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Linda McClain

Boston University School of Law

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Linda C. McClain

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RED VERSUS BLUE (AND PURPLE) STATES AND THE SAME-SEX MARRIAGE DEBATE: FROM VALUES POLARIZATION TO COMMON GROUND?

Linda C. McClain*

I. INTRODUCTION: FRAMING THE “VALUES” QUESTION

What is the role of courts in circumstances of “values polarization”? This question is one of several subsumed under this symposium’s broad topic: “Red State v. Blue State: The Judicial Role in the Era of Partisanship.” As a threshold matter, framing the issue in terms of “values polarization” invites two questions: Why frame the problem this way? What does this framing reveal about how this problem resembles or differs from other problems concerning conflicts over values? Consider several alternative ways to ask about values and the role of courts, some of which may sound familiar: What is the judicial role in circumstances of moral disagreement? Of moral conflict? Or, of “conscientious,” “fundamental,” or perhaps “intractable” moral conflict? Another framing, inspired by liberal political theory, would ask about the role in courts given value pluralism (a term that symposium contributor William Galston has used) or (in the familiar formulation of John Rawls’ political liberalism) the “fact of reasonable pluralism”?¹

Still another way to frame the question might be to interrogate the extent to which political majorities have a right “to establish or protect the moral premises of a community[.]”² How far, for example, should majorities “prevail in determining ‘what kind of a people we are,’” and if so, “is a simple majority sufficient,” or must there be “broader consensus”?³ And what role should courts play in protecting minorities? Legal scholars, political theorists, and commentators debated such questions two decades ago after the United States Supreme Court’s controversial decision, *Bowers v. Hardwick*,⁴ in which it upheld Georgia’s sodomy law as enforceable against same-sex sodomy.⁵ In 2003, the

* Professor of Law and Paul M. Siskind Research Scholar, Boston University School of Law. I presented an earlier draft of this article at the Symposium, *Red State v. Blue State: The Judicial Role in An Era of Partisanship*, September 12, 2008, at the University of Missouri-Kansas City School of Law. I thank June Carbone for inviting me and am grateful to symposium participants and to my colleague Ken Simons for instructive comments. This article benefited from helpful conversations with Naomi Cahn, June Carbone, and Jim Fleming. Thanks also to Boston University for a summer research grant that supported this article and to Jennifer Dixon, Claire Superfine, and Stefanie Weigmann, Head of Reference at the Pappas Law Library, for research assistance.

¹ WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); JOHN RAWLS, POLITICAL LIBERALISM 36 (1993).

² Sanford Kadish, *Foreword*, 77 CAL. L. REV. 475, 477 (1989) (introducing Symposium, *Law, Community, and Moral Reasoning*).

³ *Id.*

⁴ 478 U.S. 186 (1986).

⁵ See Symposium, *Law, Community, and Moral Reasoning*, 77 CAL. L. REV. 475 (1989). In that symposium, for example, Michael Sandel faulted the majority and the dissent for failing to make substantive moral arguments. Michael A. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989). In other work, Jim Fleming and I have

Court, in *Lawrence v. Texas*,⁶ overruled *Bowers* and its language about liberty presuming “an autonomy of self”⁷ in certain intimate decision making, which was violated by using criminal law as a tool to enforce moral judgments about consensual, private, adult sexual activity, sparked a fresh round of commentary about law and morality – as well as political activism around the issue of same-sex marriage.⁸ *Lawrence* drew upon the Court’s much-discussed statements in *Planned Parenthood v. Casey* about constitutional liberty and personhood entailing a right of autonomous decision-making in matters of procreation, marriage, and parenthood.⁹ In explaining the liberty of a pregnant woman to decide whether to continue or terminate her pregnancy, *Casey* affirmed but also departed from *Roe v. Wade*,¹⁰ the landmark and still controversial case in which the Court struck down Texas’ (and, by implication, other states’) criminal law prohibiting abortion. Countless pages continue to be devoted to debating not only the morality of abortion, but also whether “constitutionalizing” women’s rights was a proper or prudent exercise of federal judicial power, or instead whether this judicial resolution intruded on a proper democratic resolution and contributed to abortion’s symbolic place in an ongoing cultural war.¹¹

How does the contemporary inquiry about courts and “values polarization” differ from these alternative formulations and these earlier debates? First, by definition, “polarization” connotes “a division into two opposites,” a “concentration about opposing extremes of groups or interests formerly ranged

addressed Sandel’s critique as well as Cass Sunstein’s contrasting call for judicial minimalism. James E. Fleming and Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509 (1997); see also JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 141-71 (2006) (further critiquing Sandel).

⁶ 539 U.S. 558 (2003).

⁷ *Id.* at 562.

⁸ For examples of commentary on *Lawrence*, see Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Marc Spindelman, *Foreward*, 65 OHIO ST. L.J. 1057 (2004) (introducing Symposium, *Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas*). Both the majority opinion in *Lawrence* and Justice Scalia’s dissent, warning that judicially-imposed same-sex marriage followed from that opinion, featured in – perhaps even “ignited” – efforts to “protect” marriage by passing “defense of marriage laws” and a federal marriage amendment. See Michael Klarman, *Brown and Lawrence (and Goodridge)*, 104 U. Mich. L. Rev. 431 (2005). In other work, I have elaborated an account of liberal toleration and discussed both abortion and homosexuality. See Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: From “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19 (1998) [hereinafter *Toleration*]; LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006) [hereinafter *PLACE OF FAMILIES*].

⁹ *Lawrence*, 539 U.S. at 573-74 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

¹⁰ 411 U.S. 113 (1973).

¹¹ Cass Sunstein, for example, has called *Roe* a “maximalist” decision and argued that it might have been better if the Court issued a more minimalist decision, striking down certain restrictions, but letting state legislatures deliberate about the abortion regulation issue. CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 54-57 (1999). See also MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

on a continuum.”¹² Values polarization, then, as political commentary and political science elaborate, connotes a move away from a continuum toward a clustering around two extremes.¹³ Since the 2004 presidential election, the vivid dichotomy, “red states/blue states,” has conjured this polarization. In the recent presidential primary season, television commentators treated viewers to an array of blue, red, and even pink hues to demarcate how states – and even regions within states – divided votes among the various Democratic and Republican candidates.

Terms like “value pluralism” or “conscientious moral disagreement” may not, it seems, capture the degree of disagreement implicit in “values polarization.” In his recent book, *Is Democracy Possible Here?*, legal philosopher Ronald Dworkin notes the use of red and blue color maps by political commentators to signal a “deep, schismatic rift in the nation as a whole: a division between incompatible all-embracing cultures.”¹⁴ He starkly frames the problem as an abandonment of any effort to find common ground or shared terms of political argument:

American politics are in an appalling state. We disagree, fiercely, about almost everything. We disagree about terror and security, social justice, religion in politics, who is fit to be a judge, and what democracy is. These are not civil disagreements: each side has no respect for the other. We are no longer partners in self-government; our politics are rather a form of war.¹⁵

Dworkin resists, not surprisingly, the conclusion that common ground and principles are not possible.¹⁶ He proposes finding “shared principles of sufficient substance to make a national political debate possible and profitable” to find “common ground that makes genuine argument among people of mutual respect possible and healing.”¹⁷ His book flags an evident problem requiring solution: an apparent values polarization – a clash of cultures – with a detrimental impact on public life.

A second apparent difference lies in the *spatial* conceptualization of the problem. The issue is not simply the abstract proposition that reasonable people may hold different moral values. Rather, the premise is that the states are divided based on their identification with different values. People are “sorting”

¹² WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 909 (1987).

¹³ William Galston addresses this in his article for this symposium, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307 (2008). See also PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED (2004) available at <http://people-press.org/reports/pdf/196.pdf>. Compare MORRIS P. FIORINA ET AL., CULTURE WAR? THE MYTH OF A POLARIZED AMERICA (2004), with Alan Abramowitz & Kyle Saunders, *Why Can’t We All Just Get Along? The Reality of a Polarized America*, 3 THE FORUM 1 (2005), available at <http://www.bepress.com/forum/vol3/iss2/art1> (debate in the literature about whether there is polarization).

¹⁴ RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 2 (2006).

¹⁵ *Id.* at 1.

¹⁶ See *id.* at 6-7.

¹⁷ *Id.* at 5, 6.

themselves, both among and even within states, based on their values preferences.¹⁸ Moreover, in contrast to earlier debates over the proper role of the U.S. Supreme Court and the scope of federal constitutional rights, today's battles also focus on the role of state courts, state laws, and the interpretation of state constitutions (as is evident in the keen attention paid to decisions about same-sex marriage).

A third distinction is that earlier debates over courts and moral disagreement often centered around the limits to a political majority's use of the criminal law, while today's controversies dividing "red" and "blue" states and voters extend to a broad range of law and policy issues, from the War on Terror to teaching "intelligent design" in public schools to defining parenthood and challenging restrictions on who may marry. Undeniably, there is continuity: abortion and homosexuality, at the heart of many of the older debates, continue to be "wedge issues" – perhaps the most divisive issues – in today's values polarization.¹⁹ At the same time, the change in the landscape for the basic civil rights of gay men and lesbians from 1986 (when *Hardwick* was decided) to 2008, when, first, the California Supreme Court, one of the most prestigious state courts, in *In re Marriage Cases*,²⁰ and, then – since this symposium took place – Connecticut's high court²¹ joined Massachusetts²² in ruling that state constitutional law required that civil marriage be opened to same-sex couples, is stunning. Those rulings were paved in part by the Supreme Court's striking down of *Hardwick* in *Lawrence v. Texas*, even as they demonstrated the independent vitality of state constitutions as guarantors of individual rights. While *Lawrence* remains controversial to those who would support using the criminal law to shore up a norm of marital heterosexuality, the bigger issues today concern access by gay men and lesbians to the institution of civil marriage – or to alternative legal statuses, such as civil unions and domestic partnerships – and to the institution of parenthood. In short, as the flurry of state ballot initiatives concerning marriage, parenthood, and abortion in the November 2008 election (including Proposition 8, which blunted the California high court's ruling) confirm, one battleground is family law.²³

¹⁸ Galston, *supra* note 13, at 316-18.

¹⁹ DWORKIN, *supra* note 14, at 78-79, 86-89; Naomi Cahn & June Carbone, *Red Families v. Blue Families* 29 (George Wash. Univ. Law Sch., Pub. Law & Legal Theory Working Paper No. 343, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008544.

²⁰ *In re Marriage Cases*, 183 P.3d 385 (Cal. 2008).

²¹ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

²² *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

²³ California voters approved Proposition 8, which amended California's constitution to define marriage as the union between one man and one woman – a definition previously approved by voters as a statutory matter in Proposition 22. Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Prop 8*, WALL ST. J., Nov. 5, 2008, available at <http://online.wsj.com/article/SB122586056759900673.html>. Several legal challenges to the constitutionality of Proposition 8 are pending before the California Supreme Court. Ashley Surdin, *Legality of Same-Sex Marriage Ban Challenged*, WASH. POST, Nov. 11, 2008, at A2. In other initiatives, Arizona and Florida voters passed bans on same-sex marriage and Arkansans passed a

If, as Dworkin suggests, Americans disagree fiercely about everything, then that disagreement, as June Carbone, an architect of this symposium, and her co-author Naomi Cahn suggest, is especially fierce about family issues. Family issues – “moral values” issues – have been “particularly vulnerable” to the partisan tactics that foment values polarization because “the divisions over family values rest on genuine and deep-seated cultural anxieties.”²⁴ Cahn and Carbone use the evocative slogan, “red families versus blue families,” to capture this basic division over family values. They offer some intriguing hypotheses: “‘blue families’ and ‘red families’ are living different lives, with different moral imperatives.”²⁵ What’s more, red states and blue states have “different family law regimes” that “rest on different paradigms” about the proper regulation of sexuality, marriage, and reproduction.²⁶ Abortion and homosexuality (and the related question of whether same-sex couples should be allowed to marry) remain the two most visible – and politically divisive – in this cluster of family values issues. Other contested issues include governmental promotion of marriage, control of teen sexuality (and the best form of sex education), the law of divorce, formal versus functional definitions of family, and gender roles in the family.²⁷

Cahn and Carbone also contend that legal scholars put a “disproportionate emphasis on the federal courts and the constitutional order” when they examine battles over “moral values.”²⁸ This obscures the extent to which these struggles are over divergent views of the moral terms of family life and, in turn, family law, as well as the constructive role that state court judges may play in these struggles.²⁹ This contention by Cahn and Carbone makes for an apt contrast with Dworkin’s project. For Dworkin seeks to move beyond red-blue polarization by putting forth shared principles of personal and political morality that may guide a *national* political discussion.³⁰ In charting a path beyond values polarization, Cahn and Carbone stress the virtues of federalism and of different states articulating – through family law – different values.³¹ Dworkin emphasizes federal constitutional law and does not consider the import of his proposed shared principles for state family law, while Cahn and Carbone self-consciously put constitutional law to the side. These contrasting approaches suggest the challenge of identifying common ground – whether in the form of principles or values – or of finding strategies to cope with apparently conflicting (or even

measure barring unmarried persons from adopting children. South Dakota voters rejected a restrictive abortion law. Jessie McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Jan. 16, 2008, at A1.

²⁴ Cahn & Carbone, *supra* note 19, at 58.

²⁵ Cahn & Carbone, *supra* note 19, at 1.

²⁶ Cahn & Carbone, *supra* note 19, at 1.

²⁷ Cahn & Carbone, *supra* note 19, at 1.

²⁸ June Carbone & Naomi Cahn, *Judging Families*, 77 UMKC LAW REVIEW 267, 271 (2008).

²⁹ *Id.* at 267-70.

³⁰ DWORKIN, *supra* note 14, at 6.

³¹ Carbone & Cahn, *supra* note 28, at 303-04.

incommensurable) values that play out in legal struggles over intimate and family life and family law.³²

In this article, I will compare Dworkin's and Cahn and Carbone's interpretations of the values polarization problem. Considering these two interpretive projects in tandem helps to illuminate the merits and limitations of each and bring out different aspects of the challenge posed by the question of the judicial role in an era of values polarization. As a crucible through which to test these two interpretive projects and to examine the question of the judicial role, I will discuss *In re Marriage Cases*, in which the Supreme Court of California ruled that both the privacy and equal protection guarantees of its constitution require that civil marriage be opened up to include same-sex couples.³³ As the subsequent success of Proposition 8 at the polls – blunting the Court's ruling – and the current legal challenges to Proposition 8 before that same Court indicate, California also features an interesting interplay among institutional actors: the legislature, "the people" (through ballot initiatives), the executive (the governor), and the state and federal courts.³⁴ Moreover, since California's high court consistently ranks, in most studies,³⁵ as the best or one of the best high courts, its judicial methods in addressing a "hot button" issue may be of particular interest. The pathways followed by California's neighbors, Oregon and Washington, toward expansive domestic partnership laws are also instructive.

In its epilogue, this article asks whether the November 2008 election of President Barack Obama, who resisted the red America-blue America dichotomy and argued for a return to "values we hold in common as Americans,"³⁶ signals the beginning of the end of red-blue values polarization even in the fraught area of family life and family values. It concludes by noting the inevitable relevance of the consideration of values in developing and adjudicating family law.

II. THE RED AND THE BLUE: OF STATES, COMMUNITIES, FAMILIES, AND FAMILY LAW

In this section, I will explicate and critically evaluate Dworkin and Cahn and Carbone's contrasting interpretive projects. Dworkin interprets the red state/blue state divide on abortion, same-sex marriage, and other contentious

³² Drawing on Dworkin's earlier work on principles, symposium contributor Vivian Hamilton argues that family law reflects two foundational principles, Biblical traditionalism and liberal individualism, but that these are in an unproductive tension with each other and require revisiting. See Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31 (2006).

³³ *In re Marriage Cases*, 183 P.3d 385, 451 (Cal. 2008).

³⁴ On the success of Prop. 8, see Audi et al., *supra* note 23. The California Supreme Court will hear oral arguments in the legal challenge to Proposition 8 on March 5, 2009. See Equality California, <http://www.eqca.org> (last visited Feb. 6, 2009).

³⁵ Stephen J. Choi et al., *Which States Have the Best (and Worst) High Courts?* 7 (Univ. of Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 405 (2d Series), 2008), available at <http://www.law.uchicago.edu/files/405.pdf>.

³⁶ Barack Obama, Speech in Canton, Ohio (Oct. 27, 2008) available at <http://www.nytimes.com/2008/10/27/us/politics/27text-obama.html>.

issues as resting on two contrasting models of the relationship between religion and politics, and of liberty, community, and democracy. His strategy for showing how principled argument may be possible despite clashing views is to identify shared principles about human dignity and personal responsibility. He offers concrete steps to improve democratic deliberation, but also affirms the role of courts in protecting minorities and these dignitary principles, making genuine democracy possible.

Cahn and Carbone's interpretive framework focuses on two contrasting family law regimes, which shape the lives of red and blue families. Red states emphasize a "more traditional family system that celebrates marriage as the institution ordained to promote the unity of sex, procreation and childrearing."³⁷ Blue states "have moved toward a "new family model," which they term "the new middle class morality": it involves "less control of sexuality, celebrates more egalitarian gender roles, and promotes financial independence and emotional maturity as the sine qua non of responsible parenthood."³⁸ In this symposium, Cahn and Carbone offer directives about how, "at a time when different parts of the country are experiencing cultural change at different speeds," courts can play a mediating role in values conflicts and "solidify changing cultural understandings."³⁹

A. Dworkin: Human Dignity as a Shared Principle and Basis for Political Argument

Dworkin's aim in *Is Democracy Possible Here?* is to show that enough Americans on both sides of the "supposedly unbridgeable divide" between red and blue share two principles about "the value and the central responsibilities of a human life" that a national political debate is both "possible and profitable."⁴⁰ Those two "abstract, indeed philosophical, principles"⁴¹ involve dimensions of human dignity. The first is "the principle of intrinsic value": "each human life has a special kind of objective value," such that "once a human life has begun, it matters how it goes. It is good when that life succeeds and its potential is realized and bad when it fails and its potential is wasted."⁴² By "objective," Dworkin means that it matters – or should matter – to everyone whether a life succeeds or is wasted, just as "we should all regret an injustice, wherever it occurs, as something bad in itself."⁴³

³⁷ Cahn & Carbone, *supra* note 19, at 2.

³⁸ Cahn & Carbone, *supra* note 19, at 2.

³⁹ Carbone & Cahn, *supra* note 28 at 3.

⁴⁰ DWORKIN, *supra* note 14, at 6-7.

⁴¹ DWORKIN, *supra* note 14, at 6.

⁴² DWORKIN, *supra* note 14, at 9.

⁴³ DWORKIN, *supra* note 14, at 10. Dworkin elaborates on the idea of intrinsic value and the sanctity of life as one such value in his attempt to explain – and find resolution of – the abortion debate. See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (Vintage Books 1993).

“The second principle – the principle of personal responsibility – holds that each person has a special responsibility for realizing the success of his own life”⁴⁴ This “personal responsibility for the governance” of one’s life includes making and executing “ultimate decisions about what life would be a good one to lead.”⁴⁵ This second principle draws a line between coercion and manipulation, which are impermissible, and various permissible – indeed, inevitable – forms of influence.⁴⁶ The latter include taking the advice of friends, the impact of “the culture in which we all live,” or deferring to the judgments of a particular religious text or religious (or secular) leader.⁴⁷ Dworkin distinguishes these influences from the subordination that the second principle condemns:

We may not subordinate ourselves to the will of other human beings in making those decisions; we must not accept the right of anyone else to force us to conform to a view of success that but for that coercion we would not choose. We must be careful to distinguish subordination so defined from a variety of ways in which others may influence us that do not involve subordination and that this principle of dignity therefore does not condemn

But granting government or any other group the authority to require our adherence to a particular scheme of values on pain of punishment, or to dictate marriage partners or professions or occupations to us, would indeed mean subordination.⁴⁸

If Dworkin succeeds in persuading his readers that most Americans (or at least a critical mass of them) share these two principles – that they are the “common property of Americans,” his second substantive project is to show how these principles bear on the host of politically divisive issues.⁴⁹ The set of answers he derives are “a very deep shade of blue.”⁵⁰ They constitute an intended positive program, “firmly based” on “common ground among Americans,” for what liberalism “means and requires now.”⁵¹ Dworkin, for example, supports a right of same-sex couples to marry⁵² and a woman’s right to choose abortion,⁵³ sharply criticizes the disregarding of civil liberties and human

⁴⁴ DWORKIN, *supra* note 14, at 10.

⁴⁵ DWORKIN, *supra* note 14, at 17.

⁴⁶ DWORKIN, *supra* note 14, at 17.

⁴⁷ DWORKIN, *supra* note 14, at 10, 17.

⁴⁸ DWORKIN, *supra* note 14, at 17-18. I have elsewhere discussed the distinction between certain forms of persuasion and compulsion as consistent with an anti-compulsion rationale for toleration. See McClain, *Toleration*, *supra* note 8.

⁴⁹ DWORKIN, *supra* note 14, at 7.

⁵⁰ DWORKIN, *supra* note 14, at 7.

⁵¹ DWORKIN, *supra* note 14, at 7.

⁵² DWORKIN, *supra* note 14, at 87-89.

⁵³ DWORKIN, *supra* note 14, at 79.

rights in Bush's War on Terror,⁵⁴ and rejects teaching intelligent design as science.⁵⁵

Dworkin interprets the clash over “the fiercely galvanizing issues” of abortion and gay marriage as resting on “[t]he clash . . . over the role that religion should play in politics, religion, and public life.”⁵⁶ Americans, he argues, “agree on one crucially important principle: our government must be tolerant of all peaceful religious faiths and also of people of no faith.”⁵⁷ But they disagree over the “base” from which such tolerance should spring: should America be a religious nation tolerant of nonbelief or a secular nation that tolerates religion?⁵⁸ This disagreement turns on two contrary principles of political morality. If America is a tolerant religious nation, this means that it may not establish any one discrete faith as the official state religion, but it may “openly acknowledge and support, as official state policy, religion as such; it declares religion to be an important positive force in making people and society better.”⁵⁹ Such a nation “will accept only one reason for curtailing its rhetorical and financial support for religion – protecting the freedom of dissenters and nonbelievers”; it may declare “that nonbelievers are deeply mistaken.”⁶⁰ A tolerant secular society, by contrast, “is collectively neutral on the subject of whether there is a god or gods or which religion is best, if any is.”⁶¹ Like a religious nation, it must be “permissive” about religion and not make peaceful exercise of religion illegal.⁶² It would not discriminate against religious groups as providers of public services, but it would be “wary” of governmental programs that “particularly benefitted religious organizations.”⁶³

Dworkin concedes that there is support in history as well as among lawmakers and jurists for both models (particularly, the tolerant religious nation model), but argues “the principle of personal responsibility requires a tolerant secular state and rules out a tolerant religious state.”⁶⁴ Here, Dworkin elaborates two contrasting models of the structure of liberty that flow from a tolerant religious and a tolerant secular view. His starting definition is that “liberty is the right to do what you want with the resources that are rightfully yours.”⁶⁵ By this, he means to acknowledge that government may restrict freedom for plausible *distributive* reasons, such as laws prohibiting damage to property or tax laws.⁶⁶

⁵⁴ DWORKIN, *supra* note 14, at 41-42.

⁵⁵ DWORKIN, *supra* note 14, at 80-84.

⁵⁶ DWORKIN, *supra* note 14, at 54-55.

⁵⁷ DWORKIN, *supra* note 14, at 56.

⁵⁸ DWORKIN, *supra* note 14, at 56.

⁵⁹ DWORKIN, *supra* note 14, at 58.

⁶⁰ DWORKIN, *supra* note 14, at 58.

⁶¹ DWORKIN, *supra* note 14, at 58.

⁶² DWORKIN, *supra* note 14, at 58.

⁶³ DWORKIN, *supra* note 14, at 59.

⁶⁴ DWORKIN, *supra* note 14, at 66.

⁶⁵ DWORKIN, *supra* note 14, at 69.

⁶⁶ DWORKIN, *supra* note 14, at 69-70.

People have “a right to choose and live their values only within the space allowed by proper distributional regulations and constraints of these different kinds.”⁶⁷

By contrast to distributive constraints, government should not restrict liberty for what he calls a *personally judgmental* justification, which “appeals to or presupposes a theory about what kinds of lives are intrinsically good or bad for the people who lead those lives.”⁶⁸ Dworkin contrasts *impersonally judgmental* justifications “that appeal to the intrinsic value of some impersonal object or state of affairs rather than to the intrinsic value of certain kinds of lives.”⁶⁹ Environmental regulation that limits the freedom of timber companies to protect great forests, for example, “appeals to the impersonally judgmental justification that such forests are natural treasures;” another example is zoning laws whose purpose is to protect “architectural or historic integrity.”⁷⁰ The distinctions between impersonally and personally judgmental justifications, Dworkin contends, is “crucial to liberty”: “We must distinguish between laws that violate dignity by usurping an individual’s responsibility for his own ethical values and those that exercise a community’s essential collective responsibility to identify and protect nonethical values.”⁷¹

How does this distinction apply to legal regulations concerning homosexuality and to access to civil marriage? “Any justification for making sodomy illegal that cites the immorality or baseness of that sexual practice is personally judgmental.”⁷² Here, Dworkin favorably quotes the “personhood” language articulated in *Planned Parenthood v. Casey* and repeated in *Lawrence v. Texas*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life;” beliefs about such matters – including matters of family and human relationships – “define the attributes of personhood.”⁷³

The right of gay men and lesbians to have access to the institution of marriage poses distributional as well as liberty questions. Since marriage is a “social resource of irreplaceable value,” can unequal access to it be justified?⁷⁴ Dworkin argues no: opponents have attempted to offer various nonjudgmental justifications in litigation over this issue, but “have had to resort to thoroughly speculative hypotheses.”⁷⁵ Specifically, the argument made in dissent in *Goodridge* that heterosexual marriage is a better environment for raising children is not supported by the evidence, “reflects a judgmental religious perspective,” and is “belied by the practice, in Massachusetts as well as other states, of

⁶⁷ DWORKIN, *supra* note 14, at 70.

⁶⁸ DWORKIN, *supra* note 14, at 70.

⁶⁹ DWORKIN, *supra* note 14, at 71.

⁷⁰ DWORKIN, *supra* note 14, at 71.

⁷¹ DWORKIN, *supra* note 14, at 71.

⁷² DWORKIN, *supra* note 14, at 70-71.

⁷³ DWORKIN, *supra* note 14, at 72.

⁷⁴ DWORKIN, *supra* note 14, at 86.

⁷⁵ DWORKIN, *supra* note 14, at 86-89.

permitting unmarried same-sex couples to adopt children.”⁷⁶ Dworkin suggests that “the case against gay marriage, put most sympathetically, comes to this”:

[T]he institution of marriage is . . . a unique and immensely valuable cultural resource. Its meaning and hence its value have accreted organically over centuries, and the assumption that marriage is the union of a man and a woman is so embedded in its meaning that it would become a different institution, and hence a less valuable institution, were that assumption now challenged and lost. Just as we might struggle to maintain the meaning and value of any other great natural or artistic resource, so we should struggle to retain this uniquely valuable cultural resource.⁷⁷

Versions of this argument, in fact, have been made both in public debates about this issue and in litigation: to redefine marriage would alter the social meaning of marriage in ways that are harmful to the institution and to society.⁷⁸

Dworkin offers an interesting rejoinder, appealing to the personal responsibility that liberty protects: substitute the institution of religion for “marriage” in the above argument.⁷⁹ You will see that, over time, religion’s meaning has changed through “organic processes,” such as the development of new religions as well as “new threats to established doctrine and practice” generated by secular theories of science, politics, or social justice.⁸⁰ Moreover, “[p]eople’s sense of what religion is” has also been altered by many different social movements in the broader society (such as feminism), and by “a thousand other shifts in religious impulse that began in individual decision and ended in seismic changes in what religion can and does mean.”⁸¹ American religious conservatives, he argues, do not advocate freezing the cultural meaning of religion “by laws prohibiting people with new visions from access to the title, legal status, or tax and economic benefits of religious organization.”⁸² By contrast, the “cultural argument against gay marriage”⁸³ mistakenly assumes that “the culture that shapes our values is the property only of some of us – those who happen to enjoy political power for the moment – to sculpt and protect in the shape we admire.”⁸⁴ Instead, an understanding of liberty consistent with the

⁷⁶ DWORKIN, *supra* note 14, at 87.

⁷⁷ DWORKIN, *supra* note 14, at 87-88.

⁷⁸ I address how these arguments feature in the marriage movement and in some case law in Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007). For a recent analysis of these arguments as being over access to and exclusion from marriage as a cultural resource, see Marc R. Poirer, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 COLUM. J. GENDER & LAW 343 (2008).

⁷⁹ DWORKIN, *supra* note 14, at 88.

⁸⁰ DWORKIN, *supra* note 14, at 88.

⁸¹ DWORKIN, *supra* note 14, at 88.

⁸² DWORKIN, *supra* note 14, at 88.

⁸³ DWORKIN, *supra* note 14, at 89.

⁸⁴ DWORKIN, *supra* note 14, at 89.

personal responsibility it protects insists that “in a genuinely free society, the world of ideas and values belongs to no one and to everyone.”⁸⁵

This account of liberty, he contends, is consistent with his proposed two principles of human dignity – that “everyone’s life is of equal intrinsic value and that everyone has the same personal responsibility for his life as I do.”⁸⁶ Dworkin contends that, by contrast, a tolerant religious nation “supposes a narrow conception of religious freedom that does not include, for instance, a right to choose abortion or to marry someone of the same sex.”⁸⁷ The tolerant secular model has a broader conception of freedom that includes such rights to choose.

Over the years, Dworkin’s account of the foundations of liberalism has consistently distinguished the ethical and the moral and advanced a particular argument about the right – and personal responsibility – of individuals to shape their ethical environment.⁸⁸ First, he distinguishes the ethical and the moral: “[o]ur ethical convictions define what we should count as a good life for ourselves; our moral principles define our obligations and responsibilities to other people.”⁸⁹ Principles of dignity assign each person a “personal responsibility” for ethical decisions. Ethical values are “plainly implicated,” he argues, “in decisions about sexual conduct, marriage, and procreation.”⁹⁰ Again, Dworkin points to the personhood formulations in *Casey* and *Lawrence*, observing that religious convictions, along with “people’s convictions about the role of love, intimacy, and sexuality in their lives,”⁹¹ fall into the ethical category, and, thus, dignity is violated when laws “usurp[] an individual’s responsibility for his [or her] own ethical values,”⁹² by contrast to laws that “exercise a community’s essential collective responsibility to identify and protect nonethical values.”⁹³

A related argument is that each individual has a right to shape the ethical environment through the decisions he or she makes, rather than having that environment controlled by a majority’s view of the best way to live. As in Dworkin’s earlier work, *Is Democracy Possible Here?* presses an analogy between the economic and ethical environment.⁹⁴ On the one hand, government properly regulates the market for reasons of “distributive fairness” and to protect

⁸⁵ DWORKIN, *supra* note 14, at 89.

⁸⁶ DWORKIN, *supra* note 14, at 70.

⁸⁷ DWORKIN, *supra* note 14, at 67.

⁸⁸ See RONALD DWORKIN, FOUNDATIONS OF LIBERAL EQUALITY *passim* (TANNER LECTURES ON HUMAN VALUES) (1990) available at <http://www.esnips.com/doc/f8d4850d-33d1-4f09-ace5-bc653ab5fdd8/ronald-dworkin---foundations-of-liberal-equality-tanner-lectures>.

⁸⁹ DWORKIN, *supra* note 14, at 21. For earlier examples, see Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 479 n.1 (1989) (“Ethics, as I used the term, includes convictions about which kinds of lives are good or bad for a person to lead, and morality includes principles about how a person should treat other people.”); DWORKIN, *supra* note 88, at 13.

⁹⁰ DWORKIN, *supra* note 14, at 62.

⁹¹ DWORKIN, *supra* note 14, at 72.

⁹² DWORKIN, *supra* note 14, at 71.

⁹³ DWORKIN, *supra* note 14, at 71.

⁹⁴ DWORKIN, *supra* note 14, at 76-77.

against various kinds of externalities.⁹⁵ On the other, “Americans are unwilling to grant political majorities a parallel collective power over the fundamentals of our economic culture,” but rather, insist that “the economic culture be shaped by a vector of individual decisions reflecting individual values and wishes.”⁹⁶

After *Bowers v. Hardwick*, Dworkin contended that the Supreme Court’s decision was wrong for, among other reasons, its premise that the ethical environment must be shaped in a winner-take-all way based on supposed majority disapproval of homosexuality.⁹⁷ Whatever common life a political community has, he argues, it does not extend to a “communal sex life.”⁹⁸ For, “it is deeply implausible that the characterization of communal life that best fits such a community could be one that assumes that it must choose . . . one set of standards of sexual responsibility”⁹⁹ To this argument, Dworkin added a classic liberal argument against coercion: a person’s life cannot be improved against the grain of his or her “most profound ethical convictions” that it has not been.¹⁰⁰ The anti-coercion arguments recur in *Is Democracy Possible Here?*, where Dworkin affirms a principle of personal responsibility not to subordinate oneself to others dictating what makes for a good life for one to live. As applied to a political community, persons’ personal responsibility for their own lives is “frustrated by allowing a majority of citizens to impose their values on everyone through legislation”¹⁰¹

The role of courts receives comparatively little attention in *Is Democracy Possible Here?*, although Dworkin has addressed that topic extensively in other works.¹⁰² But the judicial role is relevant to his argument that the red-blue divide is evident in two competing conceptions of democracy: the majoritarian versus the partnership view. In the first view, “democracy is government by majority will, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage.”¹⁰³ The partnership view of democracy holds that “the people govern themselves each as a full partner in a collective political enterprise so that a majority’s decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise.”¹⁰⁴ Majority support, just on its own, does not supply a “moral reason” for what the majority supports; ideas drawn from political morality about “justice, equality, and

⁹⁵ DWORKIN, *supra* note 14, at 76.

⁹⁶ DWORKIN, *supra* note 14, at 77.

⁹⁷ Dworkin, *Liberal Community*, *supra* note 89, at 484.

⁹⁸ Dworkin, *Liberal Community*, *supra* note 89, at 497.

⁹⁹ Dworkin, *Liberal Community*, *supra* note 89, at 497.

¹⁰⁰ Dworkin, *Liberal Community*, *supra* note 89, at 486. See also McClain, *Toleration*, *supra* note 8, at 30-31, 46 (discussing such arguments by Locke and Mill).

¹⁰¹ DWORKIN, *supra* note 14, at 77-78.

¹⁰² See, e.g., RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

¹⁰³ DWORKIN, *supra* note 14, at 131.

¹⁰⁴ DWORKIN, *supra* note 14, at 131.

liberty” should inform our views about what is a democratic decision.¹⁰⁵ In this view a community is not democratic if it “steadily ignores the interests of some minority or other group.”¹⁰⁶ Rights – and their protection by courts – play a crucial role in this partnership conception. Because the U.S. Constitution provides a set of individual rights as “trumps over the majority’s power,”¹⁰⁷ the United States is not a “pure example” of the majority view.¹⁰⁸

In a majoritarian model of democracy, the Court’s decisions about “school prayer, abortion, and homosexual rights” are undemocratic because they deny “the majority the right and power to make fundamental moral decisions for itself.”¹⁰⁹ Liberals, by contrast, think “that the decisions that expanded individual rights enhanced rather than savaged our democracy;” “that view presupposes the partnership conception.”¹¹⁰ In effect, these “controversial constitutional decisions helped to ensure that the conditions” for full partnership are met, such that the majority is entitled to its will.¹¹¹

Principles of human dignity shape the place of individual rights and the role of courts in the partnership model of democracy. As a consequence of the first principle of human dignity, a political community must show “equal concern” for all persons who live within its borders.¹¹² One way to do so is by “embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities.”¹¹³ The second principle of human dignity leads to the requirement of self-government: “political arrangements must respect people’s personal responsibility for identifying value in their own lives.”¹¹⁴ Here, Dworkin rejects the argument that because majority rule *is* self-government, legislating out of concern for people’s interests is justified.¹¹⁵ Equal concern is a “necessary condition” for political legitimacy, but it cannot be a “sufficient” one, for people “have no moral right to assume coercive authority over others, even when they act in those other people’s interest.”¹¹⁶ For Dworkin, the crucial issue is “what rights must be reserved to an individual citizen if submitting to the will of the majority of his fellow citizens in other circumstances

¹⁰⁵ DWORKIN, *supra* note 14, at 134.

¹⁰⁶ DWORKIN, *supra* note 14, at 131.

¹⁰⁷ See DWORKIN, *supra* note 14, at 131.

¹⁰⁸ DWORKIN, *supra* note 14, at 131-32.

¹⁰⁹ DWORKIN, *supra* note 14, at 135.

¹¹⁰ DWORKIN, *supra* note 14, at 135-36.

¹¹¹ DWORKIN, *supra* note 14, at 136. Dworkin recognizes that people’s preferences for one model of democracy over another are likely driven in part by which model is most likely to deliver the substantive outcomes they favor, but maintains that “the choice between the two visions of democracy will remain crucial to political morality no matter how the politics of the choice shift.” *Id.* at 138.

¹¹² DWORKIN, *supra* note 14, at 144.

¹¹³ DWORKIN, *supra* note 14, at 144.

¹¹⁴ DWORKIN, *supra* note 14, at 145.

¹¹⁵ DWORKIN, *supra* note 14, at 145.

¹¹⁶ DWORKIN, *supra* note 14, at 145.

is to be consistent with his dignity.”¹¹⁷ Recall that, in Dworkin’s model, “[i]t is inconsistent with [a person’s] dignity ever to submit to the coercive authority of others in deciding what role religious or comparable ethical values should play in his life.”¹¹⁸ Thus, the partnership model “requires some guarantee that the majority will not impose its will in these matters.”¹¹⁹ Constitutional rights, by protecting an individual’s “freedom to make ethical choices for himself,” thus attempt to guarantee democracy, rather than to compromise it.¹²⁰

How useful are Dworkin’s two principles about human dignity for making progress on the issue of value polarization and the respective responsibilities of courts, legislatures, and the executive? Does this philosophy of liberalism, with its distinction between ethics and morality and its insistence on personal responsibility for ethical decisions, offer a way beyond red-blue conflicts over “moral values”? Focused as it is on the role of federal constitutional rights and the Supreme Court, can it offer any useful tools for assessing what role state courts may constructively play in conflicts that often implicate family lives and state family law? Does its distinction between personal judgmental and impersonal judgmental justifications have translation value in the arena of family law? After all, even with the “moral transformation” of family law (or, the “demoralization” of family law), contemporary family law still retains important expressive, protective, facilitative, and channelling functions that, arguably, serve the interests of adults, children, and society as a whole.¹²¹ Where would family law’s various functions fit in this distinction? To answer these questions, I will first look at the recent California Supreme Court decision, *In re Marriage Cases*, with an eye on Dworkin’s dignity principles. I will then explicate Cahn and Carbone’s interpretive project about red and blue families.

B. The California Supreme Court’s *In re Marriage Cases* as a Test Case for Dworkin’s “Dignity” Principles and Partnership Model of Democracy

California’s recent legalization of marriage by same-sex couples (albeit brought to at least a temporary halt by Proposition 8) is an interesting test case for assessing Dworkin’s appeal to principles of human dignity as a way to find common ground and, as I will later discuss, Cahn and Carbone’s idea of the clash between models of family law. First, it is helpful to situate the case in the broader landscape of high court rulings on challenges brought by same-sex couples to state marriage laws. In *In re Marriage Cases*, the California Supreme Court noted how the challenge to California’s marriage laws differed from challenges in other states because of the major strides already taken in California

¹¹⁷ DWORKIN, *supra* note 14, at 146.

¹¹⁸ DWORKIN, *supra* note 14, at 146.

¹¹⁹ DWORKIN, *supra* note 14, at 146.

¹²⁰ DWORKIN, *supra* note 14, at 146.

¹²¹ See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) [hereinafter Schneider, *Moral Discourse*]; Carl E. Schneider, *The Channelling Function of Family Law*, 20 HOFSTRA L. REV. 495, 497-98 (1992) [hereinafter Schneider, *Channelling Function*]; McClain, *supra* note 78, at 2151-55.

toward marriage equality for gay men and lesbians – strides due to shifts in family law, evidenced in case law and legislation, and due to prior interpretations of constitutional law.¹²² The legislature enacted a domestic partnership law that evolved to provide virtually all of the benefits and obligations of civil marriage to same-sex couples, including those pertaining to “parental rights and responsibilities.”¹²³ Subsequently, the legislature twice attempted to open up marriage to same-sex couples, but California’s governor vetoed the laws in light of Proposition 22, a successful ballot initiative that defined marriage as between one man and one woman, leaving it for the state court to decide. This domestic partnership law, as well as prior judicial rulings and legislation concerning the parental rights and obligations of partners in same-sex relationships, facilitated pathways to reproduction and parenthood other than through heterosexual sex within marriage. The remaining question was whether affording this alternative legal status, but not civil marriage, could withstand California’s constitutional guarantees of privacy and equal protection.¹²⁴ The court concluded it could not.¹²⁵

Dworkin’s two principles about human dignity, recall, are that it matters that each human life goes well and not be wasted, and that each person has a personal responsibility to determine how to live his or her life and not to have others coercively decide such matters.¹²⁶ Dworkin also speaks of marriage as a unique social resource.¹²⁷ In both these respects, his analysis fits well with California’s high court opinion. A conception of equal dignity and respect owed – as a matter of state constitutional law – to gay men and lesbians and the families they form was central to the California Supreme Court’s analysis.¹²⁸

¹²² *In re Marriage Cases*, 183 P.3d 384, 397-98 (Cal. 2008).

¹²³ *Id.* at 418.

¹²⁴ *Id.* at 398.

¹²⁵ *Id.* at 399, 429. In the analysis of *In re Marriage Cases* that follows, I draw on Joanna Grossman & Linda McClain, *The California Supreme Court Rules in Favor of Marriage for Same-Sex Couples: Why Domestic Partnerships Are Not Enough: Part One in a Two-Part Series of Columns*, (May 27, 2008), <http://writ.news.findlaw.com/grossman/20080527.html>; and Joanna Grossman & Linda McClain, *The California Supreme Court Rules in Favor of Marriage for Same-Sex Couples: How Conservative Reasons Led to a Progressive Result: Part Two in a Two-Part Series of Columns* (May 28, 2008), <http://writ.news.findlaw.com/grossman/20080528.html>.

¹²⁶ DWORKIN, *supra* note 14, at 9-11.

¹²⁷ DWORKIN, *supra* note 14, at 86.

¹²⁸ *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008) (“[R]eserving the historic designation of ‘marriage’ exclusively for opposite-sex couples poses at least a serious risk of denying the family relationship of same-sex couples . . . equal dignity and respect.”). *See also id.* at 428 (“This state’s current policies and conduct regarding homosexuality recognize that gay individuals are entitled to . . . the same respect and dignity afforded all other individuals”); *id.* at 429 (“In light of the evolution of our state’s understanding concerning the equal dignity and respect to which all persons are entitled . . . is it not appropriate to interpret [the state constitution] in a way that . . . excludes gay individuals from the protective reach of such basic civil rights.”); *id.* at 434-35 (“[R]eserving the historic and highly respected designation of marriage exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership – pose

The court joined Massachusetts in believing that the name “marriage” – or at least the withholding of the name – means something. According to the majority opinion, the right to marry as protected by the state constitution is a “couple’s right to have their family relationship accorded dignity and respect equal to that accorded other officially recognized families.”¹²⁹ The majority repeatedly refers to equal dignity and respect to explain what is at stake in the right to marry.¹³⁰ Calling a legally recognized relationship by a different name, depending on whom it involves, undermines equal dignity and respect. Perhaps the state could, the majority suggests, strip all unions of the name “marriage” and call them something else, but as a matter of both due process and equal protection, it cannot maintain one status for heterosexual couples and another for homosexual couples.¹³¹ This argument also seems to fit Dworkin’s premise that the “status of marriage” provides a “social resource of irreplaceable value to those to whom it is offered.”¹³² What does he mean by this? As a social institution, marriage is “a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning,” such that it is not possible to create an “alternate mode of commitment carrying a parallel intensity of meaning.”¹³³ It is unjustified discrimination, he argues, to deny homosexual couples access to that “wonderful resource.”¹³⁴

The court emphasized the “core” right of all individuals to have their family relationship accorded “equal dignity and respect.”¹³⁵ The denial of this dignity by exclusion from marriage is intertwined with the denial of access to marriage as a resource. In addition to marriage’s symbolic importance, the court noted other reasons that allowing opposite-sex couples to marry, while relegating same-sex couples to domestic partnerships, carried a serious risk of denying them such respect.¹³⁶ The long history of disparaging gay men and lesbians and their intimate relationships warrants concern that a separate status will carry a lesser *dignity*. The court also noted the practical problem, evident from Vermont’s and New Jersey’s experiences with civil unions, that the public understands marriage but does not understand domestic partnerships.¹³⁷ This leads to differential treatment and discrimination such that these alternative legal statuses fail to

a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry.”).

¹²⁹ *Id.* at 400.

¹³⁰ *See, e.g., id.* at 400, 434-35.

¹³¹ *Id.* at 400.

¹³² DWORKIN, *supra* note 14, at 86.

¹³³ DWORKIN, *supra* note 14, at 86.

¹³⁴ DWORKIN, *supra* note 14, at 86.

¹³⁵ *In re Marriage Cases*, 183 P.3d at 400.

¹³⁶ *Id.*

¹³⁷ *Id.* at 445-46. The court cited to a study on problems couples in civil unions in New Jersey were experiencing with recognition by public official and private parties of their relationship. NEW JERSEY CIVIL UNION REVIEW COMM’N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION, Feb. 19, 2008, <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf>.

afford same-sex couples and their children the hoped-for equality.¹³⁸ Finally, the court noted the risk that having separate tracks for opposite-sex and same-sex relationships may send a more general message that government regards gay men and lesbians and their families as less worthy of respect.¹³⁹

Thus, the court's analysis seems consistent with Dworkin's analysis of an individual's access to resources – in this case, a social institution rich in meaning – as part of the exercise of personal responsibility. Many same-sex couples understandably aspire to speak the “common language” of marriage. Marriage signifies a well-defined and well-understood social relationship, one that does not need individual explanation or justification. Whether or not it should, the status of “marriage” commands a unique public respect and esteem, which is why Dworkin and the California court argue that equalizing access to that status is a necessary component of equality. Consigning certain couples to a different status based solely on their identity raises concerns about second-class citizenship. The importance of the name is illustrated most effectively by the desire to withhold it from same-sex couples.¹⁴⁰

The distinctiveness of the California court's approach is manifest from a comparison with that of New Jersey's. There, the state's highest court said the naming question does not implicate constitutional questions, but is, instead, best resolved in the “crucible of the democratic process.”¹⁴¹ The majority concluded that constitutionally requiring access to “marriage” would force “social acceptance” upon the citizens of New Jersey, who may not be ready for it.¹⁴² Any change in the longstanding definition of marriage, the majority believed, ought to come from the legislature, through “civil dialogue and reasoned discourse.”¹⁴³

The California court rejects this approach, which seems to stem more from considerations of policy than constitutional reasoning. The California court makes this point emphatically with its frequent statements that its role is not to make decisions based on public policy or what is popular but to interpret the constitution.¹⁴⁴ It cites to its own precedent, *Perez v. Sharp*,¹⁴⁵ which struck down California's ban on interracial marriage in 1948, noting that although it was “rendered by a deeply divided court,” it is “a judicial opinion whose

¹³⁸ *Id.* at 446.

¹³⁹ *See id.*

¹⁴⁰ Thus, Dworkin asks: “If there is no difference between the material and legal consequences of marriage or a contrived civil union, then why should marriage be reserved for heterosexuals?” It must be because marriage has a “spiritual dimension of marriage” that civil unions do not. But “if there are reasons for withholding the status from gay couples, then these must also be reasons why civil union is not an equivalent opportunity.” DWORKIN, *supra* note 14, at 87.

¹⁴¹ *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

¹⁴² *Id.* at 223.

¹⁴³ *Id.* at 222.

¹⁴⁴ *In re Marriage Cases*, 183 P.3d at 399, 448.

¹⁴⁵ 198 P.2d 17 (Cal. 1948).

legitimacy and constitutional soundness are by now universally recognized.”¹⁴⁶ The California court’s opinion also seems consistent with Dworkin’s partnership model of democracy. Majority rule is not sufficient, on this view. In order to be full partners, the minority needs to be protected by certain rights so that a majority does not have the power to dictate to a minority how to decide ethical values. Who to marry, on Dworkin’s view, would fall within this range of ethical decisions, and yet, it also implicates questions of political morality, for marriage implicates not just freedom *from* governmental interference but also freedom *to* affirmative governmental recognition and support, a distributive matter.¹⁴⁷

A partnership model of democracy is also evident in the court’s rejection of the argument that it is precluded either by the will of “the people” expressed through the ballot initiative or by the doctrine of separation of powers from modifying the traditional definition of marriage.¹⁴⁸ The court retorts that while it would violate separation of powers if it redefined marriage based on its view of public policy or the public interest, a court “has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures” and it owes a responsibility to each member of the public to do so.¹⁴⁹ Similarly, the fact that the limitation of marriage to one man and one woman was enacted as a ballot initiative rather than as a simple legislative enactment is “irrelevant,” because (here quoting former Chief Justice Burger): “the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.”¹⁵⁰ The argument that the initiative represents the “people’s will” misses “the very basic point” that:

the provisions of the California Constitution itself constitute the ultimate expression of the people’s will, and that the fundamental rights embodied within that Constitution for the protection of all persons represent restraints that the people themselves have imposed upon the statutory enactments that may be adopted either by their elected representatives or by the voters through the initiative process. As the United States Supreme Court explained in *Board of Education v. Barnette* . . . “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”¹⁵¹

¹⁴⁶ *In re Marriage Cases*, 183 P.3d at 399; First Interim Report of the New Jersey Civil Union Review Commission, *supra* note 130.

¹⁴⁷ See Goodridge v. Dept. of Public Health, 798 N.E.2d 954 (Mass. 2003) (explicating both freedom from and freedom to); MCCLAIN, THE PLACE OF FAMILIES, *supra* note 8, at 19.

¹⁴⁸ *In re Marriage Cases*, 183 P.3d at 450.

¹⁴⁹ *Id.* at 448.

¹⁵⁰ *Id.* at 450 (quoting *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981)).

¹⁵¹ *Id.* at 449 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

Exactly so, Dworkin would no doubt say, adding that what characterizes these various decisions is that they – along with the right to marry – fall within what he calls the realm of the ethical.¹⁵²

The California Supreme Court's invocation of this classic language from *Barnette* about the vital counter-majoritarian role of rights suggests that certain contemporary battles over family law are unavoidably also about *constitutional law*. This reflects the often-noted “constitutionalization” of family law in recent decades, that is, the transformative impact of both federal and state constitutions on family law.¹⁵³ I also mean that contemporary debates over family formation and family definition seem inevitably to implicate basic constitutional guarantees of liberty and equality. The evolving interpretation of these guarantees has come to shape contemporary family law in ways that challenge a simple appeal to “historical” tradition. Thus, responding to the State's appeal both to the historical tradition of marriage as between one man and one woman as well as to the fact that the “overwhelming majority” of jurisdictions in the U.S. and around the world continue to hold to this understanding, the court counters:

if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.¹⁵⁴

The court points to well-established but now constitutionally discredited legal rules against interracial marriage, the exclusion of women from occupations and official duties, and separate and assertedly “equivalent” public facilities and institutions for racial minorities.¹⁵⁵

What is the vantage point that affords critical perspective on these practices? Here, the court turns to *Lawrence v. Texas*:

the expansive and protective provisions of our constitutions, such as the due process clause, were drafted with the knowledge that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.” For this reason, the interest in retaining a tradition that excludes a historically disfavored minority group from a status that is extended to all others – even when the tradition is long-

¹⁵² DWORKIN, *supra* note 14, at 72-73.

¹⁵³ See generally David Meyer, *The Constitutionalization of Family Law*, 42 FAM. L. Q. 529 (2008); William C. Duncan, *Constitutions and Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 331, 334 (2007); Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 433 (2005).

¹⁵⁴ *In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008).

¹⁵⁵ *Id.*

standing and widely shared – does not necessarily represent a compelling state interest for purposes of equal protection analysis.¹⁵⁶

The court goes on to find that the state could offer no compelling interests for retaining this definition.¹⁵⁷ To use Dworkin's terminology, we could say that it did not find any *impersonally judgmental* justifications for excluding same-sex couples from marriage.¹⁵⁸ The appeal to optimal childrearing, proffered by the Proposition 22 Legal Defense Fund and the Campaign for California Families, did not suffice as a justification because California's statutory laws "permit same-sex couples to adopt and raise children" and draw no distinction between married and domestic partners with respect to "legal rights and responsibilities relating to children raised within each of [those] family relationships."¹⁵⁹ The court also concluded that preserving the traditional definition was not necessary to "preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples," while "the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children."¹⁶⁰

In sum, there is a reasonably good fit between Dworkin's principles of dignity and the California Supreme Court's ruling on the constitutional problems with California's marriage laws. Arguably, California's constitutional commitment to equal protection and its evolving statutory protection against discrimination on the basis of sexual orientation are compatible with an idea of the dignity of each human life. So too is the evolution of common law and statutory law in the direction of facilitating the intimate relationships of and parenting by gay men and lesbians, and the court's ruling that opening up the institution of civil marriage itself was necessary to satisfy the requirement of equal dignity and respect. Access to the unique social resource of civil marriage, in turn, fosters the capacity of each individual to take responsibility for his or her own conception of a good life, including the place of marriage and family in it.¹⁶¹ Denying access to this resource might be viewed, in Dworkin's framework, as violating the rule that this personal responsibility is not satisfied when the state or majorities preclude a person from deciding for him or herself. The appeal to "dignity" featured, of course, in *Lawrence* and also in *Goodridge*.¹⁶² It has been important in constitutional jurisprudence about expanding definitions of family and of marriage in Canada as well as in South Africa, where the constitution contains a right to dignity.¹⁶³

¹⁵⁶ *Id.* (citation omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).

¹⁵⁷ *Id.*

¹⁵⁸ DWORKIN, *supra* note 14, at 71.

¹⁵⁹ *In re Marriage Cases*, 183 P.3d at 452 n.72.

¹⁶⁰ *Id.* at 452.

¹⁶¹ On the proper role of governmental action and restraint in fostering this capacity, see MCCLAIN, PLACE OF FAMILIES, *supra* note 8, at 160.

¹⁶² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

¹⁶³ CIVIL MARRIAGE ACT PREAMBLE (2005, c. 33), S. AFR. CONST., SEC. 9.

Would Dworkin's principles of dignity be equally helpful in considering some other areas of red-blue contention? What about another other wedge issue: abortion? Resolving the abortion issue in this way presents a formidable challenge. "Dignity" has featured in U.S. Supreme Court abortion jurisprudence both as a ground (in *Casey*) for supporting women's abortion rights as well as (in *Gonzales v. Carhart*) for prohibiting a method of late-term abortion.¹⁶⁴ As Dworkin has previously discussed, people on both sides of the issue may share a belief in the sanctity of human life – that it matters that a life begun in earnest should not be wasted,¹⁶⁵ but for opponents of legal abortion, this conviction demands prohibiting, not permitting abortion. Recent scholarship and commentary on the abortion issue stresses that the battle over abortion rights is, to a significant degree, a battle over visions of family and of women's proper roles.¹⁶⁶ This is evident from the *Carhart* majority's apparent acceptance of the argument that abortion decisions harm women, who require protection by a complete ban on certain procedures.¹⁶⁷

Dworkin's premise is that if we recognize our shared principles, then we can see that our intense disagreements stem from conflicts about the best interpretation of such principles. The same-sex marriage and abortion issues – and many other issues on which red-state v. blue-state divide – implicate conflicting visions of family, gender roles, and the proper ordering of sexuality, reproduction, and parenthood. These conflicting visions may also, to use Dworkin's framework, rest on sharply different views of what personal responsibility requires, and it might be fruitful to examine those views. But another plausible diagnosis of these conflicts is that, as Vivian Hamilton argues, family law rests upon conflicting fundamental principles, not just the liberal individualism (akin to Dworkin's own liberal principles) reflected in a commitment to individual autonomy, liberty, and equality, freedom of contract, and governmental protection of the individual, but also in Biblical traditionalism, with its emphasis on conjugality, that is, the "natural," marital, procreative family, and on a proper gender ordering within the family.¹⁶⁸ As I have elaborated in other work, this conjugal view of marriage and the natural family shapes opposition to extending marriage to same-sex couples as well as to egalitarian models of marriage that deemphasize gender roles.¹⁶⁹ It is challenged by social trends that depart from the love-marriage-baby carriage sequence. As Reva Siegel details, a religious view of the "natural" family and women's proper maternal role also shapes the "woman protective" abortion argument that

¹⁶⁴ Compare *Gonzales v. Carhart*, 550 U.S. 124 (2007), with *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

¹⁶⁵ DWORKIN, *supra* note 43, at 10-11.

¹⁶⁶ Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, U. ILL. L. REV. 991 (2007).

¹⁶⁷ *Gonzales*, 550 U.S. at 148.

¹⁶⁸ Hamilton, *supra* note 32, at 45-64.

¹⁶⁹ McClain, *supra* note 78, at 2155-74; Linda C. McClain, "God's Created Order," *Gender Complementarity and the Federal Marriage Amendment*, 20 B.Y.U. L. REV. 313 (2006).

surfaced in *Carhart* as well as opposition to contraception and comprehensive sex education.¹⁷⁰ Dworkin's goal of identifying common principles that make a national conversation possible is attractive, but it may need to reckon with the possibility that differences on these matters rest on sharply clashing principles.

One limitation of Dworkin's theory is that it focuses primarily on the individual. It speaks of marriage as a unique resource and a social institution, but it does not probe the meaning of social institutions or the premise that marriage has both personal/private and public dimensions – evident in *Goodridge*'s assertion that the state is a third party to every marriage.¹⁷¹ Dworkin's project does not centrally engage with the family as a social institution, with regulation of the family, or with competing visions of family at stake in the red/blue divide. To test the adequacy of Dworkin's interpretive project would require considering whether and how it could address those issues. How, for example, might his distinction between impermissible subordination and permissible influence apply to the various forms of education, persuasion, and incentives that government uses – or has sought to use – to influence people's ideas and behaviors concerning sexuality and family formation?¹⁷² Because of their eschewal of common – as it were, national – principles in favor of a diagnosis of sharply diverging sets of values, tied to subnational units, and their explicit focus on the family and family law, Cahn and Carbone's project provides a useful contrast.

C. Cahn and Carbone: The Traditional Family System v. the New Family Model – What Should or Can Courts Do in a Time of Transition?

In a series of writings, Naomi Cahn and June Carbone are developing the intriguing thesis that the division between red states and blue states reflects a division between the different lives families are living in red and blue states, shaped by the contrasting family law regimes produced in those states. Values polarization often centers on “moral values” concerning family.¹⁷³ Moral disagreement is exacerbated by the “partisanship” that “is an increasingly salient fact of American political life”: political activists use “‘wedge’ issues to energize their core supporters, and divide an electorate that most polls show has overwhelmingly moderate and stable political views.”¹⁷⁴ Family values issues

¹⁷⁰ Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L. REV. 1642 (2008).

¹⁷¹ *Goodridge*, 798 N.E.2d at 954.

¹⁷² In *LIFE'S DOMINION*, *supra* note 43, for example, Dworkin finds governmental persuasion that facilitates responsible choice about whether to terminate a pregnancy consistent with his principles about personal responsibility. *Id.* at 151-59. I have elsewhere discussed how liberal theory distinguishes coercion and persuasion and whether and how this distinction should apply to governmental moralizing concerning family matters. McClain, *Toleration*, *supra* note 8; McClain, *PLACE OF FAMILIES*, *supra* note 8, at 43-48.

¹⁷³ Cahn & Carbone, *supra* note 19, at 3.

¹⁷⁴ Cahn & Carbone, *supra* note 19, at 58.

lend themselves to such polarization because they reflect real anxieties and cultural differences.¹⁷⁵

Cahn and Carbone's premise is that "red states" still emphasize a "more traditional family system that celebrates marriage as the institution ordained to promote the unity of sex, procreation, and childrearing."¹⁷⁶ Control of sexuality is at a premium, and thus, pre-marital sexual activity is strongly discouraged; relatively early marriage and parenthood are encouraged.¹⁷⁷ They further contend that this model regards "socialization into traditional gender roles" as "critical to marital stability."¹⁷⁸ For red states, abortion is "an abomination" because it violates religious teachings and because it signifies sex without responsibility.¹⁷⁹ Gay marriage is "the symbol of the ability to flout moral teachings in the name of individualism and choice."¹⁸⁰ The family law of red states tends to embrace more fully the traditional role of family law in "channelling" human sexuality (that is, heterosexuality) into the social institution of marriage as the best place for reproduction and parenthood.¹⁸¹

Blue states evince what Cahn and Carbone call "the new middle class morality," which "responds to the post-industrial economy by delaying childbearing and investing in the educational and workplace opportunities of both men and women."¹⁸² People in these states generally have higher average levels of education and marry and have children at later ages than those in red states, where early marriage (including the shotgun wedding) is a way to manage the onset of sexual activity. This model

involves less control of sexuality, celebrates more egalitarian gender roles, and promotes financial independence and emotional maturity as the sine qua non of responsible parenthood. . . . In this model, abstinence is unrealistic, contraception is not only permissible, but morally compelled, and abortion is the necessary (and responsible) fallback. Nonmarital cohabitation is irrelevant to child custody determinations absent an immediate impact on the child, but domestic violence is a serious threat to family integrity that requires state intervention. Recognition of same-sex relationships is a matter of basic equality.¹⁸³

In other words, blue states do not lack "family values." Their family model reflects a particular idea about personal responsibility and how to exercise that to secure a good life.

¹⁷⁵ See Cahn & Carbone, *supra* note 19, at 58.

¹⁷⁶ Cahn & Carbone, *supra* note 19, at 2.

¹⁷⁷ Cahn & Carbone, *supra* note 19, at 60.

¹⁷⁸ Cahn & Carbone, *supra* note 19, at 3.

¹⁷⁹ Cahn & Carbone, *supra* note 19, at 3.

¹⁸⁰ Cahn & Carbone, *supra* note 19, at 3.

¹⁸¹ On the channelling function of family law, see Schneider, *The Channelling Function*, *supra* note 114, at 498-501; McClain, *supra* note 78, at 2151-71.

¹⁸² Cahn and Carbone, *supra* note 19, at 2.

¹⁸³ Cahn and Carbone, *supra* note 19, at 2.

Cahn and Carbone acknowledge that each state, whether characterized as red or blue, has diversity within it and that a number of states are better viewed as purple.¹⁸⁴ Thus, their framing device is not meant as an exact or accurate picture of actual family lives in America. Rather, it is a rhetorical strategy that helps them advance an argument about the up-to-now neglected role of family law in shaping red and blue states and, more generally, the “role of family law within a federal system at a time of cultural conflict.”¹⁸⁵

Considering the strong association of red state voters as “values voters” in the 2004 election, and the implicit critique of blue state voters as lacking or not caring about “family values,” some of the data that Cahn and Carbone present about the actual patterns of family life in red and blue states are incongruous. Red states, for example, “have the highest divorce rates in the country,” as well as higher rates of teen pregnancy and teen birth, albeit the “lowest abortion rates.”¹⁸⁶ Blue states have lower divorce rates, lower teen pregnancy and teen birth rates, and higher abortion rates.

It is tempting to address these incongruities, or cultural contradictions, by recourse to sociologist W. Bradford Wilcox’s notion of families “walking right, talking left,” and vice versa.¹⁸⁷ Red state families reportedly evince strong concern over family values, and yet their family life patterns seem to contradict such commitments (for example, the high divorce rates). By contrast, blue state families, associated with more liberal views, seem to achieve more marital stability. Ironically, religious convictions about the proper ordering of sexuality may play a part: early marriage is a strategy that makes sense given a religious world-view that condemns premarital sexual activity, but it is also a risk factor for divorce.¹⁸⁸ Wilcox and others have looked at various economic and cultural factors, religion aside, that may explain these apparent incongruities.¹⁸⁹ Wilcox suggests that even though premarital sex itself violates conservative religious views, “red state teens tend to hail from less-educated, working-class homes where childbearing at an early age is not a big deal and a long-term orientation to life is in short supply.”¹⁹⁰ Thus, “if they give in to their passions” with someone they view as a “potential marital partner . . . they don’t have [that] much to lose.”¹⁹¹ (There is a remarkable parallel here to studies of poor teen mothers, and how early parenthood may be attractive based on their assessment of their

¹⁸⁴ See Naomi Cahn & June Carbone, *Symposium: The Religion Clauses In the 21st Century: Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459 (2007); Cahn & Carbone, *supra* note 19, at 18.

¹⁸⁵ Cahn & Carbone, *supra* note 19, at 6.

¹⁸⁶ Cahn & Carbone, *supra* note 19, at 3.

¹⁸⁷ W. Bradford Wilcox & Elizabeth Williamson, *The Cultural Contradictions of Mainline Family Ideology and Practice*, in AMERICAN RELIGIONS AND THE FAMILY 37, 52 (Don Browning & David A. Clairmont eds., 2007).

¹⁸⁸ Cahn & Carbone, *supra* note 19, at 2-3.

¹⁸⁹ W. Bradford Wilcox, *Hormonographics: Red States, Blue States, and Sex Before Marriage*, THE WEEKLY STANDARD, May 28, 2007, at 45.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

futures; hence the slogan, “the best contraceptive is a real future.”¹⁹²) When Frank Keating, then governor of Oklahoma, sought to address Oklahoma’s high divorce rate, which was linked to the state’s poverty level, he found that teen marriages were a contributing factor: people “just are not financially secure, emotionally secure, or educationally secure before they take that step into a lifetime commitment.”¹⁹³ He noted a “southern culture challenge” of early marriage and articulated a goal of getting young people to wait until they are prepared for marriage.¹⁹⁴

What is intriguing about these sociological explanations is that they suggest that these patterns are not adaptive, whether measured from the perspective of the traditional family model of red states or the emerging “new middle class morality” model of blue states. Cahn and Carbone’s basic argument is that investment in one’s human capital and delaying parenting is a formula for better relationship stability and more responsible parenting.¹⁹⁵ Governor Keating, at least, would seem to agree. During the 2008 presidential election campaign, the nonmarital pregnancy of Governor Sarah Palin’s daughter Bristol – followed by the announcement that Bristol would marry the father-to-be – riveted attention on the seeming gap between red state family values and red state family lives. Wilcox commented that one reason for Governor Palin’s popularity among evangelical and conservative voters was that the failings of her own family mirrored their own. But this shortfall, he argues, fortifies religious conservatives in their conviction that law and policy should better support their family values.¹⁹⁶

One issue of great concern, as these two family models diverge, is growing family-based inequality.¹⁹⁷ As Carbone argues, for “the new elite,” who follow the model of investment in human capital and postponed parenthood, “the picture of family life is a rosy one – two active parents with more income and time to invest in their children.”¹⁹⁸ But the picture for poorer Americans is bleaker: they “disproportionately lack access to the new, approved pathways to adulthood,” as social supports for the more traditional model of family have atrophied.¹⁹⁹ Recent studies indicate that early marriage itself “continues to occur predominantly among young adults from disadvantaged backgrounds,”

¹⁹² See McCLAIN, PLACE OF FAMILIES, *supra* note 8, at 264-65 (quoting Marian Wright Edelman).

¹⁹³ Governor Frank Keating, *Remarks*, in MARRIAGE: JUST A PIECE OF PAPER? 335-36 (Katherine Anderson et al, eds., 2002).

¹⁹⁴ *Id.*

¹⁹⁵ Cahn & Carbone, *supra* note 19, at 3. But blue states themselves have problems, they note, such as “unprecedented numbers who will never marry, falling fertility rates and considerable concern [over] the lack of commitment within intimate relationships.” *Id.*

¹⁹⁶ W. Bradford Wilcox, *Talking Right, Stumbling Left*, THE IMMANENT FRAME, Sept. 24, 2008, http://www.ssrc.org/blogs/immanent_frame/2008/09/24/talking-right-stumbling-left/.

¹⁹⁷ June Carbone, *Symposium Article: Age Matters: Class, Family Formation, and Inequality*, 48 SANTA CLARA L. REV. 901 (2008); see also Amy Wax, *Engines of Inequality: Class, Race, and Family Structure*, <http://ssrn.com/abstract=1116691>.

¹⁹⁸ *Id.* at 902.

¹⁹⁹ *Id.* at 903.

particularly in rural and southern areas.²⁰⁰ Such disadvantage contributes to further inequality: Carbone contends that early marriage and childbearing are primary forces driving emerging family-based inequality.²⁰¹

What, then, should the role of courts be in the face of these clashing models in red and blue states and these problems with family life? The issue, Cahn and Carbone contend, is not whether or not courts should promote values: family law inevitably expresses values. It also “has become a situs for fundamental moral change.”²⁰² The issue is “how to decide *which* values to promote, and how to make that choice in a time of polarization.”²⁰³ “Courts, in their day-to-day decision-making on intimate family matters, often act as midwives guiding the birth of new values,” but lead effectively only if they take a “consensus-building, non-partisan stance.”²⁰⁴ While Cahn and Carbone doubt such leadership is possible on abortion, given the divisiveness on this issue, they offer some possible judicial strategies for values assertion.

One suggestion with some resonance to Dworkin’s second dignitary principle is that courts should “police the distinction between the *expression* of shared values and the imposition of state control on those who dissent.”²⁰⁵ Here, they find the right balance struck in *Lawrence*: the Court struck down the use of criminal law against same-sex sodomy (“recognizing the value of same-sex intimacy”), but did not directly challenge “the expression of contrary values” (I assume they mean that it took no stand on the issue of access to marriage).²⁰⁶ Similarly, guarding against “wholesale prohibition” (such as with abortion and contraception) can facilitate “avenues of family evolution.”²⁰⁷ They also seem attracted to judicial minimalism as a way of diffusing “hot button issues.”²⁰⁸ Thus, interstate recognition of same-sex adoption and parentage seems “less direct and confrontational” than interstate recognition of same-sex marriage.²⁰⁹

Ultimately, Cahn and Carbone argue that courts “should seize opportunities to crystallize a moral shift capable of commanding broad acceptance.” Courts can mediate values by “expressing the common ground underlying seeming conflicts.”²¹⁰ “[C]ase-by-case decision-making that can be tailored to the facts at hand is often less divisive than broader pronouncements of legislation or morality.”²¹¹ While they seem to harbor the normative aspiration that all states evolve toward the blue state model, they also seem to recognize that various

²⁰⁰ Jeremy E. Uecker & Charles E. Stokes, *Early Marriage in the United States*, 70 J. MARR & FAMILY 835, 845 (2008).

²⁰¹ Carbone, *supra* note 197, at 903.

²⁰² Cahn & Carbone, *supra* note 19, at 64.

²⁰³ Cahn & Carbone, *supra* note 19, at 8.

²⁰⁴ Cahn & Carbone, *supra* note 19, at 61.

²⁰⁵ Cahn & Carbone, *supra* note 19, at 63.

²⁰⁶ Cahn & Carbone, *supra* note 19, at 63 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

²⁰⁷ Cahn & Carbone, *supra* note 19, at 63.

²⁰⁸ Cahn & Carbone, *supra* note 19, at 63-64 (discussing minimalism of Cass Sunstein).

²⁰⁹ Cahn & Carbone, *supra* note 19, at 64.

²¹⁰ Cahn & Carbone, *supra* note 19, at 64.

²¹¹ Cahn & Carbone, *supra* note 19, at 64.

states's family law – and family values – will inevitable diverge. Thus, they suggest that, on certain issues, such as the relevance of nonmarital cohabitation to custody, “northeastern [blue] states would provide leadership . . . because these states have moved toward a model of deferred family formation.”²¹² But they also assert that one of the virtues of “family law federalism” is that different regions can express different values and, given deep divisions over values, “the expression of values may be best undertaken within smaller political units with greater sensitivity to regional variation.”²¹³ Absent from their discussion is the important consideration about how federal – as well as state – constitutional commitments will shape or constrain this expression of values.

D. Assessing Cahn and Carbone's Two Models: the Channeling Function and the Same-Sex Marriage Controversy

I find Cahn and Carbone's interpretive project particularly helpful in highlighting how the channelling function of family law is one issue that divides red and blue states. Red states, they contend, are more likely to press a unitive, or conjugal, model of sex-marriage-reproduction, that is, a view of the proper ordering of sexuality and reproduction captured in the sequence of love-marriage-baby carriage.²¹⁴ Blue states are more receptive to functional definitions of family and to non-marital pathways to family formation and to parenthood.²¹⁵ At the same time, I believe that the unitive model and the channelling function holds sway in blue states to a greater extent than they recognize, even as courts may transform their understandings of these ideas. To illustrate both the explanatory power and the limits of their models, I will take up one of their examples: how states have sorted out on the issue of whether same-sex couples may marry. I will focus in particular on the puzzle that a number of blue states have reaffirmed marriage as the union between one man and one woman, and yet established alternative legal statuses for same-sex couples. I will then take another look at the California Supreme Court's decision, *In Re Marriage Cases*, focusing on the opinion's discussion of the channelling function of family law.²¹⁶

Almost all of the red states have enacted “defense of marriage” laws (“DOMA”) either by statute or constitutional amendment. No red state has adopted a new legal status affording same-sex couples the incidents of marriage. By contrast, Massachusetts, California, and Connecticut, all blue states, now allow (or, in the case of California, did allow) same-sex couples to marry.²¹⁷ Several other blue states in the northeast have enacted civil union laws, and

²¹² Carbone & Cahn, *supra* note 28, at 32.

²¹³ *Id.* at 37.

²¹⁴ McClain, *supra* note 78, at 2133-37.

²¹⁵ Cahn & Carbone, *supra* note 19, at 2.

²¹⁶ 183 P.3d 384 (Cal. 2008).

²¹⁷ Jessica Garrison & Dan Morain, *Gay Marriages in California Surpass Those in Massachusetts*, L.A. TIMES, Oct. 7, 2008, available at <http://www.latimes.com/news/local/la-me-gaymarriage7-2008oct07,0,7906965.story>.

Oregon and Washington have domestic partnership laws.²¹⁸ Relatively fewer blue states than red ones have enacted DOMAs, whether by statute or constitutional amendment. Cahn and Carbone interpret these differences as evidence that the red states retain a strong commitment to the unitive view of marriage and to the premise that family law properly channels men and women into marriage to give order to sexuality, procreation, and parenthood. Blue states have a different view: "Marriage is no longer associated with hierarchical authority or the gendered assignment of family roles, and instead becomes a matter of choice designed to express love and commitment Recognition of same-sex relationships becomes a matter of basic equality."²¹⁹

There are a few problems with this interpretive model. First, to date, only three blue states, Massachusetts, California, and Connecticut, have extended their civil marriage laws to allow such marriages. In Massachusetts, as is by now familiar, this was as a result of a successful constitutional challenge brought by several couples in the state court, culminating in *Goodridge v. Dept. of Public Health*.²²⁰ Until recently, California had a law (adopted pursuant to ballot initiative) limiting marriage to one man and one woman,²²¹ but also had a domestic partnership law that had evolved, by various legislative amendments, to offer same-sex couples and senior heterosexual couples nearly all of the benefits and obligations of marriage available under state law. The legislature, twice, attempted to enact a law that would open civil marriage up to gay men and lesbians, but the governor (twice) vetoed it because of the ballot initiative, saying that it was up to California's high court to determine whether the ballot initiative barred such a law or whether the initiative was unconstitutional.²²² The Supreme Court of California recently ruled that, indeed, the legislature could not properly pass a law opening up civil marriage to same-sex couples without submitting it to voters for approval, but, in any case, the ballot initiative itself was unconstitutional because California's guarantees of privacy and equal protection required that same-sex couples be allowed to marry.²²³ The voters, by passing Proposition 8, subsequently blunted the Court's ruling with a constitutional amendment.

As I will discuss below, the California Supreme Court considered channelling arguments and, while it rejected these, it by no means rejected all aspects of the traditional model of marriage. Rather, it appropriated them by showing how, even taking them on their own terms, they supported extending the right to marry to same-sex couples. By contrast to California, channelling

²¹⁸ NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_10_08_color.pdf; see also H.R. 2007, 74th Legis. Assem., Reg. Sess. (Or. 2007); WASH. REV. CODE ANN. § 26.60.010 (LexisNexis 2008); Hawaii has a reciprocal beneficiaries law. HAW. REV. STAT. § 674-14 (1997).

²¹⁹ Cahn & Carbone, *supra* note 19, at 42.

²²⁰ 798 N.E.2d 941 (Mass. 2003).

²²¹ *In re Marriage Cases*, 183 P.3d at 427.

²²² For this history, see *id.* at 410.

²²³ *Id.* at 410-11.

arguments about the traditional purposes of marriage have been successful in rebuffing constitutional challenges brought in other “blue” state courts, for example, in New York’s high court²²⁴ and in the appellate court in New Jersey.²²⁵

If the cultural meaning of marriage has changed, why are some blue state courts receptive to the channelling argument? Why do constitutional challenges appealing to basic equality and an evolving conception of marriage fail? When constitutional challenges succeed, why are courts and legislatures in blue states (other than California, Connecticut, and Massachusetts) so reluctant to require that the proper remedy for same-sex couples seeking access to civil marriage is access is marriage itself, rather than an alternative status? The wording of various civil union statutes is illustrative. Legislatures seek both to affirm and preserve important traditions (including religious traditions) about the definition of marriage (namely, that it is between a man and a woman) even as they seek to honor a commitment to anti-discrimination and to valuing all families.²²⁶ This evinces a stance that there *is* something uniquely heterosexual about marriage: what is it, if not some form of argument about marriage’s unitive role, even if just reflecting the fact that marriage has been “about” uniting men and women? Simply appealing to “tradition” about what marriage has been does not tell us why that tradition should be continued.

These alternative legal statuses may well represent a political compromise and reflect a way to reconcile divergent opinions and avoid divisive battles. This in itself indicates red and blue divisions within some “blue” states and resistance to the premise that access to *marriage* by same-sex couples is a matter of basic equality. It is hard to deny that *Goodridge*, in which Massachusetts’s high court subsequently ruled that civil unions were not an adequate remedy, sparked more national outcry than *Baker*,²²⁷ where the Vermont court left the question of the remedy to the legislature. At the same time, it is interesting that the predicted overturning of *Goodridge* because of imagined popular uproar and “unnecessary political backlash”²²⁸ has not occurred. Several attempts to use the legislative process to reverse the court’s ruling have failed.²²⁹ Of course, the fact that these attempts continue suggests at least some discontented “red” folks within

²²⁴ *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

²²⁵ *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005). In particular, Justice Parrillo’s concurrence accepted channelling arguments made by the marriage movement. See McClain, *supra* note 78, at 2168-71.

²²⁶ Vermont’s statute is one example. VT. STAT. ANN. TIT. 15 § 8 (2007) (“Marriage is the legally recognized union of one man and one woman”); VT. STAT. ANN. TIT. 15 § 1201 (2007) (“‘Civil Union’ means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of the spouses”).

²²⁷ *Baker v. State*, 744 A.2d 864 (Vt. 1999).

²²⁸ See Jeffrey Rosen, *Immodest Proposal*, NEW REPUBLIC, Dec. 22, 2003, at 19 (arguing that the Massachusetts high court should have followed Vermont’s example and that its decision “threatens to provoke an unnecessary political backlash and to weaken the judiciary with another self-inflicted wound”).

²²⁹ Frank Phillips & Andrea Estes, *Right of Gays to Marry Set for Years to Come*, BOSTON GLOBE, June 15, 2007, at A1.

Massachusetts, as well as, most likely, considerable help by activists outside of the state concerned to overturn *Goodridge*. By contrast, in California, opponents of the Court's ruling swiftly mobilized and, with the aid of enormous amounts of money and effort by out-of-state organizations (including the Mormon church), passed Proposition 8.²³⁰

These contrasting examples of Massachusetts and California may be attributable in part to the more arduous and lengthy process required in Massachusetts to amend the state constitution; but one common feature is intense out-of-state interest, both by opponents and supporters of expanding civil marriage. Further, recent developments in Massachusetts make its experiment in living more exportable. Massachusetts has abolished its 1913 evasory marriage law, which former Governor Romney successfully invoked to avoid out-of-state couples being able to come to Massachusetts to enter into a civil marriage that would not be allowed in their home state.²³¹ Interestingly, one reported reason for this step was the prod of California's opening its doors to out-of-state same sex couples and the prospect of losing out on the "multimillion-dollar benefit in weddings and tourism, especially from people who live in New York!"²³² Meanwhile in New York, even though its high court has ruled that extending marriage to same-sex couples is not constitutionally required, the executive has called for recognition of such marriages. Governor David Paterson, who supports enacting a law to allow same-sex couples to marry, issued an Executive Directive that all New York administrative agencies should afford comity or full faith and credit "to same-sex marriages that are legally performed in other jurisdictions," lest they face liability. In rejecting a taxpayer challenge to this order, a trial court judge described the Governor's order as "an incremental but important step toward equality long denied, even if, according to the New York Court of Appeals [*Hernandez*], full equality is not constitutionally mandated."²³³ (Will these developments spur the New York legislature to act to allow its same-sex couples to marry and keep those dollars at home?)

Suggestive of Cahn and Carbone's acknowledgment that states, in reality, may be more *purple* than blue or red are the examples of Oregon and Washington. Cahn and Carbone's framework of a unitive versus commitment model of marriage, however, is not adequate to the task of explaining the curious coexistence in these states of defense of marriage laws with expansive (or soon-to-be-expanding) domestic partnership laws. On the one hand, Oregon voters amended the constitution to bar same-sex marriage and affirm that marriage is

²³⁰ Audi et al, *supra* note 23 (detailing "tens of millions of dollars pouring into the campaign" for Prop 8, including by the Mormon Church; an estimated thirty-eight million dollars was raised to support same-sex marriage and thirty-two million dollars to ban it). (Full disclosure: I was among the out-of-staters who contributed money to a group fighting the ban, Equality California.)

²³¹ Pam Belluck & Katie Sesima, *A 1913 Law Dies to Better Serve Gay Marriages*, N.Y. TIMES, July 16, 2008, at A1.

²³² *Id.* (reporting on study commissioned by State of Massachusetts).

²³³ *Golden v. Paterson*, (N.Y. S. Ct., Bronx County, Sept. 2, 2008) (Billings, Lucy, J.).

between one man and one woman.²³⁴ On the other, the legislature recently adopted an expansive domestic partnership law, extending to same-sex couples most of the benefits and obligations of marriage, including those relating to parenthood; an effort to subject it to a voter referendum was unsuccessful.²³⁵ The legislative findings show the legislature's delicate dance as it acknowledges its state's constitutional restriction of marriage to opposite-sex couples, and yet declares that it properly may do what it can to recognize and protect the families formed by same-sex couples.²³⁶ At a minimum, we can conclude from this example that Oregonians wish to preserve marriage as a special status for one man and one woman, but also recognize that "family" today is not confined only to the marital form.

Oregon's neighbor, Washington, also invites examination of what values are expressed through its family laws. In 2006, the Washington State Supreme Court held in that the state DOMA enacted in 1998, which prohibits same-sex marriage, does not violate the state or federal constitution.²³⁷ Using only a rational basis standard, it, like New York's high court in *Hernandez*, found that promoting and protecting procreation and raising children was the purpose of the legislation and that its over- and under-inclusiveness with regard to this goal did not make it unreasonable. In 2007, Washington adopted a domestic partnership law according a small number of the benefits and obligations of marriage to same-sex couples (and older opposite-sex couples for whom marriage is impractical) and greatly expanded this number in 2008. The legislative findings are striking in signaling that "intimate, committed, and exclusive relationships" formed by such persons are of both individual and public importance: they provide a "private source of mutual support for the financial, physical, and emotional health of those individuals and their families."²³⁸ The legislature further states that "the public has an interest in providing a legal framework for such mutually supportive relationships," irrespective of sexual orientation.²³⁹ In early 2009 (as I finish this article), the sponsor of the 2007 domestic partnership law has introduced a bill intended to expand the "rights and responsibilities of state registered domestic partners" to the point that "for all purposes under state law, [they] shall be treated the same as married spouses."²⁴⁰ Similar to the incremental strategy of legislators in California, the sponsors seek to provide "everything but marriage," but also prefer full marriage equality and harbor the

²³⁴ Associated Press, *Voters Pass all 11 Bans on Gay Marriage*, MSNBC.COM, Nov. 3, 2004, <http://www.msnbc.msn.com/id/6383353/>.

²³⁵ 74th Oregon Legislative Assembly—2007 Regular Session, House Bill 2007, <http://www.leg.state.or.us/07reg/measpdf/hb2000.dir/hb2007.en.pdf> (last visited Feb. 9, 2009).

²³⁶ OR. REV. STAT. § 106 (2008). See *Ruling Allows Legal Status for Partners of Same-Sex*, N.Y. TIMES, Feb. 3, 2008, available at http://www.nytimes.com/2008/02/03/us/03oregon.html?_r=1.

²³⁷ *Christian v. King County*, 138 P.3d 963 (Wash. 2006).

²³⁸ Wash. Rev. Code § 26.60.010 (2007).

²³⁹ *Id.*

²⁴⁰ Washington State Legislature, Bill Information, House Bill 1727-2009-10, <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2009&bill=1727> (follow "Original Bill" hyperlink) (last visited Feb. 9, 2009).

hope that this incremental strategy will help people “understand what marriage is, and that it gets them more comfortable with treating all families with equal dignity and respect.”²⁴¹ However, they view a bill for same-sex marriage, introduced simultaneously, as unlikely to succeed. What family values are expressed in Washington’s family law? As I have explored elsewhere, the messages sent may be in tension and may evidence family law’s multiple and often conflicting functions.²⁴² For example, defense of marriage laws – upheld by state courts – hold on to the expressive and channelling functions of law by retaining the definition of marriage as between one man and one woman, but domestic partnership laws manifest the facilitative and protective functions of family law by bringing nonmarital relationships with certain qualities (commitment, exclusivity) under a protective umbrella of state recognition and support. Indeed, one could argue that by affording a legal framework for “mutually supportive relationships,” the law expresses public interest in such relationships and channels people into such relationships by affixing benefits and obligations to that status. Once a state starts down this path of creating an alternative legal status because it has an interest in families other than marital families, it becomes harder to justify excluding such families from *all* the benefits and obligations of civil marriage. As the recent litigation in California and Connecticut suggests, once same-sex couples have this packet but under a different name, then practical and constitutional questions arise as to why they should not also have the nomenclature of marriage. And yet, as Proposition 8 and other defense of marriage laws illustrate, many citizens in some blue states are not ready to take that step, even if they can live with legislation that appeals to values of fairness, equality, and nondiscrimination among families.

I would invite Cahn and Carbone to reflect more on these puzzles. One lacuna in Cahn and Carbone’s analysis that, if addressed, might help us better to examine the role of courts is a consideration of the different pathways that blue states have traveled to secure some degree of marriage equality for same-sex couples.²⁴³ In some states, legislatures enacted civil union laws and domestic partnerships laws and even, in California, laws allowing same-sex couples to marry, without the spur of a court order. In others, such a lawsuit sparked a legislative remedy. Of what significance are these different pathways to the consideration of the values polarization issue? Does their “new middle class morality” model help to explain these different pathways followed in different “blue” states?

Examining some of the high court decisions, such as in Vermont and Massachusetts, readily suggests that the constitutional conclusions reached in

²⁴¹ *Washington State Bill Would Dramatically Expand Domestic Partnership Rights*, http://www.advocate.com/news_detail_ektid71888.asp (last visited Feb. 3, 2009) (quoting Representative James Pedersen, sponsor of 1727 in the House); Madelyn Fairbanks, *Work on Gay Rights Just Getting Started; Partnership Bill’s Sponsors Say Marriage Equality is Next*, SEATTLE POST-INTELLIGENCER, Jan. 29, 2009, at A10. Elsewhere, I discuss California’s incremental strategy. MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 8, at 187-89.

²⁴² McClain, *supra* note 78, at 2171-74.

²⁴³ Cahn & Carbone, *supra* note 19, at 38-45.

Baker and *Goodridge* were made easier by the extent to which the family law in each state – as reflected in legislation as well as judicial rulings – had moved away from a unitive, or conjugal, model of family and toward a model that facilitates different pathways to family formation and parenthood. Arguably, these decisions have not been overruled by popular referenda or constitutional amendment – to date – because the courts did not get too far ahead of public opinion, or at least the legislature, on this issue.²⁴⁴ The types of argument the State advanced were hard to reconcile with the facilitative steps in this direction already taken by the legislature. At the same time, even *Goodridge* acknowledged the continuing favored place of civil marriage as a “cornucopia” of benefits and obligation for married partners and their children, many of which were not available outside of marriage.²⁴⁵ Redefining marriage to include same-sex couples, on this view, is important *precisely* because the state continues to channel people into marriage, not through punishing its alternatives with the criminal law, but through the carrot of offering the most complete set of relational benefits and obligations in marriage. The unitive model’s ideal of locating parenting within marriage has been preserved, but transformed because parents here do not produce children through a heterosexual union and one or both parents may not have a biological relationship to their children.

The preference for the civil union or domestic partnership remedy within blue states seems, to me, to suggest the ongoing hold of *some* remnant of the traditional model of marriage. If marriage simply has been and must continue to be “about” a relationship between one man and one woman, then what, on this view, does marriage mean, if not something about the uniting of the two sexes? It is not so clear to me, in other words, that access to civil marriage by gay men and lesbians has become, in blue states, a matter of basic equality. What is clear is that some blue states believe that basic equality and fairness requires some legal recognition and protection of same-sex relationships, even if not the nomenclature of marriage.

E. California as a Test Case for the Cahn-Carbone Red v. Blue Family Law Model

If *In re Marriage Cases* comfortably fits Dworkin’s interpretative framework about the centrality of dignity to a sound understanding of what supposedly unites Americans despite the red/blue divide, how does it fit with Cahn and Carbone’s notion of the ascent of a newer model of family law and family lives? There is some degree of fit, but what particularly warrants comment is how the California Supreme Court’s opinion might be viewed as “conservative” in the sense of drawing on, but also applying in more inclusive ways, certain traditional arguments about the importance of marriage.²⁴⁶

²⁴⁴ See Cass Sunstein, *Federal Appeal*, NEW REPUBLIC, Dec. 23, 2003, at 21.

²⁴⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

²⁴⁶ The analysis in text expands on Grossman & McClain, *supra* note 125.

In ruling that gay male and lesbian couples were entitled to *marry*, the Supreme Court of California emphatically stressed the continuing importance of marriage both for individuals and for society.²⁴⁷ In doing so, it drew on many traditional arguments about why marriage matters. In this sense, the California ruling might be read as conservative: It recognizes and seeks to preserve the important functions of marriage, in an age when many couples simply cohabit, and many people opt to be single by choice. Thus, it would seem to pay more heed to a “unitive” model of marriage – in the sense of encouraging the stability of a sexually intimate relationship and in combining adult commitment with parental commitment – than the Cahn-Carbone view of blue state family law might predict.

At the same time, the Court’s opinion is also progressive, for it concludes that appeals to history and tradition alone are insufficient constitutional bases for excluding same-sex couples from this fundamental institution.²⁴⁸ It also considers and rejects a number of contemporary arguments made by the marriage movement against redefining marriage.²⁴⁹ In doing so, it preserves, even as it transforms, a number of traditional arguments about why marriage matters.²⁵⁰

Why is marriage fundamental? The California court offers perhaps the richest account to date by a state high court of why marriage is a vital social institution, significant both to society and to those who marry.²⁵¹ It emphasizes the unique role of marriage in providing “official recognition” to a family relationship.²⁵² In doing so, the court makes use of several traditional arguments typically used by opponents of same-sex marriage, including the channelling function, which Cahn and Carbone link particularly with the red state model of marriage. Precisely because marriage is – as conservatives often have argued – unique in offering couples societal respect and dignity, the court reasoned that the state cannot deny it to same-sex couples without undermining constitutional guarantees of rights of privacy, liberty, and equality.

From a long line of federal and state precedents about liberty, privacy, and the right to marry, the California court distills one basic idea: the fundamental right to marry embraces the right of an individual to establish, with a loved one of his or her choice, an officially recognized *family* relationship.²⁵³ Because civil marriage provides the institutional framework for families to secure such recognition, the state cannot relegate same-sex couples to an alternative, albeit equivalent status without denying them a “core element” of the right to marry.²⁵⁴

²⁴⁷ *In re Marriage Cases*, 183 P.3d 384, 422-26 (Cal. 2008).

²⁴⁸ *Id.* at 428-30.

²⁴⁹ *Id.* at 430-33.

²⁵⁰ Here I am borrowing terms used by Reva Siegel in a different context. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

²⁵¹ *In re Marriage Cases*, 183 P.3d at 419-27.

²⁵² *Id.* at 428.

²⁵³ *Id.* at 398-99, 400, 418, 421, 423-27.

²⁵⁴ *Id.* at 427.

What is society's interest in marriage? First, the court tells us, there is the channelling function of the family, as the "basic unit of our society."²⁵⁵ Older California cases state that the family "channels biological drives that might otherwise become socially destructive," giving order to sexuality and procreation.²⁵⁶ Second, civil marriage facilitates parents' providing for "the care and education of children in a stable environment."²⁵⁷ Third, society relies on marital and family relationships, which are attended by legal obligations of support, to provide crucial care for dependents and to relieve the public from, or at least share with it, the burden of support. Society favors marriage by linking many rights and responsibilities to it.²⁵⁸

For many reasons, the court explains, marriage is also of "fundamental significance" for those who seek to marry.²⁵⁹ It offers "the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."²⁶⁰ Indeed, constitutional precedents speak of it as part of the "pursuit of happiness."²⁶¹ The court notes that, of course, people can have and raise children outside of marriage, but "the institution of civil marriage affords official governmental sanction and sanctuary to the family unit."²⁶² Civil marriage – as a public statement – affords persons a public affirmation of commitment and a form of self-expression. It also enmeshes married persons in a broader network of extended family, as well as in the broader family social structure that is a vital part of community life. Families provide a place in which personality may be developed, intimate association pursued, and values and commitments generated that reach beyond the family.

Those who argue against extending marriage to same-sex couples often appeal to some of these traditional functions of marriage, particularly the channelling function. This argument prevailed, as noted above, in *Hernandez v. Robles*,²⁶³ in which New York's highest court rejected a constitutional challenge by same-sex couples to New York's marriage laws, and featured in a dissent in *Goodridge v. Department of Public Health*.²⁶⁴

Opponents of same-sex-marriage argued before the California Supreme Court that because of the historical link between marriage and procreation, the constitutional right to marry should be limited to opposite-sex couples.²⁶⁵

²⁵⁵ *Id.* at 422.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 423.

²⁶⁰ *Id.* at 422.

²⁶¹ *Id.* (quoting *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948)).

²⁶² *Id.* at 425.

²⁶³ 855 N.E.2d 1 (N.Y. 2006).

²⁶⁴ 798 N.E.2d 941, 974-75 (Mass. 2003); see also McClain, *supra* note 78, at 2155-68. One difference between California and New York is that the latter applied a "highly indulgent" rational basis test (*Hernandez*, 855 N.E.2d at 12), while California applied strict scrutiny (*In re Marriage Cases*, 183 P.3d at 442).

²⁶⁵ *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008).

Altering the definition of marriage, they argued, would send a message that marriage no longer has to do with procreation, or with a child's needing a mother and a father.²⁶⁶

The California court cogently rejected those arguments. It stated that although channelling procreation may be a reason for marriage, the constitutional right to marry has never been confined only to couples capable of procreating.²⁶⁷ Moreover, promoting "responsible procreation" among heterosexuals is not a constitutionally sufficient reason to deny same-sex couples the fundamental right to marry.²⁶⁸ The state's goal of encouraging stable two-parent family relationships can be served by extending the benefits of marriage to same-sex couples, who often raise children together. Here, same-sex couples, too, can be channelled to serve society's interest in family stability.

The California court also observes that, although providing a stable setting for procreation and childrearing is one important purpose of marriage, it is not the only one.²⁶⁹ The court rightly stresses marriage as an adult relationship. State and federal precedents link marriage to adult happiness and to personal enrichment.²⁷⁰ Here, one could say that the court draws more on what Cahn and Carbone would call the evolving blue state view of marriage, as about adult commitment instead of, primarily, organizing procreation. Moreover, the California court points out that the U.S. Supreme Court has upheld the constitutional right of married couples to use contraception.²⁷¹ Of course, the fact that *Griswold* is from 1967 suggests that important seeds of this so-called blue state, or commitment, model of marriage, were sown nearly 40 years ago.

The California court also considers and rejects another argument made by the marriage movement: the contention that allowing same-sex couples to marry will "send a message" that marriage has nothing to do with procreation and child rearing, and that it is "immaterial" to the state whether a child is raised by her or his biological parents.²⁷² But, the court held, recognizing the constitutional rights of same-sex couples to marry diminishes neither the constitutional rights of opposite sex couples nor the legal responsibilities of biological parents.²⁷³ If anything, the court concluded, recognizing these rights "simply confirms that a stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those being raised by opposite-sex couples."²⁷⁴ As New York's Chief Justice Kaye wrote in her dissent to *Hernandez*: "There are enough marriage licenses to go around for everyone."²⁷⁵

²⁶⁶ *Id.* at 432.

²⁶⁷ *Id.* at 431-32.

²⁶⁸ *Id.* at 432.

²⁶⁹ *Id.* at 431.

²⁷⁰ *Id.* at 432.

²⁷¹ *Id.* (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 433.

²⁷⁵ *Id.* at 451 (quoting *Hernandez*, 855 N.E.2d at 30).

In sum, the recent California high court opinion suggests more an adaptation and transformation than a rejection of the channelling function of family law and of the related idea of marriage as combining sex, procreation, and parenthood. No doubt California's legislature and its high court have concluded that the "unitive" view, if taken to be a conjugal model speaking just to organizing heterosexuality, is too narrow a view of marriage. Emphasizing the goods that flow to *adults* from the adult-adult aspect of marriage recognizes that marriage fosters individual and social goods apart from procreation and parenthood. But they also continue to accept the premise of the role of marriage in organizing family life in a way beneficial to adults, children, and society, by affording social sanction and support to encourage a stable, two-parent family. The advent of domestic partnerships and civil unions might seem, on one view, an opportunity to break free of the hold of marriage as such a central organizing institution and to explore alternative forms (opened up, for example, to opposite sex couples as well). Perhaps if there were not evidence of unequal treatment afforded to partners in these new legal statuses as they sought to claim the tangible benefits linked to spousal status, the California court might have been more willing to defer to the democratic process to give (as New Jersey's court suggested) these "new social and family relationships" time to catch on and the new labels time to "find [a] place in our common vocabulary."²⁷⁶ However, so long as the surrounding society continues to view marriage as the gold standard of state recognition of intimacy and family life, those alternative forms cannot yield substantive equality.

III. EPILOGUE: BEYOND POLARIZATION TO "COMMON VALUES"?

The language of value polarization and of red states and blue states harkens from recent presidential elections, most notably, that of 2004. But since this symposium took place, there has been a new election and the United States of America elected Barack Obama as its next president. President Obama, in his campaigns, strenuously resisted the idea of a red America and a blue America or red States and blue States.²⁷⁷ He instead appealed to the "United States" of America and to "values we hold in common as Americans."²⁷⁸ Undeniably, the troubling economy played a salient role in his election and his success in some red states. Nonetheless, his emphasis on the role of faith in public life and his talk about strong families, personal responsibility, and "social Gospel" types of values evidently resonated for many religious and so-called "values voters."²⁷⁹

²⁷⁶ See *supra* note 137 and accompanying text; see *Lewis v. Harris*, 908 A.2d 196, 223(N.J. 2006) (observing that, "in time," civil union label will "take hold").

²⁷⁷ *North Carolina Primary Night*, Raleigh, NC, May 6, 2008, <http://obamaspeeches.com> (last visited Feb. 3, 2009) (speech by Senator Obama).

²⁷⁸ *Obama's Speech in Canton, Ohio*, *supra* note 36.

²⁷⁹ Joel Mowbray, *Who Elected Barack Obama? Conservative Voters Become a Key Bloc*, WASH. TIMES, Dec. 2, 2008, at A17; Peter Steinfels, *Catholics and Choice (in the Voting Booth)*, N.Y. TIMES, Nov. 8, 2008, at A21.

In his inaugural address, President Obama exhorted Americans to unite to address the problems the Nation faces by returning to the “old” and “true” values on which America’s success depends: “honesty and hard work, courage and fair play, tolerance and curiosity, loyalty and patriotism.”²⁸⁰ Strikingly absent from this list is a reference to family values, although he did praise the unsung labor of a parent who nurtures a child. But what might he say about family values? Clearly, the practical challenges faced by families – including economic crises and work/family conflict – are on his agenda. But it will be important to see what kind of leadership he provides on some of the more divisive and challenging family values issues. For example, Obama’s effort to move beyond value polarization may be evident in his choice of Reverend Rick Warren, an opponent of both abortion and same-sex marriage, to deliver the opening prayer at the Inauguration. On the other hand, the stark contrast between President Obama and Reverend Warren on whether there should be a legal right to abortion raises question about common ground, beyond the possible common ground that there should be fewer unwanted pregnancies. What about same-sex marriage? Like most other Democratic leaders in recent times, Obama does not support same-sex marriage because of his personal understanding of what marriage is, but he does support civil unions for same-sex couples and repealing the federal Defense of Marriage Act so civil union partners are also eligible for federal benefits. Obama’s stance on this issue appeals to living up to America’s “founding promise of equality by treating all its citizens with dignity and respect.”²⁸¹ He also appeals to federalism and opposes a Federal Marriage Amendment: states should be free to decide on their own “how best to pursue equality for gay and lesbian couples – whether that means a domestic partnership, a civil union, or a civil marriage.”²⁸² Thus, a conservative religious leader and a Democratic, arguably progressive, President are united in resisting a change to the definition of civil marriage because of a particular religious understanding of the term. This conflation of civil and religious marriage, to the extent it is shared by people in red, blue, and purple states, remains a significant obstacle to opening up marriage to same-sex couples. What remains to be seen is whether there is any common ground possible between Reverend Warren and President Obama on where these couples and other nonmarital families fit into the fabric of American families and the array of family values. And how will this translate into the domain of family law and constitutional law? Obama suggests one way to resist division on the issue of marriage is to recognize “common ground” or a “quietly” forging consensus that gay and lesbian couples “should be treated with dignity” and have some core of protections, like hospital visitations and health care benefits.²⁸³ (The expansive scope of many state defense of

²⁸⁰ *Obama Inaugural Address*, Jan. 20, 2009, <http://obamaspeeches.com> (last visited Feb. 4, 2009).

²⁸¹ White House, President Barack Obama, Civil Rights, http://www.whitehouse.gov/agenda/civil_rights (last visited Feb. 5, 2009).

²⁸² *Id.*

²⁸³ Best Speeches of President Obama, Federal Marriage Amendment, <http://www.obamaspeeches.com/075-Federal-Marriage-Amendment-Obama-Speech> (last visited Feb. 5, 2009).

marriage laws casts doubt on any consensus on this score.) What does treating someone with dignity entail? As I have argued in this article, this strategy of incremental equality reflects a dramatically transformed landscape from the era of *Bowers v. Hardwick*. It evidences an expanding conception of family relationships and of society's interest in supporting such families. At the same time, the inevitable question arises: what justifies moving this far toward full equality – or distributive fairness – but no further?

In conclusion, as the debate over these matters continues, it may be useful to return to a question posed after the issuance of the U.S. Supreme Court's much-criticized decision in *Bowers v. Hardwick*: what is the proper place of moral argument in judicial reasoning about contested issues? Political theorist Michael Sandel criticized the majority for its empty assertion of majoritarianism as a basis for upholding the criminal ban, and the dissent for its appeal to empty liberal toleration.²⁸⁴ A better argument, he contended, must engage the issue of the substantive moral goods at stake lest the intimate lives of homosexuals are tolerated but not respected.

After *Lawrence v. Texas*, Sandel observed that, to some extent, Justice Kennedy, in his statement that “liberty presumes an autonomy of self,” drew on “the autonomy-based, nonjudgmental line of reasoning” of which Sandel is critical.²⁸⁵ However, he praised Justice Kennedy's opinion for “gesturing” toward a more “substantive” reason for the Texas law: it “wrongly demeaned a morally legitimate mode of life.”²⁸⁶ Privacy rights matter, the Court elaborated, because of the human goods of intimacy.²⁸⁷ Sandel notes that the Court also sought to move beyond “liberal toleration” to “affirm the moral legitimacy of homosexuality,” when it noted the stigma created by criminal laws banning same-sex, but not opposite-sex, sodomy.²⁸⁸ Just as liberals, Sandel suggests, were “freeing themselves from the assumption that privacy rights can be adjudicated without reference to the moral status of the practices that rights protect,”²⁸⁹ conservatives were embracing it. In declaring that there is a valid state interest for the law, Justice Scalia's dissent simply expresses a “value-neutral commitment to majoritarianism” rather than defend the antisodomy law on its merits.²⁹⁰ Sandel concludes by noting the “difficulty of bracketing moral judgment, whether in the name of respecting individual choice or deferring to majoritarian sentiment.”²⁹¹

I believe that contemporary debates over family definition inevitably entail engaging – rather than bracketing – moral judgment, political morality, and values. This seems especially true as debates turn from the use of the criminal law to distributive questions about access to resources (such as civil marriage)

²⁸⁴ Sandel, *supra* note 5.

²⁸⁵ MICHAEL J. SANDEL, PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS 142 (2005).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 143.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 144. I leave to the side here my differences with Sandel about liberal toleration.

and affirmative governmental responsibility. Of continuing importance is a strong liberal principle of affording people space to make decisions about their intimate lives.²⁹² The shift in family law in blue and some red states toward a functional definition of family responds to the *fact* of greater diversity, but also may reflect a judgment about the *value* of such diversity.²⁹³ Anxieties continue about what sorts of diversity are beneficial for children, adults, and the broader society. But arguments about the goods and values that are at stake in these family debates are part of the contemporary landscape.

²⁹² See GALSTON, *supra* note 1, at 3.

²⁹³ See *V.C. v. M.J.B.*, 748 A.2d 539, 556 (N.J. 2000) (Long, J., concurring) (“[W]e should not be misled into thinking that any particular model of family life is the only one that embodies ‘family values.’”).