THE CULTURAL PROPERTY CLAIM WITHIN THE SAME-SEX MARRIAGE CONTROVERSY

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Partisans in the contemporary controversy over same-sex marriage and marriage equality often use the rhetoric of "access" and "exclusion" to frame their positions. These terms are also used to stake out positions on how to resolve conflicts over congestible natural resources. This Article takes the terms at face value and asks whether and how the marriage equality/same-sex marriage controversy might usefully be described in terms of a controversy over a contested and potentially congestible shared resource. "Access" and "exclusion" are property language, after all.

This Article will argue that the traditionalist[1] claim that same-sex couples should be excluded from marriage is the same kind of claim as is

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[1] I will label the two sides in the same-sex marriage debate "traditionalist" on the one hand and "progressive" on the other. The term "orthodox," employed, for example, by JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 107 (1991) [hereinafter HUNTER, CULTURE WARS], is too narrow, though it does tip one off to the religious underpinnings of many a traditionalist's views. David Cruz uses the term "marriage conventionalist" for the traditionalist viewpoint. *See* David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1011 (2002) [hereinafter Cruz, *Disestablishing*]; David B. Cruz, *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 929 (2001) [hereinafter Cruz, *Expressive Resource*]. I find

often made by Native American, indigenous, and other culturally-subordinated groups to certain cultural resources—a right to exclude others in order to protect sacred objects, places, and rituals, so as to preserve and perpetuate group identity over time. This description may help progressives gain a new, and perhaps better, understanding of the sense often expressed by traditionalists of the harm they believe would accrue by allowing same-sex couples access to the institution of marriage.[2] The Article explores the details of the traditionalist position understood as a cultural property claim and then sketches out a number of progressive responses to the traditionalists' cultural property claim.

This Article focuses on the cultural and symbolic significance of legally recognizing marriages of same-sex couples—the name, legal status,

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"marriage conventionalist" misleading, as it suggests to me an affinity for social constructionist understandings of gender, sex, and marriage. Social construction is typically anathema to the views of traditionalists, who view traditional gender roles, marriage, and sexual activity within marriage as natural and often as determined by God. *See, e.g.*, Cal Thomas, *Marriage from God, Not Courts*, *in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 42 (Robert M. Baird & Stuart E. Rosenbaum eds., 1st ed. 1997) [hereinafter SAME-SEX MARRIAGE (Baird & Rosenbaum 1st ed.)].

As for a term for the other side, the term "liberal" is capable of many varying interpretations. David Cruz's term "marriage expansionist," Cruz, *Expressive Resource*, *supra*, at 927, is not fundamentally problematic, just a bit ungainly. Amy Wax's term "pluralist" is accurate as far as it goes. *See* Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377, 377 (2007) [hereinafter Wax, *Pluralism*]. But it seems to obscure the hunger for traditional values (which Wax herself acknowledges, Wax, *supra*, at 378) within the progressive argument for marriage equality, and to feed into the traditionalist claim that progressives are selfish and hedonistic. *See* WILLIAM N. ESKRIDGE JR., & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE?: WHAT WE'VE LEARNED FROM THE EVIDENCE 29 (2006) (noting that in the traditionalist rhetoric, the liberal, pro-choice feature of the case for same-sex marriage has been linked with a liberal philosophy of hedonism).

I also acknowledge here that this Article's framework of "two sides" is overly simplified. Within the feminist left, some question the goal of making marriage accessible to same-sex couples. *See, e.g.*, SAME-SEX MARRIAGE PRO & CON: A READER 121-45 (Andrew Sullivan ed., rev. ed. 2004) [hereinafter SAME-SEX MARRIAGE (Sullivan rev. ed.)] (section entitled "Why Marry?: The Debate on the Left"). This Article will steer clear of these feminist and queer arguments against same-sex marriage, as important as they are, in order to better elucidate the claims of those, both traditionalist and progressive, who do see marriage as a valuable cultural resource.

[2] *See* ESKRIDGE & SPEDALE, *supra* note 1, at 224-25, 326 n.53 (2006) (finding an analogy between the traditionalist claim for opposite-sex only marriage and Native American claims to a right to exclude outsiders from sacred sites to be especially helpful in understanding the stakes in the controversy for traditionalists).

and kinship status that marriage confers.[3] It deliberately distinguishes and brackets issues of the tangible benefits and responsibilities conferred by marriage.[4] The Vermont Supreme Court in *Baker v. State*[5] and the New Jersey Supreme Court in *Lewis v. Harris*[6] both allowed state legislatures to make this distinction in choosing how to remedy state constitutional violations discerned by those courts. In both states, the legislatures created civil unions rather than revising the legal scope of marriage to allow same-sex couples to marry.[7] The distinction between marriage and an alternate legal status was also raised in Massachusetts[8] and California,[9] but with a

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[3] I am faced with a terminological choice between "same-sex marriage," on the one hand, and "marriage equality" and some circumlocutions on the other (e.g., "access to marriage by same sex couples"). "Same-sex marriage" implies a departure from the norm, thus treating the term "marriage" alone, linguistically unmarked, as implicitly and normally heterosexual and opposite-sex. Yet "same-sex marriage" is the much more widely used term for describing the controversy, as evidenced by the term's frequency in case law and in law review and book titles. "Marriage equality" frames the issues in terms of progressive values and arguments, but its usage as a descriptor of the controversy is much less common. In this Article, I generally use "same-sex marriage" when the discussion pertains to the traditionalist concern and "marriage equality" or other phrasings when addressing the progressive approach.

[4] David Cruz separates out the symbolic aspect of marriage from the economic and legal consequences in his characterization of marriage as a resource. *See* Cruz, *Expressive Resource*, *supra* note 1, at 933. Cruz likewise brackets discussion of utilitarian defenses of mixed-sex only marriage requirements—what he calls "public welfare" defenses. *Id.* at 927-28.

[5] 744 A.2d 864, 885-87 (Vt. 1999).

[6] 908 A.2d 196, 221 (N.J. 2006).

[7] VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); 2006 N.J. Laws Ch. 103. For a discussion of Vermont, see generally WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 43-82 (2002) (describing the Vermont litigation and the subsequent Vermont legislative deliberations); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 166-242 (2000); DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE (2004) (describing the Vermont legislature's deliberations). For a discussion of New Jersey, see, for example, David S. Buckel, Lewis v. Harris*: Essay on a Settled Question and an Open Question*, 59 RUTGERS L. REV. 221 (2007); Marc R. Poirier, *Piecemeal and Wholesale Approaches Towards Marriage Equality in New Jersey: Is* Lewis v. Harris *a Dead End or Just a Detour?*, 59 RUTGERS L. REV. 291 (2007) [hereinafter Poirier, *Piecemeal*].

[8] Faced with an opinion from the Massachusetts Supreme Judicial Court reading the state constitution to require equal access to marriage, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Senate proposed to create a separate civil union status for same-sex couples, equal in all but name to marriage. The court rejected this

different result. Recently enacted broad domestic partnership statutes in Oregon[10] and Washington State,[11] as well as civil union statutes in Connecticut[12] and New Hampshire,[13] also create shadow legal institutions for same-sex couples that are nearly identical in structure to marriage, but different in name. Arguments are now being marshaled in states with supposedly GLB[14]-hospitable civil union laws—Vermont and New Jersey, for example—that civil unions do not effectively confer benefits equivalent to those received through marriage after all.[15] Thus the issue is squarely

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proposal as constitutionally inadequate. Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[9] In re Marriage Cases, 183 P.3d 384, 43 Cal. 4th 757 (2008) (holding that even in the face of a comprehensive domestic partnership law available to same-sex couples, the California Constitution's provisions of due process, privacy and equal protection required more – access to the name and status of marriage). *See* 43 Cal. 4th at 780 ("The question we must address is whether . . . the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.") (footnote omitted). On the situation in California prior to this recent decision, see Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

[10] Oregon Family Fairness Act, 2007, OR. REV. STATS. §11.106 Prec. 107-005 (West 2008) (establishing a same-sex domestic partnership regime providing to domestic partners the state law rights and responsibilities of marriage).

[11] The Domestic Partners Expansion Act, 2008 Wash. Laws Ch. 6 (signed into law Mar. 12, 2008), amending 2007 Wash. Laws. ch. 157; *see* Rachel La Corte, *Measure Adds to Rights of Domestic Partners*, SEATTLE TIMES, Mar. 13, 2008, at B7.

[12] The central provisions of this statute are codified at CONN. GEN. STAT. §§ 46b-38aa to 46b-38pp. This statute is currently under challenge in the state courts for failing to protect the fundamental right to marry and failing to provide equal rights and benefits, in violation of the Connecticut state constitution. Kerrigan v. State, 909 A.2d 89 (Conn. Super. Ct. 2006), *appeal docketed,* No. S.C. 17716.

[13] N.H. REV. STAT. ANN. §§ 457-A:1-A:8 (2007) (establishing a civil union regime affording same-sex couples the state law rights and responsibilities of marriage). This statute was signed May 31, 2007, and became effective January 1, 2008.

[14] I will typically use "GLBTQ folk" or "gay men and lesbians" as these seem to me to be the most inclusive term of digestible length. The Transgender T and Questioning Q may be dropped where appropriate. I will use "gay male or lesbian" and sometimes "homosexual" as adjectives. The nominalization is still "homosexuality." Terms within quotations remain unaltered.

[15] *See, e.g.*, New Jersey Civil Union Review Comm., *First Interim Report of the New Jersey Civil Union Review Commission,* Feb. 19, 2008, *available at*

raised in multiple jurisdictions: what is at stake in the name and legal status of "marriage," above and beyond the benefits and responsibilities that civil marriage conveys.[16] The question is no longer merely theoretical.[17]

Characterizing the same-sex marriage controversy as a contest over an intangible sacred cultural resource and a problem (from the traditionalist perspective) of signal dilution or pollution can facilitate a better understanding of our contemporary *Kulturkampf* over gender and sexuality,

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http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf (identifying a series of serious problems with New Jersey's year-old civil union law); *id.* at 9-10 (quoting Beth Robinson, Chair of Vermont Freedom to Marry, whose testimony outlined similar problems with Vermont's seven-year-old civil union law). The report documents a widespread lack of comprehension of civil union status and consequent confusion, insult, and injury to same-sex couples and their families. Rather than focus on the details, as the New Jersey Civil Union Commission's *First Interim Report* does, this Article explores the underlying cultural conflict, one that makes it impossible for civil unions and full-fledged domestic partnerships to function as marriage equivalents.

[16] Some authors celebrate civil unions on their own terms. *See, e.g.*, Greg Johnson, *In Praise of Civil Unions*, 30 CAP. U. L. REV. 315 (2002) (supporting civil unions). Other progressives criticize civil unions as unacceptable and stigmatizing halfway measures. *See, e.g.*, Buckel, *supra* note 7; Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 134 (2000) (commending the state of Vermont for providing "significant benefits, protections, and responsibilities to Vermont citizens . . . . [b]y passing a civil unions law," but noting "[t]he heterosexism inherent in restricting same-sex couples to civil unions" and adding, "[o]ur society's experiences with 'separate but equal' have repeatedly shown that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position"). From the other side, traditionalists may object even to civil unions and other shadow institutions of marriage on symbolic grounds, although they might accept the use of neutral legal forms such as wills and contracts to recognize and protect some aspects of relationships. *See, e.g.*, ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES 58 (2006) [hereinafter KOPPELMAN, DIFFERENT STATES] (discussing traditionalist positions).

In any event, no state can truly create the equivalent of marriage so long as the federal Defense of Marriage Act stands, with its definition of marriage as between one man and one woman for all federal purposes. Pub. L. No. 104-199, 110 Stat. 2419 (1996), *codified at* 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000).

[17] Whether the revocation of same-sex marriages once legally recognized would constitute a governmental taking of private property is an issue with some theoretical similarities to my argument here, see, e.g., Goutam U. Jois, Note, *Marital Status as Property: Towards a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509 (2006). It has different sources and doctrinal bases, and will not be explored.

of which the marriage controversy is a part.[18] Progressives tend to believe that allowing same-sex couples to marry[19] will not negatively affect the institution of marriage and wider society, or will change and improve them. Progressives may well be tempted to dismiss the supposed congestion[20] of the tradition of marriage as a will-o'-the wisp, a merely moral objection that is illegitimate in a liberal, pluralist state.[21] But these "mental externalities"[22]

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[18] The term *Kulturkampf*, German for "culture war," was introduced into case law by Justice Scalia, dissenting in *Romer v. Evans*, 517 U.S. 620, 636 (1996). In contemporary usage it describes a set of conservative, often right-wing, attitudes toward sexuality and family issues, positions often championed by the Catholic Church among others. *See, e.g.*, HUNTER, CULTURE WARS, *supra* note 1, at 43-48, 107; Richard F. Duncan, *Wigstock and the* Kulturkampf*: Supreme Court Storytelling, the Culture War, and* Romer v. Evans, 72 NOTRE DAME L. REV. 345 (1997); Douglas W. Kmiec, *America's "Culture War"—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183 (1993). *See generally* Marc R. Poirier, *Hastening the* Kulturkampf*:* Boy Scouts of America v. Dale *and the Politics of American Masculinity*, 12 L. & SEXUALITY 271, 298-300 (2003) [hereinafter Poirier, *Hastening the* Kulturkampf].

[19] The discussion here of the progressive position on marriage equality is limited to couples. This Article does not engage the "slippery slope" argument that allowing same-sex marriages would lead to the legalization of polygamous marriages. The mainstream progressive pressure to recognize same-sex marriages is about visibility and formal recognition of couples, not of polygamous relationships. This is true of court decisions regarding same-sex marriage, whichever way they come out, as well as legislative initiatives in the United States and abroad. *See generally* In re Marriage Cases, 43 Cal. 4th at 829 n. 52 (clarifying that the court's holding requiring that marriage be available to same-sex couples does not extend to polygamy or incest); Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008), *leave to appeal dismissed*, 2008 WL 1958987 (N.Y. 2008) (holding that New York State must recognize a Canadian same-sex marriage as a marriage, but distinguishing marriages that would involve incest or polygamy, which New York would not have to recognize); SAME-SEX MARRIAGE (Sullivan rev. ed.), *supra* note 1, at 273-88 (section entitled "A Slippery Slope? The Polygamy and Adultery Debate"); Maura Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997) (analyzing the arguments supporting restrictions on polygamy and showing how these arguments do not justify similar prohibitions on monogamous same-sex marriages).

[20] Congestion is a term from resource economics used to describe overuse or misuse of a resource that diminishes its quantity or quality for all who might want to use it. David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 25, 44-46 (2006); David W. Barnes, *Enforcing Property Rights: Extending Property Rights Theory to Congestible and Environmental Goods*, 10 B.C. ENVTL. AFF. L. REV. 583, 588-89 (1982); Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 41 DUKE L.J. 1, 5-6 & n.13 (1991) [hereinafter Rose, *Environmental Controls*].

[21] *See, e.g.*, Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 24 (2005) ("[S]ame sex marriages

are an important underlying motivation for opponents of same-sex marriage. At the very least, they merit careful description. Understanding marriage as a semiotically congestible intangible cultural resource may encourage us to (1) appreciate the coherence of traditionalists' sense of injury at the cultural and symbolic level; (2) devise rhetorical and political strategies to address and defuse traditionalists' concerns; and (3) explore whether there are possible and acceptable rebuttals and compromises that might address the same-sex marriage controversy short of a costly and divisive winner-take-all struggle. Some scholars of cultural property ultimately advocate this compromise approach to cultural property claims,[23] and it is similar to the approach advocated by many concerned with the broader incorporation of multiculturalism into political theory.[24] Debates

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are not exploitative and the only adverse externalities are based on government interests that amount to nothing more than moral or religious views about which types of relationships should be called 'marriages.'"); *see also* RICHARD A. POSNER, OVERCOMING LAW 23 (1995) (rejecting the proposition that public policy regarding homosexual acts could be based on the costs, "akin to pollution," that homosexuals impose by distressing others, because these are "purely mental externalities"). The position has long roots. *See generally* JOEL FEINBERG, OFFENSE TO OTHERS (1985) (arguing that society should not criminalize activities that are offensive but not harmful); JOHN STUART MILL, ON LIBERTY 75-76 (Alburey Castell ed., Crofts Classics 1947) (1859) (arguing that society should not prohibit activities that are offensive but not harmful).

Generally speaking, this view of moral objections seems recently to have prevailed in the Supreme Court in an opinion on the regulation of same-sex sexual behavior. Lawrence v. Texas 539 U.S. 558, 571 (2003) (ruling that a widely-held view of morality alone is insufficient to provide a rational basis for antisodomy laws). *But cf. id.* at 590 (Scalia, J., dissenting) (strenuously arguing that morality should be the basis of criminal laws). Notably, however, the *Lawrence* opinion also went out of its way to indicate that its position on morality-based legislation might not be determinative on a constitutional marriage equality question. *Id.* at 578 (majority opinion) (noting that there may be other bases to restrict marriage to mixed-sex couples that would pass muster under rational basis scrutiny); *id.* at 585 (O'Connor, J., concurring) ("[O]ther reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.").

[22] Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 J. LEGAL STUD. 245, 249 (1998). Rasmusen groups together aesthetic offense and moral offense. *Id.* at 245-46. John Nagle makes the same link. John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 276-77 (2001).

[23] *See* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 8-9, 18, 57, 242-43 (2003) (calling for middle ground solutions in the allocation of access and exclusion concerning indigenous people's cultural resources, solutions that do not pit one group's claim of rights against another group's claim of rights).

[24] This Article will discuss multiculturalism but only briefly. *See infra* Part V.

concerning the marriage equality controversy should at least consider these types of strategies.

The Article begins, in Part I, with a brief exposition of one longstanding customary defense of mixed-sex marriage:[25] invoking an apparently natural and unrevisable definition of marriage as between one man and one woman.[26] This approach, however, leads to stalemate.

In Part II, the Article embarks on its principal line of inquiry by asking what kind of congestion could be at stake in the widespread use of an intangible ritual, marriage, and in the status and identity that marriage conveys.[27] Traditionalists assert a need (on all society's behalf) to exclude a whole group from the ritual, status, and kinship identity of marriage, whose use is seen by them to misappropriate[28] and degrade the ritual, status, and identity of marriage. In short, the traditionalists' position is a claim to group control of a cultural resource, and as such, they assert a basic right to exclude.

A few thoughtful authorities have explored analogies to intellectual property claims as a way of understanding the traditionalist position opposing same-sex marriage.[29] There is a far more apt analogy to the traditionalist claim, however: some indigenous peoples and other culturally-distinct groups sometimes make claims about intangible sacred resources, including a right to exclude others. They seek to preserve their traditional individual and collective identities by restricting the use of their rituals,

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[25] I use the term "mixed-sex" marriage as well as "opposite-sex" marriage, in order to underline that the more familiar term "opposite-sex" contains an assumption of a naturally occurring male-female gender binary. Transsexuals, intersexuals, and other categories of transgender people, such as cross-dressers and drag performers, undermine this assumption of naturally occurring gender and sex binaries. I have made different terminological choices elsewhere. *See, e.g.*, Poirier, *Piecemeal*, *supra* note 7, at 293 n.10 (discussing the issue of implicit acceptance of gender, sex, and sexual orientation binaries through using "opposite sex marriage" and yet choosing the term because it reflects the position being examined).

[26] *See infra* Part I.

[27] *See infra* Part II.A.

[28] *See generally* JUDITH BUTLER, EXCITABLE SPEECH (1993) (describing several cultural conflicts around sexuality and gender in terms of the expropriation and misappropriation of performances of roles and rituals).

[29] David Cruz's work is the most helpful here, though he eventually backs away from the intellectual property analogy. *See* David B. Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 305-14 (2001) [hereinafter Cruz, *Marital Property*] (considering analogies to intellectual property).

stories, and beliefs.[30] This Article argues that, from the traditionalist point of view, marriage is just such a cultural resource. It confers a status, an identity, and a kinship network, above and beyond its tangible benefits.[31] Access to marriage by same-sex couples is understood by traditionalists to threaten the desecration of this ritual, status, and identity. If one is reluctant to put an explicitly religious spin on it, one could still say that same-sex marriage appears to traditionalists to be a misappropriation that threatens to degrade, destabilize, or dilute a central cultural institution.[32] This observation helps to explain the recurring rhetoric of pollution and desecration deployed by traditionalists in describing the threat they perceive from the potential widespread societal acceptance, not only of homosexuality in general, but of same-sex marriage in particular.

Part III explores the marriage controversy as it manifests in daily life. Inevitably, attempts to assert control over the cultural resource of marriage are also assertions of control over public microperformances by couples of the type that are authorized and legitimized by marriage. These microperformances establish and reaffirm the social identity, status, and kinship conferred by marriage. They are read and interpreted by the couples themselves, and are also read publicly by various audiences. Part of what is so troubling to many traditionalists about same-sex marriage is the subversion of traditional gender roles that occurs when same-sex couples are allowed to remain visible and then further legitimized by the legal status

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[30] For example, certain Native American tribes exclude non-tribal members from viewing sacred dances and ceremonies so that these rituals are not misused and distorted. *See, e.g.*, ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 180 (2000); BROWN, *supra* note 23, at 6, 19. I will not address a different type of intellectual property claim, sometimes made by indigenous peoples, motivated by a desire to acquire a share of the potential profit from commodification and commercialization of cultures, rituals, and traditional knowledge. Neither side of the marriage debate is fundamentally concerned with capturing profits from commodification of marriage.

[31] *See* Lewis v. Harris, 875 A.2d 259, 281 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting) (citing Turner v. Safley, 482 U.S. 78, 96 (1987)) ("[I]t is clear that no matter how marriage is defined, the marriage ceremony has spiritual significance to most, and many consider it a sacrament or exercise of religious faith."), *modified and aff'd*, 908 A.2d 196 (N.J. 2006).

[32] *See, e.g.*, Richard F. Duncan, *The Narrow and Shallow Bite of* Romer *and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147, 164 (1997) (asserting that same-sex marriage threatens to "dilute the importance and meaning of traditional marriage as the most fundamental building block of human community"); Wax, *Pluralism*, *supra* note 1; Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059 (2005) [hereinafter Wax, *Conservative's Dilemma*].

of marriage. Traditionalists who seek to prevent same-sex marriage also seek quite specifically to prevent visible, unauthorized, and parodic microperformances of couple-related gender roles. These microperformances dilute what traditionalists consider to be vital cultural messages concerning gender and sexuality, messages that are understood by traditionalists to be transmitted both by the formal legal status of marriage and by the daily performances of mixed-sex marriage.

That traditionalists can be understood to assert a cultural property claim to an intangible cultural resource does not mean that their claim should be given conclusive legal weight. Part IV sketches out several arguments that could be developed by progressives to counter the traditionalist cultural property claim to marriage. These could be based upon (1) minimizing the type of semiotic injury perceived by traditionalists; (2) arguing that an expressive resource of this nature should be shared; or (3) differentiating the greater validity of Native American and similar groups' claims to intangible sacred cultural resources from the traditionalist claim to marriage, on the basis of concerns about dominance and subordination, exit and voice, and problematic intragroup dynamics. Part IV also sketches out a different line of potential progressive responses to the traditionalist claim, presenting an analysis based on place, discursive space, and local territorial sovereignty over the definition of marriage. It suggests that understanding the type of congestion that concerns traditionalists may help to justify disestablishment, that is, removing the territorial dimension of the cultural conflict altogether by reassigning the definition of marriage from the state to churches or other equivalent nongovernmental cultural entities.

Because of its attention to establishing the foundational thesis that there may be a cultural property claim within the same-sex marriage controversy, the Article may come across as sympathetic to the traditionalist views it explores. In fact, I favor acceptance and equal treatment of GLBTQ individuals as full citizens in society, but that is not the primary concern of this Article. First and foremost, this Article seeks to understand some traditionalist perspectives as deriving from a coherent and sincerely held set of moral and often religious positions—beliefs that, though mistaken and often harmful to others, deserve respectful consideration.

I. SHALL WE DEFINE "MARRIAGE" FURTHER BEFORE PROCEEDING? NOT EXACTLY.

It has been suggested that this Article ought to define "marriage" at the outset of its discussion. The suggestion is problematic. We can usefully

distinguish, to use New Jersey Appellate Division Judge Parrillo's felicitous phrase, the "right to" marriage from the "rights of" marriage.[33] This move indicates a contrast between the symbolic or religious significance of marriage and the benefits and obligations of marriage.[34] Moreover, this Article addresses only civil marriage, not religious or sacramental marriage. Even so, "civil marriage, and not just marriage ceremonies or religious marriage, should be understood as expressive."[35] Indeed, the traditionalist demand that long-held understandings about marriage, although typically shaped by religion, should also be reflected in civil marriage is at the heart of the cultural conflict over the symbolic aspects of civil marriage.[36]

A classic response to the claim of a right of same-sex couples to marry has always been definitional: a "marriage" between two men or two women is simply not what "marriage" means.[37] Marriage, it is said, is

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[33] *Lewis*, 875 A.2d at 275 (Parillo, J., concurring), *modified and aff'd*, 908 A.2d 126 (N.J. 2006).

[34] *See id.* at 278 (Parillo, J., concurring) (describing a "symbolic significance" at the heart of the marriage equality argument, and identifying the cultural stakes in the controversy as concerning "the 'deep logic' of gender as a necessary component of marriage"); KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 51-68 (discerning two intertwined controversies around same-sex marriage, one about the normative value of marriage, the other about the administrative consequences of marriage); Poirier, *Piecemeal*, *supra* note 7, at 320-21 (discussing Judge Parillo's opinion); Wax, *Pluralism*, *supra* note 1, at 392-93 (discussing Judge Parillo's opinion).

[35] Cruz, *Expressive Resource*, *supra* note 1, at 935.

[36] Mary Anne Case presents an intriguing argument that in the United States Catholics and observant Jews recognize the difference between religious and civil marriage better than Protestants, and that this explains the particular virulence of the Evangelical Protestant opposition to legalizing same-sex civil marriage. *See* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1795-97 (2005). Case argues that "state-licensed marriage may function in somewhat the same way as state-sponsored public schools did for Protestants in the past. In each case a formally secular institution could be put in service of sectarian ends by groups that substituted capture of the state institution for development of their own clearly religious alternatives." *Id.* at 1796. *But cf.* Daniel A. Crane, *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006) (arguing that Protestant as well as Catholic and Jewish traditions have long identified a separate, religious marriage).

[37] *See, e.g.*, WILLIAM N. ESKRIDGE, JR., & NAN HUNTER, SEXUALITY, GENDER & THE LAW 1065 (2d ed. 2004) ("The main argument against same-sex marriage has been definitional: marriage is necessarily different-sex and therefore cannot include same-sex couples."); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) ("[M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary."); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and

between a man and a woman, "Adam and Eve," not "Adam and Steve."[38] The difficulty with attempting to deploy a definition of marriage to resolve the marriage equality claim is illustrated by contrasting the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*[39] and New Jersey's appellate decision in *Lewis v. Harris*.[40] *Goodridge* is explicit: the Massachusetts constitution requires the State's Supreme Judicial Court to "redefine" marriage, differently than the legislature had done, in order to achieve equal treatment and to preserve a fundamental right.[41] The *Goodridge* court characterizes marriage as a social institution that reflects "[t]he exclusive commitment of two individuals to each other that nurtures love and mutual support."[42] Elsewhere in the opinion, the court states that marriage is "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family."[43]

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rearing of children within a family, is as old as the book of Genesis."), *appeal denied,* 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) ("[S]ame-sex relationships are outside of the proper definition of marriage."), *rev. denied*, 84 Wash.2d 1008 (1974). Definitional arguments were also deployed in the hearings on the 1996 federal Defense of Marriage Act. *See* Cruz, *Expressive Resource*, *supra* note 1, at 947-50 (describing definition rhetoric in these hearings). *See generally* Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997) (analyzing and critiquing the arguments that marriage is by definition exclusively heterosexual).

[38] Sen. Jesse Helms, *in* SAME-SEX MARRIAGE (Sullivan rev. ed.), *supra* note 1, at 21 (quoting an unnamed Baptist minister in a September 9, 1996, speech in support of DOMA).

[39] 798 N.E.2d 941 (Mass. 2003).

[40] 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005), *modified and aff'd*, 908 A.2d 126 (N.J. 2006). My discussion here turns to the Appellate Division decision in the New Jersey marriage equality case, rather than the New Jersey Supreme Court decision, because the higher court's opinion does not engage cultural and gender issues nearly as explicitly as the decision below; it passes the matter off to the legislature without deep discussion. *See* Poirier, *Piecemeal*, *supra* note 7, at 321-36 (discussing the use of equality of benefits rhetoric to evade discussion of the cultural significance issue in the New Jersey Supreme Court majority opinion in *Lewis v. Harris*); Wax, *Pluralism*, *supra* note 1, at 395 (arguing that the New Jersey Supreme Court in *Lewis v. Harris* disregards and sidesteps the traditionalist argument against same-sex marriage instead of addressing it).

[41] Goodridge v. Department of Public Health, 798 N.E.2d 941, 965 (Mass. 2003).

[42] *Id.* at 948.

[43] *Id.* at 954.

Wait just a minute, says the Appellate Division in *Lewis v. Harris*. Where did all this love and commitment stuff come from? That's not the essence of marriage, at least not entirely.

> The essential premise of the *Goodridge* plurality opinion—that the institution of marriage is simply an "exclusive commitment of two individuals to each other"—constitutes a normative judgment that conflicts with the traditional and still-prevailing religious and societal view of marriage as a union between a man and a woman that plays a vital role in propagating the species and provides the ideal setting for raising children. Consequently, unlike *Loving*, *Goodridge* does not establish a right of equal access to marriage . . . but instead significantly alters the nature of this social institution.[44]

"What's love got to do with it?" the Appellate Division seems to be asking.[45]

The above quotation from the Appellate Division also illustrates another standard application of the definitional argument, as a response to the so-called "miscegenation analogy."[46] The miscegenation analogy argument runs as follows. In *Loving v. Virginia*, the Supreme Court held that a state could not prevent a white person from choosing to marry a black person and vice versa. [47] Therefore, it is argued by progressives that a state may not prevent a male person from choosing to marry another male person, nor a female person from choosing to marry another female person. *Loving* discerned, in the marriage prohibition at issue there, impermissible race discrimination,[48] as well as a violation of a fundamental right to

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[44] *Lewis*, 875 A.2d at 273 (quotation marks and citation to *Goodridge* omitted).

[45] Judge Parillo's concurrence elaborates on this point, protesting that marriage cannot be stripped down to a matter of recognizing close personal relationships. In his view, it is a social institution that includes many other aspects and that specifically privileges procreative heterosexual intercourse. *Id.* at 275-76 (Parillo, J., concurring) (citing Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004)). In addition, in Judge Parillo's view, "a core feature of marriage is its binary, opposite-sex nature." *Id.* at 287. Judge Collester, in dissent, replies, "The right to marry is effectively meaningless unless it includes the right to marry a person of one's choice." *Id.* at 278-79 (Collester, J., dissenting).

[46] *See* ESKRIDGE & HUNTER, *supra* note 37, at 1066 (noting that courts have often used the definitional argument to reject constitutional challenges based on *Loving*).

[47] 388 U.S. 1 (1967).

[48] *Id.* at 11-12.

marry.[49] Similarly, progressives argue, we should discern in the prohibition of same-sex marriage both sex discrimination and sexual orientation discrimination, as well as a violation of a fundamental right to marry.[50] A traditionalist would respond that, based on the definitional argument, at some fundamental level marriage is about a man and a woman. Whatever *Loving* addressed, in terms of opening up choices for marital partners, it did not alter that fundamental structure, either as a matter of substantive due process or of equal protection.[51] The definition of marriage remains the same, and bars same-sex marriage.[52]

Were one to turn to positive law for a definition of marriage, one would be confronted with conflict. Within the United States, Massachusetts and California now define marriage to include same-sex couples. The large majority of the remaining states and the federal government explicitly define marriage as between a man and a woman, while a few states are silent.[53] And what of the Netherlands, Belgium, Spain, Canada, South

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[49] *Id.* at 12.

[50] *See, e.g.*, Baehr v. Lewin, 852 P.2d 44, 61-63, 68 (Haw. 1993) (holding that denial of same-sex marriage is a potential equal protection violation requiring strict scrutiny, by analogy to *Loving*), *superseded by constitutional amendment and statute,* HAW. CONST. art. I, § 23; In re Marriage Cases, 43 Cal.4th at 809-29 (finding a fundamental right to marry in California, relying inter alia on *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), California's leading case overruling its anti-miscegenation statute); *id.* at 833-44 (rejecting the miscegenation analogy to *Loving* and *Perez* insofar as it was proffered to establish that denying marriage to same-sex couples was sex discrimination, but applying it instead to establish sexual orientation discrimination); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 162 (1988) (arguing that the equal protection clause forbids denial of same-sex marriage, relying on *Loving*); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 231 & n.209 (invoking *Loving* to establish that prohibiting same-sex marriage is sex discrimination).

[51] Lewis v. Harris, 875 A.2d 259, 272 (N.J. Super. Ct. App. Div. 2005), *modified and aff'd*, 908 A.2d 126 (N.J. 2006).

[52] To be sure, at the time of *Loving v. Virginia*, and certainly in earlier days, marriage in many states functioned to separate races, and in the time of slavery, slaves could be excluded from the institution of marriage altogether. *Loving*, 388 U.S. at 6, 11 (noting that Virginia was one of sixteen states to have laws against interracial marriage and determining that Virginia's statute served to "maintain White Supremacy"). Arguably, *Loving* itself shifted the definition of marriage in those states slow to recognize formally the shift in social norms around race occurring in the United States.

[53] For an account reasonably up-to-date as of this writing, see WILLIAM N. ESKRIDGE, JR., & NAN HUNTER, SEXUALITY, GENDER & THE LAW 69-72 (2d ed. supp. 2007) (table of state laws regarding same-sex marriage, civil unions, and domestic partnerships);

Africa, and most recently Norway, all of which have now defined marriage to include same-sex couples?[54] A traditionalist might well say that these civil laws are simply incorrect, by reference to some transhistorical natural law definition of marriage.

Given the multiple functions of marriage, its definition is inevitably fluid in a great many respects. Marriage, like any social institution, evolves over time, with regard to both the "right to" marriage and the "rights of" marriage.[55] For example, there are differences between the way marriage works in common law property states and community property states, some states offer tenancy by the entirety to married couples while others do not, and, in one or two states, the ancient right of dower persists. These differences can be conceived of as regional dialects, variants on the definition of marriage. The same can be said of threshold requirements such as age of consent, degree of consanguinity, requirements for divorce, and other such conditions.[56] Each jurisdiction engages in, as it must, an ongoing

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id. at 75-76 (table analyzing most recent state laws recognizing same-sex civil unions and domestic partnerships, although omitting California, Connecticut, and Washington).

[54] Loi ouvrant le marriage à des personnes de même sexe, promulgated Feb. 13, 2003, published Feb. 28, 2003, 9880-9883 (Belgium); An act respecting certain aspects of legal marriage for civil purposes, SC 2005 c 33 (Civil Marriage Act) (Canada); De Wet Openstelling Huwelijk of Dec. 21, 2000 (Netherlands); Civil Union Act, Act 17 of 2006 (South Africa); Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage (Spain); *see* Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569 (2004) (providing an overview of the same-sex marriage laws of the Netherlands and Belgium); *Norway Passes Law Approving Gay Marriage*, L.A. TIMES, June 17, 2008; Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 BYU J. PUB. L. 527, 534-47 (2006) (discussing the same-sex marriage laws of Netherlands, Belgium, Spain, Canada, and South Africa); Wade K. Wright, *The Tide in Favor of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT'L J. L. POL. & FAM. 249, 252-58 (2006) (describing the genesis of the Canadian same-sex marriage law); Michael W. Yarbrough, *South Africa's Wedding Jitters: Consolidation, Abolition, or Proliferation?*, 18 YALE J. L. & FEM. 497 (2005).

[55] *See, e.g.*, STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE (2005) (examining the current condition of marriage by tracing its historical development from a needs-based transaction to an institution based on ideals of love and lifelong companionship); NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); E.J. GRAFF, WHAT IS MARRIAGE FOR?: THE STRANGE SOCIAL HISTORY OF OUR MOST INTIMATE INSTITUTION (rev. ed. 2004); HENDRIK HARTOG, MAN AND WIFE IN AMERICA (2000).

[56] To say nothing of the more drastic shifts in the historic structure of marriage away from a gender-hierarchical arrangement in which the woman, upon coverture, lost most or all of her separate legal status. *See, e.g.*, Amy D. Ronner, *Husband and Wife Are One—*

process of weeding out undesirable variants of social practices and keeping social norms clear.[57] One result of this process is that many once-important variants are now insignificant. At the same time, new variants arise, or old ones may recur.

The contest over the definition of marriage is fundamentally about whether to allow same-sex marriage as a benign variant of marriage. Traditionalists fear that this particular variant might lead to a cultural shift in the general understanding of what marriage means, and thus shift society's understandings of gender and of acceptable forms of sexual intimacy, as well as practices of procreation and child-rearing. Rituals, like words and texts, are always open to replication and to play and hence, in Judith Butler's words, to the possibility of "misappropriation."[58] As *Shahar v. Bowers* reflects, a cultural fight can be at one and the same time over newly visible cultural practices and over the words that should be used to describe them.[59] Judge Edmondson, writing for a splintered and bare *en banc* majority in *Shahar*, used scare quotes around "marriage" and "wedding" to indicate that the Shahars' same-sex wedding ceremony, though considered legitimate in Reconstructionist Judaism, was not a legitimate marriage at all.[60] Judge Godbold, in dissent, took Judge

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Him: Bennis v. Michigan *and the Resurrection of Coverture*, 4 MICH. J. GENDER & L. 129, 132-35 (1996) (summarizing coverture and its abolition, and relying on LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969)); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2249-50 (1994) (discussing the "official story" of the abolition of coverture through Married Women's Property Acts, and questioning it).

[57] Amy Wax develops this argument with specific regard to same-sex marriage to support the secular traditionalist position. *See* Wax, *Conservative's Dilemma, supra* note 32. *See generally* Robert Cover, *The Supreme Court, 1982 Term; Foreword*, Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (describing the way in which variants of custom and understanding inevitably spring up in religious and similar communities of common culture, and the way in which the law kills off undesirable variants).

[58] BUTLER, EXCITABLE SPEECH, *supra* note 28. Butler admits that the misappropriation of signifying acts, words, and texts does not always succeed. *Id.*

[59] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997) (en banc) (holding that a lesbian's rights of intimate association and expressive association on balance did not outweigh the state's interest in preserving the integrity and effectiveness of the state attorney general's office after she had had her offer for a position with the state attorney general's office rescinded after engaging in a public religious same-sex wedding and holding herself out publicly to be married). This Article will consider *Shahar* in some detail. *See infra* Part III.

[60] *Shahar*, 114 F.3d at 1099 n.1. *See* discussion *infra* Part III.

Edmondson to task for failing to see that the Shahars' marriage had a "duality of meaning," one meaning to the Attorney General and another to the Shahars.[61] Judge Godbold argued that the court acted improperly in adopting one perception and excluding the other.[62]

Both traditionalists and progressives are motivated by the symbolic legitimacy and status offered by civil marriage. Advocates of marriage equality typically seek to appropriate the legitimacy, status, and identity which marriage, as an inherited tradition, is understood by society to convey. Traditionalists view that appropriation as a *mis*appropriation, a fundamental and degrading change to the cultural resource of civil marriage. Needless to say, the two sides differ over whether marriage is fundamentally, and therefore definitionally, between one man and one woman.

II. ACCESS/EXCLUSION AND CONGESTION IN THE CONTEXT OF MARRIAGE: MARRIAGE AS AN INTANGIBLE SACRED CULTURAL RESOURCE

Two concepts from resource economics—access/exclusion and congestion—will guide this investigation of the cultural stakes in the *Kulturkampf* over same-sex marriage. Access/exclusion and congestion (phrased variously as desecration, pollution, dilution, or degradation) are an established part of the rhetorical lexicon deployed in the debates over same-sex marriage. Reflection on the type of congestion at issue in the same-sex marriage controversy leads to this Article's proposal that marriage should be characterized as a kind of intangible sacred cultural resource. From this perspective, the ideological component of the *Kulturkampf* can be described as a question of whether to assign traditionalists, as a group, a property-like right of exclusion and control of use of this ritual, or to treat marriage as an open access cultural resource, at least with regard to adult couples. Some authorities, most extensively David Cruz, have explored treating marriage as an expressive resource, in terms of trademark and other intellectual property doctrines. These doctrines come up short, as Cruz recognizes.[63] Identifying the traditionalist claim as a cultural property claim is a much better fit. In contrast to a typical intellectual property resource, which is owned and typically managed for profit, marriage is managed informally by

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[61] *Id.* at 1121.

[62] *Id.*

[63] Cruz, *Marital Property*, *supra* note 29, at 306-07.

a group whose sense of identity is reproduced and reinforced by appropriate use and management of the cultural resource.

A. Taking the Rhetoric of the *Kulturkampf* Seriously: Access/Exclusion and Congestion

Advocates of marriage equality make the important claim that the name and status of marriage are valuable and should be available to same-sex couples. After *Baker v. State*,[64] this claim is routinely distinguished from arguments about making available to same-sex couples the benefits of marriage.[65] Arguments about the name and status of marriage may be framed in terms of freedom or liberty of access or use,[66] or may address the stigma that is generated by exclusion.[67] But, we must ask: Freedom to use what? Exclusion from what?

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[64] 744 A.2 864 (Vt. 1999) (holding that the benefits of marriage must be made available to same-sex couples under provisions of the state constitution, but that the state legislature could decide whether to grant or withhold the status of civil marriage to same-sex couples so long as the benefits of marriage were available to them).

[65] *See, e.g.*, Cruz, *Marital Property*, *supra* note 29, at 283 ("If one otherwise thought that Vermont's civil unions and civil marriage were equal in their legal consequences, would the enforced segregation of mixed-sex couples into civil marriage and same-sex couples into civil unions still appear an impermissible form of 'separate but equal' requiring Vermont to abolish the distinction and treat same-sex couples and mixed-sex couples the same, or might the 'separateness' be justified in light of the (hypothetical) equality?"); Cruz, *Disestablishing*, *supra* note 1, at 927-928 (proposing an argument distinct from public welfare arguments for and against same-sex marriage); KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 53-56 (distinguishing normative and administrative debates over same-sex marriage).

[66] For some examples of access rhetoric, see Goodridge v. Department of Public Health, 798 N.E.2d 941, 941, 950, 958 (Mass. 2003) (using "access" and "exclusion" in reference to institutions, marriage, the plaintiffs' complaint, and the stakes in *Loving v. Virginia*, 388 U.S. 1 (1967), and *Perez v. Sharp*, 197 P.2d 17 (Cal. 1948)); *Baker*, 744 A.2d at 867, 870, 880 (Vt. 1999) (using "access" and "exclusion" in reference to benefits and civil marriage); Cruz, *Expressive Resource*, *supra* note 1, at 931, 936 (discussing marriage expansion claims in terms of access).

[67] For example, the California Supreme Court concluded that "the exclusion of same-sex couples from the designation of marriage works a real and appreciable harm upon same-sex couples and their children" by marking them as second-class citizens. In re Marriage Cases, 43 Cal. 4th 757, 855 (Cal. 2008). Stigma and discrimination were also the focus of the plaintiffs' claim in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), even though the plaintiffs did not prevail on this argument. *See, e.g.*, Buckel, *supra* note 7 (attorney for plaintiffs, discussing *Lewis v. Harris* and the underlying claim of stigma). *See generally* Cruz, *Marital Property*, *supra* note 29, at 287-88 (noting that separate legal status conveys a message of inferiority in both civil union and racial segregation contexts).

David Cruz describes marriage, *inter alia*, as a unique way of communicating to a life-partner, and to the world, about that partnership.[68] He calls it a "unique expressive resource,"[69] to which he asserts that same-sex couples should have access.[70] This point that marriage is expressive is important; it allows Cruz to argue for the application of First Amendment-based heightened scrutiny to state-action attempts to restrict access to civil marriage to different-sex couples.[71] Getting married is not a direct expression of political ideas, but Cruz claims it should be considered a First Amendment matter nevertheless.

As Nancy Knauer has argued, a central flashpoint in the culture wars over homosexuality is visibility combined with a lack of shame or stigma about that visibility.[72] Same-sex couples' participation in marriage can be understood as one such avenue to visibility without shame for gay men and lesbians. It is thus expressive of a claim to identity[73] and to

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[68] Cruz, *Expressive Resource*, *supra* note 1, at 928.

[69] *Id.* at 933-45.

[70] *See, e.g.*, *id.* at 935-36. In developing this argument, Cruz considers other uniquely useful expressive resources and their attendant right of access. *Id.* at 966-70 (relying on Steven G. Gey, *Reopening the Public Forum—From Public Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998)).

[71] *Id.* at 933 ("Without an appreciation of the expressive nature of marriage, one might miss the important First Amendment dimensions of the marriage issue." (citation omitted)); *id.* at 941 ("The kinds of public expression enabled by civil marriage are high-value speech constitutionally protected by the First Amendment." (quotation marks and citations omitted)); *cf.* Bryan H. Wildenthal, *To Say "I Do":* Shahar v. Bowers, *Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381 (1998) (exploring the conflict in *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc), in terms of First Amendment expression rights in a same-sex, religiously authorized marriage). This Article will discuss *Shahar* and Wildenthal's analysis of it in greater depth below. *See infra* Part III.

[72] *See* Nancy J. Knauer, *Homosexuality as Contagion: From* The Well of Loneliness *to the Boy Scouts*, 29 HOFSTRA L. REV. 401 (2000); *cf.* Nan Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1605 (2001) (explaining that in lesbian and gay cases, coming out speech "communicat[es] both self-worth and self-identification") [hereinafter Hunter, *Accommodating*]. For a helpful general discussion of the role of shame in maintaining cultural norms around deviant behavior, see Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 58 CAL. L. REV. 54, 58-61 (1968) (discussing the role of sin and repentance in maintaining public norms of morality, even as they are visibly violated).

[73] *See* Cruz, *Expressive Resource*, *supra* note 1, at 929.

citizenship,[74] as are other forms of GLBTQ visibility. We might well agree, then, to acknowledge that marriage equality is in part an argument about the expression of identity. But instead of arguing from this premise, as Cruz does, that we must apply the First Amendment to compel access to a unique resource that facilitates expressive identity, this Article takes another tack. First, it asks whether there is any plausible reason why one might seek to limit access to marriage, understood as an expressive resource.

The theory of resource economics suggests exploring a basic analytical move: whether there is a threat of congestion that justifies exclusion from use of a resource. Resources otherwise nonrivalrous, and therefore continually available for use and reuse, can be degraded or depleted by overuse or misuse. A basic exposition of the theory typically starts by observing that many physical resources are available for use in nature by anyone, unless society intervenes.[75] These are so-called "open access" resources, such as pastures for grazing cattle, fish in the open ocean, and the air we breathe. Open access resources' usefulness to society as a whole is degraded by overuse and consequent congestion. Problematically, however, it is irrational for any single individual voluntarily to apply restraint to her or his own use of such a resource. Garrett Hardin's classic article called this problem the "tragedy of the commons."[76]

Carol Rose, summarizing a good deal of earlier analysis, outlines three strategies available to address concerns about congestion.[77] "KEEPOUT" strategies physically exclude outsiders, while allowing those in the in-group to continue to have unrestricted access to what is now called a "common pool" or limited commons resource.[78] "RIGHTWAY" strategies

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[74] *See, e.g.*, CARL. F. STYCHIN, A NATION BY RIGHTS: NATIONAL CULTURES, SEXUAL IDENTITY POLITICS, AND THE DISCOURSE OF RIGHTS 13-15 (1998).

[75] I will rely primarily on Rose, *Environmental Controls*, *supra* note 20. It is an unusually accessible version of the arguments. A foundational account is supplied by Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967). Another accessible version of the theory with more emphasis on the costs of creating property and the limited commons is Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems*, 83 MINN. L. REV. 129, 133-43 (1998) [hereinafter Rose, *Several Futures*].

[76] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1268 (1968).

[77] Rose, *Environmental Controls*, *supra* note 20, at 9.

[78] *Id.* It is no longer open access because outsides are prevented from using it. In a later formulation, Carol Rose famously called such a solution property on the outside and commons on the inside. Carol M. Rose, *Roads, and Romantic Creators: Traditions of Public*

limit the way in which individuals can use the resource.[79] RIGHTWAY thus encompasses the types of regulatory strategies often used to manage pollution. "PROP" strategies create private property in slices of the resource, as a way of compelling individuals to internalize the externalities involved in their use of the resource. PROP strategies also make a market in the resource possible.[80] A fundamental and crucial element of typical private property rights is the right to exclude others.[81] Indeed, all three congestion management strategies have in common that they exclude some users and uses in order to protect the resource from degradation.[82]

What kind of resource might marriage be, and what kind of potential for congestion might there be, to motivate a significant part of the population to seek so strongly to exclude same-sex couples from marriage? Marriage is not like a grassy pasture or schools of fish or clean air. While these latter resources can all be used up—they are rivalrous or congestible[83]—marriage is not subject to depletion in the literal sense. How does A marrying B impact stranger C?

Property in the Information Age, 66 L. & CONTEMP. PROBS. 89, 106 (2003) [hereinafter Rose, *Roads*].

[79] Rose, *Environmental Controls*, *supra* note 20, at 9.

[80] *Id.* at 9.

[81] *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

[82] KEEPOUT and RIGHTWAY both assign the power to exclude to a collectivity. In KEEPOUT, the power is assigned to a group. In RIGHTWAY, the collectivity is typically understood to be the state, governing through laws and regulations. But an informal group in charge of a KEEPOUT approach may also use norms, more or less formal and more or less like a legally structured regulatory system, to manage the uses of the internally shared common resource. One might say that PROP assigns the right to exclude to the individual owner, as one of the key attributes of property. As legal realists pointed out early in the last century, a property-based right to exclude is enforceable through the state, so that again, behind private property lies the power of the collectivity. *See* Rose, *Environmental Controls, supra* note 20, at 9-11.

[83] *See generally* Marc R. Poirier, *Natural Resources, Congestion, and the Feminist Future: Aspects of Frischmann's Theory of Infrastucture Resources*, 35 ECOLOGY L.Q. (forthcoming 2008) [hereinafter Poirier, *Natural Resources*] (distinguishing information and the internet platform from natural resources and the environmental services they provide on the basis of the core problem of higher congestibility of natural resources, compared to the nonrival and potentially public good nature of information).

One clue stems from the observation that traditionalists often use the rhetoric of pollution, desecration, and degradation to describe their concerns about a range of related contemporary cultural shifts, including homosexuality and same-sex marriage. It is fairly difficult to find recent direct quotes linking same-sex marriage directly to the rhetoric of pollution, degradation, or desecration,[84] although George Dent did recently compare the threat of same-sex marriage to the threat of global warming.[85] However, many texts link the whole complex of societal changes around gender, sexuality, marriage, and family to these terms. James Davison Hunter talks about desecration.[86] An old and infamous Senate document asserts that "[o]ne homosexual can pollute a Government office."[87] Robert George often expresses a concern with "moral ecology"[88] and, in a recent passage, likens concerns about public morality to concerns about public health and safety, such as the prevention of fire hazards and pollution.[89] Richard Posner uses "pollution" to characterize the problem of "mental externalities" around homosexuality, although he ultimately rejects shaping

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[84] In recent years, anti-marriage equality arguments to the courts have increasingly relied on utilitarian arguments around procreation and parental role models. These are potential bases for legislation limiting marriage to opposite sex couples that are not based exclusively on moral condemnation or naked definitional arguments. *See* ESKRIDGE & SPEDALE, *supra* note 1, at 21 (observing that arguments against same-sex marriage have evolved from moral and definitional arguments towards consequentialist arguments, but arguing that the newer arguments are sedimented and "layer on top of the old ones, often reflecting their underlying moral vision").

[85] George W. Dent, Jr., *"How Does Same-Sex Marriage Threaten* You*?"* 59 RUTGERS L. REV. 233, 248 (2007).

[86] HUNTER, CULTURE WARS, *supra* note 1, at 131 (discussing French sociologist Emile Durkheim's notion that the intolerance that religious communities have towards those who defy the religious community's moral convictions is rooted in a passion and fervor protecting what the community considers to be sacred).

[87] S. REP. NO. 81-241, at 4 (1950) (Conf. Rep.).

[88] *See, e.g.*, Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 17, 19, 25, 26, 28 (2000); ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY xii, 46, 45, 47 (1993).

[89] *See* ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION AND MORALITY IN CRISIS 18-20 (2001). As one specific example, George believes pornography, "material designed to appeal to the prurient interest in sex by arousing carnal desire, unintegrated with the procreative and unitive goods of marriage . . . damages a community's moral ecology in ways analogous to those in which carcinogenic smoke spewing from a factory's stacks damages the community's physical ecology." *Id.* at 19.

public policy around such externalities on classical liberal grounds as articulated by John Stuart Mill.[90]

Another similar stigmatizing trope describing the supposedly negative effects of gay visibility is "contagion."[91] For example, Justice Rehnquist articulated the contagion metaphor in his dissent from denial of certiorari in *Ratchford v. Gay Liberation*.[92] Amy Wax uses "contagion"—albeit in quotes—to describe the traditionalist fear that homosexual practice will affect heterosexual norms.[93]

As a metaphorical description of a cultural process, "contagion" has many of the same structural hallmarks as pollution. John Nagle explores how the idea of pollution is employed in various contexts.[94] He identifies a basic structure for processes that are described as polluting: "pollution involves a pollutant (the agent that produces the harmful effect), a polluter (the person responsible for introducing the pollutant into the environment), and an environment in which someone or something is harmed."[95] In the

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[90] *See* POSNER, *supra* note 21, at 23-24 (referring to MILL, *supra* note 21).

[91] *See generally* William N. Eskridge, Jr., *Body Politics:* Lawrence v. Texas *and the Constitution of Disgust and Contagion*, 57 FLA. L. REV. 1011 (2005); Knauer, *supra* note 72; Amy D. Ronner, *Scouting for Intolerance: The* Dale *Court's Resurrection of the Medieval Leper*, 11 L. & SEXUALITY 53 (2002).

[92] 434 U.S. 1080, 1084 (1978) (Rehnquist, J., dissenting) (attributing to the University of Missouri an argument that a First Amendment challenge to a state university's refusal to recognize a gay student organization was "akin to [claiming that] those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle [sic] sufferers be quarantined"). The disease metaphor in *Ratchford* has been linked to specific expert testimony on behalf of the University defendant that used literal and figurative models of disease for homosexuality. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 807-08 (2002). It is also commonly read as attributable to Justice Rehnquist's authorial voice. *See, e.g.*, Paris R. Baldacci, *Lawrence and Garner: The Love (or at Least the Sexual Attraction) that Finally Dared Speak Its Name*, 10 CARDOZO WOMEN'S L.J. 289, 292 n.12 (2004).

[93] Wax, *Conservative's Dilemma*, *supra* note 32, at 1088.

[94] These contexts include toxic pollution, noise pollution, light pollution, discrimination seen as pollution of workplaces, cultural pollution, pollution by undesirable persons or populations, and spiritual pollution. *See* John Copeland Nagle, *The Idea of Pollution* (work in progress, draft dated February 18, 2008), *available at* http://ssrn.com/abstract=969681 [hereinafter Nagle, *Idea of Pollution*]; JOHN COPELAND NAGLE, THE MANY FACES OF POLLUTION, Ch. 1, Introduction (forthcoming U. of Chicago Press 2008) (on file with the author) [hereinafter NAGLE, MANY FACES OF POLLUTION].

[95] NAGLE, MANY FACES OF POLLUTION, *supra* note 94, at Ch. 3, p. 76 (on file with the author); *see also* Nagle, *Idea of Pollution*, *supra* note 94, at 65-66.

case of toxic pollution, the pollutant is the chemical agent that harms those exposed to it. In the case of pathogenic contagion, the contagion is delivered by a pathogen that threatens to harm those it infects. The pollutant or pathogen and the exposed population share the same space, and that space may also include the polluter. This pollutable (congestible) space can be physical, as in the case of toxic or noise pollution, but it can also be symbolic space, as in the case of cultural, religious, or spiritual pollution. Nagle's generalized description helps us to understand that the rhetoric of pollution always already encompasses a claim by a group to control the proper and salutary characteristics of a shared resource, whether or not that space is a physical place.[96]

Marriage is, among other things, a shared symbolic and cultural resource. The nature of the congestion at stake is, likewise, fundamentally cultural or religious.[97] From one point of view, the congestion could be

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[96] As Nagle writes, "pollution beliefs are designed to enforce boundaries which certain things or people should not cross." Nagle, *Idea of Pollution, supra* note 94, at 36 (referencing MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO (Routledge Classics ed. 2002) (1966)). The distinction between physical and symbolic space may become important in considering how to manage congestion. In some circumstances, spatial or temporal separation of a polluting agent will be sufficient; but the separation approach will not suffice for symbolic pollution, where the mere knowledge of presence of the polluting agent, for example, through visibility, is enough to cause the congestion. This Article will introduce this topic, but does not fully explore it. *See infra* Part IV.C.

[97] This claim is hardly surprising. Many authors conclude that the nature of the *Kulturkampf* over same-sex marriage is ultimately religious. *See, e.g.*, Larry Catá Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221 (2002); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995); Josephine Ross, *Sex, Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 S.M.U. L. REV. 1657, 1659-60 (2002) (arguing, with historical and contemporary examples, that marriage makes heterosexual sex legitimate, and is viewed as sacred, while same-sex marriage is viewed as profane); Wax, *Pluralism, supra* note 1, at 377 ("Important elements of these disparate outlooks [on same-sex marriage] cannot be easily separated from matters of faith and religious belief, although they are not uniformly dependent on them." (citation omitted)). Andrew Koppelman points out that though the moral argument is "often presented in frankly religious form, . . . it has been developed as an argument that does not depend on any religious premises." KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 170-71 n.3. *See generally* Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5 (2004) [hereinafter Koppelman, *Decline and Fall*].

The progressive, pro-access side of the controversy sometimes recoils from the term "sacred." Perhaps because the traditionalist, pro-exclusion side so often bases its views on religiously-grounded beliefs, texts, and traditions, those opposing the traditionalist arguments may want to leave religion out of the debate, even if some progressives are themselves personally religious and even if some religious traditions recognize same-sex

called a species of desecration. Eric Rasmusen usefully describes the mechanics of desecration as follows:

> Desecration is a public good in the sense of being nonexcludable (other people besides the desecrator cannot be blocked from experiencing changes in utility as a result of his action) and nonrivalrous (creating a utility effect on other people does not incur extra costs). It is different from a conventional public good in that some people's utility from it is positive and some negative.[98]

Rasmusen talks about "desecration" itself as a public good. It might help to approach desecration instead as a potential consequence of the shared meaning of symbolic or communicative acts or of specific, symbolically charged and shared uses of tangible or intangible things. Once the supposedly desecrating act or use occurs and is known, its meaning is nonexcludable, as Rasmusen asserts, even if we disagree as to the content of that meaning. It is the contested meaning of publicly known or visible acts and uses that is the public good.[99]

Information is often characterized as nonrivalrous; that is, it can be used over and over without any degradation or other congestion. This assertion is misleading. The uses to which information is put in one context sometimes alter its usefulness in a different context or, as here, in the eyes

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unions and support marriage equality. The pro-access side also includes secularists, who may have no use for religion whatsoever.

[98] Rasmusen, *supra* note 22, at 250 n.14.

[99] This observation helps to respond to a comment, by my colleague Jake Barnes, that marriage is not a public good. Strictly speaking, a public good is one from which, once created, it is impossible to exclude others. Whatever polity defines marriage can of course exclude couples it deems inappropriate from the legal status of marriage. And one couple's marriage is theirs and not another's. But in another sense the provision of the status of marriage *is* a public good. The overall presence of marriage as a central ritual in a society is shared by all citizens (or perhaps all residents or neighbors). Furthermore, the way in which marriage is defined is shared by all members of a polity. At the same time, a more limited or more expansive approach to the legal definition of marriage, specifically same-sex marriage, affects differently different members who participate in the cultural tradition. This is a version of Rasmusen's point about desecration as a collective disagreement over the positive or negative value of a shared signifying resource. *Id.*

In a federal system, marriage can be defined differently in different jurisdictions, so that the state-by-state definition of marriage is in a sense a set of local public goods coterminous with each state's jurisdiction. The ramifications of this train of thought will be explored further. *See infra* Part IV.C.

of a different beholder.[100] As Rasmusen observes, some acts with regard to a symbolically-charged ritual or object will generate simultaneous negative and positive utility among different actors and perceivers. These acts thus cause localized congestion of the symbolic or communicative value of such goods, insofar as the symbolic or religious value to some is diminished. But the same acts are valuable to others. Unless we want to engage in dubious quantification of the subjective positive and negative values, we cannot confidently sum these effects and recommend how to maximize social utility in such situations.[101] Nevertheless, a symbolically significant ritual or other intangible cultural process may be misused, and thus cause semiotic congestion, in the eyes of some within the larger community engaged in interpreting the cultural resource.

From the traditionalist perspective, then, we could describe marriage as a sacred or culturally-central, intangible symbolic resource, one that is subject to semiotic congestion by improper use. Traditionalists would consider same-sex marriage one such improper use.

B. Intellectual Property Doctrines and Cultural Property Claims: Competing Accounts of the Semiotic Congestion Issue Raised by Traditionalist Objections to Same-Sex Marriage

The question addressed in this section is which legal doctrine or doctrines might be most useful in managing the signal congestion issue within the *Kulturkampf* over same-sex marriage. Following up on his characterization of the marriage resource as a type of property,[102] David Cruz asks whether marriage might be considered a type of intellectual property, exploring copyright, trademark, and some more generic intellectual property concerns.[103] Eric Rasmusen also briefly explores a possible intellectual property basis for framing a desecration claim analogously to trademark dilution, insofar as the purported harm at issue is

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[100] *See* David W. Opderbeck, *The Penguin's Genome, or Coase and Open Source Biotechnology*, 18 HARV. J.L. & TECH. 167, 206-12 (2004) (arguing that, contrary to the accepted view, information should be understood to be rivalrous because of conflicting uses and customs around it).

[101] *Cf.* Michael Rushton, *Economic Analysis of Freedom of Expression*, 21 GA. ST. U. L. REV. 693, 702-08 (2005) (criticizing Rasmusen's approach on several grounds).

[102] Cruz, *Marital Property*, *supra* note 29, at 294.

[103] *Id.* at 307-08 (discussing copyright); *id.* at 308-11 (discussing trademark); *see generally id.* at 305-14.

caused not by confusion (the standard justification for trademark protection) but by a reduction in the generally positive signifying value of the mark.[104] Naomi Mezey notes the similarity between intellectual property and claims around intangible cultural property.[105] This Article argues that a cultural property claim rather than an intellectual property claim is a better description of the traditionalist claim around same-sex marriage.

Cruz examines a sample of the traditionalist claims that same-sex marriage would dilute the meaning of the institution and concludes that "dilution of the meaning of marriage appears to be a strong concern motivating those who would restrict civil marriage to mixed-sex couples."[106] Cruz is correct that the cause of action for trademark dilution—in particular the trademark tarnishment prong of trademark dilution—may be relevant, as it reflects a dissipation of meaning and sullying of message.[107] "Tarnishment is the use of a trademark by a third party that creates a negative impression of the trademark in the minds of consumers."[108] Moreover, "courts tend to find tarnishment when the defendant uses plaintiff's famous mark in some unwholesome or unsavory

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[104] Rasmusen, *supra* note 22, at 256.

[105] Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2013 n.32 (2007) [hereinafter Mezey, *Paradoxes*].

[106] Cruz, *Marital Property*, *supra* note 29, at 309.

[107] A doctrinal note is warranted here. After a number of states had prohibited trademark dilution according to varying schemas, Congress amended the Lanham Act, 15 U.S.C. §§ 1051-1127 (2000), to include a cause of action for trademark dilution, without displacing state schemes. Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98 (1996), *codified as amended at* 15 U.S.C. § 1125(c) (2000) ("FTDA"). The Act was amended in the Trademark Dilution Revision Act of 2006, Pub. L. 109-312, codified principally at 15 U.S.C. § 1125 (c)(2006). *See generally* Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449 (2007-08); Barton Beebe, *A Defense of the New Federal Trademark Antidilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. J. 1143 (2006); Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006); Lynda J. Oswald, *"Tarnishment" and "Blurring" under the Federal Trademark Dilution Act of 1995*, 36 AM. BUS. L.J. 255 (1999); ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS 695-717 (2003). Only "famous" marks are protected under the FTDA. *See* SCHECHTER & THOMAS, *supra*, at 697-710.

[108] Long, *supra* note 107, at 1037; *see* SCHECHTER & THOMAS, *supra* note 107, at 715-17; Oswald, *supra* note 107, at 274-80; Layne T. Smith, Comment, *Tarnishment and the FTDA: Lessening the Capacity to Identify and Distinguish*, 2004 BYU L. REV. 825.

context. Many of the cases have involved use of the mark in a sexually explicit fashion."[109]

Cruz's writings constitute the fullest academic consideration thinking through traditional marriage, as possibly protected by a right to exclude, as a species of intellectual property. A few other academic authors have noted in passing the similarity of the traditionalist objection to same-sex marriage to a claim of trademark dilution or tarnishment. Richard Epstein argues that the only legitimate issue traditionalists could have with gay marriage is the choice of name, an issue "worthy of the trademark lawyer" because it is about confusion and thus putative erosion of support for the traditional institution.[110] Bryan Wildenthal writes, "[I]t may be noted only half-humorously, some kind of copyright or trademark upon the word 'marriage' seems to be precisely what many opponents of same-sex marriage, whether state-recognized or not, think they are entitled to have."[111] In a recent *Slate* article, Kenji Yoshino considers trademark

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[109] SCHECHTER & THOMAS, *supra* note 107, at 716. Cases involving sexualized expressions that were claimed to tarnish trademarks include, *e.g.*, L.L. Bean, Inc. v. Drake Pub., Inc., 625 F. Supp. 1531, 1536-39 (D. Me. 1986), *rev'd*, 811 F.2d 26 (1st Cir. 1987) (granting summary judgment under Maine trademark dilution law against an erotic publication that used a mail order catalog's trademarked name and logo); L.L. Bean, Inc. v. Drake Pub., Inc., 811 F.2d 26 (1st Cir. 1987) (reversing the district court and viewing the erotic publication as a non-commercial parody and finding that the district court's reading of the state statute violated the First Amendment); Edgar Rice Burroughs, Inc. v. Manns Theatres, 195 U.S.P.Q. (BNA) 159, 1976 WL 20994 (C.D. Cal. 1976) (granting a preliminary injunction against the use of the mark Tarz and of the character names from the Tarzan books in a pornographic parody film and finding, *inter alia*, that the film, an X-rated film over which plaintiff had no control, would dilute the value of the plaintiff's mark); Lucasfilm Ltd. v. Media Market Group, Ltd., 182 F. Supp. 2d 897 (N.D. Cal. 2002) (denying preliminary injunction against a pornographic parody of a famous film, holding on the dilution count that the pornographic film did not violate the Lanham Act because, although it tarnished the trademark, the pornographic film was noncommercial); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema Ltd., 604 F.2d 200 (2d. Cir. 1979) (upholding injunction against showing of pornographic film depicting uniforms strongly resembling those of Dallas Cowboys cheerleaders on the grounds of both Lanham Act likelihood of confusion and, in a brief footnote, state trademark dilution law). Sexualized parodies challenged under the copyright law cause a similar kind of consternation. *See generally* Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273 (2007).

[110] Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing a Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 101. Andrew Koppelman, however, pronounces Epstein's version of the trademark analogy "perhaps the strangest part of his article" and "unintelligible." Andrew Koppelman, *The Right to Privacy?*, 2002 U. CHI. LEGAL F. 105, 116 n.62.

[111] Wildenthal, *supra* note 71, at 432.

tarnishment as a way of understanding the traditionalist concern with the institution of marriage, though he immediately rejected the claim as a doctrinal and policy matter.[112]

In the political arena, Robert Knight, a dogged opponent of same-sex marriage, deployed the "marriage as brand name" argument front and center in his version of the definitional argument against same-sex marriage:

> When the meaning of a word becomes more inclusive, the exclusivity that it previously defined is lost. For instance, if the state of Hawaii decided to extend the famous—and exclusive—"Maui onion" appellation to all onions grown in Hawaii, the term "Maui onion" would lose its original meaning as a specific thing. Consumers would lack confidence in buying a bag of "Maui onions" if all onions could be labeled as such. . . . Likewise, if "marriage" in Hawaii ceases to be the term used solely for the social, legal and spiritual bonding of a man and a woman, the term "marriage" becomes useless.[113]

This is an especially clear articulation of the traditionalists' semantic congestion argument.[114]

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[112] Kenji Yoshino, *Marriage, Trademarked—How to Understand—and Answer—the Claim that Same-Sex Marriage Demeans the Institution*, SLATE, July 2, 2007, http://www.slate.com/id/2169615/ [hereinafter Yoshino, *Trademarked*]. Thanks to Sheila Foster for steering me to Yoshino's article.

[113] Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, *in* SAME-SEX MARRIAGE (Baird & Rosenbaum 1st ed.), *supra* note 1, at 108, 114-15.

[114] *See* Cruz, *Marital Property*, *supra* note 29, at 309 (providing other examples). Trademark is occasionally invoked in various ways (perhaps metaphorically, perhaps not) in exploring issues of the control of communication of queer identity and racial identity. *See, e.g.*, Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law after* Lawrence v. Texas, 9 MARQ. INTELL. PROP. L. REV. 187 (2005); Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887 (1996) (arguing by analogy to trademark law that multiracial gradations remain unrecognized, in favor of clear though artificial racial categories, which convey information efficiently, all ultimately in the service of preserving the special value of the mark of whiteness); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS. L. REV. 1141 (2005) (exploring the potential relationship between property claims—in particular trademark and right of publicity—and issues of legal and social identity).

In trying to get at the semiotic congestion issue within the same-sex marriage controversy, the trademark analogy is inexact, however. Cruz ultimately distances himself from it, for a number of reasons.[115] For example, in contrast to a trademark, there is no single author or creator of the tradition of marriage.[116] As a related matter, because a tradition such as marriage is inherited, and not created through the labor of an individual or small identifiable group, one cannot claim that the public policy behind the claimed right to exclude to prevent unauthorized imitation is necessary to protect investment in competitive advantage.[117] By the same token, insofar as it is individual labor that begets a claim of ownership, under a Lockean labor theory of property, there is no obvious single claimant who could plausibly claim to be the owner of the tradition of marriage.[118] If the cultural

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One unusual and noteworthy Supreme Court case involved a quasi-trademark right that was deployed to exclude a subordinated group that sought to appropriate the cultural identity value of the Olympics mark. San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (*Gay Olympics*). The United States Olympics Committee invoked a special trademark-like law to prevent the word Olympics and the Olympics logo from being used by a new gay and lesbian athletic competition. This action was upheld against a First Amendment challenge. *See, e.g.*, Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1874-75 (1991) (discussing *Gay Olympics*); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1584-91 (1993) (same); Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131 (1989) (same); Poirier, *Hastening the* Kulturkampf, *supra* note 18, at 330-33 (2003) (same); Jeremy Waldron, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property*, 68 CHI.-KENT L. REV. 841, 884-85 (1993) (same).

[115] Cruz suggests instead that marriage should be viewed as a "symbol in the public domain." Cruz, *Marital Property*, *supra* note 29, at 315 (citing Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990)). According to Cruz, "Marriage should be understood as a unique common or public expressive resource, maintained (although not owned) by government for the benefit of the public, and not simply for private 'owners.'" *Id.*

[116] *Id.* at 312-13 ("One cannot point to any closed set of human 'inventors' or 'authors' of marriage."). Yoshino likewise distinguishes the trademark tarnishment analogy by pointing out that marriage was not invented. Yoshino, *Trademarked*, *supra* note 112.

[117] Cruz, *Marital Property*, *supra* note 29, at 310 (asking where the unfair competition lies in letting same-sex couples marry, as their marriages do not seem to affect the reputation of another's mark); *id.* at 313 (noting that "the current generation of marriageable heterosexually identified people . . . has done little distinctive to invest marriage with significance" (footnote omitted)).

[118] Cruz asks, "Who would be the 'owner' of marriage?" *Id.* at 312. He rejects the idea that marriage could be owned as private property, because "'ownership' of marriage should not be judged to rest with some nebulous class of past, present and future

property "belongs" to a group without further specification, it is unclear how the group should make governance decisions concerning the property.[119] Cruz also points out that a typical goal for trademark dilution is protection of a mark's commercial value.[120] By implication, marriage does not fit because it is not a commodity. Rather, marriage's use is managed—limited in some circumstances and encouraged widely in other circumstances—in order to preserve and reproduce traditional cultural meanings and to create and reinforce particular versions of individual and group identity.[121]

Cruz also briefly considers and rejects a copyright analogy. A cultural property claim around marriage is about the protection of an idea and not of a fixed expression, and so it might be more analogous to an uncopyrightable *scène à faire*.[122] Additionally, the protection sought is permanent, not for a limited duration.[123]

As Cruz's analysis demonstrates, if the semantic congestion issue around marriage is characterized in terms of trademark or copyright doctrine, we come up against a number of puzzling differences. These differences serve to reinforce the argument that marriage could well be considered a cultural resource, with traditionalists seeking protection for it as their cultural property.

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heterosexually identified marriage exclusionists." *Id.* at 313 (footnote omitted). As Yoshino puts it, "intellectual property law seeks to protect intangible goods that belong to people because they have created and built up good will for them. No such claim can be made about state-sponsored marriage, because no individual invented it, and no individual owns it." Yoshino, *Trademarked*, *supra* note 112.

[119] Cruz identifies one type of potential collective ownership but rejects it, discarding the possibility that marriage might be treated as governmental property. Cruz, *Marital Property*, *supra* note 29, at 312.

[120] *Id.* at 310.

[121] For a basic argument that essential aspects of some sorts of property may not be reflected in commodification and markets, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985).

[122] Cruz, *Marital Property*, *supra* note 29, at 307.

[123] *Id.* at 306.

Consider first, as a general matter, indigenous peoples' desire that outsiders should be excluded from the use of their sacred rituals.[124] The use of traditional sacred ritual forms by outsiders is understood by those within the indigenous group to pollute, desecrate and degrade the ritual, the individual group member's identity, and the group's culture and traditions. Therefore, indigenous groups and subordinated cultures sometimes deploy a modern Western legal idiom and argue that their intangible rituals and cultural artifacts should be deemed a species of cultural property, over which the group should be assigned a right to control access and use, including the exclusion of outsiders.[125] As with intellectual property, the (claimed) misappropriation of intangible cultural property typically occurs through inappropriate, unauthorized reproduction.[126] From time to time,

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[124] One can find many examples of outsiders creating spiritual pollution by invading the ceremonies of native tribes and photographing them, recording their sacred songs or employing their religious symbols. *See, e.g.*, BROWN, *supra* note 23, at 6, 11-15, 24-28, 69-73; SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 103-06 (2005) (discussing misappropriation of cultural products and the consequent destruction of cultural values, using the example of copying a Native American ceremonial dance).

[125] *See* BROWN, *supra* note 23, at 63, 68, 71; Mezey, *Paradoxes*, *supra* note 105, at 2005-06 (arguing that the logic of cultural property claims is preservationist and seeks to preserve what is conceptualized as a static, preexisting culture against "appropriations, hybridizations, and contaminations") . Various schemata classifying the objects of Native American cultural property claims are available. *See, e.g.*, SCAFIDI, *supra* note 124, at 151 (proposing a two-by-two grid for categorizing claims to protection of cultural products, depending on whether they are public or private and whether they are commodified or noncommodified); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights,* 34 ARIZ. ST. L.J. 299, 311-13 (2002) (suggesting a fourfold taxonomy of objects, symbols appropriated for commercial use, rituals appropriated for religious use, and portrayals of Indians in movies, novels, and other media). There is currently no single, accepted, comprehensive approach.

[126] SCAFIDI, *supra* note 124, at 30-31 (stating that all intellectual property and all cultural products contain an intangible element that is subject to theft by copying). As a general matter for purposes of this article, I distinguish and bracket claims to cultural property in tangible things. Although questions about authorship, ownership, and use are still applicable, disputes over the control and ownership of things as cultural property sometimes have different characteristics. For example, tangible things can be relocated, controlled, and sometimes made secret, in ways that intangible expressions cannot be. (Indeed, the concept of cultural property developed out of concerns for destruction of physical objects by war and the plunder of antiquities, and only subsequently was extended to intangible cultural products. Mezey, *Paradoxes*, *supra* note 105, at 2009-12 (tracing the history of the legal concept of cultural property).) Rituals that are linked to specific sacred sites probably should also be thought of as another separate category of cultural property, because of their ubiety (whereness) through their association with place-specific sites. *See, e.g.*, BROWN, *supra* note 23, at ix-x (description). Susan Scafidi points out that the traditional category of cultural

indigenous people use property rhetoric to assert a right to control the performance of their sacred rituals.[127]

Cultural resources do not fit squarely into the doctrinal framework used for the typical objects of intellectual property for a number of relevant reasons.[128] These differences dovetail neatly with the reasons why Cruz and others have rejected the trademark analogy when looking at the controversy over same-sex marriage: (1) Cultural resources typically lack individual authorship and derive instead from tradition, with no specific beginning point.[129] (2) The claim of group ownership (ownership as distinct from authorship) may or may not relate to any legally cognizable group, which

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property involves "the embodiment of intangible cultural values . . . in specific, unique objects" and that the inclusion of intangibles as a form of cultural property is a more recent development. SCAFIDI, *supra* note 124, at 48.

[127] They may also claim a right to secrecy about rituals—in a sense, another level of control of access, though one evidently not relevant in the analogy to civil marriage. *See, e.g.*, BROWN, *supra* note 23, at 13-15 (describing Hopi concerns over maintaining secrecy of esoteric rituals, and their demands for repatriation of decades-old field notes, photographs and drawings that might contain such information); GULLIFORD, *supra* note 30, at 180.

[128] Among the sources from which I draw these conclusions about typical characteristics of cultural property are BROWN, *supra* note 23; Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997); LAURYN G. GRANT, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION (A.L.I.-A.B.A. Continuing Legal Education Course of Study Mar. 24-26, 2004), *available at* SJ049 ALI-ABA 469 (Westlaw); Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999); Mezey, *Paradoxes*, *supra* note 105; Suzanne Milchan, Note, *Whose Rights are These Anyway?—A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property*, 28 AM. INDIAN L. REV. 157 (2003-2004); Robert K. Paterson & Dennis S. Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, 11 CARDOZO J. INT'L & COMP. L. 633 (2003); Carol M. Rose, Book Review, *Property in All the Wrong Places?*, 114 YALE L.J. 991 (2005) (reviewing BROWN, *supra* note 23; KAREN R. MERRILL, PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM (2002)) [hereinafter Rose, *Wrong Places*]; SCAFIDI, *supra* note 124; Tsosie, *supra* note 125.

[129] SCAFIDI, *supra* note 124, at 21 ("Still more likely to fall outside the realm of intellectual property are the creative expressions of an unincorporated group, such as a particular race, ethnicity, religion, sexual orientation, profession, avocation, class, or even gender or age category."). Scafidi attributes this to the fact that authorship may not be "sufficiently identifiable to meet the standards of intellectual property law." *Id.* This is part of what Scafidi gets at in describing many cultural products as "accidental" property. *Id.* at 24.

can complicate matters of governance.[130] (3) Those who seek to control the resource may have little or no interest in economic exploitation. Therefore, standard justifications for intellectual property around either incentive or reward may not make much sense. As Carol Rose writes, "[S]tandard intellectual property is not very helpful when you do not want to sell your expressions or inventions but rather want to keep others' mitts off them, so that these objects and images are not coarsened and diluted by reproduction and profane uses among people who do not know or care about their significance."[131] Also, particularly relevant to the identity-conferring and -preserving functions of cultural resources and different from typical intellectual property, are: (4) Those who seek control desire to have a permanent, perpetual right to exclude. (5) They want to manage the right to use and exclude from use for the identity of individuals and for the continuing cultural identity of the group simultaneously.[132] (6) Finally, many cultural expressions, including rituals, may not be fixed,[133] as is required for trademark and copyright protection.

Authorities diverge on whether property is a suitable legal framework to address cultural resource controversies at all and whether, if it is, cultural property rights ought to be easily created, recognized, and assigned. The legal framework for cultural property is still emerging and

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[130] *Id.* at 37 ("[T]he amorphous nature of unincorporated group authorship . . . complicates private consensus."); *id.* at 36 ("[C]ultural products lack a legal paradigm for shared control, a lacuna that results in potential intragroup conflicts.").

[131] Rose, *Wrong Places*, *supra* note 128, at 996. Scafidi observes that in these instances, "neither commodification nor reduction to ownership serves as the primary impetus for their development." SCAFIDI, *supra* note 124, at 24. Rather, they are "intrinsic to quotidian activities and celebratory occasions within the source community. As such, they instantiate the internal dynamics, shared experiences, and value systems that bind the community together." *Id.*.

[132] This implication of group identity in governance may actually make amorphous group ownership particularly suited to the identity stabilizing, tradition-preserving function of certain cultural resources. It is curiously and usefully reflexive. Exploration of the functionality of limited commons management of cultural resources that (re)produce identity is a theoretical issue of considerable interest, but is beyond the scope of this Article.

[133] *See* SCAFIDI, *supra* note 124, at 31 ("[I]t is the nature of [some] forms of cultural expression to remain unfixed, at least while they remain within their source communities."). Scafidi points out that intangibility "has a value of its own—a value pertaining to immediacy of transmission, communal participation, and perhaps fluidity of detail." *Id.* at 32.

will undoubtedly be contested as it emerges.[134] It may be that, in its current state, the theory of cultural property is not well-equipped to describe, let alone propose, any single theoretical path towards resolution of the marriage equality/same-sex marriage debate, reframed as being about access to and exclusion from an intangible sacred cultural resource. Even if the traditionalist interest in marriage is a species of cultural property claim, to whom marriage should "belong" may be a question that ought not be resolved at this juncture—or perhaps ever.

Nevertheless, I am convinced that identifying the cultural property claim within the same-sex marriage controversy as such offers the possibility for new approaches to analyzing the conflict. The next section and Part III are reflections on various consequences of viewing marriage as potential cultural property. They are intended both to illuminate further the stakes in the contemporary *Kulturkampf* and, perhaps, to contribute towards a more general theory of cultural property claims and the relationship of legal claims to ongoing identity processes.

C. Simultaneous Exclusions from Symbolic or Discursive Space and from Physical Place

Exclusion from the misuse of a cultural resource, as part of cultural identity production and reproduction, sometimes occurs through exclusion from physical property. The discussion of this co-occurrence of physical and symbolic exclusion serves to open up this Article's consideration, in Part III, of the management of same-sex couples' visibility as an integral aspect of the semiotic congestion experienced by traditionalists,[135] and, in Part IV, as an occasional source of possible solutions to semiotic congestion.[136]

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston[137] is a particularly interesting example of this kind of exclusion. In

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[134] *See, e.g.*, BROWN, *supra* note 23; Mezey, *Paradoxes*, *supra* note 105; Rose, *Wrong Places*, *supra* note 128; SCAFIDI, *supra* note 124, at 147-57 (chapter entitled *An Emerging Legal Framework*).

[135] *See infra* Part III.

[136] *See infra* Part IV.B.

[137] 515 U.S. 557 (1995) (holding that private organizers of a St. Patrick's Day parade celebrating Irish identity have a First Amendment right to exclude would-be participants who sought to march under banner identifying them as gay, lesbian and bisexual Irish persons and that the state antidiscrimination statute was unconstitutional as applied).

this case, the Supreme Court allowed parade organizers to exclude the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) from marching under an identifying sign in a St. Patrick's Day parade, even though the underlying basis for the exclusion was antipathy toward an identity group protected by the state's antidiscrimination law. Madhavi Sunder has critiqued the Court's property-like approach to First Amendment rights because, by assigning a right to exclude to the parade organizers, it freezes cultural dialogue and maintains the status quo.[138] Sunder discerns "two conflicting views of speech: speech as a public site of cultural contest and speech as ownable and protectable private space."[139] Indeed, the "space" at issue in *Hurley* is not just semiotic. The case involves the physical exclusion from a particular event invested in the United States with significance as a marker of Irish identity. The parade is an intangible cultural resource. To reenact and thus preserve and perpetuate this cultural resource, the parade organizers relied on access to an actual public place—the streets of Boston. The Court, in holding that the parade organizers could not be forced to articulate a message other than the one they chose,[140] in effect allowed the organizers temporary control over the physical place as

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[138] Madhavi Sunder, Note, *Authorship and Autonomy as Rites of Exclusion: The Intellectual Propertization of Free Speech in* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 49 STAN. L. REV. 143 (1996) [hereinafter Sunder, *Authorship*]. Sunder discerns all three fundamental property rights as at issue in the case: use, exclusion, and alienability. *Id.* at 152-53 (examining the rights conferred on the Veterans' Council in authorizing it to produce the annual St. Patrick's Day parade). However, Sunder considers the alienability aspect of property in this case to be "theoretical." *Id.* at 153. Indeed, one type of claim to cultural property is indifferent to market alienability, for the right to use is viewed as a priori reserved to traditionally appropriate members of the culturally relevant group. *See* BROWN, *supra* note 23, at 6 (discussing that cultural resources are often claimed to be inalienable). Ownership of such a cultural resource is static and noncommodified.

[139] Sunder, *Authorship*, *supra* note 138, at 147. Sunder describes the case as a conflict over 'discursive space." *Id.* at 144. I explore the concept of discursive space and its consequences for understanding *Kulturkampf* over same-sex marriage in two forthcoming essays: Marc R. Poirier, *Same-Sex Marriage, Identity Processes and the* Kulturkampf*: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2008) [hereinafter Poirier, *Federalism*]; Marc R. Poirier, *Gender, Place, Discursive Space: Where Is Same-Sex Marriage?*, 3 FLA. INT'L U. L. REV. (forthcoming 2008) [hereinafter Poirier, *Gender, Place*]. Note that some authorities use the terminology of "space" and "place" in almost the reverse fashion when talking about similar issues. *See, e.g.*, Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 460-61 (2006) [hereinafter Zick, *Space, Place*] (using "space" for undifferentiated location, "place" as having meaning to particular persons).

[140] Justice Souter's opinion for a unanimous Court stresses that the parade makes a point, and is thus protected expression. *Hurley*, 515 U.S. at 568-69.

well.[141] As suggested above, a claim about pollution (here, the organizers' concern was cultural pollution of a ritual about Irish identity) always involves a claim to control a shared space. Here it also involved a physical place.[142]

Interestingly, in *Hurley*, the Court does not simply award a trespass-like right to exclude. The rhetoric of romantic authorship is mobilized to help justify the assignment of a right to exclude to the parade organizers.[143] This despite the fact that the cultural stake is, in major part, the nature of being Irish, and the organizers certainly cannot claim to have created Irish identity. The organizers are, however, (re)producing and (re)affirming Irish identity. As Madhavi Sunder so aptly sets out, the Court's resort to the trope of the romantic author masks dimensions of cultural contest that are inherent and inevitable in ritualized expressions of cultural identity.[144] The easy identification of the cultural resource with intellectual property, especially with its all-important right to exclude, obscures issues of cultural dissent.[145] As a consequence of the Court

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[141] The vocabulary Zick develops in his typology of expressive place may help here. Insofar as the streets of Boston are used for the St. Patrick's Day parade, they temporarily become an "inscribed place", that is, a place to which people ascribe special cultural or sacred meaning. Zick, *Space, Place, supra* note 139, at 473-75. The streets then become a "contested place", both because of the dispute over the underlying cultural meaning of the place, *id.* at 470, and because the exclusion itself creates a contest over the symbolic and stigmatizing exclusion from community ritual. *Id.* at 470-71.

[142] *See supra* Part II.A.

[143] In arguing that "a narrow, succinctly articulable message is not a condition of constitutional protection," *Hurley*, 515 U.S. at 569, Justice Souter invokes "the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll." *Id.* Later in the opinion Souter argues that the organizers are "[r]ather like a composer" who "selects the expressive units" even though "the score may not produce a particularized message." *Id.* at 574.

[144] Sunder, *Authorship, supra* note 138, at 153-156 (discussing, *inter alia*, Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. L. & JURIS. 249 (1993); Michel Foucault, *What is an Author*, *in* THE FOUCAULT READER 101 (Paul Rabinow ed., Jose V. Harari trans., Pantheon 1984); Michael Madow, *Private Ownership of Public Images: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125 (1993)).

[145] As Susan Scafidi writes, the Court's constitutional analysis is "unable to encompass the complex social relations underlying contested internal control over cultural products." SCAFIDI, *supra* note 124, at 69 (discussing *Hurley*). For similar reasons, Mezey cautions generally against approaching cultural contestation from the perspective of property, and concludes generally that law "does not have a good track record for getting at the complexities of culture." Mezey, *Paradoxes, supra* note 105, at 2046.

affirming the parade organizers' right to exclude, differing views of Irishness are shunted off to a different, less visible, and less traditional place and time.

Hurley is also instructive on the issue of visibility without shame. From the parade organizers' point of view, the problem is that GLIB's appearance under an identifying banner may be understood to indicate the organizers' endorsement of GLIB's visibility. The organizers attribute a negative value to GLIB's participation as an openly gay and lesbian group, while GLIB attributes a positive value to it. This polarization of meaning accords with Rasmusen's understanding of the general structure of desecration controversies.[146] The problem, as the parade organizers see it, is that they will be compelled to engage in unwanted speech if they are forced to share access to a physical place and a discursive space that have been placed temporarily under their control. They believe that the unwanted presence of GLIB will be understood as endorsement by the general public who are observants-participants in the parade.

The parade organizers' concern is similar to a shopping center owner's concern that leafletters' messages will be attributed to the shopping center.[147] It is the same problem Georgetown University faced when it objected to a local law requiring it to provide tangible benefits to two gay student groups, even if the law did not require it to offer the groups formal "University Recognition"—that is, official endorsement.[148] It is the same

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[146] Rasmusen argues that, in desecration controversies, there is a disagreement as to whether the symbolic speech has positive or negative utility. Rasmusen, *supra* note 22, at 249-251.

[147] *See, e.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (rejecting the shopping center owner's claim of a right to exclude, and stating that there was little likelihood that the views of leafletters would be identified with the views of the owner, who would be able effectively to disassociate himself from the leafletters' views).

[148] The majority in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* interpreted the District of Columbia Human Rights Act to require the provision of tangible benefits but not endorsement; this distinction saved the act from creating an impermissible burden on the university's free exercise of religion. 536 A.2d 1, 20-39 (D.C. Cir. 1987) (en banc) (plurality opinion by Mack, J.). In contrast, Judge Belson argued that requiring the provision of tangible benefits amounted to forcing the university to subsidize speech with which it disagreed and violated its First Amendment rights, quite apart from the issue of whether endorsement was required. *Id.* at 62, 68-74 (Belson, J., concurring in part and dissenting in part). For an argument that the plurality opinion in the *Georgetown University* case represents not just a compromise resolution but a salutary accommodation of two different identity-reinforcing cultures, see William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2431-56 (1997) [hereinafter Eskridge, *A Jurisprudence*].

problem faced by law schools that object to being coerced into allowing military recruiters physical access to law school campuses.[149] In each of these cases, compelled presence in a physical place was understood by some to congest a symbolic or discursive space.

Boy Scouts of America v. Dale[150] provides another significant example. James Dale, an assistant scoutmaster, was discharged after the local council of the Boy Scouts of America ("BSA") learned that, in his capacity as a college student leader, he had come out publicly in a recent newspaper interview. Mr. Dale had never disclosed his homosexuality in the places and spaces specifically controlled by the BSA. Yet once he was publicly identified as gay, that identity followed him everywhere. Unlike the would-be marchers in *Hurley*, who would have been allowed to march if they were willing to abandon their banner, Dale was unable to pick up and put down his gay identity in accordance with local circumstance. Context-specific invisibility or silence proved insufficient to mitigate the signal distortion of having been visibly gay. As with physical pollution and pathogenic contagion, the one who introduces the contaminant (in Nagle's term, that would be the polluter) into the shared space was not thereafter understood to retain control of its contaminating potential. Instead, anti-pollution forces claimed the right to mobilize to take control of and purify the shared, and now contaminated, space. In the case of *Dale*, this meant that the BSA could exclude Mr. Dale from BSA membership despite the state's antidiscrimination law. This exclusion from membership also amounted to banishing him from the places and spaces in which the BSA physically operates and in which its members are visible to one another and often to the public.[151]

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[149] *See* Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 547 U.S. 47, 63-65 (2006) (holding that withholding federal funding from institutions of higher education that bar physical access to campus to military recruiters because of the military's antigay employment policy does not violate any First Amendment right; a military recruiter's mere presence on a law school campus would not be confused with the law schools' position on the issue of the military's discriminatory employment policy). The Third Circuit's decision below had been based on an academic institution's academic freedom right to self-define and not to be coerced to endorse speech or policies with which it disagrees. *See* Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004), *overruled by FAIR*, 547 U.S. 47.

[150] 530 U.S. 640 (2000) (ruling that the Boy Scouts of America ("BSA") could exclude openly gay assistant scoutmaster and holding that the BSA has a First Amendment-based right of expressive association to define their organization through exclusion of persons whose identity is not in accord with organization's message).

[151] *See* Poirier, *Gender, Place*, *supra* note 139 (discussing the disruptive presence of Mr. Dale in *Boy Scouts of America v. Dale*). *See generally* Christopher S. Hargis, Student

In each of these cases, once a user of a publicly-visible, privately-controlled physical place is seen or known to carry a stigmatized identity, her access to and use of the place threatens to be construed as an endorsement of the stigmatized identity by the owner or possessor of the place. In evolving First Amendment jurisprudence, the consequence of this attribution of endorsement is often that the private owner or possessor of a publicly-visible place can successfully claim a right to physically exclude undesirable others, even though doctrinally the basis for these holdings is not a property right, but concern about compelled speech or a right of expressive association.[152] This was the result in *Hurley* and *Dale*.[153] Regardless of outcome, many of these cases—*Georgetown University*, *Hurley*, *Dale*, and, in a different way, *FAIR*—involve arguments about the attribution of views on homosexuality, where the private owner or possessor of a place is threatened with being coerced by antidiscrimination laws into allowing access. The visible presence of people displaying markers of homosexuality without shame could indeed be said to be

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Writing, *The Scarlet Letter "H": The Brand Left after* Dale, 11 L. & SEXUALITY 209, 224-40 (2002) (arguing that the *Dale* analysis treats homosexuals as "branded," making their very existence an expressive activity); Nancy J. Knauer, *"Simply So Different": The Uniquely Expressive Character of the Openly Gay Individual after* Boy Scouts of America v. Dale, 89 KY. L.J. 997, 1016-20 (2000-2001).

[152] Helpful considerations of this spatial aspect of First Amendment jurisprudence as applied to stigmatized identity and visibility may be found in Eskridge, *A Jurisprudence*, *supra* note 148; Hunter, *Accommodating*, *supra* note 72; Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000); Sunder, *Authorship*, *supra* note 138. These authorities approach the issue in terms of actual speech or dissent, when the mechanism that creates the cultural conflict is often differing interpretations of the visible presence without shame of members of stigmatized identity groups. In addition, Timothy Zick has recently embarked on an ambitious and useful reevaluation of many space and place aspects of First Amendment jurisprudence. *See* Zick, *Space, Place*, *supra* note 139 at 459-84 (setting forth a theory of "expressive place", followed by a typology of six kinds of "expressive place"); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006); Timothy Zick, *Property, Place, and Public Discourse,* 21 WASH. U. J.L. & POL'Y 173 (2006). However, Zick's work at this point focuses on traditional First Amendment concerns about speech and assembly, often explicitly political speech and assembly, rather than on expressive visibility. Zick also centers his discussion on publicly-owned spaces rather than the broader category of publicly-visible ones that may be privately owned.

[153] In a forthcoming essay I argue that the exclusion in *Dale* is about discursive space rather than a specific physical place. Poirier, *Gender, Place*, *supra* note 139. This is an important distinction in an overall theory of local control of identity performance, but plays a diminished role in the context of the instant article about marriage as cultural property.

"contagious" in this sense.[154] At the same time, to permit the differential exclusion of stigmatized groups from public or publicly-visible places communicates and perpetuates the stigma.[155]

III. MARRIAGE AS ONGOING GENDER PERFORMANCE

This Part elaborates the cultural property claim explicated in Part II, arguing that marriage inevitably involves ongoing gender performance. Marriage is many things at once—a status, a bundle of legal benefits and obligations, a vehicle for identity, a badge of citizenship, a time-tested arrangement for making and raising children, a generator of kinship ties, and a way of managing property, both within a generation and from one generation to the next.[156] Insofar as marriage is about culture and tradition, the *Kulturkampf* over marriage is often viewed as being about irreconcilable traditions or interpretations. But the *Kulturkampf* is also about how we interpret the daily visible enactments of the marital state, which inevitably include both traditional and transgressive performances of marriage.

Culture and ritual do not exist apart from the small and particular embodied social practices that express them. Neither does language, nor whatever part of gendered behavior and gender roles is socially constructed.[157] All of these collective social practices derive from and

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[154] In trying to describe the problem with Dale's presence in the local BSA meetings, Nan Hunter resorted to the descriptor "radioactive"—another way of expressing a harmful presence. Hunter, *Accommodating*, *supra* note 72, at 1608.

[155] This is part of the dynamic of a "contested place," to use Zick's terminology. Even where a particular locus has no special meaning in and of itself that makes it worth fighting over, the denial of access communicates that some individuals are "out of place" there. Thus the denial of access itself becomes the source of contest. Zick, *Space, Place*, *supra* note 139, at 470-71.

[156] *See, e.g.*, GRAFF, *supra* note 55, at xii (listing six different types of interests that are managed by marriage: "Money, Sex, Babies, Kin, Order, and Heart"); Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story about Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 406-07 (1999) (discussing the many issues raised by the possibility of same-sex marriage and the various rhetorics and registers employed to argue about them).

[157] The signifying elements of culture, language, ritual, and gender are not disembodied, atemporal ideas. Our concepts and categories have sedimented from shared and iterated social practices, even though they appear to us to be stable and acontextual. *See, e.g.*, Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (2000) (exploring Merleau-Ponty's concept of sedimentation as applied to the categories used in legal theory). A general theory of sedimentation accounts for both

depend for their perpetuation on microperformances. The possibility of social change in any diffuse, collective practice of signification—culture, ritual, language, or gender role—vitally depends on shifts in individual performances, and eventually on larger-scale systematic and formal amendments of these embodied cultural practices in the course of reproducing them.[158] As Judith Butler argues persuasively, it is the iterability of small-scale, local social practices that transmits social practices from one generation to the next, and, at the very same time and by the same mechanisms, makes shifts in social practice possible.[159]

The traditionalist claim of cultural property in marriage is centrally (although not solely) motivated by a concern about the control of visible transgressive performances of gender roles. The argument explored in this Part is not just a metaphor to coax the cultural property claim to look more like some standard intellectual property categories—copyright, trademark, a right of publicity, or a moral right, any of which can be used to assert control over unauthorized performances.[160] Transmission of tradition and culture from one generation to the next— and from one moment to the next—is achieved or altered through daily, mundane performances of culture, ritual, language, and gender roles. Indeed, the important steps early in the cultural shift toward acceptance of GLBTQ folk in the past fifty or so years occurred not (or not just) because conceptual arguments around equality and dignity were presented and prevailed, but because GLBTQ

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perspectival situatedness and for the limited possibility of change in social practice; and thus for the limited possibility of change in legal practice.

[158] *See* Poirier, *Gender, Place*, *supra* note 139; Poirier, *Hastening the* Kulturkampf, *supra* note 18; Marc R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land?*, 7 EMP. RTS. & EMP. POL'Y J. 459, 459-94 (2003) (discussing the production and reproduction of occupational gender stereotypes); Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1106-15 (1999) [hereinafter Poirier, *Gender Stereotypes*] (explaining that the process of changing gender schemas is "not easily steered . . . due to the embedding of gender schemas in very many . . . individual real world circumstances").

[159] BUTLER, EXCITABLE SPEECH, *supra* note 28, at 127-63. *See generally* David E. Van Zandt, *Commonsense Reasoning, Social Change, and the Law*, 81 NW. U. L. REV. 894 (1987) (arguing that theories of social change through law must be grounded in an understanding of diffuse social practices and the ways in which they both facilitate and hinder change). This diffuse reproduction of culture also results in an involuntary slippage of social practice, which can then be steered. *See* Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991).

[160] Although not discussed in Part II, *supra*, sometimes an authorial "right of integrity" is explored to protect cultural resources from degradation. *See* BROWN, *supra* note 23, at 62.

folk emerged into enough regular visibility to make certain kinds of claims plausible, however unsuccessful initially.[161] Justice Lewis Powell, who provided the fifth vote in *Bowers v. Hardwick*,[162] said he had never met a gay person, when one of his own clerks at the time was gay (though closeted).[163] I have argued that the cultural controversy underlying *Dale* is whether gay men will be allowed to be visible as role models for boys.[164] The current United States military ban on gays and lesbians is fundamentally about suppressing the visibility of homosexuality among soldiers.[165] Because visibility is always linked to specific and embodied performances, control of the inevitable potential for variation of the marriage ritual and status also necessitates control of the body and its microperformances.[166]

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[161] *See, e.g.*, Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1534 (2006) [hereinafter Ball, *Backlash Thesis*] ("In many ways, overcoming invisibility is the first step in successfully demanding basic civil rights."); Poirier, *Federalism*, *supra* note 139 (exploring the importance of understanding contested visibility in the sex and gender *Kulturkampf*); Poirier, *Piecemeal*, *supra* note 7 (exploring the importance of visibility in facilitating the case for GLBTQ rights); Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J. L. & PUB. POL'Y 403, 421 (2004) (arguing that *Lawrence v. Texas* "happened because gay people refused to live their lives in the closet").

[162] 478 U.S. 186 (1986).

[163] ESKRIDGE & HUNTER, *supra* note 37, at 61.

[164] Poirier, *Hastening the* Kulturkampf, *supra* note 18.

[165] *See* Poirier, *Piecemeal*, *supra* note 7, at 342, 344.

[166] I have explored the importance of what I am now calling microperformances to the experience and reproduction of gender stereotypes elsewhere. Poirier, *Federalism, supra* note 139; Poirier, *Gender, Place, supra* note 139; Poirier, *Piecemeal*, *supra* note 7, at 326-29, 344-45; Poirier, *Hastening the* Kulturkampf, *supra* note 18, at 326-329; Poirier, *Gender Stereotypes*, *supra* note 158, at 1074.

As this Article uses the term, "microperformance" is related to the concept of "microaggression" developed in the Critical Race theory literature and LatCrit literature. *See, e.g.*, John O. Calmore, *Displacing the Common Sense Intrusion of Whiteness from Within and Without: "The Chicano Fight for Justice in East L.A."*, 92 CAL. L. REV. 1517, 1524-26 (2004); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989); Daniel Solórzano, Walter R. Allen & Grace Carroll, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 15-17 (2002) (discussing Dr. Charles Pierce's psychological theories of race and microaggression). Zick's work is leading him towards a related concept, as he relies on "microgeographic principles" to describe and recommend an approach in First

The idea of societal policing of the microperformances of marriage is not as unfamiliar as it may seem. Consider the trial court's original remedy in *Loving v. Virginia*,[167] the case in which the United States Supreme Court eventually held miscegenation laws unconstitutional. The trial court judge sentenced the interracial couple to one year in jail, but suspended the sentence for twenty-five years on the condition that they leave the state and not return to Virginia *together* for those twenty-five years.[168] The couple was basically exiled from Virginia, but they were not exiled for all purposes, as might be individual criminals who had offended the fundamental mores of the Commonwealth. They were not permitted to be present in the state *together*. They were exiled *as a transgressive couple*. This remedy addressed the problem of the public visibility of an interracial married couple. If they could not be present in the state together, they could not make visible a type of marriage prohibited under Virginia's miscegenation and cohabitation laws, which might encourage others and threaten to destabilize the social norm against interracial marriage. By preventing their presence and visibility as a couple, the trial court sought to police not only the legal definition of marriage in Virginia (no whites could marry non-whites, under the Virginia law) but what would be understood by the public to be visible transgressions of that law. The Supreme Court correctly appreciated that the underlying cultural stake was the protection of whiteness.[169]

As another example, imagine the atmosphere at an educational institution like Bob Jones University in the years after it first admitted blacks, but before its institutional prohibitions on interracial marriage and

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Amendment law to managing what I would call certain types of microinteractions. Zick, *Space, Place, supra* note 139, at 452, 493-494, 498, 499, 501.

[167] 388 U.S. 1 (1967).

[168] *Id.* at 3. The state supreme court opinion expressly notes that the trial court "require[d] that the defendants leave the state and not return thereafter together or at the same time." Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966), *rev'd*, 388 U.S. 1 (1967). According to the state supreme court, the sentences did not technically constitute banishment, which would have rendered them void; the defendants *could* return to Virginia, just not together. *Id.* at 82. It also noted that while the state statute did allow for suspension of sentences for purposes of rehabilitation, the trial court had acted unreasonably in requiring that defendants leave the state and not return together; what it should have done was to condition the suspension on the defendants not cohabiting as man and wife again in Virginia. *Id.* at 83. The sentences were found void as unreasonable. *Id.*

[169] *Loving*, 388 U.S. at 11, n.11.

dating were abandoned.[170] Of course, interracial marriage could be verified by government records. But presumably interracial dating was policed by observing how students related to other students, creating an incentive of some strength for Bob Jones students to avoid even the appearance of interracial couples—staying voluntarily segregated on campus in certain social activities, for example. From a racist perspective, one type of harm resulting from interracial dating, as addressed by the university policies, might be that it would lead to interracial marriage and mixing of the races. But another part of the harm would simply be to make visible the transgressive possibility of mixed-race couples.

The idea of creating social and legal incentives for individuals to self-police their public appearance in order to avoid violating visible norms around gender should be familiar in the GLBTQ context as well. Marc Fajer famously asked whether two "real men" could eat quiche together.[171] In this particular scenario, the way in which two men behave towards one another sends signals both about their relationship and about their sexual orientation.[172] Later in the same article, Fajer wrote about the inherently public nature of relationships more generally:

> A couple in love wants to spend time together, to socialize together, to live together. Even if they don't discuss their feelings for each other in public, the constant proximity of a same-sex couple sends messages to the outside world. Discrimination against gay relationships often results from this public quality.[173]

Fajer observed, "Some discrimination results from a couple openly behaving as a couple: acts such as outward expression of their affection or

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[170] *See* Bob Jones University v. United States, 461 U.S. 574 (1983) (upholding against constitutional challenge an Internal Revenue Service policy that disqualified a university from tax-exempt status because of its ban on interracial dating).

[171] Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); *see also* Jennifer B. Lee, *What Do You Call Two Straight Men Having Dinner?*, N.Y. TIMES, Apr. 10, 2005, § 9, at 1 (discussing how two men socializing together without involving sports or business will lead to questions about their sexual orientation).

[172] There is typically a conflation of sexual orientation either with sexual behavior or with gender stereotypes. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 16 (1995).

[173] Fajer, *supra* note 171, at 575 (footnote omitted).

trying to make joint living or financial arrangements."[174] Hand holding and dancing together are other examples of such activity—permitted to some couples but not to others.[175] In other words, monitoring the public visibility of various gestures and behaviors is one of the reasons for and ways in which transgressive relationships are policed. To be sure, Fajer also wrote that discrimination against gay relationships "can take the form of refusal to allow legal, and therefore public, recognition of the relationship."[176] Tellingly, he identified two separate but related aspects of what troubles traditionalists about same-sex relationships: (1) public visibility and (2) legal recognition, understood as a form of public approval.

Some time ago, Mary Anne Case argued that same-sex couples were being kept under wraps in gay rights litigation because they were even more troubling to traditionalists than either gay individuals or gays in larger groups.[177] Case posits that visible same-sex couples pose two especially

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[174] *Id.* (footnote omitted). The military ban on GLBT folk has generated perceptive scholarship on the relationship between monitoring and self-monitoring of performance and the definition of transgressive sexual orientation. *See, e.g.*, ALLAN BÉRUBÉ, COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II (1990); David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994); DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY (Aaron Belkin & Geoffrey Bateman eds., 2003); JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY (1999); Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179 (1995); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998).

[175] Fajer, *supra* note 171, at 576.

[176] *Id.* at 575.

[177] Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1643-44, 1647-50 (1993) [hereinafter Case, *Coupling*]; *see also* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271 (2006) (exploring the same problematic for visible same-sex couples in sexual orientation antidiscrimination law). Case's factual predicate about the focus of GLBTQ litigation has been overtaken by developments on the marriage equality front since 1993, when her article was published, but her cultural analysis concerning same-sex couples remains as acute as ever. The prominence of same-sex marriage nowadays "has several causes, not the least of which is a 1993 plurality opinion by the Supreme Court of Hawaii which may eventually result in that state's recognizing same-sex marriage." MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 1 (1997) (referring to *Baehr v. Lewin*, 853 P.2d 44 (Haw. 1993)); *accord* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 150 (2002) ("The Hawaii Supreme Court's decision put the issue of same-sex marriage on the national agenda as it had never been before.").

problematic challenges to tradition. One challenge is the claim that legitimate pair bonding may occur between same-sex couples.[178] Civil marriage of same-sex couples only intensifies this claim to legitimacy, because it demands that "society do even more than tolerate [same-sex couples], that it affirmatively give recognition to [their] coupled status."[179] The other challenge is acknowledging that legitimate sex may occur between same-sex couples—indeed that sex may occur at all between same-sex couples.[180] Case neatly sums up this dual claim in a repeated wordplay on "couples" and "coupling." As she puts it, "'coupling' as in 'forming a pair bond' and 'coupling' as in 'copulating' are exactly what gay men and lesbians may want to do and what troubles society when they try to do it."[181]

Case links hostility toward homosexuality to an underlying desire to preserve traditional gender roles, as represented in the idealized opposite sex couple. She quotes from Sylvia Law's classic argument:

> When homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relationships require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex.[182]

Case also stresses that society is troubled by the visibility of same-sex couples. This visibility is "both more firmly established and more public than either an occasional furtive, anonymous encounter or an admission of orientation unaccompanied by demonstrable homosexual

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[178] Case, *Coupling*, *supra* note 177, at 1643.

[179] *Id.* at 1659.

[180] *Id.* at 1643.

[181] *Id.*

[182] Law, *supra* note 50, at 218, *quoted in* Case, *Coupling*, *supra* note 177, at 1663; *see also* RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 24 (1988) (arguing that antigay stereotypes reinforce powerful gender roles in society); Ross, *supra* note 97, at 1667 ("The fight against [same-sex] marriage is best understood as a desperate attempt to keep the gender line from further eroding, to preserve at least some demarcations between what it means to be a man and what it means to be a woman.").

acts."[183] Case aptly analogizes same-sex couples to the transgressive Jewish-Russian Orthodox couple in *Fiddler on the Roof*.[184] This marriage is a transgression of Jewish tradition that the father, Tevye, cannot tolerate, and he banishes his daughter from his sight. "Because the couple is the visible sign of this affront to tradition, its members provoke the strongest hostility when they appear together. If they insist on remaining together, they must be entirely banned from acceptance by the community."[185] This analysis of banishment as a remedy for transgression of traditional marriage fits perfectly with a transgressive visibility analysis of the exile remedy in *Loving v. Virginia*.[186]

A key point of Case's analysis is that visible and transgressive performances of same-sex couples are inevitably compared to the acceptable performances of heterosexual couples, just as an unauthorized performance of a work is compared to an authorized performance in the field of copyright. She notes that "in a gay couple the signs of sameness and difference with respect to heterosexual pairs are both clearly visible"[187] and that "[b]oth gay sex and gay marriage most sharply throw into relief the similarities and differences between couples of the same and of different sexes; they force heterosexuals to give some consideration to their own way of doing things."[188] Their simultaneous sameness and difference is the problem. Josephine Ross makes this same point: "It is the similarity between same-sex marriage and opposite-sex marriage that is the sticking point."[189] But isn't this structure exactly that of a parody in relation to an original trademark or a copyrighted work? It is different enough to distract, disparage, or distort. But it is not different enough (from the point of view of the author or of one familiar with the original) to rescue the original and

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[183] Case, *Coupling*, *supra* note 177, at 1658.

[184] *Id.*

[185] *Id.*

[186] Loving v. Commonwealth, 147 S.E.2d 78, 83 (Va. 1966), *rev'd sub nom.*, Loving v. Virginia, 388 U.S. 1 (1967).

[187] Case, *Coupling*, *supra* note 177, at 1644.

[188] *Id.* at 1663.

[189] Ross, *supra* note 97, at 1167. As Ross explains, same-sex marriage threatens to make the traditional masculine/feminine divide seem a mirage. *Id.* ("By preventing gay couples from calling their relations marriages, insecure heterosexuals may feel their own claim to masculinity or femininity enhanced. Hence, the use of gender to determine who can marry and who cannot . . . .").

its author from harm or, alternatively, to justify the harm in terms of other societal interests in allowing the allegedly impermissible copy. Indeed, Case refers several times to same-sex couples as "parodic."[190] If visible microperformances of same-sex coupling challenge and undermine traditional microperformances of heterosexual coupling in the way that a parody challenges and plays off an original, then the traditionalist's attempt to censor or make invisible the transgressive performances is like an intellectual property claim: a right to prevent unauthorized performances of "the couple."[191]

Evidence demonstrating the problem of the transgressive visibility of same-sex couples can be gleaned from current events. Recently, a Catholic school in Orange County, California, allowed a gay couple to enroll their two small boys in kindergarten, but it promptly drafted a policy that required parents to engage in "appropriate conduct" and to "provide positive role models to [the school's] students."[192] The policy was then interpreted to prohibit the two men from appearing together as a couple at school functions.[193]

Or consider another incident that occurred in the spring of 2005. The Public Broadcasting System (PBS) produces a television show, *Postcards from Buster*, in which an animated rabbit, Buster, travels to various states and interacts in the real world with people at some of the sites and events for which the state is known. In an episode about Buster's visit to Vermont, he met lesbian couples, though they were not the focus of the story line. Secretary of Education Margaret Spellings spoke out strongly against this episode, which had been prepared in part with Department of Education funding. Spellings said that putting lesbian moms into a television show designed for children was indecent and called on PBS to

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[190] Case, *Coupling*, *supra* note 177, at 1659, 1664 n.87, 1670 (using "parody" or "parodic").

[191] Bryan Wildenthal approaches this idea when he describes the marriage ceremony as "performance art," but he focuses on the ceremony, not the related and much more extensive set of microperformances as a couple that a marriage authorizes. *See* Wildenthal, *supra* note 71, at 383.

[192] Seema Mehta, *Catholic School in O.C. Limits Gay Parents' Role*, L.A. TIMES, June 14, 2005, at B3.

[193] *Id.*

return the government's money. PBS pulled the segment, and it only aired on approximately five dozen of PBS's 350 or so stations.[194]

Shahar v. Bowers[195] illustrates the problem of transgressive visibility of same-sex couples, distinct from and in combination with the problem of unauthorized legal status. Robin Shahar, a law student, had received an offer of employment from the Georgia Attorney General's office. Before beginning work, she married another woman in a religious ceremony in the Reconstructionist Jewish tradition.[196] She was open with her future work colleagues about her wedding, her marriage, and her commitment to her partner. As a consequence, her offer of employment was revoked. In upholding the Attorney General's action, the court addressed Shahar's claims of intimate association and expressive association under the *Pickering*[197] test. A bare *en banc* majority held that the Attorney General's

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[194] *See, e.g.*, Noel Holston, *On Television, One Rabbit's Leap for Humanity*, NEWSDAY (New York), March 23, 2005, at B25; Julie Salamon, *A Child Learns a Harsh Lesson in Politics*, N.Y. TIMES, Feb. 5, 2005, at B7; Julie Salamon, *Culture Wars Pull Buster Into the Fray*, N.Y. TIMES, Jan. 27, 2005, at E1.

[195] 114 F.3d 1097 (11th Cir. 1997) (en banc).

[196] *Id.* at 1100. The court apparently had trouble recognizing the validity of the marriage, inserting quotation marks around its descriptions of Robin Shahar's "marriage" and "wedding." *Id.* at 1099 n.1. It thus graphically distanced itself from the possibility that a same-sex religious marriage ought to be given weight when in tension with a prohibition on same-sex civil marriage. It did so even as it assumed, for purposes of argument, that the Shahars' marriage was entitled to some protection as intimate association or expressive association under the First Amendment. *Id.* at 1100.

Judge Godbold, in dissent, picked up on this important point, arguing that within the Jewish Reconstructionist tradition, the Shahars were validly married, even though they were not married under the civil law of Georgia. *Id.* at 1118-21 (Godbold, J., dissenting). Judge Godbold argued that there is a "duality of meaning" as to marriage and wedding, as well as spouse; that the Attorney General "attribut[ed] to the words . . . only a single meaning"; and that the court acted improperly when it "simply adopt[ed] one perception and exclude[d] the other as though it did not exist for Shahar and others of her faith." *Id.* at 1121. The Attorney General, according to Judge Godbold, acted in serious ignorance of Shahar's religious tradition and without trying to find out about it, and thus failed in his duty to explore the duality of meaning of marriage before revoking the offer of employment. *Id.* at 1122. Similarly, although more briefly, Judge Kravitch's dissent argued that the Shahars used "marriage" and "wedding" in a generic, not a legal, sense. *Id.* at 1122-23 (Kravitch, J., dissenting).

[197] Pickering v. Board of Education, 391 U.S. 563, 574-75 (1968) (articulating the First Amendment's protection of public employees' speech on matters of public importance, in the absence of knowing or reckless false statements). The *Pickering* test is reiterated and clarified in *Connick v. Myers*, 461 U.S. 138 (1983), which was also applied in *Shahar*. *Connick* states that *Pickering* stands for a balancing test between the interest of public

office was justified in revoking her employment because of fears the marriage would have a negative impact on department operations.[198]

The *Shahar* opinion is of interest because it focuses on the problem of *appearing* to be in a same-sex marriage, as expressed through a series of gestures visible to the public,[199] which were held to constitute sufficient justification for the state's revocation of its offer of employment. *Shahar* shows that the cultural stakes in the same-sex marriage controversy are

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employees in speaking out on matters of public importance, on the one hand, and the interest of the employer in promoting the public interest in the services it performs, on the other. *Connick*, 461 U.S. at 142 (citing *Pickering*, 391 U.S. at 568). Unless the employee's speech is indeed on a matter of public concern, however, the employee is unlikely to prevail. *Connick* also stresses the importance of taking seriously the public employer's full range of interests when carrying out the balancing test it prescribes. *Id.* at 150-54; *see also Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (a public employee speaking as part of his job could not be held to be a citizen speaking on matters of public importance, and therefore he could not invoke the First Amendment's protection under the *Pickering/Connick* balancing test).

[198] *Shahar*, 114 F.3d at 1106-10. Judge Tjoflat separately opined that if he had believed the relationship between the Shahars were entitled to constitutional protection as intimate association, it would have been inappropriate to grant summary judgment to the state. *Id.* at 1111-17 (Tjoflat, J., concurring). But he believed that the Shahars' relationship was not, in fact, entitled to protection as intimate association, because same-sex relationships have not "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." *Id.* at 1114 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984)). Judge Kravitch disagreed. She found that the relationship was constitutionally protected as intimate association, strongly enough to invalidate the district court's grant of summary judgment for the state. *Id.* at 1122-26 (Kravitch, J., dissenting). Judge Birch also held that the relationship was protected as intimate association. *Id.* at 1126 (Birch, J., dissenting).

Robin Shahar also presented claims based on religion and equal protection, which the majority did not address at any length or with any clarity. *Id.* at 1111 n.27 (dismissing the equal protection claim in a single sentence as unsupported by sufficient evidence); *id.* at 1117-18 (Tjoflat, J., concurring) (addressing the religion claim); *id.* at 1118-22 (Godbold, J., dissenting) (touching on the religion issue without fully exploring it); *id.* at 1126-1129 (Birch, J., dissenting) (applying Romer v. Evans, 517 U.S. 620 (1996), to the equal protection claim to decide the balancing test in favor of Shahar because of *Romer*'s prohibition on bald discrimination against homosexuals as a class). *See* Wildenthal, *supra* note 71, at 404 ("The en banc court's treatment of Shahar's religious freedom and equal protection claims was, to put it mildly, unsatisfactory.")

[199] "The public" is of course in reality a series of distinguishable and often contested publics. MICHEL WARNER, *Introduction*, *in* PUBLICS AND COUNTERPUBLICS, 7, at 9-12 (2002) (publics are necessarily different from one another because they are historically contingent; moreover, publics constitute themselves as publics); MICHAEL WARNER, *Publics and Counterpublics*, *in* PUBLICS AND COUNTERPUBLICS, *supra*, 65, at 117-24 (discussing subpublics and counterpublics).

questions of *both* ongoing unauthorized status *and* transgressive performance and visibility. A majority of the Eleventh Circuit's judges agreed with the state of Georgia that the lesbian couple's appearance of being married—its microperformances—would send mixed messages about the state's policy towards sodomy, same-sex marriage, and GLBTQ folk generally. The majority provided a lengthy description of Shahar's problematic appearance of being married:

> If Shahar is arguing that she does not hold herself out as "married," the undisputed facts are to the contrary. Department employees, among many others, were invited to a "Jewish, lesbian-feminist, outdoor wedding" which included exchanging wedding rings: the wearing of a wedding ring is an outward sign of having entered into marriage. Shahar listed her "marital status" on her employment application as "engaged" and indicated that her future spouse was a woman. She and her partner have both legally changed their family name to Shahar by filing a name change petition with the Fulton County Superior Court. They sought and received the married rate on their insurance. And, they, together, own the house in which they cohabit. These things were not done secretly, but openly.
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> Even if Shahar is not married to another woman, she, for appearance purposes, might as well be. We suppose that Shahar could have done more to "transform" her intimate relationship into a public statement. But after (as she says) "sanctifying" the relationship with a large "wedding" ceremony by which she became—and remains for all to see—"married," she has done enough to warrant the Attorney General's concern. He could conclude that her acts would give rise to a likelihood of confusion in the minds of members of the public: confusion about her marital status and about his attitude on same-sex marriage and related issues.[200]

This passage could not be clearer. Shahar and her partner openly attempted to appropriate the appearances and performances of marriage, and they apparently intended to continue to do so in their daily lives. Under these circumstances, allowing Shahar to work for the Department of Law could

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[200] *Shahar*, 114 F.3d at 1107 (footnotes omitted). Judge Godbold's dissent offers a most interesting comment on one of these offending acts, the joint insurance contract. Judge Godbold suggests that the insurance company "recognized and accepted the duality of the meaning of 'marriage'" and treated the Shahars as married for insurance purposes but not for purposes of civil law. *Id.* at 1122 n.3 (Godbold, J., dissenting).

be misread by the public as approval by the Attorney General of sodomy and of same-sex marriage. As the letter he wrote dismissing her stated, "[I]naction . . . would constitute tacit approval of [the] purported marriage . . . ."[201]

It is not the claimed status of marriage alone that troubled the Attorney General. The problem was in part that the two women did not plan to lead separate lives. As Judge Barkett pointed out in dissent, "it is not illegal in Georgia for two women to own a house in common, purchase insurance together or even exchange rings."[202] Such acts troubled the Attorney General, however, because (1) these microperformances were visible to the public, and (2) they could be understood to be a valid claim to a culturally significant status—marriage. As the majority wrote elsewhere in the opinion, "[T]his case is about a person's conduct."[203] More precisely, the case turned on how others would see and interpret the couple's conduct, and thus it was ultimately about who was authorized to control how Shahar presented herself to the world. The government's interest, as described in the court's application of the *Pickering/Connick* balancing test, is framed in terms of visibility: "[T]he government employer's interest in staffing its offices with persons the employer fully trusts is given great weight when the pertinent employee helps make policy, handles confidential information or must speak or act—*for others to see*—on the employer's behalf."[204]

Elsewhere in the opinion, the court admits that it is concerned about another type of troubling performance—not visible, but projected and problematically envisioned—once a couple claims to be married. It involves sexual acts that, at the time, were illegal in Georgia:[205]

> [W]e accept that the fact the Shahars are professed lesbians and see themselves as "married" does not prove beyond reasonable doubt that either of them has engaged in sodomy within the meaning of Georgia law. But we also accept that, when two people say of themselves that they are "married" to each other, it

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[201] *Shahar*, 114 F.3d at 1101 (quoting Letter from Michael Bowers to Robin Shahar, July, 1991).

[202] *Id.* at 1133 (Barkett, J., dissenting).

[203] *Id.* at 1110 (distinguishing *Romer v. Evans*, 517 U.S. 620 (1996), as inapplicable, because *Romer* was about discrimination based on status).

[204] *Id.* at 1103-04 (emphasis added).

[205] Georgia's sodomy statute was overturned on state constitutional privacy grounds in *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

> is reasonable for others to think those two people engage in marital relations.[206]

Apparently, for a same-sex couple to claim to be married is akin to publicly visible sex.[207] To be sure, as Judge Barkett's dissent noted, since the Georgia sodomy law was neutral as to same-sex or opposite-sex activity, one could not presume that sodomy would more likely be committed by the Shahars than by a mixed sex married couple.[208] For heterosexual couples, legal recognition does not pose a problem of cultural offense, in terms of projected transgressive sexual activities.[209] They are not assumed to occur. As David Cruz writes, for heterosexuals, "[m]arriage, and in particular civil marriage, . . . communicates to the world (however accurately or not) that one's sex life is simply one facet of one's life, incorporated into a presumptively balanced whole";[210] it confers a "privilege of respectful privacy."[211] But for same-sex couples, formal legal recognition apparently enhances a certain kind of imaginary visibility of their projected transgressive sexual performances.[212]

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[206] *Shahar*, 114 F.3d at 1105 n.17.

[207] As Mary Anne Case has explained, "[c]oupling behavior can range from the exchange of bodily fluids to the exchange of vows and rings. The couple can be simultaneously the situs for the most private of intimate relationships and the most public representation of it." Case, *Coupling*, *supra* note 177, at 1644. In short, couples, especially same-sex couples "tend to be sexualized. " *Id.* at 1694.

[208] *Shahar*, 114 F.3d at 1133 (Barkett, J., dissenting).

[209] On the contrary, as Mary Anne Case argued recently, marriage licenses entitle married couples to engage in all sorts of behaviors, both sexual and nonsexual, in structuring their relationships. *See* Case, *Marriage Licenses*, *supra* note 36, at 1765, 1772-73. Ariela Dubler observes astutely that marriage has traditionally functioned to cure the moral offensiveness of various kinds of illicit sex. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756 (2006). To the traditionalist, the curative potential of marriage is overcome by the contaminating force of homosexuality and homosexual acts. Marriage is evidently both powerful and fragile at the same time. Dubler, *supra*, at 782 (exploring ways in which marriage is treated as simultaneously powerful and fragile with regard to some other illicit sexual activities). This is not so unusual as it might seem at first. Many sacred rituals and objects are held to be at once powerful (when used properly) and fragile (when desecrated).

[210] Cruz, *Expressive Resource*, *supra* note 1, at 942.

[211] *Id.* at 943.

[212] The passage in the *Shahar* majority opinion stating that the *Shahar* case is about projected sexual conduct explicitly refers to *Bowers v. Hardwick*, 478 U.S. 186 (1986), as another case about projected sexual conduct. *Shahar*, 114 F.3d at 1110 n.25. *Hardwick*

Bryan Wildenthal's discussion of the stakes in *Shahar* accurately describes them as a "highly-charged cultural battle over symbolism"—a social, cultural and religious conflict over the meaning of marriage.[213] He brushes up against the idea that a contest over "performance art" might be involved, though he limits the scope of the performance to the marriage ceremony.[214] Wildenthal ultimately focuses on the ceremony alone as "a form of speech that should be protected under the First Amendment"[215]—it is the "expression of an idea."[216] He argues that same-sex marriage should be understood as a form of off-the-job, non-job-related speech.[217] As such, the conflict in *Shahar* would be governed by *Connick v. Myers*,[218] which Wildenthal argues is inadequate because it does not provide the right balance of Robin Shahar's private interests and the government's interest in protecting its workplace from disruption.[219]

To say that *Shahar* reflects a "cultural tug-of-war over marriage as a word and as an idea"[220] is accurate, yet incomplete. This formulation camouflages the equally relevant problem of the "cultural tug-of-war" over the authorization and interpretation of the ongoing visible microperformances of marriage.[221] The conflict derives not just from

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famously read the plaintiff's claim of a right to privacy generally for sexual activity in the home to be about a claim of a right to engage in specifically homosexual sodomy, a confusion which it then exploited. *See, e.g.*, Janet Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993). Reading visible homosexuality as signaling transgressive sexual activity has long roots. *See, e.g.*, Cruz, *Expressive Resource*, *supra* note 1, at 943-44 & n.85 (discussing Fajer, *Quiche*, *supra* note 171, and DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES (1999)).

[213] Wildenthal, *supra* note 71, at 382-83.

[214] *Id.* at 383.

[215] *Id.* at 425.

[216] *Id.* at 425, 426.

[217] *Id.* at 383.

[218] 461 U.S. 138 (1983).

[219] Wildenthal, *supra* note 71, at 385, 411-25, 440-59.

[220] *Id.* at 430; *see also id.* at 432-33 (characterizing the contest over same-sex marriage as being over a word).

[221] Wildenthal's focus on words and speech is undoubtedly encouraged by some of the dissents in *Shahar*, which discuss the cultural conflict at issue in terms of conflicting interpretations of the words "marriage," "wedding," and "spouse." *See* Shahar v. Bowers,

Shahar's appropriation of the name or idea of marriage, but from the fact that Robin Shahar "remains for all to see"[222] as though married.

Mae Kuykendall portrays resistance to same-sex marriage as an attempt to control the evolution of language and with it social practice.[223] She observes that "[t]he social meaning of marriage is complex . . . and has the quality of a spoken, communal work of art."[224] This claim already has a striking resonance with the argument made in Part II.B that marriage should be understood as an intangible cultural resource.[225] To be sure, Kuykendall attributes this complexity of social meaning to marriage being "imbedded in language,"[226] while I would suggest that marriage is "imbedded in culture." But if culture is understood to be discursive and dispersed, like a language,[227] the essence of Kuykendall's insight is preserved: with respect to marriage, "archaic gender forms persist while contemporary understandings coexist,"[228] and further, the "sovereignty of dispersed

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114 F.3d 1097. 1099 n.1 (11th Cir. 1997) (discussing the civil law meaning of marriage and wedding, as distinguished from the meaning of "marriage" and "wedding" as used to refer to Shahar's religious wedding ceremony and relationship status); *id.* at 1118, 1121 (Godbold, J., dissenting) (discussing how the case turned on the dual meanings of the words marriage, wedding, and spouse); *id.* at 1122-23 (Kravitch, J., dissenting) (beginning her analysis with Shahar's use of words such as "marriage" and "wedding"). The various judges would have been more accurate had they addressed the problem of conflicting interpretations as not about words, but as about cultural claims around the specific acts and performances those words described.

[222] *Id.* at 1107.

[223] Kuykendall, *supra* note 156, at 388-91.

[224] *Id.* at 415 (footnotes omitted).

[225] *See id.* at 415 (observing that to understand marriage "requires a lifetime of observation and reflection on the marriages one knows, the usages one hears, and the expectations one forms" (footnote omitted)).

[226] *Id.*

[227] *See* Poirier, *Gender Stereotypes*, *supra* note 158, at 1106-15 (arguing that language, ideology, and gender all have the same form, inasmuch as they are dispersed and performed ongoing cultural practices the coherent meaning of which is preserved by stamping out unauthorized variants); Poirier, *Piecemeal*, *supra* note 7, at 328-29; Poirier, *Hastening the* Kulturkampf, *supra* note 18, at 308-18 (exploring the evolution and slippage of gender practices). *See also* the discussion of the dynamic structure of diffuse social practices, *supra* at notes 157-59.

[228] Kuykendall, *supra* note 156, at 415; *see also* STRASSER, *supra* note 177, at 7 (stressing that "common parlance" uses the term "marriage" to refer to committed same-sex couples even where the law does not permit "marriage" to be used in that way).

speakers over the definition of marriage" is challenged by attempts to impose official definitions and to retain specific usages.[229]

Kuykendall describes how ongoing microperformances in a marriage reinforce the new status and identity created legally by the marriage:

> The psychological comfort and social status associated with marriage derive from a common belief that two people have altered their relationship in a manner that redefines their collective personality and reconfigures their own and others' perception of their individuality and their autonomy . . . . The novelty of calling another "husband" or "wife" gradually dissipates as the participants in a marriage are validated by outsiders treating the relational terms as genuine embodiments of an altered essence.[230]

Kuykendall's description ascribes important roles to visibility to others and validation by others in achieving the cultural identity functions of marriage, including new kinship status. As she points out, "The sources of collaboration in deepening the meaning of the term [marriage] to participants are rich and varied."[231] She specifically identifies three: (1) treatment by others of the couple as a unit,[232] (2) conversations with strangers,[233] and (3) the pervasiveness of filling out public printed forms, which "provide[] a quasi-ritualistic occasion for reinforcing the social process of investing the marital status with central significance in the vocabulary of personal identity."[234]

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[229] Kuykendall, *supra* note 156, at 415. Kuykendall later calls those who seek to preserve orthodoxy "[c]ommunitarian referees of usage." *Id.* at 420. I take it this is not intended as a complimentary description. *Cf.* Poirier, *Gender Stereotypes*, *supra* note 158, at 1112 (discussing the Académie Française as a referee and policer of linguistic usage).

[230] Kuykendall, *supra* note 156, at 416. David Cruz floats a similar concept of "social marriage," an interpersonal union recognized by individuals and private groups, and argues that "social marriage" and civil marriage are intertwined. Cruz, *Expressive Resource*, *supra* note 1, at 935 n.40. This observation is not surprising—the social norms around what constitutes marriage inevitably both reflect and influence the legal norms of civil marriage.

[231] Kuykendall, *supra* note 156, at 416.

[232] *Id.* at 416.

[233] *Id.* at 418-19.

[234] *Id.* at 417-18 (footnote omitted).

Moreover, in Kuykendall's description, the new status provided by marriage is gendered, and this gendered aspect of the new social roles and status furnished by marriage also becomes established and naturalized through daily experience and performance. As Kuykendall writes:

> The traditionally gendered aspect of marriage has lent simplicity and the reinforcement of literalness to the power of language to alter understandings of the persona of those who have married. In the lexicon of gendered marriage, "wife" and "husband" gain the same sense of grounded meaning as "brother" and "sister" or "mother" and "father." They seem to be part of the naturally occurring relational categories brought about by concrete facts. The weight of "wife" and "husband" as experienced by participants is further augmented by its confluence with the terms "mother" and "father" and, at least in the past, its close connection to the terms "Mr." and "Mrs."[235]

The experienced naturalness of the male-female binary thus reinforces the experienced naturalness of the acquired status of husband-wife and Mr.-Mrs. Here, Professor Kuykendall is describing one aspect of the reality of traditional married status as ongoing gender performance that reaffirms identity, including gender identity, albeit in a linguistic idiom rather than a cultural one.

In sum, the injury that traditionalists perceive, whether or not they would themselves describe it this way, comes in significant part from the fact that the gender binary is reaffirmed or challenged in the microperformances of couples, everywhere, day-in and day-out.[236] The

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[235] *Id.* at 416 (footnote omitted).

[236] According to Judith Butler and others, most or all of our ideas about gender and sexuality come from and are reiterated in an ongoing series of microperformances that reinforce and either reproduce or change preexisting gender roles and expectations. Butler writes:

> If gender is a kind of doing, an incessant activity performed, in part, without one's knowing and without one's willing, it is not for that reason automatic or mechanical. On the contrary, it is a practice of improvisation within a scene of constraint. Moreover, one does not 'do' one's gender alone. One is always 'doing' with or for another, even if the other is only imaginary. . . . But the terms that make up one's own gender are, from the start, outside oneself, beyond oneself in a sociality that has no single author (and that radically contests the notion of authorship itself).

resource of marriage at stake in the same-sex marriage controversy is more than a one-time event (the wedding) and more than the formal recognition of marriage (the legal status and name). Traditional, mixed-sex marriage expresses binary gender categories and heteronormativity, and it reinforces them through microperformances. When many people engage in similar gender performance, the normative components of their lived experience around gender, sex roles and heterosexual components are reinforced; indeed they come to seem quite natural and unperformed.[237] Living daily life in married orthodoxy is witnessing to the truth of gender.[238]

And yet alternative performances arise, in part because the ritual and status of marriage and the identity that go with them are valuable in tangible and intangible ways. They are therefore deliberately appropriated (or, from the traditionalist viewpoint, misappropriated) for personal and political purposes, including for the legitimacy marriage conveys. Enforcing an orthodox view of marriage is intended to strictly limit the visibility of these alternative gender performances and prevent them from taking hold, for that shift would obscure the gender signaling of supposedly more authentic and accurate performances.[239]

IV. DEVELOPING PROGRESSIVE COUNTERARGUMENTS TO THE TRADITIONALIST CULTURAL PROPERTY CLAIM TO MARRIAGE

This Part proposes several progressive responses to the traditionalist cultural property claim within the same-sex marriage controversy, sketching out different ways in which it can and ought to be rebutted. This Part also briefly explores issues of space and place as they relate to the congestion experienced by traditionalists, sketching out further

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JUDITH BUTLER, UNDOING GENDER 1 (2004). *Accord* Maxine Eichner, *On Postmodernist Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1 (2001); Poirier, *Hastening the* Kulturkampf, *supra* note 18, at 305-06 (discussing gender performance in the context of heteronormative performance); Steven Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 741, 800, 806, 809-11 (1996) (applying some of the theories of Michel Foucault to the reproduction of gender roles).

[237] SANDRA BEM, THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY 4, 143-67 (1993).

[238] Thanks to student Matthew Compton for this formulation.

[239] *Cf.* Poirier, *Piecemeal*, *supra* note 7, at 342-44 (examining some mechanisms by which traditionalist civic institutions rein in the visibility of GLBTQ folk).

possible avenues for responding constructively to the controversy over marriage equality.

A. Rebutting or Containing the Cultural Property Claim

Most of this Article has been directed towards developing a description of the traditionalist interest in opposing same-sex marriage as a cultural property claim. However, progressives should approach the cultural property claim to same-sex marriage with suspicion. The sympathy generated by analogy to the cultural property claims of Native Americans and indigenous groups could well be misplaced, for a number of reasons. Some of these have to do with the nature of the congestion or of the importance of the resource. Others involve differences in our society between Native American and indigenous groups on the one hand and traditionalists on the other. The recognition that traditionalists are motivated by a cultural property claim should not be turned lightly into a legally enforceable right to prevent same-sex couples from having access to marriage.

To begin with, one could argue that the congestion involved is after all "mere offense,"[240] regardless of what traditionalists may experience. As such, it does not merit a legal right to help to minimize it. That characterization is representative of almost all progressive responses to the traditionalist objection to the symbolic harm of same-sex marriage—dismissal. The traditionalist claim to harm is viewed as insubstantial, illogical, and meaningless; it simply does not matter. However, a real problem with this argument is that it can be turned against progressives. Once the benefits and responsibilities of marriage have been granted without the name and status of marriage (as in Vermont, New Jersey, Connecticut, New Hampshire, Oregon, and Washington State), the remaining harm is in large measure stigma and insult to GLBTQ folk and their allies.[241] But stigma might plausibly be characterized as a "mere offense" by traditionalists and thus, applying the same argument, perhaps ought not be legally cognizable either.[242]

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[240] *See generally* FEINBERG, *supra* note 21; POSNER, *supra* note 21. *But see* Rasmusen, *supra* note 22, at 245-46.

[241] *See, e.g.*, Buckel, *supra* note 7 (challenging the New Jersey decision in *Lewis v. Harris*, 908 A.2d 126 (N.J. 2006), as perpetuating a stigmatic harm).

[242] *But cf.* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007) (arguing that, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court recognized that stigmatic harm alone could be the basis of a lawsuit in federal court).

Another approach invokes property doctrines that require the entire community to have access to certain resources—a project David Cruz initiated by arguing that marriage is a unique expressive resource (though he ultimately rests his argument on the doctrinally less compromisable claims of the First Amendment).[243] One example of this approach is the public trust doctrine, nebulous as it is. It typically concerns the nonalienation of natural resources, continued rights of public access, and management of those resources in the public interest. [244] In Carol Rose's words, it has "intimations of guardianship, responsibility, and community."[245] The public trust doctrine (or related doctrines preserving public access) has been applied to cultural resources.[246] If marriage is a cultural resource, the public trust doctrine might supply an argument that there must be both a right of access and a right to preserve, in some kind of ongoing balance, for important shared cultural rituals. As for using public

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[243] Cruz, *Marital Property*, *supra* note 29, at 305, 306, 315, 316 (arguing that "marriage should be understood as a unique common or public expressive resource"); Cruz, *Expressive Resource, supra* note 1, at 928, 930-32 (advocating allowing same-sex marriage on First Amendment grounds, in opposition to the more common fundamental rights and equal protection constitutional grounds, and describing how civil marriage "functions as a uniquely powerful symbolic or expressive resource").

[244] *See generally* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573 (1989) (synthesizing substantive and procedural aspects of the public trust doctrine); Symposium, *Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources*, 15 SOUTHEASTERN ENVTL. L.J. 1 (2006) (symposium on coastal management and the public trust doctrine); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (making a germinal argument for the invocation of the public trust doctrine in environmental matters); DAVID SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK (Coastal States Org. 2d ed. 1997).

[245] Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998) [hereinafter Rose, *Joseph Sax*].

[246] *See, e.g.*, Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 769 (1986) (discussing ritual dance sites in England to which access was guaranteed, but only for members of the appropriate identity group) [hereinafter Rose, *Commons*]; Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647 (2000) (arguing that a better balance of public and private interests in information could be achieved by developing a public trust paradigm for copyright); JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT (1999) (arguing that certain objects had become so imbued with a shared cultural meaning that they could no longer be treated as typical private property to be used, destroyed, sequestered, or alienated at the will of the owner, but were instead cultural property).

trust doctrine to address stigma, New Jersey's public trust doctrine, which requires public access to ocean beaches, not only secures the civilizing effects of sociability,[247] but also eliminates the stigma of race and class discrimination, as they have been manifested through exclusion based on local residency requirements.[248] Finally, the overarching theory of Brett Frischmann could be explored as a basis for a broad argument that marriage is a fundamental infrastructure resource to which access should be assured on an open, nondiscriminatory basis.[249]

One could also investigate and seek to apply to same-sex marriage the arguments of that part of the intellectual property academy that expresses consternation at what it sees as the overpropertization of the sources of our common culture in the public domain, typically through excessive use of copyright but also through trademark.[250] These scholars typically value individual expression achieved through play and the recombination of whatever cultural raw material is available. It would be a small step to fold into this theoretical model the progressive claim to same-sex marriage, phrased as a right to reinterpret and play with the ritual and microperformances of marriage. Cruz's argument that marriage is a unique expressive resource has already gone quite far down this path. As Anupam

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[247] Carol Rose famously makes this argument to explain the extension of the public trust doctrine to recreational resources. *See* Rose, *Commons*, *supra* note 246, at 713-14, 779-81.

[248] Marc R. Poirier, *Modified Private Property: New Jersey's Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L.J. 71, 105-06 (2006) [hereinafter Poirier, *Modified Private Property*].

[249] Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 937 (2005); Brett M. Frischmann, *Infrastructure Commons*, 2005 MICH. ST. L. REV. 121; s*ee* Poirier, *Natural Resources*, *supra* note 83 (discussing some implications of Frischmann's general theory of access to infrastructure resources); Poirier, *Modified Private Property*, *supra* note 248, at 107, 119 (same).

[250] As Naomi Mezey has argued, "the central tension . . . between the restrictions of property and the mobility and creativity of culture parallels the tension in intellectual property between property protections and the public domain." Mezey, *Paradoxes*, *supra* note 105, at 2013 n.32 (citing SCAFIDI, *supra* note 124, at 17). S*ee, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003); Gordon, *supra* note 114; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). There are several ways to argue for a broad cultural commons and against an undesirable and inequitable propertization of culture. This type of argument is relevant to the useful consequence of characterizing the traditionalist claim as one to cultural property, but it cannot be explored fully in this Article.

Chander and Madhavi Sunder have asked, why not explore novel ways to structure the use of a basically public domain.[251]

One could explore a nuanced analysis to adjust claims of ownership of cultural resources according to origin, longevity, centrality to a culture, and according to the degree and length of subordination of the claimant cultural group.[252] Under this approach, many Native American and indigenous peoples' claims to cultural property might have merit, while the claim of a powerful group within society to keep its grip on a cultural resource, to the detriment of an emerging and traditionally subordinated group, might not. In the context of the same-sex marriage controversy, the cultural property claim for limiting access to marriage is based on what was once (and in many jurisdictions still is) a majoritarian view of a central cultural ritual, status, and identity. However, this view of how to manage access to marriage is not shared by other identifiable groups within the polity. The plausibility of Native American and indigenous peoples' claims need not persuade us. Noting the special rights accorded to Indian tribes, Dan Tarlock points out that minorities in America do successfully make claims to special moral and constitutional entitlements and suggests that cowboy culture, as a vanishing culture in the American West, should get special entitlement to water rights.[253] James Rasband encourages a nuanced exploration of the historical similarities and dissimilarities between Native American claims and those of the disappearing rural culture of the west,[254]

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[251] Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004).

[252] *See, e.g.*, Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1306-08 (2001) (calling for the development of an intercultural justice approach to Indian land claims taking account of a pluralist understanding of property). Tsosie relies on Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990)). Singer in turn relies on Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990), to develop an argument for critical contextualism in considering property claims, including the history of power relations among groups.

[253] A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 551 (1999); *id.* at 553 ("At risk communities' claims to special status rest on their status as victims."); *cf.* Tseming Yang, *Race, Religion and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119 (1997) (developing a cultural identity approach to constitutional protection of both racial and religious minorities).

[254] James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 52-61 (2001) (exploring and expanding on

but ultimately recommends the approach of improved participation in decision-making, rather than propertizing minority communities' claims.[255]

Concerns about the internal power dynamics of groups might be put to use by progressive in another way. Group self-definition and the policing of group identity are not always pleasant and democratic. Susan Scafidi writes, "A source community may include dissenting voices, and a grant of legal protection to those who speak on behalf of the community may silence those voices—always an issue when rights are vested in a group rather than an individual."[256] Carol Rose suggests that "common regimes governed only by custom and community norms . . . can be hierarchical, xenophobic, and backward-looking" so that we might prefer to call for a more liberal commons and more democratic approaches.[257] Madhavi Sunder's repeated calls for a theory and practice of cultural dissent[258] might be brought to bear in a thoughtful way to suggest that the progressives' claim of a need for access to marriage is justifiable, even if that access transforms and reinterprets fundamental rituals.

Additionally, one might argue that the imposition of cultural norms, including restrictions on access to rituals and their use, seems more legitimate when those who are subject to the restrictions have chosen to be members of the group. Internal policing of group norms may also be more acceptable when voluntary exit is possible without a serious penalty.[259] One

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Tarlock's thesis that cowboy culture may deserve protection for the same reasons that Indian culture does).

[255] *Id.* at 2.

[256] SCAFIDI, *supra* note 124, at xii; *see also id.* at 67-89 (addressing internally contested uses of cultural products in the chapter entitled "Family Feuds").

[257] Rose, *Roads*, *supra* note 78, at 107 (citing Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549, 566 (2001); Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479, 484-87 (2000)).

[258] *See* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495 (2001); Sunder, *Authorship*, *supra* note 138, at 168.

[259] Whether there is an alternative to the resource for those excluded from its use is certainly relevant, as David Cruz has explored. *See* Cruz, *Expressive Resource*, *supra* note 1, at 988, 1017-19. *Compare* Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 132-43 (2000) (exclusion of gay men from the Boy Scouts is permissible unless there is a monopoly for this type of organization) *with* Sunder, *Cultural Dissent*, *supra* note 258, at 538 n.238 (arguing that the Boy Scouts had a cultural monopoly, making their exclusion of gay men especially problematic).

could plausibly characterize the same-sex marriage controversy as one in which a culturally cohesive political group seeks to impose its traditions and values on those who do not wish to belong to the group, relying on the traditional power of the state to define civil marriage throughout a territorial jurisdiction. For example, in the United States, it is not required that all of those living in any particular territorial jurisdiction adhere to the religion of the majority of the residents of that jurisdiction, nor that they perform any particular religion's rituals. To impose religious practices on those who do not consent is impermissibly coercive. One might argue that the cultural property claim in the same-sex marriage controversy is similarly coercive.

B. Ubiety, Zoning, Territorial Jurisdiction, and Disestablishment

Physical things or places have ubiety, that is, "whereness." As a consequence of this characteristic, managing the congestion of physical resources sometimes resorts to approaches in which the resource use can be shared, with spatial or temporal segregation managing the signal congestion. Consequently, some conflicts over cultural resources that involve physical objects or physical spaces can be managed adequately through zoning.[260] Zoning compromises, for example, are regularly applied to certain moral congestion conflicts involving adult businesses; they rely on spatial or temporal separation to keep certain spaces free (or at least freer) from polluting signals.[261] One might then ask whether compromise

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[260] *See, e.g.*, BROWN, *supra* note 23, at ix-x, 144-72 (describing compromise resolutions of conflicts between indigenous groups and others concerning competing uses of sacred sites); GULLIFORD, *supra* note 30, at 205-08; *cf.* T.J. Ferguson et al., *Repatriation at the Pueblo of Zuni*, *in* REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 239-65 (Devon A. Mihesuah ed., 2000) (arguing against a blanket resolution and in favor of case-by-case resolution with regard to tangible funeral remains and sacred cultural objects). Several Native American sacred sites listed in the National Register for Historic Places could serve as examples of effective shared use and compromise, for many provide varying degrees of access to non-tribal members. Many of these sites are shared with the public, as national parks and outdoor recreation sites. *See generally* AUSTRALIAN COPYRIGHT COUNCIL, PROTECTING INDIGENOUS INTELLECTUAL PROPERTY: A DISCUSSION PAPER (Sept. 1998); ELAZAR BARKAN & RONALD BUSH, CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY (2002); JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (2d ed. 1996).

[261] *See, e.g.*, City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) (holding that adult businesses may be zoned to remote locations within a jurisdiction without violating the First Amendment); Fed. Commc'ns Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (holding that indecent speech that is broadcast may be relegated to a remote time of night without violating the First Amendment); *cf.* Nagle, *supra* note 22, at 305-06 (noting that "zoning has assumed the role of addressing land uses that raise moral concerns for many individuals," although zoning, licensing, and other regulatory schemes will not necessarily

based on the geographic separation of possibly unauthorized performances of marriage is available. Zoning, however, does not seem to fill the bill where same-sex marriage is concerned. Because the congestion is symbolic as well as physical, it is not easily cabined.[262]

In addition to spatial zoning, different preferences may sometimes be accommodated through differentiation in providing public goods within a local jurisdiction. This is a version of the argument made by Charles Tiebout for competition in local public goods.[263] Indeed, Tiebout analysis has occasionally been invoked to justify jurisdictional variation as to the recognition of same-sex unions, supplying a theoretical justification for a federalism argument around same-sex marriage.[264] One criticism of

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defeat a nuisance claim). The zoning approach may be limited by a "mere offense" principle. Nagle, for example, argues that mere knowledge of an activity that is not visible does not constitute a moral nuisance. Nagle, *supra* note 22, at 295-96.

[262] For expanded versions of this argument, see Poirier, *Federalism*, *supra* note 139; Poirier, *Gender, Place*, *supra* note 139. Similarly, Zick argues that zoning measures may not be effective to resolve conflict about adult land uses, because the conflict is not really about where within the community to locate such uses, but whether they should be present in the community at all. Zick, *Space, Place*, *supra* note 139, at 471-72.

[263] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

[264] *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 76-78, 87-88 (2005) (discussing how the Defense of Marriage Act and the Full Faith and Credit Clause affect the power of one state to recognize property rights derived from same-sex marriage or civil union and how that affects states' competition to provide property regimes); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (exploring the economic incentive to states to be among the first to recognize same-sex marriage); F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 601 (noting that same-sex couples may choose a place to live based on the jurisdiction's policy, as may opponents of same-sex marriage); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1324-27 (2005) [hereinafter Eskridge, *Pluralism*] (discussing state-by-state variation around recognition of same-sex marriage as an effective medium-term approach to defusing dangerous political tension, and arguing that members of the minority in any given jurisdiction could move to another state with whose position they agreed); Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 974, 981 (2002) (arguing that differentiation by state allows for the expression of different moral visions, using positions on same-sex unions in Vermont and Utah as examples). *See generally* Michael E. Solimine, *Competitive Federalism and Interstate Recognition of Marriage*, 32 CREIGHTON L. REV. 83 (1998); Robert M. Verchick, *Same-Sex and the City*, 37 URB. LAW. 191 (2005) (discussing the tension between overlapping territorial jurisdictions and different populations' contrasting cultural views towards homosexuality and same-sex marriage).

Tiebout-type solutions has to do with the costs of exit, which limit mobility.[265] Moving from one local jurisdiction to another is already expensive; moving from one state to another increases the cost of exit considerably. Richard Schragger suggests that qualifications for marriage be determined on a local rather than state basis.[266] This would address these concerns to some extent, by lessening the burden of moving from one jurisdiction to another.

Another type of challenge can be made on the basis that allowing local variation as to whether a couple is married is at odds with the seemingly uncontroversial notion that people's basic identities and related legal consequences should be stable when they move around the country.[267] The widespread expectation of a stable legal identity regardless of the location of the citizen's body seems in tension with the idea of allowing different jurisdictions to manage marriage as a local public good. Robert Ellickson recently encountered this tension. In responding to an argument by Abraham Bell and Gideon Parchomovsky that property regimes should be treated like contracts and therefore chosen and made mobile, Ellickson points out that many government policies are appropriately linked to benefits within a territory of the legal jurisdiction "to enhance the quality of the within-state physical, social, and moral environment."[268] At the same time, Ellickson acknowledges, "[l]ocation matters far less in legal relationships that are not land-based."[269] His example of the latter is a corporation, which he appears to believe should not have to have its legal regime tied to each jurisdiction in which it is physically present. But when explaining that perhaps a state should be able to resist "the importation of

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[265] *See generally* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1162 (2000) (asserting that the costs of exit can limit its usefulness as a government disciplining device); Todd E. Pettys, *The Mobility Paradox*, 92 GEORGETOWN L.J. 481 (2004) (exploring mobility problems with Tiebout's theory of local jurisdictional competition in the provision of public goods).

[266] Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

[267] With specific regard to same-sex marriage, imposition on the right to travel is one way of phrasing this problem constitutionally. *See, e.g.*, Mark Strasser, *The Privileges of National Citizenship: On* Saenz, *Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

[268] Robert C. Ellickson, *A Private Idaho in Greenwich Village*, 115 YALE L.J. POCKET PART 5, 6 (2005).

[269] *Id.*

out-of-state law [because it] can interfere with a state's efforts to create a distinctive moral climate,"[270] Ellickson gives the example of compelled recognition by an unwilling state of an out-of-state same-sex marriage and its associated property rights, which he characterized as, in the eyes of some, "a threat to moral values."[271] Ellickson thus recognizes the moral nuisance position concerning same-sex marriage without giving an account of why he would consider assigning control of this particular kind of public good to the territorial jurisdiction, favoring its land-based effects over its effects on the property and identity of the couple involved.

Both zoning compromises and Tiebout-type local differentiation in the provision of public goods falter as solutions to the same-sex marriage controversy. The signal distortion or dilution that traditionalists are concerned with is not simply about visibility in a particular physical place (the argument in Part III to the contrary notwithstanding)—it is also about a symbolic presence of pollution in cultural space.[272] As such, it cannot be cabined. Not only would traditionalists not want actually to see same-sex couples legally recognized as married, but they also would not want to know (and would not want society to know) that such recognition existed at all.[273] This cuts against a Tiebout justification for state-by-state differentiation, because in an important sense the good is not actually local after all. It also suggests that the current state-by-state approach to same-sex marriage is unstable culturally—thus, legally as well—in the long term.[274]

This Article's congestible resource analysis also has possibly unexpected implications for an analysis of proposals to disestablish marriage. Here, we should note at the outset that there is more than one view as to what disestablishment might mean in the marriage context.[275] A

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[270] *Id.* at 7.

[271] *Id.*

[272] *See supra* Part II.A-B.

[273] *See* Poirier, *Federalism*, *supra* note 139; Poirier, *Gender, Space*, *supra* note 139.

[274] *See* KOPPELMAN, DIFFERENT STATES, *supra* note 16, at xviii; Poirier, *Federalism*, *supra* note 139.

[275] Cruz, *Disestablishing*, *supra* note 1, at 1081-83; Andrew Koppelman, *Sexual and Religious Pluralism*, *in* SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE 215, 226-28 (Saul M. Olyan & Martha C. Nussbaum eds., 1998); Michael W. McConnell, *What Would it Mean to Have a "First Amendment" for Sexual Orientation?*, *in* SEXUAL ORIENTATION & HUMAN RIGHTS, *supra*, 234, 248-51 (exploring the disestablishment of matters related to sexual orientation generally by analogy to the First

progressive account of disestablishment might propose requiring the state to marry any two people, without regard to religiously-based principles of exclusion. While this approach does disestablish the mixed-sex only approach, it still connects the state to marriage. Traditionalists would surely view this as establishment of a position contrary to theirs.

Instead, disestablishment should mean the possible abolition of civil marriage.[276] The state would no longer marry anyone. Thus, it would cease to provide the contested public good of the status of civil marriage, period.[277] Different religious and civic organizations would define marriage

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Amendment's twin prescriptions of Free Exercise of religion and no governmental Establishment of religion, rather than as directly derived from these clauses). Other authors have tried to claim that the constitutional prohibition on establishment of religion applies directly to the definition of marriage, a more difficult argument to make. *See, e.g.*, James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997); Justin T. Wilson, Note, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561 (2007).

[276] *See, e.g.*, Stephen L. Carter, *"Defending" Marriage: A Modest Proposal*, 41 HOW. L.J. 215, 216 (1998) (recommending serious exploration of the question, "Why is the state in the business of regulating marriage at all?"); Stephanie Coontz, *Taking Marriage Private*, N.Y TIMES, Nov. 26, 2007, at A23; Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) ("[I]t is time to abolish civil marriage. The law should not define, regulate, or recognize marriage. Marriage . . . should become solely a religious and cultural institution with no legal definition or status."). A variant focusing more on the administrative functions currently served by relying on the legal status of marriage would abolish civil marriage and replace it with civil unions for both mixed sex and same-sex couples. *See, e.g.*, Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15.

[277] The issue of what to do about the benefits of marriage would still have to be addressed. They are so important that the state would probably still have to provide them to long-term committed couples. Depending on who was given access to the benefits, and how that access was interpreted by the factions in the culture war over marriage, provision of benefits to family-like couples might continue to fuel the controversy, as necessary and inevitable as such benefits are. In other words, any attempt to disestablish marriage might be futile, as any conferral of benefits on households could be read as an unacceptable conferral of legitimacy. *See, e.g.*, Dent, *supra* note 85, at 260-63. As Andrew Koppelman writes, "Any administrative accommodation is seen as a fatal concession of symbolic ground." KOPPELMAN, DIFFERENT STATES, *supra* note 16, at 56. Thanks to Nan Hunter for insisting on this point. On the other hand, changing the name just might help. Former Vermont Chief Justice Jeff Amestoy has recently argued that changing from civil "marriage" to something else, like civil "marriage unions," for mixed-sex and same-sex couples alike, might attenuate the seemingly unending controversy. Jeff Amestoy, *Ending the Gay-Marriage War: California's Ruling May Point Toward 'Marriage Unions' as a Solution*, CHRISTIAN SCI. MONITOR, May 22, 2008, at 9.

as they saw fit.[278] Those seeking marriage would find like-minded individuals in the group they chose to join. This is analogous to a Tiebout exit move, except that the contours of marriage would be defined privately by churches or other associations, rather than by local governments and residents therein. Rather than have the definition of marriage remain a state-by-state local public good, disestablishment of any particular definition of marriage would make the meaning of marriage dependent on individuals' chosen group membership. In a forthcoming essay, I describe one consequence of disestablishment as the conversion of the licitness or sacredness of marriage from a local public good into a nullibietous shared cultural good that is provided by private institutions rather than by the state.[279]

Justifications for the disestablishment of marriage can be laid out in terms of the separation of church and state,[280] providing a more effective form of competition among different versions of marriage,[281] on the basis of

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One might object that, because there is a fundamental constitutional right to marriage, disestablishment would be unconstitutional. Perhaps, but if the state does not *prohibit* marriages, and accords full legal benefits and responsibilities to marriages that are recognized by a variety of religions and analogous groups, then it is arguably still providing marriage, at least in a "free exercise" sense. It is simply no longer providing marriage in an "establishment" sense. *Cf.* Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 40-43 (1996) (arguing that the state could abolish marriage but is constitutionally required to protect intimacy).

[278] The state could still establish some baseline policies around issues such as a minimum age of consent, and a maximum level of consanguity necessary to prevent central types of incest.

[279] Poirier, *Gender, Place*, *supra* note 139. Local public goods have whereness, that is, ubiety, because it is territorial jurisdictions that provide local public goods. Shared cultural goods provided by nomic communities like religious denominations may well not have ubiety. One may participate in a voluntary association without having to be in a particular location. Many, if not most, religious nomic communities are not fundamentally rooted in a specific place. Instead they have the quality of nullibiety, that is, they are not located spatially in a specific place. Thanks to colleague Tim Glynn for steering me to nullibiety as an antonym for ubiety.

[280] *See, e.g.*, Crane, *supra* note 36, at 1253 ("Privatization would . . . restore religion to marriage, and marriage to religion."). Crane argues that religious institutions are better protected if marriage is identified as the province of religion, because this shelters religious marriages from possible progressive coercion. *Id.* at 1255.

[281] Zelinsky argues that deregulation of marriage would "encourage a productive competition among alternative versions of marriage." Zelinsky, *supra* note 276, at 1163. It would supposedly provide a competitive market for this important cultural institution, just as the United States' protection of religion pursuant to the First Amendment "leads to robust, diverse and entrepreneurial religious doctrines and institutions." *Id.* at 1164.

facilitating cultural dissent, or simply in order to remove the state from a bitter and perhaps unresolvable controversy altogether. Also, disestablishment resolves some of the problems of exit costs created by resorting to a Tiebout-type approach that simply requires that people who find a particular jurisdiction's approach to marriage undesirable move to another state.[282]

Sometimes overlooked is the fact that disestablishment would also allow diverse nomic communities to coexist literally in the same places and territorial jurisdictions. While the state-by-state patchwork approach to marriage may foster some experimentation, it does not provide the same cheek-by-jowl experience of others who have visibly different values as disestablishment does.[283] Disestablishment would force competing versions of what constitutes a legitimate couple, and competing versions of the gender structure of couples, to be visibly performed by neighbors or others physically close to one another, as they would probably coexist in the same localities, especially in urban areas. This visible proximity might serve in the long term to defuse the cultural tension around same-sex marriage. Forced contact can, under certain conditions. lead to conversations and associations across group lines that diminish prejudice,[284] although conditions of equality are important for this process to occur.[285] Moreover,

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[282] *See generally* Buckley & Ribstein, *supra* note 264, at 601 (exploring the "just move to another state" argument); Eskridge, *Pluralism*, *supra* note 264, at 1327 (same); O'Hara & Ribstein, *supra* note 265, at 1162 (arguing that disestablishment would effectively reduce exit costs to almost zero); Pettys, *supra* note 265 (exploring problems with Tiebout's theory of local jurisdictional competition in the provision of public goods).

[283] *See* Poirier, *Federalism*, *supra* note 139.

[284] Tristin K. Green, *Discomfort at Work: Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 394-95 (2008); Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981, 1983 (2004). Green argues that a policy of requiring employers to allow employees to signal identity subgroup membership in the workplace through their appearance will "carve out space for difference by requiring tolerance." Green, *supra*, at 400, 422. Note, *Lessons in Transcendence*, *supra*, argues that the military has performed a similar function as concerns race and gender. *See also* Lee C. Bollinger, *The Tolerant Society: A Response To Critics*, 90 COLUM. L. REV. 979, 984-85 (1990) (summarizing the argument that tolerance in matters of free speech develops a broader societal ethic of tolerance); LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986) (arguing that the First Amendment creates a more diverse and tolerant society by forcing fundamentally different persons with differing view points to be exposed to one another).

[285] *See* Note, *Lessons in Transcendence*, *supra* note 284, at 1987 ("Forced associations may be the device that can best facilitate the yields of integration by establishing relationships among individuals who would not otherwise engage one another

urban environments, with their inevitable heterogeneity, may be especially fertile locations for forced and perhaps uncomfortable coexistence.[286] Disestablishment might thus serve an important prejudice-reducing function by facilitating the uneasy copresence of different versions of marriage. It would function similarly to the way increased visibility of same-sex couples has in the past,[287] by enhancing the visibility of same-sex couples' microperformances to unwilling neighbors. It would certainly make the presence in many communities of committed, family-like same-sex couples more evident. Over time, disestablishment might well lead to greater tolerance of same-sex marriage.

V. CONCLUSION

This Article has argued that, in terms of culture and symbolism as opposed to benefits and responsibilities, the ongoing controversy over same-sex marriage and marriage equality is fundamentally a desecration controversy concerning a sacred, intangible ritual and status. Most progressives (other than the left feminist and queer critics of marriage) seek to participate in maintaining the normative values associated with marriage's ritual, status, and identity and to alleviate the stigma caused by the reiteration of longstanding insults about the polluting and contagious nature of homosexuality through exclusion from the institution of marriage. The progressive demand that access to marriage be extended to same-sex couples triggers traditionalist concern about congestion due to (perceived) misuse of the cultural resource of marriage. Traditionalists are concerned about signal distortion or (less politely) pollution and contagion. Traditionalist opposition is reflected both in opposition to legalizing same-sex marriage and in concerns about the visibility of same-sex couples in microperformances that mimic and, from a traditionalist perspective, threaten to distort the meaning of marriage. Denying legal status to same-sex couples and delegitimizing visible microperformances of couple status by same-sex couples amount to attempts by traditionalists to perfect a cultural property claim on a cultural resource.

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and giving them shared enterprises in an egalitarian environment."); Green, *supra* note 284, at 395 (stressing the involuntary nature of work contact).

[286] *See* Note, *Lessons in Transcendence*, *supra* note 284, at 1983-84 (discussing GERALD E. FRUG, MAKING CITIES: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 174 (1999)).

[287] *See, e.g.*, Ball, *Backlash Thesis*, supra note 161, at 1534; Poirier, *Piecemeal*, *supra* note 7.

Recognizing that there is a cultural property claim within the same-sex marriage controversy does not mean that claim should be granted conclusive legal force. Progressive responses to the cultural property claim might be framed by dismissing the nature of the traditionalist concern as mere offense, by arguing that the cultural resource is so important that it must be shared, or by arguing that the group dynamics and power relations of imposing a particular definition of marriage on all are significantly different from those of indigenous groups seeking to assert cultural property claims to their sacred or culturally central resources.

Sometimes, disputes over shared resources are resolved by sharing or dividing the resource. To the extent that the controversy over same-sex marriage and marriage equality concerns a public good that cannot be divided, zoned, or shared, but only fought over, perhaps a battle royal is hard to avoid. Yet prolonged winner-take-all fights are hardly efficient.[288] Indeed, William Eskridge recently offered an entire theory of constitutional interpretation around the imperative of reducing the political stakes of deeply divisive cultural and identity issues.[289] He writes, "Escalating status contests creates large costs to the groups engaged in those conflicts and diverts them from productive enterprises."[290] Moreover, prolonged battles over access to marriage may degrade marriage itself. As Stephen Carter writes, "[O]fficial acknowledgment of marriage causes enormous difficulty. One of the difficulties it causes is that marriage, precisely because of its honored and economically valued status, becomes a prize for which people fight in the political arena instead of a part of the sacred side of life."[291]

It may help us all, then, if we instead look for some kind of uncomfortable accommodation of the deeply conflicting views around marriage, rather than awarding one side or the other the prize of control over this cultural resource. Some cultural conflicts have been approached through uncomfortable compromises, under the general rubric of multiculturalism. Robert Cover argued some time ago, in the context of the First Amendment's religion clauses, that we ought to seek to achieve and maintain a larger imperial state in which differing cultural and moral

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[288] To the extent that enormous sums and efforts are expended on the culture war, there is a clear economic cost. And there is arguably a further emotional and civic cohesion cost to political strife. Zelinsky, *supra* note 276, at 1177.

[289] Eskridge, *Pluralism*, *supra* note 264.

[290] *Id.* at 1299 (footnote omitted).

[291] Carter, *supra* note 276, at 218.

systems (which he called *nomoi*) could exist side by side.[292] Carlos Ball has explored the possibility that a complex theory of equality, taking into account the roles of different groups in determining identity, should be brought to bear on gay rights issues.[293] William Eskridge's theory of constitutional interpretation, though labeled "pluralist," is also and by the same token "multicultural."[294] Patchen Markell's *Bound by Recognition* offers a book-length treatment of the perils of insisting too strongly on the recognition of group identity and consequent group rights as a solution to the problem of multiculturalism.[295] Instead, he recommends a politics of acknowledgment based on uncertain, open-ended interaction with others rather than identity.[296]

Could such an approach be brought to bear on the same-sex marriage/marriage equality controversy? Ed Zelinsky offers, "[F]or those willing to agree to disagree, deregulation [of marriage] carries the advantage that . . . the definition of marriage would cease to be a zero-sum political game, generating political conflict among contending visions of that institution. Instead, the definition of marriage would become a matter of individual and religious choice."[297] Moreover, disestablishment would permit the uncomfortable copresence and proximate visibility of neighbors whose beliefs and practices differ. If we understand the controversy over marriage to be cultural, then a multicultural approach where different

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[292] Cover, *supra* note 57.

[293] *See, e.g.*, CARLOS A. BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003); Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443 (2000) (exploring and critiquing the applicability of the social and political theories of Michael Sandel and Michael Walzer to gay rights issues).

[294] Eskridge, *Pluralism*, *supra* note 264, at 1293, 1310 (identifying pluralism as multiculturalism).

[295] PATCHEN MARKELL, BOUND BY RECOGNITION (2003). Although Markell focuses on an interpretation of Hegel, he also aims to critique and limit the argument made in Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Guttman ed., 1994). Markell views his work as background to responding to questions such as the recognition of same-sex marriages. *See* MARKELL, *supra*, at 8.

[296] *See* MARKELL, *supra* note 295, at 7.

[297] Zelinsky, *supra* note 276, at 1181.

cultures and different cultural expression can exist and be encountered side by side at least has the promise of reducing prejudice in the longer term.[298]

In my darker moments, I fear the United States is facing a protracted, all-out culture war, with the status and role of women, reproductive rights issues, and the status of GLBTQ folk placed at the center by traditionalists.[299] Same-sex marriage is an inevitable part of this culture war. A dystopian vision comes to me in the unexpected image of the dueling dinosaurs from Walt Disney's *Fantasia*,[300] a tyrannosaurus rex and a triceratops battling to their mutual death, to the jarring strains of Igor Stravinsky's *The Rite of Spring*.[301] It was the first movie I ever saw in a movie theater as a young boy. I was terrified and had to be taken home. Of course, Stravinsky's music was written as a setting, not for a dinosaur battle, but for a danced story of primitive ritual human sacrifice. It was, in fact, a fertility ritual.

In the contemporary rhetoric around marriage equality, some scholars perceive an impasse between the moral claims of traditionalists and the progressives' arguments based on liberty and equality, in part because the progressive arguments are based on an individualist frame and simply do not engage the more collectivist worldview of traditionalists.[302]

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[298] Tristin Green proposes—in another specific type of place, the workplace, rather than the neighborhood—to allow individuals the freedom to appear dressed and coiffed in ways that indicate subgroup identity. *See* Green, *supra* note 284. She argues that this approach puts to use an involuntary visibility of difference and will serve in the long run to reduce prejudice. Green's thesis is a contemporary application of the contact hypothesis, originally formulated by Gordon Allport. *Id.* at 385-86 (summarizing Green's approach to the literature investigating the hypothesis of GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954)). And in fact Green stresses that this is a "multicultural" approach to the issue of workplace diversity and prejudice. *Id.* at 405-12 (section entitled "Moving Towards a Multicultural Model").

[299] *See generally* LAUREN BERLANT, THE QUEEN OF AMERICA GOES TO WASHINGTON CITY (1997) (arguing that the right has, since Reagan, successfully replaced a valuable public discourse focused on economics, health care, and other issues with one focused on personal issues that (1) are private and ought not to be the subject of such public scrutiny and (2) are fundamentally irrelevant to social welfare).

[300] FANTASIA (Walt Disney Pictures 1940).

[301] Igor Stravinsky, *The Rite of Spring*, *on* FANTASIA: ORIGINAL SOUNDTRACK (Disney 1991) (1913).

[302] *See, e.g.*, Chai R. Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 YALE J. L. & FEMINISM 139, 144, 182 (2005) (arguing that liberal morality discourse based on equality, fairness, and respect for individual choice seems unsuited to address the main concern that opponents of gay equality raise); Koppelman, *Decline and Fall*, supra note 97, at 31 (noting that the two sides, traditionalist and

Recognizing that from the traditionalist viewpoint there is a cultural property claim within the same-sex marriage debate may aid progressives in understanding the cultural stakes of the controversy and, therefore, in mediating the debate.

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progressive, are at an impasse, as typified by the majority and dissent in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003)); Jay Michaelson, *On Listening to the* Kulturkampf, *or, How America Overruled* Bowers v. Hardwick, *Even Though* Romer v. Evans *Didn't*, 49 DUKE L.J. 1559, 1610-18 (2000) (suggesting avenues for dialogue on same-sex marriage grounded in multiculturalism); Poirier, *Piecemeal*, *supra* note 7, at 292 n.11, 334-35 (describing the impasse of opposing rhetorics around marriage equality); Wax, *Conservative's Dilemma*, *supra* note 32, at 1063 (setting out to rectify a failure of conservatives to clearly articulate the shared underlying basis of their moral opposition to same-sex marriage).