

Bless The Tie That Binds: A Puritan-Covenant Case for Same-Sex Marriage

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Introduction

An increasing number of legal scholars and students, practicing attorneys, lobbyists and legislators, and private individuals are calling for the legal recognition of gay and lesbian marriages.¹ Those writers claim that the denial of legal status for such marriages violates basic legal and moral guarantees of American law.² They also argue that full legal recognition of same-sex marriage would be good for society as a whole.³ The commentators advance various rationales for their arguments. Absent, however, from their analyses is attention to one significant authority. That overlooked authority is Puritan⁴ ideology⁵ — specifically, the concept

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1. See, e.g., *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1603-11 (1989) [hereinafter *Developments*]; Note, *From this Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 Yale L.J. 1783 (1988) (written by Claudia Lewis); Comment, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 Berkeley Women's L.J. 134 (1987-88) (written by Alissa Friedman); James D. Weinrich, *Task Force Findings: Overview and Prospect*, in *Homosexuality: Social, Psychological, and Biological Issues* 377 (William Paul, James D. Weinrich, John C. Gonsiorek, and Mary E. Hotvedt eds. 1982) [hereinafter *Homosexuality*]; Andrew Sullivan, *Here Comes the Groom*, *The New Republic*, August 28, 1989, at 20. See generally *Homosexuality*, *supra* (the book is the report of the Task Force on Sexual Orientation the Society for the Psychological Study of Social Issues, which is a division of the American Psychological Association.), and Richard Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (1988) (philosophical musings on a number of issues that arise from the intersection of homosexuality and law).

2. See, e.g., Note, *supra* note 1; Comment, *supra* note 1.

3. See, e.g., Sullivan, *supra* note 1.

4. There is no single, commonly accepted definition of "Puritan." In general, however, the Puritans were British Calvinists who were zealous in their efforts to reform religion and society. Edmund Morgan has suggested a useful, non-technical definition of Puritan:

The Puritans were English Protestants who thought the Church of England as established under Henry VIII and Elizabeth retained too many vestiges of Rom[an Catholicism]. In the 1640's [sic] and 1650's [sic] they reorganized not only the church but also the government of England and for eleven years ran the country without a king. When the monarchy was restored in 1660, Puritans were disgraced, but their

of *covenant* in Puritan theology and social thought. As ironic as it may seem, Puritan values—and especially those embodied in the notion of covenant—encourage reversal of the hostility which contemporary marriage law manifests toward same-sex couples.

The Puritans were a principal influence⁶ on American thought and polity during America's formative decades.⁷ Puritan

work could not be wholly undone. Moreover, in the 1630's [sic] they had carried their ideas to the New World, where the king could not undo them.

Edmund S. Morgan, *Introduction*, Puritan Political Ideas 1558-1794, at xiv (Edmund S. Morgan ed. 1965). See also John Witte, Jr., *Blest Be the Ties That Bind: Covenant and Community in Puritan Thought*, 36 Emory L.J. 579, 579 (1987); Goldwin Smith, *The United States: An Outline of a Political History 1492-1871*, at 4 (1893).

Not all scholars define the Puritan movement so inclusively. Margo Todd, for example, stresses that Puritans "were a self-conscious community of [Calvinist] protestant zealots committed to purging the Church of England *from within* of its remaining Romish 'superstitions,' ceremonies, vestments and liturgy, and to establishing a biblical discipline on the larger society, primarily through the preached word." Margo Todd, *Christian Humanism and the Puritan Social Order* 14 (1987) (emphasis added). She thus distinguishes Separatists (such as the Plymouth Pilgrims) from other Puritans, even though the two groups shared common theological and social points of view. *Id.* See also Allan Nevins and Henry Steele Commager, *A Short History of the United States* 8-16 (5th ed. 1966).

The term "Puritan" was, originally, a term of opprobrium, highlighting a kind of "holier-than-thou" attitude within the reformist party. Leon Howard, *Essays on Puritans and Puritanism* 41 (1986). By the end of the sixteenth century, however, Puritan persistence "had rescued the term from contempt and given it a definable meaning with reference to church government and morality." *Id.* at 3. There remains in the modern, colloquial use of the term some of the earlier connotations of excessive strictness and sobriety. Throughout this paper, however, the term is used with no overtones of disfavor. "Puritan" denotes the biologic or ideologic heirs of the British reformers who came to the New World to escape scorn and persecution in England and were instrumental in shaping what became the United States.

5. "Ideology" is used to include both theological and non-theological reflection and is used with no pejorative connotation.

6. Puritanism was one of the most important influences on the development of American identity and polity. See, e.g., John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 Emory L.J. 41 (1990). It was not, however, the only one. In explaining historical developments, it is important to avoid what Ralph Barton Perry called "the fallacy of the definite article":

It is customary to refer to *any* reason or cause by which an event can be explained or controlled as *the* reason or cause. But in all historical situations there are many reasons and many causes; and if one of these is singled out for attention, it should be referred to as *a* reason or *a* cause. . . .

Ralph Barton Perry, *Puritanism and Democracy* 33 (1944) (emphasis in the original).

7. American polity is an amalgam of influences that entered the American continent at different times—most of them from Europe. Puritanism was the earliest of the European influences. Richard Schlatter, *The Puritan Strain*, in *The Reconstruction of American History* 27-28 (John Higham ed. 1962). Tocqueville discovered that a Puritan religious ethos permeated America at the very "cradle of its infancy." He saw a necessary connection between political freedom and Puritan

concepts and metaphors guided those who led the War for Independence⁸ and who designed the political structures of the nascent republic.⁹ According to one scholar, "[t]he remarkable coherence of the American revolutionary movement and its successful conclusion in the constitution of a new civil order are due in considerable part to the convergence of the Puritan covenant pattern [of thought] and the Montesquieuan republican pattern."¹⁰ Another scholar has said, "[w]ithout some understanding of Puritanism, . . . there is no understanding of America."¹¹

religious beliefs. Alexis de Tocqueville, *Democracy in America* 31-47 (1968). Puritanism established the context for the political and intellectual movements that came later. *Id.* In his many works, Perry Miller documents the pre-eminence of Puritan influence on the development of American intellectual history and on American polity. *See, e.g.*, Perry Miller, *Errand into the Wilderness* (1956) [hereinafter *Errand*]; and Perry Miller and Thomas H. Johnson, *The Puritans* (1938).

8. Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, in *Puritan New England: Essays on Religion, Society, and Culture* 364 (Alden T. Vaughan and Francis J. Bremer eds. 1977). Morgan traces key concepts by which Americans justified the War for Independence to what he calls "the Puritan Ethic"—a unique synthesis of ideas and values which Puritans imprinted on the emerging nation. *Id.* *See also infra* notes 33-43 and accompanying text.

To cite one illustration: Puritan influence on Thomas Jefferson may be deduced from his formulation in the Declaration of Independence that the States were compelled toward independence by "the laws of nature and of nature's God." Declaration of Independence. The deistic Jefferson was loathe to acknowledge an intimate link between the earth and the clockmaker-like creator who wound the spring and set the world to work on its own. Nonetheless, in announcing grounds for the Colonies' separation from Britain, he invoked images both from the deism he espoused and from the primarily Puritan protestantism of his day. Sanford Levinson, *Constitutional Faith* 1 (1988).

Similarly, the Preamble to the Constitution declares that the purpose of the Constitution is "to form a more perfect union . . . [and] promote the general welfare." Perfect union and general welfare were Puritan notions that expressed the Puritan understanding of the purpose of government. *Cf. infra* notes 191-96 and accompanying text.

9. Puritan ideology lay behind many of the purely secular political principles of the new nation. *See* Morgan, *supra* note 4. Hannah Arendt asserted that freedom in America originated in the "covenanted" community that was a Puritan innovation in America. Hannah Arendt, *On Revolution* 171 (1963).

The argument is not that the Puritans were the only group important for the development of American law or that Puritanism was the material source of such documents as the Declaration of Independence or the Constitution. The Constitutional Convention, for example, did not attempt to establish a Puritan republic—as the Plymouth Pilgrims had attempted (and, indeed, as many Puritans would have liked to do). Rather, the point is that Puritanism provided a significant element of the intellectual and political matrix out of which the Declaration and Constitution were formed. It bears repeating: Puritan thought is one—albeit one vitally important—element of the background against which the Constitution was written and should be interpreted.

10. Robert Bellah, *The Broken Covenant* 27 (1975).

11. Perry Miller, *The Puritan Way of Life*, in Miller and Johnson, *supra* note 7, at 1.

A critical component in legal analysis is a sense of history.¹² "We find our visions of good and evil . . . in the experience of the past, in our tradition. . . ." ¹³ That is not to suggest that the past determines the present and the future—in law any more than in psychology or history. But it does point out that in legal analysis it is necessary to account for both written sources of law (e.g., the Constitution) and ideologies that lie behind those texts.¹⁴ As Justice Holmes explained:

The law embodies the story of a nation's development through many centuries In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.¹⁵

Such a "pragmatic"¹⁶ approach is not enslaved to history, but it recognizes the importance of history. That courts—most notably

12. Milner Ball indicates by implication the importance of history for legal analysis:

In private law, precedent and the pull of deciding like cases alike, the rule of *stare decisis*, is the agreed basis for decision. *Stare decisis*, however, is really a theory of possibilities rather than a binding restriction. This being so, what determines the choice between available precedents or constructions of fact that may determine the outcome of a case? What does a judge turn to, and what in turn legitimates the judicial decision?

Milner S. Ball, *The Promise of American Law* 7-8 (1981). History helps one to make the decision about what precedents to apply. In constitutional interpretation, for example, it is important—indeed, Ball indicates that it is necessary—to consult the milieu out of which the Constitution grew. *Id.* By so doing, the interpreter discovers the "reality" which the Constitution was meant to reflect and secure. *Id.* The interpreter is then able to exercise judgment in order to solve the particular problem in ways consonant with the original values.

Ball's point is similar to that of Walter Murphy. Murphy insists that careful attention to both the structure and the historical background of the Constitution reveals a fundamental system of values that the Constitution was meant to promote. Those values are relevant to contemporary decisionmaking by virtue of their being "constitutive" of the legal reality that the Constitution establishes. Faithfulness to the Constitution requires that laws and opinions give effect to those values. Walter Murphy, *An Ordering of Constitutional Values*, 53 S. Cal. L. Rev. 704 (1980).

Thus, there are many ways in which the study of history informs legal decisionmaking. Farber and Sherry also demonstrate and discuss the theory and practice of bringing history to bear in legal analysis, especially as it operates in theories of "original intent." Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 347-71 (1990).

13. Alexander Bickel, *The Morality of Consent* 24 (1975).

14. Murphy, *supra* note 12, at 704-05 (1980). See also Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 Minn. L. Rev. 1331 (1988) (describing pragmatism's eclectic approach to legal problem-solving, with its reliance on precedent, tradition, legal text, and social policy).

15. Oliver Wendell Holmes, *The Common Law* 5 (Mark DeWolfe Howe ed. 1963).

16. Farber and Sherry, *supra* note 12, at 393. See also Farber, *supra* note 14.

the United States Supreme Court¹⁷—take history into account is clear.¹⁸ Any effort to explain, justify, or change current legal positions must comprehend historical events, doctrines, and developments. The appreciation of history implicates historically important social theories.¹⁹

Puritan ideology is one of the essential sources²⁰ of American law, and as such it is a valuable and authoritative source of insight for resolving difficult legal issues. Puritan thought provides a historical balance to other theoretical arguments—e.g., “original intentionalism”²¹ or majoritarian rule²² or “neutral principles”²³—that claim historical authority.²⁴ Puritan-covenant ideology complements and corrects interpretive frameworks that root in other social-political theories,²⁵ so that legal analysis is grounded in a

17. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (indicating that fundamental liberties are those “deeply rooted in this Nation’s history and tradition”).

18. For a discussion of the Supreme Court’s use of “original intent” in its analysis, see Farber and Sherry, *supra* note 12, at 351-71.

19. Anne Goldstein demonstrates that historically based understandings of social theory influence and confuse Supreme Court decisions. Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 Yale L.J. 1073 (written by Professor Anne Goldstein). In castigating the *Hardwick* majority’s inaccuracy and misuse of historical data, she highlights the importance the Court attached to historical—as opposed to purely legal—material.

20. “[T]he ‘Constitution’ of the United States . . . encompasses much more than the formal document itself. . . . Like the ‘constitutions’ of all so-called Western democracies, that of the United States includes a tradition of ideals and practices that evidence values and principles as vital as those formalized in the actual document.” Murphy, *supra* note 12, at 704-05.

21. E.g., Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455 (1986).

22. E.g., *id.* at 465 (arguing that “a jurisprudence of original intention” reflects commitment to democracy, not government by judges).

23. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

24. Such arguments focus, for example, on the “original intent” of the authors of the Constitution. E.g., Raoul Berger, *Government by Judiciary* (1977); and Meese, *supra* note 21. For a demonstration that the founders themselves denied the validity of “original intent” as an appropriate interpretive strategy, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985). Other arguments center on social contract theory, which the Constitution is supposed to reflect. Farber and Sherry highlight the importance of John Locke’s philosophy as background of the Constitution. Farber and Sherry, *supra* note 12, at 6-13. Locke is one of the pre-eminent expositors of social contract theory.

Historians and philosophers demonstrate that historical “causes” are “constituted of common or interrelated interests and beliefs.” Perry, *supra* note 6, at 33. See Robin W. Lovin, *Equality and Covenant Theology*, 2 J.L. & Religion 241 (1984) [hereinafter Lovin J.]. See generally *Errand*, *supra* note 7, and Miller and Johnson, *supra* note 7 (both discussing the political implications of early American Puritan theology). The study of law would benefit from the recognition of the complexity of the sources of American law.

25. Cass Sunstein demonstrates how political theories correct and complement

more complete understanding of the historical and intellectual milieu which produced American law.

This article argues that the implications of Puritan covenant ideology encourage the legal recognition of marriage between gays or lesbians. It is meant to complement—and certainly not to contradict—trenchant legal arguments for the recognition of gay/lesbian marriage.²⁶ It begins with a brief sketch of the history and theology of the Puritan movement in America, to demonstrate the authority of Puritanism for American law and to set forth Puritanism's basic themes. The article goes on to infer basic jurisprudential principles, or values, from that Puritan thought. It then analyzes how those principles encourage the legal recognition of same-sex marriage.

The Puritan Understanding of Life and Society

Historical Importance of the Puritans

The Puritans and their ideology were essential elements in the development of American self-understanding and of American law.²⁷ Puritan influence was felt early in American history, since Puritans were among the earliest white settlers in America. The Pilgrims who landed at Plymouth in 1620 were Puritans.²⁸ The

each other. Cass Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 68-85 (1985). Sunstein contrasts two theories of governance, both supported by the text and background of the Constitution. He promotes "republicanism" (which is Puritan-like in its emphasis on civic virtue) as a balance to "pluralism". One problem with the latter model, according to Sunstein, is its susceptibility to manipulation by "factions" who seek only their personal interests regardless of the effect on others. Those factions may represent the majority or a minority of the citizenry. A "republican" model prevents easy satisfaction with the ability of factions to disregard the well-being of the larger society. For a discussion of the differences between "classic republicanism" and "liberalism"—which the author more closely identifies with Puritanism—see John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* 9-10 (1984).

26. See, e.g., Note, *supra* note 1, for a feminist-jurisprudential case for recognizing same-sex marriage, and Friedman, *supra* note 1, for an equal protection rationale. See generally *Homosexuality*, *supra* note 1, for discussion of the issue from the standpoint of the social sciences.

27. Perry Miller argues that Puritan theology was the "innermost propulsion of the United States." Miller, *supra* note 7, at viii. See also Bernard Bailyn, *The Ideological Origins of the American Revolution* 32-33 (asserting that Puritanism provided an almost cosmic dimension to the development of American self-understanding during the years preceding the War for Independence).

28. Jude P. Dougherty, *Puritan Aspiration, Puritan Legacy: An Historical/Philosophical Inquiry*, 5 *J.L. & Religion* 109, 110 (1988). As indicated above, there is some dispute over whether the Pilgrims should be considered Puritans. See *supra* note 4. But see Evarts Boutell Greene, *The Place of Pilgrims in American History* 23 (1921) ("The Plymouth Pilgrims . . . were only the first line of skirmishers who spied out the land, the little vanguard of the great Puritan army").

members of the Massachusetts Bay Colony, who arrived in 1629, were Puritans. Rhode Island, Connecticut, New Jersey, Maryland, and Pennsylvania also began as Puritan enclaves.²⁹

Once established, Puritan colonies thrived and grew,³⁰ and all sections of the "new world"—not just "New England"—eventually felt the Puritan influence.³¹ In the original thirteen colonies, for example, an estimated eighty-five percent of the churches were Puritan congregations.³² That religious dominance greatly influenced the development of American social and political attitudes.

Puritan theology was a major intellectual force behind the development of American "tradition, culture, institutions, and nationality."³³ Puritan thought about the nature of life and of society encouraged and contributed to the formation of American republican polity.³⁴ Puritan theology inspired political doctrines about human equality,³⁵ participatory government,³⁶ and concern for the common good.³⁷ Puritan influence is apparent from the history of the formulation of the Declaration of Independence and

29. Dougherty, *supra* note 28, at 109.

30. For example, "[i]n the spring of 1630 John Winthrop reached Salem with eleven ships carrying nine hundred settlers, enough to found eight new towns, including Boston. The Massachusetts Bay Colony grew so rapidly that it was soon throwing off branches to the south and west." Nevins and Commager, *supra* note 4, at 10. At least some of the planting of new Puritan colonies was the result of the exile from established colonies of religious radicals. Those radicals (often zealous Puritans themselves) founded colonies which also thrived. For example, after he was exiled from Massachusetts, Roger Williams founded Rhode Island. *Id.* at 10. Earliest Puritan settlements did not always embody the tolerance and respect that underlay Puritan polity. See Dougherty, *supra* note 28, at 111.

31. Bailyn, *supra* note 27, at 33.

32. Dougherty, *supra* note 28, at 110.

33. Perry, *supra* note 6, at 34. Perry notes that "[p]uritan ideals were acquired [by what became the United States] before and during the colonial period. . . . They originated in the prenatal phases of American life and have predetermined the whole of its later development." Perry, *supra* note 6, at 33-34. See also Bellah, *supra* note 10, at 13-21; Lovin I, *supra* note 24, at 241 ("Nearly everyone agrees on the seminal importance of Puritan social thought in America, but there is a similar consensus on the decline of its influence [in recent decades].")

34. See generally Symposium: *The Republican Civic Tradition*, 97 Yale L.J. 1493 (1988). That "republicanism" is not the only—or even most important—strain of American intellectual and political thought which can claim Puritan sponsorship is the central point made by Diggins. See Diggins, *supra* note 25.

35. See Lovin I, *supra* note 24. One historian has noted that "the Puritan theory of church government had an influence on later American theories of democracy." Schlatter, *supra* note 7, at 37. See *infra* notes 163-78 and accompanying text.

36. Morgan, *supra* note 8, at 371-72; Reinhold Niebuhr, *The Idea of Covenant and American Democracy*, 23 Church Hist. 126 (1954). See *infra* notes 169-75 and accompanying text. See also Winthrop Hudson, *Theological Convictions and Democratic Government*, in *Puritanism and the American Experience* 226, 233 (Michael McGiffert ed. 1969).

37. Lovin I, *supra* note 24, at 247. See *infra* notes 191-96 and accompanying text.

the Constitution of the United States.³⁸ Even the fundamental image of the United States as a "federation" or a "federal union" roots in Puritan thought.³⁹ M. Susan Power analyzed the political writings of three early American Puritan leaders and found in them the early expression of essential themes of American constitutional government.⁴⁰

Puritan themes pervaded early American thought and were especially prominent in the struggle to shape the polity of the new nation.⁴¹ Winthrop Hudson summarizes the importance of Puritanism in America:

[D]emocracy as we understand it in America was derived from the three [Puritan] theological doctrines of the sovereignty of God, human bondage to sin, and a particular understanding of the way in which the implications of revelation are made known and confirmed. From these three doctrines, in turn, were derived an insistence upon fundamental law, limitation of power, and the efficacy of discussion and persuasion.⁴²

Hudson understands those three political doctrines—fundamental law, limitation of power, and the freedom of speech—as the core

38. See, e.g., Levinson, *supra* note 8, at 22. Diggins points out that the Puritan John Adams was the "Constitutional theorist" who devoted the most time and reflection to the Constitution of the United States. Diggins, *supra* note 25, at 69. The influence of Calvinist-Puritanism on Adams is unmistakable. *Id.* at 71. Hamilton and Madison also articulated Calvinist-Puritan themes in their efforts on behalf of the Constitution. *Id.* at 9. Thus, while the Constitution was by no means the effort solely of Puritans, it was in large measure shaped and promoted by Puritans and Puritan ideology.

39. "Federal" was a common synonym for "covenant" in Puritan theological writings (from the Latin *foedus*, covenant). The popularity of the notion of federal bonds among the colonies/states reflects Puritan understandings of relationships among people—whether person-to-person or on a national level—as characterized by mutual interdependence without the sacrifice of individual integrity. See, e.g., Niebuhr, *supra* note 36, at 132.

40. M. Susan Power, *Before the Convention: Religion and the Founders* (1984). The men are John Winthrop, the first governor of Massachusetts; Thomas Hooker, the original settler of Connecticut (of whom John Locke was an admirer); and John Dickinson, author of the Articles of Confederation. Of them she says, "The thoughts and deeds of these founders are the original American tradition. It is, most importantly, a tradition derived from the religious convictions of the founders The founders' complex achievement paved the way for the constitutional framers' accomplishments." *Id.* at 32.

41. In part because of the strength of their intellects, Puritan divines, scholars, and politicians exercised enormous influence beyond Puritan communities and beyond New England: "Until quite recently New England dominated American culture and New England was wholly Puritan in origin." Schlatter, *supra* note 7, at 27. See *Errand*, *supra* note 7. Niebuhr asserts that Puritan values and images were *fundamental* to the development of American polity. Niebuhr, *supra* note 36.

42. Hudson, *supra* note 36, at 227. See also Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1128-34 (1987) (discussing the prominence of notions of fundamental law in the theory of governance of the Founders).

values around which America was "constituted."⁴³

The Theological Foundation of Puritan Social Thought

To urge renewed appreciation for the Puritans is not to suggest the adoption of their particular theological or religious stance. Even in the early days the peculiarly religious character of Puritanism was rapidly displaced, even among strict Puritan groups, by the secular concerns of settling the new nation, including government, law, trade, and war.⁴⁴ What began as a theological movement was transformed into a more generalized social theory. Nevertheless, Puritanism was religious in its origins,⁴⁵ and some sense of Puritan theology is necessary in order to understand secularized Puritan social theory.

Puritans understood themselves to be agents⁴⁶ of God on earth, entrusted with responsibility for subjecting all aspects of life to God's rule.⁴⁷ They were convinced that they had special duties in the world. All of life was infused with a potential for ministry.⁴⁸

At the heart of Puritan thought about religion and life—*as Perry Miller has called it, the "marrow of puritan divinity"*⁴⁹—was the notion of *covenant*.⁵⁰ A covenant is a mutually beneficial relationship formed when two parties pledge absolute faithfulness to each other.⁵¹ A covenant shares some of the features of a contract, in that each party can hold the other accountable for the terms of the arrangement—an arrangement to which both parties freely assent.⁵² It is, however, a broader concept than contract, one more akin to romantic notions of marriage: Each party commits, as an integral aspect of the agreement, to remain bound by the agreement even in the event of the other's breach.⁵³ The Puritans

43. *Id.* at 226.

44. 1 Sidney Ahlstrom, *A Religious History of the American People* 129 (1979).

45. See *supra* note 4 and accompanying text.

46. They believed themselves specially chosen—or "elected"—by God to accomplish God's purposes in the world. Witte, *supra* note 4, at 591.

47. Niebuhr, *supra* note 36, at 130-33. See also Witte, *supra* note 4, at 590.

48. See Niebuhr, *supra* note 36, at 130-31.

49. Perry Miller, *The Marrow of Puritan Divinity*, in *Errand*, *supra* note 7, at 48.

50. Witte, *supra* note 4, at 579. Witte quotes a Puritan theologian writing in 1597: "The whole of God's Word . . . has to do with some covenant. . . ." *Id.* at 581-82.

51. *Id.*

52. See *id.* at 587.

53. *Id.* at 585 ("Man's [sic] fall into sin did not abrogate the covenant. . . . All men [sic] still stood in covenant relation with [God]."). For an elaboration on the differences between contract and covenant theories, see *Lovin I*, *supra* note 24.

structured their entire theological system around the notions of a covenant between God and humanity and of human covenants that reflected the divine-human covenant.⁵⁴ Covenant became the central motif in the exposition of Puritan thought about both religion and society.⁵⁵

For the Puritans, the history of the human race was suffused with covenants.⁵⁶ At the creation of the world, God had established a covenant with humanity. In general terms, God promised to care for and protect the human race;⁵⁷ humans for their part were to live according to God's will and to care for and protect one another.⁵⁸ Eventually, humanity failed to fulfill its covenantal responsibilities, but God did not abandon humanity.⁵⁹ Instead, God established a new covenant with humanity through Jesus—who fulfilled the original covenant vicariously for humanity.⁶⁰

Though the second covenant—or “covenant of grace”⁶¹—was built on faith, it nevertheless incorporated some aspects of the earlier covenant, the so-called “covenant of works.”⁶² The covenant of grace “repeat[ed] and embellish[ed] for sinful [humans] the terms of the old covenant. . . . Both required that the faithful believer lead his [sic] life in devotion, service, and praise of God—not as a condition of salvation, but as an expression of gratitude for God's grace and mercy.”⁶³ Within this scheme, every believer had a contribution to make. Each person was created with a unique

54. Witte, *supra* note 4. For the British Puritan John Preston, covenant was “the foundation for the whole history and structure of Christian theology”: “[Y]ou must know [the Covenant] for it is the ground of all you hope for, it is that that every man [sic] is built upon, you ha[v]e no other ground but this, God ha[s] made a Co[v]enant with you, and you are in Co[v]enant with him.” *Errand, supra* note 7, at 60 (spelling adapted to modern conventions).

55. See, e.g., Miller, *supra* note 7, at 60; Witte, *supra* note 4, at 579; Lovin I, *supra* note 24, at 241; Robin W. Lovin, *Covenantal Relationships and Political Legitimacy*, 60 *J. Religion* 1 (1980) [hereinafter *Lovin II*].

56. The term is used throughout the Bible. Early in the Bible, the term denotes the arrangement whereby God promised, following the Exodus of Israel from Egypt, to make the people of Israel his own special people and they consequently promised to live according to his commandments. *Exodus* 19-34. The Puritans read the notion of covenant back from the Exodus into the stories of the creation of humanity, Adam and Eve, in *Genesis* 1-3. Witte, *supra* note 4, at 583-84. They thereby invested the relationships between God and humanity with covenantal significance from the beginning of the world. See also *Errand, supra* note 7, at 63-71.

57. *Errand, supra* note 7, at 61 (quoting Richard Sibbes, a seventeenth-century Puritan divine: “God for his [sic] part [of the agreement between God and ‘poor creatures’], undertakes to convey all that concerns our happiness . . .”).

58. Witte, *supra* note 4, at 585-86.

59. *Id.*; Witte, *supra* note 4, at 60-63; Morgan, *supra* note 4, at xx-xvi.

60. Witte, *supra* note 4, at 585; *Errand, supra* note 7, at 62.

61. Witte, *supra* note 4, at 586; *Errand, supra* note 7, at 62.

62. Witte, *supra* note 4, at 583.

63. *Id.*

combination of traits and talents which she was expected to employ in the service of God.

The Puritans understood both covenants to require service to one's neighbor.⁶⁴ The covenant between God and humankind had its correlate in the believer's covenant with her neighbors and with the physical universe. The Puritans understood life to be a vital and exuberant—if sober and responsible—embrace of the world as the place where one expressed her devotion and service to God.⁶⁵ Care for and service to one's neighbor were a part of worship, on a par with singing psalms and preaching sermons.⁶⁶

Covenant theology impressed on Puritans that human life is essentially communal. Human being is defined in terms of relationships with others.⁶⁷ Every human event and relationship (covenant) is a reflection of the covenant between God and the human race, and each is invested with divine significance.⁶⁸

64. In this regard, the Puritans were true to their Calvinist roots. See Dwight J. Penas, *Always Settling, Never Settled: Family Life Among Contemporary Yankees 13-18* (Unpublished Master of Science Thesis, 1983) (copy on file with Law and Inequality).

65. *Id.*

66. Todd, *supra* note 4, at 133-39; *Lovin I, supra* note 24, at 253.

67. Covenant theory does not deny that individual existence is important. But covenant theory understands relationships—not individuals—to be the basic unit of society. In that regard it is distinct from social contract theory, with which it is often confused. For social contract theory, the individual is the basic unit of society. *Lovin I, supra* note 24, at 244.

Social contract theory in its broad sense roots in the philosophy of Thomas Hobbes (see *Leviathan* (1651)) and John Locke (see *Two Treatises on Civil Government* (1690)). While there are differences in the perspectives of the two, there is a relative congruence in their views. For both, human beings exist in nature as isolated individuals. The natural human state is the individual's striving to satisfy her needs and wants. See *Lovin II, supra* note 55, at 6-7 (summarizing Hobbes' explanation). Liberty is the unrestrained freedom to use whatever force is necessary to fulfill individual desires. *Id.* at 6. In a state of nature, human beings represent threats to each other's well-being, by competing for resources. Society is possible only when individuals give up some measure of their individual liberty to fulfill their needs and desires. See *id.* at 7.

Social contract theory posits that human society arose when—and continues to exist because—individuals consent (or contract) to forego asserting some of their liberty in exchange for others' promise to forego some of theirs. *Id.* at 8. As necessary as it is if human beings are to live together, such a "social contract" represents a profound challenge to individual integrity and a frustration of the individual's push for self-assertion. Society, or government, is fundamentally an unnatural condition. See *Lovin II, supra* note 55, for a concise comparison of social contract theory with covenant theory.

Covenant theory does not deny that individuals are important. But it understands social relationships to be the basic unit of existence. See *id.* See also *infra* notes 134-40 and accompanying text. See generally Perry Miller, *The Theory of the State and of Society*, in Miller and Johnson, *supra* note 7, at 181-94.

68. *Lovin I, supra* note 24, at 247 ("[O]ne essential partner in every Puritan covenant [between people] is God.")

Puritan notions of covenantal relationship are clearly manifested in the Puritan doctrine of marriage, which Puritans understood to be a covenant between a man and a woman.⁶⁹ Puritans played down the Anglican view of marriage as "an expression of the natural requirements of procreation."⁷⁰ Instead, Puritans emphasized the partnership of marriage: Puritan sermons on marriage emphasized mutual help, affection, and respect.⁷¹ Puritans married with an open-eyed understanding that in marriage they undertook serious obligations toward their spouses.⁷² For that reason, there was an emphasis on a person's freedom to choose whether or not and whom to marry.⁷³ In addition, marriage served an iconic function, exemplifying in microcosm the love and co-operation, service and care that the city, state, and nation were to practice.⁷⁴ As one Puritan writer put it in the sixteenth century: "A household is, as it were, a little commonwealth, by the good government whereof, God's glorie may be advanced, the commonwealth which standeth of several families, benefitted, and all that live in that familie may receive much comfort and commodities."⁷⁵

But the Puritan doctrine of covenant embraced realms wider than the family: The emphasis on covenantal service led Puritans to emphasize the believer's duty to contribute to the "common good."⁷⁶ "Living in covenant [meant] regarding persons and events with an unselfish eye, with a view to the whole rather than to a partial [individual] interest."⁷⁷ The Puritans were by no means communitarians.⁷⁸ But they were conscious that those well-off

69. Puritans held marriage in high regard as a state ordained by God. Nevertheless, they de-sacralized marriage and made marriage a civil matter. For several years they considered weddings which occurred in church to be illegal. Christopher Durston, *The Family in the English Revolution* 16 (1989).

70. *Lovin II, supra* note 55, at 5.

71. *Id.*

72. Witte, *supra* note 4, at 594-95.

73. Durston, *supra* note 69. See generally Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800*, at 325-34 (1977) (on the rise of "companionate marriage" in England parallel to that within Puritan society in New England). Both men and women enjoyed great freedom with respect to decisions about marriage.

74. Witte, *supra* note 4, at 594-95.

75. Robert Gataker, *quoted in id.*, at 595.

76. Robin Lovin notes the frequency of Puritan sermons emphasizing the duty of mutual help. *Lovin II, supra* note 55, at 5. See also *infra* note 81 and accompanying text for an example of that preaching. See also E. Clinton Gardiner, *Justice in the Puritan Covenantal Tradition*, 6 *J.L. & Religion* 39 (1988).

77. *Lovin II, supra* note 55, at 6.

78. See Todd, *supra* note 4, at 127-39; *Lovin II, supra* note 55, at 256. To cite one example: The Puritans, while aware of dangers associated with wealth, did not despise wealth *per se*. They were, however, profoundly concerned with the ways in

should help those less-well-off.⁷⁹ By employing its God-given intelligence, humanity would address human problems in such a way that everyone was better off.⁸⁰

The "common good" encompassed community and nation as well as personal relationships.⁸¹ Puritans understood their individual destinies to be wrapped up with the political subdivisions in which they lived. For example, before landing in Massachusetts, John Winthrop exhorted his fellow travelers to form the kind of, closely knit and care-filled society that would fulfill God's covenantal requirements and assure the Puritan community's success in the New World:

[W]ee must be knit together in this worke as one man [sic], wee must entertaine each other in brotherly [sic] Affeccion, wee must be willing to abridge ourselves of our superfluities, for the supply of others necessities . . . wee must . . . make others Conditions our owne, rejoyce together, mourne together, labor and suffer together. . . .⁸²

Winthrop's sermon indicates the inter-relatedness of all spheres of life in Puritan ideology. Community and nation were religious concerns as much as church and home.⁸³

Whether at the level of the community or at the level of the nation, political covenants, like personal covenants, were "tri-party agreement[s among] God, the civil ruler, and the people."⁸⁴ Civil rulers were to be accorded great respect because they represented God's authority to the society and guided the society in living according to God's will.⁸⁵ Such respect did not require absolute obedience, however. If the ruler violated God's will, it was the people's responsibility to replace the unsatisfactory ruler with one faithful to the ways of God.⁸⁶

which wealth was created and enjoyed. Stewardship and business ethics were well-developed themes in Puritan social thought. Todd, *supra* note 4, at 154-58.

79. *Lovin II*, *supra* note 55, at 257; Todd, *supra* note 4, at 127-39.

80. *Lovin I*, *supra* note 24, at 6.

81. Witte, *supra* note 4, at 590.

82. Bellah, *supra* note 10, at 14 (quoting John Winthrop).

83. Miller, *supra* note 67.

84. Witte, *supra* note 4, at 592.

85. *Id.* at 593.

86. *Lovin I*, *supra* note 24, at 254-56. Thomas Jefferson's motto may have been inspired by Puritans: "Rebellion to tyrants is obedience to God." Perry, *supra* note 6, at [frontispiece]. The motto was cited by one of modern times' most consistent Puritan legatees, The Rev. Mr. William Sloane Coffin, Jr., in a symposium about civil disobedience. Coffin argued (against the position of U.S. Supreme Court Justice Whittaker) that civil disobedience is a legitimate response to immoral government. He invoked the example of "our Puritan Fathers [sic]" to bolster his argument. Charles E. Whittaker and William Sloane Coffin, Jr., *Law, Order, and Civil Disobedience* 29 (1967).

Edmund Morgan elaborates on the notion of consent of the governed, which is

Puritans' concern for their righteousness before God led them to profound concern for the orders of society. Since all aspects of life were integrated under the rule of God, politics and law were as much dimensions of religion as was worship. Even after Puritan theological zeal waned, the religious-like dedication to political and legal matters had been planted too firmly in American soil to be dislodged.⁸⁷

Puritans and Same-Sex Marriage

There is no suggestion that the Puritans would have sanctioned same-sex marriage. The historical Puritans were people of their times. Official abhorrence of "sodomy" or "unnatural acts" was a part of their milieu.⁸⁸ In their denunciations of homosexuality Puritans were scarcely distinguishable from their counterparts.⁸⁹ Puritans did not always follow their ideology to its logical

implicit in the doctrines of covenant. He finds the roots of American willingness to break with England in the Puritan emphasis on the consent of parties to covenants—whether personal or national. Morgan, *supra* note 8, at 368-72. The ruler was "called" to serve the common good of those whom he governed. When the ruler failed to do so, he was to be sanctioned or even overthrown. *Id.* at 372-73.

87. See generally Levinson, *supra* note 8.

88. See Stone, *supra* note 68, at 492-93.

89. Durston groups homosexuality with rape and prostitution as objects of Puritan denunciations. Durston, *supra* note 69, at 31. He quotes one description of homosexuality as "unnatural heat" and "an impiety not to be credited to an honest heart." *Id.* He does not, however, suggest that homosexuality was considered more outrageous than other forms of sexual "immorality"—e.g., adultery, which if repeated, would have been punished by death (at least, if one Puritan had had his way.) *Id.* (Homosexuality was probably not dwelt on in Puritan teaching at lengths similar to other forms of sexual "misconduct".)

It is important to realize that until relatively recently there was no notion of "homosexuality" as an identifiable human condition. The terms "homosexuality" and "homosexual" are modern terms, originating in the late nineteenth and early twentieth centuries. Arthur N. Gilbert, *Conceptions of Homosexuality and Sodomy in Western History*, in *Historical Perspectives on Homosexuality* 61 (Salvator J. Licata and Robert P. Peterson eds. 1981) (citing Michel Foucault). Seventeenth- and eighteenth-century Puritans did not have the scientific understanding with which to rethink their time's general social disapproval of homosexual acts.

By the same token, there is reason to question whether the Puritans were as completely aghast at the notion of homosexual behavior as we are inclined to think. See, e.g., Martin Bauml Duberman, "Writhing Bedfellows": 1826—Two Young Men from Antebellum South Carolina's Ruling Elite Share "Extravagant Delight", in *Historical Perspectives on Homosexuality* 85 (Salvator J. Licata and Robert P. Peterson eds. 1981). Two law students of Puritan background, who eventually became prestigious members of society, share letters celebrating their physical joys in bed together, apparently without shame or self-consciousness. For the thesis that homosexuality was considered a vice but was nevertheless tolerated, see B.R. Burg, *Ho Hum, Another Work of the Devil: Buggery and Sodomy in Early Stuart England*, in *Historical Perspectives on Homosexuality* 69 (Salvator J. Licata and Robert P. Peterson eds. 1981). See Stone, *supra* note 73, at 541-42, for the suggestion that toleration for homosexuality was related to socio-economic class.

implications. For example, while Puritans were remarkably ahead of their times in affording equality and dignity to women in society,⁹⁰ they did not extend the right to vote to women.⁹¹ As another example, slavery was the subject of divisive concern for the Puritans at the founding of this country, but their treatment of the question—while radical in some quarters in their day⁹²—is unenlightened by modern standards. It is, therefore, neither surprising nor contradictory to suggest that, while the Puritans themselves would not have advocated legal status for same-sex marriage, Puritan ideology planted the seeds which would blossom into just such a stance.

The Puritans are important to contemporary legal analysis because of their importance to the formation of American law; their importance does not derive from their particular structures of society or from their solutions to social problems. The history-bound forms of their society are less important in modern times than are the values that informed their social structure and what they contributed to the American mix:

A political Puritan paradigm of covenant adequate to contemporary needs cannot be provided by simple resuscitation of some Puritan commonwealth in old or New England. . . . What we want to recover from the Puritan commonwealth is, not its constitution, but the basic normative guidelines that follow from its covenant structure of freedom and accountability.⁹³

The Puritan-Covenant Case for Same-Sex Marriage

There exists no systematic Puritan jurisprudence.⁹⁴ The earliest Puritans did not develop one and modern advocates of covenant theory have not yet undertaken the task. Even though law and the ordering of society were of vital concern to Puritans,⁹⁵ Pu-

90. Todd, *supra* note 4, at 96-97. See also E.S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England* (rev. ed. 1966).

91. Abigail Adams was actively involved in political affairs even without the vote. See, for example, Thomas Jefferson's letters to her on a variety of topics, among them the Sedition Act of 1798. 4 Thomas Jefferson, *Letter to Mrs. Adams*, *Jefferson Works* 555 (Washington ed. 1871).

92. See, e.g., *A Coppie of the Liberties of the Massachusetts Colonie in New England*, in Morgan, *supra* note 4, at 196 ("There shall never be any bond slaverie, villinage or Captivitie amongst us unles it be lawful Captives taken in just warres, and such strangers as willingly selle themselves or are sold to us.")

93. *Lovin II*, *supra* note 55, at 1.

94. Contemporary scholars are, however, beginning to systematize Puritan social theory and to explore its implications. See *Lovin I*, *supra* note 24; *Lovin II*, *supra* note 55; and Douglas Sturm, *Community and Alienation: Essays on Process Thought and Public Life* (1988).

95. See *supra* text accompanying notes 64-87.

ritans did not isolate jurisprudential concerns from the rest of their reflections on how to structure their lives in faithfulness to their covenant with God. Still, it is possible to identify a set of basic jurisprudential principles—or “values”⁹⁶—implicit in Puritan ideology.

After an analysis of the “problem” posed by same-sex marriage, this section of the article articulates major principles of Puritan jurisprudence. It relates those principles to modern expressions of legal philosophy. Finally, it demonstrates that each of those principles contributes to the substantial case for the legal recognition of same-sex marriage. Legal recognition is not only permissible under modern articulations of Puritan jurisprudence; it is compelled.

Costs of the Denial of Legal Status to Same-Sex Marriage

Marriage between partners of the same sex is illegal in every state.⁹⁷ Despite legal prohibitions, however, gay men and lesbians continue to form committed relationships, marriage-like in all aspects except legal status.⁹⁸

The denial of legal status to the relationships does not have merely incidental repercussions. The costs to a gay or lesbian couple of being denied legal status for their relationship are enormous. The denial of marriage to couples exposes them to discrimination from employers, landlords, and institutions offering facilities to the public.⁹⁹ Unmarried couples face discrimination in housing.¹⁰⁰ Gay and lesbian partners are generally barred from

96. Murphy, *supra* note 12.

97. See, e.g., Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

98. See Mary Mendola, *The Mendola Report: A New Look at Gay Couples* (1980). Psychologist Charles Silverstein has described the varieties of and issues in gay male love relationships and enlivened the discussion with extensive anecdotal material. Charles Silverstein, *Man to Man: Gay Couples in America* (1981).

99. Graham Douthwaite, *Unmarried Couples and the Law* 6 (1979). See *Developments, supra* note 1, at 1610-23. See also Matthew A. Coles, *The Case for Gay Rights*, 9 Hamline J. of Pub. L. and Pol. 237 (1988).

100. *Developments, supra* note 1, at 1612-13. There has been a move in housing and zoning case law in favor of including a wide range of living arrangements under the rubric “functional equivalents of families.” See, e.g., Braschi v. Stahl Assoc., 74 N.Y.2d 201, 544 N.Y.S.2d 784, 543 N.E.2d 49 (1989) (holding that the right of a family member to continue to occupy a rent-controlled apartment should not be limited to spouses and blood relatives of tenants). There is continuing difficulty, however, for unmarried couples in securing housing. See, e.g., State by Cooper v. French, No. C2-89-1064 (Minn. Aug. 31, 1990) (LEXIS, Minn library, Minn. file)(holding that the Minnesota Human Rights Act does not protect unmarried cohabitants, even though it prohibits discrimination on the basis of “marital status”).

spousal benefits under worker's compensation laws, since they are not legal spouses.¹⁰¹ Married couples receive benefits from the federal government which are denied to gay and lesbian partners, such as special tax treatment¹⁰² and Social Security benefits.¹⁰³

Not only does denial of legal recognition deprive same-sex couples of entitlements accorded "married" couples, but the lack of legal marital status limits the causes of action available in tort to gay and lesbian partners. For example, a California court held that an unmarried partner could not collect damages for negligent infliction of emotional distress or loss of consortium.¹⁰⁴ Another court held that an intimate homosexual relationship does not fall within the "close relationship" standard for negligent infliction of emotional distress.¹⁰⁵

Domestic relationship law is a field in which gay and lesbian partners face definite hardship. The legal difficulties associated with child custody¹⁰⁶ and visitation,¹⁰⁷ and with conceiving¹⁰⁸ and adopting children,¹⁰⁹ are manifold. There are no rights of inheritance for a gay or lesbian partner in the event of the death of the other partner.¹¹⁰ Since the famous *Marvin v. Marvin*¹¹¹ decision

101. *Developments, supra* note 1, at 1618. "Only one workers' compensation board has recognized the claim of an insured employee's gay partner." *Id.* at 1619.

102. *See, e.g.*, I.R.C. §§ 1, 6013(a) (1987) (joint return) and I.R.C. § 152 (1987) (dependency deductions).

103. *See, e.g.*, 42 U.S.C. §§ 401-03.

104. *Elden v. Sheldon*, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

105. *Coon v. Joseph*, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987).

106. *See e.g.*, the analysis of *Zenker v. Zenker* in *Lesbian/Gay Law Notes*, Oct. 1989, at p. 51, col. 1. *But see* *In re Pearlman*, 15 Fam. L. Rep. (BNA) 1355 (holding that a lesbian partner of a biological mother of a ten-year-old child was entitled to custody as a "de facto" parent). *See also* Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 Harv. L. Rev. 617, 619-20 (1989) (documenting that courts are more likely to deny custody to a gay or lesbian parent if that parent is in an intimate, same-sex relationship than when the parent is single).

107. *Douthwaite, supra* note 99, at 111-46.

108. *See, e.g.*, Donald Shapiro and Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. Fam. L. 271 (1985-86). *See also* Mary Hotvedt and Jane Barclay Mandel, *Children of Lesbian Mothers, in Homosexuality, supra* note 1, at 275-85.

109. *See* Emily C. Patt, *Second Parent Adoption: When Crossing the Marital Barrier Is in a Child's Best Interests*, 3 Berkeley Women's L.J. 96 (1988) (advocating second-parent adoption when couples have children and are not married or do not wish to marry).

110. *See* Sol Lova, *When Is a Family not a Family? Inheritance and the Taxation of Inheritance within the Non-Traditional Family*, 24 Idaho L. Rev. 353, 363 (1987-88) ("Unless . . . voluntary protections [such as drafting a will] have been created, the survivor of such an unmarried couple . . . stands completely without inheritance rights.").

111. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The notorious case of Marc Christian's suit against the estate of Rock Hudson did not involve claims for

there may be grounds, at least in California, for an unmarried heterosexual partner to get support from the other partner—so-called “palimony.” In the event that a gay or lesbian relationship breaks up, however, there is no precedent for the award of such support as is available to unmarried heterosexual partners.¹¹² The experience of one lesbian couple in Minnesota demonstrates that the lack of legal status for their relationship has adverse implications even for one partner’s rights to visit her disabled lover.¹¹³

The denial of legal recognition for same-sex marriage takes a toll beyond the economic and legal costs. Richard Mohr has written passionately of the intertwined legal and emotional burdens that he and his “lover and husband” must bear as a result of the lack of legal sanction for their relationship:

[I]n the eyes of the law we are necessarily strangers to each other, people who had as well never met. In Illinois, [where Mohr and his lover live] one cannot will one’s body. By statute, it goes to next of kin. That which was most one’s own—the substrate for personality—which was most one’s own for another—that in which and by which one loved and made love—is, for gays, not one’s own at all. The lover is barred from the lover’s funeral. The compulsory intervention of heterosexuality at death is the final degradation worked by The People on gay people.¹¹⁴

spousal or quasi-spousal benefits. See Susan Adams, *Money for Fear: Why a Jury Awarded \$21.75 Million Dollars to Rock Hudson’s Lover*, 11 Am. Law. 135 (July-Aug. 1989).

112. Several authorities suggest that partners should sign pre-nuptial-like contracts to cover contingencies of the relationship. See, e.g., Hayden Curry and Denis Clifford, *A Legal Guide for Lesbian and Gay Couples* 22 (3d ed. 1985). See also Lenore Weitzman, *The Marriage Contract* (1981) (suggesting contractual arrangements in lieu of formal marriage for all couples). The suggestion that the couple sign a contract to cover foreseeable emergencies or contingencies is sound as far as it goes. Such a contract, however, does not substitute for marriage.

The problems with proposals which substitute contracts for marriage is that they miss the point: They often express a view of marriage as a less-than-desirable arrangement. See Weitzman, *supra*. They fail to address the needs of those couples who seek the social and emotional benefits which formal marriage accords. The proposals also fail to account for the loss of legal and economic benefits to the couple by virtue of their not being married. Finally, there is the danger that the contracts will not be enforced. Farnsworth notes that “[c]ourts have traditionally looked with disfavor upon . . . ‘cohabitation contracts,’ because they have regarded them not only as immoral, but also as a threat to the institution of marriage.” E. Allan Farnsworth, *Contracts* 345-46 (1982). He goes on to discuss the *Marvin* decision, which he admits changes the legal atmosphere with regard to non-marital agreements. But he points out that *Marvin* has not enjoyed universal acceptance. *Id.* at 136.

113. See also Karen Thompson and Julie Andrezejewski, *Why Can’t Sharon Kowalski Come Home?* (1988) (an account of Thompson’s efforts to gain rights to visit with her life partner after Kowalski’s hospitalization with severe injuries stemming from an accident).

114. Mohr, *supra* note 1, at 18.

Numerous rationales have been offered to justify denial of legal status to gay and lesbian marriage. Friedman identified and evaluated several of the most common of those rationales.¹¹⁵ In every case, she found the rationale inadequate to justify the practice.¹¹⁶

States claim an interest in encouraging procreation,¹¹⁷ but such an interest cannot withstand scrutiny: Certainly, there is little reason to fear the extinction of the human race from underpopulation.¹¹⁸ Neither do Supreme Court rulings with respect to birth control and abortion support the assertion that the state has an overriding interest in encouraging procreation.¹¹⁹

Concern for the well-being of children conceived within or brought into a marriage is a legitimate state interest. But there is no empirical evidence that the legalization of same-sex marriage represents a threat to children of the marriage. Children are no more likely to be molested by gay or lesbian parents than by heterosexual parents.¹²⁰ If the concern is to discourage development of homosexual identity in children, there is no evidence that children develop homosexual identities because of their families' make-up.¹²¹ Children of gay or lesbian partners are no more apt to be stigmatized if the partners are married than if they are

115. Comment, *supra* note 1, at 160-69.

116. *Id.*

117. See, e.g., *Singer v. Hara*, 11 Wash. App. 274, 259, 522 P.2d 1187, 1195 (1974) ("The refusal of the state to authorize same sex marriage results from [the] impossibility of reproduction. . .").

118. Comment, *supra* note 1, at 161. As Friedman points out, no state has forbidden sterile men or women from marrying a member of the opposite sex. *Id.* It is at best questionable whether procreation is an interest which the state encourages by denying marriage to same-sex couples. Indeed, reproductive technology allows lesbians to bear children. Shapiro and Schultz, *supra* note 108, at 274. That fact would obviate state objection to lesbian marriage if the objection is based on a desire to encourage procreation.

119. Comment, *supra* note 1, at 161-62. The Court has given individuals' privacy interests pre-eminence over any state interference, unless the state has an overwhelming, legitimate reason for doing so. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1977).

120. See sources cited by Shapiro and Schultz, *supra* note 108, at 163. Studies suggest that the rate of child molesters is lower within homosexual populations than within heterosexual populations. William Paul, *Introduction*, in *Homosexuality*, *supra* note 1, at 302.

121. Comment, *supra* note 1, at 163. The etiology of homosexuality is far from ascertained. That it is a choice from among options is almost universally disputed by psychologists and sociologists. See Weinrich, *supra* note 1, at 378-79. That sexual orientation is established fairly early in life and is "immutable" is increasingly accepted as beyond question. Richard Green, *The Immutability of (Homo)Sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 *Psychiatry & L.* 537 (1988) (Dr. Green is both Professor of Law and Professor of Psychiatry at U.C.L.A.).

merely living together.¹²² There is thus little support for the claim that children would be more "at risk" in gay- or lesbian-parent families than they are in heterosexual-parent families.¹²³

Another claim advanced by those who oppose same-sex marriage is that the denial of marriage to same-sex couples discourages illegal homosexual activity.¹²⁴ They argue that the state has an interest in discouraging illicit sexual activity so as to encourage fidelity, responsible sexual activity, and public health. By legalizing same-sex marriage, however, the state does not give up authority to regulate extramarital sexual activity. (Arguably a state would have to decriminalize intramarital homosexual activity. Still, in *Bowers v. Hardwick*, the Supreme Court held that while the right to privacy protects marriage, procreation, and family decisions, it does not necessarily protect all sexual practices in marriage.¹²⁵ Thus the legalization of marriage between gays or lesbians would not necessarily prevent a state with a sense of the ironic from prohibiting certain sexual practices—as Georgia's sodomy statute does.¹²⁶)

Another common objection to same-sex marriage is that it represents a challenge to the "traditional" family,¹²⁷ but how same-sex marriage would undermine the values associated with family life is vaguely defined.¹²⁸ The institution of same-sex marriage would foster the same values as does heterosexual marriage: Same-sex marriage would foster commitment, loyalty, and inti-

122. Comment, *supra* note 1, at 163-64. It may well be the case that children would benefit from the enhanced social prestige which would accompany the recognition of the marriage of the same-sex couple.

123. David J. Kleiber, Robert J. Howell, and Alta Lura Tibbits-Kleber, *The Impact of Parental Homosexuality in Child Custody: A Review of the Literature*, 14 Bull. Am. Acad. Psychiatry & L. 81, 86 (1986).

124. Comment, *supra* note 1, at 164. That argument, of course, has no force in the twenty-three states that have decriminalized homosexual activity between consenting adults. *Id.* at 164-65.

125. See *Bowers v. Hardwick*, 478 U.S. 186, 193-94 (1986) (pointing out without disapproval that in 1986 twenty-four States and the District of Columbia provided for criminal penalties for sodomy).

126. Comment, *supra* note 1, at 164-65. The *Hardwick* majority appears to grant such a point. See *Bowers v. Hardwick*, 478 U.S. 186, 215 (Justice Stevens dissenting) (commenting on majority opinion). Justice Stevens attacks that point specifically, concluding that a state must stay out of a married couple's sex life. *Id.* at 217-18.

127. Comment, *supra* note 1, at 168. A "traditional" family is an often-evoked platitude. It is, however, difficult to define what a "traditional" family is. It is the guess of the author of this article that "traditional" is usually meant to indicate "nuclear" families. But nuclear families are not universally recognized as traditional or normal. See, e.g., Carol Stack, *All Our Kin: Strategies for Survival in a Black Community* (1978) (an anthropological study of family life among a predominantly Black community in a small midwestern city, and sources cited by Penas, *supra* note 64.).

128. See Comment, *supra* note 1, at 169.

macy, just as does heterosexual marriage.¹²⁹ There is no evidence that gay men and lesbian women in committed relationships are any less committed to the permanency of their relationships than are heterosexual partners.¹³⁰ If, on the other hand, the fear is that legalization of same-sex marriage would lessen the appeal of opposite-sex marriage, the answer is obvious: People do not choose their sexual orientation;¹³¹ neither, then, for the vast majority of people, is the gender of a potential marriage partner a matter of choice.

Courts have given permission for the majority culture to promote and impose its cultural and moral norms, and some justify legal hostility toward gay and lesbian couples by recourse to a history of disfavor of homosexuality.¹³² But under the Constitution there are limits to majority rule:

Majority rule is simply not the same thing as constitutionalism, as that concept was classically defined. One cannot understand the notion of a constitution, at least prior to twentieth-century thought, without including its role of placing limits on the ability of majorities (or other rulers) to do whatever they wish in regard to minorities who lose out in political struggles.¹³³

129. See sources cited in Comment, *supra* note 1, at 157 nn.151-52 & 158-68.

130. See Mendola, *supra* note 98, at 68-69. Indeed, gays and lesbians may show greater capacity to establish durable relationships than do heterosexuals: Many are able to maintain long-term relationships despite the lack of official legal and social supports on which heterosexual couples can count and despite formally sanctioned discrimination. Richard Mohr has rhapsodized on the nature of gay "marriage" and of his own in particular:

The sanctifications that descend instantly through custom and ritual on current marriages, descend gradually over and through time on gay one is. . . . [T]he sacred values and loyal intimacies contained in a gay marriage are products of the relation itself, are truly the couple's own. Marriages are patens for value. In this, though, they vary like patinas. . . . Gay marriages . . . are like the development of a patina on wood. The warming, the enriching, the surface that is depth, the depth that is sheen are a result of a necessary age And so, after a decade together, we feel and to many puzzled others appear more married than the married.

Mohr, *supra* note 1, at 18. See also C.A. Tripp, *The Homosexual Matrix* 159 (2d ed. 1987) ("[T]he settled-in qualities of the homosexual couple tend to be precisely those which characterize the stable heterosexual relationship.").

131. Green, *supra* note 121, at 569. Heterosexuals do not choose their sexual nature and would certainly not choose same-sex marriage. Homosexual marriage is, thus, not alluring to the majority of people. See *Watkins v. United States Army*, 847 F.2d 1329, 1347-48, *reh'g en banc* ordered by 847 F.2d 1362, opinion withdrawn on *reh'g* by 875 F.2d 699 (9th Cir. 1989) (discussing the immutability of homosexuality and its relationship to equal protection).

132. Comment, *supra* note 1, at 167. See, e.g., *Hardwick*, 478 U.S. at 193-94.

133. Levinson, *supra* note 8, at 70. See also *Bowers v. Hardwick*, 478 U.S. at 210 (Justice Brennan dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passion with which it defends them can withdraw legislation from this Court's scrutiny."). Such a view echoes the Puritan

The issue of the rights of gay and lesbian people—and in particular the right to legal recognition of their committed relationships—will not go away. The issue is of vital concern, not only to gay and lesbian Americans, but also to heterosexual Americans. Puritan covenant analysis reveals that what is at stake is fidelity not just to the letter of American law, but also to its “spirit” or its “heart”. Puritan covenant analysis reveals both what is at stake in the argument and how to resolve the problem.

Special Protection for Relationships

As a first principle, covenant theory “both in affirmations of its ideals and [in] lamentations over its failure, reminds us that relationships between persons in . . . society carry a special weight.”¹³⁴ That is, because of their importance in the overall scheme of life, personal relationships are due special attention and protection. The fundamental premise of covenant theory is that human life is communal, interpersonal, social¹³⁵: “[O]ur lives . . . are caught up with each other. They cannot be lived in splendid isolation, each pursuing an independent pathway. . . .”¹³⁶ Covenanting with others—individuals and collectivities—is of the essence of human being.

Among covenants, marriage is special. Marriage is a covenant between two independent people and the most basic expression of the communal nature of human being.¹³⁷ The marriage bond embodies, in covenant terms, a community of mutual “love and service, cooperation and care.”¹³⁸ It is the basic level of social involvement.¹³⁹ The Puritan view suggests that marriage is due

emphasis on personal dignity and has significant implications for the majority’s interference with interpersonal relationships. Constitutional rights cannot be abridged by majoritarian moral beliefs. Furthermore, there is little reason for the majority to do so.

134. *Lovin II*, *supra* note 55, at 1.

135. See *supra* notes 64-82 and accompanying text.

136. Sturm, *supra* note 94, at 61.

137. See Witte, *supra* note 4, at 594-95.

138. *Id.* at 595. It may very well be that many marriages are far from the models of mutual respect and care that covenant theory believes it possible for them to be. See, e.g., Lenore Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Calif. L. Rev. 1235-36 (1974), for a denunciation of marriage as an oppressive regime. That such criticism identifies an essential and unavoidable flaw in the institution, however, is disputed by the vast numbers of people who apply for license to marry. From a covenant perspective, marriage has at least the potential to be a liberating influence. See Laurence D. Houlgate, *Family and State: The Philosophy of Family Law* 57-67 (1988).

139. *Lovin II*, *supra* note 55, at 1. Puritans added a special touch to the most liberal view of marriage in their day. They stressed the qualities of consent and companionship over that of procreation. They did not completely ignore marriage

special care and protection. Marriage is fundamentally important to the people involved, of the utmost importance to them. As such, it is also of utmost importance to society.¹⁴⁰ As an institution, marriage contributes to the common good of society.

Such high respect for the covenant between two people is neither unique to the Puritan view nor lost to the past. Time and again, the U.S. Supreme Court has recognized—at least implicitly—that one-to-one relationships are of vital importance to the fulfillment of liberty. Thus, for example, it has severely restricted the power of states to interfere with an individual's decisions about whether and whom to marry,¹⁴¹ birth control,¹⁴² with whom to live,¹⁴³ child care and education,¹⁴⁴ and whether to carry a fetus to term.¹⁴⁵ The Court has had to struggle, however, to articulate a rationale for such protection.¹⁴⁶ Most decisions propound an individualistic, social-contract¹⁴⁷ doctrine of "privacy" or "fundamental" rights. For example, Justice Douglas, writing for the majority in *Griswold*, identified a "penumbra of privacy" among the rights guaranteed by the Bill of Rights.¹⁴⁸ The argument is that the Bill of Rights is not a limited specific list of rights aside from which there are no others guaranteed.¹⁴⁹ Rather, the Bill of Rights describes a field of rights from which it is possible to extrapolate specific applications. The Bill of Rights establishes a zone of individual autonomy which the government may not invade or

as the setting for the conception and rearing of children. They did, however, replace child-bearing with companionship as the chief point of marriage. *Id.* at 5.

140. Witte, *supra* note 4, at 595 ("The married couple, the covenant family, played a vital role in society, alongside the church and the state.").

141. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's law forbidding interracial marriage on grounds that marriage is a fundamental right against which Virginia could assert no compelling state interest).

142. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that interference with decisions regarding the use of contraception is an unconstitutional violation of due process).

143. *See Moore v. East Cleveland*, 431 U.S. 494 (1977) (invalidating a housing ordinance which restricted cohabitation to certain configurations of blood relatives). *But see Belle Terre v. Boraas*, 416 U.S. 1 (1974) (holding that there is no fundamental right to share housing with people to whom one is not related).

144. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (invalidating a statute requiring parents to send their children to public schools, thereby preventing their sending children to private or parochial schools).

145. *See Roe v. Wade*, 410 U.S. 113 (1973).

146. Comment, *supra* note 1, at 153.

147. *See supra* note 67.

148. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

149. *Id.* at 492 (Justice Goldberg concurring) ("[T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive.").

violate.¹⁵⁰

Covenant theory reinforces "privacy theory"¹⁵¹ while also transcending it. It builds on the view that not all of the "rights" of members of society are articulated in specific passages of the Constitution.¹⁵² In the case of marriage, protection does not depend solely on "penumbral" guarantees of individual liberty located within the interstices of constitutional amendments. It is grounded in the "morality" of the Constitution's framers, which morality can be "translate[d] . . . into . . . rule[s] to cover unforeseen circumstances."¹⁵³

Marriage is a fundamental right¹⁵⁴—whether considered from the standpoint of "privacy" doctrine or from covenant theory. States must have a substantial reason for interfering with or denying marriage to heterosexual couples.¹⁵⁵ There is insufficient reason to deny its benefits to couples who are of the same sex. Covenant ideology asserts that committing to a relationship is a basic expression of being human. Such commitment is no less funda-

150. *Id.* at 484.

151. "Privacy" may be a misnomer, from a covenant point of view. The issues commonly protected under "privacy" doctrine have very public implications. Nevertheless, it is beyond the scope of this article to rename well-established constitutional doctrines.

152. *Griswold*, 381 U.S. at 482-84. The most vehement critics of privacy doctrine—e.g., Robert Bork—are surprisingly quiet about the ninth amendment to the Constitution. Levinson, *supra* note 8, at 86. The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. That amendment strongly indicates that citizen rights are not restricted to those rights set forth in the Constitution and amendments. Justice Goldberg makes this point in his concurrence in *Griswold*. 381 U.S. at 488. For a discussion of the ninth amendment and its potential importance for constitutional decision-making, see Randy E. Barrett, *Reconceiving the Ninth Amendment*, 74 Cornell L. Rev. 1 (1988). See also *Symposium on Interpreting the Ninth Amendment*, 64 Chi.-[]Kent L. Rev. 37 (1988). If that is the case, covenant social theory is an authoritative source to be consulted in order to identify what those unenumerated-but-protected rights are.

153. Levinson, *supra* note 8, at 81 (quoting Robert Bork).

154. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men [sic]. . . . Marriage is one of the basic civil rights. . . .") Courts have consistently rejected strict scrutiny of marriage laws that distinguish between heterosexual and homosexual orientation. The United States Supreme Court, for example, dismissed the appeal from *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971) "for want of substantial federal question." 409 U.S. 810 (1971). Courts and legislatures need not remain bound, however, to a past that gives short shrift to fundamental rights not heretofore recognized. See *Loving's* rejection of the rationale in *Pace v. Alabama*, 106 U.S. 583 (1883), as "represent[ing] a limited view of the Equal Protection Clause which has not withstood analysis in subsequent decisions of this court." *Loving*, 388 U.S. at 10. Both courts and legislatures should be confronted with the covenant case for same-sex marriage and convinced to reverse that part of legal tradition which denies recognition to same-sex marriage.

155. *Loving*, 388 U.S. at 9.

mental for gay men and lesbian women than it is for heterosexual couples.¹⁵⁶ The need to connect with another is felt as keenly by homosexual people as by heterosexual people.¹⁵⁷

There is no valid reason to distinguish between homosexual and heterosexual couples in matters regarding the right to marry; studies suggest that homosexual couples are virtually indistinguishable from heterosexual couples.¹⁵⁸ In many cases, gays and lesbians already live in *de facto* marriages.¹⁵⁹ Many have formalized and publicized their commitment through rituals, even though those rituals do not have legal effect.¹⁶⁰

Richard Mohr suggests the positive consequences of legalizing gay and lesbian marriage: "[I]f current discrimination, which drives gays into hiding and into anonymous relations, was lifted. . . one would see gays forming [families]. Virtually all gays express a desire to have a permanent lover. . . . In general, when afforded the opportunity, gays have shown an amazing tendency to nest."¹⁶¹ The legal recognition of gay and lesbian marriages would afford all people, regardless of their sexual nature, the opportunity to fulfill this aspect of their human nature. From a covenantal perspective, no less can be demanded of a social order.¹⁶² No one suggests that all gay or lesbian couples would choose to marry. To deny the option to those who would marry, however, is to deny them a basic guarantee of the Constitution as Puritans would understand that document.

Equality for All

The heart of covenant theory is the affirmation of the equal-

156. See Comment, *supra* note 1, at 152-60 (due process analysis).

157. Note, *supra* note 1, at 1791. "Reality belies the myth of homosexuals as aberrant loners who bear no relation to the tenderness associated with marriage and the family. . . . The human proclivity for forming traditional [sic] family bonds is deeply socially ingrained and not dependent on sexual orientation." *Id.*

158. Tripp, *supra* note 96, at 159. See also Mendola, *supra* note 96. See also the review of the literature on gay and lesbian relationships in the following articles: Paul C. Larson, *Gay Male Relationships*, in *Homosexuality*, *supra* note 1; and Letitia Anne Peplau and Hortensia Amar, *Understanding Lesbian Relationships*, in *Homosexuality*, *supra* note 1. See also Mohr, *supra* note 1, at 17-18.

159. Mendola, *supra* note 98, at 2-3.

160. *Id.* at 3.

161. Mohr, *supra* note 1, at 44. Mohr goes on to suggest that the social and legal hostility to homosexuality makes the development of committed relationships difficult: "[A] life of hiding is a tense and pressured existence not easily shared with another." *Id.*

162. *Lovin II*, *supra* note 55, at 10 ("[In covenant thought] freedom occurs when a claim against the resources of the community is honored by the society's systems of justice, or recognized with a shock by those who have withheld this recognition in the past.").

ity of all people.¹⁶³ In Puritan thought, even the covenant between God and humanity involved God's treatment of humanity as an equal.¹⁶⁴ The centrality of personhood and the dignity with which each person was to be treated were and are hallmarks of covenant thought.¹⁶⁵

Covenant equality is equality of participation in society and in the apparatus by which decisions about that society are made.¹⁶⁶ Covenant affords a dynamic model of relationships in which covenant partners "sustain one another, contribute to one another, and constitute a creative center for the ongoing life of the community."¹⁶⁷ Participation is an end in itself; it is not simply a means to some other end, such as peace in society.¹⁶⁸

Participation is more than equality "before law"¹⁶⁹—that is, equality in some procedural sense. The concept of equality of participation includes equality of opportunity and of access to the "benefits" of society.¹⁷⁰ Through their participation, people share in the benefits of the whole society, and they learn to gear their individual and group contributions to the "common good" of the society.¹⁷¹ It is incumbent on a legal system to remove any and all barriers to full and equal participation by all people.

The dual qualities of equality and participation categorically forbid the suppression of or discrimination against minorities. It is a radical denial of covenant for a majority of the members of soci-

163. *Lovin I, supra* note 24, at 251.

164. *Id.* at 251-52 (quoting a seventeenth-century British Puritan divine).

165. Social contract theory is also built on notions of equality: Every individual has an equal right to pursue her aims without stint. *See id.* at 249. On that basis, everyone's powers to seek individual fulfillment had equally to be checked. *Id.* The sovereign who was charged with enforcing the social contract (whereby individuals foreswore certain of their natural powers in exchange for others' doing the same) owed a duty to hold everyone in the society in rough parity. *Id.* at 248-51.

Contractarian equality is self-centered. It is focused on the individual's choice for herself of how to live her life. It is, as such, amoral—offering no norm by which to judge those choices. Those choices are essentially private. *See Lovin II, supra* note 55, at 12-13.

166. *Lovin I, supra* note 24, at 256-57.

167. Sturm, *supra* note 94, at 85.

168. *Lovin II, supra* note 55, at 12.

169. Equality "before law"—e.g., "procedural" equality—is important. But if equality were nothing more, it would amount to a perpetuation of existant injustice. For example, it is not sufficient, from a covenant perspective to offer a slave impartial treatment within the rules of the plantation—even though that could be interpreted by some as "just." *See Sturm, supra* note 94, at 100-01.

170. *See id.* at 101-02. Anthony Honore asserted that "all men [sic] considered merely as men [sic] and apart from their conduct or choice have a claim to an equal share in all those things, . . . called advantages, which are generally desired and are in fact conducive to their well-being." Anthony Honore, *Social Justice*, in *Essays in Legal Philosophy* 62 (Robert S. Summers ed. 1976).

171. *See infra* notes 191-200 and accompanying text.

ety to draw lines of participation in the society in such a way as to exclude others.¹⁷² To do so is to deny the humanity of those excluded, effectively denying them both a voice in their own destiny and an opportunity to contribute to the common good.¹⁷³

The society which is faithful to covenant, therefore, must be an open society. A society cannot be accounted free if it closes the door on members—any members. If it does so, it is not a covenant community, for it has thereby institutionalized inequality and barred certain would-be members from the society. Society, if it is to be faithful to the covenant model, must be amenable to change.¹⁷⁴ It must be willing to allow participation by all the members of society to bring about change. An open society is one equally respectful of tradition, contemporary communication, and creativity.¹⁷⁵ Neither the stability of the past nor the innovations of the future can be easily ignored. Both must be tested, however, against the ideal of full participation by all persons in society.

The importance of equality in covenant theory “requires a method something like . . . ‘strict scrutiny’ of any deviation from a standard of equality. . . .”¹⁷⁶ Unless the state can demonstrate a compelling reason for discrimination, discrimination must be abandoned.¹⁷⁷ Any less is the society’s breaking faith with those who are the objects of discrimination. Social change to eliminate discrimination has priority over other frequently expressed concerns for cautious development or pragmatic deliberation. “The covenantal idea of equality overrules the usual objections of prudence to tampering with social systems that seem to be working efficiently, if not altogether fairly.”¹⁷⁸

The Constitution already provides for such equality, but without the emphasis of covenant theory the radicality of the Constitu-

172. *Lovin I, supra* note 24, at 248.

173. *See infra* notes 187-90 and accompanying text.

174. *Lovin II, supra* note 55, at 15 (“Maintaining a participatory equality requires a priority for justified claims over existing institutional procedures and even over the most widespread popular expectations.”).

175. *Cf. Sturm, supra* note 94, at 85. Covenant communities are often accused—and, in many cases, with good reason—of rigidity and homogeneity. *See Lovin II, supra* note 55, at 11. Zeal often results in insensitivity towards those not similarly zealous. But the ideal of covenantal respect for the equality of all people forecloses bigotry. Open-mindedness is a requirement occasioned by respect due all people in their disparate conditions and situations. *Lovin I, supra* note 24, at 253.

176. *Lovin II, supra* note 55, at 14-15.

177. *Id.* *Lovin* understates the burden on the state to justify discrimination under strict scrutiny: To survive equal protection challenge under strict scrutiny, a state must establish that the discrimination is necessary and narrowly tailored to a compelling state interest. *See* John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, *Constitutional Law* § 14.3 (3d ed. 1986).

178. *Lovin II, supra* note 55, at 15.

tion's guarantees is often ignored. The Equal Protection Clause mandates that the government act to end discrimination against disadvantaged groups, regardless of the depth or history of social contempt for the group.¹⁷⁹ Built into the Constitution's structure is a means for "look[ing] forward, serving to invalidate practices that were widespread at the time of [the Constitution's] ratification and that were expected to endure."¹⁸⁰ Where due process guarantees fail to protect substantive rights, the Equal Protection Clause may be invoked to protect "fundamental rights."¹⁸¹ The Equal Protection Clause allows the Constitution to transcend "common law," "status quo baselines," and "Anglo-American conventions" in favor of a much broader principle of equality.¹⁸²

The Supreme Court has acknowledged that the Constitution requires treating people equally with respect to the right to marry: In *Loving v. Virginia*,¹⁸³ the Court struck down a Virginia law that prohibited interracial marriages. The law, which classified potential marriage partners on the basis of race, violated the Fourteenth Amendment and was "subversive of the principle of equality at the heart of the Fourteenth Amendment. . . ."¹⁸⁴ Since the freedom to marry is "vital" and "essential to the orderly pursuit of happiness by free men [sic],"¹⁸⁵ legal obstacles can only be justified by compelling state interest effectuated by narrowly tailored means.¹⁸⁶

From a covenant perspective, the equal-protection case for same-sex marriage is even stronger than the due process argument

179. Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161, 1163 (1988). Sunstein understands the Due Process Clause to be much less "activist" than the Equal Protection Clause:

From its inception, the Due Process Clause has been interpreted largely . . . to protect traditional practices against short-run departures. . . . [It] often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the proper level of generality, is violated by the practice under attack.

Id. The Equal Protection Clause, in marked contrast, has been employed in much more radical ways to eliminate discrimination, "however deeply engrained and longstanding." *Id.*

180. *Id.*

181. *Id.* at 1169-70.

182. *Id.* at 1174.

183. 388 U.S. 1 (1967).

184. *Id.* at 12 (discussing the denial of due process as a ground additional to equal protection for invalidating Virginia's law).

185. *Id.*

186. Strict scrutiny of marriage regulations was affirmed in *Zablocki v. Redhail*, 434 U.S. 374 (1978).

discussed above.¹⁸⁷ The fundamental assumption of covenant ideology is that all members of society are to be treated with fundamental equality. Coupled with the in-place radical Constitutional guarantee of equal protection, that assumption argues vigorously against the denial of marriage to gay and lesbian couples. To deny them the right to marry is to foreclose their enjoying the "benefits" of marriage—benefits which are legal, economic, and emotional.¹⁸⁸ Denial of the right to marry thus excludes them from full participation in the life of the society. It relegates them to the margins of society and isolates them from the processes of government by which they were banished to the periphery.¹⁸⁹

To deny marriage to same-sex couples violates an essential aspect of government, as Puritan covenant theory understands government. It violates the basic human dignity of gay and lesbian people by treating them as inferiors and excluding them from the society. The fact that no suggested state interest withstands scrutiny¹⁹⁰ compounds the outrage.

The Common Good

A third major strain in covenant thought concerns what is called "the common good." Politics, according to covenant theory, has as its *raison d'être* and its goal the service of society. Its purpose is to serve the public good.¹⁹¹ That public good, however, is not divorced from the good of the individual; it does not have a significance beyond or transcending the individual:

[P]ublic good is the good of the public. It is the good of the open society itself. It is the good of the relationships through which the members of the community sustain one another, contribute to one another, and constitute a creative center for the ongoing life of the community. To act in the public good is

187. See text accompanying *supra* notes 141-60. Friedman argues the opposite case. See Comment, *supra* note 1, at 169 (arguing that substantive due process is the strongest ground for supporting same-sex marriage). See also Note, *supra* note 1, at 185-88 for a discouraging analysis of "traditional equal protection analysis" which the author understands to "legitimize existing inequity."

188. See *supra* notes 97-114 and accompanying text.

189. To require, as a condition of acceptance, that one person be like everyone else is to guarantee that the one will never be treated as an equal: "*Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard as against which one's entitlement to be equally treated is measured.*" Catherine MacKinnon, quoted in Note, *Marriage: Homosexual Couples Need Not Apply*, 23 New Eng. L. Rev. 515, 539 (1988) (emphasis in the original). To refuse acceptance on the basis of difference is, thus, to force the unaccepted one to margins.

190. See *supra* notes 115-24 and accompanying text.

191. See Sturm, *supra* note 94, at 83-85; and *supra* notes 76-86 and accompanying text.

not to deny the individuality of persons of associations, but it is to reject the indifference to others of individualism.¹⁹²

The function of the legal process is "to pursue ways and means of improving [the] quality [of living together]. It is to create and to sustain those relationships in which the actions of each enhance the life of all."¹⁹³ Both individuals and the society itself are duty-bound to work toward the well-being of all individuals.

Covenant theory recognizes that there is no "public life" separate from the individual and collective existences of the individuals.¹⁹⁴ Conversely, the life of each individual is wrapped up with the lives of others. Service to the well-being of the individual and service to society are inextricably linked. If one person is harmed, all people suffer. If one individual harms another, the entire web of social relationships—which is to say, the society—is assaulted: If public action harms an individual, the greater society is also thereby harmed. That harm, furthermore, is not some idealistic imperfection; it is a real and palpable harm. For the stability of a society is in direct proportion to the extent to which it "invites and ultimately requires" citizens to achieve "full citizenship" in the society and "places them in reciprocal relationship to each other."¹⁹⁵ The legitimacy of a social order is integrally related to the well-being of the individuals within society. By assuring the well-being of individuals, a social order serves the good of all. A society is not merely "less good" because it treats some people inhumanely; it is no society at all. A society which breaches the public or common good reverts to lawlessness and threatens to destroy itself.

Society, to the extent that it has an existence independent of those people whom it comprises, benefits when it serves all those who constitute society. Thus,

civil liberties do not fulfill a function only for the individual. In principle, they fulfill a critical function for the political association as well, indeed, for the entire community of being. Civil liberties are a means for effective participation in communal decisions. They are a means to press for reform and to introduce novel patterns of relationship. They constitute a structure within which and through which persons and groups may contribute alternative modes of thought and styles of life to the ongoing community.¹⁹⁶

192. Sturm, *supra* note 94, at 85.

193. *Id.* at 21.

194. The contrast to a social-contract understanding of society is stark. The disadvantage of any one person or group—so long as it is a minority of the society—does not threaten the existence of a social-contract society. See *Lovin I*, *supra* note 24, at 250-51.

195. Niebuhr, *supra* note 36, at 132.

196. Sturm, *supra* note 94, at 86.

By drawing persons into the social matrix, the society elicits their loyalty and their effort in behalf of the well-being of the society. It accomplishes the integration of society—i.e., the integrity, unity, and wholeness of the community.

By denying legal recognition to same-sex marriage, American society denies itself the loyalty and integration of a segment of its population. Not only does it disserve those people, but it also dis-serves itself. By recognizing same-sex marriage, society could channel the personal and political energy of gay and lesbian couples into the society and not away from it. By including them, instead of excluding them, the society establishes its authority with them in such a way as to encourage them to “make an ‘internal’ commitment to covenant”¹⁹⁷—commitment to each other and to the society.

A function of covenant society is to assist the members of society to adjust their desires from self-interest toward the good of the larger community.¹⁹⁸ It can only do so if it brings those members into commerce with the wider society. If it blocks the participation in society by some, it fractures the unity of the society and destroys the community by and through which individual desires or interests are socialized.¹⁹⁹ That much should be clear from the African-American civil rights movement.

Richard Mohr implies that the legal recognition of same-sex marriage would be good for America beyond its good to individual Americans:

[I]n extending to gays the rights and benefits it has reserved for its dominant culture and extended selectively to others, America would confirm its deeply held, nearly religious vision of itself as a morally progressing nation, a nation itself advancing and serving as a beacon for others—especially with regard to human rights. . . . Ours is a nation given to a prophetic political rhetoric which acknowledges that morality is not arbitrary and that justice is not merely the expression of the current collective will.²⁰⁰

The legal recognition of same-sex marriage would confirm America's commitment to full justice for all people. It would thereby strengthen America's claim to “legitimacy.” It would justify society's claim of authority over one segment of the population that currently experiences that authority as repression.

197. *Lovin II*, *supra* note 55, at 13.

198. *Lovin I*, *supra* note 24, at 247.

199. See *Lovin II*, *supra* note 55, at 12-13.

200. Mohr, *supra* note 1, at 44-45.

Conclusion

Legal analysis of complex and troubling social problems is a sophisticated enterprise. It calls for the contributions of a range of thinkers, not just legal scholars, legislators, and judges. Legal decisionmaking is "contextual,"²⁰¹—i.e., it implicates sources of learning outside of case reporters and hornbooks. Values, history, and interpretive frameworks influence how law is made.²⁰² Legal decisions "must be defended as flowing from a coherent and uncompromised vision of fairness and justice, because that, in the last analysis, is what the rule of law really means."²⁰³

The treatment of same-sex marriage by the American legal establishment raises profound questions about "the fairness and justice" of that treatment. Gay and lesbian couples are denied the full benefit of their citizenship by laws that refuse legal sanction for same-sex marriages. That legal posture can and should be changed.

Supporting a change in the law is the strain of social thought which this paper calls "Puritan covenant thought." Originating in the sixteenth- and seventeenth-century religious movement, Puritan social thought transcended both its religious origins and its sphere of influence in New England. Puritanism was a dominant intellectual strain which contributed to the development of the new land that became the United States. The importance of that strain of thought should be re-recognized²⁰⁴ and its themes resuscitated to inform legal and political decisions.

Puritan covenant thought buttresses the arguments which come from many different perspectives²⁰⁵ in favor of the legal recognition of gay and lesbian marriages. The decision to legalize such marriages would afford gays and lesbians the kind of support for their committed relationships which the society rightly offers heterosexual marriages. It would be a step toward the full participation of gays and lesbians in American society, recalling them from the margins of society where they have been forced by legalized discrimination. American society itself would benefit from the decision. It would be able more reasonably to count on the loyalty of those whom it would newly include among its full citizens;

201. See Farber, *supra* note 14, at 133; and Levinson, *supra* note 38, at ch. 1.

202. Levinson, *supra* note 8, at ch. 1.

203. Ronald Dworkin, *A Matter of Principle* 2 (1985).

204. It is a relatively recent phenomenon that the importance of Puritan thought as an important strain of American intellectual history need be defended. See Niebuhr, *supra* note 39.

205. See, e.g., Comment, *supra* note 1 (feminist theory); Mohr, *supra* note 1 (gay rights philosophy); Sunstein, *supra* note 179 (republican theory).

it would be truer to its declared ideals; and it would be a more complete incarnation of the just and equitable commonwealth its Founders envisioned.

