
The Fourteenth Amendment, Same-Sex Unions, and the Supreme Court

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I. PROTECTING CONSTITUTIONALLY ENTRENCHED HUMAN RIGHTS: WHAT ROLE SHOULD THE SUPREME COURT PLAY?

That it makes sense for a liberal democracy to entrench certain human rights does not entail that it also makes sense for a liberal democracy to empower its courts to protect or enforce the entrenched rights; whether it makes sense to do the latter is a separate question: “One can have a constitution of entrenched rules but leave the interpretation of those rules to democratic decision making, and many countries do just that.”¹ Is it appropriate—is it a good idea, all things considered—for a liberal democracy to do what most liberal democracies do:² cede to its courts the power to oppose, in the name of constitutionally entrenched human rights, laws and policies of the

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1. Larry A. Alexander, *Constitutionalism*, THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 248, 255 (Martin P. Golding & William A. Edmundson eds., 2005).

2. Australia and New Zealand are exceptions. For a vigorous argument in defense of the status quo in Australia, see James Allan, *A Defence of the Status Quo*, in PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 176, 176–94 (Tom Campbell et al. eds., 2003). See also James Allan, *Rights, Paternalism, Constitutions and Judges*, in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 29, 29–46 (Grant Huscroft & Paul Rishworth eds., 2002). For an argument in opposition to the status quo in Australia, see Dianne Otto, *Addressing Homelessness: Does Australia’s Indirect Implementation of Human Rights Comply with Its International Obligations?*, in PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 281, 281–306 (Tom Campbell et al. eds., 2003). For an argument that New Zealand ought to establish a system of judicial review, see Andrew S. Butler, *Judicial Review, Human Rights and Democracy* in LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 47, 47–72 (Grant Huscroft & Paul Rishworth eds., 2002). See also G.W.G. Leane, *Enacting Bills of Rights: Canada and the Curious Case of New Zealand’s ‘Thin’ Democracy*, 26 HUM. RTS. Q. 152, 167 (2004) (finding that New Zealand’s approach to rights protection is problematic). But cf. James Allan, *The Effect of a Statutory Bill of Rights where Parliament Is Sovereign: The Lesson from New Zealand*, in SCEPTICAL ESSAYS ON HUMAN RIGHTS 375, 390 (Tom Campbell et al. eds., 2001).

government?³ I have argued elsewhere that the answer is yes; there is no need to rehearse that argument here.⁴ The more serious and more difficult question is this: If such a power is to be ceded to the courts, how great should the power be; in particular, should it be the power to have the last word when the court concludes that the law/policy in question violates the human right at issue?⁵ I have argued elsewhere that the power should not be so great; the judicial power to protect constitutionally entrenched human rights should be the power of judicial “penultimacy,” not the power of judicial “ultimacy”; it should be the power to have, not the last word, but the penultimate word: a word that may be overruled by ordinary legislation.⁶ Canada, in 1982, and the United Kingdom, in 1998, each opted for a system (each for a different system) of judicial penultimacy.⁷

In the United States, by contrast, the Supreme Court exercises the power of judicial ultimacy—supremacy.⁸ According to American-style judicial supremacy, a decision by the Supreme Court that a law, policy, or official action is unconstitutional may be overruled only by extraordinary, supermajoritarian lawmaking, i.e., by constitutional amendment. Congress, for example, may not overrule the decision by enacting legislation rejecting the decision.⁹ This state of affairs gives

3. One could ask the same question about entrenched legal norms that are not “human rights” norms; in the United States, for example, one could ask the same question about “separation of powers” norms, or about “federalism” norms. See, e.g., JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE SUPREME COURT 4–12* (1980) (discussing the conflict between American representative democracy and judicial review).

4. See MICHAEL J. PERRY, *TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, COURTS* (forthcoming, 2006).

5. The last word, i.e., short of an extremely improbable event: a successful, supermajoritarian effort to amend or repeal the entrenched provision on which the court based its decision.

6. See PERRY, *supra* note 4.

7. See Jeremy Waldron, *A Question of Judgment*, *TIMES LITERARY SUPP.*, Sept. 28, 2001, at 7 (referring to the United Kingdom); see also Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 599 (2005) (referring to Canada).

8. See Mark Tushnet, *Marbury v. Madison and the Theory of Judicial Supremacy*, in *GREAT CASES IN CONSTITUTIONAL LAW* 17, 17 (Robert P. George ed., 2000) (stating that judicial review plays a large role in national governance).

9. However, a decision by the Supreme Court that a law is constitutional is subject to a different rule: If legislators believe that a law would be unconstitutional, they may decline to enact the law on that basis even if in the judgment of the Supreme Court the law would not be unconstitutional. See *id.* at 18 (arguing that legislators take an oath to uphold the Constitution, not the Supreme Court). Similarly, if the President of the United States or a governor of a state believes that a law is unconstitutional, he may decline to enforce the law on that basis even if in the Court’s judgment the law is not unconstitutional. *Id.* at 28.

An official who refuses to act on constitutional grounds—who vetoes a bill rather than

rise to this important question: *If in a liberal democracy the courts have the power of judicial ultimacy, should they exercise this great power deferentially? That is, should the courts defer in some degree to the judgment of the members of the legislative and/or executive branches of government whose law/policy is in question and who presumably have concluded that the law/policy does not violate the human right at issue?*

The choice here is best understood as a choice between two different judicial attitudes or orientations. For a judge to adopt a deferential attitude is for her to be prepared to rule that a challenged law/policy does not violate a constitutionally entrenched human rights norm if the claim that the law/policy does not violate the norm is “not unreasonable.” A claim that a law/policy does not violate a legal norm is not an unreasonable claim if in the judge’s view there are plausible grounds for affirming the claim. For a judge to adopt a nondeferential attitude is for her to be prepared to rule that a challenged law/policy violates a human rights norm if according to the judge’s own position, the law/policy violates the norm—even if the claim that the law/policy does not violate the norm is “not unreasonable.” The difference between these two attitudes, or orientations, is a matter of degree: Not every judge will draw the boundaries of the “not unreasonable” in the same place. An arrogant judge will not draw them at all. Still, the difference between the two attitudes is recognizable and not inconsequential: It is easy to imagine human rights cases in which the difference will make a difference to the outcome of the case.

The most famous and influential argument for this sort of judicial deference was made by James Bradley Thayer, in an essay published in the October 1893 issue of the *Harvard Law Review*: “The Origin and

signs it, who refuses to prosecute for violating the antisedition act—is defying the courts just as much as a person who acts pursuant to a statute the courts have held unconstitutional. In short, the fact that our constitutional system does not have a way to get the courts to review some official decisions that conflict with the courts’ constitutional interpretations does not really counter the theory of judicial supremacy. It identified an awkward procedural “defect” in our constitutional system without rejecting the theory directly.

Id. In any event, the doctrine of judicial supremacy, however broad or narrow it may be, should not be confused with the different and extremely problematic doctrine of judicial *exclusivity* that the present Supreme Court seems, implicitly, to have embraced. *Id.* at 17. The Court has acted as though it is not only the supreme but also the exclusive expositor of constitutional meanings. See Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 135–36 (2001) (asserting that the Supreme Court alone interprets the Bill of Rights); see also Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (concluding that the Court’s recent decisions support the view that the Supreme Court has exclusive authority to interpret the Constitution).

Scope of the American Doctrine of Constitutional Law.”¹⁰ Even now, over a hundred years later, Thayer’s essay remains the locus classicus of the argument that in enforcing constitutional norms, the courts—including the Supreme Court—should proceed deferentially:

[The court] can only disregard the [challenged] Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional.

[A] court cannot always . . . say that there is but one right and permissible way of construing the constitution. When a court is

10. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), reprinted in LEONARD W. LEVY, *JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS* 43–63 (1967) (Citations to Thayer’s essay are to the essay as reprinted by Levy). See generally *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993) (containing several essays on Thayer himself, and his ideas and philosophy, as well as criticisms of and responses to essays about Thayer written by other constitutional scholars).

Felix Frankfurter described [Thayer], his teacher, as “our great master of constitutional law.” Thayer, said Frankfurter, “influenced Holmes, Brandeis, the Hands (Learned and Augustus) . . . and so forth. I am of the view that if I were to name one piece of writing on American Constitutional Law—a silly test maybe—I would pick an essay by James Bradley Thayer in the *Harvard Law Review*, consisting of 26 pages, published in October, 1893, called ‘The Origin and Scope of the American Doctrine of Constitutional Law’ . . . Why would I do that? Because from my point of view it’s a great guide for judges and therefore, the great guide for understanding by non judges of what the place of the judiciary is in relation to constitutional questions.”

LEVY, *supra*, at 43.

Thayer was a friend and professional colleague of Oliver Wendell Holmes, first in law practice and then at Harvard, where Thayer taught for thirty years. Louis Brandeis was a student of Thayer’s, and Felix Frankfurter, who just missed Thayer at Harvard, acknowledged Thayer’s substantial influence. Of Thayer’s most famous essay in constitutional law, “The Origin and Scope of the American Doctrine of Constitutional Law,” Holmes wrote, “I agree with it heartily and it makes explicit the point of view from which implicitly I have approached the constitutional questions upon which I have differed from some other judges.”

PAUL KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 84 (1992).

interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, what the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, *the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*¹¹

Thayer's plea for judicial deference—for "the rule of the clear mistake," as Alexander Bickel called it¹²—was not rooted in a faith in the capacity of the other, nonjudicial departments of government—the legislative and executive departments—to resolve constitutional questions responsibly; nor was it rooted in a belief that the legislative and executive departments are truly representative of the people.¹³ Thayer's position was rooted, instead, in his conviction that because in the United States, which is a democracy, the citizens are the ultimate

11. LEVY, *supra* note 10, at 54, 59. Thayer's most prominent judicial disciple was Felix Frankfurter, who wrote in his dissenting opinion in *West Virginia State Board of Education v. Barnette* (in which the Court struck down a state rule, challenged by a Jehovah's Witness, that required public school students to salute the flag and recite the Pledge of Allegiance):

Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 661–62, 666–67 (1943). As Justice Frankfurter understood, a Thayerian approach to the judicial protection of constitutionally entrenched norms affords relatively little opportunity for a judge's own values to influence her resolution of the conflict at hand. *Id.* at 647. (However, relatively little opportunity is different than no opportunity.)

According to Thayer, the deferential approach is fitting when a federal court reviews, for federal constitutionality, federal action or when a state court reviews, either for federal constitutionality or for state constitutionality, state action, but not when a federal court reviews, for federal constitutionality, state action, in which case a nondeferential approach is fitting. See LEVY, *supra* note 10, at 62–63. This distinction makes little sense, however. SANFORD BYRON GABIN, *JUDICIAL REVIEW AND THE REASONABLE DOUBT TEST* 5 (1980). "[T]he reasonable doubt test should be applied not just to all national legislation but, contrary to Thayer's prescription, to all state legislation as well." *Id.* Most commentators who discuss Thayer's conception of proper judicial role fail even to note the distinction. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 35–46 (1962); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 72–73 (1978). But see CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 34–35 (1981). Black argues that even Justice Frankfurter failed to note the distinction—or to heed it, as his dissent in *Barnette* makes clear. See *W. Va. Bd. of Educ.*, 319 U.S. at 646–71.

12. See BICKEL, *supra* note 11, at 35.

13. See KAHN, *supra* note 10, at 86–87.

political sovereign, they and not the judiciary should have final responsibility for resolving, through their elected representatives, contested constitutional questions so long as their answers are not unreasonable.¹⁴

Thayer's argument for judicial deference has always had great appeal in the context of American-style judicial supremacy, as evidenced by the fact that in the United States, in one or another version, the argument is always being mounted anew.¹⁵ Should we who are U.S.

14. See *id.* at 85–89 (commenting on Thayer's argument). Paul Kahn has encapsulated Thayer's point: "[T]he more the Court tries to represent the people, the more the people cease to function as the popular sovereign." *Id.* at 87.

Moreover, according to Thayer, a nondeferential, aggressive-judicial approach to enforcing constitutional norms would weaken the capacity of the people and their representatives to deliberate about contested constitutional questions as responsibly as they should. *Id.* Thayer elaborated the point in a book on John Marshall:

[T]he exercise of [judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility.

JAMES BRADLEY THAYER, JOHN MARSHALL, 85–86, 88 (Phoenix ed., Univ. of Chi. Press 1967). Many modern students of American judicial review have shared Thayer's concern. For example, Alexander Bickel wrote that "[t]he search must be for a [judicial] function . . . whose discharge by the courts will not lower the quality of the other departments' performance by *denuding them of the dignity and burden of their own responsibility.*" BICKEL, *supra* note 11, at 24 (emphasis added). Cf. Allan C. Hutchinson, *Waiting for Coraf (or the Beatification of the Charter)*, 41 U. TORONTO L.J. 332, 358 (1991) ("By endlessly waiting for [the Charter of Rights and Freedoms], we place ourselves *in waiting*; it inculcates a servile and sycophantic attitude in people. Such a practiced posture of dependence is anathema to the democratic spirit. It is infinitely better to run the unfamiliar risks of genuinely popular rule than to succumb to the commonplace security of distant authority."). For a more recent, but nonetheless critical, statement by Hutchinson, see Allan C. Hutchinson, *Supreme Court Inc.: The Business of Democracy and Rights*, in RIGHTS AND DEMOCRACY: ESSAYS IN UK-CANADIAN CONSTITUTIONALISM 29 (Gavin W. Anderson ed., 1999) (arguing that Canada's incorporation of a bill of rights into its laws will seriously undermine truly democratic government).

15. Mark Tushnet's and Jeremy Waldron's respective arguments against American-style judicial review are each at least partly Thayerian in character. MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*, 129–76 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT*, 211–312 (1999).

I have argued elsewhere that the Thayerian argument for judicial deference has little if any power

citizens want the Supreme Court to bow to Thayer's argument; should we want the Court to exercise its power of judicial ultimacy deferentially; should we want Supreme Court Justices to defer to the "not unreasonable" judgment of the members of the legislative and/or executive branches of government whose law/policy is in question and who presumably have concluded that the law/policy does not violate the human right at issue?

Mark Tushnet and Jeremy Waldron have suggested that American-style judicial review—judicial review *cum* judicial supremacy—is not only a bad idea, but that *it is worse than no judicial review at all*.¹⁶ If one is inclined to concur in the Tushnet-Waldron judgment, one should be no less inclined to concur in the view that because American-style judicial review is a fact of life, Supreme Court Justices, in the exercise of judicial review, should proceed in the deferential way that Thayer recommended; they should adopt a deferential attitude. But is it true that American-style judicial review is worse than no judicial review at all? In the United States, has the American system of judicial ultimacy *always* been worse than no judicial review at all? Has it been worse than no judicial review no matter what right has been at issue? What if the right concerned is, say, religious liberty?¹⁷ What if the right protects detainees, prisoners, and others from torture or other inhumane and degrading treatment? Aren't these questions relevant?

Of course, we are primarily concerned with the future of American-style judicial review, not with its past: In the United States, will the system of judicial ultimacy be worse than no judicial review at all thirty, or even one hundred, years from now? But how can we plausibly speculate about the future of American-style judicial review—if we can plausibly speculate about it at all—without first evaluating its past?¹⁸

in the context of a system of judicial penultimate, like Canada's. See PERRY, *supra* note 4.

16. TUSHNET, *supra* note 15, at 129–76; WALDRON, *supra* note 15, at 211–312. Waldron attributes this claim to Mark Tushnet and then seems to affirm it: "[P]opulist constitutional politics, freed from court-centered legalism, tends to project a progressive and liberating vision (rather than a tight-fisted libertarian one) on to the founding commitments of the American republic." Jeremy Waldron, *A Question of Judgment*, TIMES LITERARY SUPP., Sept. 28, 2001, at 7 (reviewing TUSHNET, *supra* note 15). According to Tushnet, "progressives and liberals are losing more from judicial review than they are getting." TUSHNET, *supra* note 15, at 129–53.

17. "Some of the time, judicial review will do some good. Judges did nothing for the Mormons, but they may have saved the Jehovah's Witnesses and the Amish. If judges can save one religious minority a century, I consider that ample justification for judicial review in religious liberty cases." Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DEPAUL L. REV. 373, 376 (1992).

18. "So far as the scene of American judicial review is concerned, the question whether judicial review has been on balance a good thing for America may be the only question worth asking once the detritus of philosophers' arguments is swept off the table." Richard A. Posner,

Whatever our view—and we may not have a confident view—about “whether judicial review has been on balance a good thing for America,” we are left with this question: Which arrangement, for the United States, is better going forward:¹⁹ A system of judicial ultimacy in which the Supreme Court is deferential (Thayerian) in the exercise of its power to protect constitutionally entrenched human rights? Or a system of judicial ultimacy in which the Court exercises its power nondeferentially? One may want to answer this question on the basis of a prediction about the likely long-run political consequences of the Court’s embracing Thayerian deference.²⁰ But any such judgment is inevitably speculative—and easily contestable.

For better or worse, I lack confidence in, and doubt that anyone should have confidence in, such judgments. So I am left to answer the question on the basis of the same, straightforward premise that Thayer invoked: In the United States, the citizens are the ultimate political sovereign; they, therefore, through their elected representatives, should have final responsibility for resolving contested constitutional questions *so long as their answers are not unreasonable*.²¹

In the remainder of this essay, I pursue the implications of Thayerian deference for the constitutional controversy over same-sex unions.²²

Review of Jeremy Waldron, Law and Disagreement, 100 COLUM. L. REV. 582, 592 (2000).

19. *Id.* The qualifier “for the United States” is important:

There is no reason to suppose that the issue [whether American-style judicial review is a good idea] should be resolved the same way in two different countries, even countries that share the same language and the same basic legal and political heritage. That depends on all sorts of empirical questions and judgmental imponderables involving the political and legal cultures of the two countries and the career path of legislators and judges in them.

Id.

20. Something Alexander Bickel said about judicial review itself is tangentially relevant here:

It will not be possible fully to meet all that is said against judicial review. Such is not the way with questions of government. We can only fill the other side of the scales with countervailing judgments on the real needs and the actual workings of our society and, of course, with our own portions of faith and hope. Then we may estimate how far the needle has moved.

BICKEL, *supra* note 11, at 24.

21. Whether the Court should be deferential—and, indeed, what it would mean for the Court to be deferential—in the exercise of its power to protect constitutionally entrenched federalism norms and/or constitutionally entrenched separation-of-powers norms are questions I do not address in this Essay.

22. A clarification is in order: In this Essay, when I refer to and affirm Thayerian deference, I am not affirming judicial deference to, say, a state legislature’s position—its perhaps implicit position—about what the relevant constitutional provision (text) *means*. I am affirming judicial deference to the legislature’s position that the challenged law does not violate the provision *given what the provision means—given*, that is, what the court understands the provision to mean.

II. THE SECOND SENTENCE OF SECTION ONE OF THE FOURTEENTH AMENDMENT: WE-THE-PEOPLE'S UNDERSTANDING

The second sentence of section one of the Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²³

Does any part of this constitutional provision require the states to recognize, by extending the benefit of law to, same-sex unions? The answer depends partly on the answer to a prior question: In 1866–68, when the Fourteenth Amendment was being ratified, what imperatives did “We the People” understand the three parts (clauses) of the second sentence of section one to constitutionalize?

The Preamble to the Constitution declares, in part, that “We the People of the United States . . . do ordain and establish this Constitution for the United States of America.” The text of the Constitution is *We-the-People's* text; it is *their* text, *their* written communication of various imperatives. To whom does the Preamble’s “We the People” refer? Neither to those who drafted the constitutional text (or some part of it) nor even to those in the states who voted to ratify the text. Rather, “We the People” refers to the citizens *on whose behalf* the text was written and ratified. The constitutional text is primarily *their* text. The text of the Bill of Rights is the text of the People—the citizens—in 1789–91 who, through their elected representatives, ratified—who “ordain[ed] and establish[ed]”—the Bill of Rights. The text of the Fourteenth Amendment is the text of the People in 1866–68 who, through their elected representatives, ratified the Fourteenth Amendment.

So, the question whether the second sentence of section one of the Fourteenth Amendment requires the states to recognize same-sex unions depends in part on what the second sentence meant to the People in

We should distinguish between the act of interpreting a constitutional provision, like the cruel and unusual punishments clause of the Eighth Amendment—which is the act of discerning, or of trying to discern, what the provision means (“cruel”? “unusual”?)—and the act of deciding whether a challenged law (or other government action) violates the provision *given what the provision means*. See MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 23–35 (1999) [hereinafter *WE THE PEOPLE*] (discussing what it means to interpret the Constitution). I concur in Mitch Berman’s judgment that Thayerian deference, “if it is to exist, will find a more hospitable home at the level of applying constitutional meaning, not deriving it.” Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 104 (2004). For Berman’s argument, see *id.* at 102–04.

23. U.S. CONST. amend. XIV, § 1.

1866–68 who Constitutionalized (i.e., constitutionally entrenched) the various provisions of the Fourteenth Amendment. The second sentence of section one is *their* text. And we cannot know whether a state’s failure to recognize same-sex unions is consistent with that text unless we know what the second sentence meant to them. The now-common name for the People’s understanding of what their text meant is the “original” understanding or meaning.²⁴

24. See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1144–45 (2003): “[The original meaning/understanding approach] asks not what the Framers or Ratifiers meant or understood subjectively, but what their words would have meant objectively—how they would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them.” See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 90–93 (2004) (defending Bork’s originalist positions); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (arguing that the “original understanding” of the Constitution is manifested in secondary materials); Ilya Somin, ‘*Active Liberty*’ and *Judicial Power: What Should Courts Do to Promote Democracy?*, 100 NW. U. L. REV. (forthcoming 2006) (presenting a review of Justice Breyer’s critique of originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL’Y 599, 599 (2004) (“Originalism regards the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present.”).

[T]he new originalism is focused less on the concrete intentions of individual drafters of constitutional text than on the public meaning of the text that was adopted It is the adoption of the text by the public that renders the text authoritative, not its drafting by particular individuals. This is not to say that the history of the drafting process is irrelevant—it may provide important clues as to how the text was understood at the time and the meaningful choices that particular textual language embodied—but it is not uniquely important to the recovery of the original meaning of the Constitution. Similarly, the discovery of a hidden letter by James Madison revealing the “secret,” true meaning of a constitutional clause would hardly be dispositive to an originalism primarily concerned with what the text meant to those who adopted it. The Constitution is not a private conspiracy.

Id. at 609–10. Cf. Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 649–50 (2005):

- A text means what its author intends.
- There is no meaning apart from intention.
- There is no textualist position because intention is prior to text; no intention, no text.
- There is no choice between intentional meaning, conventional meaning, dictionary meaning, and the meaning imputed to the ordinary, or exceptional, or reasonable man, only choices between alternatively posited intentions. Dictionaries and conventions do not have intentions; the ordinary or exceptional or reasonable man did not author the text you are interpreting.
- If you are not trying to determine intention, you’re not interpreting; but sometimes interpreting is not what you want to be doing (although before you do something else, you should be sure you have good reasons).
- The intentions of readers, except for the intention to determine intention, do not count as interpretations, but as rewritings.
- None of the above amounts to a method. Knowing you are after intention does not help you find it, you still have to look for evidence and make arguments. And thinking

Again: In 1866–68, when the Fourteenth Amendment was being ratified, what imperatives did “We the People” understand the three clauses of the second sentence of section one to constitutionalize? I have addressed that question at length in my book *We the People: The Fourteenth Amendment and the Supreme Court*,²⁵ here it will suffice to rehearse my principal conclusions.²⁶

In the aftermath of the Civil War, it quickly became clear that a state could, and the former Confederate states did, oppress the ex-slaves, and others, in three basic ways. Each of the three clauses of the second sentence of section one responds to one of the three basic ways—each clause responds to a different way—that some state officials might seek to oppress some human beings.

A. Due Process Clause

Let us begin with the due process clause. “No State shall . . . deprive any person of life, liberty, or property, without due process of law”²⁷ In making this language a part of the Constitution, the People constitutionalized an imperative forbidding state officials to deprive any person of his life, his liberty—his physical freedom—or his property extrajudicially; state officials may execute a person (life), or imprison him (liberty), or fine him or confiscate his property, if at all, only pursuant to “due process of law,” which the People understood to refer to the process of law—in the words of the Civil Rights Act of 1866, to the “laws and proceedings for the security of person and property”²⁸—that is generally due persons under state law.²⁹ Whether they understood it to refer to more process—more procedural protections—than that which is generally due persons under state law is neither clear nor, here, relevant.

that it is something else you are after will not disable you if you are really interpreting; for then you would be seeking intention even if you said you were not.

- Interpretation is not a theoretical issue, but an empirical one, and, therefore, all debates about interpretation should stop. (Fat chance!)

See also Steven Knapp & Walter Benn Michaels, *Not a Matter of Interpretation*, 42 SAN DIEGO L. REV. 651 (2005) (arguing that “textualism” is judicial interpretation).

25. See WE THE PEOPLE, *supra* note 22, at 48–87 (answering the question of what norms we the people have established).

26. Readers who are skeptical about my conclusions, or who want more detail, may consult WE THE PEOPLE, *supra* note 22, and weigh my arguments.

27. U.S. CONST. amend. XIV, §1.

28. 14 Stat. 27 (1866).

29. WE THE PEOPLE, *supra* note 22, at 52–53 (explaining that due process of law was understood to refer to the processes due ordinary citizens).

B. Equal Protection Clause

“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”³⁰ In making this language part of the Constitution, the People constitutionalized an imperative requiring state officials to give to every person within the state’s jurisdiction the same protection—“equal protection”—that is generally due persons under state law: the same protection “of the laws.” What laws? *Protective laws*: laws—such as those against homicide, kidnapping, or theft—that *protect* a person’s life, liberty, or property.³¹

There are two sentences in section one of the Fourteenth Amendment. The first sentence declares that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”³² As the Supreme Court emphasized six years after the Fourteenth Amendment was ratified, this sentence was meant to “overturn[] the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States” (and of the state wherein they reside).³³ In *Dred Scott v. Sandford*³⁴—surely the single most infamous case in American constitutional law—the Supreme Court ruled, *inter alia*, that:

a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States That [the] main purpose [of the first sentence of section one of the Fourteenth Amendment] was to establish the citizenship of the negro can admit of no doubt. The phrase, ‘subject to its jurisdiction’ was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.³⁵

But what good would it have been to declare a person to be a citizen of the United States and of the state wherein he resides if a state could treat him as a second-class citizen?

Even if state officials do not deprive persons of their life, liberty, or property except pursuant to the process that is generally due persons

30. U.S. CONST. amend. XIV, § 1.

31. WE THE PEOPLE, *supra* note 22, at 54–57 (defining what laws “protective laws” refer to).

32. U.S. CONST. amend. XIV, § 1.

33. Slaughter-House Cases, 83 U.S. 36, 73 (1872).

34. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

35. *Slaughter-House Cases*, 83 U.S. at 73. On *Dred Scott*, see DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). For a shorter commentary, see DON E. FEHRENBACHER, *Dred Scott v. Sandford, 19 Howard 393 (1857)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 584 (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1986).

under state law, and even if state officials do not fail to perform their legal duty to protect persons from those who would unlawfully deprive them of their life, liberty, or property, there is a third basic way that state officials might seek to oppress, and that some state officials after the Civil War did oppress, some of their citizens: by making and enforcing laws that treat some citizens (e.g., ex-slaves) as inferior to other citizens—laws that treat some citizens as second-class citizens (or worse).

C. *Privileges and Immunities Clause*

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”³⁶ In making this language a part of the Constitution, the People constitutionalized an imperative forbidding states to make or enforce any law that treats some citizens less well than other citizens³⁷ *unless the differential treatment serves the public good (i.e., a legitimate governmental interest) in a reasonable fashion.*³⁸ The thought here is that although not every law that treats some citizens less well than others fails to respect the equal citizenship of those the law treats less well, some laws do, namely, laws that do not serve the public good in a reasonable fashion. A law fails to serve the public good in a reasonable fashion if either (1) it fails to serve the public good *at all* or (2) it serves the public good—it achieves some public benefit or benefits—but fails to do so *in a reasonable fashion*. What sort of laws—what sorts of differential treatment—fit the latter profile?

Differential treatment that serves the public good fails to do so in a reasonable fashion (a) if the differential treatment is based on a demeaning view—a false, deficit-attributing view—about those who are treated less well;³⁹ or (b) if the cost or costs the differential treatment visits on those who are treated less well are so great relative to the public benefit or benefits the differential treatment achieves that there is no reasonable justification—no reasonable case to be made—

36. U.S. CONST. amend. XIV, § 1.

37. That treats them less well, that is, with respect to *nonpolitical* privileges and immunities. The principal political privilege is the right to vote. See *Slaughter-House Cases*, 83 U.S. at 67–69.

38. See *id.* at 57–80.

39. Or if the differential treatment is based on a negative but accurate generalization about those the law treats less well, if government can, without serious cost, avoid reliance on the generalization. See, e.g., *United States v. Virginia*, 518 U.S. 515, 534 (1996) (finding that the exclusion of women from the Virginia Military Institute constituted a violation of the Equal Protection Clause). See also PERRY, *supra* note 4.

for the differential treatment.⁴⁰ One may be treated less well than another either because of *who one is* (e.g., African-American) or because of *what one does or has done* (e.g., had an abortion).⁴¹ In the remainder of this essay, I inquire whether a state's refusal to extend the benefit of law to same-sex unions is based on a demeaning view about one's being gay or lesbian.

III. DO STATE REFUSALS TO RECOGNIZE SAME-SEX UNIONS VIOLATE THE FOURTEENTH AMENDMENT? AND EVEN IF WE THINK THEY DO, SHOULD WE WANT THE COURT TO SO RULE?⁴²

Again, if a law or policy that treats some persons less well than others is based on a demeaning view about those the law treats less well, the law/policy—the differential treatment—fails to serve the public good *in a reasonable fashion*. In saying that a law/policy is based, even partly, on a view, I mean that government would not have enacted the law or adopted the policy but for the view. By a “demeaning” view, I mean a view that *falsely* attributes a deficit of some kind—a lack, an inferiority—to a person in virtue of some aspect of the person's particularity: her race, for example, or her sex.⁴³ An example: Women

40. The reader familiar with the Supreme Court's equal protection and substantive due process cases will notice: (1) The Court's equal protection doctrine is grounded substantially in the requirement that differential treatment not be based on a demeaning view about those the law treats less well or on a negative but accurate generalization about those the law treats less well, if government can avoid reliance on the generalization without serious cost. (2) The Court's substantive due process doctrine is grounded substantially in the requirement that the costs the law visits on those who are treated less well not be disproportionate to the benefits the law achieves.

41. Elsewhere I have inquired whether the costs visited on (some) women by a state ban on previability abortions are so great relative to the benefits the ban achieves that there is no reasonable justification for the ban. See PERRY, *supra* note 4.

42. I do not address here the question whether the Fourteenth Amendment requires that same-sex unions be recognized as “marriages” instead of as “civil unions.” On the “marriage” v. “civil unions” issue, compare David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73, 74 (2005) (characterizing the argument that civil unions are sufficient for gays as “separate but equal” and arguing that this “separate status . . . is a mark of inferiority”) with Andrew Koppelman, *Civil Conflict and Same-Sex Civil Unions*, THE RESPONSIVE COMMUNITY, Spring/Summer 20 (2004) (arguing that civil unions are “the best [contemporary] compromise”). Cf. Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16 (noting that due to fears of backlash, gays are temporarily retreating from their main goal of same-sex marriage recognition). For a debate about whether states should abolish *civil* marriage, see *Should States Abolish Marriage*, LEGAL AFFAIRS, May 16, 2005, www.legalaffairs.org/webexclusive/debateclub_m0505.msp.

43. We all know that governments have sometimes discriminated against the members of a racial or ethnic group on the basis of a demeaning view about their race/ethnicity. The paradigmatic example of such a view holds that because of their race/ethnicity, some persons are not truly, fully human and therefore lack the moral status that those who are truly, fully human

have. History, recent as well as distant, is brimming with instances of such views—racist views. Nazi ideology famously held that Jews were not truly, fully human. See MICHAEL BURLEIGH & WOLFGANG WIPPERMAN, *THE RACIAL STATE: GERMANY, 1933–1945* (1991); Johannes Morsink, *World War Two and the Universal Declaration*, 15 *HUM. RTS. Q.* 357, 363 (1993); CLAUDIA KOONZ, *THE NAZI CONSCIENCE* 4–13 (2003). An instance closer to home should be painfully familiar to Americans: “[T]he straightforward assertion that the Negro is not really a human being at all, not part of . . . the ‘Adamic family’ that originated in the Garden of Eden.” PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* 101 (2002) (referring to “the bestselling *The Negro a Beast, or ‘In the Image of God’* (1900) by Charles Carroll[,] [a] hodgepodge of dubious biblical interpretations and bogus science”). See also H. SHELTON SMITH, *IN HIS IMAGE, BUT . . . : RACISM IN SOUTHERN RELIGION, 1780–1910* (1972) (“trac[ing] the growth of this anti-Negro movement between 1780 and 1910”).

The most common way to deny what the morality of human rights affirms, namely, that every human being (or, as the Preamble to Universal Declaration of Human Rights puts it, “all members of the human family”) has inherent dignity—the most common way, that is, other than straightforwardly denying that every human being has inherent dignity—is to claim that not all who are *apparently* human beings are *really* human beings, that although some who are apparently human beings are really human beings, some are not, some are merely pseudohumans. KOONZ, *supra*, at 1–2: “The texts of Western moral philosophy and theology are littered with less-than-fully-human ‘others.’ . . . In 1933 Carl Schmitt, a distinguished political theorist and avid Hitler supporter, paraphrased a slogan used often in Nazi circles when he denounced the idea of universal human rights, saying: Not every being with a human face is human. This belief expressed the bedrock of Nazi morality.” KOONZ, *supra*, at 1–2. See also *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999): “The past provides many instances where the law refused to see a human being when it should have.” During the period of “ethnic cleansing” in Bosnia, Richard Rorty observed:

Serbian murderers and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings, but to *Muslims*. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between the humans and infidel dogs, and the Black Muslims make between humans and blue-eyed devils. [Thomas Jefferson] was able both to own slaves and to think it self-evident that all men are endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, “participates more of sensation than reflection.” Like the Serbs, Mr. Jefferson did not think of himself as violating *human* rights. The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity.

RICHARD RORTY, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 112 (Stephen Shute & Susan Hurley eds., 1993). Understood as a variation on the claim that only some human beings have inherent dignity, the claim that only some who are apparently human beings are really human beings contradicts the morality of human rights. For government to discriminate on the basis of the view that those against whom it is discriminating are less than truly, fully human is for government to violate those against whom it is discriminating.

Although the most demeaning view about one or another aspect of one’s particularity—about one’s race, for example—is that because of that aspect, one is not human at all, one is merely pseudohuman, not all discrimination that we rightly regard as unjust is based on a view that denies that every human being is truly, fully human. Indeed, some who supported the institution of race slavery in the American South did not believe that the slaves were less than truly, fully human. For the interesting details, see EUGENE D. GENOVESE, *A CONSUMING FIRE: THE FALL OF THE CONFEDERACY IN THE MIND OF THE WHITE CHRISTIAN SOUTH* 81 *et seq.* (1998) (noting how the southern church rejected the scientific racism of the North). The problem with much discrimination against women, for example, is that even though it does not deny that women are

are, as such (i.e., because they are women), not fit for the practice of law.⁴⁴

In refusing to recognize—in refusing to extend the benefit of law to—same-sex unions, as most states do, a state

effectively excludes [same-sex partners] from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decisionmaking privileges, spousal

truly, fully human, it is nonetheless based on a demeaning view—a false, deficit-attributing view—about women. Consider the American experience. In 1873, in his now-notorious opinion in *Bradwell v. Illinois* (in which the U.S. Supreme Court ruled that Illinois could exclude women from admission to the bar), Justice Bradley declared: “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life The paramount mission and destiny of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” 83 U.S. 130, 141 (1873) (Bradley, J., joined by Swayne & Field, JJ., concurring in the judgment). (For a contemporary expression of a similar view, see Neil MacFarquhar, *In Najaf, [Iraq,] Justice Can Be Blind But Not Female*, N.Y. TIMES, July 31, 2003, at A1.) Such sentiments were not confined to the judiciary. As the U.S. Supreme Court reported in a 1996 opinion:

Dr. Edward H. Clarke of Harvard Medical School, whose influential book, *Sex in Education*, went through 17 editions, was perhaps the most well-known speaker from the medical community opposing higher education for women. He maintained that the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs. See E. Clarke, *Sex in Education* 38–39, 62–63 (1873); *id.* at 127 (“identical education of the two sexes is a crime before God and humanity, that physiology protests against, and that experience weeps over”); see also H. Maudsley, *Sex in Mind and in Education* 17 (1874) (“It is not that girls have not ambition, nor that they fail generally to run the intellectual race [in coeducational settings], but it is asserted that they do it at a cost to their strength and health which entails life-long suffering, and even incapacitates them for the adequate performance of the natural functions of their sex.”); C. Meigs, *Females and Their Diseases* 350 (1848) (after five or six weeks of “mental and educational discipline,” a healthy woman would “lose . . . the habit of menstruation” and suffer numerous ills as a result of depriving her body for the sake of the mind).

United States v. Virginia, 518 U.S. 515, 536–37 n.9 (1996). See *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (referring to “the role-typing society has long imposed” on women and to the normative view that “the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas”).

44. A demeaning claim—a claim that falsely attributes a deficit of some kind to a person in virtue of, say, her being a woman—should not be confused with a negative but accurate generalization about the members of a group. An example of the former: Women are, as such, not fit for the practice of law. An example of the latter: Women are, in general, less strong than men. A law or policy based on a demeaning claim about those the law/policy treats less well is not the only sort of law/policy that fails to serve the public good *in a reasonable fashion*. So too does a law/policy based on a negative but accurate generalization about the members of a group *if government can, without serious cost, avoid reliance on the generalization*. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (noting the burden of justification is “demanding” and lies with the state). See also PERRY, *supra* note 4.

support, intestate succession, homestead protections, and many other statutory protections.⁴⁵

Are state refusals to recognize same-sex unions based on a demeaning view—a false, deficit-attributing view—about persons (gays and lesbians) in virtue of their homosexuality? If so, a state’s nonrecognition policy fails to respect the equal citizenship of those the policy treats less well; more precisely, the policy fails to serve the public good *in a reasonable fashion*, thereby violating the Fourteenth Amendment.

A policy that refuses to recognize interracial marriages is rooted in and expresses, and is finally inexplicable apart from, the racism in a culture. One may fairly wonder whether a policy that refuses to recognize same-sex unions is rooted in and expresses, and is finally inexplicable apart from, the “irrational fear and loathing of” homosexuals, who, like the Jews with whom they “were frequently bracketed in medieval persecutions[,] . . . are despised more for who they are than for what they do . . .”?⁴⁶

45. *Baker v. Vermont*, 744 A.2d 864, 870 (Vt. 1999). For a fuller specification of the benefits in question, *see id.* at 883–84. *See also* *Goodridge v. [Mass.] Dep’t of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (noting financial, employment, and legal benefits).

46. RICHARD POSNER, *SEX AND REASON* 346 (1992):

[S]tatutes which criminalize homosexual behavior express an irrational fear and loathing of a group that has been subjected to discrimination, much like that directed against the Jews, with whom indeed homosexuals—who, like Jews, are despised more for who they are than for what they do—were frequently bracketed in medieval persecutions. The statutes thus have a quality of invidiousness missing from statutes prohibiting abortion or contraception. The position of the homosexual is difficult at best, even in a tolerant society, which our society is not quite; and it is made worse, though probably not much worse, by statutes that condemn the homosexual’s characteristic methods of sexual expression as vile crimes. . . . There is a gratuitousness, an egregiousness, a cruelty, and a meanness about [such statutes].

Id.

Cf. LOUIS CROMPTON, *HOMOSEXUALITY AND CIVILIZATION* (2003). Crompton’s book is discussed in Edward Rothstein, *Annals of Homosexuality: From Greek to Grim to Gay*, N.Y. TIMES, Dec. 13, 2003, at B9 (noting the book associates homosexuality with “the inner workings of civilization itself”).

As history teaches, “an irrational fear and loathing” of *any* group “more for who they are than for what they do” has tragic consequences. The irrational fear and loathing of homosexuals—that is, the fear and loathing of them *more for who they are than for what they do*—is no exception. There is, for example, the horrible phenomenon of “gay bashing.” “The coordinator of one hospital’s victim assistance program reported that ‘attacks against gay men were the most heinous and brutal I encountered.’ A physician reported that injuries suffered by the victims of homophobic violence he had treated were so ‘vicious’ as to make clear that ‘the intent is to kill and maim.’” ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* 165 (1996). As “[a] federal task force on youth suicide noted[,] because ‘gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from family and peers,’ young gays are two to three times more likely than other young people to attempt and to

[T]he judge's famous speech at Oscar Wilde's sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, "treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people." From this it is not very far to Heinrich Himmler's speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs "was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them."⁴⁷

It is doubtful, however, that in contemporary liberal democracies, including the United States, the "irrational fear and loathing" to which Richard Posner refers—the view that homosexuals are not truly, fully human—underlies opposition to recognizing same-sex unions. Indeed, the pope and bishops of the Catholic Church are among the foremost opponents of recognizing same-sex unions, and their "teaching about the dignity of homosexual persons is clear. They must be accepted with respect, compassion, and sensitivity. Our respect for them means that we condemn all forms of unjust discrimination, harassment or abuse."⁴⁸ Hate the sin, but love the sinner.

However, that a policy is not based on the view that those the policy treats less well are not truly, fully human does not entail that the policy is not based on a demeaning view about those the policy treats less well. Are state refusals to recognize same-sex unions based on a demeaning view about gays and lesbians (i.e., gays and lesbians *as such*, gays and lesbians *in virtue of their homosexuality*)?

Again, among the foremost critics of proposals to extend the benefit of law to same-sex unions are the pope and bishops of the Catholic Church, who "strongly oppose any legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means."⁴⁹ As it happens, the pope and bishops contend against the legal recognition of same-sex unions on *nonreligious* grounds:

commit suicide." *Id.* at 149.

47. Andrew Koppelman, *Are the Boy Scouts Being as Bad as Racists? Judging the Scouts' Antigay Policy*, 18 PUB. AFF. Q. 363, 372 (2004).

48. USCCB Administrative Committee, *Promote, Protect, Preserve Marriage: Statement on Marriage and Homosexual Unions*, 33 ORIGINS 257, 259 (2003) [hereinafter *Statement on Marriage and Homosexual Unions*]. Cf. Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998, at 34–35: "There is the obvious but important possibility that one can 'hate' an individual's behavior without hating the individual."

49. *Statement on Marriage and Homosexual Unions*, *supra* note 48, at 259.

grounds that presuppose the authority neither of Christianity (much less of Catholicism) nor, indeed, of any religious belief.

The principal ground of the Church's position on same-sex unions is the Church's official teaching that it is immoral for anyone to engage in any species of sex act that of its nature ("inherently") is not procreative (e.g., oral copulation). The Church also teaches that it is immoral to engage in any deliberately contracepted sex act with the intention of preventing the act from being procreative. According to the Administrative Committee of the U.S. Conference of Catholic Bishops, "[w]hat are called 'homosexual unions,' . . . *because they are inherently nonprocreative*, cannot be given the status of marriage."⁵⁰ For most Americans, however, the Catholic Church's official teaching on sex and procreation is simply not credible; indeed, for most *Catholic* citizens, this teaching has long since ceased to be credible. So it is fanciful to suppose that the Church's teaching on sex and procreation underlies, say, Georgia's refusal to recognize same-sex unions.⁵¹

50. *Id.* (emphasis added).

51. For anyone who rejects the Church's teaching on sex and procreation, it is no longer possible to argue that sex/love between two persons of the same sex cannot be a valid embrace of bodily selves expressing love. If sex/love is centered primarily on communion between two selves *rather than on biologicistic concepts of procreative complementarity*, then the love of two persons of the same sex need be no less than that of two persons of the opposite sex. Nor need their experience of ecstatic bodily communion be less valuable.

ROSEMARY RUETHER, *The Personalization of Sexuality*, in FROM MACHISMO TO MUTUALITY: ESSAYS ON SEXISM AND WOMAN-MAN LIBERATION 70, 83 (Eugene C. Bianchi & Rosemary R. Ruether eds., 1976) (emphasis added). Cf. Edward Collins Vacek, SJ, *The Meaning of Marriage: Of Two Minds*, COMMONWEALTH, Oct. 24, 2003, at 17, 18–19: "When, after Vatican II, Catholics began to connect sexual activity more strongly with expressing love than with making babies, it became harder to see how homosexual acts are completely different from heterosexual acts." For a critical comment on one desperate, tortured effort to justify tolerating heterosexual nonmarital sex while criminalizing homosexual nonmarital sex, see Andrew Sullivan, *Unnatural Law*, NEW REPUBLIC, March 24, 2003, at 18 (discussing historic origins of sodomy and the Supreme Court case of *Bowers v. Hardwick*).

None of this means that with respect to nonmarital sex, including nonmarital sex between two persons of the same sex, anything goes. Consider what Margaret Farley, a Catholic sister and Stark Professor of Christian Ethics at Yale University, has written:

My answer [to the question of what norms should govern same-sex relations and activities] has been: the norms of justice—the norms which govern all human relationships and those which are particular to the intimacy of sexual relations. Most generally, the norms are respect for persons through respect for autonomy and rationality; respect for relationality through requirements of mutuality, equality, commitment, and fruitfulness. More specifically one might say things like: sex between two persons of the same sex (just as two persons of the opposite sex) should not be used in a way that exploits, objectifies, or dominates; homosexual (like heterosexual) rape, violence, or any harmful use of power against unwilling victims (or those incapacitated by reason of age, etc.) is never justified; freedom, integrity, privacy are values to be affirmed in every homosexual (as heterosexual) relationship; all in all,

The Administrative Committee of the U.S. Conference of Catholic Bishops has articulated a second nonreligious argument—one that does not presuppose the Church’s official teaching on sex and procreation—for its position on same-sex unions: extending the benefit of law to same-sex unions would have, *in the long run*, subversive consequences for marriage as we have known it.⁵²

The magisterium fears that a purely non-procreative, contractualized notion of marriage might lead to the elimination of the family and to anarchy in child-rearing practices. They believe that even conservative gays who want to have the monogamous commitments receive the social support that comes from legal validation are, unwittingly or not, pursuing a Trojan horse policy in which entry into the institution will eventually lead to its demise. Instead of helping matters, contractualism would leave them on their own and make it easier for fathers routinely to abandon their children.⁵³

As it happens, this seems to be the principal nonreligious argument advanced in public political debate by activists opposed to the legal recognition of same-sex unions. This is, to me and many others, a deeply counterintuitive argument.⁵⁴ But counterintuitive or not, little if any empirical data support the argument.⁵⁵

individuals are not to be harmed, and the common good is to be promoted.

MARGARET A. FARLEY, *An Ethic for Same-Sex Relations*, in *A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH* 93, 105 (Robert Nugent ed., 1983). Farley then adds that “[t]he Christian community will want and need to add those norms of faithfulness, forgiveness, of patience and hope, which are essential to any relationships between persons in the Church.” *Id.*

52. See *Statement on Marriage and Homosexual Unions*, *supra* note 48, at 259 (discussing homosexuality’s threat to marriage). The argument that *even in the short run* legalizing same-sex unions would have subversive consequences for traditional marriage is difficult to take seriously. See Stephen J. Pope, *The Magisterium’s Arguments against ‘Same-Sex Marriage’: An Ethical Analysis and Critique*, 65 *THEOLOGICAL STUD.* 530, 555 (2004) [hereinafter *The Magisterium’s Arguments*]:

The magisterium argues that support for marriage, and especially for children, requires opposition to the legal recognition of same-sex marriage. There is, however, no convincing evidence showing that currently functioning gay households are causally related to the deterioration of marriage in the wider society. The biggest threat to marriage comes from the high incidence of divorce that has followed the development of the “no fault” divorce laws of the 1970s.

See also Stephen J. Pope, *Same-Sex Marriage: Threat or Aspiration?*, *AMERICA*, Dec. 6, 2004, at 11 [hereinafter *Threat or Aspiration?*].

53. *Threat or Aspiration?*, *supra* note 52, at 559 (citing JUDITH S. WALLERSTEIN & SANDRA BLAKELESS, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* (1995)). Cf. Geoffrey Nunberg, *We the People? (In Order to Form a More Perfect Gay Union)*, *N.Y. TIMES*, Feb. 22, 2004, at 47: “For opponents [of recognizing same-sex unions as marriages], broadening the definition of marriage is like opening an exclusive hotel to package tours, with the result that the traditional clientele will no longer feel like checking in.”

54. See Jonathan Rauch, *Family’s Value: Gay Marriage Is Good for Kids*, *NEW REPUBLIC*, May 30, 2005, at 15; Rosemary Radford Ruether, *Marriage Between Homosexuals Is Good for*

A third nonreligious argument against recognizing same-sex unions has been deployed by British philosopher Roger Scruton. Here is Scruton's argument, as summarized by Roderick Hills:

[O]ne might reasonably believe that men and women have different and complementary sexual "temperaments" such that sexual relationships between members of different sexes will be more psychologically satisfactory than relationships between members of the same sex. Scruton argues that men tend to be more sexually predatory and promiscuous than women; while women seek permanence in their sexual relationships, men tend to seek adventure. Therefore, if men form sexual relationships with other men rather than with women, those relationships will tend to have shorter duration and a greater concentration on physical self-gratification than heterosexual relationships. If one assumes that these characteristics are undesirable, then one might conclude that at least male homosexuality is undesirable.⁵⁶

Marriage, NAT'L CATHOLIC RPTR., Nov. 18, 2005, at 20.

55. Though evidently skeptical of the argument, Catholic theologian Stephen Pope has suggested that "[i]t is possible for people of good faith to differ on this issue. At the very least, further discussion, investigation, and deliberation are in order." *The Magisterium's Arguments*, *supra* note 52, at 562.

For a careful presentation and vigorous rebuttal of the argument, one should read this important paper, published in 2004: William N. Eskridge Jr., Darren R. Spedale & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, ISSUES IN LEGAL SCHOLARSHIP (2004), <http://www.bepress.com/ils/iss5/art4>.

In the 1990s, the opponents of same-sex marriage created a new line of critique The new line, which has been embraced within the White House and the most anti-gay circles of Capitol Hill, is this: "We love gays and lesbians—but as a society we cannot give them things that would undermine traditional marriage, which is the foundation of America's values and culture. Same-sex marriage would do precisely that—undermine marriage and the nuclear family. For that reason, neutral people should be skeptical of complete equality for these people We traditionalists love just about everyone—and look what we've done for homosexuals, we don't put them in jail anymore. But a positive and loving approach requires that we consider the public welfare, especially the welfare of children, our most vulnerable charges. So we cannot go along with the entire 'homosexual agenda,' for it sacrifices a great institution and the public welfare."

Id.

56. Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Nondiscrimination Laws*, 95 MICH. L. REV. 1588, 1610–11 (1997) (citing ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 305–11 (1986)).

Even if we credit his controversial empirical generalizations,⁵⁷ Scruton's argument fails as a rationale for a state's refusal to recognize same-sex unions. First, the argument doesn't explain why a state should refuse to recognize woman-woman unions. Second, the argument doesn't explain why, even if in general man-woman unions might be "more psychologically satisfactory" than man-man unions, a state should refuse to recognize man-man unions if those who form such unions are incapable of forming man-woman unions. Third, the argument doesn't explain why, even if in general man-man sexual relationships are more transitory than man-woman sexual relationships, a state should refuse to recognize the man-man sexual relationships of those who are committed to, and seek public affirmation of, their relationships *as lifelong unions of faithful love*.⁵⁸ There is no reason to think that legal recognition of such relationships would do the relationships harm—and no reason to doubt that legal recognition would do the relationships good.⁵⁹ It is genuinely difficult to discern a

57. *But see* Martha C. Nussbaum, *Platonic Love and Colorado Law: The Relevance of Ancient Greek Norms to Modern Sexual Controversies*, 80 VA. L. REV. 1515, 1601 (1994):

Scruton's argument was always a peculiar one: for why should one believe that all individuals of one sex are more like each other in quality than any of them is like any member of the opposite sex? And would Scruton really wish to generalize his argument, as consistency seems to demand, preferring relationships between partners different in age, and race, and nationality, and religion? Even if he were to do so, Plato's dialogues offer good argument against him. Along with Aristotle's ethical thought, they argue that people who are alike in the goals they share and the aspirations they cherish may be more likely to promote genuine social goods than people who are unlike in character and who do not share any aspirations. In addition, the dialogues show that the kind of "otherness" that is valuable in love relationships—that one's partner is another separate and, to some extent, hidden world; that the body shows only traces of the soul within; and that lovers never can be completely welded together into a single person—is quite different from the "qualitative" otherness of physiology and character. Indeed, the "otherness" of mystery and separateness is actually defended in Scruton's argument, as it is in Plato's, as an erotic good.

58. Andrew Koppelman has argued:

[E]ven in the present regime in which they are not permitted to marry, same-sex couples do not seem to be much less stable than heterosexual couples. [The] data suggests that same-sex couples are not all that different in terms of their capacity to function or to remain stable from heterosexual couples.

Andrew Koppelman, *Three Arguments for Gay Rights*, 95 MICH. L. REV. 1636, 1666 (1997).

59. *See* Andrew Sullivan, *Three's a Crowd*, NEW REPUBLIC, June 17, 1996, at 10, 12:

[M]arriage acts both as an incentive for virtuous behavior—and as a social blessing for the effort. In the past, we have wisely not made nitpicking assessments as to who deserves the right to marry and who does not. We have provided it to anyone prepared to embrace it and hoped for the best For some, it comes easily. For others, its responsibilities and commitments are crippling. But we do not premise the right to marry upon the ability to perform its demands flawlessly. We accept that human beings are variably virtuous, but that, as citizens, they should be given the same rights and responsibilities—period.

plausible nonreligious (secular) rationale for opposing the legal recognition of same-sex unions.⁶⁰

See also David Brooks, *The Power of Marriage*, N.Y. TIMES, Nov. 22, 2003, at A15 (arguing that conservatives should encourage gay marriage because it leads to fidelity and can sanctify love).

60. Even if we accept, for the sake of argument, the Catholic Church's official teaching on sex and procreation, it is difficult to discern a nondemeaning rationale for insisting that *none* of the benefits of law should be extended to same-sex unions. Significantly, some Catholic bishops in the United States have recently expressed a willingness to consider supporting, as a matter of distributive justice, the extension of *some* of the benefits of law to same-sex unions. *See* Editorial, *Bishop Brings Reason to Issue of Gay Benefits*, NAT'L CATHOLIC RPTR., Nov. 7, 2003, at 24:

[Daniel P.] Reilly[, Roman Catholic bishop of Worcester, Massachusetts,] told legislators that the Massachusetts Catholic Conference, made up of the dioceses of Boston, Worcester, Springfield and Fall River, was unequivocally opposed to legislation that would recognize gay "marriage" or "civil unions." But the church is open, he said, to discussing what public benefits should accrue to those in non-traditional relationships "If the goal is to look at individual benefits and determine who should be eligible beyond spouses, then we will join the discussion," said Reilly [Reilly] engaged the issue on the church's terms, saying such benefits are a matter of "distributive justice."

"Some argue that it is unfair to offer only married couples certain socioeconomic benefits," Reilly told [a committee of Massachusetts legislators]. "That is a different question from the meaning of marriage itself. The civil union bill before this committee confuses the two issues, changing the meaning of spouse in order to give global access to all marital benefits to same-sex partners in a civil union. This alters the institution of marriage by expanding whom the law considers to be spouses. Let's not mix the two issues."

Even more recently, the papal nuncio to Spain, Archbishop Manuel Monteiro de Castro, "has surprised public opinion by defending legal same-sex unions as a 'right.'" *See Nuncio Backs "Right" to Gay Unions*, THE TABLET (London), May 15, 2004, at 30:

The nuncio's words took commentators by surprise, as the Spanish bishops officially hold the view that homosexual relationships cannot receive any kind of approval "It is right that other types of relationship are recognized," the nuncio said. He added that those in such unions should have the same rights to social security "as any other citizen." But "let's leave the term 'marriage' for that to which it has always referred," he added.

See also "Sign of the Times," AMERICA, Nov. 15, 2004, at 4, 5:

Bishop George H. Niederauer of Salt Lake City did not endorse the proposed constitutional amendment in Utah, saying that he believed that state law already prohibited same-sex marriages. He said he shared concerns voiced by all three candidates for attorney general about the amendment's stipulation that "no other domestic union may be recognized as a marriage given the same or substantially equal legal effect."

Cf. Jennifer 8. Lee, *Congressman Says Bush Spoke About Options on Gay Rights*, N.Y. TIMES, Feb. 9, 2004, at A15 ("President Bush believes states can use contract law to ensure some of the rights that gay partners are seeking through marriage or civil union, a South Carolina congressman said Sunday."); Brian Lavery, *Ireland: Premier Backs Rights for Gay Couples*, N.Y. TIMES, Nov. 16, 2004, at A6 ("Prime Minister Bertie Ahern said his government might consider giving same-sex couples more rights, which would allow them to benefit from cheaper tax rates and more favorable inheritance laws.").

I expect that within the next generation or two—within the lifetime of our children or our children’s children—the understanding will come to be widely shared, in the world’s liberal democracies, that refusing to recognize same-sex unions, if not morally akin to outlawing interracial unions,⁶¹ is nonetheless bereft of plausible rationale.⁶² The conclusion

61. On the analogy of opposition to gay marriage to opposition to interracial marriage, see Allen G. Breed, *Blacks Split on Analogies to Gay Marriage*, ASSOCIATED PRESS, Mar. 6, 2004; Nicholas D. Kristof, *Marriage: Mix and Match*, N.Y. TIMES, March 3, 2004, at A23 (comparing attempts to pass a constitutional amendment prohibiting same-sex marriage with earlier attempts to prohibit interracial marriage by constitutional amendment); David E. Rosenbaum, *Legal License: Race, Sex, and Forbidden Unions*, N.Y. TIMES, Dec. 14, 2003, § 4, at 4 (“As a political, legal and social issue, same-sex marriage seems to be now where interracial marriage was about 50 years ago.”). Cf. Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255 (2004), <http://ssrn.com/abstract=508022> (analogizing the sexual undertones underlying the opposition to interracial marriage to the opposition of same-sex marriage).

62. Many countries already extend many or all of the benefits of marriage to same-sex unions (which are sometimes called “marriages”): Belgium (which, however, does not permit same-sex couples to adopt children), Canada, Czech Republic, Denmark, Finland, France, Germany, Iceland, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Switzerland, and the United Kingdom. Moreover, the Australian states of New South Wales, Western Australia, and Tasmania and the city of Buenos Aires, Argentina, legally recognize same-sex unions. Wikipedia, Same-Sex Marriage, http://en.wikipedia.org/wiki/Same-Sex_Marriage (last visited Nov.13, 2006).

Where do things stand in the United States? As of September 2005, while only Massachusetts recognizes same-sex “marriage,” California, Connecticut, the District of Columbia, Hawaii, Maine, New Jersey, and Vermont grant persons in same-sex unions a similar legal status to those in a civil marriage by domestic partnership, civil union, or reciprocal beneficiary laws. See *id.* Recently, the Alaska Supreme Court ruled, in a unanimous decision, that under the state constitution public employers that grant spousal benefits to opposite-sex married couples must also grant spousal benefits to same-sex couples, notwithstanding that the state constitution specifically disallows same-sex marriage. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005).

By contrast, “[v]oters in eighteen states have already passed [constitutional] bans [on same-sex marriage]” Benjamin Wittes, *Marital Differences*, ATLANTIC MONTHLY, May 2006, available at <http://www.theatlantic.com/doc/200605/gay-marriage>. The eighteen states are Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, and Utah. Benjamin Wittes argues:

[Because] the ballot initiatives have proven to be a major base-mobilizer for conservatives[,] this year, there will be more. At least six states—Alabama, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin—will certainly hold referenda, and Arizona and Colorado are likely to do so as well. And given the success such measures have enjoyed at the ballot box, they will probably pass with strong majorities.

Id. For a contrasting view, see Will Lester, *Poll: Young Adults Split Over Gay Marriage*, ASSOCIATED PRESS, Nov. 18, 2003.

Younger adults are evenly split over gay marriages, but older Americans are opposed by a 4-1 margin, according to a poll examining attitudes about homosexuality.

The poll, released . . . by the Pew Research Center for the People & the Press, found that . . . [w]hile younger people in general were more apt to approve of gay marriage—

that will come to be widespread is that what really animates refusals to recognize same-sex unions is a demeaning rationale: a rationale that falsely judges homosexual sexual desire to be defective, disordered, pathological.⁶³ Such a rationale, because it is demeaning (false, deficit-attributing), violates the Fourteenth Amendment.

Whether the Supreme Court should so rule, however, is a separate question. A state that wants to defend its refusal to recognize same-sex unions against a Fourteenth Amendment challenge must articulate a plausible (i.e., to the courts) and therefore nondemeaning rationale for its nonrecognition policy. Following Thayer,⁶⁴ the question for each Supreme Court Justice, in responding to that defense, is not whether in his/her judgment the rationale is true; rather, the question is whether in his/her judgment the rationale is plausible: a rationale that, in the Justice's judgment, state legislators can plausibly accept (even if they can also plausibly reject the rationale).

I said that it is genuinely difficult to discern a plausible nonreligious rationale for opposing the legal recognition of same-sex unions. In the United States, however, this matters little as a practical matter, because most Americans self-identify as Christians, and for many Christians, the principal rationale for opposing the legal recognition of same-sex unions is religious: "According to the Bible, which discloses to us the will of God, same-sex unions are contrary to the will of God. Government should not affirm, by extending the benefit of law to, relationships that are contrary to the will of God." In my book *Under God? Religious Faith and Liberal Democracy*, I explained why such an argument is not an illegitimate basis for political decision making in a

those between ages 20 and 30 were about evenly split— . . . among those in their 60s and 70s, opponents outnumbered supporters by more than four to one.

. . . .

The poll of 1,515 adults was taken Oct. 15-19 by the Pew Research Center on behalf of the Pew Forum on Religion and Public Life. The survey has a sampling error of plus or minus 3 percentage points.

Id.

63. Robert N. Bellah, *Foreword* to RICHARD L. SMITH, AIDS, GAYS AND THE AMERICAN CATHOLIC CHURCH xii–xiii (1994).

[A] principled rejection of gay sexuality, whether put forward by the church or any other sector of society, is morally indefensible. It has the same status today as arguments for the inferiority of women. To remain stuck in that position, as the church for the time being seems likely to do, is not only unfortunate: it makes the church collaborate in continuing forms of domination. To put it even more strongly: it makes the church collaborate in sin.

Id.

64. See *supra* notes 10–15 and accompanying text (explaining Thayer's argument for judicial deference to the determination of other branches of government).

liberal democracy—even a liberal democracy that, like the United States, is constitutionally committed to the nonestablishment of religion.⁶⁵ It also explains, however, why Christians, *as Christians*, have good reason to be wary about relying on this biblically-based argument as a ground for opposing the legal recognition of same-sex unions. The interested reader may want to take a look at the relevant portions of *Under God?*⁶⁶ Suffice it to say, for present purposes, that for many of us—including many of us who self-identify as Christian, even as evangelical Christian—a biblically based argument that same-sex unions are contrary to the will of God is simply not credible.⁶⁷

Nonetheless, many citizens of the United States firmly believe that same-sex sexual relationships, including same-sex unions, are contrary to the will of God. Should the Supreme Court reject as implausible a religious rationale that so many Americans—indeed, probably a majority of them—affirm? Should it do so, that is, if neither any provision of the constitutional text nor any well established constitutional law is clearly inconsistent with the rationale?

In 1967, in *Loving v. Virginia*,⁶⁸ the Supreme Court ruled that no state may ban interracial marriages. *Loving* involved Virginia's antimiscegenation law, and no doubt some Virginia citizens believed that interracial marriages were contrary to the will of God. By 1967, however, most Americans—even, probably, most Virginians—rejected that belief. As the Court noted, in the fifteen years before *Loving* reached the Court, fourteen states had repealed their antimiscegenation laws; only sixteen states retained such laws, which were largely unenforced.⁶⁹ Thus, by the time the Court decided *Loving*, forty-four states did not have antimiscegenation laws on their books. In ruling as it did, the Court did not reject a religious rationale that a large number of Americans affirmed. Moreover, even before 1967 it was constitutional bedrock that no policy based on an ideology of White Supremacy is consistent with the Fourteenth Amendment (even if the ideology is religious). What if tomorrow the Court were to rule that the

65. See MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 20–52 (2003).

66. *Id.* at 55–80. Cf. Nicholas D. Kristof, *Lovers Under the Skin*, N.Y. TIMES, Dec. 3, 2003, at A31 (reporting that “[a] 1958 poll found that 96 percent of whites disapproved of marriages between blacks and whites In 1959 a judge justified Virginia’s ban on interracial marriage by declaring that ‘Almighty God . . . did not intend for the races to mix.’”).

67. See, e.g., DAVID G. MEYERS & LETHA DAWSON SCANZONI, *WHAT GOD HAS JOINED TOGETHER? A CHRISTIAN CASE FOR GAY MARRIAGE* 84–104 (2005) (discussing Bible scriptures that address homosexuality).

68. 388 U.S. 1 (1967).

69. *Id.* at 6 n.5.

states must recognize same-sex unions? In so ruling, the Court would be rejecting a religious rationale that a very large number of Americans affirms. Moreover, neither any provision of the constitutional text nor well established constitutional law is clearly inconsistent with the rationale.

Why should these differences matter?⁷⁰ After the Court finally got around to striking down antimiscegenation laws in 1967, there was no outcry for a constitutional amendment to overrule the Court's decision. But if tomorrow the Court were to rule that the states must extend the benefit of law to same-sex unions, this would be the predictable result: a constitutional amendment not merely overruling the Court's decision—not merely handing back to the states their discretion not to recognize same-sex unions—but forbidding states to recognize same-sex unions.⁷¹ Thus, in addition to James Bradley Thayer's powerful argument from democracy, there is an important prudential reason for concluding that the Court, if faced anytime soon with a constitutional challenge to a state's nonrecognition policy, should exercise its power of judicial ultimacy as deferentially as it conscientiously can.⁷² Surely the Court

70. Cf. Wittes, *supra* note 62 (“American federalism is enormously flexible, and varied state approaches to a social issue are unremarkable.”).

71. Cf. John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (the gay rights movement is balancing “how far and how fast the movement can push without provoking a backlash”); Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16 (“gay rights groups say filing suit in Federal Court arguing that the new amendments violate the federal constitution would be treacherous”). For an exchange on the necessity of the Federal Marriage Amendment, see Christopher Wolfe, *Why the Federal Marriage Amendment Is Necessary*, 42 SAN DIEGO L. REV. 895, 921–22 (2005) (“[The Federal Marriage Amendment] is necessary because there are reasonable grounds to protect, promote, and make available to people a genuine institution of marriage—monogamous and heterosexual . . .”), and Michael J. Perry, *Why the Federal Marriage Amendment Is Not Only Not Necessary, But a Bad Idea: A Response to Christopher Wolfe*, 42 SAN DIEGO L. REV. 925, 933 (2005) (“even if you are morally opposed to granting marital status to same-sex couples, you nonetheless have good reason *not* to support the effort to amend the U.S. Constitution”).

72. Consider Richard Posner's position that

[it is not] the business of the courts to buck public opinion that is as strong as the current tide of public opinion running against gay marriage Because the basis in conventional legal materials for creating a constitutional right . . . to gay marriage is extremely thin, opponents cannot be persuaded that the creation of [this right] by courts is anything other than a political act by a tiny, unelected, unrepresentative, elite committee of lawyers.

Richard Posner, *Gay Marriage—Posner's Response to Comments*, The Becker-Posner Blog, July 24, 2005, <http://becker-posner-blog.com> [hereinafter *Gay Marriage—Posner's Response to Comments*].

To avoid misunderstanding, it bears emphasis that nothing I have said here entails that a *state* supreme court should not interpret the antidiscrimination provision of the state constitution to require the state to recognize same-sex unions. Posner finds the “argument for recognizing homosexual marriage quite persuasive,” but he nonetheless thinks that the Supreme Court should

can conscientiously decline to reject as implausible a religious rationale that so many Americans affirm, if neither any provision of the constitutional text nor well established constitutional law is clearly inconsistent with the rationale. Listen, in that regard, to Richard Posner:

I think the main basis for the opposition [to gay marriage] is religious and . . . that such opposition is different from opposition based on a scientific error. Religion is not scientific, but there is a difference between a belief that is demonstrably based on error and a belief based

not require states to extend the benefit of law to same-sex unions: Such “a radical social policy . . . is deeply offensive to the vast majority of its citizens [For the Court to do so] would be an unprecedented example of judicial immodesty.” Richard A. Posner, *Should There Be Homosexual Marriage, And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1584–85 (1997) [hereinafter Posner, *Should There Be Homosexual Marriage?*]. Posner’s preference is for “[letting] a state legislature or activist (but elected, and hence democratically responsive) state court adopt homosexual marriage as a policy in one state, and let the rest of the country learn from the results of its experiment. That is the democratic way” *Id.* at 1585–86.

Because of two state court rulings, one by the Vermont Supreme Court in 1999 and the other by the Supreme Judicial Court of Massachusetts in 2003, Vermont and Massachusetts now both recognize same-sex unions. In Vermont, the recognized unions are called “civil unions;” in Massachusetts, “marriages.” The Vermont Supreme Court ruled that the right “to the common benefit and protection of the law guaranteed by . . . the Vermont Constitution” requires the state legislature to extend the benefit of law to same-sex unions. *Baker v. Vermont*, 744 A.2d 864, 869–70 (Vt. 1999). The court concluded its ruling with these words: “The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.” *Id.* at 889. The Massachusetts court introduced its ruling with these words:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens [The Commonwealth] has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

Goodridge v. [Mass.] Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

In 2005, the legislature of another New England state—Connecticut—became the first to extend the benefit of law to same-sex unions without being told by its state judiciary to do so. Cara Rubinsky, *Civil Union Law Takes Effect in Connecticut*, ASSOCIATED PRESS, Oct. 1, 2005. Moreover, California, the District of Columbia, Hawaii, Maine, and New Jersey “grant persons in same-sex unions a similar legal status to those in a civil marriage by domestic partnership, civil union or reciprocal beneficiary laws.” See Wikipedia, Same-sex Marriage, http://en.wikipedia.org/wiki/Same-sex_marriage (last visited Nov. 13, 2006). Recently, the Alaska Supreme Court ruled, in a unanimous decision, that under the state constitution public employers that grant spousal benefits to opposite-sex married couples must also grant spousal benefits to same-sex couples, even though the state constitution specifically disallows same-sex marriage. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005).

on a system of thought that science neither supports nor refutes In a democratic society, one has to respect religious beliefs; and no reasonable theory of the meaning of the religion clauses of the First Amendment permits one to argue that religious belief cannot be permitted to influence secular law.⁷³

IV. CONCLUSION

In this essay, I have pursued the implications of Thayerian deference for a constitutional controversy at the epicenter of the American culture wars. Assume that you agree with me that state refusals to recognize same-sex unions violate the Fourteenth Amendment. As I just explained, it does not follow that we should want the Court, *just yet*, to so rule.⁷⁴

It may appear strange for one who concludes that a state policy is unconstitutional to oppose the Court's ruling that the policy is unconstitutional. But, of course, appearances can be deceiving. I have explained elsewhere why it does not make sense for the supreme court of a country to accept the Thayerian plea for judicial deference if, as in Canada, the court has only the power of judicial penultimate; indeed, it makes sense for such a court to *reject* the Thayerian plea.⁷⁵ But, as argued here, it may make sense, all things considered, for the supreme court of a country to accept the Thayerian plea if, as in the United States, the court has the power of judicial ultimacy.

A strong case can be made that the United States Supreme Court should have, not the power of judicial ultimacy, but only the power of judicial penultimate.⁷⁶ For better or worse, however, the Court has the power of judicial ultimacy. *Given* that the Court has this power, what role should the Court play in protecting constitutionally entrenched human rights? In his classic work, *The Least Dangerous Branch*, Alexander Bickel wrote:

73. Posner, *Gay Marriage—Posner's Response to Comments*, *supra* note 72.

74. Cf. Posner, *Should There Be Homosexual Marriage*, *supra* note 72, at 1586 ("When the Supreme Court moved against public school segregation, it was bucking a regional majority but a national minority (white southerners). When it outlawed the laws forbidding racially mixed marriages, only a minority of states had such laws on their books."). More recently, Posner wrote that "*Brown [v. Board of Education, 347 U.S. 483 (1954)]* would have been unthinkable—and in my pragmatic view unsound—had the case arisen in 1900 rather than the 1950s, because in 1900 the vast majority of the American population would have considered compelled racial integration of public schools improper." Posner, *Gay Marriage—Posner's Response to Comments*, *supra* note 72.

75. See PERRY, *supra* note 4.

76. *Id.*

The search must be for a function . . . which differs from the legislative and executive functions; . . . which can be so exercised as to be acceptable in a society that generally shares Judge [Learned] Hand's satisfaction in a 'sense of common venture'; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.⁷⁷

I am inclined to think that in exercising its power of judicial ultimacy in a Thayerian fashion, the Court would be playing its proper role—it would be serving its proper function—in protecting constitutionally entrenched human rights.

However, whether Thayerian deference is appealing *all things considered* depends in part on what the implications of Thayerian deference turn out to be for various constitutional doctrines. Here I have pursued the implications of Thayerian deference for the constitutional controversy over same-sex unions; elsewhere, I have pursued the implications of Thayerian deference for the constitutional controversies over capital punishment and abortions.⁷⁸ Still, there are many other questions to be answered: Can Thayerian deference accommodate the Supreme Court's most important free speech decisions? Its most important antidiscrimination decisions—including, of course, *Brown v. Board of Education*?⁷⁹ Its most important criminal procedure decisions? Indeed, perhaps we should not generalize across every constitutionally entrenched human right; perhaps there are reasons for thinking that Thayerian deference is appropriate in cases in which certain human rights are at issue but inappropriate in cases in which certain other human rights are at issue—the right to freedom of speech, for example, or the right not to be discriminated against on the basis of a demeaning view about an aspect of one's particularity.⁸⁰ In any event, the implications of Thayerian deference surely bear on our estimate of the all-things-considered appeal of Thayerian deference.⁸¹

77. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 24 (1962).

78. See PERRY, *supra* note 4.

79. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Cf. CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 33 (1981) (describing *Brown* as "the decision that opened our era of judicial activity").

80. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

81. As Gerard Lynch has written, "to most lawyers of my generation, *Brown* is a touchstone for constitutional theory fully as powerful as *Lochner* was for a previous generation." Gerard E. Lynch, *Book Review*, 63 *CORNELL L. REV.* 1091, 1099 n.32 (1978). Mark Tushnet has said much the same thing: "For a generation, one criterion for an acceptable constitutional theory has been whether that theory explains why [*Brown*] . . . was correct." Mark V. Tushnet, *Reflections on the*

Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. & MARY L. REV. 997, 999 n.4 (1986). See also GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 105 (1992), (“The acid test of originalism, as indeed of any theory of constitutional adjudication, is its capacity to justify what is now almost universally regarded as the Supreme Court’s finest hour: its decision in *Brown v. Board of Education*”) But see John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1463 n.295 (1992) (“I do not think that my theory of the 14th Amendment stands or falls with [its ability to accommodate the Court’s decision in *Brown*]. Man is not the measure of all things, as Socrates replied to the Sophists, and neither is *Brown v. Board of Education* An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.”).