Ill. L. Rev. 253 (1998), who show Wardle's work to be pervaded by sexist and heterosexist assumptions that lead him to systematically misinterpret the evidence on which he relies. Wardle has been influential to the extent that some courts have relied on his work to justify denying child custody to gay parents. See Stacey & Biblarz, *supra* n. 97, at 161. But this is success only in the sense that Lysenko, the quack who dominated Soviet biology in the 1940s and 1950s, was a successful scientist.