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Marital Status as Property: Toward a New Jurisprudence for Gay Rights

*Goutam U. Jois**

Whether one's ultimate approach to the Takings Clause is based upon social, economic, or other theories, it is apparent that the threshold question—what “property” is, for constitutional purposes—is most crucial.¹

INTRODUCTION

The issue of same-sex marriage has received much attention over the past few years, with significant focus on the role of the judiciary. For example, the first legal gay marriages in the country took place after a court decision in Massachusetts, and no state has sanctioned same-sex marriage through the legislative process.² Proponents of same-sex marriages generally justify their creation on civil rights grounds, relying in particular on equal protection and due process arguments. However, the *preservation* of same-sex marriage can be defended on other grounds as well. I examine one such alternative theory, that of property rights.

In this Note, I argue that we must fundamentally reconceptualize marriage, personal identity, and property rights in our society—for *all* people and *all* marriages. If marriage is the most cherished institution in our society, then we should afford marital status the most cherished constitutional protection: that of a property interest. While this theory has legal significance, it also conveys an important metaphoric message. When we recognize a property right, we recognize an individual's very real, con-

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¹ LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS POWER AND MEANING* 153–54 (2003).

² *But see infra* notes 75–76 and accompanying text (summarizing the California legislature's failed attempt to legalize same-sex marriage).

crete interests. People view private property as a way to foster individual liberty, autonomy, and identity. Thus, recognizing a property interest in the status of being married demonstrates our willingness to deploy the power of the state to protect this most important social institution.

This property rights theory rests on a simple notion: people get married because there is something “special” about marriage. This “specialness” gives rise to my primary argument, that marriage status itself confers a property interest. Additionally, marriage results in a variety of rights, duties, obligations, and privileges, which involve both property and other interests. These types of interests are routinely recognized as property interests in other contexts. Jointly and severally, these rights and duties form the secondary argument for marital status as property.

Recognizing the property interests inherent in marital status has important implications. For example, when a marriage is abrogated by the state without the parties’ consent, a property interest has been “taken,” giving rise to a standard takings challenge. Therefore, the same-sex couples whose marriages have been invalidated or abrogated by the state should receive compensation—either in the form of cash or reinstatement of their marriages—for the state “taking” their marital status.

Part I of this Note outlines the recent history of same-sex marriage in the United States, with particular focus on those states where gay marriages were performed and then later invalidated. This Part of the Note seeks to ground the discussion in the real-world struggles for marriage equality that have arisen around our country.

Part II, the core of my argument, works through the four elements of a takings claim, both generally and as applied in the same-sex marriage context. Here, I delve extensively into the question of what it means to have a property interest in one’s marital status, as related to what I call the primary and secondary arguments for a property interest. The primary argument is that the “specialness” of marriage, without more, is a status that our government ought to protect as a property interest. Some case law and common-law history provides support for this point. The secondary argument is that the rights, benefits, duties, and obligations that flow from marriage are such that they, jointly and severally, ought to be recognized as property—and, indeed, are routinely recognized as property in other contexts.

Part III surveys some counterarguments, both theoretical and practical. In this Part, I also examine the implications of my argument for a few key states. Part IV concludes.

I. THE RECENT HISTORY OF SAME-SEX MARRIAGE

Over the past several years, the issue of gay marriage has come to a head in many states. Some states legalized (or at least began performing) same-sex marriages, other states moved successfully to ban gay marriage,

while others had elements of both movements. Before probing into the argument for a property interest in marital status, I sketch an outline of the recent history of same-sex marriage. In doing so, I focus primarily on the states where a number of gay marriages were legalized or performed.³ These states provide the most fertile ground for “test cases” for my argument.⁴

A. Massachusetts

Massachusetts was the first (and thus far, the only) state in the country to perform state-sanctioned same-sex marriages. The court opinions that form the backbone of the marriage right lay some of the best foundation for what I call the primary⁵ and secondary⁶ arguments for a property interest in the status of being married.

On November 18, 2003, Massachusetts became the first state in the country to recognize gay marriages. In *Goodridge v. Dept. of Public Health*,⁷ fourteen individuals from Massachusetts applied for marriage licenses, were denied, and then sued because the state law did not allow for marriage between two persons of the same sex.⁸ The court granted summary judgment for the defendants and the plaintiffs subsequently appealed. Both parties requested, and were granted, direct appellate review by the Massachusetts Supreme Judicial Court (SJC).⁹

Near the outset of its opinion, the SJC noted that “denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, *with its appurtenant social and legal protections, benefits, and obligations.*”¹⁰ The body of the SJC opinion discusses the Massachu-

³ Most of these marriages have been subsequently invalidated. By “invalidated,” I refer to the process by which a court holds that same-sex marriages were void *ab initio*. By “abrogated,” I refer to the process by which a same-sex marriage that was *originally valid* is later nullified. As of this writing, same-sex marriages can only be *abrogated* in Massachusetts, since it is the only state where the marriages have been held to be valid. Marriages in Oregon, California, New Mexico, and New York can only be *invalidated*, if courts hold that the marriage licenses were issued improperly.

⁴ The best such test case is probably in Oregon, where the author is co-authoring an amicus brief raising the arguments described in this Note. See Brief for Goutam U. Jois and Laura S. Underkuffler as Amici Curiae Supporting Appellant, *Martinez v. Kulongoski*, No. A130818 (Or. Ct. App. Dec. 22, 2005) (forthcoming 2006) (on file with author).

⁵ See *infra* notes 144–175 and accompanying text (discussing the importance of status in the marriage context).

⁶ See *infra* notes 176–199 and accompanying text (discussing the rights, privileges, duties, and obligations arising out of a civil marriage).

⁷ 798 N.E.2d 941 (Mass. 2003).

⁸ *Id.* at 949–50. See also *id.* at 950 n.4 (providing text of the then-existing statute that precluded gay marriages).

⁹ *Id.* at 950–51.

¹⁰ *Id.* at 950 (emphasis added). The SJC’s focus on “protections, benefits, and obligations,” which recurs throughout the opinion, is of particular importance because these give rise to the secondary argument for the property interest in the status of being married. See, e.g., *id.* at 948, 949, 950, 968, 969.

sets Constitution's "guarantee of equality before the law" and its "liberty and due process provisions," and in particular notes that the two doctrines "frequently overlap, as they do here."¹¹ Over dissent,¹² the SJC held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."¹³

However, this was not the end of the matter. Less than a month after the SJC's ruling, the Massachusetts Senate asked the SJC to opine as to whether a bill

which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all the 'benefits, protections, rights, and responsibilities' of marriage compl[ies] with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?¹⁴

In a fairly straightforward discussion,¹⁵ the court said no.¹⁶ Specifically, the SJC reasoned that "[t]he dissimilitude between the terms 'civil marriage' and 'civil union' . . . [relegates] same-sex, largely homosexual, couples to second-class status."¹⁷ The court elaborated, saying marriage is a "*status that is specially recognized in society* and has significant social and other advantages."¹⁸ Denying "marriage" to same-sex couples would be "status discrimination."¹⁹

The SJC's ruling met significant opposition, both in Massachusetts and nationally. First, both *Goodridge* and the subsequent *Opinion* rested on 4-3 majorities. The Massachusetts legislature's attempt to substitute "civil unions" for "civil marriage" in the same-sex context indicated resistance from the legislature as well. Governor Mitt Romney immediately came out against the SJC's decision, citing "3000 years of recorded history" on his side.²⁰ Later, Romney reiterated:

¹¹ *Id.* at 953 (citations omitted). This characterization is important because most discussions regarding gay marriage revolve around these, and related, concepts. For example, the *Goodridge* concurrence argues that "the case is more directly resolved using traditional equal protection analysis." *Id.* at 970 (Greaney, J., concurring). In contrast, I argue for a conception of marital status that is rooted in the idea of *property*, which (1) enjoys a special, protected status in both rhetoric and reality in this country and (2) provides a unique ground upon which advocates for gay marriage may argue.

¹² *Id.* at 974-1005 (Spina, J., dissenting).

¹³ *Id.* at 969 (majority opinion).

¹⁴ Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

¹⁵ Again with only a four-justice majority. *Id.* at 572-81.

¹⁶ *Id.* at 569.

¹⁷ *Id.* at 570.

¹⁸ *Id.* at 570 (emphasis added).

¹⁹ *Id.* at 571.

²⁰ Frank Phillips & Rick Klein, *Lawmakers Are Divided on Response*, BOSTON GLOBE, Nov. 19, 2003, at A1.

From day one, I've opposed the move for same-sex marriage and its equivalent, civil unions If the question is: Do you support gay marriage or civil unions? I'd say neither. If they say you have to have one or the other . . . then I'd rather have civil unions than gay marriage. But I'd rather have neither.²¹

President Bush waded into the foray as well. On May 18, 2004—the day the first state-sanctioned same-sex marriages were performed in the United States—President Bush renewed his call for a federal constitutional amendment banning gay marriage.²² A variety of other groups took up calls for a ban as well, including the Massachusetts Family Institute (“MFI”), which is leading the campaign to amend the Massachusetts Constitution.²³ At the national level, James Dobson’s Focus on the Family sent letters to more than 4000 clergy in Massachusetts, saying “the eyes of the nation and world will be fixed on the Bay State. How will the church respond at this critical time?”²⁴

On March 29, 2004 (about two months before the first gay marriages were set to be performed), the legislature narrowly approved a proposed constitutional amendment that would ban gay marriages but legalize civil unions with the same rights and benefits.²⁵ To go into effect, the proposal would have to be approved by the legislature again during the 2005-06 session and then approved by the voters in 2006.²⁶ However, several legislators who voted for the proposal in 2004 have more recently expressed doubts about it, and public opinion has shifted as well.²⁷ While only 40% of those surveyed supported gay marriage in 2004, a majority (53%) were in favor of gay marriage a year after the first such ceremonies were performed.²⁸ Gay marriage opponents were considering a ballot initiative requiring the support of only fifty-one legislators instead of a constitutional

²¹ Steve LeBlanc, *Romney Says He's Always Been Opposed to Gay Marriage and Civil Unions*, BOSTON GLOBE, Feb. 23, 2005, http://www.boston.com/news/local/massachusetts/articles/2005/02/23/romney_says_hes_always_been_opposed_to_gay_marriage_and_civil_unions.

²² See, e.g., *Gay Couples Exchange Vows in Massachusetts*, MSNBC ONLINE, May, 18, 2004, <http://www.msnbc.msn.com/id/4991967>.

²³ Interestingly, MFI’s campaign, even if successful, would leave intact the gay marriages that have already been performed. The MFI notes that it is “nearly impossible to retroactively revoke rights Any amendment attempting to dissolve the existing marriages would most likely be successfully challenged under federal law.” Mass. Family Inst., *Frequently Asked Questions*, <http://www.mafamily.org/amendmentfaq.htm> (last visited Mar. 28, 2006).

²⁴ Raphael Lewis, *Christian Group Sets Mass. Clergy Sessions Against Gay Marriage*, BOSTON GLOBE, Dec. 16, 2003, at B5.

²⁵ Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban*, BOSTON GLOBE, Mar. 30, 2004, at A1. The measure passed 105-92, just barely meeting the 101 votes needed.

²⁶ *Id.*

²⁷ See generally Raphael Lewis, *Passage of Marriage Amendment in Doubt*, BOSTON GLOBE, May 16, 2005, at A1.

²⁸ *Id.*

amendment.²⁹ However, with a majority of voters supporting gay marriage, such an initiative's prospects are also slim. A year after the first gay marriages in Massachusetts, at least 6000 couples had availed themselves of the privilege.³⁰

In short, the Massachusetts experience has been favorable to same-sex couples, and in the absence of a federal amendment banning gay marriage, it seems to be the most secure as well. From a practical perspective, couples have been permitted to enter into civil marriage and can receive the full rights and benefits thereof.

Doctrinally, the SJC's rulings provide some of the reasoning that supports the primary³¹ and secondary³² arguments for a property interest in the status of being married. First, the SJC discusses "status discrimination,"³³ acknowledging the important difference in status between marriage and non-marriage. My argument merely adds a dimension to this distinction: if there is a difference, it stands to reason that people would have a property interest in that difference. The SJC also recognizes the "protections, benefits, and obligations" that come with marriage,³⁴ which form the basis of my secondary argument. These protections, benefits, and obligations are quite similar to those that have been recognized as property interests elsewhere.³⁵

B. Oregon

The Massachusetts experience touched off a wave of same-sex marriages across the country. Perhaps nowhere were those waves more strongly felt than on the west coast, particularly in Oregon. The Oregon story provides a good "test case" for the marriage property rights argument:³⁶ local authorities in Oregon authorized same-sex marriages, but the state supreme court invalidated them, resulting in the nullification of about 3000 same-sex marriages.

Multnomah County, which includes the city of Portland, began the movement toward same-sex marriage in Oregon on March 2, 2004. That day, Multnomah County's attorney, Agnes Sowle, issued an opinion stating that "[r]efusal to issue marriage licenses to same sex couples violates

²⁹ *Id.*

³⁰ *Id.*

³¹ See *infra* notes 144–175 and accompanying text.

³² See *infra* notes 176–199 and accompanying text.

³³ Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004).

³⁴ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 950 (Mass. 2003).

³⁵ See, e.g., *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (indicating that "property," for Fifth Amendment purposes, "is addressed to every sort of interest the citizen may possess").

³⁶ Specifically, in Part II, *infra*. The marriages in Oregon were invalidated, not abrogated. See *supra* note 3 for the distinction between invalidated and abrogated marriages.

Article I, section 20 of the Oregon Constitution.”³⁷ Relying on the Sowle Memo, Multnomah County began issuing marriage licenses to same-sex couples on March 3. Over 400 couples obtained licenses on the first day that same-sex marriages were recognized in Oregon.³⁸

Reacting to the opposition that came from many corners,³⁹ Oregon Attorney General Hardy Myers wrote a letter to Governor Ted Kulongoski, outlining (1) how the Supreme Court of Oregon would decide the issue of same-sex marriage; and (2) how state agencies should treat same-sex marriages while waiting for the Supreme Court to speak.⁴⁰ Like the Sowle Memo, the Myers Letter focused on Article I, section 20 of the Oregon Constitution.⁴¹ The Myers Letter went on to consider whether the “legal incidents” of marriage were “privileges or immunities” within the meaning of the Oregon Constitution and concluded that they were:

The parties to a *civil marriage contract* are, by reason of that status, entitled to numerous privileges and benefits under Oregon law [T]he benefits and obligations that result from entering into a civil marriage contract govern significant legal aspects of the couple’s life. Consequently, it is virtually beyond question that the opportunity to enter into such a marriage contract is a privilege or immunity as those terms have been interpreted by Oregon courts.⁴²

There are two noteworthy aspects to this analysis. First, it elevates the privileges and benefits of civil marriage to constitutional status. Moreover, it recognizes that civil marriage involves (1) a status and (2) a contract. The former is important for my argument that there is a property interest in the status of being married.⁴³ The latter idea of marriage as contract is important to a subsidiary argument for reliance damages on a contract theory.⁴⁴

³⁷ Confidential Memorandum from Agnes Sowle, Multnomah County Att’y, to Multnomah County Comm’n 1 (Mar. 2, 2004) [hereinafter Sowle Memo], available at http://www.co.multnomah.or.us/marriage/county_attorney_opinion.pdf. Article I, section 20 reads, in its entirety: “No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the terms, shall not equally belong to all citizens.” OR. CONST. art. I, § 20.

³⁸ David Austin & Laura Gunderson, *Ties That Bind and Divide: Multnomah County Recognizes Gay Marriage Amid Joy, Protest*, OREGONIAN, Mar. 4, 2004, at A01.

³⁹ See, e.g., *id.*

⁴⁰ Letter from Hardy Myers, Or. Att’y Gen., to Ted Kulongoski, Or. Governor (Mar. 12, 2004) [hereinafter Myers Letter], available at http://www.oregonlive.com/news/AG_samesexopinion.pdf.

⁴¹ See *id.* at 3.

⁴² *Id.* at 4 (emphasis added). While this sounds very similar to a federal equal protection analysis, Myers goes on to note that Oregon jurisprudence has been diverging from its earlier path of merely tracking federal law. *Id.*

⁴³ See *infra* notes 144–175 and accompanying text.

⁴⁴ See *infra* notes 236–249 and accompanying text.

The Myers Letter was not the end of the matter.⁴⁵ Shortly thereafter, gay rights advocates in Oregon filed a lawsuit asking the courts to declare Oregon's marriage law unconstitutional, granting civil marriage benefits to same-sex couples.⁴⁶ Almost simultaneously, gay marriage opponents began collecting signatures to put a constitutional amendment on the ballot in 2004 ("Measure 36") that would explicitly and exclusively define marriage as between one man and one woman.⁴⁷

On November 2, 2004, Oregon voters approved Measure 36 with a 57% majority, precluding same-sex marriages in the state.⁴⁸ In response, gay marriage advocates changed litigation tactics: though they had started the case pushing for same-sex marriage, they now argued for civil unions instead.⁴⁹ The state responded by asking the court to nullify the approximately 3000 same-sex marriages that had taken place since March 3, 2004.

The resulting case, *Li v. State*,⁵⁰ made its way to the Oregon Supreme Court. Though the case was filed before the passage of Measure 36, oral arguments were heard after the amendment had passed.⁵¹ The case was re-briefed, but the court did not rule on the constitutionality of Measure 36. Moreover, though plaintiff's counsel argued that denying the *benefits* of marriage might be unconstitutional, the court ruled that those issues were "not properly before the court."⁵²

Instead, the court ruled simply that Multnomah County did not have the authority to issue the marriage licenses in the first place.⁵³ Since those licenses were void *ab initio*, the Court declared that it "need not consider the independent effect, if any, of Measure 36 on those marriage licenses."⁵⁴ Finally, the court held that same-sex marriages were unlawful before the passage of Measure 36 and that they continued to be unlawful after its passage.⁵⁵

⁴⁵ The letter concluded by saying that, while the Oregon Supreme Court would likely find discrimination against same-sex couples unconstitutional, there were "uncertainties" about the type of analysis the court would use. Thus, "it would be unwise to change current state practices until, and unless, a decision by the Supreme Court makes clear what, if any[,] changes are required." Myers Letter, *supra* note 40, at 11.

⁴⁶ See, e.g., Ashbel S. Green & Michelle Cole, *Court Annuls Gay Marriages*, OREGONIAN, Apr. 15, 2005, at A01.

⁴⁷ See *id.*

⁴⁸ See, e.g., Bill Graves, *Oregonians Vote Against Land Rules, Gay Marriage*, OREGONIAN, Nov. 3, 2004, at A01.

⁴⁹ See, e.g., Green & Cole, *supra* note 46.

⁵⁰ 110 P.3d 91 (Or. 2005).

⁵¹ See *id.* at 97.

⁵² *Id.* at 102. Chapter 106, to which the court makes reference, is the chapter dealing with civil marriage.

⁵³ *Id.* at 99.

⁵⁴ *Id.* at 102. I argue below that the court *should* have considered that "independent effect," because the parties to the marriages in question had an actionable claim on a contract theory, for reliance damages. See *infra* notes 236–249 and accompanying text.

⁵⁵ *Id.*

In response, marriage advocates challenged Measure 36 in another proceeding. On November 4, 2005—a year after Measure 36 was adopted—an Oregon trial court upheld the amendment's validity.⁵⁶ As of May 20, 2006, that case was pending on appeal.⁵⁷

The Oregon experience is interesting and relevant because it illustrates one form of the argument I lay out here. From a practical perspective, the couples who were married on March 3, 2005 thought they had received both the status and the legal rights and benefits that are coextensive with being married, each of which gives rise to a property interest therein. Thus, the Oregon Supreme Court abrogated these individuals' property rights. Although the court reasoned that these marriages were void *ab initio*, one could argue that the couples should be entitled to damages;⁵⁸ Measure 36 itself should be held to violate the *federal* Constitution with regard to the thousands of couples who were married before its passage.⁵⁹

C. California

California provides a strong case for the property rights of marriage as well. As in Oregon, same-sex marriages were performed in California but then nullified by the California Supreme Court. Unlike in Oregon, a state trial court subsequently held the state marriage statutes to be unconstitutional. Also, the legislature legalized gay marriage, and the Governor vetoed the bill. How this situation will play out remains to be seen; several cases are pending.

The California story is also different because California has a domestic partnership law that confers the same benefits to same-sex couples that opposite-sex couples receive.⁶⁰ The fact that same-sex couples nonetheless wanted to obtain civil marriage licenses shows that the couples valued the *status* of being married in addition to the concomitant legal rights and benefits.

Unhappy with President Bush's call for a constitutional amendment defining marriage as between a man and a woman at the 2004 State of the Union Address, San Francisco Mayor Gavin Newsom asked his office to

⁵⁶ See *Martinez v. Kulongoski & Def. of Marriage Coal.* PAC, No. 05C-11023, 2005 WL 3047355 (Or. Cir. Ct. Nov. 4, 2005).

⁵⁷ *Martinez v. Kulongoski*, No. A130818 (Or. Ct. App. Dec. 22, 2005).

⁵⁸ See *infra* notes 236–249 and accompanying text.

⁵⁹ It might be unconstitutional on a state constitutional theory as well. "Measure 37," which was adopted the same day as Measure 36, obligates the State of Oregon to compensate property owners for any regulation that subsequently devalues their property. See Letter from Bill Bradbury, Or. Sec'y of State, to All Interested Parties (Mar. 17, 2003), *available at* <http://www.sos.state.or.us/elections/irr/2004/036text.pdf>. Measure 37 can be interpreted as providing stronger property protections, in the takings context, than the federal Constitution. If this is true, then Measure 37 would provide even stronger grounds for compensation.

⁶⁰ See CAL. FAM. CODE § 297.5 (West 2004).

determine an appropriate response. The resulting plan led to the first California same-sex marriage on February 12, 2004.⁶¹ Opponents mobilized almost immediately, but by the court hearing the following Tuesday, San Francisco had issued nearly 3000 marriage licenses. When asked about their legal theory, city officials argued that failing to provide same-sex couples access to civil marriage violated the equal protection clause of the California constitution.⁶²

On March 11, the California Supreme Court issued a stay, ordering that no more same-sex marriages be performed pending court review of their legality.⁶³ Eventually, on August 12, 2004 the California Supreme Court unanimously ruled that Mayor Newsom exceeded his authority and violated state law by issuing the marriage licenses. A 5-2 majority also held that the marriages theretofore performed were void.⁶⁴

The relevant issue, the Court said, was “relatively narrow”:

[W]hether a local executive official [i.e., Mayor Newsom] who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.⁶⁵

Working within these (self-imposed) narrow bounds, the court held that, “to the extent the mayor purported to ‘direct’ or ‘instruct’ the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates . . . he exceeded the scope of his authority.”⁶⁶ Moreover, the clerks who issued the marriage licenses lacked the authority to recognize and solemnize the same-sex marriages.⁶⁷ The court instructed the county clerk to identify

⁶¹ See Rachel Gordon, *The Battle Over Same-Sex Marriage*, S.F. CHRON., Feb. 15, 2004, at A1.

⁶² See Harriet Chang & Rachel Gordon, *The Weddings Go On*, S.F. CHRON., Feb. 18, 2004, at A1. Since local officials were sworn to uphold the constitution, they were, in their view, obligated to issue the licenses.

⁶³ *Lockyer v. City & County of San Francisco*, 2004 Cal. LEXIS 2184 (Cal. Mar. 11, 2004).

⁶⁴ *Lockyer v. City & County of San Francisco*, No. S122923, 95 P.3d 459 (Cal. 2004). Justices Kennard and Werdegar dissented from the portion of the majority opinion invalidating the marriages, saying that “determination should be made after the constitutionality of California laws restricting marriage to opposite-sex couples has been authoritatively resolved through judicial proceedings now pending in the courts of California.” *Id.* at 503. This passage is important because it distinguishes the two grounds of the Court’s analysis: first, whether Mayor Newsom exceeded his authority; second, and separately, whether the marriages he sanctioned were valid or not.

⁶⁵ *Id.* at 462–63. The court goes on to specify that a ministerial duty is one where the administrator in question has no discretionary authority. *See id.* at 472–74.

⁶⁶ *Id.* at 472.

⁶⁷ *Id.* at 488–89.

the same-sex couples who were married, notify them that the marriages were “void from their inception and a legal nullity,” refund all marriage-related fees paid, and correct all relevant records.⁶⁸

In their joint dissent, Justices Kennard and Werdegar refrained from declaring the then-existing same-sex marriages invalid. Justice Kennard wrote that the same-sex couples had waited “years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give.”⁶⁹ This language is particularly important, as the domestic partnership law mentioned earlier confers the “same rights and benefits to registered domestic partners as are granted to spouses.”⁷⁰ Thus, the “public validation” that these couples sought was their interest in the status of being married.

Justice Werdegar also wrote a dissenting opinion of his own. In it, he emphasized that by invalidating the same-sex marriages that had already been performed, “the majority permanently deprives future courts of the ability to award *full relief* in the event the existing statutes are held unconstitutional.”⁷¹ The focus on “full relief” suggests that the only appropriate remedy for these same-sex couples is recognition (or reinstatement) of their marriages. The dissenters recognized this, though on a different constitutional theory, and rightly argued that the best way to avoid such a scenario altogether is to leave the marriages intact while constitutional litigation proceeds.

On the property rights theory of marriage, the thousands of couples whose marriages were invalidated might have a takings claim against the State of California, and California would owe compensation to each of those couples.

The *Lockyer* case was not the end of the story. On March 14, 2005, a trial court in San Francisco ruled that the California marriage statutes,⁷² defining marriage as between a man and a woman, were unconstitutional.⁷³ This case, as well as other same-sex marriage cases, are currently pending on appeal.⁷⁴

⁶⁸ *Id.* at 498–99.

⁶⁹ *Id.* at 507 (Kennard, J., concurring and dissenting).

⁷⁰ *Id.* at 462 (majority opinion); CAL. FAM. CODE § 297.5 (West 2004).

⁷¹ *Lockyer*, 95 P.3d at 508 (emphasis added).

⁷² See CAL. FAM. CODE §§ 300, 308.5 (West 2004).

⁷³ Marriage Cases, No. JCCP-4365 (Cal. Super. Ct. filed Mar. 14, 2005), available at <http://www.sftc.org/Docs/marriage.pdf> (six coordinated cases). The March 14 decision was a “tentative” decision, which was made final a month later. See Marriage Cases, No. JCCP-4365 (Cal. Super. Ct. Apr. 13, 2005), available at <http://www.sftc.org/Docs/Marriage%20Final%20Decision.pdf>.

⁷⁴ There are six marriage cases pending in California. They have been consolidated for oral argument but are being briefed separately; as of February 24, 2006, oral arguments were not yet scheduled. The cases are collectively referred to as the *Marriage Cases* and the docket numbers are A110449, A110450, A110451, A110463, A110651, and A110652 (Cal. Ct. App.).

California's treatment of gay marriage has been unusual in another respect as well. On February 18, 2005, Assembly Bill 849 amended the California Family Code to legalize same-sex marriage. The bill recognized that the then-extant law denied same-sex couples "the unique public recognition and affirmation that marriage confers on heterosexual couples" (my primary argument) as well as "specific legal rights and responsibilities" (my secondary argument). The bill passed the California Assembly and Senate but was vetoed by Governor Arnold Schwarzenegger.⁷⁵ Interestingly, Governor Schwarzenegger vetoed the bill despite his belief that same-sex couples were "entitled to full protection under the law" because he felt that the issue should be decided by the courts.⁷⁶

In short, while the California Supreme Court has invalidated about 4000 same-sex marriages, it has not yet actually spoken to the constitutionality of the statutes that currently prohibit same-sex marriage. The legislature attempted to legalize such marriages, but the measure was vetoed by a governor who thought the issue was one for the courts. Meanwhile, a lower court decision has invalidated statutes prohibiting gay marriage, though same-sex marriages are still not sanctioned by the state.

Additionally, the dissenters in *Lockyer* recognized the importance of the status of being married—importance that, as I argue below, constitutes a property interest.⁷⁷ Justice Werdegar's separate dissent underscores the difficulty of fashioning an appropriate remedy to the same-sex couples in question,⁷⁸ a point that I also address later (though in a somewhat different manner).⁷⁹ The pending appeal may ultimately result in the invalidation of California's marriage statutes. However, that fact does not speak to the remedy that the couples who had their marriages invalidated should receive. The argument I present below provides just that insight.

D. New Mexico

New Mexico, like Oregon and California, got into the same-sex marriage debate when one of its counties started performing gay marriages.⁸⁰

⁷⁵ See, e.g., Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, at B3.

⁷⁶ *Id.* Of course, this runs counter to the prevailing opinion in anti-gay-marriage circles that courts should defer to legislatures on this very question. See, e.g., Press Release, President George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> ("After more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization."). Governor Schwarzenegger's rationale for setting aside the legislature's bill was a defense of marriage initiative passed by the *people directly* in 2000. See *supra* note 75.

⁷⁷ See *infra* notes 144–175 and accompanying text.

⁷⁸ See *supra* note 71 and accompanying text.

⁷⁹ See *infra* notes 176–199 and accompanying text.

⁸⁰ San Francisco is both a city and a county, which is why it was able to issue marriage

Unlike other states, however, the final say on the matter in New Mexico came from the executive branch, not the judicial branch.

Sandoval County, New Mexico, began issuing marriage licenses on February 20, 2004, after the Sandoval County Clerk determined that the “office is not aware of anything that would prohibit issuing marriage licenses for same sex couples.”⁸¹ Just as in Multnomah County, Oregon, Sandoval made the decision to issue licenses after checking with the county attorney.⁸² But Sandoval County issued only about sixty licenses, as opposed to thousands in Oregon.⁸³ Moreover, while the Oregon Attorney General concluded that same-sex marriages would probably be permissible,⁸⁴ the New Mexico Attorney General declared that “no county clerk should issue a marriage license to same sex couples because those licenses would be invalid under current law.”⁸⁵

Despite legal wrangling by Sandoval County Clerk Victoria Dunlap (including attempting not to follow the Madrid Letter),⁸⁶ same-sex marriages remain banned in New Mexico.⁸⁷ The licenses that were originally issued were declared invalid, much like the licenses issued in San Francisco and Multnomah County.⁸⁸ However, unlike those cases, the judicial record in New Mexico is sparse—the state supreme court gave no reasons in its one page decision that refused to overturn the temporary restraining order against Dunlap.⁸⁹ While the New Mexico story unfolded primarily along political, as opposed to legal lines, the net effect for those couples is a state order invalidating their marriages and rights therein. The same-sex couples in New Mexico therefore suffer from the same situation as the thousands of couples in Oregon and California who had marriage licenses issued to them that were subsequently invalidated by the state. It is also important to keep in mind that these New Mexican couples would

licenses—something usually done at the county level in California.

⁸¹ Joshua Akers, *Sandoval To Allow Same-Sex Nuptials*, ALBUQUERQUE J., Feb. 20, 2004, at A1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Myers Letter, *supra* note 40.

⁸⁵ Letter from Patricia A. Madrid, N.M. Att’y Gen., to Timothy Z. Jennings, N.M. State Senator (Feb. 20, 2004), available at <http://www.ago.state.nm.us/divs/civil/opinions/a2004/SameSexMarriages.htm> [hereinafter Madrid Letter].

⁸⁶ See, e.g., Joshua Akers, *Nuptials for Gays Back On in N.M.*, ALBUQUERQUE J., Mar. 23, 2004, at A1 (describing Dunlap’s attempt to issue licenses notwithstanding the Madrid Letter); *Judge Will Hear Dunlap Lawsuit*, ALBUQUERQUE J., Apr. 13, 2004, at Rio Rancho Journal 2 (describing a suit against Dunlap to halt the issuance of same-sex marriage licenses).

⁸⁷ See Michael Davis, *Halt to Same-Sex Unions Remains*, ALBUQUERQUE J., July 9, 2004, at Rio Rancho Journal 1 (indicating the New Mexico Supreme Court’s refusal to overturn a temporary restraining order preventing Dunlap from issuing more licenses).

⁸⁸ See Madrid Letter, *supra* note 85.

⁸⁹ See, e.g., Davis, *Halt to Same-Sex Unions Remains*, *supra* note 87. The restraining order was in effect for approximately nine months. On December 31, 2004, Dunlap’s term expired and the issue has become moot. See Joshua Akers, *Ex-Clerk Says She Has No Regrets*, ALBUQUERQUE J., Feb. 20, 2005, at A1.

have realized the property interest in their marriage *status* even if some state agencies would not afford them the full range of rights and benefits that married couples receive. Thus, even if the secondary case for a property interest is weak in the New Mexico case, the primary argument is strong.⁹⁰

E. New York

New York's situation is somewhat unique. Mayor Jason West of New Paltz, NY, performed marriage *ceremonies* for same-sex couples since they could not obtain marriage *licenses* under state law. Governor George Pataki came out against the ceremonies, while a spokesperson said Attorney General Eliot Spitzer favored gay marriage.⁹¹ At the same time, the town clerk in New Paltz refused to issue licenses to the very same couples that Mayor West had just married.⁹²

Several court cases were filed to test New York's marriage law. In one of the first cases, the court ruled for the same-sex couples. The judge held that while the extant laws restricted marriage only to opposite-sex couples,⁹³ New York City "has not presented even a legitimate State purpose that is rationally served by barring same-sex marriage. Accordingly, this Court concludes that defendant's denial of plaintiffs' requests for marriage licenses violated plaintiffs' right to the equal protection of the law."⁹⁴ As a remedy, the court ruled that words such as "bride," "groom," "husband," and "wife" in the Domestic Relations Law be construed to mean "spouse," and that personal pronouns be construed to refer to either gender.⁹⁵ This opened the door for same-sex couples to marry.

However, the decision was limited in that it applied only to New York City, where the trial court is located. On appeal, the case was vacated and summary judgment was granted for the State of New York.⁹⁶ This comports with the decision of other New York appellate division cases, which have uniformly held that the current marriage law *is* constitutional.⁹⁷

⁹⁰ This might be the case in California as well, where same-sex couples were put "on notice" that the rights and benefits inherent in their marriages would be subject to legal clarification. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 497 (Cal. 2004). Even if this were the case, the status itself might confer a property interest and give rise to a takings challenge.

⁹¹ See, e.g., Marc Santora & Thomas Crampton, *Same-Sex Weddings in Upstate Village Test New York Law*, N.Y. TIMES, Feb. 28, 2004, at A1.

⁹² *Id.*

⁹³ *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005).

⁹⁴ *Id.* at 604. Again, the court rests its decision, inter alia, on equal protection grounds, much like courts in other states.

⁹⁵ *Id.* at 608.

⁹⁶ *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005).

⁹⁷ See *Seymour v. Holcomb*, 790 N.Y.S.2d 858, 863-65 (Sup. Ct. 2005) (ruling, in Tompkins County, that the Domestic Relations Law does not authorize issuance of marriage licenses to same-sex couples and that the failure to do so does not violate either the New York or U.S. Constitutions); see also *In re Shields v. Madigan*, 783 N.Y.S.2d 270

The New York situation is interesting because it does not involve couples who were granted marriage licenses. Moreover, the New York County trial court's decision opened the door to same-sex marriage, while the Tompkins and Rockland County decisions foreclosed that possibility elsewhere. New York City Mayor Michael Bloomberg attempted to appeal the *Hernandez* decision directly to the New York Court of Appeals, the state's highest court, but the case was transferred instead to the intermediate court. All of this suggests that a resolution in New York will be some time in coming.

Consequently, the legal status of the marriages that West performed will remain in doubt. While it is a misdemeanor to solemnize marriages that do not have a license, the legality of the couple's status is unknown.⁹⁸ Thus, it might be that while West committed a crime in performing the ceremonies, the couples themselves could nonetheless retain a property interest in the status of their marriage. As such, the New York cases, while unusual in their fact patterns and dispositions, nonetheless provide grounds for the type of argument laid out here.

F. Maryland

It is worth noting in passing that a judge in Maryland recently ruled that restricting marriage to opposite-sex couples violates the Maryland constitution.⁹⁹ This case is pending.

G. Bans on Gay Marriage

Finally, a variety of states have passed constitutional amendments banning gay marriage. In 2004, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, Ohio, Oklahoma, Oregon, North Dakota, and Utah all passed constitutional amendments banning gay marriage by a substantial margin.¹⁰⁰ The measures passed in traditionally conservative states as well as traditionally liberal states, indicating that there may be bipartisan support for these amendments.¹⁰¹ These states joined the six others that already have constitutional amendments banning gay marriage.¹⁰²

(Sup. Ct. 2005) (same, in Rockland County, but preceding *Hernandez*).

⁹⁸ See, e.g., Santora & Crampton, *supra* note 91.

⁹⁹ *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), was the trial court decision; the state immediately appealed.

¹⁰⁰ See, e.g., T.R. Reid, *Same-Sex Marriage Measures Succeed*, WASH. POST, Nov. 3, 2004, at A25. Those measures were codified as follows: ARK. CONST. amend. 83; GA. CONST. art. I, § IV; KY. CONST. § 233A; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263a; MONT. CONST. art. XIII, § 7; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; N.D. CONST. art. XI, § 28; and UTAH CONST. art. I, § 29.

¹⁰¹ But see Lewis, *Passage of Marriage Amendment in Doubt*, *supra* note 27 (indicating that opposition to gay marriage declined in Massachusetts after gay marriage was legalized there).

¹⁰² Traditional Values Coal., *Survey of States With Marriage Amendments*, <http://www.>

There is also a movement to pass a so-called “Federal Marriage Amendment” to define marriage in the Constitution as between a man and a woman. President Bush called for such an amendment in his 2004 State of the Union Address,¹⁰³ adding legitimacy and media coverage to a movement that has been spearheaded primarily by religious groups.¹⁰⁴ The movement to pass a constitutional amendment banning gay marriage enjoyed a surge after states passed such amendments in 2004.¹⁰⁵ However, little has happened in the ensuing year and a half.¹⁰⁶

The argument advanced here is of little utility in states with a constitutional amendment banning gay marriage. In those states, same-sex couples are effectively on notice that their marriages would be invalid.¹⁰⁷ The argument is strong in those states that have no law that precludes same-sex marriage, if and when marriages are performed and subsequently invalidated (as in California, Oregon, New Mexico, and New York). Moreover, if a federal amendment is passed prohibiting same-sex marriage, my argument will be strongest with regard to the marriages in Massachusetts that are subsequently abrogated.

II. SAME-SEX MARRIAGE AND THE TAKINGS ANALYSIS

In this Part, I describe how the issue of same-sex marriage relates to a takings analysis. In doing so, I focus extensively on the nature of the property interest at stake. I then describe the alternative model for takings

traditionalvalues.org/marriage_protection_amendments.php (last visited Mar. 28, 2006) [hereinafter *Survey*]. When those eleven states passed marriage amendments, Nebraska had an amendment and Kansas did not. Since then, the Nebraska amendment has been declared unconstitutional, *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), while Kansas recently passed an amendment banning gay marriage. KAN. CONST. art. 15, § 16. Some of these amendments ban gay marriage and civil unions while some ban only gay marriages. See *Survey, supra*.

¹⁰³ President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (“If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.”).

¹⁰⁴ See, e.g., Focus on the Family, *Stop Judicial Tyranny: Take Action on the Federal Marriage Amendment*, http://www.family.org/cforum/judicial_tyranny/take_action.cfm?pt=fma (last visited Mar. 28, 2006).

¹⁰⁵ See, e.g., Adam Liptak, *Caution in Court for Gay Rights Groups*, N.Y. TIMES, Nov. 12, 2004, at A16 (noting that “[m]any of the state amendments passed by overwhelming margins”).

¹⁰⁶ A Constitutional amendment has been introduced in Congress on several different occasions. The most recent incarnations of such legislation are H.R.J. Res. 39, 109th Cong. (2005) and S.J. Res. 1, 109th Cong. (2005). The House version was introduced on March 17, 2005, and has not been acted upon since being referred to committee on April 4, 2005. The Senate version was introduced on January 24, 2005, and has not been acted upon since being referred to committee that same day.

¹⁰⁷ See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 497 (2004) (explaining that because the marriage statutes at issue defined marriage as between a man and a woman, the same-sex marriages authorized by California officials were deemed void and invalid).

cases that Laura Underkuffler, a well-regarded property theorist, puts forth in her recent book. Finally, I show how this model yields the same result as the traditional takings analysis when it comes to same-sex marriage.¹⁰⁸

My central goal is to reconceptualize the way we think about marriage, property rights, and individualism in our society. Instead of asking questions about, for example, whether one state can refuse to recognize another state's same-sex marriage, we should engage in a deeper exploration of what is at stake. Marriage is one of the most important and exalted institutions in our society. By recognizing the property rights inherent in marriage, we afford to it our most important and exalted constitutional protection as well. When we do so, we can see all the more clearly the lengths to which we as a society sometimes go to deny those very real, very concrete rights to certain people. In the end, a same-sex marriage opponent might reject the implications of this argument. But in doing so, he must address why the state's coercive power will back some individuals' claim-rights but not those of others.

The Fifth Amendment to the U.S. Constitution provides, in part: "nor shall private property be taken for public use, without just compensation."¹⁰⁹ This proscription lays out the four elements of a takings claim: (1) a private property interest; (2) a governmental taking; to serve (3) a public use; which requires (4) just compensation. I will examine each of these elements in turn.

A. *Public Use*

A takings analysis begins with the threshold question of whether a taking is effected for "public use," because the answer to this question determines whether a policy is "substantively permissible."¹¹⁰ The U.S. Supreme Court has indicated that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers."¹¹¹ The judiciary's role in examining the legislature's determination of what constitutes a public use is "an extremely narrow one."¹¹²

In general, the legislature's determination will rest undisturbed unless "it is shown to involve an impossibility,"¹¹³ is "palpably without reasonable foundation"¹¹⁴ or is not "rationally related to a conceivable public pur-

¹⁰⁸ In fact, Underkuffler's analysis forms the outline of much of this chapter. I describe the takings analysis in Part II below, with a strong reliance upon Chapter 13 of Underkuffler's book. See UNDERKUFFLER, *supra* note 1, at 150–61.

¹⁰⁹ U.S. CONST. amend. V.

¹¹⁰ UNDERKUFFLER, *supra* note 1, at 152.

¹¹¹ *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

¹¹² *Id.* (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

¹¹³ *Id.* (quoting *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925)).

¹¹⁴ *Id.* at 241 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

pose.”¹¹⁵ While the Court requires that the regulation share an “essential nexus” with the stated governmental interest,¹¹⁶ it is highly unlikely that the Court will scrutinize “public use” determinations very closely. Last term, the Court reiterated that “[w]ithout exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”¹¹⁷ In sum, “public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”¹¹⁸

Kelo provides a straightforward definition of the public use: that a policy must serve a “public purpose.”¹¹⁹ This definition is important because it is only under this expansive conception of public use that regulation of same-sex marriages is “substantively permissible.”¹²⁰ In short, whatever one thinks of *Kelo* on the merits,¹²¹ it reiterates longstanding takings jurisprudence and underscores the deferential treatment that courts will give a legislature’s determination of public use.

The state’s police power, in its broadest form, is the power to issue laws and regulations in furtherance of the public health, safety, welfare, and morals.¹²² In the same-sex marriage context, the police power seems sufficient to provide justification for regulation of same-sex marriage. Indeed, as several cases have indicated, regulation of civil marriage is well within the purview of the state.¹²³ Thus, in the takings context, the opera-

¹¹⁵ *Id.* (citations omitted).

¹¹⁶ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

¹¹⁷ *Kelo v. City of New London*, 125 S. Ct. 2655, 2657 (2005).

¹¹⁸ *Id.* at 2664.

¹¹⁹ *Id.* at 2665.

¹²⁰ An alternative, proposed by Justice Thomas, did not carry the day in *Kelo*. He wrote that “the term ‘public use’ . . . means that either the government or its citizens as a whole must *actually* ‘employ’ the taken property.” *Id.* at 2679 (Thomas, J., dissenting) (emphasis added). Under this narrower view of public use, if a property interest in marital status were recognized, any taking thereof would be substantively impermissible. See *infra* text accompanying notes 127–128.

¹²¹ There are a variety of views on the matter. Compare, e.g., Editorial, *Kennedy’s Vast Domain*, WALL ST. J., June 24, 2005, at A12 (criticizing the *Kelo* decision), with John Hinderaker, *Second Thoughts on Kelo*, DAILY STANDARD, July 5, 2005, <http://www.weeklystandard.com/Content/Public/Articles/000/000/005/779fkbar.asp> (praising the *Kelo* decision for not legislating from the bench). See also Michael C. Lehane & Goutam U. Jois, *Kelo and Eminent Domain Policy*, CITY & TOWN MAG. (Dep’t of Revenue/Div. of Local Servs., Boston, Mass.), Oct. 2005, at 1.

¹²² See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2221 (2005) (O’Connor, J., dissenting) (“The States’ core police powers have always included authority to . . . protect the health, safety, and welfare of their citizens.”); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . .”).

¹²³ See, e.g., *Li v. State*, 110 P.3d 91, 100 (Or. 2005) (“We conclude that Oregon law currently places the regulation of marriage exclusively within the province of the state’s legislative power.”); *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 467 (Cal. 2004) (“[T]he Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated . . .” (quoting *McClure v. Donovan*, 205 P.2d 17, 24 (Cal. 1949))); *Goodridge v. Dep’t of Pub. Health*,

tive question is whether the public use test is met—whether a valid public purpose is served—by laws limiting marriage to one man and one woman.

This seems quite clearly to be the case. In his call for a constitutional amendment banning gay marriage, President Bush made reference to the “sanctity of marriage,”¹²⁴ which aligns with the police power’s emphasis on public welfare and morals. If the public will suffer harm by same-sex marriages, then action to remedy that harm seems appropriate.

Additionally, a public purpose would presumably be served if existing gay marriages were invalidated. According to opponents of gay marriage, a majority of citizens oppose state recognition of same-sex marriages.¹²⁵ If this is true, those citizens should benefit from the elimination of same-sex marriages that are currently in place—simply from the knowledge those marriages cannot exist.¹²⁶ Since the test is extremely deferential, this would (to use *Kelo*’s phrase) serve a “public purpose.”

Note, however, that states could not abrogate existing marriages under the narrow view of “public use” put forth by Justice Thomas.¹²⁷ Under this view, private property may only be taken if the public can actually utilize what results. For example, condemning a house to build a park would be permissible because any member of the public could use the park for recreation. However, it remains unclear how the public could “use” a dissolved same-sex marriage. Thus, if there is a property interest in the status of one’s marriage and a court employs the definition of public use put forth by Justice Thomas, the policy would be substantively impermissible.

B. Private Property Interest

1. Generally

Once governmental action is “substantively permissible, the Court proceeds to determine whether its impairment of the claimant’s property interest is such that compensation must be paid.”¹²⁸ This question (particularly in the same-sex marriage context) is critical. “Until we know what the property at stake is, it is impossible to evaluate whether it has been taken or whether compensation for its loss should be paid.”¹²⁹

798 N.E.2d 941, 954 (Mass. 2003) (“Civil marriage is created and regulated through exercise of the police power.”).

¹²⁴ Bush, State of the Union Address, *supra* note 103.

¹²⁵ See, e.g., Traditional Values Coal., *Most Americans Opposed to Homosexual Marriage*, <http://www.traditionalvalues.org/modules.php?sid=1585> (last visited Mar. 28, 2006).

¹²⁶ This might be similar to all New Yorkers benefiting from a historic building, even though they may not live near it. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹²⁷ See *supra* text accompanying note 120.

¹²⁸ UNDERKUFFLER, *supra* note 1, at 152.

¹²⁹ *Id.* at 154.

Yet, “[d]espite the importance of this question, finding any coherent, underlying analysis or understanding of constitutionally cognizable property in the Supreme Court’s takings cases is a difficult task.”¹³⁰ In these cases, the Court has suggested that the property interest might encompass “the right to exclude (which was sometimes portrayed as absolute in nature and sometimes not); the right to use (which was apparently assumed to be contingent in nature); the entire parcel owned; or the strip of land subject to the public-use request.”¹³¹ In another case, the Court suggested property “might be ‘the owner’s reasonable expectations’ or possibly ‘the [s]tate’s law of property’”¹³² The Court has, “in a single case, denied that the definition of property is a federal or constitutional question, only to apply tests derived from federal law; or assumed that a state has sweeping prerogative in determining property interests, only to deny—in the same case—the state’s ability to change those interests.”¹³³

This case law stands wholly separate from the various theories used to justify property. For example, if a property regime is instituted to further economic efficiency,¹³⁴ the property interest at stake might be different than if a property regime is instituted to enable individual growth and development.¹³⁵ The incredibly broad range of property theorists and theories adds another level of complexity to the analysis.¹³⁶

Underkuffler provides yet another approach to property in her book. She argues that property is comprised of four dimensions: theory, space, stringency, and time.¹³⁷ The first dimension “describes the theory of the particular rights that is used for any particular conception of property,” including “some theory of individual rights”¹³⁸ The second dimension refers to “the space, or area of field, to which the theoretical dimension applies.”¹³⁹ Most property theories consider these first two dimensions; indeed, they are probably indispensable to most conceptions of property.¹⁴⁰ Underkuffler adds the third and fourth dimensions, which describe the de-

¹³⁰ *Id.*

¹³¹ *Id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

¹³² *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

¹³³ *Id.* (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (for the first proposition) and *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) (for the second)).

¹³⁴ *See, e.g.*, RICHARD POSNER, *ECONOMICS OF JUSTICE* (1981).

¹³⁵ *See, e.g.*, GEORG WILLIAM FREDERIC HEGEL, *PHILOSOPHY OF RIGHT* 38–57 (T. Knox trans., Clarendon Press 1942) (1821). *See also* MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 44–48 n.37 (1993) (discussing Hegel’s theory of property and how it relates to “personhood”).

¹³⁶ *See, e.g.*, UNDERKUFFLER, *supra* note 1, at 12 n.4, 13 n.8 (discussing various theories of property).

¹³⁷ *See id.* at 16–33.

¹³⁸ *Id.* at 19 (emphasis omitted).

¹³⁹ *Id.* at 21 (emphasis omitted).

¹⁴⁰ But most conceptions of property nevertheless stop there. *Id.* at 24.

gree to which rights are protected (stringency);¹⁴¹ and when the rights are determined, as well as if they are subsequently mutable (time).¹⁴²

The crux of this Note is that individuals have a property interest in the status of being married. The shortest, and perhaps best, explication of this idea is the most intuitive. People get married, even without consideration of the legal incidents thereof, because their marital status has special significance to them.¹⁴³ I argue simply that this significance should be protected with the coercive authority of the state as a property interest. This forms what I have referred to thus far as the “primary” argument for a property interest in marital status—the subjective significance that individuals see in their marriages, its character akin to a property interest, and the state’s role in vindicating that interest.

I have also referred to the “secondary” argument for a property interest in the status of one’s marriage. This refers, not to the subjectively perceived significance of the marriage, but to the legal and financial rights, duties, benefits, and obligations that flow from the status of being married. One’s contractual, legal, and financial rights have long been recognized as property interests. This should be no different with regard to marriage.

In the following Sections, I outline support for my position from case law, common law, statutes, and recent history. But none of these should obscure the fact that we must dramatically shift the way we approach this question. Instead of asking whether, for example, New Hampshire has the right not to recognize gay marriages from Massachusetts, we should be asking whether New Hampshire, in refusing to recognize gay marriage, is denying individuals’ very real, very concrete rights. To the extent that there is a property interest in the status of one’s marriage, the answer must be “yes.” In today’s political discourse, these discussions often center on issues such as morality and religion. These values are most certainly important means by which to inform one’s worldview. But if we recognize the (property) interests that people—gay and straight—have in their marriages, the next issue is whether those values are sufficiently strong to deny others’ property rights.

Moreover, the idea of “property” holds a special, near-mythical place in our society and (to a lesser extent) in our jurisprudence. Marriage is one of the most important institutions in our society. Marital status as property is then an important metaphor as well: indicating that we will extend our most important legal protection to our most important institution.

¹⁴¹ *Id.*

¹⁴² *See id.* at 28–30.

¹⁴³ For my purposes, the extent, nature, character, and scope of that significance is not important; the most important point is that it exists.

2. *In the Same-Sex Marriage Context*

a. *Primary Argument*

My argument throughout this Note has been that there is a property interest in the *status* of being married. This argument should hold *regardless* of the legal incidents of marriage.

i. *Case Law*

The idea that civil marriage is within the province of the legislature has been around for centuries. As early as 1888, the U.S. Supreme Court wrote, “[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.”¹⁴⁴ While regulation varies by state, the legislature prescribes, *inter alia*, the age at which people may marry, the procedure by which to do so, the duties and obligations that are coextensive with marriage, the property rights and obligations it creates, and the means by which it may be dissolved.¹⁴⁵ This status—that custom, common law, and statute all recognize as distinct from the status of non-marriage—confers a property interest.

There is support, by analogy, for this proposition in other areas of case law. For example, the Supreme Court has held that employees have a property interest in a “de facto tenure system” when working at a college, even when there was no formal system in place.¹⁴⁶ The Court held that “‘property’ interests . . . are not limited by a few rigid, technical forms. Rather, ‘property’ denotes a broad range of interests that are secured by ‘existing rules or understandings.’”¹⁴⁷

Some states have made the property interest in one’s job status explicit. In New Jersey, for example, a court held that “[a]s civil servants . . . plaintiffs are endowed with constitutionally protected property interests in their tenure”¹⁴⁸ Similarly, in a Georgia case, both sides (and the court) agreed that “plaintiffs had a protected property interest in their jobs.”¹⁴⁹

This is important in the context of marriage because “existing rules or understandings” certainly imply a status that is coextensive with marriage, including public recognition and validation. Moreover, a couple’s property interest would increase with time. This squares with the discussions above finding a property interest in tenure. For example, in *Perry*, the professor had been employed in the state college system for about ten

¹⁴⁴ *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

¹⁴⁵ *Id.*

¹⁴⁶ *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

¹⁴⁷ *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

¹⁴⁸ *Capua v. Plainfield*, 643 F. Supp. 1507, 1520 (D. N.J. 1986).

¹⁴⁹ *Bostic v. McClendon*, 650 F. Supp. 245, 251 (N.D. Ga. 1986).

years, which made the case for his property interest even stronger.¹⁵⁰ By analogy, the same-sex couples who have been married longer would have a stronger property claim to their status as a married couple.

The obvious response to this line of argument is that a job (and tenure therein) is a financial arrangement, and the individuals' property interest is in, say, their wage, not their job *status*. However, the New Jersey case (and others) refute this position. The court went on to say that the plaintiffs "have constitutionally recognized liberty and property interests in their individual reputations, and in the honor and integrity of their good names. *Such protected reputational interests derive directly from plaintiff's employment status as fire fighters* and cannot be arbitrarily or capriciously infringed by government officials."¹⁵¹

In another case, the Supreme Court held that distributing flyers identifying "excessive drinkers" to liquor stores violated the Fourteenth Amendment.¹⁵² The Court held that:

the governmental action taken in that case deprived the individual of a right previously held under state law [I]t was *that alteration of legal status* which, combined with the injury resulting from the defamation, justified the invocation of procedural [due process] safeguards.¹⁵³

Both *Paul* and *Capua* emphasize that due process interests—in liberty and/or property—can be implicated by a change in legal status. Moreover, *Capua* recognizes a constitutionally cognizable property interest in reputational status. Since legal status, reputation, and existing rules or understandings are all of utmost importance in the marriage context,¹⁵⁴ the argument for a property interest in marital status is quite strong.

The issue of a specific property interest in marital status also came up in *Swartz v. Rogers*, in which a married man was threatened with deportation.¹⁵⁵ His wife argued that the deportation deprived her of a property interest in her marriage, violating the Fifth and Fourteenth Amendments.¹⁵⁶ The court rejected her claim, but not because there was no property interest in marital status. Instead, the court reasoned that the marriage was not destroyed; she could live abroad with her husband or live in the

¹⁵⁰ *Perry*, 408 U.S. at 594, 602.

¹⁵¹ *Capua*, 643 F. Supp. at 1520–21 (emphasis added).

¹⁵² *Paul v. Davis*, 424 U.S. 693, 694 (1976).

¹⁵³ *Id.* at 708–09 (emphasis added).

¹⁵⁴ Recall that California has a domestic relations law that affords the same benefits as marriage to same-sex couples. Thus, a significant motivation for the couples in San Francisco in seeking marriage must have been something other than those benefits—that is, the reputation and status of being married.

¹⁵⁵ 254 F.2d 338, 338 (D.C. Cir. 1958).

¹⁵⁶ *Id.* at 339.

United States without him. Since the marriage was left intact, the wife suffered no violation of her constitutional rights.¹⁵⁷

The relationship between marriage as status and marital status as property is illustrated in a Delaware case. There, the court reasoned that “marriage is primarily a personal status, even though it secondarily affects certain property rights.”¹⁵⁸ The court thus recognizes the dual aspects of marriage, which give rise to what I call the primary and secondary arguments for a property interest in marital status. What the court does not recognize (but does not foreclose) is that one has a *property interest* in the personal status itself, in addition to a property interest in the concomitant property rights. Of course, as *Perry*, *Capua*, *Paul*, and others suggest, there are arguments for a property interest in *status* as well.

Courts have also recognized more “conventional” property interests in one’s marital status. In a bankruptcy case, a man’s interest in his house was attached by creditors. He and his wife owned the house in a tenancy by the entirety. Though the court ruled against the debtor, they held that a “debtor whose interest has been attached retains the right to occupy the premises, *more by virtue of his/her marital status than because of some unidentifiable property interest.*”¹⁵⁹ The court again recognizes the dual nature of one’s property interests by virtue of marital status. Here, the husband’s property interest was attached; it was no longer his. Yet he still had rights—in this case, the right to use—by virtue of his marital status. While the secondary interests were attached by his creditors, he still retained his primary interest.

Before concluding this Part, I want to survey some contrary authority. In what seems to be the only case directly on point, the Nebraska Supreme Court ruled in 1976 that “the marriage contract does not create a property right in the marital status.”¹⁶⁰ In that case, a man brought an action to divorce his wife. In response, the wife alleged that divorce statutes were unconstitutional, depriving her of a property interest without due process.¹⁶¹ In rejecting her argument, the Nebraska court also rejected the analogy to *Perry*, cited above.

However, *Buchholz* involved an action by a party to the marriage. In the same-sex marriage cases, it is the state, *sua sponte*, which seeks to dissolve the marriages. Moreover, *Buchholz* ultimately turned on the Fourteenth Amendment; the issue at stake was whether property had been deprived *without due process of law*. By contrast, in a takings case, the issue is not with due process (necessarily) but rather with the compensation that must be paid.

¹⁵⁷ *Id.*

¹⁵⁸ *Wilmington Trust Co. v. Hahn*, 241 A.2d 517, 521 (Del. 1968).

¹⁵⁹ *In re Gibbons*, 52 B.R. 861, 867 (Bankr. D.R.I. 1985) (emphasis added).

¹⁶⁰ *Buchholz v. Buchholz*, 248 N.W.2d 21, 23 (Neb. 1976).

¹⁶¹ *Id.* at 22.

Buchholz cites a California case along similar lines. There, the court said,

Certainly a wife has a legitimate interest in her status as a married woman, but, separate and apart from marital property and support rights [i.e., the secondary argument] . . . , we entertain some doubt whether her interest *in her status as a married woman* constitutes property within the purview of the due process clauses of [the California and United States Constitutions].¹⁶²

Again, this case deals with due process protections, not the wholly separate question of whether a taking has been effected and compensation must be paid. Additionally, the retroactive application of the law was at issue. While the court found that it was not retroactive,¹⁶³ it is clear that in the same-sex marriage context the marriages in question were retroactively voided (the proposed amendment to the Massachusetts Constitution is an exception).¹⁶⁴

As the foregoing discussion shows, there is some authority in case law for finding a property interest in the status of being married. These cases, together with the discussion below, provide strong grounds for what I call the primary argument.

ii. Alienation of Affections

Alienation of affections laws also provide an argument for recognizing a property interest in marital status, though the laws are now repealed in most states. According to *Black's Law Dictionary*, the common-law cause of action for alienation of affections had three elements: "(1) some

¹⁶² *In re Marriage of Walton*, 104 Cal. Rptr. 472, 476 (Cal. Ct. App. 1972) (emphasis added).

¹⁶³ *Id.* at 477.

¹⁶⁴ The issue of a due process analysis, as opposed to a takings analysis, merits some further discussion. The Fourteenth Amendment provides that property may not be taken without due process of the laws, while the Fifth Amendment provides that property may not be taken for public use without compensation. However, the Supreme Court has never suggested that the *meaning* of property is different in these two contexts. When the Court has discussed what constitutes "property," it has stated the question broadly, as applicable to the Fifth and Fourteenth Amendments. For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), the Court said property is determined by "traditional resort to 'existing rules or understandings' that stem from an independent source such as state law to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments . . ." (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). *Roth*, of course, is a Due Process case while *Lucas* is a takings case. *Cf. E. Enterprises v. Apfel*, 524 U.S. 498, 546 (1988) (Kennedy, J., concurring in part and dissenting in part) (suggesting that the underlying substantive property claim-right is narrower in a takings claim as opposed to a due process claim). In short, the substance of what underlies the Due Process Clause and the Takings Clause is the same: property. The two diverge procedurally, but this does not affect my analysis.

wrongful conduct by the defendant with the plaintiff's spouse, (2) the loss of affection or loss of consortium of plaintiff's spouse, and (3) a causal relationship between the defendant's conduct and the loss of consortium."¹⁶⁵ The cause of action has been eliminated, in whole or in part, in twenty-six states and the District of Columbia. Nonetheless, it exists with vigor in other places, as in North Carolina, where an ex-wife recovered \$1 million in an alienation of affections claim against her ex-husband's new wife.¹⁶⁶ The cause of action implies a cognizable interest in the *status* of being married; the action exists independent of any other legal or financial rights and obligations in the marriage.

The cause of action has come under criticism as being an anachronism. One lawyer writes that "[a] cause of action based on alienation of affections rested on the principle that wives were the property of their husbands, so that 'stealing' a wife away from her husband deprived her husband of his rightful property interests."¹⁶⁷ That, of course, is one interpretation of the law. As the North Carolina verdict shows, the cause of action depends only on satisfying the elements above and not on the gender of the parties.

What is the property interest? On the one hand, it might be that each spouse is the property of the other, and that an interloper in the relationship has effectively converted another's property. Yet it might be that the cause of action defends one's right to an exclusive relationship. In this regard, the claim seems less onerous. Instead of recognizing a wife's property in her *husband*, the same elements of the cause of action could support a property interest in her *relationship with her husband*. These are two wholly different ideas. In the latter case, the spouse has an interest, not in the *object* of her marriage (her husband) but in the *status* of her marriage (the exclusive relationship).

In short, alienation of affection laws might have originated from a sexist interpretation of marriage, viewing the wife as the husband's property. But the same cause of action can support a property interest, not in one's spouse, but in the status of one's marriage.

iii. The Decision to Marry

In Part I of this Note, I sought to ground the theoretical discussion of marriage and property rights in the real-world events unfolding regarding gay marriage. At this juncture, it makes sense to reflect, not on case law and nineteenth century causes of action, but on the impact of marriage on the

¹⁶⁵ BLACK'S LAW DICTIONARY 80 (8th ed. 2004). Thus where the cause of action is viable, a plaintiff-couple might have a cause against the interloper-state.

¹⁶⁶ *Hutelmyer v. Cox*, 514 S.E.2d 554 (N.C. Ct. App. 1999), cited in BLACK'S LAW DICTIONARY, *supra* note 165, at 80.

¹⁶⁷ Cathy R. Cook, *Alienation of Affections*, DIVORCENET, July 14, 2004, http://www.divorcenet.com/states/ohio/ohart_10.

couples who lined up by the thousands to get married in Massachusetts, Oregon, California, New Mexico, and New York (among other places).

In a 2004 editorial, *The Economist* came out strongly in favor of same-sex marriage. In rejecting the alternative of civil unions, the editors wrote:

Gays want to marry precisely because they see marriage as important: they want the symbolism that marriage brings, the extra sense of obligation and commitment, as well as the social recognition . . . Marriage, as it is commonly viewed in society, *is more than just a legal contract*.¹⁶⁸

The editorial provides a simple encapsulation of what I have called the primary argument. While marriage does confer rights, duties, benefits, and obligations, couples—same-sex and opposite-sex—want to marry for more than just those benefits. Thence arose *Goodridge*'s characterization of civil unions as conferring “second-class status.” Similarly, it was for the same reason that same-sex couples wed in San Francisco. There, couples knew that the benefits they would receive by virtue of their marriage were in doubt. Nonetheless, Robin Marks lined up to get married, saying “it’s simply a statement.”¹⁶⁹ Shannon Trimble described his marriage as “one more level of validation.”¹⁷⁰

Courts recognize this, both when endorsing and when rejecting same-sex marriages. *Goodridge*, for example, referred to the special status that marriage enjoys in our society and went so far as to characterize civil unions as “status discrimination.”¹⁷¹ Even *Lockyer*, which invalidated the marriage licenses that Mayor Newsom issued, indicated that there is a “public validation that only marriage can give.”¹⁷²

Activists recognize this, too. In suing for marriage rights (as opposed to civil unions) in Connecticut, plaintiff Janet Peck said she wanted to marry, not for the legal benefits, but for what “I, and all of society, honor as the ultimate sharing of love and commitment.”¹⁷³ In its comparison chart of marriages, civil unions, and “no marital status available,” the advocacy organization GLAD has a line item devoted specifically to the *word* marriage and its power and meaning in society.¹⁷⁴ GLAD goes on to say:

¹⁶⁸ *The Case for Gay Marriage*, ECONOMIST, Feb. 26, 2004, http://www.economist.com/opinion/displayStory.cfm?story_id=2459758 (emphasis added).

¹⁶⁹ Carolyn Said, *Wedding Perks: Married Couples Save on Inheritance Insurance*, S.F. CHRON., Feb. 20, 2004, at A1.

¹⁷⁰ Harriet Chiang et al., *Mad Dash to S.F. City Hall to Say “I Do”*, S.F. CHRON., Feb. 14, 2004, at A1.

¹⁷¹ Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004).

¹⁷² *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 507 (Cal. 2004).

¹⁷³ Press Release, Gay and Lesbian Advocates and Defenders, GLAD Makes the Case for Marriage Over Civil Unions in CT (July 28, 2005), http://www.glad.org/News_Room/press99-7-28-05.html.

¹⁷⁴ Gay and Lesbian Advocates and Defenders, *What’s the Difference?*, http://www.glad.org/rights/Marriage_v_CU_chart.pdf (last visited Mar. 28, 2006).

Marriage is a *unique legal status* conferred by and recognized by governments the world over. It brings with it a host of reciprocal obligations, rights, and protections. Yet *it is more than the sum of its legal parts. It is also a cultural institution.* The word itself is a fundamental protection, conveying clearly that you and your life partner love each other, are united and belong by each other's side.¹⁷⁵

The status of being married carries important social and personal values, entirely apart from the legal benefits. In other words, people the world over have a strong interest in the status of being married. If we believe that marriage is “fundamental,” then we should recognize people's strong subjective valuations of that status and recognize it as property—for *all* couples. This abstract discussion about property theory forces us to grapple with the grounds on which we freeze entire groups of people out of this “fundamental” institution.

iv. Conclusion

The primary argument for a property interest in marital status is again perhaps best explained in intuitive terms: we all know that people get married for reasons other than tax breaks, evidential immunity, and inheritance rights. My argument is simply that those reasons *do and should* rise to the level of constitutionally cognizable property rights. There is some support for this position in case law, in the common law, and most important, in the eyes of people who get married. All individuals have deep-rooted expectations—interests—in certain rights that our society implicitly and explicitly acknowledges through marital status. The primary argument for marital status as property is, in short, that we ought—that we are morally obligated—to protect those interests.

b. Secondary Argument

Above, I argued that individuals should have a per se property interest in the status of their marriage. Here, I argue that the *rights incident to marriage* should additionally confer a property interest in marital status.

i. Marriage Rights Generally

In 1997, the United States General Accounting Office identified 1049 “federal laws classified to the United States Code in which marital status

¹⁷⁵ Gay and Lesbian Advocates and Defenders, *Civil Marriage v. Civil Unions: What's the Difference?*, <http://www.glad.org/rights/OP7-marriagevcu.PDF> (last visited Mar. 28, 2006) (emphasis added).

is a factor.”¹⁷⁶ These include laws related to: social security, housing, and food stamps; veterans’ benefits; taxation; federal civilian and military service benefits; immigration law; Indian law; trade, commerce, and intellectual property law; financial disclosure laws; crime and family violence laws; and more.¹⁷⁷ Nearly a decade later, the GAO updated its study to examine laws passed, repealed, or modified since 1996. There are now 1138 such laws.¹⁷⁸ None of these laws apply to same-sex couples.¹⁷⁹

The practical effect of these laws (and others at the state level) is significant. Married couples have hospital visitation rights, while unmarried couples do not. Employers often offer benefits to “spouses,” but where same-sex marriages are not recognized, these benefits only apply to opposite-sex couples. Even the dissolution of a marriage has property-related, financial, and other procedures that must be followed. There is no comparable process to govern the dissolution of a same-sex relationship in the absence of marriage recognition.¹⁸⁰

There are a variety of common-law benefits that accrue to married couples as well. In the event of an intestate death, spouses have inheritance rights that non-spouses do not.¹⁸¹ At common law, only a married couple could own a property in a tenancy by the entirety.¹⁸² In litigation, spousal immunity protects one spouse from having to testify against another—again, a protection that does not apply to same-sex couples.¹⁸³

The argument here is not that it is discriminatory to confer benefits upon some citizens but not others.¹⁸⁴ Instead, it is that those benefits, *once conferred*, give rise to a property interest in those rights. For example, couples who are currently married in Massachusetts benefit from interests in each others’ property, inheritances, etc. Of course, these are the types of interests that courts routinely protect as “property.”¹⁸⁵ As Underkuffler

¹⁷⁶ Letter from Barry R. Bedrick, Assoc. Gen. Counsel, GAO, to Henry J. Hyde, Chairman, House Judiciary Comm., 1–2 (Jan. 31, 1997), *available at* <http://www.gao.gov/archive/1997/og97016.pdf>. The number 1049 was arrived at by way of a computer search, which has some margin of error. *Id.* at 2.

¹⁷⁷ *Id.* at 3.

¹⁷⁸ Letter from Dayna K. Shah, Assoc. Gen. Counsel, GAO, to Sen. Bill Frist, Senate Majority Leader 1 (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

¹⁷⁹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000)), precludes federal recognition of any same-sex marriage. Thus, even the couples married in Massachusetts do not receive the federal benefits of marriage.

¹⁸⁰ *See, e.g.*, Marriage Equality USA, Get the Facts on Marriage, <http://www.marriageequality.org> (follow “Get the Facts” hyperlink) (last visited Mar. 28, 2006).

¹⁸¹ *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1 to 1.6 (Consol. 2005).

¹⁸² *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 341 (5th ed. 2002) (“A *tenancy by the entirety* can be created only in husband and wife.”) (emphasis in original, citation omitted).

¹⁸³ *See, e.g.*, 81 AM. JUR. 2D *Witnesses* § 243 (1992).

¹⁸⁴ But of course it is. The point is merely that this argument is not the focus of my Note.

¹⁸⁵ *See, e.g.*, Thomas-Lazear v. FBI, 851 F.2d 1202, 1205 (9th Cir. 1988) (stating that property entitlements come from “explicit understanding[s] created by the representations of government officials”).

puts it, the “common conception” of property includes “rights, privileges, powers, and immunities that govern the relative power of individuals over tangible and intangible things.”¹⁸⁶ Thus, everything from welfare benefits to financial instruments to reliance interests have been recognized as property in varying degrees. These concepts and relationship are the backbone of my secondary argument for a property interest in marital status.

Property rights, as commonly understood, also include rights to use, exclude, and alienate.¹⁸⁷ These rights, too, fit the paradigm of marital status as property. For example, when one gets married, only she (and her spouse) may “use” her marital status.¹⁸⁸ Simultaneously, she has a right to exclude others; no third party has an interest in that relationship or status.¹⁸⁹ Finally, marital status is (effectively) hers to sever as well. While one’s marital status is not alienated in the way one’s fee simple interest in a plot of land might be, only a spouse with an interest in the status of being married can dissolve that marriage, just as only one with an interest in land can alienate that interest.

Taken together, these rights, benefits, obligations, and privileges should be protected as “property.” Indeed, when faced with the wide variety of interests that courts have recognized as property, from job tenure to reputation, it is difficult to argue why these particular interests should *not* be recognized.

ii. Counter-argument

There is a strong, ideological counter-argument to recognizing a property interest in one’s marital status. Considering one’s marriage to be property, some might argue, “cheapens” the relationship. Instead of basing marriage on love and trust, it is reduced to the same status as one’s house, widgets, or stock certificates. Moreover, one spouse should not be thought of as the “property” of the other, even if the relationship were bilateral and equal.

These arguments have merit and are not incompatible with the view I advance here. It is not the marriage *itself* that is property; rather, it is one’s marital *status* that is property. The distinction is crucial. In real property, the fee is viewed as something separate from the land to which it refers; thus, when I sell you the mythical piece of land known as Blackacre, you do not receive “Blackacre,” you receive a fee simple interest *in*

¹⁸⁶ UNDERKUFFLER, *supra* note 1, at 16.

¹⁸⁷ *See, e.g., id.* at 13 (discussing various “‘rights’ in ‘things’” that are recognized as property).

¹⁸⁸ The relatively unusual case of the polyamorous excepted. Presumably even there, joint use is with consent *ex ante*, giving the third (or fourth or fifth) party status more akin to an invited guest than a trespasser.

¹⁸⁹ When a third party did interfere, he was liable at common law. *See supra* notes 165–167 and accompanying text.

Blackacre.¹⁹⁰ Similarly, the property interest in marital *status* exists apart from (though not independent of) the marriage itself. One can have a property interest in the marital *status* without having a property interest in (for example) her husband. Arguing for a property interest in one's spouse is surely distasteful. However, one must carefully distinguish a property interest in the spouse or marriage from an interest in *marital status*.

iii. Implications

I want to pause here to consider briefly the implications that the argument that there is a property interest in marital status has for *all* couples, same-sex or opposite-sex. This discussion is admittedly schematic. But it is worth considering—if only for the purposes of future work—the effect that a property interest might have on, for example, divorce laws, marriage statutes, and civil marriage generally. For example, in *Buchholz*,¹⁹¹ a woman opposed her husband's suit for divorce, claiming that the divorce statutes were themselves unconstitutional for depriving her of a property interest in her marital status. The court rejected that argument then. Would the same hold under my theory?

Cases like this probably would be handled by a manner other than the takings challenge I outline in this Note. For example, *Buchholz* asked not whether there was a property deprivation but whether there was a due process violation, since the husband initiated the divorce. There should be no question that there is no taking when one party (there, the husband) *chooses* to dissolve a marriage. In the same-sex context, the state acts unilaterally. A similar response would come, for example, in the case of child emancipation. Parents might argue that their property interest in “parent status” has been taken. However, in such a case, the child would surely have an equal interest. Underkuffler argues that when two parties evince the same claim-right, neither side presumptively trumps. Thus, the mere fact that a property interest might be recognized in a particular context is not *per se* outcome determinative.

Other questions may also arise. For example, the argument advanced in this Note might hew disturbingly close to the “bad old days,” when women were considered the property of their husbands. However, doctrinally, this need not necessarily be the case. Alienation of affections laws, for example, were surely a product of those antiquated times, but a woman recently won a million dollar verdict using that same cause of action.¹⁹²

This vignette is not intended to resolve the question of how broad issues in family law would be affected by recognizing a property right in

¹⁹⁰ See, e.g., DUKEMINIER & KRIER, *supra* note 182, at 211 (“Instead of thinking of the land itself, the lawyer thinks of an *estate in land*, which is imagined as almost having a real existence apart from the land.”).

¹⁹¹ *Buchholz v. Buchholz*, 248 N.W.2d 21 (Neb. 1976).

¹⁹² See *supra* note 167.

marital status. Laws regarding alienation of affections, ownership rights, and perhaps even inheritances, might be altered by recognizing such a property interest. My response is only, first, that adequate due process provisions might guard against any serious problems; and, second, that the impact is likely to be minimal.¹⁹³

c. Conclusion

A strong argument exists for a property interest in the status of being married. People get married because it “means something” apart from tax breaks and rules of evidence. If we truly believe that marriage is one of the most important institutions in our society,¹⁹⁴ then we should give it our most important constitutional protection. In Underkuffler’s words, “property claims . . . enjoy tremendous presumptive power, as both an intuitive and a legal matter, even when opposed by compelling public interests.”¹⁹⁵ Property claims “cannot be overridden by the simple or routine goals of government.”¹⁹⁶ Shouldn’t we protect the most important of our social institutions with such vigor?

My takings argument applies with greatest force to the same-sex marriages that have been performed in Massachusetts. Perhaps the marriages performed in New York or San Francisco, for example, are not as doctrinally compelling. However, in realizing that, we must recognize—and be comfortable with—the fact that we are taking affirmative steps to *deny* property rights to groups of people.

This idea becomes even more powerful when viewed in light of a fundamental reconceptualization of the nature of marriage, personal identity, and property rights. Margaret Jane Radin distinguishes between “personal” and “fungible” property, with the former being strongly related to one’s “personhood” and the latter less so.¹⁹⁷ She then goes on to argue that the former should get greater protection than the latter. “[T]he personhood perspective generates a hierarchy of entitlements: The more closely

¹⁹³ If we recognize that neither side is presumptively superior when both assert property interests, then problems with issues like divorce, custody, and inheritance will have to be resolved with reference to other values and doctrines. As such, the arguments would be beyond the scope of this Note and back, more or less, to where the law is today. Of course, this need not *necessarily* be true, but it is likely.

¹⁹⁴ There is good indication that many people, both pro- and anti-gay marriage, do. *See, e.g.*, Focus on the Family, Marriage and Family, <http://www.family.org/cforum/fosi/marriage> (last visited Mar. 28, 2006) (“Family is the fundamental building block of all human civilizations. Marriage is the glue that holds it together.”); Human Rights Campaign, Why Do Same-Sex Couples Want to Marry?, <http://www.hrc.org> (follow “Marriage” hyperlink; then follow “Answers to Questions About Marriage Equality” hyperlink; then follow “Why Do Same-Sex Couples Want to Marry?” hyperlink) (last visited Mar. 28, 2006) (“Many same-sex couples want the right to legally marry . . . to honor their relationship in the greatest way society has to offer . . .”).

¹⁹⁵ UNDERKUFFLER, *supra* note 1, at 4.

¹⁹⁶ *Id.* at 132.

¹⁹⁷ *See* RADIN, *supra* note 135, at 53–55.

connected with personhood, the stronger the entitlement.”¹⁹⁸ In this context, a marriage is perhaps the most personal a relationship can be (apart from one’s self-identity). If we genuinely care about enabling autonomy, valuing individuals’ relationships, and vindicating property rights to foster personal identity, then recognizing a property interest in one’s marital status is eminently logical.¹⁹⁹

The property element of the takings analysis is most controversial in the same-sex marriage context. On the one hand, opponents of gay marriage will likely be opposed to any new legal or conceptual framework that provides more support for those marriages. Simultaneously, even some supporters of gay marriage might feel that the idea of a marriage as property serves to “cheapen” what it means to be married.

C. Governmental Taking

In many cases, particularly in the so-called “regulatory takings” realm, the question of whether the property interest is “taken” is of foremost importance. Some cases are quite simple; if the government appropriates someone’s house (say, to build a highway through that parcel), then the property has been taken and compensation must be paid.

Other cases are less obvious. For example, in *Lucas v. South Carolina Coastal Council*, the owner of the regulated lot still held title to the parcel in question.²⁰⁰ The crux of the issue there was whether the Beachfront Management Act, by reducing the value of his property, was in effect a “taking,” and the Supreme Court held that it was.²⁰¹ There, the taking depended on the extent of devaluation. In another context, the taking hinged on the extent of interference with the “bundle” of rights commonly thought of as property. Thus, while the physical interference in *Loretto v. Teleprompter* was miniscule, the Supreme Court held that it nonetheless constituted a taking. New York had effected a “permanent physical occupation of property,” which cut against the landowner’s right to exclude others from her property.²⁰² But the case law uniformly agrees that if a property interest is completely abolished by the state, it is certainly taken.

In the same-sex marriage context, the issue of a taking seems fairly straightforward once a property interest has been established. If a couple had a property interest in their marriage, then the state’s abrogation of

¹⁹⁸ *Id.* at 55.

¹⁹⁹ Radin’s schema is one of many ways to answer the question, “What is property?” The model Underkuffler proposes is another (discussed below). The important takeaway is that, under either of these models or the common conception of property, *supra* notes 128–142, there are strong reasons to find a property interest in marital status.

²⁰⁰ 505 U.S. 1003 (1992).

²⁰¹ *Id.* at 1007.

²⁰² *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

that marriage has obviated that property interest, and the Fifth Amendment's protections should be triggered.

The caveat in this case regards the marriages that were allegedly invalid from the start. On the one hand, the argument could be made that nothing was taken since nothing existed in the first place. However, as I will argue below,²⁰³ even these couples could have an argument that they have relied on official advice. Thus, the couples would still have a takings claim.

D. *Just Compensation*

If private property has been taken for public use, then the government must provide just compensation to the property owner.²⁰⁴ In general, the compensation given is the fair market value of the property taken.²⁰⁵ However, the price that the market would bear is not necessarily the price the owner would demand if he were to sell the property. Thus, as many commentators have noted, while the government might pay "fair market value" to provide "just compensation," it is not necessarily providing *full* compensation as far as the owners are concerned.²⁰⁶

The question of compensation is rather difficult to answer in the same-sex marriage context. In general, the compensation that is given in a takings case is fair market value.²⁰⁷ However, the couples whose marriages were abrogated would presumably want their marriage reinstated, not simply financial compensation. There are two possible avenues by which these marriages might be reinstated.

First, as described above, there are thousands of laws that reference marriage.²⁰⁸ If the state were to pay couples for their takings, it should have to pay the net present value of all of these downstream benefits, as they would accrue over the couple's expected lifetimes.²⁰⁹ Aggregated across the thousands of couples who had been married, this number would probably be cost-prohibitive. Faced with a choice between eliminating the marriages at the cost of millions of dollars or allowing the marriages to stand, the state would probably choose the latter.

²⁰³ See *infra* notes 236–249 and accompanying text.

²⁰⁴ U.S. CONST. amend. V.

²⁰⁵ See, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) ("The Court has . . . employed the concept of fair market value to determine the condemnee's loss."). But see *id.* at 512 (making an exception for "manifest injustice") (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). This will become relevant in Part IV *infra*.

²⁰⁶ See, e.g., Richard Posner, *The Supreme Court, 2004 Term: Foreword—A Political Court*, 119 HARV. L. REV. 31, 93 (2005) ("Ordinarily an owner's subjective valuation will exceed market value . . .").

²⁰⁷ See *supra* note 205.

²⁰⁸ See *supra* notes 176–179 and accompanying text.

²⁰⁹ This would essentially be liability rule protection for the married couples. See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Of course, there is no guarantee that it would do so. Thus, the couples need a legal argument for having the marriages reinstated as well. This is somewhat more difficult, because takings cases are usually compensated in cash at fair market value. However, this need not always be the case. The real question is not, “How much money should the state pay?” but rather, “Is money the best compensation the state can give?” As the Supreme Court wrote in *564.54 Acres of Land*, the task is to “determine whether application of the fair-market-value standard here would be impracticable or whether an award of market value *would diverge so substantially from the indemnity principle as to violate the Fifth Amendment*.”²¹⁰

This is not the only case with such a holding. The Court cites four other cases for the proposition that fair market value may not always be an appropriate measure of compensation, saying

[When] market value has been too difficult to find, *or when its application would result in manifest injustice to the owner or public*, courts have fashioned and applied other standards Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is “just” both to an owner whose property is taken and to the public that must pay the bill?²¹¹

This argument applies with particular force to the same-sex marriage context. When the state takes a house through eminent domain, it is at least conceivably possible to purchase another, comparable house. Marital status, however, is not a commodity that can be transacted. In the case of real property, courts in breach of contract cases are more likely to order specific performance, instead of money damages, on the theory that all real property is unique.²¹² Spouses (one hopes!) are even more unique than real property. As such, the argument for equitable relief—reinstatement of the marriages—seems even stronger.

E. A Richer Model

In this Part, I briefly outline an alternative model for the takings question here. Underkuffler puts forth a “two-tiered” model to evaluate constitutional claims.²¹³ This model predicts that the resolution of a dispute

²¹⁰ *564.54 Acres of Land*, 441 U.S. at 513 (emphasis added).

²¹¹ *Id.* at 512 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)) (alteration and omission in original) (emphasis added).

²¹² See, e.g., LON FULLER & MELVIN A. EISENBERG, *BASIC CONTRACT LAW* 337–38 (7th ed. 2001) (“It is well settled that in a contract for sale of land, the buyer can get a decree specifically ordering the seller to execute a deed in his favor The traditional rationale . . . has been that damages are inadequate in such cases because . . . [e]very piece of land is to some extent unique . . .”).

²¹³ See UNDERKUFFLER, *supra* note 1, at 85–87.

between two claimed rights will depend on the “core values” at stake.²¹⁴ In a “Tier One” case, the model predicts that an individual’s constitutionally based claim-right will presumptively trump any stated government interest if and only if the “core values” at stake are different.²¹⁵ If they are the same—for example, if both the individual and the state are asserting property claims—then neither presumptively trumps. Instead, we face an internal conflict about the content of that right, a “Tier Two” case.²¹⁶

To understand how the model works, we can examine a relatively simple example. Over the years, many towns passed (or attempted to pass) laws requiring beggars, peddlers, and solicitors to obtain permits or licenses from the town.²¹⁷ The stated purpose of these laws is generally to protect the public from fraud, to ensure public safety, and the like.²¹⁸ In a recent U.S. Supreme Court case, Jehovah’s Witnesses challenged the ordinance, arguing that it violated their constitutional rights, including their right to free exercise of religion.²¹⁹

To evaluate this conflict using Underkuffler’s model, we have to examine the “core values” at play on each side. The Jehovah’s Witnesses are asserting their right to exercise their religion, free of governmental interference.²²⁰ The state, on the other hand, is asserting residents’ privacy, safety, and so on.²²¹ Since the core values at stake differ, Underkuffler’s model would predict that the Jehovah’s Witnesses’ claim is presumptively superior and should be vindicated, absent a compelling contrary interest.²²² This is exactly what happened. In an 8-1 decision, the Supreme Court held that the town could not require individuals to register, saying that “a law requiring a permit to engage in . . . speech constitutes a dramatic departure from our national heritage and constitutional tradition.”²²³ The Tier One case was decided in favor of the individuals asserting the claim-right.

Another example from takings case law illustrates a Tier Two case.²²⁴ In the famous *Penn Central* case, a developer was not allowed to construct

²¹⁴ See *id.* at 86 (diagramming the two-tiered model).

²¹⁵ *Id.* at 85–86.

²¹⁶ *Id.* at 86.

²¹⁷ See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 154 n.3 (2002) (quoting *Village of Stratton Ordinance No. 1998-5 § 116.03*).

²¹⁸ See *id.* at 158 (quoting the Mayor of Stratton’s desire to protect residents from “‘flim flam’ con artists”).

²¹⁹ *Id.* at 153.

²²⁰ See *id.* at 158 (quoting the Jehovah’s Witnesses as saying that the registration requirement “would almost be an insult to God”).

²²¹ See *id.* at 158 (referencing “‘flim flam’ con artists”).

²²² The individual’s claim is presumptively superior because of what Underkuffler terms the “normative hypothesis,” which argues that, particularly in the U.S., a “right” trumps a non-rights interest that collides with it. See UNDERKUFFLER, *supra* note 1, at 65.

²²³ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002).

²²⁴ This example is discussed in Underkuffler’s book. See UNDERKUFFLER, *supra* note 1, at 112–14.

an office building on top of Grand Central Station in New York because the station was protected by New York's Landmarks Preservation Law.²²⁵ At first, this seems like a Tier One case, with the owner asserting a property interest and the city asserting interests in historic preservation, aesthetics, etc. However, on deeper examination, this case involves a Tier Two issue. In creating historic preservation districts, the city is protecting the *property* rights of the surrounding landowners; for example, their presence in a historic district bolsters their property values in a way that might not be the case if they were located in a different area. Or, as Underkuffler puts it, "the ensuing conflict pits the property-rights claim of that owner against the property-based interests of the other owners Since the core values that underlie the claimed right and the conflicting public interest are the same in kind, this is a Tier Two case"²²⁶

In a Tier Two case, there is no normative basis for deciding between the two claim-rights. Neither side's position presumptively trumps, and the dispute reveals an internal conflict about the nature of the right itself.

In the same-sex marriage analysis, the previously married couples are asserting a property interest in their marital status.²²⁷ On the other hand, the government is asserting a non-property interest. In seeking to preserve public morals, promote family values, or advance any similar end,²²⁸ the government forces a Tier One conflict. As described above, in such a conflict, the property claim-right is presumptively superior.²²⁹

The one means by which this might turn into a Tier Two conflict is in the government's (and activists') interest in preserving the "sanctity of marriage." Pennsylvania Senator Rick Santorum, for example, indicated that his own (heterosexual) marriage would be threatened if same-sex couples were allowed to marry.²³⁰ Thus, this might be a Tier Two case analogous to *Penn Central*, with each side asserting a property interest. But examine Senator Santorum's comment closely: he believes that his *marriage* would be threatened. As described above, one's *marriage* is not the same as one's *marital status*.²³¹ Thus, for this to be a true Tier Two case, the mere existence of gay marriages would have to threaten Senator Santorum's property interest in the *status of being married*.

Of course, this is not the case. In the purest form of the argument for marital status as property, the very state of being married gives the spouses a property interest. Senator Santorum's marital *status* does not change if gay couples are allowed to marry in Pennsylvania. The secondary argument for marital status as property entails the legal rights, duties, obliga-

²²⁵ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²²⁶ UNDERKUFFLER, *supra* note 1, at 98.

²²⁷ See *supra* notes 144–175 and accompanying text.

²²⁸ See, e.g., Bush, State of the Union Address, *supra* note 103.

²²⁹ See *supra* notes 215–228 and accompanying text.

²³⁰ Michael Sokolove, *The Believer*, N.Y. TIMES MAG., May 22, 2005, at 60.

²³¹ See *supra* note 190 and accompanying text.

tions, and benefits that flow from being married, amounting, jointly and severally, to a property interest. But again, none of these is threatened by the existence of same-sex marriages. It is not, for example, as if Senator Santorum's right to survivorship benefits from his wife's life insurance policy are obviated when two men marry in Philadelphia. Indeed, the Senator could go his entire life without even knowing the men were married—unlike *Penn Central*, where a grotesque building would have directly affected the surrounding landowners every day.²³²

In sum, Underkuffler's model provides us with a richer theoretical model to analyze takings claims. By evaluating the core values at play, Underkuffler's model illuminates the fact that many takings challenges (as Tier Two cases) involve conflicting values regarding the nature of property itself, not merely an attempt to abrogate property rights. In the same-sex marriage case, once the property interest is established, it should, as a Tier One case, presumptively trump any non-property-based opposing interest.

III. ANOTHER VIEW

I want to conclude this Note by considering and responding to a possible response to the argument that I have put forth, namely, that the same-sex marriages that were performed in every state but Massachusetts were void *ab initio*. As such, no property interest was ever conferred, and no taking could ever be effected. My response to this objection comes along three lines: first in Massachusetts; second, in states where the validity of same-sex marriage was unclear; and finally, in states where the (in)validity of same-sex marriage was clear. Moreover, whether or not litigants in a particular case adopt the argument presented here is, in one sense, immaterial. The property interest in one's marital status exists *independent* of what litigants do in particular cases. While there may be objections to the idea as applied in a particular state, these should not detract from the argument's vitality as a doctrinal matter.

Moreover, the objection, while accurate in certain respects, does not tell the whole story. In Oregon, New Mexico, and New York, there were no laws that explicitly stated that same-sex marriages were impermissible as of early 2004 (when the marriages were first performed).²³³ Only in Cali-

²³² The argument might be raised that Senator Santorum's marriage is "devalued," as surrounding properties might be devalued. However, this rhetorically clever comment is devoid of content. The legal and economic contours of Senator Santorum's interests (that I have described as property above) remain entirely unchanged whether or not same-sex couples are allowed to marry. In this sense, the total harm to Senator Santorum and all those similarly situated would be precisely zero.

²³³ Oregon's Measure 36 was passed only after the marriage licenses were issued, and New Mexico still has no such laws regarding marriage. In New York, marriage ceremonies were performed but no licenses issued; however, the status of these marriages is uncertain. See *supra* Part I for a discussion of the recent history of same-sex marriage, including

ifornia, which already had a “Defense of Marriage Act,”²³⁴ was the invalidity of same-sex marriage clear from the start.

A. Massachusetts

In Massachusetts, couples have been legally married, with the full incidents thereof—with the primary and secondary arguments for a property interest in full force. The only way these marriages could be abrogated is by constitutional amendment, either federally or in Massachusetts. Even the most ardent opponent of same-sex marriage will be hard pressed to claim that the position presented here should not apply to these couples. Indeed, even the Massachusetts Family Institute, which is leading the charge to amend the Massachusetts Constitution, acknowledges that the existing same-sex marriages would have to be left intact.²³⁵

B. Oregon, New Mexico, New York

In these three states, the decisions that were handed down in some way “clarified” the existing situation in invalidating the marriages. In Oregon, for example, the court held the marriages performed to be invalid from the start,²³⁶ and did not consider the “independent effect” of Measure 36 on the already-existing gay marriages. However, this argument misses the mark. First, the validity of same-sex marriages was unclear at the time the marriages were performed.²³⁷ Moreover, and ironically, the very fact that Measure 36 was (perceived as) needed seems to indicate that the statutes as they existed *before* Measure 36 *did* allow for same-sex marriages. In other words, if the statutes really did preclude same-sex marriage, then Measure 36 would have been superfluous. In either case, marriages were clearly valid at best and in doubt at worst; in both situations, the couples would have a reliance argument for reinstating their marriages, which I describe later in this Section.

A similar situation arose in New Mexico. There, the statutes were and still are unclear as to whether same-sex marriages are valid or not.²³⁸ The marriages were originally halted by executive fiat, as the Attorney General opined that the marriages were probably invalid.²³⁹ Then, a judge issued a temporary restraining order preventing the issuance of more marriage licenses.²⁴⁰ While some legal and political maneuvering has since developed in New Mexico, no final resolution of the issue has emerged.

these nuances.

²³⁴ CAL. FAM. CODE § 308.5 (West 2004).

²³⁵ See *supra* note 23.

²³⁶ *Li v. State*, 110 P.3d 91, 102 (Or. 2005).

²³⁷ Myers Letter, *supra* note 40, at 11.

²³⁸ See, e.g., *Survey*, *supra* note 102.

²³⁹ See Madrid Letter, *supra* note 85.

²⁴⁰ See *supra* notes 87–89 and accompanying text.

Thus, the couples in question should again have a reliance argument for reinstating their marriages, since the validity and status of their marriages was and continues to be in question.

Finally, New York couples might have a similar argument for the protection of their marriages. Mayor West presumably committed a misdemeanor by solemnizing marriages that did not have a marriage license. However, Mayor West's criminality, if any, does not speak to the status of the *couples'* marriages. In fact, the validity of those marriages remains in question.²⁴¹ As such, the reliance argument should hold (though the argument is admittedly weaker here).

The reliance argument proceeds, not on a property theory, but on a contract theory. In essence, the state contracts with the parties to a marriage, providing them with a marriage license, benefits, and the status of being married; the couples pay the appropriate fees as consideration for these benefits. If the state issues marriage licenses and the parties to the marriage reasonably rely on the validity of the licenses (as they presumably did when they considered themselves married), to their detriment (which was probably evident when the marriages were invalidated), then the state is estopped from denying the validity of these marriages *ex post*.²⁴²

A court might later say that the statutory language clearly prohibits these marriages, but this can be seen as little more than a conclusory statement of fact. In Oregon, for example, the statute provided only that “[m]arriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age.”²⁴³ While this is usually taken to mean a marriage *between* a man and a woman, even the court recognizes that the language is not dispositive.²⁴⁴ The same-sex couples' reliance thus seems quite reasonable. When one party to a contract is estopped from denying the truth of his earlier claim, he is obligated to perform his part of the bargain.²⁴⁵ In this context, then, it would seem that the state is obligated to recognize and uphold the marriages that were licensed. Of course, if it does not, then the takings challenges outlined above come into effect.

Additionally, courts have recognized property rights in the reliance interests themselves.²⁴⁶ In determining what rises to the level of a constitutionally protected interest, courts have examined the nature of the commitment made by the state. For example, “informal assurances” are not sufficient. Additionally, it is insufficient if “the government which is the source of the interest in question retains unrestricted discretion over fu-

²⁴¹ See *supra* note 92 and accompanying text.

²⁴² See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

²⁴³ OR. REV. STAT. § 106.010 (2003).

²⁴⁴ *Li v. State*, 110 P.3d 91, 96 (Or. 2005).

²⁴⁵ See, for example, *Griswold v. Haven*, 25 N.Y. 595 (1862), an amusing case involving nonexistent grain.

²⁴⁶ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

ture enjoyment of the interest.”²⁴⁷ If these exceptions do not apply, then the parties have a constitutionally cognizable property right that stems from their reliance on official advice.

Since neither of these is true here, it would seem that the couples have a constitutionally cognizable interest at stake. First, the marriage licenses were far more than “informal assurances”; they were “explicit understanding[s] created by the representations of government officials.”²⁴⁸ Moreover, the state generally does not have the ability to dissolve marriages unilaterally.²⁴⁹ If the reliance interest (in having a valid marriage) is itself a property right, then invalidating the marriage again abrogates the property right (in the reliance interest, not in marital status). As such, a taking is effected and compensation must be paid.

C. California

The weakest case for reinstating the couples’ marriages is probably in California. There, the couples were on notice that their marriages might result in a loss of benefits (from domestic partner status).²⁵⁰ Thus, as the court reasoned, the couples knew that “the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. Now that we have confirmed that the city officials lack this authority, we do not believe that these couples have a persuasive equitable claim” to leave the marriages intact while constitutional litigation proceeded.²⁵¹

The court’s argument is persuasive. To the extent that the individuals relied on Mayor Newsom’s assurances that he was correct—that the California marriage statutes are indeed invalid—their reliance could not have been reasonable within the meaning of § 90. Indeed, it would be paradoxical to hold that the couples had legitimate reliance interests in the status and

²⁴⁷ Thomas-Lazear v. FBI, 851 F.2d 1202, 1205 (9th Cir. 1988).

²⁴⁸ *Id.*

²⁴⁹ But see *Maynard v. Hill*, 125 U.S. 190, 205 (1888), in which the legislature passed a law dissolving a couple’s marriage. It is probably safe to write this case off as the exception, not the rule. The law, dissolving the marriage between David S. and Lydia A. Maynard, was passed in 1852. *Id.* at 203.

²⁵⁰ See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 497–98 (Cal. 2004). The application for a marriage license read, in part, as follows:

Please read this carefully prior to completing the application: [P] By entering into marriage you may lose some or all of the rights, protections, and benefits you enjoy as a domestic partner, including, but not limited to those rights, protections, and benefits afforded by State and local government, and by your employer. If you are currently in a domestic partnership, you are urged to seek legal advice regarding the potential loss of your rights, protections, and benefits before entering into marriage.

Id. at 465 n.5 (alterations in original).

²⁵¹ *Id.* at 497–98.

benefits of their marriage after being explicitly warned that such benefits might never accrue.

This argument, while doctrinally accurate, is significantly removed from the argument that motivates this Note. If some individuals have a property interest in the status of being married, then not recognizing marital status in California demonstrates the extent to which we refuse to vindicate those rights for others. I have argued for a reconceptualization of marriage for all individuals, according marriage the utmost level of constitutional protection. If one accepts this argument, then it becomes all the more glaring that we are willing to extend these rights to some but not others.

IV. CONCLUSION

Over the course of this Note, I have used the issue of same-sex marriage to argue for a property interest in the status of being married. This property rights theory provides a strong base from which to argue for the preservation of existing marriages. Moreover, where such marriages do not exist, the argument illustrates the lengths to which our society is willing to go to deny those rights to a certain class of people.

Denying marriage to same-sex couples is, without a doubt, discriminatory. In asking whether that discrimination is justified, proponents of gay marriage (correctly) refer to traditional arguments regarding equal protection, civil rights, and so on. However, there is another facet to this issue. The overwhelming majority of people around the world consider marriage to be one of the most important institutions in their lives. If we are serious about fostering individualism, autonomy, and personal identity, then that subjective and inter-subjective importance should be recognized as a property right. When we deny that right to certain groups of people, we should be forced to confront the lengths to which we will go to shut some people out of that institution.²⁵²

²⁵² The property rights argument complements, but does not supplant, other arguments for gay marriage. Moreover, while a property claim-right is *presumptively* valid, it is not *conclusively* valid; the argument here does not compel us to travel down Justice Scalia's slippery slope. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (suggesting that recognizing a liberty interest in sexual activity would lead to invalidation of laws against, among other things, adult incest, bestiality, and polygamy).

But whence does the primary argument arise? The exact origins and contour of the primary argument are admittedly unclear. While one's subjective valuation of one's marriage is of the utmost importance, *compare* *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that religion is purely subjective); *with Lawrence*, 539 U.S. at 574 (recognizing "one's own concepts" of life are "[a]t the heart of liberty"), it also seems correct to retain some inter-subjective element. After all, simply valuing something does not give rise to a *property* interest. Yet this cannot be the entire answer; the solution is not simply a vote. Thus, there must be a middle ground. While it may escape precise formulation, it is no less real.

The primary argument for a property interest in the status of being married is simply that the law ought to recognize the “specialness” that motivates most people to marry in the first place. Additionally, marriage results in a variety of rights, duties, obligations, and privileges of the sort that are routinely recognized as property in other contexts. When a marriage is abrogated by the state without the parties’ consent, that property interest has been “taken,” giving rise to the standard takings challenges.

People on all sides of the same-sex marriage debate agree that marriage is the most important and cherished institution in our society. For the benefit of all marriages, then, we should afford one’s marital status the most important and cherished of our constitutional protections: that of a property interest. Of course, some might argue that it is precisely to protect marriage that they want to restrict it to heterosexual couples. But they ask for a constitutional amendment to achieve this end precisely because existing constitutional doctrines are insufficient to afford the “protection” that they want. On the other hand, property, as an idea and as an institution, has enjoyed exalted status in Anglo-American jurisprudence for centuries. Recognizing a *property* interest in marital status, as opposed to some other interest, is thus uniquely important—practically, doctrinally, and metaphorically.²⁵³

When fully recognized, this argument has a whole range of implications. I have outlined one above: a means by which to argue that abrogating or invalidating same-sex marriages is unconstitutional. There are strong symbolic implications as well. In our society, property exists as an idea as well as an institution. By recognizing a property right, our society puts the power of the state behind the very real, very concrete interests that an individual has. Particularly in American society, private property is seen as a way to foster individual liberty, autonomy, and identity—and what demonstrates these qualities more strongly than one’s choice of marriage partner?

The same-sex marriage debate has only just begun. Introducing this new theory into the discussion will give us an opportunity to understand the value judgments that determine exactly when we recognize certain individuals’ rights—and demonstrate all the more clearly the injustice when we do not.

²⁵³ Of course, if a same-sex marriage opponent agrees with the property interest but wants to restrict it only to heterosexual couples, then the equal protection and civil rights arguments that have been raised in other cases become relevant.

